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THE ROLE OF LOCAL GOVERNMENTS IN GREAT LAKES ENVIRONMENTAL GOVERNANCE: A CANADIAN PERSPECTIVE

Marcia Valiante*

Restoration of environmental integrity in the Great Lakes Basin has been only a qualified success after thirty-five years of efforts pursuant to policies developed by federal, state, and provincial governments. Many unresolved problems stem from activities under local government control, yet in the past local governments were excluded from Great Lakes policy-making. By looking at recent changes in the powers, interests, experience, and influence of local governments in Ontario, this Essay concludes that local governments now have the ability to participate meaningfully in Great Lakes policy formation and implementation. To include local governments would improve the chances of successful restoration of ecosystem integrity. However, a number of challenges must first be tackled so that an expanded role for local governments can be most effective.

INTRODUCTION

Environmental governance in the Great Lakes Basin is the work of a rich amalgam of governmental and non-governmental agencies and organizations at all levels, (roughly) pursuing the common goals of clean up and sustainable ecosystem management. The formal structures and norms of this system were established by agreement between the federal governments of the United States and Canada, starting with the Boundary Waters Treaty of 1909¹ and finishing up with the Great Lakes Water Quality Agreements of 1972 and 1978.² In addition, the eight states and two provinces³ have become more closely associated and have developed

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1. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

2. Agreement Between the United States of America and Canada on Great Lakes Water Quality, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301, superseded in 1978 by 30 U.S.T. 1383, amended in 1983 by 35 U.S.T. 2371, amended in 1987 by Protocol Amending the 1978 Agreement between Canada and the United States of America on Great Lakes Water Quality, U.S.-Can., Nov. 18, 1987, T.I.A.S. No. 11551 [hereinafter GLWQA].

3. The eight states in the Great Lakes Basin are New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Minnesota; the two provinces are Ontario and Quebec.

their own structures and rules, particularly with respect to water management and diversions.

With respect to water quality, national, state, and provincial water quality policies and programs have been undertaken in pursuit of the binational objectives. Under these programs, thirty-five years of efforts to clean up and restore the integrity of the environment of the Great Lakes Basin have been only a qualified success:

Although much progress has been made, some of the problems have become more serious, many have not been solved, and new ones continue to develop. Despite good intentions and hard work, the strategies and efforts to date simply have not been effective enough to do the job of cleaning up the Great Lakes or preventing further degradation. A much more concerted effort over a longer period of time is essential for the restoration and protection of the resource and the prevention of future problems.⁴

The Great Lakes Water Quality Agreement (GLWQA) is now under review by the parties.⁵ For purposes of the review, the two federal governments are conducting broad consultation with agencies, organizations, and the public, asking for input on the effectiveness of the current agreement and its institutions and their suitability for meeting future challenges.⁶ At this moment of reflection, it is appropriate to look beyond the traditional lens of sovereign governments and their joint institutions to the other participants in this governance experiment. The qualified success of the GLWQA shows that, while sustained federal, state, and provincial government commitments and actions are essential, they are not sufficient. Without concerted action by others, including civil society, the private sector, and local governments, comprehensive

4. GREAT LAKES REGIONAL COLLABORATION STRATEGY TO RESTORE AND PROTECT THE GREAT LAKES 4 (2005), http://www.glrc.us/documents/strategy/GLRC_Strategy.pdf [hereinafter GLRC STRATEGY]. This view is also reflected in public comments on the Great Lakes Water Quality Agreement. See INTERNATIONAL JOINT COMMISSION, SYNTHESIS OF PUBLIC COMMENT ON THE FORTHCOMING REVIEW BY THE FEDERAL GOVERNMENTS OF CANADA AND THE UNITED STATES OF THE GREAT LAKES WATER QUALITY AGREEMENT (2006), <http://www.ijc.org/php/publications/pdf/ID1588.pdf> [hereinafter SYNTHESIS OF PUBLIC COMMENT].

5. See GREAT LAKES WATER QUALITY AGREEMENT REVIEW 2006, http://binational.net/glwqa_2006_e.html [hereinafter REVIEW 2006].

6. See *id.* Nine Review Working Groups have convened to discuss a range of issues. See GREAT LAKES WATER QUALITY AGREEMENT REVIEW: SUMMARIES OF QUARTERLY REPORTS SUBMITTED TO AGREEMENT REVIEW COMMITTEE 1 (2006), http://binational.net/glwqa/1stQuarterlyReports-Summaries_Apr28toJul206_ENG.pdf.

clean-up will not be achieved and further degradation will not be prevented.

This Essay will reflect on the role that local governments play within this system—primarily in terms of their relationship to achievement of the goals of the GLWQA, but also more generally with respect to environmental protection in the Great Lakes Basin—and what role they might play in the future. Specifically, this Essay will address, from a Canadian perspective, the importance of local government actions to achieving the common goals; the effectiveness of local actions; the constraints on local governments; appropriate roles for them in the future; and how local governments can be included in more meaningful ways.

I. LOCAL GOVERNMENTS AND GREAT LAKES ENVIRONMENTAL QUALITY

Environmental issues facing the Great Lakes Basin are numerous and reflect both a historical legacy of serious chemical contamination and ongoing actions inconsistent with GLWQA objectives. Leading issues of concern include: chemical and bacteriological pollution of surface and groundwater from point sources and non-point sources, both past and present; degradation, loss, and fragmentation of natural systems and habitat; resource exploitation; invasive species introduction; water removals; and climate change.⁷

Even for issues fully within federal or provincial jurisdiction, local interests are affected.⁸ It is local communities that live with the economic, social, and environmental consequences of senior governments' policies. Many people within those communities are differentially affected,⁹ and it is appropriate that those voices be heard in the making of policy.

7. INTERNATIONAL JOINT COMMISSION, TWELFTH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY 5–6, 13, 25–27, 47–49 (2004), http://www.ijc.org/php/publications/html/12br/pdf/12thbrfull_e.pdf.

8. Regulation of polluting industries, for example, affects local environmental quality. In addition, transportation, immigration, trade, and tax policies have a significant impact on growth and development patterns.

9. See NEIL BRADFORD, PLACE-BASED PUBLIC POLICY: TOWARDS A NEW URBAN AND COMMUNITY AGENDA FOR CANADA 2 (2005), <http://www.cprn.org/en/doc.cfm?doc=1186>. Neil Bradford notes that poverty and polarization have increased in certain neighborhoods in Canadian cities, disproportionately impacting those already vulnerable, including Aboriginal peoples, recent immigrants, single-parent families, and elderly women. *Id.*

Local government actions and inaction also directly influence many of the priority environmental issues facing the Great Lakes region. For example, in Ontario local governments control most industrial sources of water pollution through the adoption and enforcement of sewer use bylaws.¹⁰ Of the 260 municipalities that have such bylaws (out of 446 municipalities), only a handful have stringent limits on industrial pollutants entering the sewers.¹¹ Once in the sewers, these pollutants then go to municipal sewage treatment plants (STP).¹² However, Ontario STPs “are not designed to treat persistent organic compounds, toxic metals and many other contaminants routinely discharged to sewers; these substances are not normally monitored in the effluents of STPs; and there are no legal limits in certificates of approval for STPs to control their discharge to the environment.”¹³

Until recently, Ontario had fifteen municipal STPs discharging into the Great Lakes with only primary treatment, and even then, there was a forty percent rate of non-compliance with the most basic effluent standards that apply to primary treatment.¹⁴ For plants with secondary treatment, there is a twenty-five percent rate of non-compliance with regulatory requirements.¹⁵ However, “[d]espite an apparent problem with non-compliance at many municipal STPs, [the Ministry of the Environment] very rarely

10. ENVIRONMENTAL COMMISSIONER OF ONTARIO, CHOOSING OUR LEGACY: 2003–2004 ANNUAL REPORT 35 (2004), <http://www.eco.on.ca/english/publicat/ar2003.pdf>. The overwhelming majority of industries discharge contaminants to water via the local sewer system rather than directly to surface waters. It has been estimated that at least 12,000 commercial and industrial facilities discharge contaminants to Ontario sewers, while only about 200 facilities discharge directly to surface waters. In addition, some thirty municipal sewage treatment plants take landfill leachate for treatment. *Id.*

11. *Id.*

12. In Ontario, municipal governments have the responsibility for managing wastewater collected through their sewer systems. Municipal Act 2001, S.O. 2001, c. 25, § 11(3). More than fifty percent of municipal governments own and operate their own treatment plants, with the rest contracting out operation, mostly to the Ontario Clean Water Agency (OCWA). See generally HON. DENNIS R. O’CONNOR, REPORT OF THE WALKERTON INQUIRY, PART TWO: A STRATEGY FOR SAFE DRINKING WATER (2002), <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part2/>. OCWA is a crown agency of the province, established in 1993 and accountable to the Legislature through the Minister of the Environment. See ABOUT OCWA: COMPANY OVERVIEW, <http://www.ocwa.com/home/about/index.asp?id=1>. All wastewater treatment plants operate under provincially issued certificates of approval, which specify the contaminant effluent limits. Ontario Water Resources Act, R.S.O., ch. O.40, § 53 (1990).

