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THE BOUNDARY WATERS TREATY 1909 — A PEACE TREATY?

Commissioner Gordon Walker, Q.C.

International Joint Commission

The following is the text of the 7th Annual Canada-United States Law Institute Distinguished Lecture given at Western University Faculty of Law by Commissioner Gordon Walker, Q.C., on Oct. 29, 2013. A native of St. Thomas, Ontario, and a graduate of Western University, from which he received a B.A. and LL.B., Mr. Walker served as Member of Provincial Parliament for London from 1971 to 1985, including as Minister of Correctional Services, Provincial Secretary for Justice, Minister of Consumer and Commercial Relations, and Minister of Industry and Trade. From 1992 until 1995 Mr. Walker served the International Joint Commission (IJC) as a Canadian Commissioner. He was reappointed to the IJC in June 2013 and currently serves as both Commissioner and Canadian Chair.

It is my distinct honour to present the 7th annual Canada-United States Law Institute's distinguished lecture here at Western University.

Western's School of Law has shaped my law career, over the past five decades – whether it was the practice of law, the making of law, or the administering of law. Not a day goes by when the basic grounding I received here at Western has not played a role. Perhaps I helped shape the University somewhat as the Act that governs this University at one point for a decade carried my name as its sponsor in the Ontario Legislature.

The purpose of the Canada-United States Law Institute is identified as serving as a forum for exploration and debate about legal aspects of Canada-United States relations.

If one were to look for a case study to best examine the relations between the two countries then the Boundary Waters Treaty (BWT) of 1909¹ is perhaps the best place to look. The Boundary Waters Treaty established the International Joint Commission (IJC)² as a permanent Commission. It is all there.

¹ Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, United Kingdom-U.S., Jan. 11, 1909, 36 Stat. 2448, T.S. 548.

² See *About the IJC*, International Joint Commission (IJC), <http://www.ijc.org/en/>.

The title of this lecture is – “*The Boundary Waters Treaty 1909 – a Peace Treaty?*” With that title, I pose the question of whether the Boundary Waters Treaty is a treaty about water resources per se – or is it really more accurately viewed as a Peace Treaty?

Before I get to the Treaty I think we need to be clear on what constitutes a peace treaty. The common understanding is that a peace treaty contains provisions to end hostilities between two nations by resolving the issues that led to the conflict in the first place, as well as providing for the resolution of future conflicts, before they escalate reopening hostilities.

In short, an effective peace treaty should both: end the conflict and keep the peace. And so with that I will set out my general thesis for this Lecture, namely that the BWT has been, for over 100 years, and continues to be, a model agreement between two nations for the prevention and resolution of disputes. Now some historical context to help play this out.

Water and water rights have been important and enduring issues in the longstanding and generally amicable relationship between Canada and the United States since the American War of Independence. A number of treaties preceded the BWT and are worth mentioning here for context. The *Definitive Treaty of Peace*,³ concluded in 1783 between Great Britain and the United States, recognized that each country had jurisdiction over waters on its own side of the border. During the following century, Great Britain and the United States concluded several treaties to resolve disputes, all with provisions relating to the use of water flowing along or across the boundary, particularly for navigation. The more notable ones included the 1794 *Jay Treaty*,⁴ which although mostly known for Article III giving Native Americans the right to crisscross the border, settled leftover disputes from the US Revolutionary War and bought about 10 years of peace; the 1817 *Rush-Bagot Agreement*,⁵ which demilitarized the Great Lakes and Lake Champlain; and the 1871 *Treaty of Washington*⁶ which settled a dispute over the location of the Pacific border in Juan de Fuca Strait, the first border dispute in the world to be settled by arbitration with the arbitrator appointing a three person Commission to determine the facts and recommend a solution.

Of particular note for purposes of this discussion is the International Waterways Commission,⁷ which operated officially from 1905 to 1913, of which

³ The Definitive Treaty of Peace 1783, United Kingdom – U.S., Sept. 3, 1783, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA Vol. 2 (Hunter Miller ed.) (1931).

