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Chair

Mr. Alan Tonks

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● (0905)

[*English*]

The Chair (Mr. Alan Tonks (York South—Weston, Lib.)): Good morning, members of the committee, witnesses who are here today, and ladies and gentlemen in the committee room. Pursuant to the standing orders with respect to Annex 2001, the committee has been deliberating with respect to the implications of it. We thank you very much for being here today.

We have, representing the Sierra Club of Canada, Elizabeth May; the Canadian Environmental Law Association, Sarah Miller; Great Lakes United, Derek Stack; and the Council of Canadians, Steven Shrybman and Sara Ehrhardt.

Have you resolved the order in which you would like to make your presentations?

Ms. Elizabeth May (Executive Director, Sierra Club of Canada): Mr. Chairman, we aren't actually a joint panel by choice, so we've made no selections whatsoever.

Some hon. members: Oh, oh!

The Chair: So some degree of arbitrariness on my part won't be taken personally by any of the organizations. Okay. Then I would suggest that whoever would like to lead off do so, and then we can play it by ear in terms of who would like to follow.

I would like to say that the committee is more interested in getting your encapsulated position so that we can enter into a dialogue through the question and answer period.

Elizabeth.

Ms. Elizabeth May: Mr. Chairman, can we have some guidance from you as to timing, because there are four different presenters with not entirely identical positions. I want to make sure that everyone has a fair chance to present, and then of course that committee members have a fair chance to answer. So could you give us some guidance, and then we don't mind moving down the ranks fairly arbitrarily.

The Chair: That's fair enough.

It should be roughly 10 minutes for each entity or organization, and then we go into a first round of questioning, which is 10 minutes for each of the parties represented on the committee. Then we go to a five-minute round in approximately the same order. So it's 10 minutes.

I'll start on the right this time.

Ms. May, perhaps you'd like to start.

Ms. Elizabeth May: I'm not used to being on the right, but I'll accept that from you, Mr. Chairman.

Some hon. members: Oh, oh!

Ms. Elizabeth May: With apologies to Mr. Richardson.

Good morning.

First, I would like to say that it's an honour to have the former chairman of this committee in the room, the Honourable Charles Caccia, as we begin our first ever appearance before the committee in the new Parliament. It's a real pleasure to see such a great group of members of Parliament on the environment committee, so thank you for that.

I also want to start by saying this is unusual. Usually, when the Sierra Club of Canada appears before the Standing Committee on the Environment, there's a bill before you or something the government has asked you to take on, and every now and then we appear before the committee when it's something the committee itself has chosen to investigate.

I particularly want to thank this committee, because I know it took all-party support to have the Great Lakes annex as one of the first items on your agenda for this session of Parliament. Your intervention in this issue is extremely important, and we're very grateful for the opportunity to appear before you. We're also grateful to you for undertaking what is not an easy task in sorting out this very complicated issue of the Great Lakes annex.

Just parenthetically, we were appearing at the Ontario government's public consultations on this annex agreement between the eight Great Lakes states and the two Canadian provinces within the Great Lakes Basin. Senator Jerry Grafstein was there and got to the microphone and said, “As a senator, I'm used to giving bills sober second thought and looking at issues for sober second thought. I thought I knew a lot about the Great Lakes and was keeping on top of all the issues, but I don't think this has had a first thought, much less a sober second thought”. So the work of this committee is much appreciated.

I think you have our full evidence before you. Given the 10 minutes I have, I'm going to move through it in abbreviated fashion and not read my entire evidence.

We are aware of the fact that this piece of work, this Great Lakes annex, has engaged a number of my colleagues here at this table and people in both countries in government and the private sector, and non-government organizations, for quite a long time. I think there is a premise of goodwill on the part of all of those engaged to come up with what is best for the protection of the Great Lakes. There's certainly no question that the issues are complex and that those who are engaged in trying to develop what is essentially a permitting scheme for diversions have actually done so with the aim of protecting the lakes from diversions. You'll see in my evidence that I think the major problem here—unusual for an environmental issue—is a misunderstanding, or the acceptance perhaps of a false premise, about U.S. law. So it's a legal question more than an ecological question that primarily brings us here.

The fundamentals that brought people together to negotiate the Great Lakes annex was a conclusion that the status quo would not hold and that none of protections for the Great Lakes, whether through the Boundary Waters Treaty of 1909 or the U.S. Congress and the Water Resources Development Act, or various agreements between Canada and the U.S., or Canadian law, and so on, would be sufficient to protect the Great Lakes. It's that premise that brings us here.

We are particularly heartened by the recent announcement of Ontario's Minister of Natural Resources, the Honourable David Ramsay, that Ontario is not prepared to accept this agreement in its current form. The Attorney General of Michigan has made similar comments. I think this committee is particularly well placed to provide very timely advice, both to the Parliament of Canada and to the other jurisdictions struggling with what can be done to either fix the current agreement or compact before us, or to start over and develop a different approach.

I begin by looking at our substantive concerns; so I'm actually beginning at page 4. The first and most fundamental point, as many of you may have noted from the lack of answers from previous witnesses, is that governments collectively have far too little information available to take risks with the hydrology of the Great Lakes. Key information is missing. The Great Lakes Charter of 1986 required that an inventory be prepared of water uses and conservation plans within the basin. That has not yet been done. The need for the public, not to mention decision-makers, to be fully informed about current uses and withdrawals from the Great Lakes is essential.

● (0910)

No agreement should be concluded without this essential foundation of knowledge. This is a key point I noted in your questions to Ralph Pentland, Jim Bruce, and Environment Canada on different days before this committee; you were also seeking answers that we simply don't have at this point.

The second level of concern is about the concepts of the agreement. The essential purpose of the agreement and the annex is to create a process for regulating uses and diversions of Great Lakes water. Under the proposed agreement, requests for diversions would be judged under a review relying on eight criteria, including requirements relating to the development of conservation plans and the assessment of significant cumulative impacts of such withdrawals on both the quantity and quality of Great Lakes waters.

A benefit of the proposed approach is that it would be more transparent than decisions under the current U.S. law, the Water Resources Development Act, or decisions under current Ontario or Quebec law. Additional improvements include that the proposal clearly applies to groundwater, as well as to the surface water, of the Great Lakes. However, the Sierra Club of Canada does not believe that these improvements are sufficient grounds to accept the agreement in its current form.

A careful review of the proposal makes it clear that, regardless of the intent, in practice the agreement could facilitate diversions of Great Lakes waters. In particular, the agreement does not place limits on the amount of water that could be diverted, no limits on the duration of diversions, nor on the purpose for which the waters may be used, nor on the geographic area to be serviced.

The agreement appears, in our view, to be contrary to the advice of the International Joint Commission. I note that when the Right Honourable Herb Gray appeared before you, he said they were still conducting that analysis and that the commission, as a whole, had not yet come to a conclusion as a commission. But in our review of it, it appears to us that this is contrary to the advice of the IJC.

Now, getting back to this point about the legal foundation, the legal foundation for the approach being taken by the agreement stems from some questionable legal opinions. These opinions are not universally shared. In fact, the International Joint Commission came to a different conclusion. For instance, the document that they rely on, and I refer to, is the legal opinion of Lochhead et al, from the two firms of Brownstein Hyatt & Farber in Denver and Davies, Ward & Beck in Toronto. They prepared this opinion on May 18, 1999, at the request of the Council of Great Lakes Governors. In this legal opinion, they hold out the threat of what would happen if there was a World Trade Organization dispute about Great Lakes water.

We think that by ignoring NAFTA, this particular legal opinion made a really serious mistake. We are far more likely to see disputes over water, and we've already seen, as I think one of the committee members asked Peter Fawcett from Foreign Affairs Canada, when he was here, about what would happen under NAFTA and the Sun Belt case. We know the Sun Belt case is pretty dormant, but NAFTA, chapter 11, is what really worries me about treating water as a commodity in Canada. This particular legal opinion did not look at the NAFTA regime at all. In fact, it is the NAFTA regime that will open the taps for both countries from all water bodies, not just the Great Lakes, should the Great Lakes scheme inadvertently treat water in its natural state as a good in commerce.

Worse yet, this legal opinion from the Denver firm reaches a poorly reasoned and unresearched conclusion that water in its natural state, in the Great Lakes Basin, is already a commodity. This completely erroneous and dangerous view is made based on domestic U.S. case law relating to restrictions on commerce in groundwater based on two cases that dealt with interstate water issues between Nebraska and an adjacent state and between New Mexico and Texas. Rather than making the logical distinction between these cases based on the fact that the Great Lakes Basin is subject to an international treaty and that it has the IJC and there is also U.S. law already in place, they merely state, quote: "Great Lakes Basin water is even more likely than Nebraska or New Mexico groundwater to beheld to be an article of commerce".

They didn't cite any case law for this. They don't have any deeper analysis than these one or two paragraphs I've repeated in the brief before you, so this breathtakingly audacious opinion is supported with not one legal reference, not one case citation, much less with any biological or ecological background.

This is my conclusion, but it seems to me that the whole Great Lakes annex mess traces back to a few paragraphs in the conclusory opinion from two law firms. In order to satisfy conditions set out by this one legal opinion, the whole house of cards of the Great Lakes annex has been constructed. If there was ever a call for getting a second opinion, this is it.

I'll examine this deck of cards one at a time and try to get to recommendations before my 10 minutes is up.

● (0915)

You've heard a lot about the resource improvement standard from other witnesses, so to save some time, let me just say I share their concerns. I think Ralph Pentland summed it up quite well in asking, how many buckets of water are worth a dozenducks?

That's the one-minute warning? Let me move to my recommendations.

The Sierra Club of Canada believes of course that we cannot support the current draft, but we also recognize the status quo may not be sufficiently robust to protect the Great Lakes from diversions. Achieving the goal of workable, enforceable, legally defensible agreements and compacts to ensure the Great Lakes are not eroded in quantity or quality is within our reach but not yet within our grasp.

