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Canadian Chair,

International Joint Commission

Opening Address

Boundary Waters Treaty Centennial Symposium



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I would like to thank and congratulate the students of the Wayne Law Review, Wayne State University Law School and the University of Windsor Law School, for organizing this symposium on the 100th Anniversary of the the Boundary Waters Treaty.

This is one of the first “official” events to mark that 100th Anniversary of the signing of the Treaty. You can see why all six IJC Commissioners wanted to be here at Wayne State – the three from Canada, three from the US, as well as the Secretaries of the Commission for this symposium.

In the early 1900’s differences about the sharing of boundary fresh waters between Canada and the United States were increasingly a source of tension between the two countries.

Water and water rights have always been important issues in the relationship between what was then British North America (now Canada) and the United States since the American War of Independence.

The Definitive Treaty of Peace, concluded in 1783 between Great Britain and the new United States of America, recognized that each party had jurisdiction over the fresh waters on its own side of what is now the Canada-US border. During the following century, Great Britain and the United States signed several treaties which included provisions relating to the use of water flowing along or across that boundary, particularly for navigation.

By the end of the 19th Century difficulties were increasingly encountered about how to apportion the boundary waters for uses like navigation, irrigation, as well as municipal, sanitary and industrial purposes.

This led to resolutions unanimously accepted by the United States, Mexican and Canadian participants at International Irrigation Congresses in Denver in 1894 and in Albuquerque in 1895. These non-governmental meetings recommended to the United States I quote “*the appointment of an international commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character.*”¹

A decade later in 1905, an International Waterways Commission was set up with members appointed from Canada and the US as an investigative body without authority to act on or

enforce its recommendations. Mexico and the US also established their own similar but separate Commission. However, within a year of its founding, the Waterways Commission recommended the establishment of principles to govern the use of the Canada/US boundary waters and the creation of a permanent Commission with wider powers.

Prompted by these recommendations, negotiations for a treaty opened in Washington in 1907. Since Canada (then the Dominion of Canada) did not have independent diplomatic status, negotiations were formally between British Ambassador to the US-- James Bryce for Canada and Secretary of State Elihu Root for the US. However, in fact, these negotiations had the close attention of Canadian Prime Minister Sir Wilfrid Laurier². The actual negotiations for Canada were carried out by a lawyer he appointed—George—later Sir George Gibbons, from London, Ontario. After protracted and sometimes difficult discussions, the negotiations were concluded successfully in Washington on January 11, 1909 with the signature of the Boundary Waters Treaty. It provided, in particular, for the establishment of the International Joint Commission (IJC). The IJC held its first meeting in Washington on January 10, 1912 after ratification by the US and Great Britain acting on behalf of Canada.

The Treaty itself dealt specifically with only two disputes -- one involving the St. Mary and Milk Rivers between Southern Alberta and Northern Montana; and the other involving the Niagara River between Ontario and New York State. However, it did provide the framework—the principles - for resolving other cases and preventing future disputes.

The treaty is a remarkable document. It is surprisingly well written in concise and approachable language. Commissioner Trépanier will be discussing the Treaty and environmental international law this afternoon. The Treaty is quite forward-thinking for an early 20th Century document.

I say this because it is often cited by others as the first environmental treaty in history. This is because of its Article IV. It reads in part, “*the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on*

¹ IJC Handbook: Origin, Mandate, Functions, Structure, Procedures, Policies, Practices and Responsibilities, Canadian Section, IJC, 2000.

² See “Sir George Gibbons and the Boundary Waters Treaty of 1909” Alan O. Gibbons, Canadian Historical Review, No. XXXIV, No. 2, June 1953, University of Toronto Press

either side to the injury of health or property of the other.”

The Treaty does not provide a specific mechanism for applying these words. However, there are provisions for the overall management of the boundary waters.

Let me now say something about what the Commission does. I do so as an introduction to a more detailed discussion by other presenters on exactly what the Treaty does say. For example, Commissioner Olson will talk about the Treaty in the context of Canada/US relations.

The IJC responds to formal requests from the two governments, called references. It does so in the form of non-binding, advisory reports. So basically there are two forms of reference. The first calls on the IJC to produce a report on how to handle a specific issue. The second involves permanent references written into other agreements, particularly the Great Lakes Water Quality Agreement. In it, the IJC, by reference is required to monitor and report publicly on the two national governments' progress in carrying out the agreement both to them and to the public.

Clause 9 of the Treaty on references is quite broadly worded so that the two governments can give the IJC references on almost any subject. It is not limited to water.

Also, the IJC has a quasi-judicial role. The Commission is required to decide on applications to build works in the fresh waters along the boundary. It has full authority to decide against an application, or to decide to issue an order approving it. It can issue such an order with conditions attached. This is what almost always has happened. Generally, the day-to-day monitoring to ensure the carrying out of these conditions is handled by a board appointed by the IJC.

The Treaty has been a living document respected by the governments and applied for almost 100 years by the Commission.

The Treaty establishes a framework for the Commission's role on references. This process is characterized by several elements. One is decision by consensus when the Commission responds to a reference with a report. This consensus decision is based on a scientific and factual report from a study board appointed by the IJC specifically for this purpose. Other elements are public consultation, objectivity and flexibility.

There are only two recorded cases in 100 years where a decision was not reached by a consensus of all six commissioners (actually, here, consensus has meant unanimity).