⁴ Treaty of Amity Commerce and Navigation (The Jay Treaty), United Kingdom – U.S., Nov. 19, 1794, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA Vol. 2 (Hunter Miller ed.) (1931).

⁵ Exchange of Notes Relative to Naval Forces on the American Lakes (The Rush Bagot Agreement), United Kingdom – U.S., Apr. 28-29, 1817, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA Vol. 2 (Hunter Miller ed.) (1931).

⁶ The Treaty of Washington, United Kingdom – U.S., 8 May 1871, *reprinted in* CALEB CUSHING, THE TREATY OF WASHINGTON: ITS NEGOTIATION, EXECUTION, AND THE DISCUSSIONS RELATING THERETO (1873).

⁷ *About the St. Croix Corridor*, ST. CROIX INT’L WATERWAY COMMISSION, <http://www.stcroix.org/about-the-st-croix-river>.

I will speak in more detail later but first, let us look at what is encompassed in the Boundary Waters Treaty.

The words “boundary waters” seem succinct, indeed easy to say — but for Canada and United States the boundary waters are in proportions unparalleled in the world. Boundary waters are those waters which cross the boundary, or which make up the boundary — there being obvious examples like the Great Lakes and the St. Lawrence River, but even these proportions are huge!

- 1500 miles – some 2400 kilometres from one end to the other
- 40% of the boundary either bisecting, or transecting shared, lakes, rivers and streams
- 20% of the world’s freshwater
- In places more than a thousand feet deep and in other places but a few feet.

But those lakes are not our only boundary waters. The boundary waters encompass over 300 lakes and rivers across, along and over our common border, from the Bay of Fundy to the Straits of Juan de Fuca, to the Beaufort Sea in the north.

With 10,000 miles of coastline in the Great Lakes and with a border the full length, the possibility of issues abound.

When we think of the Great Lakes, we must also keep in mind that the basin, or the watershed, is part of this same territory — and this basin is so big that it is larger than several European countries. Economically, taken on its own, it would comprise the 8th largest economy in the world. The “Laurentian Great Lakes”, as they are sometimes referred to, are truly an ecological and economic powerhouse in the heart of North America.

In fact we here today are situated beside the Thames River, one of the great tributaries coursing within a few hundred feet, traveling all the way to Lake St. Clair, some 200 from miles headwater to delta. We all drink Great Lakes water. In fact 40 million people drink that water every day, even if they take it from a plastic bottle. Lake Huron water is piped directly to the fountain in the hallway here at this Faculty of Law. We stand in the watershed of Lake St. Clair; and 10 miles south is the Lake Erie watershed, and 10 miles north, the Lake Huron watershed. If we measured all the groundwater in the basin it would surpass that of Lake Michigan, and that is one deep lake. The Great Lakes basin encompasses parts of eight States of the Union and two Provinces of Canada. Now that is just part of the IJC’s coast to coast to coast domain, though a big part.

The other 300 lakes and rivers across Canada that fall within the definition of “boundary waters” under the BWT, begin in the east from where the St. Croix River touches Passamaquoddy Bay in New Brunswick/Maine, move to the Richelieu River as part of the Lake Champlain basin, and Rainy River - Lake of the Woods basins in Ontario and Minnesota, and the Red River in Manitoba and North Dakota, and the Souris and all the way across to the Columbia in BC and Washington; and even stretching up to the Yukon River in Alaska. I mention those revealing statistics to demonstrate the immensity of the territory covered by the BWT and to highlight the potential for conflict as humans interact along every inch of the way.

Across it all runs a line — a boundary line — that is only visible on a map — or by the occasional signpost, or perhaps a border crossing at the end of some roadway in one country or another.