There is no external time limit to be imposed on such significant negotiations. Both the Canadian and the United States federal governments and the International Joint Commission must be granted sufficient time to offer their legal and scientific opinions. As the committee has noted, there has been no clear indication from the Council of Great Lakes Governors that the Canadian federal government's views will still be accepted following the extremely limited review time offered to the public. If political will exists to protect the lakes, then the Council of Great Lakes Governors must continue the analysis of this draft, provide a foundation in ecological principles, and not become overawed by a handful of legal opinions from private law firms.

The development of the agreement to implement the annex must be grounded in the precautionary principle, which at this point is not mentioned in any of the documents before you. Therefore, we urge this committee to call for a stronger federal government role. The issue of protecting the Great Lakes should be elevated on the binational agenda with the United States. We have a good opportunity for that with the upcoming visit of the U.S. President.

It must be made clear to the Great Lakes governors that the current draft compact and agreement are not to proceed. The Canadian and United States federal governments, as well as the provincial and state governments within the Great Lakes Basin, should commit to undertaking the following work before any new regulatory instruments for preventing diversions are negotiated.

In brief, the four things we call for before any new agreement is accepted are the following. One, we believe that inventory is essential and must be completed. Two, we believe a law commission with senior counsel for Canada and the United States should be created to address issues in a more impartial way; to assess whether U.S. constitutional law, and particularly the dormant commerce clause, is actually the threat to water that the Denver law firm believed. Three, we believe there should be a science commission within the jurisdiction of the IJC to better inform the current debate. Last, we believe there are some elements within the compact and agreement, particularly those related to conservation, consumptive uses, and protecting the water, that could proceed at the state and provincial levels while the issue of diversions could be left to federal governments and ensure that no diversion—no diversion—is the position of all jurisdictions that have any mandate to protect the Great Lakes.

Thank you, Mr. Chairman.

● (0920)

The Chair: Thank you, Ms. May. We appreciate that input.

We'll go immediately to Ms. Miller. Ms. Miller, would you like to start?

Mrs. Sarah Miller (Coordinator/Researcher, Canadian Environmental Law Association): Actually, Derek Stack and I are going to present together, if that would be all right, and Derek is going to start.

[*Translation*]

Mr. Derek Stack (Executive Director, Great Lakes United): I thank the members of the committee for inviting us.

[*English*]

Before I get into the text and the spiel that was prepared, there are a couple of points I think need to be addressed.

One is that, as I think Commissioner Gray indicated earlier in his testimony, there are as many legal opinions available as there are lawyers. I think the honourable members have before them today legal opinions that fail to address the conservation impacts of not proceeding with the annex—not in its current form, of course; obviously in improved draft agreements—and to have legal opinions that do not address the conservation impacts, frankly, as far as our environmental groups are concerned, we, Great Lakes United and CELA, question the usefulness of such an opinion.

[*Translation*]

The Canadian Environmental Law Association is a legal assistance clinic of public interest which offers legal and representation services to the population, and whose mandate covers both environmental law and environmental policy reform.

Founded in 1982, Great Lakes United is an international coalition devoted to the preservation and restoration of ecosystems in the Great Lakes and the St. Lawrence.

In 1984, both organizations were already involved in efforts to reinforce the Great Lakes Charter and were among those who opposed each of the seven American proposals for massive and damaging withdrawals and diversions from the American side of the Great Lakes, following the signature of the Charter in 1985. We also actively opposed the two major withdrawal projects submitted in Ontario since the inception of the Charter, the Great Recycling and Northern Development canal proposal, and a proposal for diverting water from Georgian Bay to the York region. In 1998, CELA and GLU gained the right to intervene before the Ontario Court of Appeal. The purpose of the appeal was to consider the permit delivered by the province of Ontario to the Nova Group for the exportation of bulk water in tankers from the Canadian waters of Lake Superior to the East. Following negotiations with the government of Ontario, this permit was withdrawn before a dangerous precedent was created.

In our 1997 publication, *The Fate of the Great Lakes—Sustaining or Draining of Sweetwater Sea?*, our organizations chronicled the continuous problems affecting the management of the Great Lakes water following the inception of the Great Lakes Charter. Here are a few of this report's conclusions.

The decisions relating to water diversion proposals between 1985 and 1997 were strictly political and did not protect the environment.

Despite the fact that the provinces received notices from the United States regarding diversions exceeding five million gallons, they did not play a direct role in the decision-making process for these diversions.

The report accurately predicted that the communities established near the limits of the Great Lakes Basin, but outside of these limits, would turn to the Great Lakes for their future water supply.

After signing the Great Lakes Charter, the states and provinces did little to reduce water consumption and loss in the Great Lakes Basin.

The Great Lakes states may not have enough power to refuse the requests from the thirsty states of the American Southwest.

The collection of data on water consumption in the region is uneven and incompatible, and it has not yielded reliable scientific data on the cumulative and individual impacts of the water volumes already withdrawn from the Great Lakes.

Demand for water from the basin continues to increase, and we will need to manage this demand with conservation measures.

Our report concluded that it would be unreasonable to maintain the status quo. This is why our organizations, during the last three years, participated in the work of an advisory committee including representatives of governors and premiers responsible for negotiating preliminary agreements on the annex. This is also why we will continue to work on reinforcing the two agreement projects relating to Annex 2001.

We agree with the Ontario government on the fact that maintaining the status quo is no longer an option. Even though the governments of Ontario and Quebec and the federal government of Canada took measures to avoid diversions from the Canadian side, we must continue to get involved to ensure protection is provided on the American side of the Great Lakes.

● (0925)

[*English*]

So before Sarah addresses the issue of the federal Canadian government, I'd like to address the point of possibly decoupling the question of diversions from the annex negotiations. Clearly there are political, industrial, and commercial interests within the annex negotiations that are at the table, because they're hoping to keep Great Lakes water in the Great Lakes Basin for their industrial and political purposes. If the issue of diversion is removed, those people are likely to leave the table and the issues of conservation and proper water management, and an allocation framework in states such as Michigan, where those frameworks are sorely lacking, will likely be abandoned and the regional perspective in the ecosystem approach to dealing with water use in the Great Lakes Basin is in peril.

Mrs. Sarah Miller: Thank you very much for inviting me here today. I am also going to edit my remarks because I have read the transcripts, at least from your first two days of hearings, and I know a lot of what I'd say would have already been covered by the Honourable Herb Gray and by testimony from government staff.

Even though I'm from the Canadian Environmental Law Association, I'm not a lawyer. The association has been involved in this issue since 1984 because we did want to see a legally binding set of environmental principles that would put us on the road to having a conservation culture in the Great Lakes Basin. Almost 20 years after the signing of the charter, I don't think we've even begun to move up that road, in the basin, and that has been central to our involvement in this issue.

After the Nova Group proposal on which CELA and GLU were prepared to go to the appeal, as you know, the federal government reacted very strongly with a three-part strategy. They looked for federal-provincial accords, which weren't entirely successful but did result in Ontario and Quebec strengthening their water law regimes. They requested the IJC reference.

From my view around the table, being on the advisory committee to the annex—and I expect that you'll have a lot of questions for me from that perspective, because I guess for the last three years I've been closer than other people to some of the negotiations, though not in the room—I think there is a feeling among the jurisdictions that they are actually responding to the IJC reference, that their efforts under the annex are addressing the recommendations that enshrine protection for the Great Lakes. If you take the 2000 recommendations from the reference and look at the annex, you'll see actual clauses that are trying to respond directly to recommendations. The annex can't address all of the IJC recommendations, because some of the issues, such as invasive species and climate change, are going to take far, far more effort.

Our concern has been to protect all of the Great Lakes Basin. When the Boundary Waters Treaty in 1909 established the IJC and set up a hierarchy of uses, the environment really wasn't considered to be a use at that point in time, and the environment isn't included in that hierarchy. There was little understanding at that time about the significance of groundwater in the Great Lakes Basin. So as you heard from Herb Gray, the boundaries of the International Boundary Waters Treaty Act amendments are only really covering the surface waters in the Canadian side of the Great Lakes Basin. As well, WRDA does not cover groundwater in the United States. So the IJC reference was very clear that there needs to be considerable work done on groundwater in the Great Lakes Basin to ensure that we're protecting the full basin.

I would also recommend that you look at a document done by the Great Lakes Commission, a decision-making support framework document where they basically looked at the status of science in the Great Lakes Basin on all these issues. They have also been collecting what sparse data has been coming in from each of the jurisdictions since the Great Lakes Charter. So this is a document that I think very much sets out what needs to be done.

We think the Great Lakes annex actually plugs some of the loopholes, because it includes looking at groundwater.

● (0930)

Around the table there is an intention, I think, to look at a new definition, perhaps, in the long term, of the boundaries of the Great Lakes Basin. We have heard about Waukesha and the fact that in Wisconsin there is pumping happening in the Great Lakes Basin at such a rapid rate that it's drawing down Lake Michigan. But what that probably means, the scientists think, is that groundwater is in the Great Lakes Basin. So as our science grows, I think we are going to be seeing that the boundaries of the Great Lakes Basin may be revised.

The weaknesses in WRDA make the region vulnerable, and I think it also means that Ontario and Quebec need to be involved in those U.S. vulnerabilities.

Under the Great Lakes Charter we have monitored all the applications that have come forward for harmful withdrawals and diversions from the Great Lakes Basin, and our organizations have written letters. We have worked with the Ontario government often in opposing many of those proposals, and we are on record. But what has happened, essentially, under the prior notice and consultation under the charter is that we get notice, but there is no forum we can attend. There are no tables that Ontario and Quebec have been able to sit around. Most importantly, there are no tools to protect the environment.

