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# Standing Committee on Environment and Sustainable Development

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**Tuesday, November 2, 2004**

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**Chair**

**Mr. Alan Tonks**

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## Standing Committee on Environment and Sustainable Development

Tuesday, November 2, 2004

• (0910)

[English]

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning to members of the committee, our witnesses, and ladies and gentlemen.

We would like to welcome the Honourable Herb Gray and his colleagues to the meeting this morning. In every particular way that title has been well earned and it is very much in character.

As you know, Mr. Gray, we have been looking at the implications with respect to Annex 2001. We've been attempting to gain some insight in terms of the principles it's based on, and the committee would be very pleased to hear the response through the viewpoint of the International Joint Commission and our Canadian representatives. We welcome you to provide us with that.

**Right Hon. Herb Gray (Chairman, Canadian Section, International Joint Commission):** I am pleased to be here to speak to you about the views of the International Joint Commission regarding the draft proposal to implement Annex 2001 of the Great Lakes Charter. However, I can do so only to the extent the commission has reached a decision on such views.

I was in the audience last Thursday, and I heard most of what was said—I couldn't stay to the end of the meeting. I do not intend to repeat all the information that was presented to you by officials from the Department of Foreign Affairs and Environment Canada.

As you know, in 1909 the Boundary Waters Treaty was entered into between Canada and the United States to establish a permanent means of preventing and resolving disputes over water where it formed their common boundary. The Boundary Waters Treaty set out agreed principles for managing U.S.-Canada transboundary waters and established the International Joint Commission to carry out a number of functions described in the treaty to deal with them.

It's important to note that the commission is composed of six commissioners—three Canadians appointed by the federal cabinet acting as Governor in Council, and three commissioners appointed by the President of the United States and confirmed by the U.S. Senate.

Once appointed, however, commissioners are not representatives of their respective countries, and all commissioners must sign a solemn declaration to faithfully and impartially perform the tasks set out for them in the treaty.

The commission may take decisions by majority vote, but in practice it makes decisions by reaching a consensus on them, and not

by voting. The commission, in 93 years, divided on national lines only twice. So the commissioners work to reach a consensus for a decision on the matter referred to them, as set out in a document, which they all sign.

I appear here at the committee pursuant to your request as Canadian chair of the IJC; therefore, I can speak about the matter before you only to the extent that commissioners as a whole have reached a consensus decision about it. My remarks will be based on the reports the commission has issued in recent years about protecting the waters of the Great Lakes.

First there was our 2000 report, which was updated by our 2004 report, a review of the recommendations in the earlier one. The commission as such has not yet reached a view on the proposals to implement Annex 2001 other than what we said in our August 2004 report, which updated and reaffirmed the recommendations in the report we issued in 2000.

The commission has two principal functions under the Boundary Waters Treaty. One is to carry out studies and make reports at the formal request of the Canadian and American federal governments. These formal requests are called "references". The reports are made to the two governments and are also issued to the public.

The second function is to issue orders in response to applications submitted to the commission through the federal government of the country where the project will take place. If the IJC issues an order approving the application, it usually does so with conditions, and if so, it supervises the implementation of the resulting order and conditions through a binational control board.

Although the treaty allows either government to give the commission a reference, references have always been given by both governments. This means both governments have an equal obligation to respond to the resulting report and its recommendations and to consider acting on them.

The Boundary Waters Treaty expressly states in article IX that in the case of references made under it, the commission's report shall not be considered a formal decision about the questions and either the facts or the law regarding the matter referred. In other words, they aren't binding arbitral awards. The commission's reports in these cases are matters of fact-finding, scientific information, and recommendations.

We know that the waters of the Great Lakes are essential for the health and well-being of the Great Lakes ecosystem and for the nearly 40 million people on both sides of the border who rely on the lakes for drinking water, food, work, and recreation.

The Canadian and U.S. governments have committed themselves in the Great Lakes Water Quality Agreement to restore and maintain the integrity of this unique, vital, and—as the commission has found, and I'll talk about this in a minute—virtually non-renewable resource.

Also, the governments of the Great Lakes states and of Ontario and Quebec have made commitments in the Great Lakes Charter and in Annex 2001 along similar lines.

In its 2000 report the commission concluded that the Great Lakes do not offer a vast reservoir for an increasingly thirsty world. The report noted that although the Great Lakes contain about 20% of the fresh water on the earth's surface, only 1% of this water is renewed each year from snowmelt and rain.

The commission concluded that the removal of water from the basin reduces the resilience of the system and its capacity to cope with unpredictable stresses, such as those created by climate change. Therefore the commission recommended that governments take a number of specific measures to ensure that removals of water from the basin will not endanger the integrity of the Great Lakes basin ecosystem and that in-basin consumptive usage should be dealt with separately and differently. I will discuss these measures in a minute or two.

The commission was asked by the two federal governments to review the recommendations it made in its 2000 report in the light of developments that have taken place since that report was issued. We did so in the report issued this year on August 30. While there are not at present any active proposals for diversions outside the Great Lakes basin, except to communities on the outside edge of the basin, this situation could change. Moreover, the increasing demands for water to supply the needs of these near-basin communities and potential future demands for diversions to other parts of the continent, I submit, make it urgent for the two federal governments to carry out the package of recommendations in the commission's 2000 report and for the Great Lakes states and provinces to implement their Annex 2001 in a manner that conforms with those recommendations, and which I will proceed to describe shortly.

Specifically, the commission recommends in its August 2004 report that the outcome of the Annex 2001 process should include a standard and management regime consistent with the recommendations in its 2000 report. Until the process of developing proposals to implement Annex 2001 is complete, it's not possible to say whether and to what extent the published draft proposals to implement the annex and measures taken under it will give effect to and be consistent with recommendations in the commission's 2000 report.

The 2000 report specifically recommended about removals for the basin:

Without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin and that: a. there are no practical alternatives for obtaining the water, b. full consideration has been given to the potential cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future, c. effective conservation practices will be implemented in the place to which the water would be sent, d. sound planning practices will be applied with respect to the proposed removal, and e. there is no net loss to the area from which the water is taken and,

in any event, there is no greater than a 5 percent loss (the average loss of all consumptive uses within the Great Lakes Basin); and the water is returned in a condition that, using the best available technology, protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.

In its 2004 update, the commission observed with reference to the recommendation in the 2000 report about removals that no proposals to divert water out of the Great Lakes basin have been approved since our 2000 report. The report went on to say:

In December 2002, the Canadian government proclaimed in force Bill C-6 which amended the Canadian International Boundary Waters Treaty Act and new related International Boundary Waters Regulations. These, among other things, prohibit new removals from the Canadian boundary waters of the Great Lakes-St Lawrence Basin by means of diversions and also prohibit removals by any other means of amounts over 50,000 liters per day.

You might observe that the regulatory impact statement says that's equal to approximately one tanker and trailer load of water.

There are limited exceptions for: manufactured products that contain water, including water and other beverages in bottles or packages; water used in conveyance, including a vessel, aircraft or train, as ballast, for the operation of the conveyance, or for people, animals or goods on or in the conveyance; or water used in a non-commercial project on a short-term basis for fire-fighting or humanitarian purposes.

● (0915)

This prohibition against all the basin removals applies only to those Canadian waters that are boundary waters as that term is defined in the Boundary Waters Treaty.

Now, as we know, in 1999 Ontario enacted a water taking and transfer regulation, which generally prohibits transfers out of Ontario's part of the Great Lakes and the St. Lawrence basin, and since 1999 Quebec has also generally prohibited transferring water outside of Quebec that has been taken in Quebec. And recommendation I, on "Removals", ends with these words: "Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty".

Now, in our 2000 report there is recommendation II, "Major New or Increased Consumptive Uses", and it reads as follows:

To avoid endangering the integrity of the ecosystem of the Great Lakes Basin, and without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for major new or increased consumptive use of water from the Great Lakes Basin to proceed unless:

- a. full consideration has been given to the potential cumulative impacts of the proposed new or increased major consumptive use, taking into account the possibility of similar proposals in the foreseeable future,
- b. effective conservation practices will be implemented in the requesting area, and,
- c. sound planning practices will be applied with respect to the proposed consumptive use.

"In implementing this recommendation," the report says, "states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement". This section also ends with words similar to the recommendation on removals, that nothing in these recommendations alters rights or obligations under the treaty.

Finally, in its 2000 report the commission said about both consumptive uses and removals:

Any transboundary disagreements concerning the above that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

Briefly, about the U.S. government's action, the commission noted that the U.S. section 504 of the Water Resources Development Act of 2000, which amended the act of 1986, said in part that it's the purpose and policy of the Congress to prohibit any new diversion of Great Lakes water by any state, federal agency, or private entity for use outside the Great Lakes basin unless such diversion is approved by the governor of each of the Great Lakes states.