That boundary line is easy to draw, but for over half the width of our country it is invisible as it courses through the centre of waterways — and across that terrestrial part of the border, a mere swath of land 6 meters wide, 3 on each side kept trim to denote the line of demarcation — even in pristine protected wilderness areas such as the Waterton-Glacier International Peace Park. And on the waterways, ships cross it regularly, only knowing where they are with the help of a Global Positioning Satellite or GPS, but not caring which side of the border they are on, for neither do the waves, the fish, nor the currents, nor the pollution.

It is wonderful that we have an 8,891 Km (5,525 mile) border that is undefended. We have good relations between Canada and the US so we can have that kind of border.

But it has not always been that way. There was a time when there was open conflict between our nations.

200 years ago today, the peoples of Canada and United States were locked in a war — over many things, but largely it was the border. On October 5th, 1813, the Battle of the Thames, not 50 miles west of here at a place called Moraviantown which, from here, saw the British routed by General Harrison, who went on to be a President. And dying on the battlefield was that great Aboriginal Chief Tecumseh. And the British General and his regulars and Canadian militias retreating along the Thames to these forks where we are today, and beyond. (A battle that was re-enacted on its bicentennial just a few weeks ago). But the seesaw back and forth, saw the British rout the Americans on October 26th southwest of Montreal at Châteauguay, Quebec, with de Saliberry's great victory where 300 men in battle repulsed an army of 3000, saving Montreal. Stalemate is frequently the description of the outcome of that War. At the end of that War, the two countries each had a lot more respect for the other, and the border, well it remained unchanged.

In fact there were three countries involved in this War — Great Britain, and of course it played a huge role, as Canada was but a colony, and of course, the United States.

I mention these countries because 100 years later the same players were at it once again, Britain, United States, and the Dominion of Canada — as it was then called, reflecting its semi-independent colonial status.

Admittedly, 100 years ago today, relations had become better; but only marginally. In the decade before, the relations amongst those three countries were on tenterhooks. The United States and Britain were getting along pretty nicely, in fact Britain had been making nice to U.S. for many years as it attempted to counter the growing strength of Germany in a military arms race. Yet by the turn of the century Canada still had its problems with United States, and Britain was still Canada's protector, indeed its only voice on the world stage — there being no Canadian capacity for foreign affairs and no department of foreign affairs. Canada was barely 30 years old, a country that had knitted

together a string of British colonies stretched across 5000 miles connected by nothing more than a line on a map, and a railway line called the Canadian Pacific Railway, and very few people living in between. Canada had come together as a nation largely to thwart northern expansion of the United States, it being noted that on the day Canada became a country, July 1st 1867, that very day United States acquired Alaska from the Russians. American Secretary of State Seward who always intended on enlarging the US frontiers, had now bookended Canada with the States to the south and the new territory to the north.

So towards the turn of the 20th century there were issues that were causing friction — indeed which might have led to war.

For one, there was the Alaska Panhandle dispute, a border question between Canada and U.S., over the position of the line between Alaska and B.C. It had not been resolved since the days of Russian ownership of Alaska, and suddenly with the 1898 Klondike Gold Rush this narrow strip of no man's land took on big proportions. It was a question of whether the line of demarcation would be along one set of mountain tops or another just a few miles distant; really not much of an issue one would think. However, it led President Teddy Roosevelt to threaten to send in the marines if U.S. did not get its way and having been late of the Spanish American War where he made his name winning that battle with marines, he was certainly not to be ignored. He even threw out the line, "Walk softly and carry a big stick" — a phrase that certain caught the attention of Canada, now led by Prime Minister Sir Wilfrid Laurier.