One of the misconceptions about the annex that I would like to address is that the regional review is going to be deciding on a yes or no vote on a proposal. This isn't true. There is an intent to work in consensus, to examine proposals with the decision-making standards that are set up both in the compact and in the annex. A recommendation of findings of whether or not the proposal is consistent with the decision-making standards is then going to be sent to the jurisdiction, but the ultimately responsibility for the decision still rests with the jurisdiction of origin, where the diversion or consumptive use proposal came from.

Therefore, like the IJC, part of the development of the ecosystem approach around the Great Lakes is a real willingness to try to enter into a consensus-building exercise. As Derek said, what is at risk here is that, if we walk away from this, Quebec and Ontario will again not be at the table and will continue to be sidelined, and we will continue not to be able to bring our own wisdom to bear.

I'd like to say, because we have been working very closely with Ontario on this, that Ontario is the leader in the Great Lakes Basin, having the most protective and rigorous program for examining water allocation. Currently they examine everything under 20,000 litres, which is 13,800 gallons. It is the size of a small to medium-sized farm. So they know what's happening to all their water at that level. That's considerably more than any other Great Lakes jurisdiction is willing to even contemplate, as you see with the numbers in the trigger level.

I think there's a misconception that the drafts that came out under great pressure because Governor Engler, when he originally announced the annex, gave a three-year deadline...they are really very much in draft form. I can say from being at the meeting on Monday and Tuesday that I couldn't predict what the next drafts will look like, because there is still so much dissent around the table among the advisory committee members.

I would just like to say that the character of the negotiations has been such that we don't know what the negotiators are doing on the advisory committee. They throw out ideas just before an advisory committee meeting, and the members of the advisory committee then react to those ideas, but we had never seen the complete draft language before anyone else saw it in July of this year.

● (0935)

But most of the members of the advisory committee are very large users of the Great Lakes Basin and are going to be experiencing huge challenges and huge financial implications. They think the standards are huge deterrents to water use in the Great Lakes Basin. The Council of Great Lakes Industries estimated at the meeting that it would cost an applicant anywhere from $445,000 to $1 million U. S. to even begin to put together proposals for a diversion—and that isn't even implementing it.

So we do believe that the environmental standards are rigorous and feel that they will act as a deterrent. We feel that the mere fact that there will be 10 jurisdictions' eyes examining a proposal is a deterrent.

I will conclude there.

Mr. Derek Stack: Our lead recommendations are on page 9, for those of you who'd like to see them. We're not supporting the drafts in their current form; we've had lots of recommendations to improve them. There's a summary of those recommendations available to the members on page 9.

The Chair: Thank you very much, Mr. Stack.

Mr. Shrybman, can we go to you now, please?

Mr. Steven Shrybman (Legal Counsel, Council of Canadians): Sara is going to begin, and we're going to share our 10 minutes.

Ms. Sara Ehrhardt (National Water Campaigner, Council of Canadians): I'll begin by thanking everyone for giving me the opportunity to speak today. I just want to take a moment to describe citizens' concerns about the annex and also briefly mention a few items I didn't see appearing in the transcripts.

The Council of Canadians is Canada's largest public interest group, with 100,000 members across Canada. Since 1999 we have been fighting to stop water diversions, water privatization, and bulk water export, and we have been calling upon the federal government to recognize the human right to water, to develop a new national water policy, and to protect all of Canada's waters from diversion and trade threats.

[*Translation*]

I would also like to mention that the Council of Canadians is a member of Eau Secours!, a Quebec coalition for the responsible management of water. Several representatives of the coalition participated in the consultations with the Quebec government and also expressed several major concerns.

[*English*]

This year the Council of Canadians commissioned an Ipsos-Reid poll and found that 97% of Canadians overall expressed their support for water to be recognized as a human right.

Despite the threats of bulk water exports, climate change, recent drinking water scandals, and the government's own reports, such as the comprehensive report in 2003 of the National Water Research Institute on the threats to Canadian freshwater—despite all of this, the federal government has ignored Canadians' concerns by refusing to revamp the 1987 federal water policy and to take action on national water issues.

Today the Council of Canadians is calling on the federal government to take immediate action to condemn the annex and to stop water diversions from the Great Lakes. We are demanding that the federal government assert its jurisdiction over the Great Lakes and do everything in its power to protect our shared waters from water diversion threats.

As the final point, I did not see any mention made in the transcripts of first nations. At the governors' consultations in Canada, there was clear criticism from both the Chiefs of Ontario and the Union of Ontario Indians of the relations between governments on this agreement. While I cannot speak for first nations' concerns, it is clear that more consultation is needed with all Canadians, and also that it is required with first nations, who have unique rights regarding consultation and governance.

● (0940)

Mr. Steven Shrybman: Thank you, Mr. Chairman and members of the committee.

We have a difference of opinion with two of my friends sitting next to me on this panel from the Canadian Environmental Law Association and Great Lakes United. I used to be the counsel with CELA for years. But let me begin by saying that we have much more in common in what we agree about than disagree about. Certainly, the need to preserve the ecological integrity of the Great Lakes and the fundamental building blocks of environmental policy, like the precautionary principle, are values we share. We greatly admire and respect the commitment that CELA and GLU have made to protecting the Great Lakes. I don't think there are any environmental organizations who have done more or would even be able to compete with their record of commitment on that issue. So our disagreement with them is really about strategy more than it is about the fundamental principles we all adhere to.

I just want to make three points today. I'm one of the authors of a legal opinion that Elizabeth May has warned you against being overawed by, but just having great deference would be fine from my point of view!

The points are these. The first is that the federal government got it right when it commented on the annex in early 2001. I don't get to say that often enough about the federal government and its commitment to conservation and environmental policy, but it raised two fundamental concerns at that point, and I highly recommend their critique. I'm sure you've seen it. It's dated February 28, 2001. Their response to the annex was, first, that the standard was too permissive and would open the door to long-distance, large-scale removals of water from the basin; and second, that implementation of the annex could "clash", to use their word, with the Boundary Waters Treaty and thereby undermine the role of the IJC.

We think both of those points were well taken. As the annex has been given expression in the compact and this agreement between the provinces and the governors, we think those concerns are amply underscored. In terms of a too permissive standard, this is a regime to facilitate diversions without establishing any cap on the amount of water that can be removed from the basin, without establishing any geographical constraint on how far that water can be taken, without imposing a time limit on those diversions, and without even specifying the purposes for which those diversions could be used. So that's too permissive in our view.

With respect to the clash between the compact, in particular, and the Boundary Waters Treaty, we think those concerns were well taken as well. In the Boundary Waters Treaty, article 3 provides that the IJC is to approve diversions that, in the key words, "affect the level or flow of...waters on the other" side of the boundary.If you look at the approach that Bill C-6 has taken to that issue, it clearly references the treaty; it deems any diversion of water from the lakes to have that consequence, thereby invoking the jurisdiction of the IJC. It's true that the compact refers to the Boundary Waters Treaty, but it sets out and establishes an entirely parallel regime, including an appellate process absolutely indifferent to the role of the IJC in the process. That's very problematic. I think the federal government had it right.

The second point I want to make is on trade, which happens to be my area of expertise, and this is simply to say two things. One is that trade issues are important when fashioning public policy and law related to conservation in the Great Lakes, but not for the reasons underlying the creation of the compact. It isn't the WTO. A challenge by another nation to this compact or to Canadian conservation water management laws is extremely unlikely, but that's not true of a foreign investor claim under NAFTA.

There are two things that are fundamentally different about NAFTA. One is that the investment rules can be privately enforced.

The other critically important thing is that the conservation exception under the GATT and the WTO doesn't apply to foreign investor and foreign service provider claims under NAFTA. Conservation is no excuse under NAFTA. You can't justify a measure that interferes with the rights of foreign investors or service providers because it's necessary for conservation reasons. They wrote that fundamental exception of the WTO out of NAFTA.

● (0945)

The third point is that everyone agrees that the existing framework is inadequate. We're reminded that the Boundary Waters Treaty doesn't deal with groundwater, it doesn't deal with tributaries to the Great Lakes, and it doesn't embrace the precautionary principle. All of that's right.

The answer, from our point of view, is to strengthen the framework of international law with respect to the management of Canadian water resources. That's ultimately where we have to go in order to ensure that conservation and environmental policies trump the rights of foreign investors and service providers, and free trade objectives.

We need to strengthen law so that it does apply comprehensively to all the water in the basin. We need to strengthen the international framework of law to establish a binational approach to dealing with these problems, not simply an approach that resides with the provinces and the states, who have an important role to play, but that role must respect the sovereign prerogatives of both the United States and Canada. When it comes to water, the federal government has an important jurisdiction, the most important element of which, for this purpose, is to negotiate international treaties that bind the nation.

So that, we believe, is the right answer. The type of agreement that has been negotiated among the governors and between the governors and the provinces are an important complement to strengthening that framework of law, but until we do that, Canadian water will be at risk, Canadian sovereignty is at risk, and more so, undermined by this initiative rather than strengthened.

Thank you very much.

The Chair: Thank you very much, Mr. Shrybman.

Thank you to all the witnesses. We'll now go to the committee.

Mr. Richardson, would you lead off, please?

Mr. Lee Richardson (Calgary Centre, CPC): Thank you, Mr. Chairman. I won't take but a minute because of the shortness of time.

I want to begin by apologizing to our presenters today for not only the shortness of time that you were allowed for presentations, but also time to prepare the specific written presentations, which were very helpful.

I particularly want to thank Ms. May for the thoughtful and thorough outline of this program. Again, I won't go on with that, but I found it very informative and useful.

Mr. Chairman, I would like to defer to Mr. Watson, who is on this issue for our party and whose riding happens to be on the Great Lakes.

Jeff, do you want to take it from here.

Mr. Jeff Watson (Essex, CPC): Sure. Wow, I get some respect! Thank you to my colleague.

Thank you to all of you for your presentations. Again, I'm sorry there's such a short timeframe for you here as we're drawing this issue to a close, but it's an issue that's incredibly important, and we certainly recognize that on this side of the table as well.

