



Commissioner Pierre Trépanier

Panel II – *The Boundary Waters Treaty and International  
Environmental Law*

*Boundary Waters Treaty Centennial Symposium*



**Presented by the Wayne State Law Review  
In association with  
Wayne State University Law School  
And the University of Windsor**

Spencer M. Patrich Auditorium

Wayne State University Law School

Detroit, MI

February 5, 2009

The IJC was established by Article VII of the Boundary Waters Treaty as part of a broader regime for preventing and settling environmental disputes between the two countries. As a former Commission Chair, Leonard Legault, a life-long senior diplomat in the Canadian Government noted in a speech published in the CASE WESTERN Reserve Journal of International Law in 2000,

*“It is, of course, relevant to enquire whether the Commission applies rules and principles of public international law when acting in either its quasi-judicial or advisory capacity. The answer is that, for the purposes of the Commission’s mandate, the applicable international law for waters in the boundary region is established by the Boundary Waters Treaty. In following the requirements of the treaty, the Commission is applying the appropriate rules of international law”.*<sup>1</sup>

But what are those appropriate rules?

First of all we should note that the Commission may adopt its own rules of procedure, compel witnesses, take evidence on oath and decide when and where to meet. It is at all times subject to special call or direction by the two Governments; its rules must be in accordance with justice and equity; and all parties interested in any matter which is within the Commission's jurisdiction must be provided with a convenient opportunity to be heard.

Article XII states that the United States and Canadian Sections of the Commission may each appoint a Secretary who shall act as joint Secretaries of the Commission at its joint sessions. The Commission is also authorized to employ engineers and clerical assistants, as the treaty refers to advisers and administrative personnel. The salaries and personal expenses of the Commission and of the Secretaries must be paid by their respective governments and all reasonable and necessary joint expenses incurred by the Commission are to be paid equally by the two governments.

The Commission's status as an international organization has been recognized in Canada and in the United States. In both countries, the

Commission, Commissioners, experts and staff have been granted immunity from legal process with respect to acts performed in their official capacities.

The Boundary Waters Treaty is properly entitled a Treaty between the United States and Great Britain relating to Boundary Waters, and questions arising between the United States and Canada. While the treaty was originally concluded between Great Britain and the United States, as Canada acquired international personality it replaced Great Britain as a High Contracting Party.

The treaty deals not only with waters that flow along or across the boundary but also more generally with other environmental questions arising between Canada and the United States. The preamble states that *“the High Contracting Parties are equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may arise...”*.

Articles III and IV assign the IJC the quasi-judicial function of deciding whether certain kinds of works or activities can be built or undertaken in rivers or lakes which flow along or across the international boundary. In very general terms, unless there is a special agreement between the United States and Canadian governments, new uses, obstructions and diversions of boundary waters (which according to the Preliminary Article are waters along which the boundary passes) must not take place without the approval of the IJC if the proposed use, obstruction or diversion will affect the natural level or flow of those waters on the other side of the boundary.

Similarly, in the absence of an intergovernmental special agreement, obstructions cannot be constructed or maintained in waters flowing from boundary waters or downstream from the border in rivers that flow across the boundary without the approval of the IJC if the obstruction will raise the natural level of waters on the upstream side of the boundary. When deciding on applications for approval to build or undertake works covered by Articles III and IV the Commission must follow the rules or principles which the governments have agreed to in Article VIII. These include an order of precedence among certain kinds of works and for the protection and indemnification of interests that

<sup>1</sup> *“The Roles Of Law And Diplomacy In Dispute Resolution: The IJC As A Possible Model”*, Leonard Legault, Volume 26, Canada US Law Journal, 2000

may be injured.

Article VIII states that a majority of the Commissioners shall have power to render a decision and that if the Commission is equally divided, separate reports shall be made by the Commissioners on each side to their own government.

The need for IJC approval in cases falling within Articles III and IV is additional to and does not replace any domestic requirements in the country where the work or undertaking will take place. Applications cannot be submitted to the Commission directly by individuals but must be sent through their government. There is no appeal from an IJC decision in these cases. The Commission's decision can be varied only by a special intergovernmental agreement.

The Commission has usually made its approval of works and undertakings subject to conditions. Some of these conditions may be technical. Others may be aimed at providing suitable protection and indemnification of interests. Still others may establish surveillance and monitoring mechanisms to inform the IJC about how its Order of Approval is being implemented and to alert the Commission to new developments. The Commission usually retains continuing jurisdiction over these Orders so that it can alter the terms of its approval as appropriate.

When the IJC receives an application for an Order of Approval it usually establishes a board composed of United States and Canadian experts to assist the Commission in assessing the implications of the proposed work or undertaking. If the Commission approves a project, it normally establishes a so-called "control board" to monitor and sometimes assist with implementation of the Commission's Order.