13. ENVIRONMENTAL COMMISSIONER OF ONTARIO, PLANNING OUR LANDSCAPE: 2004–2005 ANNUAL REPORT 128 (2005), <http://www.eco.on.ca/english/publicat/ar2004.pdf>.

14. ENVIRONMENTAL COMMISSIONER OF ONTARIO, THINKING BEYOND THE NEAR AND NOW: 2002–2003 ANNUAL REPORT 40, 45 (2003), <http://www.eco.on.ca/english/publicat/ar2002.pdf>.

15. *Id.*

prosecutes STP operators.”¹⁶ It is thus not surprising that, of the seventeen “Areas of Concern” (AOC) in Ontario, ten have municipal wastewater pollution as a major problem contributing to beneficial use impairments, such as beach closings.¹⁷ Surface water quality in Ontario AOCs is also adversely affected by combined sewer overflows, in which the material in combined sanitary and storm sewers bypasses the treatment plants during storm events.¹⁸ Urban storm water runoff containing oils, pathogens, pesticides, and other contaminants is a major source of surface water degradation in the Great Lakes Basin.¹⁹

Rural wastewater systems are also a concern for water quality. The authority to approve and oversee the more than 1.2 million septic systems in Ontario was transferred from the province to municipal governments in 1998.²⁰ The statutory provisions do not require local governments to re-inspect septic systems, but do allow them to establish such programs, although only a few have done so.²¹ Most rely on education and matching grants to encourage the upgrading of facilities.²² However, the high levels of rural groundwater contamination suggest that a large number of septic systems are failing to adequately treat wastewater.²³

Another threat to water quality under municipal authority is waste management practice. Municipal programs determine the waste disposal options of residents and influence their disposal practices.²⁴ Despite a province-wide target of sixty percent diversion from landfill into recycling by 2008, most household waste generated in Ontario is still disposed of in municipally owned and

16. *Id.* at 46.

17. See generally ENVIRONMENT CANADA, CANADA'S RAP PROGRESS REPORT 2003, http://www.on.ec.gc.ca/water/raps/report_2003/Introduction_e.html.

18. ENVIRONMENTAL COMMISSIONER OF ONTARIO, *supra* note 14, at 41–42.

19. PRIORITIES 2001–2003: PRIORITIES AND PROGRESS UNDER THE GREAT LAKES WATER QUALITY AGREEMENT 79 (2003) <http://www.ijc.org/php/publications/html/0103prienglish/> (Report to the International Joint Commission by the Great Lakes Water Quality Board, the Great Lakes Science Advisory Board, the International Air Quality Advisory Board, and the Council of Great Lakes Research Managers, September 2003).

20. See Building Code Act, 1992 S.O., ch. 23 (Can.).

21. See ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, SEPTIC SYSTEM RE-INSPECTIONS 3 (2001), http://www.obc.mah.gov.on.ca/userfiles/page_attachments/library/4/14003_59372_10435_1336411_septic_English_.pdf.

22. See, e.g., ONTARIO RURAL WASTEWATER CENTRE, COURSES AND WORKSHOPS, http://www.orwc.uoguelph.ca/Courses/courses_main.htm.

23. See Clean Water Act, 2006 S.O., ch. 22, § 112 (Can.) (authorizing the province to adopt regulations requiring mandatory re-inspection of septic systems in areas that are sources of drinking water).

24. For example, through the availability of curbside recycling and composting programs, bag limits on waste disposal, etc.

operated landfill sites.²⁵ The province regulates these sites, but it “lacks the information necessary to monitor and regulate Ontario’s landfill sites effectively.”²⁶ There is a particular concern with lack of monitoring at older landfill sites, both active and closed.²⁷

One of the most significant local responsibilities affecting environmental quality is the regulation of land use. The International Joint Commission first studied the issue in the 1970s and concluded that:

[t]he conversion of land over many decades from its natural covering of mostly forest to more intensive . . . crops has been a major factor in the degradation of water and other components of the Great Lakes ecosystem [T]he Great Lakes are being polluted from land drainage sources. Such pollution occurs most seriously from land areas of intensive agricultural and urban use.²⁸

Twenty-five years later, the International Joint Commission has adopted “urbanization” as one of its priorities to reflect the continuing problems associated with land use patterns.²⁹

Municipalities in Ontario, through exercise of powers under the Planning Act,³⁰ take the lead in determining the location, type, and density of development within their boundaries. While the province sets broad policy objectives and has an oversight role,³¹ most

25. See MINISTRY OF THE ENVIRONMENT, HOW ONTARIO MANAGES ITS WASTE: THE BASIC FACTS AND FIGURES (2006), <http://www.ene.gov.on.ca/envision/news/2006/083101.htm>. Of the 13.3 million tonnes of household, institutional and commercial waste generated in Ontario every year, 3.3 million tonnes are diverted from landfill through recycling programs. Of the 10 million tonnes remaining, sixty percent is disposed of in Ontario landfills. The rest is disposed in landfills out of the province, with a small amount being disposed of by incineration. *Id.*

26. ENVIRONMENTAL COMMISSIONER OF ONTARIO, NEGLECTING OUR OBLIGATIONS: 2005–2006 ANNUAL REPORT 35 (2006), http://www.eco.on.ca/english/publicat/ar2005_en_report_01.pdf.

27. *Id.* at 33–38.

28. INTERNATIONAL JOINT COMMISSION, POLLUTION IN THE GREAT LAKES BASIN FROM LAND USE ACTIVITIES: SUMMARY 1 (1980), <http://www.ijc.org/php/publications/pdf/ID501.pdf>.

29. See PRIORITIES 2003–2005: PRIORITIES AND PROGRESS UNDER THE GREAT LAKES WATER QUALITY AGREEMENT 85 (2006), <http://www.canamglass.org/glwqa/files/prioritiesfullreport.pdf>.

30. Planning Act, R.S.O., ch. P.13 (1990) (requiring municipalities to adopt official plans and providing authority for zoning and subdivision of land). Zoning and public works must conform to official plan policies once the plan is approved. *Id.* § 24(1).

31. See, e.g., *id.* § 17(24) (appeal of official plans), § 34(19) (appeal of zoning bylaws), § 51(39) (appeal of subdivision approvals). The province has adopted a “Provincial Policy Statement” that must be followed when planning decisions are made at every level. ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, PROVINCIAL POLICY STATEMENT (2005)

land use decisions are made lot by lot by municipal councils or committees. Issues such as whether wetlands will be drained and filled, whether agricultural land, recharge areas, watercourses, shorelines or woodlots will be protected from development, whether “sprawl”—low density, separated use, auto-dependent development on the urban fringe—will be allowed, what storm water management measures will be required, what types of transportation will be favored, whether brownfields will be redeveloped, and similar decisions are all under the control of local authorities.³² The outcomes of such decisions are important determinants of air and water quality, water resource availability and habitat quality. The overall record of this “tyranny of small decisions” is problematic.³³

Local government actions also influence water conservation and use. About eighty-two percent of the Ontario population receives its drinking water through communal water treatment and distribution systems.³⁴ Municipal governments own most of these systems, with a few in Northern Ontario owned by private water or industrial companies.³⁵ About seventy percent are operated directly by municipalities, twenty-three percent are operated on behalf of municipal governments through contracts with the Ontario Clean Water Agency, and the rest are operated through contracts with private companies.³⁶ The quality of a system (for example, whether there are large water losses from aging infrastructure) and local water utilities’ decisions on metering and pricing have an impact

(adopted by Order in Council 140/2005), <http://www.mah.gov.on.ca/Page1485.aspx>. Also, some official plans need provincial approval, and many planning decisions can be appealed to a provincial tribunal, the Ontario Municipal Board, which has the power to overrule local councils. *Id.* Part I.

32. *Id.* Developments in flood plains or developments that entail shoreline or stream alteration require permits from watershed-based Conservation Authorities. Content of Conservation Authority Regulations under Subsection 28(1) of the Act: Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, O. Reg. 97/04, § 4. Conservation Authorities are run by boards largely comprised of councilors from constituent municipalities and are funded partly by the province and partly by the municipalities. Conservation Authorities Act, R.S.O. 1990, c. C.27. All have watershed plans, which are mostly implemented through local planning instruments. See CONSERVATION AUTHORITIES OF ONTARIO: MANDATE, <http://www.conservation-ontario.on.ca/about/mandate.html>.

33. EXTERNAL ADVISORY COMMITTEE ON CITIES AND COMMUNITIES, FROM RESTLESS COMMUNITIES TO RESILIENT PLACES: BUILDING A STRONGER FUTURE FOR ALL CANADIANS 51 (2006), http://www.infrastructure.gc.ca/eacc-ccevc/alt_formats/pdf/eacc_rep_ccevc_rap_e.pdf.

34. O’CONNOR, *supra* note 12, at 278.

35. *Id.* at 279 n.7.

