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The Right Honorable Herb Gray, P.C., C.C., Q.C.[†]

Well, thanks very much for your introduction. It is better than the one I received at a gathering like this some weeks ago where the chairman said, “We are running late, so I won’t bore you with Herb Gray’s biography; he can do that himself.” I won’t do that.

I will respond to the topic given to me by Professor King, and the topic is “Canada and U.S. Approaches to the Great Lakes – Environmental and Economic Aspects. There are a number of ways to approach this topic, but I want to advance the argument that when it comes to Canadian and American approaches to the environmental and economic aspects of these Lakes, these approaches are largely the same for both countries. And, I say this because of the existence of three remarkable international agreements that help provide a common framework for these approaches – two in particular. I am talking about the Boundary Waters Treaty of 1909 between the U.S. and Great Britain on behalf of Canada;¹ the Great Lakes Water Quality Agreement;² as well as the International Air Quality Agreement,³ also between our two countries.

[†] The Rt. Hon. Herb Gray, P.C., C.C., Q.C. represented the Federal riding of Windsor West in the House of Commons from June 1962 to January of 2002. Mr. Gray has served as Deputy Prime Minister of Canada; Leader of the Government in the House of Commons and Solicitor General of Canada; Minister without Portfolio working with the Minister of Finance; Minister of National Revenue; Minister of Consumer and Corporate Affairs; Minister of Industry, Trade and Commerce; Minister of Regional Economic Expansion; and President of the Treasury Board. He also served as Opposition House Leader and Leader of the Official Loyal Opposition. While Deputy Prime Minister, Mr. Gray was also the Minister responsible for the Millennium Bureau of Canada and the Office of Indian Residential Schools Resolution. Mr. Gray worked extensively as a Minister and as a Member of Parliament in the fields of parliamentary affairs; economic and industrial development; foreign investment; finance; consumer protection; competition; international trade; Federal law enforcement; the environment and climate change; and Canada-US border issues. On January 15, 2002 the Governor General bestowed on Mr. Gray the title “Right Honourable” making him one of only 16 Canadians to currently hold this title. Mr. Gray is a Companion of the Order of Canada – the highest designation of the Order of Canada- bestowed by the Governor General on up to only 165 outstanding Canadians recognizing their special contribution to Canada. Mr. Gray is currently Canadian Chair of the International Joint Commission an organization that deals with transboundary water and air issues between Canada and the United States.

¹ See Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, U.S.-Can., Jan. 11, 1909, 3 U.S.T. 2607 [hereinafter the Boundary Waters Treaty].

² See Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383.

³ See Canada-United States: Agreement on Air Quality, U.S.-Can., March 13, 1991, 30 I.L.M. 676.

I suppose on the economic side I could also mention NAFTA.⁴ There are those Canadians who say the Agreement has its gaps when they look at issues like the softwood lumber and mad cow disease matters,⁵ but I will leave that discussion for another speech at some other time. But NAFTA does have its environmental side-agreement, creating the three governments' – Canada, Mexico, and the U.S. – Commission for Environmental Cooperation, supposedly on trade-related environmental matters of concern for the three countries.⁶

Now, what about the Boundary Waters Treaty? It was signed in 1909 between the United States and Great Britain acting for Canada.⁷ At that time, Canada did not have treaty-making status as an independent country. It gained the status following the Treaty of Versailles, the treaty that ended the First World War.⁸ In fact, much of the treaty negotiation on the Canadian side was carried out not by the then U.K. Ambassador James, later, Lord Bryce,⁹ but by a Canadian lawyer based in London, Ontario, George Gibbons.¹⁰ That's why in London you will see the George Gibbons Park.¹¹

The basic purpose of the Treaty is to avoid or resolve disputes between Canada and the United States on matters involving the Boundary Waters. The Treaty creates a unique international institution to help the two national governments carry out its purpose. And this institution is the International

⁴ See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

⁵ See Peter Urmetzer, *So What If We Abandoned Free Trade?*, THE GLOBE AND MAIL, Aug. 25, 2005, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20050825.wcomment0825/BNSStory/National> (last visited Oct. 31, 2005).

⁶ See generally Steve Charnovitz, *The Nafta Environmental Side Agreement: Implications For Environmental Cooperation, Trade Policy, And American Treaty-making* 8 TEMP. INT'L & COMP. L.J. 257, 4 (1994), <http://www.worldtradelaw.net/articles/charnovitznaftaenvironment.pdf> (citing the creation of the NAAEC after NAFTA, and the establishment of the Commission); see also North American Commission for Environmental Cooperation, *Who We Are*, http://www.cec.org/who_we_are/index.cfm?varlan=English (last visited Oct. 31, 2005) (discussing the authorization for the commission).