Now, as you know, on June 18, 2001, the Great Lakes states and Ontario and Quebec concluded an annex to the 1985 Great Lakes Charter. Annex 2001 is a good faith arrangement between the Great Lakes states and Ontario that establishes principles for the management of Great Lakes water resources. Annex 2001 commits the Great Lakes states and Ontario and Quebec

...to develop and implement a new common, resource-based conservation standard and apply it to new water withdrawal proposals from the Waters of the Great Lakes Basin. The standard will also address proposed increases to existing water withdrawals and existing water withdrawal capacity from the Waters of the Great Lakes Basin.

We know that in July the Council of Great Lakes Governors, representing the eight Great Lakes states, together with Ontario and Quebec released the draft proposals for implementing Annex 2001 for a 90-day public comment period. We know there's also a draft compact released that would only be between the eight Great Lakes states and the U.S. federal government. Now, according to the information I heard provided by officials at your hearing last Thursday, a final draft will not be available until sometime in 2005. So I cannot comment yet, as chair of the IJC for Canada, on whether the commission believes the draft proposals to implement Annex 2001 are consistent with our year 2000 recommendations or not, and this is because, as I said, the commission is still actively considering the matter.

However, in our 2004 update we did say

The Commission recommends that the outcome of the *Annex 2001* process should include a standard and management regime consistent with the recommendations in our 2000 Report. Until this process is complete, it is not possible to say whether and to what extent *Annex 2001* and measures taken under it will give effect to the recommendations in the Commission's 2000 Report.

• (0920)

Finally, there are some other subjects in these reports that came up at your committee meeting last Thursday that the IJC has commented on, and to assist the committee I want to talk about them briefly.

First, the commission stated in its review of the recommendations of the 2000 report:

The Commission concluded in its 2000 report that existing international trade law obligations do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem. The governments of Canada and the United States support this view....

Also, the review stated that "Just as important, the Commission continues to strongly support the basic principle espoused in our 2000 report that water use standards that treat in-basin and out-of-basin users differently are reasonable".

Then the commission went on to say—and I've talked about this as well but I'll give you some additional detail:

The Commission understands that, at this time, demand for diverted water resides on the U.S. side of the boundary in communities near the basin divide such as... Lowell, Indiana. Indeed, the Commission is aware of a growing number of proposals to allow communities that straddle or lie just outside the surface-water divide of the Great Lakes Basin to use Great Lakes water. Of particular concern to the Commission is unsustainable groundwater depletion in these communities that could lead to declining water quality, the dewatering of tributaries, and destruction of habitat. For instance, large groundwater withdrawals in southeastern Wisconsin have reduced groundwater flow to Lake Michigan and, in some locations, have reversed flow.

...the Commission continues to urge that the new regime

—any new regime involving measures to deal with these demands by near-basin communities in a fair and sustainable way—

be consistent with the Commission's recommendations in its 2000 report. In addition, the federal, state and provincial governments should work together to map and characterize groundwater aquifers.

With respect to conservation, the commission found

...that substantial work remains to be done at all levels of government to implement the water-saving measures set out in the Commission's 2000 report. Therefore, the Commission urges that those conservation recommendations be instituted as soon as possible. Governments at all levels should also encourage the development and implementation of policies such as metering and conservation-pricing as well as technologies that will reduce the consumption and loss of water as long as low income families are protected.

Finally, I would like to note the following from the 2004 report:

Over the years, the Commission has been asked by governments on several occasions to offer its advice on protecting the waters of the Great Lakes Basin from unsustainable use and diversion. While knowledge of the ecosystem has advanced and policies and practices are improving, serious concerns remain and a great deal of work still needs to be done to achieve sustainable management of these resources for the benefit of present and future generations.

Having said that, I want to deal with the matter of lake levels and our Lake Ontario and St. Lawrence study. This study is not primarily a water level study per se; it's a review of the IJC's orders for the regulation of the Lake Ontario and St. Lawrence River system. This study does include an assessment of water level impacts of the current allocation plan along with newer plans being developed in the study on the environment and all interests around the basin. This is done using historic water supply scenarios as well as climate change scenarios developed from the use of major climate models in 2002 and 2003.

• (0925)

I have to point out that the study is not complete. It's in the fourth year of a five-year period, but there are interim reports.

Water levels around the Great Lakes and St. Lawrence River are continually monitored by agencies collaborating with the IJC in both countries. The levels, though, have always been variable and have seen record lows in the 1930s and mid-1960s, as well as a higher period between the 1970s and 1990s.

In the upper lakes, Superior, Michigan, and Huron have been below average over the past six years, since 1998. They have recovered somewhat but still remain below normal.

I should note that while this study involving the lower lakes is underway, there is no upper lakes study underway similar to the lower lakes one. The commission has presented a plan for such a study to the two national governments. As yet, they have not agreed to provide the necessary funding.

So, as I've said, the IJC has not yet made the determination as to whether the present draft proposals to implement Annex 2001 are consistent with our 2000 report. It will likely not make such a comparison at least until it sees the annex implementation in their final form at some point, probably late in 2005 and likely before they are submitted to the Great Lakes state and provincial legislatures and the U.S. Congress for approval.

However, I end with a suggestion for this committee. I hope I'm not being presumptuous in this regard. This committee, with the assistance of the research branch of the Library of Parliament and each of the party caucuses' research bureaus, could carry out its own comparison of the present draft proposals to implement Annex 2001, comparing them with the IJC's recommendations in its 2000 report, or you could wait until the proposals are in their final form in 2005 and before the Great Lakes state legislatures and Congress begin voting on it.

I also noted that the officials at last Thursday's hearing said they expected comments from the Canadian federal government to be released in November, which I gather means later this month.

This concludes my statement, and I would welcome the committee's questions and comments.

• (0930)

[*Translation*]

It would be a pleasure to answer your questions and your comments in both French and English. Thank you Mr. Chairman.

[*English*]

**The Chair:** Thank you very much, Mr. Gray.

Do either of your colleagues wish to add anything to what you've said?

**Right Hon. Herb Gray:** Well, they'd better not unless I ask them, but I should introduce them.

Michael Vechsler is the counsel to the commission, on the commission's staff.

Dr. Clamen is the secretary—or in effect, deputy minister—of the Canadian section of the International Joint Commission. He has a counterpart in the United States.

There's one commission, but there are two bodies for administrative purposes, so we work together in our Ottawa and Washington offices with our Great Lakes office in Windsor.

**The Chair:** Good. Thank you, Mr. Gray.

Welcome to you both.

Mr. Mills, we'll start off with you.

**Mr. Bob Mills (Red Deer, CPC):** I welcome you, Mr. Gray. You've spent long years here.

I think there are two things, really. First of all, the Great Lakes concern a huge number of Canadians right across this country. The Great Lakes are a huge resource. As you've mentioned, some 40 million people in both countries depend on it.

There are two things I would like to know. First, in examining Annex 2001 and comparing that to the Boundary Waters Treaty, the legality of the document, a number of people have raised that issue in terms of whether there are contradictions. Is that a natural process in the development of that agreement between them?

I think the second and more important question probably is—and you've referred to it—that the eight governors need to go to Congress for approval if, down the road, next year, a decision is made. I wonder why the two provinces don't come to the federal government for the same sort of approval and examination and detailed study. I think you said it, and certainly that's what I interpreted, that this is not the procedure.

**Right Hon. Herb Gray:** Thank you.

With respect to comparing Annex 2001 and the Boundary Waters Treaty, this is an area I don't think I can get into at this time, because the commission hasn't formed a public consensus.

Now, with respect to the eight governors needing to go to Congress and why the two provinces don't come to the federal government for the same sort of approval, this is because, as I understand it—and here I'm subject to correction by my officials on either side—the Annex 2001 implementation proposals are actually two documents. One is a good faith agreement between the eight Great Lakes states and Ontario and Quebec, and the other is a compact between the eight Great Lakes states and the U.S. federal government, made under U.S. federal law, a separate document that, once voted on favourably by the eight states and the U.S. Congress, becomes a binding equivalent, in my view, to our Bill C-6.

In other words, rather than one single federal statute, the U.S. government is using their process to ask for a formal compact under delegated authority, signed by the U.S. states around the Great Lakes and voted on by their legislatures and of course the U.S. Congress. So we're dealing with two documents, and what your question involves is a U.S. federal process.

As to what the governments of Ontario and Quebec may want to do, you'll have to ask them, although I would like to observe that since the work on the proposals to implement Annex 2001 began, there are different governments in place, both in Ontario and Quebec. Whether they will have the same view as the previous two governments, I don't want to speculate.

• (0935)

**Mr. Bob Mills:** So if the two provincial governments don't agree with the eight—now, we're supposing this—governors, and it does go through their Congress and so on, what recourse does the federal government have? What can the federal government then do if that scenario were to play out?

**Right Hon. Herb Gray:** This is a question of interpretation of international relations and constitutional law, which I don't know I'm necessarily qualified to get into, but I would take the risk of observing that before this was voted on, the Canadian federal government would approach the American government and would state its position on how this measure would impact on Canada and what its gains or deficiencies would be.