Although the two countries are asymmetrical, with the US having ten times the population and size of economy as compared to Canada, the Treaty is not. It gives no more weight to US Commissioners in decision making, in spite of this asymmetrical relationship, than to the Canadian Commissioners.

The Treaty and the Commission operate on the basis of equality. The Commissioners are appointed by the highest level of the executive branch in each country. But once appointed they are not representatives of the governments that appointed them. They are not diplomats. They are independent and serve at arms length. However, they and their staff are in close contact with governments.

Once decisions are taken on applications for orders they are final and not subject to appeal to courts or the governments, a topic on which Commissioner Trépanier will elaborate on during his remarks.

The IJC can re-open, revise or rescind an order of its own accord or at the request of the original applicants for the order or others. Creating this quasi-judicial role in the Treaty was a remarkable yielding of sovereignty in 1909. One can ask the question: Would it be possible to have such a clause if the Treaty were to be negotiated for the first time today?

Responding to a reference entitled, “The IJC in the 21st Century”, the Commission proposed to review and if necessary revise or update its existing orders. It has done this for the St. Croix. It is on the home stretch of doing this for the St. Lawrence River and Lake Ontario by reviewing an order originally made in 1958 for the building of the Moses-Saunders Dam. This facilitated the building of the Seaway. The order regulates to some extent the levels of Lake Ontario and the St. Lawrence. The IJC has a review underway for the Upper Lakes, upstream from Niagara, which are regulated in part by an order made in 1914 approving the building and operation of the works at the Sault.

Article XII of the Treaty says, “... in any proceeding, or inquiry, or matter within its jurisdiction under this treaty... all parties interested therein shall be given convenient opportunity to be heard...” The Commission has always emphasized the importance of public consultation and advice. As I've said, the reports responding to references are advisory only. The IJC makes these reports to governments but also issues them directly to the public. I am told that, as a result, a high proportion of its recommendations over almost a 100 years have been acted on by the governments.

Equal numbers of US and Canadian officials and others appointed by the IJC to its scientific and study boards meet on neutral ground, in their personal and professional capacities. This creates a neutral fact and science base for the IJC's response to references.

The Treaty requires that Commissioners seek solutions in the common interest of the two nations. To that end, the treaty says Commissioners on appointment "make and subscribe a solemn declaration in writing" that they "will faithfully and impartially perform the duties imposed" under the treaty.

The work of the IJC, using the elements I've mentioned, often has kept difficult issues from the diplomatic agenda of the governments. They have helped to ensure the continued health of the Can/US transboundary relationship.

The Commission noted in that report to the governments called *"The IJC in the 21st Century", the 21st century will bring potentially disruptive change in the environmental conditions of the U.S.-Canada boundary area.]. Old problems will intensify and new problems will appear. The Commission can best assist the parties in meeting the new transboundary challenges that will inevitably arise by concentrating on its core mission under the treaty: preventing and resolving disputes and addressing issues of common concern along the border."*³

Therefore, since 1998 and arising out of that 1997 report, the Commission has been developing ways to encourage a better integrated, more participatory, ecosystem-based approach to issues in transboundary water basins under its "International Watersheds Initiative."

However, it is important to note that this approach does not replace the reference and order-making functions of the Commission because they are stipulated by the Treaty. [In the locations where watershed boards have been implemented they have combined existing "pollution boards" with existing "engineering boards" -- that is control boards.]

An aspect of this is the developing of hydrologic and geographic databases in which the Commission works to combine information collected

on each side of the border into a seamless, coherent and integrated whole.

Secretary Clamen will present the paper by US Commission Chair Irene Brooks was to give that talks about the IWI in the concluding session of this conference, which will be moderated by Canadian Commissioner Dr. Jack Blaney.

You can see why over the next year the Commission will be celebrating the 100th Anniversary of the Boundary Waters Treaty. We think a century of successful Canada/US cooperation protecting our shared boundary fresh waters is worth celebrating.

A major event will mark the issuing by Canada Post of a Boundary Waters 100 stamp at a ceremony in Niagara Falls, Ontario this coming June 12th.

Also, following on June 13th at the invitation of the Niagara 10 Mayors there will be a major public ceremony held on the centre of the Rainbow Bridge connecting Niagara Falls, Ontario and Niagara Falls, New York. Invited will be the Canadian and American ambassadors, The President and the Prime Minister and their Foreign Ministers, as well as the Premiers of Ontario and Québec and the Governor of New York.

To conclude, last month January 11 was the 100th anniversary date of the actual signing of the Treaty. On that date a statement was issued by then Secretary of State Condoleezza Rice as one of her last official acts in that capacity. It said in part:

"The Boundary Waters Treaty remains vibrant as it enters its second century.... The Treaty continues to be a model for managing shared resources and a tribute to the enduring friendship between the United States and Canada."

The then and current Foreign Affairs Minister of Canada, Lawrence Cannon, issued a similar statement at the same time

These are words I hope we can all concur with. Not only is this successful cooperation in protecting our shared fresh waters worth celebrating, so is the Treaty which facilitates this. I believe it is still robust and vibrant and that it has served both countries well and will do so for many years to come!

³ The IJC and the 21st Century: Response of the IJC to a Request by the Governments of Canada and the United States for Proposals on How To Best Assist Them to Meet the Environmental Challenges of the 21st Century, IJC 2000.