⁷ See the Boundary Waters Treaty, *supra* note 1, at 2607.

⁸ See Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 3 U.S.T. 3714, 112 B.F.S.P. 1 [hereinafter Treaty of Versailles].

⁹ See generally First World War.com, *Who's Who: Lord Bryce*, <http://www.firstworldwar.com/bio/bryce.htm> (last visited Oct. 31, 2005) (discussing Lord Bryce's career in the First World War).

¹⁰ See Parks Canada, *The Government of Canada Unveils a Plaque Commemorating The National Historic Significance of the Boundary Waters Treaty of 1909*, http://www2.cdn-news.com/scripts/ccn-release.pl?/1999/10/06/1006082n.html?cp=ccnmatthews_f (last visited Oct. 31, 2005).

¹¹ See generally Answers.com, *London*, <http://www.answers.com/topic/london-ontario> (last visited Oct. 31, 2005) (discussing the major parks in London, Ontario).

Joint Commission of Canada and the United States.¹² The Treaty is worded and applied, and the Commission it created is operate, in a way that many might considered unusual, and that is on the basis of equality between the two countries.¹³ I say this because of the disparity in their size, population, and economies; the U.S. being ten times the size of Canada in both population and economy.¹⁴ The Commission has six members: Three American, three Canadian; one is the U.S. chair, one is the Canadian chair, but they serve simultaneously and work together.¹⁵ The U.S. commissioners are appointed at the highest level in the U.S. federal government, that is, by the president, with the concurrence of the Senate.¹⁶ Their Canadian counterparts are appointed by the governor and council, in other words, the cabinet, the highest level in the Canadian federal government.¹⁷ The three U.S. commissioners do not have more votes nor do their votes carry more weight than those of the three Canadian commissioners.¹⁸ In fact, the commissioners, by long standing custom, reach decisions by consensus, like a cabinet committee, and not by formal vote.¹⁹ Formal votes have happened only twice since the Commission began operations in 1911, and certainly not since I became Chair three and a half years ago.²⁰

The Commission has dealt with almost 100 matters since 1911. Unlike in other international organizations, commissioners do not formally represent their countries. Instead, on appointment, each commissioner signs a declaration based on the words of Article 12 of the Treaty; the declaration states, "Each Commissioner shall make and subscribe a solemn declaration in writ-

¹² See The International Joint Commission, Who We Are, http://www.ijc.org/en/background/biogr_commiss.htm (last visited Oct. 31, 2005).

¹³ See The Intentional Joint Commission, What It Is, How It Works, http://www.ijc.org/en/background/ijc_cmi_nature.htm (explaining the Commission's operations).

¹⁴ See generally The CIA World Factbook, Canada, <http://www.cia.gov/cia/publications/factbook/geos/ca.html> (citing Canada's resources); see also The CIA World Factbook, United States, <http://www.cia.gov/cia/publications/factbook/geos/us.html> (citing the resources of the United States).

¹⁵ See The Intentional Joint Commission, *supra* note 12 (listing the commissioners from each country).

¹⁶ See The Intentional Joint Commission, *supra* note 13 (explaining the appointment of US commissioners).

¹⁷ Treaty Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., May 5, 1910, art. VII, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

¹⁸ *Id.* art. VIII.

¹⁹ Rules of Procedure of the International Joint Commission, Decisions by the Whole Commission, Rule 8, <http://www.ijc.org/rel/agree/water.html> (last visited Oct. 30, 2005).

²⁰ Press Release, International Joint Commission, Right Hon. Herb Gray Appointed to the Canadian Section of the IJC (Jan. 17, 2002), available at <http://www.ijc.org/rel/news/17jan02e.html>.

ing that he will faithfully and impartially perform the duties imposed upon him under this treaty.”²¹

The concluding paragraph of Article 4 of the Treaty deals with what we would today refer to as “environmental aspects” because it says, “It is further agreed that the waters herein defined as boundary waters, that waters flowing across the boundary, shall not be polluted on either side to the injury of property or health on the other.”²² You know, these are unusual words in a treaty signed in 1909, in a period when industrial and urban development were first in most people’s minds, in their government’s minds, and not the pollution caused by that development.

Article 8 outlines the priority of the use of the Boundary Waters, first domestic and sanitary purposes; second, navigation, including the service of canals for the purpose of navigation; and thirdly, uses for power and for irrigation purposes.²³ I don’t have to indicate how all these uses have both environmental and economic implications.