**Mr. Bob Mills:** I think that's the bottom line. What the citizens around the Great Lakes are concerned about is that in fact the Americans will have total control of the issue and Canadians won't have the input they should have. It will sort of be the eight-to-two scenario, and how can you win that one?

I guess I would like to think that the IJC...I'm not sure what other international agreements, but certainly the IJC would be the one to pick up the sword and go on the attack for Canadian citizens. Yet I'm not sure I have confidence that will happen.

**Right Hon. Herb Gray:** As I explained in my opening remarks, don't forget that the commission is a Canada-U.S. body set up under a treaty. It's not reporting to or accountable to any department or minister in either country. It operates within the framework set up for it by the treaties. It's a unique binational but independent institution, and there are equal numbers of Canadian and American commissioners.

I found this very interesting over the years—the U.S. has no greater number of commissioners than Canada, in spite of the disparity of population and economy and so on. And the decision-making process involves consensus rather than voting.

I would observe that there's a role here for the Canadian federal government. I heard the officials say to this committee that the Canadian federal government would be publicly issuing its comments this month. You may want to ask them to come back and talk about their comments.

Another thing I want to observe is that the U.S. State Department has publicly asked the Great Lakes governors to add language to their draft proposals, confirming that these measures are subject to the Boundary Waters Treaty. I think it's interesting that the U.S. State Department has already formally made this request, that the language of the compact be changed or added to on this important point.

**Mr. Bob Mills:** Thank you.

**The Chair:** Thank you.

Mr. Bigras.

[Translation]

**Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** Thank you, Mr. Chairman.

Welcome to this committee Mr. Gray. It is always a pleasure to have you here.

From what I've understood, you felt that it was fundamentally important that the Annex 2001 reflect the recommendations in the 2000 report. In fact, the first paragraph on page 8 of the August 2004 report sums up your presentation

quite nicely: Until this process is complete, it is not possible to say whether and to what extent Annex 2001 and measures taken under it will give effect to the recommendations in the Commission's 2000 report...

From what I have also understood, you were suggesting that the committee and the Library of Parliament undertake an analysis to determine whether or not Annex 2001 reflects your recommendations. I would like to know if you have undertaken any analysis in order to determine whether or not Annex 2001 reflects your recommendations, particularly recommendations 1 and 2 of your report. Have you done any analysis?

• (0940)

**Right Hon. Herb Gray:** That is the work that we are currently doing. Our officials, for example Mr. Vechsler and his counterpart in Washington, are preparing a consensus document for the commissioners. We ourselves have begun our review. We have to carry on with this work because it is not finished yet.

I'm sorry our work cannot be of any use to you yet. However I still thought it would be useful for me to appear before your committee even though it may be impossible to answer your questions specifically.

**Mr. Bernard Bigras:** Fine.

**Mr. Chairman,** I have before me the minutes of an executive meeting held on September 21, 2004 in Ennis, Ireland. One of the main points on the agenda of this meeting was

to send a letter to the Council of Great Lakes Governors, with a copy to the U.S. Department of State and the Canadian Ministry of Foreign Affairs, notifying them that the Commission will not be able to fully consider the Annex 2001 proposal until after its face-to-face meeting in October.

Another point—and I will read from the minutes of this meeting—was that the Commission agree

that staff should develop a consensus document in advance of the October semi-annual meeting addressing consistencies/inconsistencies with recommendations in the Commission's report and the questions posed by the Council of Great Lakes Governors, and to discuss the matter in detail at the October semi-annual meeting.

It is now November.

I am sure that the Library of Parliament will do this comparison between the report's recommendations and Annex 2001. Given that we will provide you with our analysis, can you, in all transparency, share with us the contents of that preliminary consensus document as well as the purpose of the discussions that took place at the October meeting?

**Right Hon. Herb Gray:** Unfortunately, it was impossible to finish that document. Our officials, like Mr. Vechsler, are still discussing this with their American counterparts in Washington. We realized that it would be impossible to do this by October. It was too early for the commissioners to reach a consensus on these issues. Quite often we set up a date for the commissioners to wrap up their work and, for various reasons, it turns out to be impossible for them to do it by that date.

We felt it would be possible. Unfortunately, and I apologize to the committee, we did not reach a consensus in October.

**Mr. Bernard Bigras:** You're telling us that the International Joint Commission does not have a preliminary report. You are assuring us of that. There is no preliminary document that addresses consistencies or other points for the International Joint Commission.

**Right Hon. Herb Gray:** If our staff has prepared any documents, these documents do not represent the commission's opinion. The commission's opinion is established only by vote or by consensus. The commission's decisions are always those made by the commissioners.

**Mr. Bernard Bigras:** First, would it be possible to table with the committee the letter that was sent to the various members of the Council of Governors? Second, when that preliminary document is discussed at the executive meeting, will you be able to table a copy with the Standing Committee on the Environment and Sustainable Development?

**Right Hon. Herb Gray:** Unfortunately, that will not be possible because it is not a commission's document if there has been no consensus on the part of the commissioners regarding that document. However I can ask Mr. Vechslar about the letter to the Council of Governors.

[English]

Mr. Vechslar, did we send letters to the governors?

[Translation]

My officials tell me that we discussed the possibility of sending such a letter, but that it was not sent.

• (0945)

**Mr. Bernard Bigras:** The letter was not sent? Yet the executive board approved a decision that was discussed, if I am not mistaken, at another meeting. That's not the first time you were discussing this issue. Why was the letter not sent since it was approved by the executive board?

**Right Hon. Herb Gray:** There was no letter sent to the governors. Sometimes we change our position from one commissioners' meeting to another, given that we work by consensus, just like a party caucus or a cabinet committee does.

**Mr. Bernard Bigras:** Thank you very much, Mr. Chairman.

[English]

**The Chair:** Thank you, Mr. Bigras.

Ms. Ratansi.

**Ms. Yasmin Ratansi (Don Valley East, Lib.):** My question—

**The Chair:** Oh, I'm sorry. Did you wish to take up the balance of the time, Christian?

[Translation]

**Mr. Christian Simard (Beauport—Limoilou, BQ):** Yes, Mr. Chairman.

Good morning, Mr. Gray. Did you say that the 2001 agreement, once implemented, will be similar to authority delegated by the American federal government and will have the same weight as the International Joint Commission? It will therefore have a life of its own. That means that there will be no possibility of appealing before the International Joint Commission if, for example, there is a breach of the Boundary Waters Treaty, because in the 2001 agreement the

American Department of State included compliance with the Boundary Waters Treaty. Is it true then that one will not necessarily be able to appeal before the commission, or am I wrong?

**Right Hon. Herb Gray:** We have not yet reached a decision on that. That is one of the questions we are considering and that is a possibility. I must tell you that the Department of State, on behalf of the United States' federal government asked the governors' working committee to include wording in the document to the effect that the governors' agreement would have no more weight than the Boundary Waters Treaty.

We are currently looking at this issue. Personally, I'm pleased that the Department of State made that request to the governors. I await with great interest the document that will be published by the federal government this month.

**Mr. Christian Simard:** Towards the end of the 1980s, I sat on an advisory committee to the International Joint Commission. At the time, we were discussing flood waters. We realized that we had absolutely no knowledge of the physical state of the waters of the Great Lakes. We did not really know how they function.

How will it be possible to follow this water for the purposes of monitoring? I am referring to traceability. How will we truly be able to monitor the 2001 agreement and verify whether or not it contravenes the Boundary Waters Treaty? Is this not opening the door wide to everything, given that we will have no reference points, neither before or after?

**Right Hon. Herb Gray:** We need to take measures that will give us authority over these issues. One of the issues that we need to look at, and that you should look at, is whether the agreement between the states and provinces was reached in good faith, and whether the states have enough monitoring and review agencies.

As you indicated, there are some very interesting and very important scientific issues at stake, and there are also business issues. If water diversions are allowed, what will be the cumulative effects? Perhaps Mr. Vechslar would like to add something.

[English]

Monsieur Vechslar, do you have anything to add?

• (0950)

**Mr. Michael Vechslar (Legal Adviser, International Joint Commission):** Not really, no.

[Translation]

**Right Hon. Herb Gray:** Fine. Thank you.

**Mr. Christian Simard:** There's also the effect on water quality.

**Right Hon. Herb Gray:** Yes. That is why in its 2000 report the commission said that there had to be compliance with the Great Lakes Water Quality Agreement between the United States and Canada.

[English]

**The Chair:** Ms. Ratansi.

**Ms. Yasmin Ratansi:** Mr. Gray, I'd like to thank you and your team for being here and for providing us with such an exhaustive presentation.



I haven't had the opportunity to read this report, so I do not know what a tight regime you have in here.

My question is in regard to Bill C-6. On Thursday a committee member expressed an opinion that Bill C-6 does not ban diversion or bulk exports of water from the Great Lakes and it gives the minister the discretion to license under that act.