36. *Id.* at 279.

on levels of water usage and availability. Conservation is often ignored, even though per capita water use in Canada is second highest in the world (second only to the United States), and some two to four times that in Europe,³⁷ and even though some areas of southern Ontario experienced drought in the late 1990s.³⁸ Some municipalities have adopted bylaws restricting nonessential uses, such as lawn watering, during periods of drought.³⁹

The provision and maintenance of infrastructure for roads, transit, water, and wastewater is primarily a municipal responsibility.⁴⁰ During the 1990s, senior levels of government reduced funding and downloaded responsibility for affordable housing and social services onto municipalities.⁴¹ This occurred at a time when growth put added pressure on municipalities for expanded services, but limited sources of revenue delayed investment and led to a serious situation of deteriorating infrastructure.⁴² Ontario is projected to grow by another 4 million people over the next twenty-five years,⁴³ so infrastructure investment and growth management will be major determinants of Great Lakes water quality into the future.

Despite their importance at the center of many environmental issues affecting the Great Lakes Basin, local governments are all but ignored in the formal agreements establishing the present system of Great Lakes governance. Because of the international status of the Great Lakes, the two national governments have been the main players in negotiating the water quality framework.⁴⁴ Federal, state, and provincial officials are the main participants in governing structures.

Local governments are mentioned in the 1978 Great Lakes Water Quality Agreement only in conjunction with wastewater treatment plant operation,⁴⁵ yet a number of the Agreement's pro-

37. Martin Mittelstaedt, *Water Growing Scarce, Report Says*, TORONTO GLOBE & MAIL, Dec. 4, 2003, at A6 (discussing the Statistics Canada report, human activity, and the environment).

38. See ONTARIO MINISTRY OF NATURAL RESOURCES: LOW WATER, <http://www.mnr.gov.on.ca/mnr/water/p774.html>.

39. See, e.g., Regional Municipality of Waterloo, Ontario, By-law Respecting the Outdoor Use of Water, 03-025 (May 13, 2003).

40. Municipal Act, 2001 S.O., ch. 25, § 11(3).

41. BIG CITY MAYORS' CAUCUS, OUR CITIES, OUR FUTURE: ADDRESSING THE FISCAL IMBALANCE IN CANADA'S CITIES TODAY 32 (2006), <http://www.fcm.ca/english/documents/bcmcfinal.pdf>.

42. *Id.*

43. MINISTRY OF PUBLIC INFRASTRUCTURE RENEWAL, PLACES TO GROW: GROWTH PLAN FOR THE GREATER GOLDEN HORSESHOE 12 (2006) (adopted by Order in Council 1221/2006), <http://www.pir.gov.on.ca/english/growth/gghdocs/FPLAN-ENG-WEB-ALL.pdf>.

44. See generally Boundary Waters Treaty, *supra* note 1; GLWQA, *supra* note 2; Great Lakes Fisheries Convention Act, R.S.C., ch. F-17 (1985).

45. GLWQA, *supra* note 2, annex 3.

visions ultimately rely on municipal cooperation or active engagement for their achievement.

Annex 2, Remedial Action Plans (RAP) and Lakewide Management Plans, requires development and implementation of RAPs in areas of concern, which are localized sites suffering impaired beneficial uses. Setting priorities and implementing the remedial actions require the active support and participation of local governments. In practice, the parties work in collaboration with local governments, industry, and citizens in pursuing RAP clean up.⁴⁶

Annex 3, Control of Phosphorus, requires development and implementation of programs for the construction and operation of municipal wastewater treatment facilities and of non-point source programs and measures, including urban drainage control.⁴⁷

Annex 13, Pollution from Non-Point Sources, targets inputs of contaminants from urban and agricultural drainage, with a focus on land-based activities, watershed management and wetlands threatened by development, all of which are under the primary authority of local governments. Local public health authorities monitor beaches for the presence of pathogens.⁴⁸

Annex 16, Pollution from Contaminated Groundwater, focuses on the control of sources of contamination. Many of these sources are under the control of local governments.⁴⁹

Within Ontario, national commitments in the GLWQA are implemented through a federal-provincial agreement, known as the Canada-Ontario Agreement (COA).⁵⁰ The present agreement, signed in 2002, specifies goals and outcomes, and actions to be taken by both governments over the five-year life of the agreement.⁵¹ A number of the actions relate to RAP implementation and municipal STPs, but municipalities do not participate in COA except in an advisory role.⁵² COA expires in 2007 and is currently

46. See *id.* annex 2.

47. See *id.* annex 3

48. See *id.* annex 13.

49. See *id.* annex 16. For example, landfill sites and septic systems are controlled by local governments.

50. See generally CANADA-ONTARIO AGREEMENT RESPECTING THE GREAT LAKES BASIN ECOSYSTEM (2002), http://www.on.ec.gc.ca/laws/coa/coa_pdf/coa_agreement_e.pdf [hereinafter Canada-Ontario Agreement].

51. See generally *id.*

52. See ENVIRONMENT CANADA, FINAL REPORT: REVIEW OF THE CANADA-ONTARIO AGREEMENT ON THE GREAT LAKES BASIN ECOSYSTEM 17 (2006), <http://www.on.ec.gc.ca/greatlakes/98096EE2-DF3C-48B2-98BD-C3DA8261C35D/COA-FinalReport.pdf> [hereinafter CANADA-ONTARIO FINAL REPORT]. Municipal representatives sit on the Great Lakes Innovation Committee, which advises the COA Management Committee. See generally ENVIRONMENT CANADA, *supra*.

under review.⁵³ One finding of the review is that municipalities accomplish more than the parties in terms of getting work done under COA.⁵⁴ The review recommends broadening the focus to include more issues affecting the ecosystem, including urbanization and land use, and expanding decision-making under COA to include municipalities and others with a direct stake in the success of the effort.⁵⁵

Local governments are demanding a greater role in formal Great Lakes governance. The Great Lakes and St. Lawrence Cities Initiative participated in the United States Great Lakes Regional Collaboration and now participates in the GLWQA review process and seeks to have cities included as “full partners with the other orders of government” in the next Agreement.⁵⁶ Many citizens participating in the GLWQA review identified the need for greater attention to land use and urbanization as a way of making the agreement more effective.⁵⁷

II. IS THERE A ROLE FOR LOCAL GOVERNMENTS IN GREAT LAKES GOVERNANCE?

There are different ways to address Great Lakes water quality problems that stem from actions under local government control. One option would be to amend the GLWQA to include specific objectives for reducing contaminants from STPs and non-point sources, while leaving implementation up to domestic legal mechanisms (such as an expanded COA in Ontario). The RAP provisions could also be amended to redefine the meaning of beneficial use impairments to reflect broader concerns with storm water management and urbanization and to set standards to stimulate adoption of local best practices. While these changes should be made, on their own they are not likely to be entirely successful. The top-down approach of policy-making by senior governments with implementation by local governments has been only partially effective. Unless local governments are included in the goal-setting and decision-making stages, they have the potential to act as spoilers of the plans set down by senior governments. Particularly given

53. See generally ENVIRONMENT CANADA, *supra* note 52.

54. *Id.* at 36.

55. See *id.* at 32, 37.

56. GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE, RESOLUTION 4-2006M 4-6 (2006), http://www.glslcities.org/Final%202006%20Resolutions_complete.pdf; see also GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE: ANNUAL REPORT 2005-2006 8 (2006), http://www.glslcities.org/Annual%20Report%2005_06%206.16.06_online.doc.

57. See SYNTHESIS OF PUBLIC COMMENT, *supra* note 4, at 28.

the large local role in land use, sewage treatment and storm water management, a more comprehensive and inclusive strategy will be necessary to make significant progress.

Creative and adaptive solutions are necessary, and given the variability between municipalities in Ontario, local input is required to find what works best under varying conditions. Active and continuing community support is also necessary to achieve the goals of ecosystem restoration and sustainable development. At the same time, national and provincial policies play out differently in different communities and equity remains a concern. Because both ordinary citizens and traditionally disadvantaged groups generally have more political influence at the local level than with senior governments, local governments play a key, bridging role.

This is not to argue that the top-down approach should be abandoned in favor of an exclusively bottom-up approach. There are advantages to both approaches and including local governments in policy-making as well as implementation should capitalize on the strengths their enhanced role will bring, while continuing to build on the strengths of senior levels of government. A collaborative approach is called for.

Any consideration of how to include local governments in Great Lakes governance requires an assessment of their capacity and the challenges restricting their greater involvement. In the past, Canadian municipal governments in the Great Lakes Basin have been constrained legally, financially, and politically in their ability to fully address the environmental issues facing them. As a result, they were never included as partners in Great Lakes policy formation. As the next section discusses, the powers of local governments have changed significantly in recent years, and as a result, their autonomy and capacity to play a meaningful role has increased. However, there are still important challenges that must be addressed.

