

Joint Program Concept VLS-McGill Program on Environmental Resource Management Water Resources

Background

McGill and Vermont Law School (VLS) have a long history of collaborative activity including faculty visits, student exchanges, and joint conferences. This proposed initiative will build on this cooperation and the respective strengths of the institutions in environmental law, comparative law and sustainable development. Trans-border environmental concerns are a significant common concern of the United States and Canada (See *“The Emergence of Cross-Border Regions between Canada and the United States – Synthesis Report”*, May 2006). Agreements and other management mechanisms are expected to increase between the US and Canada in order to address these growing concerns. A joint legal initiative between VLS and McGill will help to address these problems and provide direction for future environmental resource management initiatives. This paper describes a strategy for moving forward with such an initiative and sets forth short-term and long-term implementation steps.

Strategy

VLS and McGill have held several coordination meetings over the past two years to develop a joint initiative on areas of common interests. In 2006 faculty members from the two institutions proposed “The Vermont-McGill Initiative on Cross-border Sustainability,” under which a joint working group of the two Faculties would undertake the following:

- Seek to establish a Fullbright Joint Chair;
- Initiate Joint Research Grant Applications/Projects;
- Increase Student Exchanges;
- Encourage Academic Visits; and,
- Organize Joint Conferences.

Five thematic areas were identified as a focus in the Initiative. These are areas where the two Faculties have a unique role to play and where a cross-border approach is the most efficient way to tackle the problems. They are also issues in which an important impact can be made on the environment and sustainable development through a joint legally focused initiative. The areas are

- Energy supply and demand;
- Management of common air and water resources;
- Natural resources;
- Flora and fauna; and
- Cross border interests of native populations

The Deans of both Faculties approved the Initiative in principle. A copy of the original proposal is attached.

Subsequent discussions have led to the present concept that the institutions will set up a program around a focused effort on the cross-cutting issue of **water rights and management**, a core thematic area that links all of the areas identified (“the Program”). Development of proposals and projects on this issue will provide a “proof of concept” model for the Program as a whole and will help to build the institutional relationship and define the modalities for managing cooperation between the two faculties. The focus on water is also merited because of its critical importance amongst the issues identified as being of common concern to both countries and the pressing and growing demands now being placed on both national governments and state/provinces around this issue.

Goals and Objectives

The overall goal of the Program is to improve efforts to effectively manage and address environmental and natural resource issues of common concern to the United States and Canada. This goal will be achieved through improved cross-border dialogue and information exchanges (including best practices and lessons learned from previous and existing efforts), the provision of joint technical and legal advisory inputs and policy relevant research, and education and outreach targeted at key stakeholder groups in both Canada and the US.

Program Activities

The Program will be implemented through a number of joint activities designed to help deliver results that contribute to meeting the above objectives. Specifically the following activities will be undertaken during the first phase with a ***primary focus on water issues.***

- Development and implementation of joint research projects.
- Establishment of technical/advisory capacity to support water management agreements and capacity build trans-boundary institutions and key governmental and non-governmental actors.
- Convening of joint conferences (as related to above activities).
- Formulation of joint grant applications, and
- Formulation of a full program.

During this phase, the two Faculties will continue to explore and develop the broader program, including the following components:

- Fund raising
- Establishment of a Joint Fulbright Chair
- Student Exchanges
- Academic Visits

A number of water issues are of relevance to this partnership. The focus will primarily be on **water management, water quality, and hydropower** given the common interests in the two institutions and the comparative experience and priorities of the governments of Canada and the US in this important

field. Specific areas under this thematic area for possible research, policy advice/technical support to government, and development of shared lessons learned and best practices may include:

Water Pollution and Quality

Both the US and Canada pursue policies which attempt to curtail water pollution and ensure water quality. From the Clean Water Act to the Canadian Environmental Protection Act, each country pursues permitting, enforcement, and other management tools to ensure water quality. The dominant fraction of pollution derives from non-point sources with agriculture by far the largest single source of impairment.

- Priorities and policies for water quality protection – Federal and state/provincial regulation
 - Clean Water Act (9th Circuit Court)
 - CEPA
- Comparative study/lessons learned on regulation/enforcement of point and non-point source pollution
 - Non-point agricultural pollution:
 - Regulating nutrient rich discharge into rivers and lakes.
 - Sedimentation of waterways
 - Urban runoff:
 - Storm water discharge – management, regulation and problem-solving approaches
 - Regulating heavy metals, organic pollutants and bacterial matter.
- Comparative study/lessons learned on coastal/trans-border zone management
- Conservation of water related land resources.