As a member of the cabinet and the government that brought forward this bill, could you clarify this? Is this the way you perceived it? Is this interpretation right?

**Right Hon. Herb Gray:** I think Bill C-6 was voted on by Parliament and proclaimed into force just at the end of my period in cabinet, after I left, but I'll be happy to offer a comment.

Again, you may want to hear directly from representatives of the foreign affairs department and the Department of the Environment. If I look at the bill, I would say that I think you have to read three subclauses together: subclauses 11(1), 12(1), and, in particular, 13(1), which to me seem to go further even than what we said in our 2000 report. It says:

Despite section 11, no person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.

If you read their regulatory impact statement, which was published at the same time the regulations were published, that expresses the intentions of the government. In reading it—I'm just giving you my own personal observation—it seemed to me the government was intending that there not be any use or diversion of boundary waters—these have to be Canadian boundary waters, obviously—outside the water basin in which the boundary waters are located.

By the way, this bill is not just about the boundary waters of the Great Lakes. It includes all the boundary waters stipulated by regulation, which among other things would include the St. Croix, for example, and others listed there. I just observe this.

I have to be clear on this. You're asking me for a legal interpretation. I'm giving you my reading of it and my understanding of the intentions of the government, especially as confirmed by the regulatory impact statement. But you may want to ask people from the relevant federal departments, maybe a legal adviser to the federal government, the legal branch, I should say, of the foreign affairs department to come and answer your specific questions on this.

**Ms. Yasmin Ratansi:** But being on the IJC, how do you see it? Is that your personal opinion, or is that an opinion from an IJC perspective?

**Right Hon. Herb Gray:** All I can say is that our 2004 report spoke about Bill C-6. It stated in the 2004 report that the intention of Bill C-6 was to ban any removals from the basin. I can only cite what I read out to you from our 2004 report.

• (0955)

**Ms. Yasmin Ratansi:** Thank you.

**The Chair:** Mr. Scarpaleggia.

**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** Welcome, Mr. Gray.

My first question relates to the role of the IJC. I'm trying to get a handle on it. It's not an arbiter per se, it's a body that coordinates research and makes recommendations. Is that correct?

**Right Hon. Herb Gray:** It does that. But it does go further, if asked to do so by the Canadian and American governments. In its reports, it doesn't only provide information. It states specific recommendations, even though under article 9 they do not have the force of binding arbitral awards.

Second, if it issues an order of approval with conditions on a structure for which an application of approval has been submitted, those orders of approval and conditions are binding.

**Mr. Francis Scarpaleggia:** They are binding.

**Right Hon. Herb Gray:** So that refers to the authority to build a structure on, over, or under a boundary water which may affect levels and flows in the other country and the conditions of how the water is to be apportioned for various uses. Those orders are binding.

**Mr. Francis Scarpaleggia:** What you've mapped out here, it seems to me, is a whole system of checks and balances against misuse or harmful diversion of Great Lakes water. You talk about the fact that in the agreement—or that's my understanding anyway—you mentioned any agreement between the states and the provinces would have to be consistent with the Great Lakes Water Quality Agreement. It would have to be consistent with the Boundary Waters Treaty. It would have to be consistent with the policies and standards of the American Congress and so on.

Do you feel there are sufficient checks and balances in the system, adding the fact that the IJC has strong recommending powers? Do you feel there are enough checks and balances in the system to prevent harmful diversion of water? That would be my second question.

My third question: In the event that a diversion plan is approved and over the years one finds it hasn't worked out the way we planned and is in fact compromising the ecosystem, what remedial measures can be taken? Or suppose the system is such that a state of inertia would be created, whereby the harmful state of affairs would go on and on and on—what is the remedy?

**Right Hon. Herb Gray:** I may have to ask you to help me to restate some of your questions, but I'll work backwards.

Once a diversion is approved, you can't get the water back. The water is gone and the system for removing continues to operate. That's why what we call the precautionary principle is so important, and this is one of the basic principles on which the IJC bases its work. By that it's meant that where you're not sure that something harmful isn't going to happen, you're better off not making a decision that could lead to that harmful activity taking place.

That's why the commission says a regime has to be in place applying the precautionary principle, so that there are no diversions unless the conditions that we set out—and I read out to you—are there. I would say, from the point of view of the precautionary principle, the weight of the argument is against a lot of the diversions.

Actually, the federal government's Bill C-6 goes further, I think, than what our 2000 report said. I mean, if you just stop and think, there are diversions into the Great Lakes from.... What's the name of those lakes?

•(1000)

**Mr. Michael Vechsler:** Long Lac and Ogoki.

**Right Hon. Herb Gray:** Long Lac and Ogoki and Lake Superior. That bounces the water going out of the Great Lakes through the Chicago Sanitary and Ship Canal into the east Mississippi. To say someday we're going to turn off the Chicago Sanitary and Ship Canal is not realistic. Nor is it realistic to say that we're going to turn back the Ogoki diversion.

That's why I think the committee may want to conclude that you have to be darned careful about what you start doing, because if you're dealing with something of this nature it may be very difficult, if not impossible, to turn it around. Maybe you could close off the diversion or ban the tankers taking the water out, but you're not going to get back the water that went through the system outside the basin.

**Mr. Francis Scarpaleggia:** I know the precautionary principle is more and more being inserted in legislation in Canada, and obviously the IJC is guided by the precautionary principle. Is it as deeply rooted in the U.S. Congress and in the U.S. political system in terms of environmental legislation and so on, in your opinion?

**Right Hon. Herb Gray:** I'm sorry, I'm not sufficiently informed to answer your question.

**The Chair:** That's the ten-minute allocation to the Liberal group.

I may have inadvertently made an error. I'm learning as I go here.

Mr. Comartin, I had short-changed Mr. Mills and his colleagues by four minutes. By your leave and with the committee's permission, could I go to Mr. Richardson and allow him the four minutes and then return with the ten minutes for the NDP?

Thank you, Mr. Comartin.

Mr. Richardson.

**Mr. Lee Richardson (Calgary Centre, CPC):** Thank you, Mr. Chairman.

I want to get an overall picture of the IJC here. You've been called a toothless watchdog. Do you even see yourself as a watchdog? Is that part of your role? Do you see the IJC as a watchdog for Canadian interests?

**Right Hon. Herb Gray:** The IJC is not a Canadian body, nor is it an American body.

**Mr. Lee Richardson:** I didn't suggest it was, sir. I asked if you saw the IJC as a watchdog of Canadian interests.

**Right Hon. Herb Gray:** I think the IJC is a watchdog for the interests of the people of both countries when it comes to the waters that form the boundary between the two countries. It has to work for the interests of the people on both sides of the border. That's why, unlike most international bodies, once the commissioners are appointed, they have to sign an additional declaration that they are not there on behalf of their governments, they are there on a non-partisan basis to serve the best interests of the populations, as

required by the treaty. It's a rather unusual structure, but this is what was negotiated back in 1909. Both countries have felt it has stood the test of time for a hundred years.

I think the treaty has never been amended, except in one instance, and that was to change the specific provisions about apportioning the water for the Niagara River. There is a separate little agreement that amends the original treaty. But the main thrust of the treaty must have stood the test of time, because neither government has approached the other to amend the treaty since 1909. Unlike most treaties, I find—as a layman in these matters, but as an interested one—the language is much less complicated and technical than most treaties. And it has something in there that is remarkable for the year 1909: it says neither country shall pollute the waters of the other to the damage of the health and safety of the other.

**Mr. Lee Richardson:** Thank you.

On that point—I guess we have gone over that—I think we at this committee were looking for some kind of security or sense that perhaps there was an authority or a dispute mechanism within the International Joint Commission that might assuage some of the concerns we had about any deleterious effect of Annex 2001, or actions that might be taken unilaterally by U.S. governors, for example. If we had that concern, is there some assurance we might derive from the International Joint Commission that you could override some action taken unilaterally by the Americans that would be deleterious to Canadian interests or waters?

**Right Hon. Herb Gray:** There is a dispute mechanism provided for by the treaty to be applied by the IJC, but it has to be triggered by the two governments asking that it be used. That's the way the treaty is written.

Second, the treaty does not create the IJC as a body that can override decisions of the other country, nor of sub-national groups, unless an article I haven't mentioned is used. That's article X. If article X is used and the matter is referred to the commission under article X, then decisions made under it have the force of arbitral awards; they are binding and not simply advisory. However, article X can't be invoked unless the U.S. Senate agrees. That's the way it was written, I think.

Speaking of my reading of history, at the last minute, in order to enable to the treaty to be agreed to, words about the U.S. Senate were put into article X. As a result, article X has never been used. If it were used, the decisions made under it would not simply be advisory; they would have the force of arbitral awards, awards made by a board of arbitration.

•(1005)

**The Chair:** Thank you, Mr. Richardson.

I'll go to Mr. Comartin, but just before I do, Mr. Wilfert, did you wish to make a point of order?