A. Legal Powers of Canadian Municipal Governments:

Legally, local governments are the “constitutional orphans of Canada” in that they have no independent constitutional status or powers in Canadian law.⁵⁸ The only mention of “municipal institutions” in the Constitution Act, 1867, is to assign them to provinces

58. Michael Mendelson, *The Emancipation of Cities*, in TORONTO: CONSIDERING SELF-GOVERNMENT 73 (Mary W. Rowe ed., 2000).

as a matter of exclusive provincial legislative authority.⁵⁹ The prevailing reality in Ontario is that municipalities owe their existence, structure, and powers to provincial statutes, and thus are legally “creatures of [province].”⁶⁰ There is no independent right to local self-government recognized by the courts in Canada.⁶¹

The structure of municipal government in Ontario is the result of both historical factors and Canadian federalism. The structure of local government was established prior to Confederation in the first Municipal Act, known as the Baldwin Act of 1849.⁶² Numerous cities and towns were long in existence by then, most established as corporations, but the British colonial government administered local affairs.⁶³ Different studies of the origins of local government in Canada emphasize different contributing factors, including “the influence of democratic reform, the anti-democratic views of elite family compacts, and the requisites of colonial administration and protection from American intrusion.”⁶⁴ These competing factors contributed to the rebellions in Upper and Lower Canada in the 1830s, which led directly to the gradual transfer of powers to local bodies and the passage of the Baldwin Act.⁶⁵ Under the Baldwin Act, a common framework was developed for the incorporation and governance of municipalities by locally elected councils. Discussions about the appropriate structure and role of local governments in Canada have reflected a tension between conflicting views of municipal governments as service providers versus as key democratic institutions.⁶⁶ Over time, democracy increased at the local level, but no concept of home rule ever developed.

There have been several periods of reform since the Baldwin Act. In the late nineteenth century, reformers successfully advo-

59. See Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 92(8) (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Also, matters of a “local or private nature” are assigned to the provinces. See *id.* § 92(16).

60. See *R. v. Greenbaum*, [1993] 1 SCR 674, 687.

61. *East York v. Ontario*, [1997] 34 O.R.3d 789, *aff'd*, [1998] 43 M.P.L.R.2d 155, *leave refused*, [1998] 1 S.C.R. vii. Some provinces now recognize in their legislation the obligation for the provincial government to consult with municipalities on any changes to their powers, duties, other matters of mutual interest. See, e.g., Community Charter, S.B.C., ch. 26, § 276 (2003); Municipal Government Act, S.N.S., ch. 18, §§ 196, 519 (1998).

62. An Act to Provide, by one General Law, for the Erection of Municipal Corporations, and the Establishment of Regulations of Police, in and for the Several Counties, Towns, Townships and Villages in Upper Canada, 1849 12 Victoria, ch. 81 (U.K.).

63. Engin F. Isin, *The Origins of Canadian Municipal Government*, in CANADIAN METROPOLITICS: GOVERNING OUR CITIES 63–64 (James Lightbody ed., 1995).

64. KATHERINE A. GRAHAM & SUSAN D. PHILLIPS, URBAN GOVERNANCE IN CANADA: REPRESENTATION, RESOURCES, AND RESTRUCTURING 45 (1998).

65. Isin, *supra* note 63, at 75.

66. See generally C. RICHARD TINDAL & SUSAN NOBES TINDAL, LOCAL GOVERNMENT IN CANADA 5–7 (5th ed. 2000).

cated the removal of partisan politics from municipal government as a way to eliminate the risk of corruption and achieve efficient administration. Several “structural changes designed to reduce the influence of the politician and to elevate the role of the appointed expert” were made.⁶⁷ Following the Depression, the financial autonomy of municipalities was significantly restricted. Structural changes included the creation of regional governments in the 1950s and 1960s due to rapid urbanization,⁶⁸ and a series of controversial forced amalgamations in the late 1990s that reduced the number and increased the size of many municipalities.⁶⁹ All municipal governments in Ontario are now classified as one of three kinds: single-tier or, within a two-tier arrangement, upper or lower-tier. Single-tier municipalities are usually, but not exclusively, the larger cities, including Toronto, Ottawa, Hamilton, and London. A two-tier arrangement is used for smaller towns within counties and for cities and towns within regions. Following amalgamation, regions are now mostly limited to parts of the “Greater Golden Horseshoe” area around Toronto.⁷⁰

However, the first dramatic shift in legal status and powers came only recently with adoption of the Municipal Act, 2001, which came into force in 2003.⁷¹ For the first time, an Act recognized that municipalities are created by the province to be responsible and accountable *governments*. The approach of the Ontario Legislature from the nineteenth century until enactment of the new statute had been to confer limited authority on municipal governments, usually through detailed statutory prescriptions in the Municipal Act and in other pieces of legislation.⁷² Under the new Act, all municipal governments are, for the first time, given “natural person” powers and broad grants of regulatory authority.⁷³ The broadest powers, intended to be exclusive to local governments, are known

67. *See id.* at 10. Appointed boards removed control over planning, policing, public health, children’s services, and public transit from elected councils. *Id.*

68. Metropolitan Toronto was created in 1953, followed by the creation of twelve other regional governments between 1969 and 1974. *See id.* at 99, 106.

69. Andrew Sancton, *Why Municipal Amalgamations? Halifax, Toronto, Montreal, in CANADA: THE STATE OF THE FEDERATION 2004: MUNICIPAL-FEDERAL-PROVINCIAL RELATIONS IN CANADA* 119 (Young & Leuprecht eds., 2006).

70. *See* Growth Plan Areas, O.Reg. 416/05; *see also* ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, ONTARIO MUNICIPALITIES, http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/3858872_List_of_Ontario_Municipalities.Mar06.2006.pdf (providing a list of Ontario Municipalities with their tier levels).

71. Municipal Act, 2001 S.O., ch. 25 (Can.).

72. *Compare* Municipal Act, R.S.O. 1990, c. M.45 *with* Municipal Act, 2001.

73. *Id.* § 8.

as “spheres of jurisdiction.”⁷⁴ “Specific powers” are those in areas that overlap with areas of provincial regulation and thus are more carefully tailored.⁷⁵

In addition to narrow grants of authority in the earlier legislation, Canadian courts followed “Dillon’s Rule” when interpreting the limits of municipal authority.⁷⁶ This rule provides that a municipality may exercise “only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purposes of the corporation.”⁷⁷ An interventionist role for the courts was justified historically because of the origins of municipal decision-making in the hands of non-elected officials and because of concerns about incompetence, conflicts of interest, and corruption.⁷⁸ Even what appeared to be broad grants of power (e.g., general welfare powers, discussed below) were interpreted so narrowly as to render them meaningless.⁷⁹ This was a very different approach from that taken with other statutory bodies created by the province, which were entitled to considerable deference when acting within their jurisdiction.⁸⁰

The result of narrow legislative grants plus the application of Dillon’s Rule by the courts was that municipal powers were strictly construed and local governments had little flexibility to meet new challenges. Each time new issues arose, municipalities would have to petition the Legislature to add new powers to the legislation.⁸¹ The decisions of local councils were entitled to no deference.⁸² It was only in the 1990s that this situation began to change in the courts, at the same time that new legislation was being developed.⁸³

In the courts, a new approach began to crystallize around a strong dissent from Justice McLachlin in the 1994 Supreme Court of Canada decision on municipal powers, *Shell Canada Products Ltd. v. Vancouver*.⁸⁴ In that case, Justice McLachlin said:

74. *Id.* § 11.

75. *Id.* §§ 24–149.

76. STANLEY M. MAKUCH, NEIL CRAIK & SIGNE B. LEISK, *CANADIAN MUNICIPAL AND PLANNING LAW* 82 (2004).

77. *Id.*

78. *Id.*

79. *Id.* at 83.

80. Marcia Valiante, *Turf War: Municipal Powers, the Regulation of Pesticides and the Hudson Decision*, 11 J. ENVTL. L. & PRAC. 327, 333 (2001).

81. MAKUCH ET AL., *supra* note 76, at 88–89.

82. *Id.*

83. *Id.* at 90–93.

84. *Shell Canada Prod. Ltd. v. Vancouver (City)*, [1994] S.C.R. 231, 244, 248 (McLachlin, J., dissenting).

Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” . . . and confer the powers by reasonable implication. . . . I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy.⁸⁵

This view has since been adopted as the Court’s prevailing view of municipal powers.⁸⁶ In addition, the courts have been called on to interpret the new municipal legislation. In the leading Supreme Court of Canada decision reviewing the new powers, *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary*, Justice Bastarache said:

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities The ‘benevolent’ and “strict” construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced . . . This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.⁸⁷

With respect to the new Ontario legislation, the Ontario Court of Appeal’s view is that:

. . . absent an express direction to the contrary in the *Municipal Act, 2001*, which is not there, the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve

85. *Id.*

86. MAKUCH ET AL., *supra* note 76, at 90–93.

87. *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 493.

the legitimate interests of the municipality and its inhabitants.⁸⁸

In addition to construing municipal powers more broadly, Canadian courts have also taken an ever-narrower view of what constitutes a conflict between municipal bylaws and federal or provincial laws.⁸⁹ The effect is to reduce the likelihood of there being a conflict in areas of overlapping regulation, thereby supporting a wider range of municipal actions.