So what is the Commission required to do? First, it responds to “references,” formal requests from the two national governments to look into specific matters or problems and make findings and recommendations for action by the two governments to resolve the problem. These reports under Article 9 do not have the status of formal arbitral awards. However, these reports are released to the public at the same time as they are submitted to the two governments,²⁴ and, therefore, the force of public opinion can, and does support the IJC’s recommendations. Also, the request for the reference, by custom, always comes from both governments in the same terms and at the same time. Therefore, there is at least an implied obligation on both of them to deal with the report in a responsive way. I am told that the percentage of IJC recommendations acted upon by the two governments since 1911 has been very high. The Commission also receives permanent references from the two governments. These involve requests to assist them and oversee the way the governments carry out certain other international agreements between them, and they are set out in specific language in the Great Lakes Water Quality Agreement,²⁵ in particular, as well as the International Air Quality Agreement.²⁶ So the duties for the IJC regarding these agreements are written into them, and we talk about them as being “permanent references.”

²¹ Boundary Waters Treaty, *supra* note 17, art. XII.

²² *Id.* art. IV.

²³ *Id.* art. VIII.

²⁴ *Id.* art. IX.

²⁵ Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 138.

²⁶ Agreement on Air Quality, U.S.-Can., March 13, 1991, T.I.A.S. No. 11783.

The Treaty does provide in Article 10 for references for which the IJC reports would be binding arbitral awards.²⁷ However, under the Treaty, to make such a reference, the U.S. federal government would have to have the concurrence of the American Senate.²⁸ Understandably, no such reference under Article 10 has ever been given nor has ever been sought. Now, the Commission also makes decisions on applications presented to it by the two governments on whether to allow the building of structures on, over, or under, a Boundary Water that affects the natural levels or flows of water in the other country.²⁹ The Commission's decision could be to allow the application, to deny it, or allow it with conditions. The latter is usually what has happened. If an order of approval with conditions is made, the IJC sets up a control body to oversee the implementation of these conditions.³⁰ The IJC has 15 such control bodies reporting to it along the U.S.-Canada boundary, at different points, from one ocean to the other.³¹ When it comes to the Great Lakes, they are control bodies involving the structures on the international section of the St. Lawrence River between Cornwall (Ontario) and Messina (New York), and at the Sault and the St. Mary's Rivers.³² The IJC also oversees flows in the Niagara River pursuant to a reference, rather than an order, but it has a control board for that purpose.³³

Well, apportioning of these waters for industry, navigation, and for power, obviously has both economic and environmental effects. However there have been almost no such orders for major projects since the completion of the Seaway in the early 1960s, except the Great Lakes Power Redevelopment at the Soo in 1979. This could change if, and when the governments decide to proceed with new bridges and/or tunnels at a major Canada-U.S. Great Lakes highway gateway separated by water, particularly across the Detroit River between my original home city of Windsor (Ontario), and Detroit (Michigan),³⁴ as well as across the Niagara River at Fort Erie (Ontario) and Buffalo (New York).³⁵

²⁷ Boundary Waters Treaty, *supra* note 17, art. X.

²⁸ *Id.*

²⁹ Boundary Waters Treaty, *supra* note 17, art. IV.

³⁰ See International Joint Commission, Who We Are, http://www.ijc.org/en/background/ijc_cmi_nature.htm#gls (last visited Oct. 30, 2005).

³¹ *Id.*

³² See International St. Lawrence River Board of Control, <http://www.islrbc.org/new-Version/brochure.html> (last visited Oct. 30, 2005); see also IJC International Lake Superior Board of Control, http://www.ijc.org/conseil_board/superior/lake/en/superior_mandat_mandat.htm (last visited Oct. 30, 2005).

³³ See IJC - International Niagara Board of Control, http://ijc.org/conseil_board/niagara/en/niagara_home_accueil.htm (last visited Oct. 30, 2005).

³⁴ See generally *US/Canadian Border-Crossing Gridlock Poses Serious Risks for Great Lakes/Ontario Regions, Economists Say*, CAN. NEWSWIRE GROUP, Nov. 4, 2003, available at

These IJC control orders, once made by the IJC, are not subject to appeal.³⁶ The IJC, however, can consider a request to reopen and modify such orders,³⁷ but that has rarely happened in the past.³⁸ Whether or not the IJC does this, is in its sole discretion.

The IJC has a special board that is now in the concluding year of carrying out a major five-year study to see whether the control order for Lake Ontario and the St. Lawrence River should be modified to take into account factors that were not considered, or have changed since the order came into effect in 1958.³⁹ I refer in particular to matters like recreational boating, sports fishing, marinas, and the building of many more cottages and permanent homes close to the shores of Lake Ontario and the St. Lawrence River.⁴⁰ Another factor involves environmental matters generally, including preserving wetlands and native plants, fish, and animal species.⁴¹ This bi-national study involved some 100 people on both sides of the border and cost some \$30 million, one half of which is provided by each government.⁴²

A proposal by the Commission for the funding of a similar comprehensive study and review of the control order at the Sault River for the upper Lakes is being considered by the two governments.⁴³ In spite of the Treaty bearing the name "Boundary Waters" in its Article 9 and its preamble, if you look at the wording, the governments are not limited to giving the IJC references about matters dealing with water.⁴⁴ From the early years of the Treaty, the two governments have given the Commission references on matters of

<http://www.newswire.ca/en/releases/archive/November2003/04/c8313.html>.