I want to probe some of the differences here. Ms. May, I'm looking at one of your recommendations—recommendation 7 on page 5 of your submission. Essentially it's about improving the regional body approval process, if I understand that correctly. If you're strengthening this regional body that's proposed, what happens to the role of the IJC?

Ms. Elizabeth May: I'm not sure it's my brief that you're referring to.

● (0950)

Mr. Jeff Watson: Do I have the wrong organization?

Ms. Elizabeth May: We're not connected in any way to the Sierra Legal Defence Fund.

Mr. Jeff Watson: Goodness, I have the wrong person here and the wrong recommendation in front of me. My apologies. Hopefully I have the right folks on this one now.

You believe the proposed compact lessens U.S. federal government interference. What about NAFTA?

I'm speaking specifically of independent non-government challenges to treatment of water as an article of commerce, or possibly as a commodity. The compact may lessen what the federal government does, but what about independent bodies that are non-governmental—business, corporate, or whatever—through NAFTA?

Mr. Derek Stack: I think in their approach to dealing with diversions they've very clearly taken an approach that won't appear discriminatory to out-of-basin users, and that's why we're not seeing the compact come up with language such as “ban” and “prohibition”. We're seeing all these measures built in place that are designed and geared to basically make it impossible for large-scale diversions and, most importantly, diversions outside of the basin. I think that might partly address your question, but I'm certainly not a trade lawyer able to deal with NAFTA.

The Chair: Ms. May, do you want to expand on that at all?

Ms. Elizabeth May: I'd yield to Steven Shrybman on this point, but I would think that it's not relevant to a private investor suit under chapter 11. Discriminatory or not discriminatory is not a factor. All that's a factor is that once you treat water as an article of commerce any private company can complain, regardless, as Mr. Shrybman has pointed out, of whether there was a valid conservation purpose. None of that makes any difference under chapter 11.

Mr. Jeff Watson: Do you want to comment on that as well?

Mr. Steven Shrybman: I think the issue of discrimination is relevant in terms of the requirement for national treatment under not only chapter 11 but the GATT as well. So the question is, would this compact pass that non-discrimination test, and those that favour it think, yes, it would because it establishes a conservation standard. If you look at the jurisprudence, the tribunals have had no difficulty, in fact, in consistently looking behind the face of the measure. So even if it's non-discriminatory on its face, they will look behind the face of the measure to discern its impact and true intent.

There are examples of this. Canada was challenged by U.S. investors successfully for banning PCB exports from Canada in the SD Myers case. The measure in Canada banned exports and it didn't matter whether you were a Canadian investor or a foreign investor, or a company operating in Canada. So it was non-discriminatory on its face, but it looked behind the face of the measure, at the memos that were written by Environment Canada bureaucrats and the motivations that some of those memos discussed for implementing the measure. We suspect that will happen in this case as well. It's the consistent approach the tribunals have taken. So they will look behind the face of the measure to find all of the talk, I gather, by governors and others explaining how this is really about protecting users in the basin, and they've come up with an ingenious device for doing that.

So is the approach reliable? We think it isn't, and our reasons for having doubts about that derive from the jurisprudence itself, which is pretty consistent and pretty corrosive of public policy objectives other than commercial public policy objectives. If you're trying to protect the environment, you're not going to do nearly as well with a foreign investment tribunal as when your goal is protecting the commercial interest of investors.

Mr. Jeff Watson: On page 4 of your submission you contended that the treaty provisions combined with the annex protect all of the uses in all of the waters making up the Great Lakes ecosystem. Wait a minute, maybe that's not the one I'm looking at here. Sorry.

You seem to suggest that the annex and the International Boundary Waters Treaty are compatible. Are you aware of the State Department's opinion that there needs to be a non-abrogation clause inserted into this agreement? That almost seems to imply that the two are not compatible.

Mrs. Sarah Miller: Who are you directing your question to?

Mr. Jeff Watson: Let me check whether I have the right one here. I believe it's to you guys.

Mr. Derek Stack: On page 4, sir?

Mr. Jeff Watson: I think that's page....

Mrs. Sarah Miller: There is language in the last drafts that we saw—

● (0955)

Mr. Jeff Watson: Page 3, sorry. Under point number two about halfway down. It says you believe that the annex and the treaty are compatible. The annex addresses weaknesses and limitations of the treaty. The State Department of course has an opinion that a specific clause, a non-abrogation clause, needs to be included so that this is more specifically put within the boundaries—

Mrs. Sarah Miller: Sorry, in chapter 7, article 702 states: “Nothing in this Agreement is intended to provide nor shall be construed toprovide, directly or indirectly, to any person any right claim or remedy underany international Agreement or treaty”.

So there is language already in there. Whether it's adequate or not, I don't know.

Mr. Jeff Watson: Maybe this is a comment for the honourable parliamentary secretary too in light of the change of head at the State Department. I'm interested to find out if the government knows whether this stance on that non-abrogation clause will continue under them or change. Maybe you can tuck that under your hat for later. I know there will be perhaps a new direction, which we sense may not be as friendly towards Canada as previously.

Mrs. Sarah Miller: That opinion was with the previous draft of the annex, I think.

Mr. Jeff Watson: This was issued very recently, if I'm not mistaken, about two weeks ago. We had it before the committee—-

The Chair: We're actually in the witness section here, and I think that as you had characterized with the tucking under the hat, the parliamentary secretary is up to that challenge, and when we come to our open discussion he can address that.

Mr. Jeff Watson: That's fine. I wasn't asking him to answer the question, I was just going to ask him to tuck it.

How much time do I have left?

The Chair: A couple of minutes.

Mr. Jeff Watson: I'm coming back to you guys here again. On page 5 you seem to indicate, about halfway down, that Ontario can almost pick and choose which measures it can incorporate to strengthen, and you suggest that its laws won't be weakened. We've had some testimony before on this committee, and I've asked the question a couple of different times about whether bringing Canadian law into standard with these agreements may not weaken our laws in any respect. Are you of the opinion that it may?

I'm not sure if we have the ability to just pick and choose here, I think that's what I'm probing.

Mrs. Sarah Miller: There are clauses in the current drafts of the annex that say there can be higher standards, stronger standards, among any of the jurisdictions, and that language is already in there. The Ontario government in fact is right now strengthening its water-taking permitting system even more, as we speak.

I think that if they decide they are going to commit themselves to the final draft of the annex, when it comes out, what Ontario would do would be to incorporate by regulation whatever they needed to that wasn't already adequately protected into their own domestic law, if they needed to. But I certainly don't think they are going to weaken their own laws. In fact, I think it's very important Ontario be around the table, because Ontario is leading by example to show other, more reluctant jurisdictions that indeed you can actually have very strong programs, it is affordable, it is doable, and they have been doing it for quite some time.

The Chair: I'm going to go to Mr. Simard now, please.

[*Translation*]

Mr. Christian Simard (Beauport—Limoilou, BQ): Good morning and thank you for being here. I read your submissions with a great deal of interest, and I even noted the difference in the approach.

I would like to continue with this question, because it is fairly fundamental. Based on what I understood of presentations by experts and many publications, there currently seems to be a gap between the treaty and its application by the provinces and states. According to the terms of the treaty, there can be referrals to the International Joint Commission, and these must necessarily come from the two states if they are to be considered by them. In addition, there is absolutely no possible arbitration. This is like trade agreements, but there is no arbitration. In theory, the treaty provides for arbitration at the International Joint Commission level, but the American Senate approval is required. So in fact, there is no arbitration, and this has been evidenced. According to me, we have a major application problem.

I rather agree with the position adopted by Great Lakes United and the Sierra Club, i.e. that status quo is a false protection. The treaty is great, but it is not applied in municipal, provincial and state jurisdictions. So it's a problem.

Now, as is the case for any legislation or agreement having impacts on the environment, there is always this danger—which is enormous in this case—of standardizing pollution, of not reducing it. In this case, it's not pollution but water withdrawals. There is a danger of saying that there will be a legal framework, but this framework will be made for water users, not for the conservation of the basin, and as for any project, there will be mitigation or conservation measures. However, there is absolutely no guaranteed of balance. This is the flaw in the current 2001 agreement as it is drafted.

I would like to hear the positions of Mr. Shrybman and Mr. Stack, or maybe of Sarah or Elizabeth—if I may call you by your first names—on the strength of the agreements from the Canadian provinces' perspective, Quebec and Ontario. On the one hand, we have an enforceable compact which, as I understand it, will become enforceable for the eight states; on the other hand, we have two Canadian signatory provinces, but there does not seem to be any right of veto or balance, because it's two against eight. Have you given some thought to the matter, and do you propose—it's not clear in your texts—a way to reinforce this aspect, from the provinces' perspective? As for Ms. May's comment, I think we should be very careful with the idea that the federal government should be involved, as well as the provinces and just about everybody else, to improve this. This is often a source of confusion and could be dangerous. Witnesses told us that the approach for reinforcing the current agreement should rather be used.

Finally, how could we ensure there would be the equivalent of a Canadian or Ontario-Quebec compact? How could we reinforce this fundamental aspect of the agreement?

● (1000)

[*English*]

The Chair: Ms. May, would you like to begin?

Ms. Elizabeth May: Yes, I'll be first again.

Thank you.

[*Translation*]

Thank you Mr. Simard. I will answer in English, because it is better for everybody.

[*English*]

The reason the Sierra Club of Canada stresses the role of the federal government.... There is no question of multi-jurisdictional mandates here. But if the real problem here, as I understand the premise of the whole negotiation being, is the flaws within U.S. protection, that's much more the concern. We have a shared body of water. Diversions from anywhere in the Great Lakes Basin affect the whole Great Lakes Basin ultimately. Yet it's the U.S. Constitution commerce clause that is most often referenced as a source of problems in weakening the current protections for the Great Lakes that exist within the Water Resources Development Act of the U.S. Congress.