1. Specific Powers with Respect to the Environment

For many years, local governments in Ontario have had specific powers to regulate aspects of environmental protection. For example, municipalities had the power to pass bylaws to establish, operate, and maintain sewers, drains, sewage works, water systems, waste collection and management systems; to address flood control; to control nuisances; to regulate the discharge of substances to sewers; and to regulate site alteration and placing of fill under the Municipal Act.⁹⁰ Broad powers to regulate the subdivision of land and the siting, density, and use of buildings were also delegated to municipalities under the Planning Act.⁹¹

Under the old municipal legislation, local governments also had what appeared on its face to be residual authority to adopt bylaws to protect the general health and welfare of their inhabitants.⁹² Yet, for many years, courts read this power so narrowly that it was stripped of meaning.⁹³ Then, in 2001, the Supreme Court of Canada upheld a municipal ban on the cosmetic use of pesticides under a similar provision found in the Québec municipal legislation, the Cities and Towns Act.⁹⁴ This led to a flurry of similar

88. *Croplife Canada v. Toronto (City)*, [2005] 75 O.R.3d 373.

89. *See* 114957 *Canada Ltée v. Hudson*, [2001] 2 S.C.R. 241. The test for conflicts with either federal or provincial legislation is now “first, that they both deal with similar subject matters and second, that obeying one necessarily means disobeying the other.” *Id.* at 271.

90. *See* Municipal Act, R.S.O., ch. M.45 (1990).

91. *See* Planning Act, R.S.O., ch. P.13 (1990).

92. *See* Municipal Act, R.S.O. 1990, c. M.45, § 102.

93. *See* *Morrison v. Kingston (City)*, [1937] 4 D.L.R. 740.

94. 114957 *Canada Ltée v. Hudson*, [2001] 2 S.C.R. 241. The Court rejected this traditional interpretation, adopting the view that grants of general welfare authority must be given some meaning:

It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unfore-

bylaws across Québec and in other provinces, including Ontario. The Toronto bylaw was enacted under the new Municipal Act, 2001, which was intended to give municipal governments broader powers to address areas of local concern.⁹⁵ The power to act “for purposes related to the health, safety and well-being” of local inhabitants was limited to a “specific power,” rather than a broad “sphere of jurisdiction,” that is, a more narrow power.⁹⁶ Even so, the Ontario Court of Appeal threw out the old jurisprudence and upheld the pesticide bylaw, refusing also to find any conflict with federal or provincial pesticide legislation.⁹⁷ This decision suggests acceptance of a more expansive power in local governments to address issues that might affect community health and well-being, including environmental protection.

The Municipal Act, 2001 included environmental protection in the category of a “specific power” to reflect the province’s significant role and minimize potential overlap.⁹⁸ Recent changes to the powers of the City of Toronto,⁹⁹ which the province has extended to other municipalities,¹⁰⁰ will change the categorization of powers with respect to “[e]conomic, social and environmental well-being” and “[h]ealth, safety and well-being of persons” from specific to “general powers.”¹⁰¹ This change means that municipal regulation of environmental and health protection will be subject only to specified limitations, which is deliberately intended to expand the flexibility that municipalities will have in legislating to achieve these objectives. How far municipalities will be able to go remains to be seen, as environmental authority will continue to be shared with the province, and local bylaws cannot conflict with provincial laws.¹⁰² The amendments also allow the provincial cabinet to rein in municipal regulation temporarily if it considers it “necessary or desirable in the provincial interest.”¹⁰³

seen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community . . .

Id. at 278 (LeBel, J., concurring).

95. See *supra* text accompanying notes 73–75.

96. Municipal Act, 2001 S.O., § 130.

97. *Croplife Canada v. Toronto (City)*, [2005] 75 O.R. 3d 373.

98. JOHN MASCARIN & CHRISTOPHER J. WILLIAMS, *ONTARIO MUNICIPAL ACT AND COMMENTARY* 16 (2005).

99. See *City of Toronto Act, 2006 S.O.*, ch. 11 (Can.).

100. *An Act to Amend Various Acts in Relation to Municipalities*, S.O. 2006, c. 32.

101. *Id.* § 10(2)(5)–(6).

102. See MASCARIN, *supra* note 98.

103. See *An Act to Amend Various Acts in Relation to Municipalities*, *supra* note 100, at § 451.1.

With respect to protection of water quality, the province has imposed strict province-wide standards for drinking water, following the recommendations of the Walkerton Inquiry.¹⁰⁴ New legislation on source water protection, known as the Clean Water Act, will require watershed-based plans to protect sources of drinking water.¹⁰⁵ Municipalities, along with other local interests, will participate on the committees that develop the plans, but it will be municipalities that will be responsible both for implementing the plans through official plans and zoning bylaws and for enforcement.¹⁰⁶

On planning issues, the trend is not toward more local autonomy but toward increased provincial control over development in order to accommodate growth while attempting to stem the phenomenon of sprawl. For all areas of the province, local and regional planning decisions must now be consistent with policies that, *inter alia*, promote intensification and brownfield redevelopment, link planning for infrastructure and growth, and ensure adoption of storm water management practices that minimize runoff and contaminant loads and increase vegetative and pervious surfaces.¹⁰⁷ Within the large region around Toronto, the province has legislated to allow for the development and implementation of a “growth management plan” and a greenbelt.¹⁰⁸ The Growth Plan for the Greater Golden Horseshoe, finalized in June of 2006, identifies policies that advance compact, mixed use and transit-supportive development within designated settlement area, establishes targets for intensification, and adopts policies for the protection of prime agricultural land and natural systems outside settlement area boundaries.¹⁰⁹ Municipalities within the region will be required to amend their official plans to bring them into conformity with the plan.¹¹⁰ The Greenbelt Plan restricts development in designated rural and agricultural areas and in areas with signifi-

104. See, e.g., Safe Drinking Water Act, 2002 S.O., ch. 32 (Can.). Ontario established a public inquiry following the fatal outbreak of disease from contaminated municipal drinking water in the Town of Walkerton in 2000. See O’CONNOR, *supra* note 12, at 2. New legislation, the Safe Drinking Water Act, 2002, and numerous regulations were adopted to deal with standards for drinking water quality, management of municipal drinking water systems, training of water utility operators, licensing of laboratories, etc. *Id.*

105. Clean Water Act, 2006, S.O. 2006, c. 22.

106. *Id.* § 39, 47.

107. ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, PROVINCIAL POLICY STATEMENT 4, 5, 10, 16 (2005) (adopted by Order in Council 140/2005), available at http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/789108_ppsenglish.pdf.

108. See Places to Grow Act, 2005 S.O., ch. 13 (Can.); Greenbelt Act, 2005 S.O., ch. 1 (Can.).

109. See generally MINISTRY OF PUBLIC INFRASTRUCTURE RENEWAL, *supra* note 43.

110. Places to Grow Act, 2005 S.O., § 12.

cant ecological and hydrological functions.¹¹¹ Again, all municipalities within the coverage area¹¹² must bring their official plans into conformity, but they are free to adopt policies that are more stringent than the provincial policies.¹¹³

2. Specific Powers with Respect to Intergovernmental and International Relations

In Canada, international relations, in the sense of formal diplomacy and treaty making, are primarily a matter for the federal government.¹¹⁴ However, the incorporation of treaty obligations into domestic law requires legislative action by the level of government with jurisdiction over the subject matter of the treaty.¹¹⁵ This requirement means that a treaty signed by the federal government may have to rely on provincial governments to bring the treaty into legal effect. To the extent that municipalities exercise power delegated by provincial governments, they may have a limited role to play in treaty implementation. On the flip side, even though municipalities are invisible in international law, if they act in a way that is inconsistent with Canada's international obligations, Canada could be liable to claims.¹¹⁶

But this is by no means the end of the story. Canadian provinces are very active internationally. They have entered into numerous agreements with states in the United States and participate in many regional, transboundary organizations.¹¹⁷ Municipalities, too, are active internationally. Although they cannot enter into treaties,

111. GREENBELT PLAN 2005 14, 17 (2005) (adopted by Order in Council 208/2005), http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/1701401_greenbelt_plan_final.pdf.

112. The Greenbelt Plan covers a smaller region than the Growth Plan. It links up rural areas within the region with already protected lands along the Niagara Escarpment and the Oak Ridges Moraine. *Id.* at 1.

113. *Id.* at 42.

114. Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 132 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Constitution Act 1867, § 132.

115. A.G. Can. v. A.G. Ont. (Labour Conventions), [1937] A.C. 326 (P.C.).

116. See Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 13–14 (2006) (discussing several cases of trade and investment disputes originating in the actions of local governments).