³⁵ See generally *IJC Issues Supplementary Order for Approval for Peace Bridge Expansion*, IJC FOCUS, Spring 2000, available at <http://www.ijc.org/rel/focus/v25i1/>.

³⁶ The Boundary Waters Treaty, U.S. – U.K., art. VII-X, Jan. 11, 1909, 36 Stat. 2448 [hereinafter *The Boundary Waters Treaty, U.S. – U.K.*].

³⁷ *Id.*

³⁸ See generally Leonard B. Dworsky & Albert E. Utton, *Assessing North America's Management of its Transboundary Waters*, 33 NAT. RESOURCES J. 413 (1993).

³⁹ See generally Int'l Joint Commission, *International Lake Ontario-St. Lawrence River Study*, <http://www.losl.org> (last visited Nov. 12, 2005).

⁴⁰ *Id.* at <http://www.losl.org/twg/pi-e.html>.

⁴¹ *Id.*

⁴² See Media Release, *International Lake Ontario St. Lawrence River Study, Canada Confirms Funding of Study to Review Regulation of Lake Ontario and St. Lawrence River Levels and Flows* (Jan. 3, 2001), available at http://www.losl.org/media/archives/2001_01_03-e.html.

⁴³ See Int'l Joint Commission, *Report from the Upper Lakes Plan of Study Revision Team, Upper Lakes Plan of Study for the Review of the Regulation of Outflows from Lake Superior* (Oct. 2005) <http://www.ijc.org/rel/boards/upper/DraftPOS-82505.pdf>.

⁴⁴ The IJC's jurisdiction for air pollution matters comes from the preamble of the Boundary Waters Treaty: "...to settle all questions ... along their common frontier," and from Article IX references: "...any other questions ... along the common frontier." *The Boundary Waters Treaty, U.S. – U.K.*, *supra* note 36.

cross-boundary air pollution.⁴⁵ For example, the Trail Smelter Reference, in 1928 – a very famous case in international law – recognizing that deposition from the air is a major form of pollution of the water.⁴⁶ Years later this was also specifically recognized in Annex 15 of the Great Lakes Water Quality Agreement.⁴⁷

As I've said, Article 9 of the Treaty is not limited to water and air matters as a subject of references. They can be about any cross-border issue. The Treaty has been used to look into other matters at least twice in the past. One example is a reference about which a report was made in 1961 as to whether the salt-water tides of Passamaquoddy Bay could be harnessed commercially to produce hydroelectric power.⁴⁸ So the Treaty can be used by the two countries not just for matters involving trans-Boundary Waters and the air above them, and this could be of interest in the light of calls recently by some private sector organizations for a new institutional model to facilitate Canada-U.S. relations.⁴⁹ One such group, the Canadian Association of Chief Executives, has made specific recommendations about using the IJC, or an expanded version, or at least its model, on a sector or regional basis, as an instrument to better facilitate and manage these relations.⁵⁰

Now, a few words about the Great Lakes Water Quality Agreement. It was signed by Canada and the United States in response to the growing concerns of the millions of people living around the Lakes about their deterioration and, more specifically, in response to IJC reports about their bad condition.⁵¹ This Agreement was replaced six years later by the 1978 Agreement,

⁴⁵ See Response of IJC to a Request by the Governments of Canada and the United States for Proposals on How Best to Assist Them to Meet the Environmental Challenges of the 21st Century 7 (Oct. 1, 1997) <http://www.ijc.org/php/publications/pdf/ID1011.pdf>.

⁴⁶ Trail Smelter Arbitral Decision (U. S. v. Can.), 3 R.I.A.A. 1905, reprinted in (1939) 33 A.J.I.L. 182 (decision dated April 16, 1938) and in (1941) 35 A.J.I.L. 684 (final decision dated March 11, 1941).

⁴⁷ Agreement Between the United States of America and Canada on Great Lakes Water Quality, Nov. 22, 1978, U.S.-Can., 30 U.S.T. 1383 [hereinafter The Great Lakes Water Quality Agreement].

⁴⁸ See Int'l Joint Commission, *Investigation of the International Passamaquoddy Tidal Power Project*, (Apr. 1, 1961) <http://www.ijc.org/php/publications/pdf/ID308.pdf>.