And there was the question of the Milk and St. Mary River in Alberta, Saskatchewan and Montana. The Americans dammed up one river, and built canals for irrigation; the Canadians retaliated by starting to dig their own canal. It escalated to the point where many thought it would lead to violence. Disputes over other waters were developing too. On the Niagara River diversions for electricity were threatening the scenic beauty of Niagara Falls. On the Rainy River-Lake of the Woods there was conflict over what should be the proper water level for navigation, hydro production and farming. Of course when it comes to water, one level "size" does not fit all and so the conflicts continued. For Canada, the diversion of Lake Michigan water at Chicago was another concern. The Canadian Government was troubled at the prospect that unilateral actions on the part of the U.S. to divert more water out of Lake Michigan would lower Lake Huron and would have economic impacts in terms of lost revenues generating hydropower at the Niagara Falls and necessitate lighter loads for shipping. Somehow it didn't seem fair nor equitable: even though Lake Michigan is the only Great Lake that's located wholly within one country, presumably Canada should have some say in the diversion; for if Lake Michigan had lower levels of water, that would affect Lake Huron as they are one and the same lake hydrologically. These are but a few examples of conflict. In fact there were conflicts developing all along the boundary waters between interests in Canada and the United States.

So the question was, what to do to resolve the conflicts and maintain peace between us along the border?

By 1906, the Americans and the British were quite impressed with the formula used to solve the Alaska Panhandle dispute; though conversely Canada was quite annoyed. Nevertheless the formula of solving the dispute with three High Commissioners from each country seemed to work — except for the British judge, Lord Alverstone, siding with the Americans and tipping the balance of power, to the annoyance — indeed anger — of Canada. But the formula was good, so it would seem. In the event, the Canadians were far angrier with the British than they were with the Americans for Canada expected Britain to take their side. But Britain was now putting its foreign policy vis-à-vis the U.S. before the interests of Canada.

In the end, the three countries saw value in a treaty to address the boundary waters disputes that existed, but also the ones that inevitably would arise. Although at the time Britain was still handling all foreign affairs for Canada, it was holding back and letting Canada do its own negotiations, which it did; largely with the intervention and work of a local person from here in London, Ontario, Canada, Mr. George Gibbons, a lawyer, who had the ear of Prime Minister Laurier. That was Canada's negotiation team, its foreign affairs department — run from a law office not far from here in London; at King and Richmond Streets. His U.S. counterpart was none other than the renowned Secretary of State, Hon. Elihu Root, who had been a U.S. presence since the days of President Ulysses Grant. And Root, of course, had the ear of President Roosevelt.

George Gibbons was well known at this University — he was a member of the Board of Governors all the time that he was negotiating the BWT.

Gibbons was also the chair of the predecessor organization to the International Joint Commission, the International Waterways Commission — which failed in the decade of its existence to resolve a single dispute. In fact it operated on instructions from governments and its members had no authority to negotiate. It was that experience that convinced Gibbons that only an independent body made up of as the Treaty negotiations themselves were described in the Treaty's preamble the word "*plenipotentiaries*" i.e. "invested with full power to transact business" — could resolve these thorny issues.

And in fact, under the Treaty, upon appointment: Each Commissioner . . . shall, . . . make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty."

These men, Gibbons and Root, cobbled together the Boundary Waters Treaty, what would become one of the last Empire Treaties — Great Britain not prepared to give too much latitude to Canada, it would be signed by Britain.

The fact it is a treaty — and in Canada, an Empire Treaty — is significant. In the U.S. by virtue of being a treaty, and being approved by the U.S. Senate, it is binding on the states. In Canada, by virtue of being an Empire treaty it is binding on provinces. Under Sec. 132 of the *Constitution Act, 1867*⁸ the federal government has the authority to implement treaties entered into by Britain on

⁸ Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

Canada's behalf. However in the Canadian Constitution there is no federal power to implement treaties — so the provinces or the federal government is responsible for the implementation of treaties depending on which constitutional power the subject matter of the treaty falls under.

The Treaty itself is very elegantly written:

The United States of America and His Majesty , the King of the United Kingdom of Great Britain and Ireland and the British Dominions beyond the Seas, Emperor of India, being 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 hereafter arise, have resolved to conclude a treaty in furtherance of these ends, . . .

Consider now on a closer read, how the preamble supports the thesis that the BWT is really more a peace treaty than a water treaty:

The parties are “*resolved to conclude a treaty . . . being equally desirous to prevent disputes regarding the use of boundary waters . . . and to settle all questions which are now pending . . . , and to make provision for the adjustment and settlement of all such questions as hereafter arise . . .*”

So in short, the purpose of the Treaty is really to establish and keep the peace over the two nations' shared boundary waters.