117. See generally COUNCIL OF GREAT LAKES GOVERNORS, GREAT LAKES CHARTER (1985), <http://www.cglg.org/projects/water/docs/greatlakescharter.pdf>; GREAT LAKES-ST. LAWRENCE RIVER BASIN SUSTAINABLE WATER RESOURCES AGREEMENT (2005), http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf.

they do have authority to enter into agreements with other governments in areas of municipal authority.¹¹⁸

Many Canadian municipalities individually participate in international organizations, such as ICLEI,¹¹⁹ or have taken action to implement international norms, including human rights conventions and climate change targets.¹²⁰ As well, more than 1000 municipalities representing eighty percent of the Canadian population are members of the Federation of Canadian Municipalities (FCM), a national umbrella group.¹²¹ Ontario municipalities are also members of the Association of Municipalities of Ontario (AMO). Both groups represent the interests of local governments in negotiations and partnership arrangements with senior levels of government and with their counterparts internationally.¹²² FCM has a Standing Committee on International Relations,¹²³ has adopted many resolutions on international issues, and has established an International Center for Municipal Development and a Municipal Partnership Program to share expertise and experience with municipalities in developing countries.¹²⁴ FCM also has an ongoing collaborative relationship with the U.S. Conference of Mayors and the National League of Cities.¹²⁵ Larger cities are linked through networks of professional staff on a wide range of issues.¹²⁶ Local

118. Municipal Act, 2001 S.O., ch. 25, §§ 20–23.

119. See generally ICLEI: LOCAL GOVERNMENTS FOR SUSTAINABILITY, <http://www.iclei.org>. ICLEI has nineteen Canadian members, many of which are in the Great Lakes Basin. Through ICLEI, these municipalities pursue sustainability management and participate in climate change initiatives and the North American Green Purchasing Initiative, a government procurement program that supports environmentally friendly production. *Id.*

120. For example, the City of Toronto established the “Toronto Atmospheric Fund” to provide limited financing of initiatives that combat climate change and improve air quality. CITY OF TORONTO, TORONTO ATMOSPHERIC FUND, <http://www.toronto.ca/taf/index.htm>. Funded projects and educational efforts have related to energy conservation, alternative energy, car sharing, green roofs, and green tourism. *Id.* For a number of examples from the United States, see Shanna Singh, Note, *Brandeis’s Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT’L L. REV. 537 (2005). For a discussion of the different roles that local governments play internationally, see Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875 (2006); Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L L.J. 263 (2006).

121. See ABOUT FCM, <http://www.fcm.ca/english/about/about.html>.

122. See MARY LOUISE MCALLISTER, GOVERNING OURSELVES? THE POLITICS OF CANADIAN COMMUNITIES 124–25 (2004) (discussing FCM and provincial associations, of which AMO is one).

123. FCM, STANDING COMMITTEES, www.fcm.ca/english/policy/internationalsc.html.

124. FCM, INTERNATIONAL CENTRE FOR MUNICIPAL DEVELOPMENT, www.international.fcm.ca.

125. FCM, POLICY DEVELOPMENT BOOK 30 (2006), www.fcm.ca/english/policy/pdb.pdf.

126. See CANADIAN ASSOCIATION OF MUNICIPAL ADMINISTRATORS, www.camacam.ca.

governments in the Great Lakes region participate in the Great Lakes and St. Lawrence Cities Initiative.¹²⁷

B. Financial Powers of Canadian Municipal Governments

Despite growing legal authority and experience in environmental policy development and implementation, Canadian municipal governments are not financially self-sufficient. Because of their lack of independent constitutional status, municipalities depend on the province to delegate the power to raise funds for their activities.¹²⁸ By statute, Ontario limits municipal governments to raising money through property taxes and development charges,¹²⁹ and through licensing and user fees.¹³⁰ Municipal governments cannot budget for a deficit in annual operating expenses,¹³¹ so they must raise all the funds required to pay their obligations each year. The province also places restrictions on capital borrowing.¹³² Debt limits are set out in regulations.¹³³

Municipal sources of revenue tend to grow more slowly than income or economic activity, and there is significant political pressure not to increase these sources, but at the same time, expenses have grown. "As cities grow, new infrastructure demands and quality service expectations force municipalities to make capital and operating expenditures without capturing an equitable share of the tax revenue benefits that accompany such growth: those benefits are retained by the provincial/territorial and federal governments."¹³⁴ For example, from 1999 to 2003, federal and provincial revenues grew by twelve percent and thirteen percent

127. See GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE, www.glsicities.org.

128. *Id.* at 20–21. Under the Canadian Constitution, provinces themselves are limited to raising revenues by way of "direct" taxation, and thus can only delegate to the extent of this power. Ontario Home Builders' Ass'n v. York Bd. of Educ., [1996] 2 S.C.R. 929.

129. See Development Charges Act, 1997 S.O., ch. 27 (Can.). Development charges are fees local governments are entitled to collect from the developers to pay for the capital costs of certain new services and facilities necessitated by new development. The fees are then passed on to the new owners. *Id.*; see also, Municipal Act, 2001, S.O. 2001, c. 25, §§ 306–26 (provisions related to municipal taxation).

130. See Ontario Private Campground Ass'n v. Harvey, [1997] 39 M.P.L.R.3d 1. User fees are limited to the amount necessary to defray the costs of the program and are not used to raise revenue. Otherwise, the fees would be considered a tax and would be ultra vires. *Id.*; see also, Municipal Act, 2001, §§ 390–400 (provisions related to fees and charges).

131. See Municipal Act, 2001 S.O., ch. 25, § 407(1).

132. *Id.*

133. See Debt and Financial Obligation Limits Regulation, O.Reg. 403/02 (Can.).

134. BIG CITY MAYORS' CAUCUS, *supra* note 41, at 9.

respectively, but municipal revenues grew by only eight percent.¹³⁵ The gap is made up by conditional and unconditional grants and transfers from other levels of government, primarily from the provincial government.¹³⁶

During the 1990s, a Conservative government was elected in Ontario on a platform known as the “Common Sense Revolution.”¹³⁷ One priority of the new government was the rationalization of services as between the province and municipalities.¹³⁸ Responsibilities for some services were shifted, accompanied by changes in the financing of those services. Most importantly, education financing from residential property taxes raised by local school boards was reduced and replaced with a combination of provincial transfers and property taxes.¹³⁹ In turn, municipalities were given responsibility for social assistance, emergency services, and infrastructure, so they could raise property taxes and the province could reduce transfers for these purposes, without the local residential ratepayers seeing any difference in their local tax bill.¹⁴⁰ The result has been a significant reduction in provincial transfers to municipalities, and even greater reliance by local governments on property taxes and user fees for their revenues, from sixty-eight percent to seventy-six percent.¹⁴¹ Heavy reliance on the property tax and the particular system used in Ontario for assessing value and levying property taxes means “an increase in a municipality’s spending has an overt and immediate impact on the individual taxpayer.”¹⁴² This heightens political sensitivity to any increase in spending and results in strong pressure to reduce or freeze tax rates. The effect is to push local politicians toward increasing the assessment base to increase their revenues, which motivates their “support [for] planning decisions that have a positive effect on the overall balance of

135. FEDERATION OF CANADA MUNICIPALITIES, POLICY STATEMENT ON MUNICIPAL FINANCE AND INTERGOVERNMENTAL ARRANGEMENTS 2006–2007, <http://www.fcm.ca/english/policy/munfin.html>.

136. *Id.* at 5.

137. David Siegel, *Recent Changes in Provincial-Municipal Relations in Ontario: A New Era or a Missed Opportunity?*, in CANADA: THE STATE OF THE FEDERATION 2004: MUNICIPAL-FEDERAL-PROVINCIAL RELATIONS IN CANADA, *supra* note 69, at 181–97.

138. *Id.*

139. *Id.*

140. Melville L. McMillan, *Municipal Relations with the Federal and Provincial Governments: A Fiscal Perspective*, in CANADA: THE STATE OF THE FEDERATION 2004: MUNICIPAL-FEDERAL-PROVINCIAL RELATIONS IN CANADA, *supra* note 69, at 54–55.

141. *Id.*

142. MAKUCH, *supra* note 76, at 35. Under the current Part IX of the Municipal Act, 2001, tax increases for commercial, industrial, and multi-residential properties are capped, so any significant increase in local spending would have to come from increases in rates paid by single-family residential taxpayers. Municipal Act, R.S.O., ch. 25, §§ 327–38 (2001) (Can.).

assessment."¹⁴³ Another result has been a neglect of funding for the maintenance of infrastructure, the result of chronic underinvestment by all levels of government.¹⁴⁴

As a result of rapid growth and greater responsibilities without greater fiscal authority, Canadian municipalities are facing a situation of "fiscal unsustainability."¹⁴⁵ This

has at least two significant negative consequences for maintaining urban place quality. First, it has led to a sizable "municipal infrastructure deficit," as needed capital investments in transit, roads, telecommunications networks, and the like are postponed or delayed, hindering cities in their efforts to meet the competitiveness challenges of globalization Second, it creates incentives to ecologically harmful sprawl.¹⁴⁶

Expenditures by local governments are limited to spending for "municipal purposes."¹⁴⁷ Spending associated with specific powers would clearly qualify. There are some restrictions, including a restriction that a municipality cannot directly or indirectly assist a business through the granting of "bonuses," such as giving or lending money, guaranteeing borrowing, leasing or selling municipal property at below market value, or giving a total or partial exemption from levies or fees, to induce the business to locate or undertake certain kinds of development.¹⁴⁸ However, some limited exceptions are allowed, for example, if a development will involve either restoration of a heritage property or redevelopment of a brownfield site.¹⁴⁹ Although not formally recognized in the Ontario legislation, some municipalities have set up programs that provide

143. MAKUCH, *supra* note 76, at 35. This political resistance to spending has spilled over into resistance to capital borrowing by Ontario municipalities, so that their indebtedness is well below the provincial limits. See Enid Slack, *The Road to Financial Self-Sufficiency for Toronto: What are the Impediments and How Can They be Overcome?*, in TORONTO: CONSIDERING SELF GOVERNMENT, *supra* note 58, at 62.