⁴⁹ See generally Donald Barry, *Managing Canada-U.S. Relations in the Post-9/11 Era: Do We Need a Big Idea?* Policy Paper on the Americas Vol. XIV, Study 11 (Nov. 2003), available at http://www.usembassycanada.gov/content/can_usa/csis_1103.pdf; *Building a North American Community*, (2005) http://www.cfr.org/content/publications/attachments/NorthAmerica_TF_final.pdf.

⁵⁰ See Can. Council of Chief Executives, *New Frontiers: Building a 21st Century Canada-United States Partnership in North America* 31 (Apr. 2004), http://www.ceocouncil.ca/publications/pdf/8502a13cf417d09eab13468e2a7c9f6s/New_Frontiers_NASPI_Discussion_Paper_April_2004.pdf.

⁵¹ See Int'l Joint Commission, *Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River* (Jan. 1, 1970),

in which the two governments equally committed themselves to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin ecosystem.⁵²

This Agreement has been updated and added to, particularly in 1987. The Agreement, as amended in that year, introduced the idea of identifying Areas of Concern (AOC): The worst environmental geographic locations in the Lakes, the hot spots, and it also provided for the creation of RAPs, Remedial Action Plans, to restore their beneficial uses.⁵³ Forty-two such Areas of Concern were identified based on a list recommended by my Commission.⁵⁴ The two countries have the same obligations to clean up their respective portion of the Lakes under the Agreement,⁵⁵ and I have to say a lot has been accomplished in both countries since the first version of the Agreement was signed in 1972. Hundreds of millions of dollars in both countries have been spent to upgrade existing, or to build new, sewage and water treatment plants and to ban the discharge of certain chemicals into the Lakes, particularly phosphorous.⁵⁶ The Agreement also bans the manufacture of PCBs (Polychlorinated Biphenyls) and the use of DDT (Dichlorodiphenyltrichloroethane), and certain other pesticides.⁵⁷ In addition, it virtually eliminated the formation of dioxides from the pulp and paper sector.⁵⁸

However, a lot still remains to be done in the Areas of Concern, which I mentioned, and generally to complete the cleanup of the Lakes. There are new threats to the Lakes emerging. A concern now exists over fire retardant chemicals, for example, and pharmaceuticals used by humans. They are now

<http://www.ijc.org/php/publications/pdf/ID364.pdf>; , Int'l Joint Commission, *Special Report on Potential Oil Pollution, Eutrophication and Pollution from Watercraft –Third Interim Report on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River* (Apr. 1, 1970), available at <http://www.ijc.org/php/publications/pdf/ID370.pdf>; Int'l Joint Commission, *Transboundary Air Pollution – Detroit and St. Clair River Areas* (Jan. 1, 1972), <http://www.ijc.org/php/publications/pdf/ID380.pdf>.

⁵² The Great Lakes Water Quality Agreement, *supra* note 47, at art. II.

⁵³ *Id.* at art. VI.

⁵⁴ See Int'l Joint Commission, *Status of Restoration Activities in Great Lakes Areas of Concern*, (Apr. 2003) http://www.ijc.org/php/publications/html/aoc_rep/english/report/chapter2/report_purpose.html

⁵⁵ The Great Lakes Water Quality Agreement, *supra* note 47, at art. VI.

⁵⁶ See Int'l Joint Commission, *Twelfth Biennial Report on Great Lakes Watershed – Prepared Pursuant to the Great Lakes Water Quality Agreement of 1978 for submission to the Government's of the U.S. and Canada and the state and provincial governments of the Great Lakes Basin* (Sept. 2004), http://www.ijc.org/php/publications/html/12br/pdf/12-thbrfull_e.pdf.

⁵⁷ The Great Lakes Water Quality Agreement, *supra* note 47, at annex I.

⁵⁸ See *United States Great Lakes Program Report on the Great Lakes Water Quality Agreement*, Environmental Protection Agency (1997).

turning up in the Lakes.⁵⁹ In addition, there have been some worrisome changes. There has been back-sliding in Lake Erie, for example. There appears to be a new buildup of phosphorous in that lake.⁶⁰ Since 1987, only two Areas of Concern have been rehabilitated to the point where they have been completely de-listed, both in Canada.⁶¹ Two more in the U.S. are close,⁶² and while there has been progress in cleaning up the other AOCs, they are not close to being de-listed.⁶³