**Hon. Bryon Wilfert (Richmond Hill, Lib.):** No, I just want to get on the list. But I want to let you know that before this committee ends I might have to leave in order to deal with a bill.

Thank you.

**The Chair:** Mr. Comartin.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair.

Mr. Gray and officials, thank you for coming.

Last week we had a statement from the State Department that was given out by the representatives from the foreign affairs department. We also had reference to a letter that the Attorney General of Michigan had forwarded, expressing concern over, if not opposition to, the annex. I have not received that. I've checked with Mr. Cullen, and he hasn't either.

**A voice:** None of us have.

**Mr. Joe Comartin:** It actually would have been helpful to have the State Department's statement here today. So if we could get that as quickly as possible....

**The Chair:** The clerk has taken note of that.

Mr. Clerk, could you give us an update on that?

**The Clerk of the Committee (Mr. Eugene Morawski):** I got from the department yesterday some documents that were sent out electronically. I don't know if that was part of the package. I got them late yesterday.

**The Chair:** We'll double-check that, and we'll certainly get them to you for the next go-round.

**Mr. Joe Comartin:** Thank you.

I want to follow up Mr. Bigras' question in terms of the status, at this point, of the position within the IJC.

If I understand the situation, some of your officials would have prepared at least a preliminary analysis of the annex and the conditions criteria that would be required to be met in order to have waters permitted to be diverted by the council, and compared those to the list that you gave us earlier today. I understand that has to be kept within the commission, but I wonder if that analysis is going to be shared with either the federal environment department in Canada or the foreign affairs department before they give us their comments—which they've indicated we're going to have by the end of this month or early in December. Will that be shared with them?

**Right Hon. Herb Gray:** Once the commissioners are ready to release a report, they will share a draft of the report with relevant departments in both countries, solely to see whether we're making any factual or scientific errors. We do not take aboard any comments they make. So what we would share with the governments is a draft of our report as a commission, solely for the purpose of knowing in advance whether we have made a factual or technical error.

I think I'm right in that, Mr. Vechsler.

**Mr. Michael Vechsler:** Yes, that's correct.

**Mr. Joe Comartin:** I'm assuming that at the rate the commission work is going, that will be after the end of this month.

**Right Hon. Herb Gray:** I think one would have to recognize that, as I say, we work by consensus. I think you'll know from your discussions in your caucus—or for those who have been in cabinet, from cabinet—that sometimes reaching a consensus takes longer

than you think. We've found, with a hundred years of successful experience, that's the way to do business

• (1010)

**Mr. Joe Comartin:** Let me just express my concern, Mr. Gray. It's not that I've always been a complete admirer of the IJC, but the reality is that the IJC has been much more protective of the Great Lakes, in my opinion, and has reacted more appropriately and quickly than the foreign affairs department has on a number of issues. So I guess I'll just leave it and give encouragement that the work of the commission be done as quickly as possible so that you can share it with the government, at least on this side of the border.

Let me go to another point—that is, the major concern I have with regard to the ultimate usage that will be made of the agreement, and more specifically, the compact.

Mr. Vechsler, it may be you who needs to respond to this, but I cannot see how we're not at some stage going to get into a conflict between a decision made by the council and a decision made by the IJC, if an application is made and it gets referred to the IJC. My analysis of the difference in the criteria is that it is quite extensive. That is, everybody I have seen, from the environmental groups that have done the analysis on both what the IJC position is on diversion and what the annex position is on that, say that the criteria under the annex are extremely permissive by comparison with the IJC.

Just assume that for a minute; don't take a position.

If that is the case, what happens if the council at some point recommends and permits a diversion, and the issue does get referred to the IJC and it opposes that diversion? What happens then?

**Right Hon. Herb Gray:** I'll ask Mr. Vechsler to assist me.

If the IJC issues a conclusion different from the decision of the council of ministers, I think its decision is actually a report given to the two governments. To add weight to the recommendations, it's released to the public. We don't give secret reports to governments. It will then be up to the Canadian government to weigh in, through its links with the U.S. authorities or increasingly through direct contact, through consulates or embassies, with governors and American legislators.

We have to recognize that we're dealing—if you talk about the Great Lakes—with one water basin but with two sovereign governments, eight sub-national governments in the U.S., two sub-national governments in Canada. The lines drawn on a map by human beings don't fit in with what mother nature has provided us. So it's a continuing challenge. In both countries we're dealing with federal governments and so on.

I would like to ask Mr. Vechsler to assist us here.

**Mr. Michael Vechsler:** The only thing I'd like to add is that I think it's important to remember that the commission's authority always comes from the treaty, which is in essence part of the international relationship between the two countries, so that in the end, one has to look to the international law as it's being applied between Canada and the United States to see what the commission's authority is or is not in any particular case.

**Mr. Joe Comartin:** But unless article X of the treaty is invoked, and I'm assuming that the reference on a specific application.... For example, Waukesha applies for a diversion, the council grants it, it gets referred to the IJC, and the IJC recommends against it. That application and that report is not part of article X. There would have to be a further invocation of that section. Am I correct on that?

**Right Hon. Herb Gray:** As I understand it, it has to be invoked from the outset, that is to say, the reference to the commission has to specifically say we're doing this under article X. Now, in order for that to work and for the ruling to be in the nature of an arbitral award, the U.S. Senate has to agree. Whether you think that's the way the clause should have been written in the first place, you'll have to ask people who haven't been around for almost a hundred years. Interestingly enough, there is an appeal from any arbitral award made under article X to the Hague international tribunal.

Do you want to add something, Mr. Vechsler?

•(1015)

**Mr. Michael Vechsler:** The only other thing I'd like to add is that if the situation were to fall within article III or article IV, if it was a situation requiring an order or bilateral approval pursuant to either of those articles, and if the government where the project was taking place then decided to refer it to the commission pursuant to article III or article IV, then of course there's a question of an order, and then the commission decision would be binding. But that's a narrow situation.

**Mr. Joe Comartin:** Yes. Has article X ever been used?

**Right Hon. Herb Gray:** Not that I know of. I don't think so.

Do you have any information?

**The Chair:** One minute.

**Mr. Joe Comartin:** I'm sure I didn't use up ten minutes. It was Mr. Gray who used it up.

**Right Hon. Herb Gray:** That's right. Deduct that from my time.

**Mr. Joe Comartin:** Mr. Gray, the statement that we did get from the State Department last week, quite frankly, gave me some cause for comfort. It may be unfair to ask you this, but I'll ask it anyway.

I would have felt more comfortable if there had been a specific reference in that statement to the ongoing role of the IJC and it being supreme over the council. Without asking you to take a position on behalf of the commission, would that give the average Canadian a greater sense of comfort as well?

**Right Hon. Herb Gray:** I have a file here with the words; maybe Mr. Vechsler could leaf through there.

I'm not suggesting that what the U.S. government has asked the governors to do is the final word on the subject or that it's the ideal language. From the point of view of my position as chair of the IJC, I think it's a constructive thing to do, and it's consistent with what we said in our year 2000 report, where we said anything dealing with removals or consumptive uses is not intended to take anything away from the authority of the IJC. So I'm saying that the U.S. government's request to the governors is something constructive, but I'm not suggesting it's the final word on the subject.

**The Chair:** Thank you.

Unfortunately, the ten minutes encompasses also the questions and answers. We've now gone through the ten-minute envelopes allocated under the procedural bylaw. We now go to the open portion.

The following members have indicated they'd like to ask questions: Mr. Paradis, Mr. McGuinty, Mr. Watson, and Mr. Jean.

Mr. Paradis.

[*Translation*]

**Hon. Denis Paradis (Brome—Missisquoi, Lib.):** Thank you, Mr. Chairman.

**Right Hon. Herb Gray:** Mr. Chairman, I would like to add a point to the reply I made to Mr. Comartin.

[*English*]

In its 2000 report on both consumptive abuses and removals, the commission recommended—and this is my statement—that:

Any transboundary disagreements concerning the above that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

That doesn't rule out trying to use article X, or what Mr. Vechsler said in a limited way to use article III.

I'm sorry to intrude here.

[*Translation*]

**Hon. Denis Paradis:** Thank you, Mr. Chairman. I would like to welcome Mr. Gray and the other members of the International Joint Commission's team.

Obviously everyone agrees on the importance of water and on the fact that it is probably Canada's greatest natural resource. You only have to look at the price of oil today. I think that in 15 or 20 years, water will have become an extremely rare resource on this planet.

It seems quite clear that the Boundary Waters Treaty allows no diversions if this affects the flow or natural levels of water, and the International Joint Commission plays a role in this area. Second, with Bill C-6, the Canadian government intervened by prohibiting water removals and diversions. I think this was the wish of not only the Canadian federal government but also of the provinces of Ontario and Quebec.