If that's the nature of the threat, then actions at the state level are more likely under U.S. constitutional law to trigger the commerce clause than an action at the federal level. That is why we think we should fortify all conservation efforts. The people in the Great Lakes Basin, as you've already heard, are profligate wasters of water. We need to focus on that aspect.

But in terms of the diversion issues, which are also, as you've heard from Mr. Shrybman, quite enmeshed in trade issues, it's the federal level of jurisdiction in both nations that stands the best chance of locking down an agreement that will prevent diversions, period. That's our view.

We also premise that with saying—although it's easy to take pot shots at lawyers and there will always be as many opinions as there are lawyers—the point is that governments should not be afraid to look at the laws they've already signed, look at their constitutions, and look at trade rules, and figure out what is the best way to fashion a law that prevents us from being victimized by these agreements. Then the governments can do that. I think it's at the federal level in the United States that we can best protect the Great Lakes and the Water Resources Development Acts that already exist in the U.S. Congress.

● (1005)

The Chair: Ms. Miller, you wanted to respond on that to Mr. Simard.

Mrs. Sarah Miller: Yes.

One thing I don't think is too clear to people—and it hasn't really been well articulated in the annex drafts that have come out now, but it has certainly been stated around the table—is that the way decision-making would take place is that the compact approvals and the regional approvals would be done essentially by the same people and would be almost consecutive, i.e., in the same room or in the next room, because there would be the same people on the committees considering the same thing. Working towards consensus is the goal. There has been quite a bit of discussion about what if consensus couldn't be reached, and what means of arbitration there could be, and the IJC actually came to the committee meeting considering this and went through their history. And, as you heard from the Honourable Herb Gray the other day, they have never exercised their arbitration powers.

The IJC is only as strong as the governments whose agents they are, and I think the reason they've never exercised their arbitration powers is that the governments have never asked them to do it. Perhaps they've never been comfortable with their doing it. I think this is part of the dilemma, and I think that has to be understood. It's certainly something for the federal government to take under consideration in their opinion.

Mr. Lee Richardson: Mr. Chairman, for clarity, could the witness just respond. Is that because they doubt their authority?

The Chair: Everything is through the chair.

[*Translation*]

Mr. Christian Simard: I raise a point of order. I have not finished.

[*English*]

The Chair: Mr. Richardson just wanted a clarification. I wouldn't take that off your time. You'll allow some degree of flexibility. Mr. Simard, you're back in, but perhaps you can integrate the response of Mr. Richardson.

Mr. Simard, you have three minutes.

[*Translation*]

Mr. Christian Simard: I disagree with that, Mr. Chairman. There is a certain coherence in the questions I ask. He can ask his question when his turn comes.

[*English*]

The Chair: Absolutely. The continuity is very important. I understand that.

Mr. Shrybman.

Mr. Steven Shrybman: I'll just respond briefly to your question. In terms of the Boundary Waters Treaty you suggested that both the United States and Canada would have to jointly refer a matter to the IJC for consideration. That's not true under article IX. Either country can do that.

Under article III, which is the diversion provision, for a diversion to occur there are two conditions that must be met. One of them is that it's approved by either national government. The other is that it is approved by the IJC. So you don't need a referral to the IJC in order to invoke the approval authority under article III.

The other point I would make is that the trade agreements are fundamentally corrosive of provincial authority—I think that's clear—and ignore the constitutional division of power between the federal and provincial governments. We have a great strengthening of the law for commercial and corporate objectives and a weakening of law for other purposes.

The strengthening of the law happens in the context of NAFTA and the WTO. The weakening of international law is happening right now with respect to this compact, which has the blessing of the U.S. federal government and which basically ignores the IJC, its approval authority, and the authority of Canada's federal government.

This is a shared water resource. It seems to me that there is a strong case for the Government of Canada to take some ownership and play a role here.

The Chair: You have one minute, Mr. Simard.

[*Translation*]

Mr. Christian Simard: It is certainly an extremely important issue, i.e. whether it should or should not be considered a basic product affected by the trade agreements. This is a big problem.

As for the boundary treaty, there is a little confusion in my mind. You say that the agreement must be improved, because it is important and it must be reinforced. At the same time, you also say, Elizabeth, that it is important to have both federal governments, because this provides more guarantee for conservation.

I don't know if the American federal government offers more guarantee for conservation than the compact, because the American Midwest is insatiably thirsty. As for the American compromise, I don't know if the American federal state is stronger in terms of conservation than the states bordering the Great Lakes. I might add Vermont, because it borders the basin, with Lake Champlain, as one expert said. It would be important to add Vermont to this, because they are more conservation-oriented than Illinois. These contradictions should also be played with the Americans.

However, I still have a big problem understanding your position. You are in favour of a Canadian federal government involvement, through the International Joint Commission, and the reinforcement of the 2001 agreement. I see a contradiction in this.

● (1010)

[*English*]

Ms. Elizabeth May: There are a couple of fundamentals here. One is that nothing that's done from this point forward should undermine the IJC or the Boundary Waters Treaty. We all agree on that. Some of us at this table believe the current drafts do that, and others do not.

I also believe nothing in this agreement should undermine the current Water Resources Development Act of the U.S. Congress. This law says there should be no diversions of water out of the Great Lakes Basin without the unanimous consent of all Great Lakes governors.

You are quite right to point to the thirst in the southwest. This is one of those things driving the concern of Great Lakes governors. It's driving the concern, and our colleagues in U.S. environmental groups are also of different views about how to handle this compact, how to handle this annex, how to best protect the Great Lakes.

One of the reasons that I hear from people who are concerned that we should move forward with this approach is that, as population moves from the Great Lakes states as the industrial belt there has been in decline, the population shifting to the southwest has also involved congressional districts' reapportionment, so that their chances of getting a good law through Congress in the future will not be as good as what they have now.

Certainly we don't want to take anything to the U.S. Congress that relates to an international matter, because if it's a treaty, it requires 75% approval in the U.S. Senate, whereas what we have now with the Boundary Waters Treaty from 1909 was actually negotiated between the United States and Britain on our behalf—but that's another long story.

What you end up having is the threat of potential water users in the U.S. southwest wanting water. That is why I think this approach that has been proposed in draft form is particularly dangerous, because it opens the door to saying, “We can accept diversions if they meet these conditions”.

My concern is that as we go down that road, if the conditions become onerous or if they appear, like return flow, to be geographically discriminatory, they will be abandoned down the road because the horse will be out the gate in terms of saying we allow diversions. Once that is accepted in jurisdictions throughout the basin, it will be very hard to keep conditions in place that make those diversions difficult, particularly in the face of trade loss.

The current U.S. President, in the election campaign, campaigned in the Great Lakes states that were against diversions. Everyone says they are against diversions.

Our view is that between the Boundary Waters Treaty, which says neither government should allow anything that affects the level or flow of the Great Lakes, and what's already in place at the federal level in Canada and the federal level in the U.S., what we first need to do is to sort out exactly what needs to be done to ensure that the existing instruments are not undermined and to strengthen them.

The Chair: Thank you, Ms. May. I am going to have to leave it at that. Perhaps in our questioning we will come back to some of these points.

Mr. Scarpaleggia.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): As a matter of fact, that's very informative, and thank you all for being here. Your explanations have been excellent, and it's a real education for me.

To continue on this line of questioning from Mr. Simard, let me ask a naive question in order to get an answer that could possibly help me crystallize my understanding of this issue.

The IJC basically makes binding decisions on diversion projects. Is that correct?

● (1015)

Ms. Elizabeth May: If referred to it under article III....

Mr. Francis Scarpaleggia: They have to be referred by one government or the other. Is that it?

Mr. Steven Shrybman: Well, article III doesn't say that. It says simply that for a diversion to occur, it has to be approved by either the United States or Canada, "with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission."

Mr. Francis Scarpaleggia: So, ultimately, any diversion project would have to be approved by the IJC?

Mr. Steven Shrybman: If it's going to affect the level and flow of water on the other side of the boundary...which, of course, is the sixty-four thousand dollar question.

Mr. Francis Scarpaleggia: Could you repeat the last part?

Mr. Steven Shrybman: That's the sixty-four thousand dollar question: will it or won't it?

Mr. Francis Scarpaleggia: That will lead me to my second question.

So the IJC has—

The Chair: Mr. Scarpaleggia, Ms. Miller also wanted to respond.

Mr. Francis Scarpaleggia: I'm sorry, Ms. Miller.

The Chair: I'm sorry to interrupt you, but perhaps it might be helpful. It's on the same thought.

Mr. Francis Scarpaleggia: Absolutely.

Mrs. Sarah Miller: As regards affecting the levels and flows, I referred you to the Great Lakes Commission report primarily because they looked at all the science and basically came to the conclusion that no single diversion will ever actually be able to be detected as affecting the levels and flows of the Great Lakes. We have a problem.

If it were from a tributary, yes, we could tell that there are impacts, but it's very, very unlikely. What they have acknowledged is that it's the cumulation. It's all the many small withdrawals with the bigger withdrawals, but any single one withdrawal will never really have that kind of measurable impact.

To my knowledge, I don't think the IJC has ever approved or disapproved any of the diversions that have gone ahead, precisely because the impacts weren't measurable.

Mr. Francis Scarpaleggia: That's an excellent point.

Mr. Derek Stack: If I could just add, we need to temper the legal authority with the political will of the IJC to step in.

Mr. Francis Scarpaleggia: Could you expand on that?

Mr. Derek Stack: I was here when Commissioner Gray testified, and I was not at all heartened that the IJC would take a strong role in the absence of the political will, a consensual political will.

Mr. Francis Scarpaleggia: My next question flows from your answer, Ms. Miller. I do not know if it was you or Ms. May who mentioned that we need to do an inventory of water uses and conservation measures, in other words, that we need to do a lot more science.

Could you tell me where you think that science should be done? Someone mentioned a science commission attached to the IJC, but would you see a role for the Canadian federal government in doing more water science?