Canada and the U.S. coordinate their efforts under the Great Lakes Water Quality Agreement through the BEC, the Binational Executive Committee. The BEC is a discussion forum composed of senior level officials of Canadian and American federal, state, and provincial departments and agencies, which are accountable for delivering the programs and activities that carry out the terms of the Great Lakes Water Quality Agreement.⁶⁴ The meetings include an IJC representative as an observer. Under the Agreement, the IJC is required to assess the progress of the two governments in carrying out their commitments.⁶⁵ In particular, my Commission is required to make a major report at least every two years to the two governments and the public on how the governments are carrying out these commitments.⁶⁶

However, the Commission can report on any aspect of the Agreement whenever it likes,⁶⁷ as it did in a special report on the status of all the AOCs two years ago.⁶⁸ The most recent biannual report, the twelfth, came out last September.⁶⁹ The Agreement provides that after every third such report, the

⁵⁹ Emily Fawver, *Fire retardant chemicals may affect wildlife and human health*, The Daily Press (Ashland, WI), Sept. 28, 2005, http://www.ashland-wi.com/dailypress/index.php?sect_rank=6&story_id=207338.

⁶⁰ See generally Int'l Joint Comm'n, Canada and the United States, *12th Biennial Report on Great Lakes Water Quality*, at 48 (Sept. 2004) [hereinafter *12th Biennial Report on Great Lakes Water Quality*].

⁶¹ The Great Lakes Commission, *Remedial Action Plan Resources, A Virtual Library, Resources for Delisting U.S. Great Lakes Areas of Concern*, <http://www.glc.org/rap/resources/#delisting1> (last visited Nov. 12, 2005).

⁶² *Id.*

⁶³ See generally *id.*

⁶⁴ See generally *id.*

⁶⁵ See Binational Executive Comm'n, *About Binational.Net*, http://cfpub.binational.net/about_us_e.cfm (last visited Nov. 12, 2005).

⁶⁶ See generally Int'l Joint Comm'n, Canada and the United States, *Who We Are, The International Joint Commission – What It Is, How It Works*, http://www.ijc.org/en/background/ijc_cmi_nature.htm (last visited Nov. 12, 2005).

⁶⁷ See generally *id.*

⁶⁸ Int'l Joint Comm'n, Canada and the United States, *Status of Restoration Activities in Great Lakes Areas of Concern: A Special Report* (Apr. 2003).

⁶⁹ *12th Biennial Report on Great Lakes Water Quality*, *supra* note 60.

two national governments have to carry out a review of the Agreement.⁷⁰ Our twelfth report has triggered the obligation to carry out such a review.⁷¹ A bi-national governmental scoping committee published for comment a draft plan to carry out this review, seeking public input in a period that ended last March. Therefore, the review itself has not yet begun.

Now, after every biannual report, the IJC holds a major public conference to get the views of the public as part of the planning for the next report, and to discuss the work of the IJC's scientific boards and council, the Water Quality Board, Science Advisory Board, Council of Great Lakes, Research Managers, International Air Quality Board, and the Health Professional Task Force.⁷² The next such meeting will take place on the campus of Queens University in Kingston, Ontario on June ninth to eleventh.⁷³ You are all invited to attend. For further information about the meeting and program, please check our web site.⁷⁴

Also in the International Air Quality Agreement, the two governments are required to issue a report every two years on their progress in achieving its objectives.⁷⁵ The IJC is required to invite public comments on it and synthesize these comments into a special report, to the two governments, and the public. The Commission is in the process of preparing the latest such report at the present time.⁷⁶

In 1998, the IJC received a reference to report on whether the waters of the Great Lakes could sustain diversions in bulk outside of their basin, particularly to the U.S. It followed an application to Ontario by the Nova Corporation in 1998, to export water by tanker from the Ontario side of Lake Superior.⁷⁷ Although the Ontario license for this was later rescinded,⁷⁸ this application caused a great deal of public concern about other possible bulk water removals from the Lakes.⁷⁹ The IJC issued a report in 2000 which noted that

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Int'l Joint Comm'n, Canada and the United States, *Review of the Great Lakes Water Quality Agreement, Join us in Kingston!*, http://www.ijc.org/2005biennial/about_en.php (last visited Nov. 12, 2005).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Int'l Joint Comm'n, Canada and the United States, *United States • Canada Air Quality Agreement, Progress Report, 2004*.

⁷⁶ See generally *id.*

⁷⁷ Tom Henry, *Civic Leaders are Stingy about Sharing Commodity*, THE TOLEDO BLADE, available at <http://toledoblade.com/apps/pbcs.dll/article?AID=/20010612/SRGREATLAKES/106120006> (last visited Nov. 12, 2005).