However, at the same time two provinces and eight states signed agreements. The question I have is about the interaction between the federal government and the two provinces. Everyone on the Canadian side agrees: no water removals or diversions. But what about cooperation on the Canadian side? Where is the cooperation between the provinces and the Canadian government? If we are inconsistent in what we present to the Americans—we all know the expression “divide and rule”—, if the provinces take one approach and the federal government takes another, and the joint commission plays another role, I think that in the long run we will all lose. What do you think should be done to encourage more consistency and cooperation on the Canadian side, at the federal-provincial level?

Second, if we were not divided on our side and if we did have a clear and consistent approach, what role could your commission play in inviting and encouraging the United States to use an approach as clear and simple as the one we may be using on the Canadian side, while restricting the discussion on anything related to water removals and diversions?

• (1020)

**Right Hon. Herb Gray:** First, there are cooperation tools for the federal government and the governments of Quebec and Ontario, as well as an agreement between the federal government and the government of Ontario called the Canada-Ontario Agreement, whose purpose is to facilitate the improvement of water quality in the Great Lakes. There's also a similar agreement for the St. Lawrence River, but I am not sure exactly what it is called.

[English]

Do you remember the exact name? Was it the Quebec federal agreement?

[Translation]

In any case, there are links for cooperation between both governments involving departments such as the Department of the Environment and the Department of Natural Resources. There are also at least two agreements between the federal government, the province of Ontario and the government of Quebec.

**Hon. Denis Paradis:** Mr. Chairman, that's fine in terms of water quality, but what about diversions or bulk water removals? That is what I am very concerned about.

**Right Hon. Herb Gray:** Fine. When there was a controversy surrounding diversions and water withdrawals in 1997 and 1998, the government raised this issue with both provincial governments. That is why both governments implemented their own legislation and regulations prohibiting diversions and withdrawals. Mr. McGuinty can perhaps confirm or expand on this, namely that in Quebec and Ontario there are regulations and legislation preventing diversions and withdrawals. Have I answered all your questions?

**Hon. Denis Paradis:** Would you like to see greater cooperation between our various levels of government in order to deal with problems related to diversions and bulk withdrawals? I know that we have the federal Bill C-6 and that we've asked provinces to take similar action in order to prevent bulk water withdrawals on their territory, but would you like to see us take a common stand, to see us use an integrated approach and take a common position with respect to the United States on diversions and withdrawals?

• (1025)

**Right Hon. Herb Gray:** I think that cooperation already exists. If you are talking about a common stand on the Annex 2001 agreement, I think that is something that the Government of Ontario is at least considering. In terms of the current situation, according to what I have been told there is good cooperation. I may be wrong, but according to what I have been told, there is cooperation to prevent these types of withdrawals and diversions on provincial territories.

[English]

**The Chair:** Thank you, Mr. Gray.

We're now going from side to side, the clerk has informed me. The order I have is Mr. Watson would be the next questioner, then Mr.

Watson, Mr. McGuinty, Mr. Jean, then Mr. Comartin—we go back and forth—and Mr. Simard.

Mr. Watson.

**Mr. Jeff Watson (Essex, CPC):** Thank you, Mr. Chair.

Thank you to Mr. Gray for being here.

Gosh, five minutes, I think I need another two hours to try to figure this out. Forgive me, I'm not very analytical in my thinking. I'm much more of a global thinker. Broad strokes are easier for me to understand. I need to probe a few things here with you, if possible. I need some understanding here.

The International Joint Commission, you've said, can be an arbiter if both the U.S. and Canadian governments make a reference to it. What happens if only one government makes a reference to the IJC? First of all, can only one government make a reference to the IJC?

**Right Hon. Herb Gray:** Yes, only one government can make a reference. The approach has developed, the conventions, that references are always brought by both governments. I think the reason for that is simple. If a reference is brought by only one government and the report is advisory, then it's more likely that the report will be taken seriously by the other government if it asks for the reference to be made.

So I'm not aware of any instances where a reference has been brought by only one government, although that's clearly permitted by the treaty. I think the practice of both governments agreeing on a reference to be made and the language has helped make the recommendations of the commission have more weight than would otherwise be the case.

**Mr. Jeff Watson:** Okay.

This is an important question to probe. With regard to Mr. Fawcett's testimony last week, when Quebec and Ontario and the federal government were not happy with the process currently underway with respect to the compact, their course of action was to seek consultations with the U.S. government, which is what they're preparing some comments on, apparently. Then they would say they would likely refer the issue to the IJC.

The question I didn't hear answered is whether anything binding can be issued if only one country references to the IJC. Is there any action that can come from IJC that would be binding on the other party as well?

**Right Hon. Herb Gray:** This could be done, I think. You use the word "arbiter". If the reference was made under article X, for that to come into force you need the approval of the U.S. Senate, as well as, of course, the Canadian cabinet. I repeat: it's a fascinating part of the treaty, but you can see why it's never been used. Perhaps it should have been, but it hasn't been.

**Mr. Jeff Watson:** Perhaps I can move to a different line of thought.

There is some concern that the compact creates a new standard for diversion approval that goes around the IJC. Is it your understanding that there's a unilateral mechanism that's being created here that would go around the authority of the IJC with respect to it?

**Right Hon. Herb Gray:** Speaking as Canadian chair of the IJC, I can only say that this is an issue we're considering.

**Mr. Jeff Watson:** Nobody seems to have an answer on that question.

**Right Hon. Herb Gray:** Perhaps this is something the Canadian government will beat us to the punch on by offering their comments before this month is up.

**Mr. Jeff Watson:** There is one other interesting point of contention. I'll make this brief, because I know my time is running down.

I'm switching gears again to a difference of legal opinions. We were able to probe this somewhat last week. The Council of Great Lakes Governors says they cannot distinguish between in-basin and out-of-basin withdrawals. They have a legal opinion that's different from the International Joint Commission's over the distinguishing between in-basin and out-of-basin transfers. Could you please explain the difference in the legal opinions between the governors and the IJC?

• (1030)

**Right Hon. Herb Gray:** First, I'd like to observe that legal opinions are not the equivalent of court judgments. Secondly, as Mr. Comartin, a distinguished senior counsel, will tell you, you can find as many opinions sometimes on a subject as there are lawyers willing to comment.

The commission has, in effect, stated approval with the advice they received from counsel of the Canadian and American federal governments on matters like the application of NAFTA and so on. I don't think I'm qualified to analyse and parse the two sets of opinions, but I do refer you to what the commission, as such, has said in accepting the opinions provided to it formally by the Canadian and American governments on the non-applicability of World Trade Organization or NAFTA provisions, provided the water is dealt with or regulated in its natural state.

I realize that's not specifically what you're asking me, but it may help you to see how governments approach these legal issues.

**Mr. Jeff Watson:** Okay, thank you.

**The Chair:** Thank you, Mr. Watson.

Mr. McGuinty.

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chair.

Mr. Gray, it's good to see you again. Thank you for coming with your colleagues.

I wanted to hearken back to some opening remarks you made, during which you alluded to something that simply jumps out on every second page of your report in 2000 and jumps out even more clearly in the August 2004 review of the report, which gets to some of the systemic challenges you talked about, and that is, the state of science, the state of research. It picks up on what my colleague, Monsieur Paradis, alluded to about potential cooperation between the Government of Canada, the governments of Ontario and Quebec, and governments in the United States, state and federal.

First of all, congratulations again on this report from 2000. I have a penchant for looking at the back of a report first to find out who in fact participated. And when you look at the multi-stakeholder input, the huge efforts you went to for public outreach and dialogue and for consultation, I can only assume as one member of this committee that this is a strong representation of where the common understanding would be and where common ground might be.

I'm trying to find out, given our very important global stewardship responsibility as the wealthiest continent on the planet, what we can do to ratchet up the seriousness with which this is taken at the government level so that we can in fact build on cooperation that you mentioned in your answer to Monsieur Paradis. You said earlier that there are in fact two new governments in Ontario and Quebec since the beginning of the annex process. That is the case. Is it time for us to revisit how we're approaching the water issue? Should we be launching a national water project for the country in order to pick up on all of the recommendations that are in this report and all of the important comments made by the commission following up on the recommendations in 2000? How do we get this on the radar screen?

**Right Hon. Herb Gray:** I think one way is through hearings like this open to the public and the press and sometimes broadcast. You have an important role to play, in conjunction with other committees, like the fisheries and oceans committee. I look forward to this committee playing that kind of role.

Second, I should point out that the Great Lakes Water Quality Agreement requires that approximately every six years there be a full review of it by the two national governments, the signatories. They intend, as you may know, to carry out a very detailed, in-depth, transparent review, and they will likely formally ask the IJC to carry out the public consultation process. Right now, there's a scoping committee of the two governments working out the details of that review. So that can play at least a part of a role regarding what you were talking about.