The BWT contains a number of articles to keep the peace. It was designed as a mechanism to protect each side from the other, to resolve disputes, and to solve problems, mostly relating to boundary waters – particularly matters relating to water quantity and water quality, using the word pollution for one of the first times, a far-sighted move.

So how does the BWT keep the peace?

First of all in the “Preliminary Article” it defines “boundary waters” — so as to limit disputes as to what waters are and are not subject to the Treaty:

[B]oundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Article 1 notes that the Treaty does not affect free navigation on boundary waters and Lake Michigan. It singles out Lake Michigan since the definition of “boundary waters” would not include Lake Michigan. Similarly if you look at the Fraser River in British Columbia, although it has major tributaries that cross the

boundary, the main stem of the Fraser lies entirely within Canada, and so the river itself is not considered a boundary water under the Treaty — nor is the Ottawa River. So it carefully defines what is a boundary water.

Taking a closer look at the Treaty, Article 2, extends the rights and access to legal remedies for an action taken in one country on boundary water to citizens of the other country.

Article 3 agrees that “*no further obstructions or diversions, of boundary waters*” . . . - this basically enshrines the status quo at the time — which is why the Chicago Diversion is not subject to the Treaty — “*affecting the natural level or flow of boundary waters on the other side of the line*” — The treaty is about protecting the rights of the other country. “*shall be made except by Authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval of. . . The International Joint Commission*”.

The BWT does not provide someone additional rights in the country he or she reside in, if it is that country which is taking an action. For instance if the United States proposes a structure for the production of electricity between its shore and that of an island, so that it only blocks half of river, then the protections in the Treaty are for Canadian interests — they are not for U.S. interests, which have domestic remedies available, although under the BWT Canadians would have access to the same remedies as Americans in America.

Furthermore, the Treaty does not give an American the right to undertake a project in Canada without the authorization of the Canadian government, and vice versa.

These are concepts that the public often struggles to understand, as they read the Treaty, and think the rights extend to both countries, which is only the case, when a structure or diversion affects both countries more or less equally — which is more often the case. This is especially true in light of Articles 4 and 7.

Article 4 of the Treaty allows the two nations to enter into “special agreements” if they wish to act outside of the Treaty, but otherwise agree that the construction of any dam or structure that may “*raise the natural level of waters on the other side of the boundary*” shall be approved by the IJC. Again, if the structure was to raise the natural level on the same side of the boundary as where it is constructed, the BWT does not apply, assuming it does not create a diversion.

Article 4 also includes a clause which causes it to be cited as the first international pollution treaty in history, namely that “*the waters herein defined as 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.*”

These are unusual words for a treaty signed in 1909, in a period when industrial and urban development were generally first in peoples’ and their governments’ minds and not the pollution caused by development. However, it is important to note that it is not a general prohibition against polluting, but rather about protecting the rights of the other country. Basically under the Treaty you can pollute the waters on your own side, but only up to the point that you start polluting the other side. So in some ways, the pollution clause is about keeping

the peace, about preventing a dispute from occurring, and providing recourse when that dispute does occur.

Articles 5 and 6 directly outline solutions to resolve the disputes over the Niagara River, and the St. Mary Milk Rivers and to provide the remedy for keeping the peace in the future. Article 5 has since been replaced by the Niagara Treaty of 1950.⁹ And the Article 6 is still in force and is the basis of the 1928 IJC Order of Approval¹⁰ — although the order itself remains controversial to this day, and the Commission has historically twice split when trying to amend the order.

When we think of a peace treaty — we normally think about it being primarily to resolve the matters of conflict between two nations. But the BWT also has provisions to resolve conflict — to keep the peace — between interests. And in fact most disputes are more likely based on competing interests, rather than based strictly on nationality.