Ms. Elizabeth May: If I may, Mr. Chair, that was in my brief.

It is a commitment that governments already made in 1986 in the Great Lakes Charter to conduct a full inventory of water uses and conservation plans within the basin to know what's going on in terms of current uses and withdrawals. But we don't have that information. So that's a current obligation unfulfilled by both governments.

I think a lot of this should be done at the federal level in Canada. I note with some caution, because this is not a personal comment about individuals within the bureaucracy, but you have had some very impressive witnesses who used to be in Environment Canada. You will not find their equal there now. I refer to Dr. Jim Bruce and Ralph Pentland, scientists who understood their area really well. We have had a real reduction in capacity to do the science at the federal government level. Again, the people who appear before you from Environment Canada are very fine people and very dedicated civil servants; we just don't have the same capacity we once had.

Mr. Francis Scarpaleggia: And you feel this work should be done within the federal government, as opposed to by arm's-length bodies, universities, and so on?

Ms. Elizabeth May: It is a big piece of work, so I think it should be supervised and coordinated somewhere. Some of it will be done at the federal level and some of it could be done at universities. Certainly, as you have heard, the Province of Ontario and the Province of Quebec have very large roles to play. We need to know what we are doing with the Great Lakes on both sides of the border, per the commitments made by all parties to the Great Lakes Charter, and I think that needs to be done.

Mr. Francis Scarpaleggia: Thank you.

The Chair: Thank you, Mr. Scarpaleggia.

Ms. Miller, do you wish to comment?

Mrs. Sarah Miller: Yes, just briefly. There have been data collected under the Great Lakes Charter, available from the Great Lakes Commission on discs. The problem with the date that Great Lakes United and CELA identified in their *Fate of the Great Lakes* report is that it is totally inconsistent. It can't be compared. It's apples and oranges, because the information that each of the Great Lakes jurisdictions is collecting on water is collected at different levels; some of them are only collecting it from certain sectors and not other sectors. We just don't have broad-based information and we certainly don't have information on groundwater.

So there is a desperate need for research, more than the universities and, probably, the provinces and the federal government could have the capacity to produce together, because we have such a lack of knowledge on the interaction of the surface waters and the groundwaters of the Great Lakes, and given climate change predictions and scenarios. We especially don't know how little is too little to cause cascades, deaths of species, loss of biodiversity, and the other huge impacts we are seeing in some of our lakes.

● (1020)

Mr. Derek Stack: I don't think anyone would argue against the pursuit of knowledge, but both the Nature Conservancy and the Geological Survey commented in their interventions in the last couple of days in Chicago that, yes, we need more information, but we clearly have enough information to know that the threat is real and that the threat is today.

The Chair: Mr. Wilfert, we have three minutes left in that line of questioning. If the committee is okay with that, we can just finish on that side with you.

Hon. Bryon Wilfert (Richmond Hill, Lib.): Mr. Chairman, first of all to Mr. Watson, if I might, I have taken his question under advisement and I have indicated to the department that I think it is probably not going to change, but we want to make sure. Obviously, it's one of the issues we would raise with President Bush when he is in Ottawa. It's a valid point, and we will endeavour to get the answer.

Mr. Chairman, in my view, there's no question that the draft annex procedures in the compact will not adequately protect the waters of the ecosystems of the Great Lakes and the St. Lawrence. On these proposals, from what I've heard from witnesses, they would compromise the role of the IJC and the provisions of the Boundary Waters Treaty.

I would like to make abundantly clear again, to those witnesses who may have missed this, the resolve of the Government of Canada and the resolve of the Minister of the Environment. We are absolutely opposed to any bulk water exports, period. You can check *Hansard* of a few weeks ago if you missed that. We also oppose diversions.

Let's make it very clear that the issue of the Great Lakes and the protection of the ecosystem of the Great Lakes is very high on this list of this particular minister and of the government. Let's also make it very clear that we're not interested in politics, we're interested in science. Decisions must be made based on science.

I think the State Department's response was very clear, as was that of the Attorney General of Michigan. There is concern that opening up direct discussions, with Canada versus the United States, would open up the whole issue of water across the United States.

What I have not heard effectively from anyone this morning—and I apologize if in fact you said it and I didn't hear it—is how the Government of Canada can best engage in this process, in the most effective way. For example, we know Ontario and Quebec will be engaging the government between now and the discussions in January 2005. What I want to know from you is what you think the most effective way is.

Obviously we are going to be making, again, a very clear statement on this issue. But we are not directly in these discussions. So, Mr. Chairman, the question is very simple: how best to engage.

The Chair: Thank you.

Ms. Miller, would you like to start off? And then we'll hear from Ms. May—and if you could, do it within a couple of minutes now, please.

Mrs. Sarah Miller: I'll try.

We have very particular federal–provincial work underway in the Great Lakes, but it's always very related to existing agreements, like the Great Lakes Water Quality Agreement and the Canada–Ontario agreement that comes out of that for furthering it. What we don't have is an ongoing working relationship between the provinces and the federal government, looking at all-encompassing issues in a way that I think is helpful.

We have so much on our plate now. We have invasive species. We have climate change coming. Certainly when our own federal water policy was conceived, climate change was really not widely accepted. And we keep being told that policy is going to be updated. We need some real working groups, and we came to Ottawa a couple of weeks ago to try to further that.

In the U.S. Congress, there are working groups with the states and the congressional representatives in Congress who work regularly on Great Lakes issues, and not in just a reactive way, but in a proactive and visionary way. I think it's time we set up these systems in Canada.

● (1025)

The Chair: I think I'm going to have to jump in at this point.

Mr. Comartin may want to follow up on that same line of questioning. You may want to integrate your responses, and maybe not.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Why don't we let Ms. May just take a minute or two to respond, and then I'll go into the other points I want to raise.

The Chair: That's very generous. Thank you, Mr. Comartin.

Ms. May.

Ms. Elizabeth May: That is very kind of Mr. Comartin.

I don't want to cut into your questioning time. I would just address the honourable parliamentary secretary and make it clear, on the record, that we are well aware of Canada's commitment against bulk water exports, against diversions. We appreciate it. We appreciate the leadership of the Premier of Ontario on this issue. We appreciate what's being said by Canadian authorities to protect the Great Lakes.

Our concern is that what's being drafted undermines that. Again, our brief speaks directly to the role of the federal government in raising the issue bilaterally with the United States by ensuring that nothing in this annex agreement undermines the IJC and the Boundary Waters Treaty. But frankly, the threat lies south of the border, and we need to be very vigilant. The legal tools we now have are probably not adequate in the long term, but we shouldn't rush to an agreement that actually undermines the tools we now have.

The Chair: Thank you very much.

Mr. Comartin, it's back to you.

Mr. Joe Comartin: Thank you, Mr. Chair.

Thank you all for coming today. I'm sorry I had to step out, but I had to go to the House for a minute.

Mr. Stack and Ms. Miller, you've had the most intimate contact with the process of anybody we've had come before us in the last few weeks. In terms of the recommendations you've made, in particular the first four or five, and maybe six, I wonder if you could give us some sense of what the response will be from the Great Lakes governors in the Great Lakes states to the proposals you're making. In terms of those comments, given that these protections—which I would agree with you are very important and would buttress and strengthen the annex very significantly—are not in the annex now and we have not seen these types of protections up to this point, what are the chances of our getting them from the Great Lakes states?

Mrs. Sarah Miller: That's very hard to predict. It's been a very hard slog around that table. We're certainly not prepared to support agreements that don't include the kinds of level playing fields we have been struggling for between the provinces and the states.

One of our big concerns is that the language isn't a compact and the regional agreement is not consistent. In fact, the regional agreement contains all the environmental protections, but one little understood point is that in the implementation manuals there are actual, day-to-day practices that are going to have to change in the provinces and states to try to enshrine better, ongoing data collection to establish a baseline to establish conservation. It's very unclear. There's still a lot of greed around the table. Every single region still wants to prosper, to be able to attract industry.

On conservation, they've received 10,000 responses from the public. Overwhelmingly, the public has wanted conservation strengthened. Even in Wisconsin, where there's the demand from Waukesha for water, they had the strongest turnout in favour of conservation. I think the politicians are lagging behind the public in this regard. Whether or not the politicians will be willing.... We have minority legislatures in most of the states right now, we had an election in the middle of this process, and we're having a hard time getting legislation through. Michigan has legislation going through the House that would mean it would actually be, for the very first time, trying to generate water data. That legislation is being opposed.

So I couldn't really say, because every time we've seen a draft, it has been radically different from the next draft. There's still a lot of contention. There are strong states and there are weak states. There are states that have hardly participated. As you know from looking at a map of the region, there are states that have very little.... Pennsylvania has participated quite strongly, but it has 18 miles of shoreline. Indiana has hardly been involved. So it's very hard to predict.

● (1030)

Mr. Derek Stack: We could say fairly, though, that with the relative attention now being paid in Canada, particularly with respect to diversions, it has been repeated over and over again in two days. Some of the issues that are clearly more issues here than they are south of the border are now...I won't say front and foremost, but they're certainly ranking higher than they were on their list of things they need to do if these deals are going to pass. That was the framework for one of the data. What do we need to do to these deals so that they have a hope of surviving?

Mr. Joe Comartin: Mr. Shrybman, do you have any comments on the proposals from Ms. May about the two structures here: one, that the IJC and the federal governments would be responsible, particularly around bulk export and diversion; and other issues like consumptive use, conservation, and other issues like those that would lie more with the states than the provinces? I would say this is the first I've heard of this.

Ms. May, I'm going to ask you for some elucidation, but Mr. Shrybman, do you have any comments, from a legal perspective and a constitutional and international law perspective, about whether that could function?

Mr. Steven Shrybman: I can't give you a thoughtful opinion about it, but it seems to accord with my understanding of the jurisdictional line between the federal and provincial governments with respect to water—but by responding to you, I might also respond to the honourable parliamentary secretary's question.