In addition to that, you might ask the people from the Department of Foreign Affairs and Environment and, say, CIDA to brief you on what they're doing in international fora. There's a meeting every two years, roughly, called the World Water Forum that brings together stakeholder groups and governments on these issues. There are a number of programs at the UN, as you know, under UNESCO and the Department of Economic and Social Affairs, on water. In fact, the UN has just set up a virtual coordination system of all the water activities within all its agencies called UN Water, which you might want to be briefed on.

This is a world problem, and we in Canada have to do our part as global citizens, so to speak. At the same time, we have to be aware of our own obligations for stewardship, bearing in mind—and this may seem strange, standing on the shores of the one of the Great Lakes—that the Great Lakes aren't an ever-renewable resource. If anything, as we said in our 2000 and 2004 reports, calls for conservation measures are as important for the populations around the Great Lakes as for those in the southern U.S. And I think you can, as a member of this committee and as an MP, add from your own professional experience in this regard.

• (1035)

**The Chair:** Thank you, Mr. McGuinty.

Mr. Jean.

**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** Thank you, Mr. Chair, and thank you for coming, gentlemen.

The more I read, the more fearful I become about our future in Canada and the northern U.S. I certainly have a lot of questions, but I'll try to frame them so they can be yes and no.

**Right Hon. Herb Gray:** I'm sorry, I never was able to give yes or no answers very easily. I warn you in advance.

**Mr. Brian Jean:** You must have had a history in politics, sir.

First, does the IJC have authority over these other tributaries that feed the Great Lakes? My understanding is they do not—for instance, the Algonquin diversion and the other lakes. Does the IJC have any authority to stop any damming project that would stop the feed?

**Right Hon. Herb Gray:** I'm going to ask Mr. Vechsler to help us here.

You have to look at the preliminary article defining boundary waters. Let's say, hypothetically—Mr. Vechsler, I'm sorry, here I'm perhaps doing your job—what if the Government of Ontario said they wanted to stop the diversion of the lake and the Nipigon River into Lake Superior? Maybe that's too blunt a question.

**Mr. Brian Jean:** That is my question.

**Right Hon. Herb Gray:** We may want to reflect on some of your questions and provide you further written answers, if you want.

**Mr. Michael Vechsler:** I think there are two parts to your question.

The first part is that clearly the preliminary article states the term "boundary waters" would not include tributary waters. If you're talking about work on a tributary to the Great Lakes basin, it appears it does not fall within the boundary waters.

**Mr. Brian Jean:** So in essence there would be no authority to take any steps?

**Mr. Michael Vechsler:** Except under article IV. There might be some circumstances, if you were backing the water up, but that's unlikely. So the answer is generally yes, to answer your question, the commission would not have authority on tributary waters.

**Mr. Brian Jean:** My next of seven questions deals with the issue that with not more than 5% removal per year and 1% replenishing it doesn't take a genius to figure out that in 50 years we could be down to 30% or 40% of our current water in the Great Lakes. Does it not seem that we should limit the amount that is able to be withdrawn, especially on a commercial basis, or have some sort of user fee or taxing system to replenish this, or have some sort of conservation program funded?

**Right Hon. Herb Gray:** There are those who would argue that if there are, as you say, user fees, it may cause a commodification of water and bring NAFTA into play.

Second, the reference to 5% was in our year 2000 report, and this is not as strong as what the Canadian government has set out in clause 13 of Bill C-6. But this is a question that interested me, because I came aboard two years after this report was issued about the 5% and 1%. Perhaps I can ask Dr. Clamen and Mr. Vechsler to

show us the difference. The 5% is the accumulation, I think, of consumptive uses, not diversions out of the basin.

• (1040)

**Mr. Murray Clamen (Secretary, Canadian Section, International Joint Commission):** The 5% was essentially an average amount of what was consumed over time through all the various uses. There's quite a diversity and difference between an irrigation use and another use. The commission looked at the data, and the 5% seemed a reasonable average amount.

**Mr. Brian Jean:** But it still is 5% of the total, from my reading, so it seems quite astronomical, to put it bluntly. Considering the total use of the water, it just seems like a number that is very large, considering the ramifications.

I have two more brief questions, if I may.

**Right Hon. Herb Gray:** Mr. Vechsler, your handwriting is getting as bad as mine. Could you read this out, please.

**Mr. Michael Vechsler:** Of course. It's 5% of the water withdrawn; it's not 5% of the total of the Great Lakes.

**Mr. Brian Jean:** The 50,000 gallon-per-day removal from the Great Lakes, is that on an average over a year? For instance, if a commercial enterprise uses 50,000 gallons per day, is that done on a yearly basis or a daily basis?

**Right Hon. Herb Gray:** I don't remember. I'm afraid I can't answer that, although one fact in the regulatory impact statement that fascinated me was that this is the equivalent of one tanker truck with a trailer behind it. How much you can take out cumulatively on that basis is an interesting question, but you'd have to direct that question, at this point anyway, to people who are responsible for Bill C-6.

**Mr. Brian Jean:** I have a final quick question. Michigan seems to be the one state that does not have any conservation programs. Of course, Lake Michigan has reverse flow rivers on it. Has there been any quantification in terms of what this means to the Great Lakes, with the reverse flows on underground rivers, etc.?

**Right Hon. Herb Gray:** I'm not aware of the commission doing this, but certainly we felt that what we knew was sufficient to create concern, because this water, at one point, would be draining into the Great Lakes, and with heavy use would be draining the aquifers at the other side of the dividing line—which, by the way, comes very close to the Great Lakes; It's fascinating to look at a map on this. This is a problem. So there are two issues: taking water from the Great Lakes for near-basin communities, what does that mean; and second, bearing in mind what they're doing with their water, how does that affect the flow of water through aquifers into the Great Lakes? We're raising that as a question in which there has to be more work. We're ready to say, with what we know now, that this is an issue that has to be dealt with.

**The Chair:** Thank you, Mr. Jean.

Now I'm in a dilemma. When I said who was the next speaker... I'm now empathizing with Mr. Caccia, who was here when I used to think I was the next questioner, and then someone else would come on the list when we were into the back and forth.

I had announced that Mr. Comartin was the next questioner, but we were on this side of the opposition and then Mr. Paradis had indicated that he wanted to ask a question. Technically, I should go to the other side and ask Mr. Paradis, but I wonder, Mr. Paradis, if you would bow to Mr. Comartin and then I would come to you. Is that okay? And then we'll go to Mr. Simard.

Mr. Comartin.

**Mr. Joe Comartin:** Thank you, Mr. Chair, and thank you, Mr. Paradis.

I have some factual questions, Mr. Gray. Has the IJC been able to determine a number for us as to how many citizens on the American side are close enough to the Great Lakes basin to be looking at a quick diversion to them, and are there any Canadian communities that are in this state, where they would be looking to divert water out of the Great Lakes?

•(1045)

**Right Hon. Herb Gray:** I'll ask the staff to help me.

It depends on what you're looking at. It's my impression—because in my work I have to visit Chicago from time to time—that on the other side of the divide.... In the metropolitan area of Chicago there may be some very large suburban communities, and there are other communities—you mentioned Waukesha, Wisconsin, and so on—and the number could be substantial and growing. I'll ask my staff to help as to whether there's any number we haven't quantified.

You could just look at this, shall I say, subjectively. If you visit Chicago you can see what's involved.

**Mr. Joe Comartin:** But the commission has not done a specific analysis.

**Right Hon. Herb Gray:** No, we haven't, actually.

**Mr. Murray Clamen:** There is a map in the 2000 report that shows potential...but we didn't check the number of people involved in those locations.

**Right Hon. Herb Gray:** As far as Canadian cities are concerned, I don't think there are any sufficiently large outside the basin that are pressing. Now, there may be issues about water movement within the basin, say in Ontario from Lake Huron to communities close to Lake Erie, but upon looking at the clock, I'd say that's another issue we'll have to discuss on another day.

**Mr. Joe Comartin:** Mr. Gray, you made reference to the IJC requesting support—financial resources—for the upper Great Lakes study. Do you know how much the budget was for that study?

**Right Hon. Herb Gray:** It's interesting to note that the so-called lower lakes study involves a five-year commitment by both governments of a total of \$30 million. I stand to be corrected by Dr. Clamen, but I would presume the upper lakes study would have to extend for the same period, about five years, with its own permanent staff with technical boards and so on. It could involve the same amount, although we have argued to the government that there could be economies using some of the administrative structure we

already have in place for the lower lakes study. It wouldn't necessarily cost the same as the study now coming down the home stretch.

Do you have anything you could help us with on that?

**Mr. Murray Clamen:** It's essentially what you said. It's roughly \$2 million to \$3 million a year; but there are actually two options, to have it within three or five years, so it could be anywhere from \$6 million to \$9 million to as high as \$15 million Canadian for our study.

**Right Hon. Herb Gray:** Are you talking about money from each government, or do you mean from both governments?

**Mr. Murray Clamen:** That's from each government.

**Mr. Joe Comartin:** Neither government has indicated a willingness to...?

**Right Hon. Herb Gray:** Well, nobody said no. They're still considering the matter.

Am I right there?