Article 8 of the Treaty outlines the priority of use of boundary waters:

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

Uses for domestic and sanitary purposes;

Uses for navigation, including the service of canals for the purposes of navigation;

Uses for power and for irrigation purposes.

However, the Treaty is not limited to those three interests as it goes on to note that “The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

In the modern day context, IJC Commissioners have regarded things like the environment, and recreational boating, for example to be “interests” that need to be considered when balancing interests. Recreational boating was hardly a consideration in 1909, but today it is huge. We have to adapt.

Article 8 also states the Commission when considering the effects of structures on boundary waters “shall require as a condition of its approval thereof, that suitable and adequate provision . . . be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.”

Again the Treaty is concerned about making sure that the action in one country does not harm interests in the other country, without recourse. The purpose is not to ensure that there is no harm, but that the harm is not in the other

⁹ *Treaty between Canada and the United States of America Concerning the Diversion of the Niagara River*, Can.-U.S., Feb. 27, 1950, T.I.A.S. 2130, 1 U.S.T. 694.

¹⁰ *The Activities of the International Joint Commission 1909-1956*, INT’L JOINT COMMISSION (IJC), <http://ijc.org/files/publications/A63.pdf>.

country, without compensation — that could result in creating a dispute between the two countries. Again, the key concern here is to keep the peace.

As well, the IJC undertakes investigations and studies for governments, invariably on thorny issues such as studying the water levels in the Great Lakes, or the diversion of waters for electricity purposes through Article 9 references. Like a Statement of Claim which we know initiates an action in the courts, references are something the same, as they are formal requests from the two national governments to look into and analyze specific matters or problems and make findings and non-binding recommendations for action by the two governments to resolve a specific issue. Although the BWT allows for either government to give the IJC a reference, by custom the governments have jointly given the IJC its references, with the exact same wording.

It should be noted that reports under Article 9 do not have the status of arbitral awards. Nevertheless, IJC reports are also released to the public at the same time as they are submitted to the two governments. The force of public opinion supports the IJC's recommendations. Therefore there is an implied obligation on both governments to deal with the report in a responsive way. As an aside, it is interesting to note that the Treaty is not limited to fresh water — and the governments have sent the Commission references on other matters — one on the social economic consequences of Point Roberts's Washington separation from the rest of the state as it only has a land border with the British Columbia mainland, and another on producing hydroelectric power from the Passamaquoddy tides.

The Commission also receives permanent references from the two governments under Article 9.

They are set out in specific language in the Great Lakes Water Quality Agreement,¹¹ in particular, as well as the Canada-U.S. Air Quality Agreement.¹²

The Treaty does provide, in Article 10, for references for which the IJC reports would be binding arbitral awards. However, to make such a reference under the Treaty, the U.S. federal government would have to gain the concurrence of the U.S. Senate. Understandably no such reference under Article 10 has ever been given. As it is now, the U.S. Senate takes six months or more just to approve the appointment of IJC Commissioners.

It is important to understand that the Treaty is not self-activating. What this means is that in all these cases, it is the governments which decide if the Treaty is invoked — not the IJC or the public. The governments decide if a proposed project may affect levels and flows and if it should be sent to the Commission. The governments decide if the Commission should investigate an issue on the boundary.

In the dispute mechanism there was to be established under Article 12 a permanent boundary waters Commission, to be styled the IJC — the word 'Joint'

¹¹ Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as amended on October 16, 1983 and on November 18, 1987 (Great Lakes Water Quality Protocol of 2012), Can.-U.S., 7 Sept. 2012, <http://www.ec.gc.ca/grandslacs-greatlakes>.

¹² Canada-United States Agreement on Air Quality, Can.-U.S., 30 I.L.M. 676 (1991).

being an invention of Secretary Root, as he felt it best described what he and Gibbons envisaged. The Commission would be made up of six Commissioners, three to be named by the President and three to be named by the Prime Minister of Canada. They would swear their allegiance to the Commission and specifically not be seen as a representative of their respective countries. It had been Gibbons who persuaded Secretary Root that a permanent commission was the only way to ensure peaceful resolution of those many disputes then extant, and the inevitable ones to come.