In addition to the general requirements for Commission approval set out in Articles III and IV, Article VI of the Boundary Waters Treaty contains specific provisions for apportionment of the St. Mary and Milk Rivers to be undertaken under the direction of the Commission.

Articles IX and X of the Boundary Waters Treaty provide for the Commission to undertake two additional and quite different functions.

Under Article IX, either the Canadian government or the United States government may refer other questions or matters of difference along the frontier to the Commission, and ask the Commission to report on the facts of the particular issue and to provide the governments with appropriate conclusions or recommendations. The

government(s) giving the so-called "Reference" may limit the scope of the Commission's enquiry and response. Furthermore, the IJC's report under an Article IX Reference cannot be regarded as a decision either on the facts or the law. According to Article IX, the IJC shall make a joint report to both governments in all cases in which all or a majority of Commissioners agree, and in cases of disagreement, the minority may make a joint report to both governments or separate reports to their respective governments. The Article goes on to state that if the Commission is evenly divided, the Commissioners on each side must make separate reports to their own government. This seems to assume that divisions will always be along national lines, which is not always the case. In fact that has only happened twice.

While in theory a Reference may be provided to the Commission by either government alone, in practice, References have always been given by both governments. Probably, the best known current example of a Reference is found in Article VII of the 1978 Great Lakes Water Quality Agreement where the two Governments direct the IJC to assist in the implementation of that Agreement.

When the IJC receives a Reference it traditionally appoints a binational study board or task force to carry out investigations and provide such expert advice as the Commission requires responding to the issue(s) raised by the governments.

In response to References, particularly regarding pollution, the Commission has often recommended that it be authorized to monitor water quality on an on-going basis. If such a recommendation is accepted, the Commission may then appoint a "pollution board" to undertake this continuing task. As the Commission moves to the International Watershed model – which Chair Brooks will be discussing in detail later today, it has been combining its pollution boards and water level control boards into unified boards – recognizing of course that there is a relationship between the two responsibilities. An example of this is in the St. Croix basin.

Article X allows the Canadian and United States governments to refer any question or a matter of difference arising between them to the IJC for a decision or finding by a majority of Commissioners. However, Article X states that must be done with the consent of both governments, and it is understood that on the part of the United States any such action will be by and with the advice and

consent of the Senate and that on the part of Canada with the consent of the Governor General in Council. If the Commission is equally divided or otherwise unable to reach a decision, provision is made for the issue to be referred to an umpire chosen in accordance with the terms of the 1907 Hague Convention for the Pacific Settlement of International Disputes. The procedure established by Article X has never been used, so far.

It appears to be generally accepted that under the Boundary Waters Treaty, the Commission has a responsibility to draw to the attention of governments potential problems along the boundary that could call into question the mutual commitments of governments under the treaty.

The IJC has also been assigned specific responsibilities by a number of other treaties. The 1925 Convention between Canada and the United States to Regulate the Level of the Lake of the Woods and the 1938 Convention for Emergency Regulation of the Level of Rainy Lake and of the Level of Other Boundary Waters in the Rainy Lake Watershed call on the Commission to play a role in implementing these agreements. The 1950 Treaty between the United States of America and Canada concerning the Diversion of the Niagara River replaced certain provisions for use of the Niagara River in Article V of the Boundary Waters Treaty and, in effect, called for the Commission to be given a Reference concerning certain remedial works in the Niagara River. This Reference, as subsequently amended, is still in effect. Article XVI of the 1964 Columbia River Treaty allows for differences between the two countries to be referred to the IJC for resolution. Most recently, the 1991 Canada-United States Air Quality Agreement gives the Commission a Reference to invite and synthesize comments on progress reports.

In addition to the foregoing, the Boundary Waters Treaty establishes a number of principles that the Canadian and United States governments have agreed to apply as between themselves with respect to waters that flow along or across the common boundary. These include: Article I concerning free navigation of boundary waters; Article I1 concerning the use and diversion of waters which naturally flow across the boundary or into boundary waters; and the second paragraph of Article IV which states that boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other side.

Commissioner Speck will explain during the next panel the implications of this clause in detail.

Generally speaking, the IJC does not have a role in the application of these principles unless the governments ask for the Commission's assistance through a Reference. A major portion of the Commission's time is, in fact, spent on References to assist governments to meet the requirements of the second paragraph of Article IV concerning transboundary water pollution.

Finally I would note that there are, however, cases when the Commission may have to consider other requirements of international law, usually under Article IX references. For example when the Commission examined the issue of bulk water diversions from the Great Lakes, they considered whether or water in its natural state was a trade commodity under NAFTA. It found that it was not and that therefore international trade law did not prevent governments from protecting the waters on the lakes.

In conclusion, let's remember that this Treaty (without being perfect) has allowed our two countries to prevent and/or resolve close to 120 disputes over the last 100 years, and it should serve as an example of what can be achieved when common goals and mutual respect led the path to acceptable compromises.