**Mr. Murray Clamen:** The Government of Canada at our last semi-annual meeting indicated some support, but we haven't had any financial commitments. The U.S. government has not provided any, thanks to the U.S. Congress.

**Mr. Joe Comartin:** I know there are other studies the IJC would like to pursue along the lines of getting additional scientific information so we understand much better how water flows in the Great Lakes, what affects the levels, and in particular at this period of time what the likely outcome is to be of global warming and climate change, which needs more work. Are there additional urgent studies, if I can put it that way, that the IJC is looking to press—

**Right Hon. Herb Gray:** I should remind the committee—and I'm sure they already know this—that under the Great Lakes Water Quality Agreement we have a number of scientific boards reporting to us. These are binational boards, each with a Canadian and an American chair, composed of scientists seconded by both governments and sometimes from universities as well. We have a science advisory board, a water quality board, a research management board, and, under a different agreement, the International Air Quality Advisory Board. They have an ongoing program of work in these areas, and certainly if there were additional funding these scientists would be very happy to tell us where they could add to the existing work.

**Mr. Joe Comartin:** Thank you.

**The Chair:** . Mr. Paradis.

[*Translation*]

**Hon. Denis Paradis:** Mr. Chairman, the more I hear the more I'm concerned. The federal government has clearly said no to bulk water withdrawals. At least I think that Bill C-6 is a clear stand against bulk withdrawals.



The July 19, 2004 document, the agreement between the eight States and the two provincial governments of Quebec and Ontario, includes the standards here and there. For example, paragraph 100(1)(c) includes the words “to create a cooperative arrangement regarding water withdrawal management” and paragraph 100(1)(d) includes the words “to provide common and regional mechanisms to evaluate water withdrawal proposals”. According to the definition, an applicant is the person who submits a project proposal involving a withdrawal of water. Article 200 deals with water withdrawals from the Great Lakes basin.

**Article 201 requires:** 1. regional review of a proposal for new or increased diversion of one million gallons per day (3,800 million litres per day) or greater average—

2. regional review of a proposal for new or increased consumptive use of 5 million gallons per day (19,000 million litres per day) or greater average—

I call that bulk diversion and withdrawal. On the one hand the federal government is saying that there must not be any bulk withdrawals in Canada and on the other hand two provinces sign an agreement allowing bulk water withdrawals. I'm very concerned, Mr. Chairman.

Does the Chairman of the International Joint Commission not think that it would be appropriate for the July 19 document to include wording to the effect that the Canadian Parliament has already passed a bill to prevent bulk withdrawals?

• (1050)

**Right Hon. Herb Gray:** You're asking me for a legal opinion. Although I am a lawyer, I do not claim to be an expert on these matters. However, I must point out that Bill C-6 is a piece of federal legislation, and I think it would take precedence over provincial legislation in the case of boundary waters on the Canadian side of the basin. Bill C-6 is a series of amendments to acts that implement in Canada the 1909 Boundary Waters Treaty. Here is a reference to a power of the federal government which takes precedence over provincial legislation in this field.

[English]

My counsel says I'm on the right track.

**Some hon. members:** Oh, oh!

**The Chair:** Thank you, Mr. Paradis.

Mr. Simard.

[Translation]

**Mr. Christian Simard:** I would like to respond to the comments made by Mr. Paradis and Mr. McGuinty. I think it is not in the long term interest of Quebec or Ontario to drain the St. Lawrence, Lake Érié, Lac Huron and Lac Superior. I believe there are discussions and consultations underway at the moment on the Annex 2001, and I do not think we should repeat once again that *Ottawa knows best*. There must be cooperation and a sharing of information. That is the purpose of that committee. I think that the diversions may be the

greatest challenge faced by the International Joint Commission since 1909.

As regards the quality of the Great Lakes water, everyone is interested in having high-quality drinking water, and the States have exchanged information on this and operated by means of consensus. In this case, there is so much interest in the Great Lakes water and the boundary waters on the American side that we may see how far the International Joint Commission and the Boundary Waters Treaty can go.

This is my interpretation of the situation. It seems to me that the difficulty your commission is having just to send a letter to the Council of governors and the possibility of a meeting to discuss a report are leading to intense internal tension within the International Joint Commission. The will of the American people, who need water, and the will of the people of Canada and Quebec to preserve their water are in conflict, and this concerns me a great deal.

Something else concerns me as well, and I would like your views on this. Once water is bottled and marketed, are the provisions of the Boundary Waters Treaty no longer applicable and replaced by the provisions of NAFTA? Do you have an opinion on this?

• (1055)

**Right Hon. Herb Gray:** The Commission has said in the past that in the case of water in its natural state, there is no oversight under NAFTA or even the treaties on international trade. That is the opinion of the American and Canadian governments. There is no difference of opinion on this.

In the case of bottled water it is different. That is a commodity. However, I do not think it is possible to bottle quantities of water equivalent to the quantities we would use in the case of major diversions, and so on.

Second, I think there is already good cooperation between the Quebec government and the federal government, and between the Ontario government and the federal government. I see for myself Canadian government officials in Quebec City working with their counterparts in the Provincial Ministry of the Environment. I see the same thing in Toronto, where Environment Canada officials from the Ontario region work with their counterparts in the Ontario Ministry of the Environment. As Mr. Paradis said, there is always room for improvement. To be fair on this, I must say that I have seen some very interesting cooperation, but there is always room for improvement.

I hope I have answered your questions. However, I must repeat that we have not decided to send a letter to all the governors. Once we have reached a consensus, we will inform the two national governments of this by letter. Clearly, we will be sending copies to the governors, but we will communicate mainly with the two national governments.

[English]

**The Chair:** We have witnesses and the next committee lining up.

Mr. Jean, could you finish with your question? Then we'll bring this to a close.

**Mr. Brian Jean:** It's very simple; it's not a yes or no answer, sir, but were there were any studies done on the consumption, an analysis between north and south, between our U.S. neighbours compared to us on what portion of consumption they utilize of the Great Lakes, either on a commercial basis or a private basis? Have there been any studies done on that?

**Mr. Murray Clamen:** Within the Great Lakes, we did some studies. There is some data in the 2000 report on consumptive use.

**Mr. Brian Jean:** I saw that. Does it go into any further detail? Are those reports available? Could I get a copy?

**Mr. Murray Clamen:** Yes. We can make more detailed reports available to you.

**Mr. Brian Jean:** If I could get a copy, that would be great.

I have a final question. Have there been any studies on what the ramifications would be if water in its natural state were actually viewed as a commodity? What would the economic ramifications be for Canada?

Of course, free trade under NAFTA does not necessarily mean free product or free transportation.

**Right Hon. Herb Gray:** That's a legal issue that I regret I'm not prepared to comment on at this point. There are those who argue that if the product came under NAFTA, then the chapter 11 arbitration rights would arise where private interest could challenge Canadian policy or American policy, etc., and chapter 11 would become quite controversial. There may be similar clauses in the World Trade Organization agreement.

I want to end by saying, and repeating, that the commission has in effect agreed with the position of the two national governments that water in its natural form can be regulated by the two governments, regulated differently in basin and out of basin, without attracting any activity under either the NAFTA or the World Trade Organization.

**Mr. Brian Jean:** My question was actually on whether there had been any studies done relating to that, as far as the economic ramifications of the definition itself.

• (1100)

**Right Hon. Herb Gray:** I would only offer—and I'd like Mr. Vechsler to assist me here—that it depends on the project. The

project could have massive economic ramifications. In my view, it depends on the nature of the project that would be challenged under, for example, chapter 11.

**Mr. Brian Jean:** Thank you, sir.

**Right Hon. Herb Gray:** All right. Thank you very much.

**Mr. Brian Jean:** Thank you, Mr. Chairman.

**The Chair:** Thank you to the Right Honourable Herb Gray. We do appreciate you being here.

We are going to follow up on some of the suggestions, in particular a combined research document that perhaps we could feed back to the staff, in line with what you are suggesting.

Members of the committee, I have some housekeeping issues. First of all, I don't mean to be presumptuous, because it's hard to know what line of questioning one wants to use, but when one has access to a document or a letter or so on that is going to be germane to the deliberations of the committee, it's helpful that other members of the committee may have access to that. So would you kindly keep that in mind and then the clerk can also follow up and make it available to our translators.

The second thing is we will be getting those two documents Mr. Comartin asked for. We'll have that. The clerk has noted that.

On the agenda on Thursday, we will have two pieces of legislation before us. The steering committee has met. We have a draft with respect to the Kyoto framework, which the committee had asked for. We are getting some other responses from the steering committee. Hopefully we will have that on the agenda for the first committee meeting after the break.

I think that's all at this point.

**Mr. Joe Comartin:** Are we dealing with the annex at all on Thursday?

**The Chair:** No, not on Thursday.

Thank you very much.

The meeting is adjourned.

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