⁷⁸ See *id.*

⁷⁹ See e.g., Eric Reguly, *Water Fight with U.S. has Just Begun*, GLOBE & MAIL, October 23, 1999, at B2.

although the Great Lakes contained about 20% of the fresh water on the earth's surface, only 1% of this water is renewed each year from snow melt and rain. It found and recommended, as a result, that the bulk removal of water from the Lakes was definitely not a good idea.⁸⁰ In December 2002, the Canadian Government proclaimed, in force, Bill C6, which was passed by parliament in 2001.⁸¹ It amended the International Boundary Waters Treaty Act, and made new, related International Boundary Waters regulations. The Act and its regulations prohibit any new bulk removals from the Canadian Boundary Waters starting with the Great Lakes' St. Lawrence River Basin.⁸² In 1999, Ontario and Quebec enacted regulations in effect prohibiting transfers out of their part of the Great Lakes and the St. Lawrence River Basin.⁸³

What about the United States? Well, the U.S. Congress in 1986 passed the Water Resources Development Act. It said that no diversion in bulk is allowed from the Lakes if a governor of any Great Lakes state objects. Even if the project does not involve that governor's state. And the U.S. Congress called for the Great Lakes States to work with Ontario and Quebec to deal with proposals for bulk water removal essentially on the U.S. side of the Great Lakes; in other words, to match what the Canadian federal government and the provinces of Ontario and Quebec had already done through legislation and regulation.

So on June 18, 2001, the Great Lakes States, Ontario, and Quebec, concluded the draft annex to the 1985 Great Lakes Charter. They are working on ways to implement this Annex 2001.⁸⁴ I would have to point out that the proposals for implementing the Annex 2001 involve two complementary activities: One is, under American law, an effort to develop a compact between the eight Great Lakes States and the U.S. federal government, which would be legally binding on them to regulate the taking of water in bulk from the Great

⁸⁰ International Joint Commission, *Final Report to the Governments of Canada and the United States: Protection of the Waters of the Great Lakes*, Biennial Report on Great Lakes Water Quality (June 29, 2000), available at <http://www.ijc.org/php/publications/html/finalreport.html>.

⁸¹ *International Boundary Waters Treaty Act*, CANADA GAZETTE, December 18, 2002, available at <http://canadagazette.gc.ca/partII/2002/20021218/html/sor445-e.html>.

⁸² *Id.*

⁸³ The Right Honourable Herb Gray, *The Reflections on the Challenges Today to the Quantity and Quality of the Waters of the Great Lakes*, Address before The Kiwanis Club of Ottawa (March 4, 2005), http://www.ijc.org/re/comm/gray_050304_3.htm.

⁸⁴ See The Council of Great Lakes Governors [CGLG], *The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter* (June 18, 2001), available at <http://cglg.org/projects/water/docs/Annex2001.pdf>; see also generally, *Introduction: Great Lakes Charter Annex Implementing Agreements* (last visited October 30, 2005), available at http://www.on.ec.gc.ca/greatlakes/Links/Great_Lakes_Charter-WS6A96C621-1_En.htm.

Lakes.⁸⁵ The other would be a good-faith agreement between the Great Lakes States, Ontario, and Quebec, to achieve the same purposes.⁸⁶ I don't have to tell you that in Canada – and I think it is the same thing in the United States – international agreements cannot be concluded by provinces and states. This would be a good-faith exercise.

In any event, the draft proposals received a very bad response from observers. The Canadian Government said the proposed agreements to implement Annex 2001 did not afford a sufficient level of protection to the waters of the Basin, and needed to be strengthened in a number of respects.⁸⁷ The U.S. federal government, as did the Canadian federal government, said more attention had to be given to the role of the Boundary Waters Treaty and the International Joint Commission.⁸⁸ The province of Ontario said it would not sign the proposals in that current form.⁸⁹

So where are we today? Well, the working group of the Great Lakes governors is now considering all the comments from the federal governments, and others, about the proposals. They include considering the views of a group left out the first time around, the First Nations – tribes whose reservations are around the Lakes in both countries.⁹⁰ The working group of the governors met a few weeks ago and began developing the new version of the proposals based on these comments.⁹¹ It is my understanding that the Great Lakes governors working group hopes to release a second draft for public comment in the middle of May,⁹² which would respond more effectively to the complaints.

We know about the Great Lakes regional collaboration taking place under a presidential executive order bringing all the U.S. Great Lakes federal pro-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Government Response to the Second Report of the Standing Committee on Environment and Sustainable Development: "The Great Lakes Charter Annex 2001 Implementing Agreements"* (January 7, 2005), available at <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=117021> [hereinafter *The Great Lakes Charter Annex 2001 Implementing Agreements*].

⁸⁸ IJC, *11th Biennial Report Great Lakes Water Quality: The Challenge to Restore and Protect the Largest Body of Fresh Water in the World* (September 2002) at 72, available at <http://www.ijc.org/php/publications/html/11br/english/report/pdfs/11rep-e.pdf>.