It was not a treaty full of words only. It included the concept of a permanent watchdog that would give the Treaty teeth.

The Commission has two chairs, one American and one Canadian, serving simultaneously and working together.

Uniquely, the U.S. Commissioners do not have more votes nor do their votes carry more weight than those of the Canadian Commissioners, in spite of the great differences in population and economic activity. I say uniquely, because under the model of the United Nations 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes these and other factors are taken into account, resulting in some countries' votes being weighted more than others. The inconsistency between the BWT and the UN Convention, the absence of equality, is one reason Canada and the United States have not signed, and are unlikely to sign, this particular UN Convention.

In fact the Commissioners, in principle and by long standing custom, set out to reach decisions by consensus — not by formal vote. Although it's important to understand that consensus is not the same as unanimity. Every meeting, every decision requires a quorum of four. This way at least one Commissioner from the other country has to be in the quorum and thus Commission votes cannot be only those of one country.

As well, under Article 12 the Commission can establish rules of procedure but they must be in accordance with the principles of justice and equity. The Commission must also ensure "*all parties interested therein shall be given convenient opportunity to be heard*". The Commission does this by requiring that it holds public hearings for both references and applications. This has become one of the fundamental principles of how the Commission operates. It could be argued that the holding extensive hearings on the matters before it, allowing the effected public, industries, and other levels of government, to have their say, helps as well to keep the peace on contentious issues.

As described earlier in Article 3, the Commission also makes decisions on applications presented to it by the two governments on whether to allow the building of structures on, over, or under a boundary water that affect its natural levels or flows in the other country.

The Commission's decision could be to allow the application, to deny it, or allow it with conditions — the latter is usually what has happened. If an order of approval with conditions is made, the IJC sets up a control body to oversee it.

The IJC has 15 such control bodies usually referred to as Control Boards along the entire US-Canada boundary. When it comes to the Great Lakes there are control bodies involving the structures on the international section of the St.

Lawrence River — between Cornwall and Massena and at the Sault on the St. Mary's River. The IJC also oversees flows in the Niagara River pursuant to a reference, rather than an order, but it has a control board for that purpose.

So as you can see, in those first few years the IJC dealt with a backlog of thorny issues.

And some of these issues never really go away. For example, after a request from Montana to reopen the 1928 Order, the Commission held public meetings in 2006 on the request, and appointed an administrative task force to find efficiencies in the implementation of the Order to benefit both Montana and Alberta. As well, this last year the Commission had interactions with the City of Winnipeg over the 1913 Shoal Lake diversion from Lake of the Woods providing Winnipeg its water.

This is not to say that things at the Commission do not change or that we are not asked to look into and examine new issues.

At the turn of the Millennium the Commission received a charge from governments to consider its own future, which led the IJC to develop what is known as the International Watersheds Initiative (IWI),¹³ which has become a new way for the IJC to conduct its business and one that has received strong support from both national governments.

Under the IWI, the IJC is taking an ecosystem approach to addressing local concerns with direct local participation. Conventionally, IJC boards have focused only on regulating water levels and flows or on monitoring water quality: one or the other. Under the IWI, boards work with the local community to recognize the complex interrelationships of water quantity and water quality issues within a watershed. Through the IWI, the IJC also makes funding available to all its boards in developing tools those local organizations can use to solve issues within their watersheds.

Established in April 2007, the International St. Croix Watershed Board¹⁴ was the first official IJC watershed board. It monitors the ecological health of the St Croix River watershed and ensures that four dams on the river comply with the Commission's Orders of Approval. The International Rainy Lake of the Woods Watershed Board¹⁵ became the second watershed board in January 2013 with a mandate to assist in coordinating binational water quality efforts for the entire watershed and to coordinate the management of the water levels and flows on the Rainy River and Rainy Lake. All of the IJC's boards' members are appointed by Commissioners and all the boards are composed of an equal number of members from both countries. Appointments are from diverse groups including federal, provincial/state and local governments, non-governmental organizations, industries, aboriginal communities, academic institutions as well as the public.