We know the framework of trade law is corrosive of public policy and law related to conservation and environmental goals. We know the Boundary Waters Treaty is inadequate and incomplete. The answer to his question is that—and Elizabeth May offered it as well—there need to be some bilateral discussions with the United States. Is it going to be easy? No. Are we going to get anywhere by simply putting it off? No.

Hiding our heads in the sand and pretending as if some initiative by the states and the provinces can address either of those problems is just way off base. The solutions lie in bilateral negotiations, and I reject this glib political calculus that somehow, in the United States, the interests of water-thirsty states would prevail. I frankly don't know how the political pie would be cut on an issue like that.

There are some blue states out there as well. There are some red states in the basin. We certainly have allies in the Great Lakes Basin who don't want to see massive diversions to the southwest. You'd have to prove to me the notion that somehow Congress is going to favour that brief. I'm not willing to accept it, though I know it's a glib assessment of how things would play out.

Mr. Joe Comartin: It's an urban myth rather than reality.

Ms. May, with regard to the splitting of jurisdictions—

Ms. Elizabeth May: On most of what I've presented, I've been quite candid with committee members—and I realize the brief wasn't circulated in advance, for which I apologize; I have copies with me, but

[*Translation*]

it's not available in both official languages. It's my fault.

[*English*]

In our brief, most of what I've presented to you is the result of works of our two chapters in Ontario and Quebec, as well as national committee volunteers and members on our water privatization committee and concerned people throughout our organization. But this idea is mine alone.

I started by trying to come before your committee while thinking about what would be a useful way to proceed. A lot of people have worked very hard on the documents before us. Personally, I think they're dangerous, but there are elements in them that represent progress, particularly around consumption and consumptive uses. Those are legitimately areas the states and the provinces should be working on more, but the issue of diversions is really one, both under constitutional law in Canada and constitutional law in the United States, that is best dealt with.... If you want to shut that barn door and lock it down, you're better to do it at the federal level, where you state clearly and unequivocally....

We already have the Boundary Waters Treaty. Let me make it really clear that we don't want to reopen any negotiations around the 1909 Boundary Waters Treaty. We got that one, so let's hang on to it. But look to both jurisdictions to say we have a commitment. Both national governments claim they are four-square against diversions and bulk water exports. Fine. The weaknesses in the domestic legislative schemes appear to be on the U.S. side of the border, not the Canadian side of the border, so what do we do in Canada to make U.S. rhetoric match U.S. reality? I don't think it's these agreements.

By separating them out, I thought we could move ahead with the ones that weren't problematic and make sure we don't undermine the IJC, the Boundary Waters Treaty, and U.S. domestic law, to the extent that they have a good law in the Water Resources Development Act of 1986. That would best be done at the federal level.

● (1035)

Mr. Joe Comartin: Do I still have time?

The Chair: You have one minute.

Mr. Joe Comartin: I bet this is going to be impossible.

Mr. Shrybman, again, can you give us a quick scenario of what it would be like if a private investor came forward and made a claim? Is it possible to answer that in 45 seconds?

Mr. Steven Shrybman: It would be a foreign investor in the United States. In this case, under NAFTA, it would file the complaint that somehow the regime discriminated against its interests, in the same way some investors have now filed against Mexico. That would go to an international arbitral tribunal that would decide all of the issues we've been debating, not the Parliament of Canada, not the Congress in the United States, nor the executive there. The tribunal would decide whether the regime engaged water as a resource and created proprietary interests that then could be subject to trade.

The problem with the regime is that it leaves the decision with international tribunals. They operate behind closed doors. They have commercial mandates. There may be no judicial review if the place of arbitration is outside Canada, so Canadian courts would not have any role to play before, during, or after the dispute was resolved. That's the problem.

Mr. Joe Comartin: I think we all recognize it's limited—and they recognize it, too—but would the criteria put out so far by the IJC be taken into account in that scenario?

Mr. Steven Shrybman: It would certainly be brought to the attention of the tribunal. How the tribunal would take it into account, we don't know.

Mr. Joe Comartin: Thank you, Mr. Chair.

The Chair: Thank you, Mr. Comartin.

I'll go now in five-minute opportunities, beginning with Mr. McGuinty, and then Mr. Jean.

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

Thanks very much, folks, for showing up. I really appreciate the presentations and the debate. It's good to see many of you again.

When Raymond Chrétien, the Canadian ambassador to the United States, gave an exit speech at the end of his term in Washington, Mr. Chairman, one of the things he said was that his greatest surprise was the extent of his time dedicated to environmental issues. He said he spent over 40% of his time dealing with continental environmental issues—not necessarily just bilateral ones, but continental ones—and that these issues were not going to go away and probably had the longest shelf life of all.

I want to pick up on what the parliamentary secretary was saying. I think we've touched around it a little bit. I am a strong proponent of re-examining the overall system in place, Mr. Shrybman, as you keep suggesting, including the public law regime that governs this and the questions around whether or not the WTO is in fact corrosive. I think there are probably competing opinions with respect to that question.

Is it time for a continental initiative? President Bush is joining us in several weeks. Is it time for us to stop the fiction around the fact that we live on the same continent, that we trade increasingly in the same continent? The last time I looked, our oceans were contiguous. We're going to have to deal with our oceans management strategy, for example, in a contiguous fashion with American and Mexican ocean policy. Concepts like conservation and the precautionary principle weren't even devised in 1907 and 1908, the time when that first treaty was being negotiated.

Question number one: Is there any evidence, south of the border and in Mexico, that a continental initiative of this kind would be well received?

Question number two to the panel: None of you have mentioned the economics of water. None of you have mentioned the expanded use of economic instruments to achieve environmental improvement. That's something we have, I think, not been overly aggressive in pursuing in Canada. Mind you, I like real baselines, I don't like fictitious ones. I'm looking for nation-states that have found better use of economic instruments.

Can you comment on, for example, the fact that the Province of Ontario is now seriously examining the question of water pricing and abstraction licensing? What impact would a rethinking of the economics around this issue have on the sustainable development of our water resources?

● (1040)

The Chair: Ms. Ehrhardt, you were trying to catch my eye. Would you like to start there, and then we'll come down through the other side of the panel?

Ms. Sara Ehrhardt: I'll just say my membership is very concerned about the way in which continental integration takes place. While we do understand that there are ways in which all of these jurisdictions have to work together, we want to make sure Canada and Canadians continue to have a sovereign voice on anything that takes place and that civil society continues to push our government to be the leaders we want them to be in environmental matters.

I also want to touch base on the economic use of water. That was brought up in the 1987 federal water policy, which, as I mentioned, has not been reviewed, has not been updated. That's something we've been pushing for, for quite some time.

At the Council of Canadians, we do have concerns around the use of economic instruments. We do want to hold commercial water takers to task. At the same time, we don't want to commodify water. We want to target those with swimming pools, we want to target water bottlers; we don't want to target the Canadian poor. I would just register that caution, but say we do think a comprehensive review of water policy across Canada is needed.

The Chair: Ms. May.

Ms. Elizabeth May: Thank you, Mr. McGuinty.

I would say I'm also very grateful, because the Canadian embassy in Washington just mentioned one of those environmental issues on their file and to which they're going to have to pay a lot more attention, and that's protecting the Arctic National Wildlife Refuge. I bet that was a big chunk of Ambassador Chrétien's time.

In terms of continental policy, yes, it would be an ideal time to do a ten-year review mark of NAFTA. There's an effort by civil society to draw the attention of a different parliamentary committee to the idea of reviewing where we are. Where have we seen positive results, and where have we seen negative results? Let's really try to get an assessment.

From an environmental point of view, I would flag the North American Commission for Environmental Cooperation, which has done some very useful things despite being a toothless organization subject to three environment ministers from three jurisdictions who can stop them at any time. I'm concerned about their current trend, whether they'll be protected, whether they'll continue to be independent, but some continental environmental monitoring is certainly appropriate.

While I share Ms. Ehrhardt's concerns about integration, I just want to speak briefly. We've talked about the federal water policy of 1987 and how it needs to be updated because it's so very old. I was in the Minister of the Environment's office at the time. I helped work on it and Mr. Pentland worked on it very closely. As I recall, it was very progressive. It talks about water pricing. It talks about the need to value the resource. It uses much the same arguments as we would use around energy use, if you're not paying the real cost. That's not to say you privatize it, that's not to say you commodify it, but just as with energy issues, we are not paying the real price for our water at the tap, yet we seem to be willing to spend more money than we spend on gasoline per litre to buy bottled water of unknown purity, placed in plastic bottles that leak endocrine-disrupting plastic substances. The way we treat water in this country boggles my mind.

That's separate from this annex agreement, but I do think it's worth looking at. We would favour the use of economic instruments.

The Chair: Thank you.

Ms. May, I'm going to have to just clip it there and go to Mr. Jean. Perhaps we can come back to some of these themes.

Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chairman.

Thank you, guests, for speaking today.

I would like to start by just indicating to Ms. May that she might want to rethink her political position on using right and left, because it usually changes whenever you turn your back. Instead, I would suggest using colours. If you know your primary colours, there are only four, one of which is blue, and you can't get green without blue. I just wanted to establish that.

Finally, at the risk of astonishing my colleagues, I think we met once at a Sierra Club meeting in Calgary. As well, I'm a member from Fort McMurray.

I have some comments, and I also have three questions. I only have five minutes, so I'd like to spill them out quickly.

I agree with some comments made in relation to the issue of a commodity and water. I am a solicitor by trade and have studied international and environmental law in both Australia and the U.S., and to be honest, it frightens me greatly. I do not believe the status quo will stay, and I think the U.S. will be seeking more and more to establish water as a commodity, even in its natural state.

I would also like to point out that I don't believe we're going to be in bilateral issues with the U.S. Instead, it will be more of a trilateral situation with Mexico, with NAFTA, and I think that is another issue that needs to be addressed, as the rest do.