Trans-boundary water management agreements and institutions

US-Canadian bilateral cooperation dates to 1909 and the Boundary Water Treaty. This Treaty provided procedural mechanisms for the resolution of disputes over water quality and quantity along the US-Canadian border including through the International Joint Commission (IJC). Additional treaties include the Niagara Treaty of 1950 and the Columbia River Treaty. Foremost amongst the water quality treaties is the Great Lakes Water Quality Agreement signed in 1972 and the local level Great Lakes Charter between the eight Great Lakes states and the provinces of Quebec and Ontario. A more recent agreement between the US and Canada is the Missisquoi Bay Phosphorus Agreement. The IJC, Environment Canada, EPA and various state and local governments are actively involved with many of these agreements with IJC charged with reviewing the Great Lakes programs. The joint initiative could support capacity building of the actors involved in cross-border management, supporting the institutions through technical assistance, information sharing and formulation of lessons learned and best practices from these shared experiences. This may include:

- Comparative research, formulation of best practice and information sharing on existing Canada-US agreements
 - Trans Boundary Agreement,
 - Great Lakes Water Quality Agreement,
 - Missisquoi ,Tripartite Agreement NY, VT, PQ)
- Capacity building support for Trans-boundary management mechanisms (e.g. International Joint Commission)
- Trans-boundary watershed based management systems
- National security interests – energy and water

Diversion/Bulk Water exports

Water diversion and export is a controversial issue in Canada given the attachment given to renewable fresh water supplies. The US's potential thirst for external supplies in the future has fuelled serious concerns about the status of water and export issues associated with trade agreements and liberalization efforts. Thinking on water export differs. On the one hand some espouse the potential economic gains, development and even humanitarian imperatives while on the other some stress the importance of water to not only humans but all life, eco-systems and indeed sovereignty.

A number of legal issues arise from this debate and may be the focus of further work by VLS-McGill:

- Great Lakes region (Lake Michigan – Chicago Diversion) diversion to Mississippi River.
- Legal frameworks on water exports e.g. Canadian fresh water to US.
 - NAFTA
 - WTO
 - Province level
 - US Supreme Court cases
- Legal bases for prohibitions and licensing of bulk water exports/diversions

Conflict and the negotiation of water rights

There is often sharp competition and dispute around the management of water resources. These occur at local, regional and international levels and have been the focus of efforts in both Canada and the US for improved management practices and dispute resolution. Efficiency and equity are often at the heart of disputes or where efficiency collides with the rights of other users or disadvantaged groups. There are also competing usages of limited water supplies which need to be effectively managed. Traditional approaches for the allocation of scarce water supplies are under stress. Each country has experience on approaches, lessons learned and best practice that can be compiled and shared to inform future efforts.

- Innovative cross-border State-Province level solutions(i.e. Poplar River with Saskatchewan)

- Intrastate/province: managing competing local interests (Riparian, appropriation, correlative etc.)
- State to state (i.e. compacts) or province to province conflict resolution/management
- Supply conflicts
- Water allocation decision making processes
- Restricting/Transfer of water rights; protecting resources
- Institutional conflicts
- Experiences with negotiated/mediated settlement of disputes over water resources
- Tribal water rights vs. “formal” federal regulation (tensions, gaps and inconsistencies between traditional and formal regulatory systems)

Program Implementation

Initial Venture

VLS and McGill each have a number of faculty members with research interests in land use and water resources law. A group of these colleagues will meet in the spring semester 2009 to develop a joint research and writing project that can be undertaken with modest resources as an initial effort designed to test common interests and methods of cooperative endeavor. The project will focus on three pieces of legislation adopted or in the works in three relevant jurisdictions: Ontario (2006), Vermont (2008), and Quebec (in process):

1. Ontario Clean Water Act, 2006. This legislation applies a “land use planning” approach to address the inevitable need to integrate land use planning laws and the water regime set up by the act.
2. Quebec water resources protection act, Que. Bill 92, 2008. This pending legislation contains underlying assumptions about ownership to water in situ (which under Quebec civil law is classified as a *res communes*).
3. Vermont--groundwater protection legislation—10 V.S.A., ch. 48, as amended by Act 199 of 2007 (Adj. Sess.). This legislation is closer in issues to the Quebec bill than to the Ontario statute.

Faculty members would combine to write three comparative articles, one focusing on each jurisdiction. The articles would be submitted for publication as a group in either the Vermont Law Review or the McGill International Journal of Sustainable Development Law and Policy, or some other appropriate venue.

Next Steps

Following successful initiation of the first project, the two institutions will hold several working-level planning meetings in order to jointly identify other water issues for developing specific research/technical support projects and agree on directions for the mobilization of resources. An assessment of research interests will be compiled in matrix format for submission to the workshops in order to assist decision-making and agreement on the final program of work.

Subsequent Program implementation possibilities include

- Joint teams, including lead actors, charged with undertaking various elements of the Program.
- Presentation of the program and initial results from the joint initiative in a public event.
- Throughout implementation, workshops, conferences and publications relating to achievement of the goals of the Program will be produced.
- Launching of a public relations effort to inform the respective institutions, other stakeholders and partners as well as the public about objectives and results and to complement resource mobilization efforts.