144. EXTERNAL ADVISORY COMMITTEE ON CITIES AND COMMUNITIES, *supra* note 33, at 25–26.

145. NEIL BRADFORD, *WHY CITIES MATTER: POLICY RESEARCH PERSPECTIVES FOR CANADA 11* (2002).

146. *Id.*

147. Municipal Act, 2001 S.O., ch. 25, § 407(2).

148. *Id.* at § 106.

149. See Ontario Heritage Act, R.S.O., ch. O.18, § 39 (1990); Planning Act, R.S.O., ch. P.13, § 28. Municipalities are also allowed to cancel, reduce or refund property taxes for land being rehabilitated or for heritage properties being renovated, but not for any other purpose. See Municipal Act, 2001 S.O., ch. 25, § 106.

tax increment equivalent grants to provide an incentive for brown-field redevelopment.¹⁵⁰

Fees and charges are another source of revenue for municipalities. These sources also have the potential to influence behavior toward greater conservation, however, as the regulations restrict the amount of such charges to the cost of providing a service or system.¹⁵¹ For waste, water, and sewage, charges have not been set at rates that covered the full operating, capital, and replacement costs, contributing to their underfunding.¹⁵² New legislation that has been adopted, but is not yet in force, will allow municipalities to recover the full costs of providing such services, including costs for source water protection, operation, financing, renewal, and improvements, from those using the systems.¹⁵³

C. Political Influence of Canadian Municipal Governments

In the last few years, there has been a major shift in the political importance of urban issues and the influence of local governments, particularly of Canada's large cities. Throughout the nineteenth and twentieth centuries, the dominant public policy discourses treated the national level as the important scale of political relevance, resulting in a "systematic downplaying of the significance of cities as relevant policy spaces."¹⁵⁴

Nearly eighty percent of Canadians now live in urban areas, and these areas are growing.¹⁵⁵ The responsibilities of municipal governments have changed dramatically:

When the *Baldwin Act* was enacted, the principal local government issues were drunkenness and profanity, the running of cattle or poultry in public places, itinerant salesmen, the repair and maintenance of local roads, and the prevention or abatement of charivaries, noises and nuisances. Today, municipalities own and operate hospitals, welfare systems, waste

150. See ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, MUNICIPAL FINANCIAL TOOLS FOR PLANNING AND DEVELOPMENT 9–11 (2000), http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/2566879_financialtools_e.pdf.

151. Fees and Charges Regulation, O.Reg. 244/02 (Can.).

152. EXTERNAL ADVISORY COMMITTEE ON CITIES AND COMMUNITIES, *supra* note 33, at 25–26.

153. See Sustainable Water and Sewage Systems Act, 2002 S.O., ch. 29 (Can.).

154. BRADFORD, *supra* note 145, at 14.

155. EXTERNAL ADVISORY COMMITTEE ON CITIES AND COMMUNITIES, *supra* note 33, at 2. There is a flow of people from rural to urban areas and from urban to ex-urban areas, but most urban growth is due to immigration from outside Canada. *Id.* at 5. Almost ninety-four percent of recent immigrants live in large urban areas. *Id.*

treatment plants, airports, public housing, hydroelectric plants, telecommunication systems, forensic laboratories, AIDS hospices, homeless shelters, hot lunch programs for school children, economic development, toxic waste remediation and fiber optic transmission. These duties and responsibilities are evolving in the face of legislation and structures that have not varied from a model anchored to the needs of the mid-1800's.¹⁵⁶

Also, the responsibilities of all levels of government overlap. Under the Canadian federal system, the federal government cannot interfere with municipal institutions or influence local governments directly, other than through its "spending power."¹⁵⁷ However, because of the structure of Canadian society, numerous federal programs touch on urban issues and affect local communities.

Senior governments have come to recognize that cities are the "engines of the economy" in a globalized world and that Canada's ability to compete internationally depends on very localized "quality of place" factors such as availability of skilled labor, infrastructure, cultural resources, educational, health and social services, security, and environmental quality.¹⁵⁸ The performance of urban areas is of increasing significance to the federal government in particular. A new arrangement with local governments is supported by the work of a number of think tanks and influential scholars.¹⁵⁹

156. DONALD LIDSTONE, A COMPARISON OF NEW AND PROPOSED MUNICIPAL ACTS OF THE PROVINCES: REVENUES, FINANCIAL POWERS AND RESOURCES 1-2 (2001), http://www.canadacities.ca/pdf/donald_lidstone.pdf.

157. Loleen Berdahl, *The Federal Urban Role and Federal-Municipal Relations, in CANADA: THE STATE OF THE FEDERATION 2004: MUNICIPAL-FEDERAL-PROVINCIAL RELATIONS IN CANADA*, *supra* note 69, at 27-30.

158. For example, growth rates for employment are highest in the country's biggest cities. From 2001 to 2004, more than seventy percent of all new jobs in Canada were created within ten large metropolitan areas. FEDERATION OF CANADIAN MUNICIPALITIES, BUILDING PROSPERITY FROM THE GROUND UP: RESTORING MUNICIPAL FISCAL BALANCE 12 (2006), <http://www.fcm.ca/English/media/backgrounders/fiscalim.pdf>. Three cities alone accounted for nearly half of all employment growth in the country: Vancouver, Toronto, and Montreal. *Id.* Competitiveness depends on the existence of geographically based clusters that attract talent and "accelerate the pace of innovation, attract investment, stimulate job creation and generate wealth." *Id.*

159. See Robert Young & Christian Leuprecht, *Introduction: New Work, Background Themes, and Future Research about Municipal-Federal-Provincial Relations in Canada, in CANADA: THE STATE OF THE FEDERATION 2004: MUNICIPAL-FEDERAL-PROVINCIAL RELATIONS IN CANADA*, *supra* note 69, at 14.

Under the Liberal governments of Prime Ministers Jean Chretien and Paul Martin, several initiatives were launched that together comprise a "New Deal for Cities and Communities."¹⁶⁰ Most of the focus of the New Deal has been on providing expanded funding for infrastructure.¹⁶¹ As part of the New Deal, the federal government has entered into agreements to share revenue from the federal gasoline tax with municipalities, in Ontario providing \$1865.5 million in new funds to local governments over five years, conditional on the money being used for investment in "environmentally sustainable municipal infrastructure."¹⁶² The federal government has also agreed to a 100% rebate of Goods and Services Tax payments by municipal governments, the equivalent of \$7 billion over ten years.¹⁶³ A new federal department was established that now provides grants directed toward local investment in infrastructure development and renewal.¹⁶⁴ The Ontario government has also added a new ministry, agencies, and programs to address the infrastructure deficit.¹⁶⁵

Aside from the new grants, most of which are conditional, the provincial government has not moved to change the taxing power

160. CANADA DEPARTMENT OF FINANCE, A NEW DEAL FOR CANADA'S COMMUNITIES, www.fin.gc.ca/budget05/pamph/pacome.htm.

161. CANADA ET AL., AGREEMENT FOR THE TRANSFER OF FEDERAL GAS TAX REVENUES UNDER THE NEW DEAL FOR CITIES AND COMMUNITIES 7 (2005), http://www.infrastructure.gc.ca/communities-collectivites/alt_formats/pdf/gt_can_on_e.pdf. To qualify for funding, investments must meet one of the objectives of reduced greenhouse gas emission, cleaner water or cleaner air. *Id.*

162. *Id.*

163. GOVERNMENT OF CANADA, BUDGET 2005: A NEW DEAL FOR CANADA'S COMMUNITIES, <http://www.fin.gc.ca/budget05/pdf/pacome.pdf>.

164. The new department is known as Infrastructure Canada and includes a Cities and Communities Branch. Funding for infrastructure comes from several programs: the Canada Strategic Infrastructure Fund (\$6 billion), the Border Infrastructure Fund (\$600 million), the Municipal Rural Infrastructure Program (\$3.2 billion), and the Infrastructure Canada Program (\$2.05 billion), which includes funding for "green" municipal infrastructure. INFRASTRUCTURE PROGRAMS, http://www.infrastructure.gc.ca/ip-pi/index_e.shtml.