My final comment before my questions is to ask the members here and the guests who have come to rethink the issue of the federal governments, especially in the U.S., getting involved and being the be-all and end-all for any additional treaties that they would obviously have to be involved with. I would rather see Ontario, Quebec, and the interested states being the controlling mechanism for future annexing of water, simply because the federal government in the U.S. has to deal with the benefit of all states. That is again frightening because of the situation. Especially with migration of employees coming out of the States and in Canada and going to the rest of the provinces, I believe that again will be a federal jurisdiction issue in the future. We'll have to look at all the states and all the provinces, and I think that will be to the detriment of the provinces and states directly hit.

First, I'm going to ask all the questions. On inventory, I would like to have some more specifics in relation to why you would like to see an inventory. I know levels have gone up and down dramatically or significantly since the thirties. What benefit would there be to establishing those inventories?

Second, negative flow is happening in some areas because of diversions. What can be done about that at the current stage?

And third, on the withdrawals you have suggested in your case, Ms. May, do you believe that's actually enough to stop the flow and protect the Great Lakes?

● (1045)

Ms. Elizabeth May: Thank you, and it's good to see you again. I hope you'll take out a new Sierra Club membership.

I'll try to address your questions in order.

Because the Great Lakes Charter of 1986 required this inventory, I think we would be, without doubt, in better shape now in answering some very specific questions about the state of the lakes. The Boundary Waters Treaty speaks to level and flow. Of course, in a water body this enormous, as you've heard, it's very difficult to figure out what any one impact is on that level and flow. One of the things that would aid us in this is a better inventory. As you've heard from Ms. Miller, the numbers and the data that come in are not in the form of a usable inventory and are not comparable between jurisdictions. Better information is needed, without doubt. Given that this is an existing obligation, we'd like to see it fulfilled.

In terms of existing and future impacts on water, this is part of our written brief that I didn't get a chance to speak to. Let me just stress that the Sierra Club of Canada is far more concerned with the impacts of climate change on the Great Lakes than any commercial scheme to take water. The impacts of climate change on the Great Lakes are likely to be enormous and very significant, and to affect users throughout the basin. That makes it all the more problematic to be looking at a scheme for allowing diversions of water in a way that does not take into account, at this point, the precautionary principle and the need to be aware of climate change impacts.

As we look into the future, the Great Lakes system will very likely be under severe stress, based on the modelling for climate change impacts. Where we're seeing reduced flow in certain of the major rivers within the basin, that's being tied to increased evaporation due to warmer temperatures in winter months. So it's a complex picture of what will happen to the Great Lakes 10, 20, 30, or 150 years from now. Since they are one of the great water bodies of the planet, we need to be very cautious in embracing any arrangement that would actually add to the stresses on the lakes. I'm not confident anything in the current set of agreements will protect us from diversions.

I agree with your point that the states near the Great Lakes and the provinces near the Great Lakes are the ones most interested in protecting that body of water. The reason I point to the federal government in the United States and the federal government of Canada is that this is the level of government most able to deal with it.

Let me back up. The reason this agreement is so very complex is that they're trying to create a scheme that will withstand a still hypothetical challenge based on the commerce clause of the U.S. Constitution. I think there are simpler ways to prevent the U.S. Constitution's commerce clause from being applied, by getting a statement at the federal level that could be used in a future court case rather than creating this enormously complex review scheme, regional engagement, all for the purpose of making sure the Water Resources Development Act of 1986 in the United States can hold up.

● (1050)

The Chair: Thank you.

Ms. Ratansi, and then Mr. Simard.

Ms. Yasmin Ratansi (Don Valley East, Lib.): Perhaps you have answered these questions. I thank you for coming here. It's a very complex issue, and I'm looking at all different papers.

If I look at the Boundary Waters Treaty, and then the compact and the two agreements—and I'm looking at you because you're the lawyer here on the panel—I understand that the Boundary Waters Treaty is the overarching agreement and that no other agreements can violate it. Am I naive in my understanding? That's number one.

Number two, does the draft agreement between the governors and the provinces undermine the powers of the IJC?

Number three, Bill C-6, which was an amendment to the International Boundary Waters Treaty Act on May 24, 2001, was a very strong bill in terms of prohibition provisions, etc. How does it impact the whole discussion that is taking place?

Mr. Steven Shrybman: Let me try to answer those three quickly.

As a matter of international law, the most recent agreement prevails. To the degree that NAFTA or the WTO agreements impact water and there's a conflict between those requirements and the requirements of the Boundary Waters Treaty, as a matter of law the agreement latest in time would prevail, so we have a problem in terms of a conflict between trade law and the treaty. That's point one.

Point two is that the compact and an agreement between the governors, or between the governors and the premiers, cannot impact the framework of international law. In fact, that law can't be impacted by anything that Congress or Parliament does either, other than to renegotiate those international agreements.

Point three is that as a matter of practice rather than law, Canada raised a serious concern about the annex. Its concern was that the role of the IJC was being marginalized by creating an independent parallel regime that didn't seem to have any regard to the IJC playing a role.

The linchpin in all of that may be this whole notion of flows on the other side of the boundary. We've heard environmentalists say they're hard to measure. In some cases, if there's a big enough diversion, as at Chicago and this one into Lake Superior, yes, you can, but often you won't be able to.

What approach did the Parliament of Canada take in passing Bill C-6 to strengthen the Boundary Waters Treaty? It said any diversion of water will be deemed to affect the flow on the other side of the boundary, making it very clear that, in Canada's view, that required review by the IJC. In other words, not only did Canada ban exports, it deferred to the authority of the IJC and declared itself on what impact diversions would have. None of that exists in the compact. That's one of the reasons for concern.

Ms. Yasmin Ratansi: Thank you, Mr. Chair.

The Chair: We will go to Mr. Simard.

[*Translation*]

Mr. Christian Simard: Thank you, Mr. Chairman.

The last point you raised on the predominance of the international agreements if very interesting. It is quite obvious that the agreement between the states and provinces cannot be considered a trade agreement. Consequently, it is a parallel agreement. Now, it remains that in this 2001 agreement project, there is nonetheless a reference to the Boundary Waters Treaty. What does not help us in the debate is that we do not have a clear position of the International Joint Commission. Their representatives have come here. How does the International Joint Commission react? We can read between the lines that there are very difficult debates between their legal advisors, and maybe two confronting positions.

In reality, the International Joint Commission has failed anyway. The Chicago diversion is something that actually happened despite an existing international agreement and structure. I sometimes believe that this international agreement is a false protection, a theoretical legal protection. This agreement was negotiated with a country that is much larger than ours, as many other agreements, and this other country always gets what it wants.

I still did not get an answer to my question.

How can we improve the 2001 agreement to ensure there is some balance between the signatory provinces and states? I have the feeling that reality will prevail, and no matter what legislation the federal government may introduce on this side of the Great Lakes, if the same legislation is not introduced on the other side, there will be no improvement to the treaty. It takes two to work out a treaty.

How can we ensure that, by improving these projects, the system will be protected? The true victims in all this are the Ontario lakes and the St. Lawrence. You know that in our region, an enormous lake could be lost, Lake Saint-Pierre, which is an extraordinary biological production plant for both the St. Lawrence itself and the Gulf of St. Lawrence. Lakes Erie and Huron are also seriously threatened. This is my concern.

Ms. Miller is also associated with the process. How, as part of a compact in the United States, can we have a certain veto or right of intervention.

● (1055)

[*English*]

Mrs. Sarah Miller: Your point on the Chicago diversion is well taken. Ontario's minister of natural resources, when he announced the release of the draft annex, strongly outlined his concern that probably the most logical place we're going to be seeing further diversions from the Great Lakes Basin will be in increases at Chicago. Right now, the Chicago diversion is set out by a U.S. Supreme Court decree. It's unlikely that Canada would get standing in the U.S. Supreme Court, but the Ontario government has been trying to argue at the table that any further and new increases of that diversion should be subject to this annex. That is a very, very important point because they certainly diverge on the U.S. side.

We don't have very good luck in courts on water. As you know, the recent Manitoba-North Dakota decision went against Manitoba, even though we did get standing in the courts.

These are very serious issues. As you pointed out, Quebec and Ontario are at the receiving end of the system, and most of the impacts are going to be hugely exaggerated for us as we lose more and more water in the system. That's why, if we come up with an annex we feel we can live with, I would really like to see both Quebec and Ontario adopt it in their own legislation so it is binding. The states are only binding themselves to each other in the compact, but we're binding ourselves to our own domestic legislation so there is that enduring strength. But I wouldn't recommend it with the current drafts, unless they're changed.

The Chair: Ms. May.

Ms. Elizabeth May: Thank you for your question, Mr. Simard, because I also wanted to mention that in our written brief we specifically raise the threat to the Great Lakes ecosystem from possible increases at the Chicago diversion, because it can take place without significant new works being established. We've heard that there may be a request already on the table from Illinois to do just that, and that jurisdictions on the U.S. side of the border are keeping this one quiet until they get through the discussion of this annex.

We've also heard that at least some reviewers have interpreted the agreements in the Great Lakes Charter annex as exempting increases to the Chicago diversion from most of the provisions of the agreement. So I think it needs to be clarified that any agreement going forward—this, a more robust version of this, or any negotiations—need to be very clear that all increases to existing diversions must be treated the same as any new diversions.

The Chair: Okay, thank you very much.

Members of the committee, we've reached the point where we have to bring this to a close.

On behalf of the committee, I would like to thank you. By the depth and the deliberative nature of the questioning, I think you can see the committee takes this issue very seriously. We will be working toward a report that we will be putting back to the House, and the input that you've made this morning will be very helpful as we do the right thing with respect to this issue. So thank you very much for being before the committee.

● (1100)

Ms. Elizabeth May: Thank you, Mr. Chairman.

The Chair: Members of the committee, we'll adjourn. Thank you very much for your attention.

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