In subsequent years the initial thematic area (water) will be subsumed into a larger joint program consisting of a number of thematic areas. Linkages and complementarities will be developed to the extent possible with this thematic area, and lessons learned from the first phase will be designed into later work, building on the experience with implementation structures and modalities and management arrangements.

Management Arrangements

A joint team will be established by the two institutions to carry forward the joint Program. Each institution will identify a lead manager and a working-level coordinator for this initiative, as well as participants that will contribute to various parts of the program of work...

Risks and Challenges

- Fundraising, Institutional constraints, vying priorities
- Number of constraints identified by working groups include:
 - Summer conflicts
 - Research interests
 - Difficulty in obtaining funding
 - Need to elaborate an overall cooperation framework

Resource Mobilization and Budget

VLS has obtained seed funding through the Embassy of Canada to the United States (Academic Relations Office) to meet preliminary meeting and coordination costs for this initiative. The VLS Land Use Institute has assigned research associates to the program in order to prepare and help to implement initial activities.

Additional fundraising will be undertaken by both institutions. Grants and other contributions, as well as partnerships, will be sought from government, private trusts and non-governmental bodies.

A fundraising strategy will be jointly developed at the outset to guide efforts to raise funds for the Partnership's research and policy program and closely coordinated with external communications efforts undertaken by both institutions.

ATTACHMENT

MEMORANDUM

TO: DEAN NICHOLAS KASIRER, DEAN GEOFFREY SHIELDS
FROM: RICHARD JANDA AND KINVIN WROTH
SUBJECT: VERMONT-MCGILL INITIATIVE ON CROSS-BORDER SUSTAINABILITY
DATE: 8/4/06
CC: JAYE ELLIS, JANE GLENN, ROBERT GODIN, CHARLES GONTHIER, MICHAEL DWORKIN, MARK MIHALY, LINDA SMIDDY

The purpose of this memorandum is to set out a general framework for a joint initiative between Vermont Law School and the Faculty of Law of McGill University, to which we have given the working title “The Vermont-McGill Initiative on Cross-Border Sustainability.” Thanks in part to a grant that VLS received from Foreign Affairs Canada’s Canadian Studies Grant Program, an informal working group of colleagues from both Law Faculties, whose members include those listed above as well as ourselves, has met on a number of occasions over the last year, most recently on July 27 at Kinvin Wroth’s Lake Champlain camp, to discuss the possibilities and opportunities for such an initiative.

McGill and VLS have a long history of collaborative activity, including faculty visits, student exchanges, and joint conferences. The proposed Initiative will build on that history to establish a serious long-term relationship between the two institutions in areas of their respective strengths. VLS’s leadership in environmental law together with McGill’s leadership in comparative law and more recent work on sustainable development provide a natural complementarity for the investigation of cross-border sustainability issues. Indeed, the Canadian Government’s Policy Research Institute, in a report entitled *The Emergence of Cross-Border Regions between the United States and Canada*, has recently highlighted the economic, social and cultural significance of cross-border regions, noting that trans-border environmental concerns are among the most significant common issues. From a conceptual standpoint, the investigation of sustainable development across borders allows jurists to consider what it means to do justice to future generations when the task cannot be accomplished within the bounds of sovereign jurisdiction alone. From a practical standpoint, such investigation may lead to the development of proposed bi-national or other agreements and legislation to begin to address cross-border environmental and sustainability issues as they affect our shared region.

Our informal discussion group identified a significant array of practical issues to which we could turn common attention, including cross-border energy supply and demand; the management of common air and water resources, natural resources, and flora and fauna; and the cross-border interests of native populations. We also felt that the exploration of the theme of sustainable development itself from the perspectives of the two countries, and comparative analysis of existing national, binational, and international regimes, could frame a rich joint research agenda. In addition, there are opportunities for joint teaching, semester-long student exchanges, participation of students in Vermont Law School’s Summer School, and joint conferences and events.

To move the initiative forward, we ask that the Deans agree in principle on the basic goal of establishing the Vermont-McGill Cross-Border Sustainability Initiative and on the following set of steps to be taken by a joint working group of the two faculties over the next academic year:

- Pursuit of a Fulbright Joint Chair in Cross-Border Sustainability, as part of an application to the Fulbright Program in Cross-Border Security (Michael Dworkin and Richard Janda).
- Inclusion of a Vermont-McGill dimension as part of research grant applications in the area of sustainable development.
- A formal effort to bolster McGill student participation in Vermont Law School's Summer School and to increase academic year student exchanges.
- Encouragement of brief visits by faculty for short-term class-room participation.
- Development of a joint research agenda.
- Planning for a joint conference in summer or fall 2007 to highlight the purposes and goals of the Initiative.
- Exploration of the appropriate form of organization that would be best suited for the future development of the Initiative.
- Exploration of funding opportunities for a more formalized version of the Initiative.