165. The new ministry is known as the Ministry of Public Infrastructure Renewal. *See* MINISTRY OF PUBLIC INFRASTRUCTURE RENEWAL, <http://www.pir.gov.on.ca/english/infrastructure/index.html>. Also, a Crown corporation known as Infrastructure Ontario was established in November 2005 to manage infrastructure projects using alternative financing methods. *See* INFRASTRUCTURE ONTARIO, ABOUT US, <http://www.infrastructureontario.ca/en/about/index.asp>. In May 2005, a new program, ReNew Ontario, was set up to provide \$30 billion to municipalities over five years in order to repair the "neglect of the past" and build for future growth. *See* RENEW ONTARIO, THE CHALLENGE, <http://www.pir.gov.on.ca/english/infrastructure/solutions.htm>. Ontario also contributes to federal-provincial programs, including the Canada-Ontario Municipal Rural Infrastructure Fund for small and medium sized municipalities and the Canada Strategic Infrastructure Fund. *See* CANADA-ONTARIO MUNICIPAL RURAL INFRASTRUCTURE FUND, INFRASTRUCTURE, <http://www.comrif.ca/eng/default.asp>.

of municipal governments in any significant way.¹⁶⁶ The Liberal government elected in late 2004 has commenced a review of the provincial-municipal relationship that will include a review of funding, service delivery, and service governance, expected to be complete in 2008.¹⁶⁷ In the meantime, the proposed changes to the City of Toronto Act and the Municipal Act, 2001, discussed above, add only incrementally to the ability of local governments to raise revenue from new sources. These powers are still quite limited compared to the powers of municipalities in other countries.¹⁶⁸ This is likely to mean that even with expanded legal powers, the practical reality for many municipal governments in the short term will be a continuation of the status quo.¹⁶⁹

D. Summary

Canadian municipalities are demanding respect and a new political role that requires collaboration, partnership, networking, consultation, “place based policy” in substance, and financial autonomy. Local governments are gaining powers to make and implement environmental policy, increased financial autonomy as a result of strong political influence at the national and provincial levels, and experience with international partners. More could be done to secure their autonomy, but even now, these changes suggest that local governments are well positioned to play an expanded role in Great Lakes policy formation and implementation.

Nevertheless, local governments in Ontario remain “creatures of the province,”¹⁷⁰ subject to changes in their structure, powers, and responsibilities imposed from outside. The trend has been for the province to increase the size of municipalities through amalgamation—even against the will of residents—in an effort to achieve greater efficiency, and to add both new powers and new

166. MASCARIN & WILLIAMS, *supra* note 98, at 50. The Ontario government has adopted several new regulations to provide more flexibility to municipalities in terms of eligible investments. See O.Reg.s. 651/05–655/05.

167. See ONTARIO MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, PROVINCIAL-MUNICIPAL FISCAL AND SERVICE DELIVERY REVIEW: ENHANCING THE PROVINCIAL-MUNICIPAL PARTNERSHIP, http://www.mah.gov.on.ca/userfiles/HTML/nts_1_27603_1.html.

168. MAKUCH ET AL., *supra* note 76, at 79 (discussing the U.S. “home rule”).

169. See Siegel, *supra* note 138, at 194–95. The focus of many municipalities and their associations has been on the financial issues, the so-called “fiscal imbalance,” rather than on their expanding authority. The persistence of subordinate behavior by municipalities and paternalistic behavior by the province appears not to have changed yet. *Id.*

170. R. v. Greenbaum, (1993), 14 M.P.L.R.2d 12.

responsibilities. Even in the new municipal legislation, which expands local powers, the province retains residual authority to check the actions of local governments if provincial interests are at stake. In addition, decentralization of authority to local governments has been matched by greater centralization on the specific issue of growth management. And, there is still a reluctance to make major adjustments to the revenue-raising abilities of local governments.

III. CHALLENGES TO EXPANDED INVOLVEMENT OF LOCAL GOVERNMENTS IN GREAT LAKES POLICY MAKING

Expanding the role of local governments in Great Lakes policy-making would require tackling a number of challenging issues. These include issues of scale, fragmentation, resources, and commitment.

Some problems affecting Great Lakes water quality are undoubtedly local, but many transcend the local to affect a region or beyond. While individual local governments play a leading role in the former, they lack the authority to address region-wide problems in any comprehensive way, despite having an interest in and influence over what happens at that level. Thus, a challenge for an expanded local government role is what system and structures can be put in place to address region-wide problems. Ontario already uses a number of regional scale structures to address this challenge. For example, two-tier governments allow for the scaling up of issues affecting a number of local governments, including transportation and waste management.¹⁷¹ For broader scale concerns, the province has established inter-municipal special purpose agencies, such as the Greater Toronto Transportation Agency.¹⁷² There is also a long history of municipal involvement in watershed-based Conservation Authorities that could form the framework for this level of water quality policy-making. Common policies for watersheds are developed at this level and implemented through local planning decisions.¹⁷³ A similar structure will be used to protect drinking water sources: watershed-based source water protection committees will be required to address impacts on the Great Lakes in their assessments and plans, and local municipalities will be re-

171. Municipal Act 2001, S.O. 2001, c. 25, § 11.

172. Greater Toronto Transportation Authority Act, S.O. 2006, ch. 16. This new agency was established earlier this year to address transportation planning and coordination in the Greater Toronto and Hamilton area. *Id.*

173. CONSERVATION AUTHORITIES OF ONTARIO: MANDATE, www.conservation-ontario.on.ca/about/Mandate.html.

quired to implement Great Lakes policies in their planning instruments and decisions. This system would serve as a useful model for a structure to coordinate multi-level involvement in Great Lakes protection.

One of the risks of scaling down policy-making to the local level is that the cumulative effect of the policies that are adopted might not support the vision adopted at the binational level. The point of including more local involvement is to ensure that local governments recognize that their actions can undermine these larger objectives and to get them to take responsibility for change, while at the same time allowing innovative, community-based solutions to come forward. Thus, an important challenge is how to link local efforts into the larger enterprise of protection of Great Lakes water quality so that all participants accept the goal and work toward it in a coordinated way. Rather than simply shift to a "bottom-up" approach, Great Lakes governance must become "multi-level" to become more effective. Coordination could be enhanced by including municipal representatives in the policy-making negotiations, most easily through the inclusion of municipal associations such as AMO, FCM, and the Great Lakes and St. Lawrence Cities Initiative. In Ontario, coordination in the implementation of provincial policies is already done through legislated requirements for conformity between provincial and local policies and actions, through provincial standards, and through provincial approval mechanisms.¹⁷⁴ Intergovernmental agreements and partnerships, such as COA, are commonly used in Canada and could be a vehicle for effective coordination if municipal governments are included.

There is great variability between Ontario municipalities in terms of their size, the nature of their economic base, development pressure, social structures, and environmental problems. There is also variability in local government capacity to play a meaningful role in policy development and implementation, in terms of access to funds, expertise, research, training, monitoring, and analysis. Associations, such as AMO and FCM, play an important role in providing their members with access to information and training, and communications technology allows for the rapid spread of ideas and experience from all around the world. However, senior levels of government are still required to help out with the resource deficit, especially that of smaller municipalities. There has been a pointed shift in senior level government officials' support for infrastructure, but this support is too narrow. Until municipali-

174. See *supra* text accompanying notes 84–96.

ties gain greater fiscal autonomy, resource constraints will hamper their active participation in Great Lakes environmental protection.

One of the most difficult challenges is the variability between local governments in their commitment to action on Great Lakes clean-up. Some municipalities have been able to advance environmental protection significantly even with limited powers and limited access to funding, while others have not bothered to do more than the minimum required by senior levels of government. Scholars are divided on the potential of local governments to provide a forum for social movements, innovative policies, and new relationships in the wake of economic globalization.¹⁷⁵ What is clear is that local politics in many places continues to be dominated by traditional economic and property interests, so that while innovations are possible, there is often resistance.¹⁷⁶ Overcoming that resistance depends on motivated leaders both in and out of government, who are able to demonstrate political courage and inspire visionary thinking. Networking with other municipalities and civil society groups and strong support from senior governments can help to inspire change and deepen cooperation and local commitment to Great Lakes protection.

CONCLUSION

It is clear that no single order of government or sector can resolve the problems facing the Great Lakes. A multi-level system that includes all governments, the private sector, and civil society already exists and should be expanded. More inclusive policy-making will help ensure more comprehensive and innovative policies, more effective implementation, and greater accountability. Recognition of the importance of local governments in the protection of water quality should begin with the procedures and substantive provisions of the GLWQA and build on existing structures.

An expanded role for local governments within the GLWQA at this time fits with legal and political trends occurring in Canada. Municipalities have growing autonomy, interest, and capacity, although there is much variability between individual local governments. A more inclusive policy role will only be possible if a

175. Compare Caroline Andrew, *Globalization and Local Action*, in *THE POLITICS OF THE CITY: A CANADIAN PERSPECTIVE* 139, 141 (Timothy L. Thomas ed., 1997), with Robert R.M. Verchick, *Why the Global Environment Needs Local Government: Lessons from the Johannesburg Summit*, 35 *URB. LAW.* 471, 474-481 (2003).

176. Andrew, *supra* note 175, at 147.

number of challenges can be met. Meeting these challenges will not necessarily be easy, but would be worth the effort.