⁸⁹ Mary Gordon, *Suspend Great Lakes Water Removal, Report Urges; International Deal Too Weak, MPs Say Urge Moratorium 'til It's Toughened*, TORONTO STAR, November 26, 2004, at A11.

⁹⁰ *The Great Lakes Charter Annex 2001 Implementing Agreements*, *supra* note 87.

⁹¹ See CGLG, *Appropriations Request Letter to Congress*, March 18, 2005, at 3, available at <http://www.cglg.org/Projects/priorities/CGLGFY06AppropriationsRequestLetter3-18-05.pdf>.

⁹² See generally, Great Lakes Regional Collaboration, *A Strategy to Restore and Protect the Great Lakes: Draft Action Plan* (July 2005), available at <http://glrc.us/viewentiredoc.php>.

grams under a central coordination.⁹³ The Canadian Government responded and it said it looked forward to collaborating with this new U.S. effort.⁹⁴

There is something else I will skim over quickly. There is concern on both sides of the border about aquatic, alien invasive species. Now, these are not opposition political parties, they are creatures like the Zebra mussels and the Asian carp.⁹⁵ Both countries are developing plans for dealing with these species,⁹⁶ although their plans are more for discussion at this point than implementation. We have pointed out that what's missing is there is no bi-national body coordinating this work on both sides of the border.⁹⁷ The problem is clearly bi-national. Therefore we have asked for a reference to coordinate the bi-national aspect of controlling alien invasive species, just as we received the reference to coordinate the implementation of the Great Lakes Water Quality Agreement.

Well, I want to sum up and conclude by saying I believe that Canadian and American approaches to the environmental and economic aspects of the Great Lakes have much in common because of the three agreements I mentioned. Also, I should note there are many other levels of cooperation between Canada and the United States, which involve a host of federal, state, and provincial departments and agencies. However, vigilance by citizens and their governments on both sides of the boundary is required to ensure that the approaches and goals do not ever diverge too greatly, and that there is always movement forward on both sides of the border to complete the work that remains to be done. The objective on both sides of the border must be that economic and environmental progress for the Great Lakes, and the 40 million people living around their shores, continues at an accelerated rate for them and, more importantly, for their, for your, and for my children, and especially my new grandchildren.

U.S. President Andrew Jackson said that "Eternal vigilance by the people is the price of liberty."⁹⁸ In my view, this concept is relevant when it comes

⁹³ Exec. Order No.13340, 69 Fed. Reg. 29043 (2004) available at <http://www.whitehouse.gov/new/releases/2004/05/20040518-3.html>; see also generally, U.S. Environmental Protection Agency, *Regional Collaboration: Making the Great Lakes Greater*, <http://www.epa.gov/glnpo/collaboration> (last visited Nov. 12, 2005).

⁹⁴ Tina Adler, *The Great Lakes Awash in Policies*, ENVIRONMENTAL HEALTH PERSPECTIVES, March 2005, at A176.

⁹⁵ CGLG, Press Release, *Great Lakes Governors Applaud Congressional Action to Help Keep Asian Carp Out of the Great Lakes Basin* (October 7, 2004), available at <http://cglg.org/projects/ais/CGLGPressRelease10-7-04.pdf>.

⁹⁶ See generally, Great Lakes Water Quality Board, *Report to the IJC: Alien Invasive Species and Biological Pollution of the Great Lakes Basin Ecosystem*, May 2001, available at <http://www.ijc.org/rel/pdf/ais.pdf>.

⁹⁷ *Id.*

⁹⁸ President Andrew Jackson, Farewell Address (March 4, 1837), available at <http://xroads.virginia.edu/~CAP/Jackson/jack~1.htm>.

to the economic and environmental health of the Great Lakes and the land around them. Yes, we must maintain eternal vigilance as the price of making progress and avoiding back sliding in matters of the quantity and quality of the Great Lakes' waters, and better still, as the price of moving forward and restoring the biological, chemical, and physical integrity of the Great Lakes.

There is an ancient American – or as we say in Canada, “First Nations” – saying that we do not inherit the land from our ancestors, we borrow it from our children. Surely this applies to the waters of the Great Lakes as well. The early French explorer Samuel de Champlain, when he first saw these waters 400 years ago, called them the “Sweetwater Sea.”⁹⁹ I say we must strive together to make them, once again, for all of us, our Sweetwater Sea.

Thank you very much.

(Applause.)

⁹⁹ GREAT LAKES COMM'N, LIVING WITH THE LAKES (1999) at 9, *available at* <http://www.glc.org/living/pdf/introduction.pdf>.