¹³ *International Watersheds Initiative*, INT'L JOINT COMMISSION (IJC), available at <http://www.ijc.org/en/IWI>.

¹⁴ *International St. Croix River Watershed Board*, INT'L JOINT COMMISSION (IJC), http://ijc.org/en/isrwb/International_St_Croix_River_Watershed_Board.

¹⁵ *International Rainy-Lake of the Woods Watershed Board*, INT'L JOINT COMMISSION (IJC), http://ijc.org/en/RLWWB/International_Rainy-Lake_of_the_Woods_Watershed_Board.

Finally, I would like to note an area where the BWT is silent and that is in the context of our two nation's dealings with First Nations and Tribes.

It is clear in the early years of the Commission that little if any consideration was given to First Nations and Tribal rights as specific interests under the Treaty. That has created a lot of mistrust between First Nations and Tribes and the Commission.

It is important to note that Canada's implementing legislation for the BWT is by the *International Boundary Waters Treaty Act*¹⁶ which now acknowledges that nothing in BWT negates First Nation treaty rights.

The IJC has traditionally engaged with First Nations by inviting them to public meetings and hearings and providing briefings. In recent years governments have provided clearer guidance to the Commission on how it should engage First Nations. For example on the *Lake Ontario – St. Lawrence River Plan 2007*,¹⁷ governments told the IJC it could brief First Nations on the content of the plan but they i.e. governments would consult directly with First Nations. For the recent Lake of the Woods governance reference however, the IJC was instructed to engage with First Nations/Tribes directly and to advise the two governments how we planned to do so.

The U.S. Government's response to Third International Watershed Initiative Report¹⁸ specifically requested that IJC engage Tribes/ First Nations in its work.

With the creation of its newest watershed board earlier this spring, the International Rainy-Lake of the Woods Watershed Board, the Commission has now included membership positions for Metis, First Nations and U.S. Tribes. This is also the first IJC board to have an equal number of non-government members as government members and a majority of members based in the watershed. As a result, the Commission is looking at its other current watershed and non-watershed boards to increase public, local and First Nations and Tribal participation.

But it is not a quick or easy process. It took over a year of discussions before Aboriginal peoples covered by Treaty 3 were in a position to nominate an individual to serve in the Canadian public position on the former International Rainy Lake Control Board.

One of the big issues for First Nations in Canada is that they have their own treaty with the Crown, and usually start from a position of wanting to participate as a third nation to the Treaty.

Over the last 100 plus years the IJC has been addressing the problems of the day, the disputes, or the applications, all with great wisdom, one would have to conclude, as the two countries have not come to blows.

Some of the notable successes of the Commission include:

*1944: Reference on the Columbia River*¹⁹ – A major study by the IJC set the stage for the coordinated development of water resources in the Columbia River

¹⁶ International Boundary Waters Treaty Act, R.S.C., 1985, c. I-17.

¹⁷ *Lake Ontario-St. Lawrence River Plan 2014*, INT'L JOINT COMMISSION (IJC), www.ijc.org/files/tinymce/uploaded/LOSLR/IJC_LOSR_EN_Web.pdf.

¹⁸ *Third Report to Governments on the International Watersheds Initiative*, INT'L JOINT COMMISSION (IJC), Jan. 2009, www.ijc.org/files/publications/ID1627.pdf.

basin. Principles recommended by the IJC for sharing flood control and electric power benefits also helped the two federal governments negotiate the 1961 Columbia River Treaty.²⁰ Developing and operating the dams in a coordinated manner produced greater benefits for both countries.

*1952: Regulation Plan for Lake Ontario and St. Lawrence River*²¹ – A major hydroelectric power project in the St. Lawrence River approved by the IJC controls the outflow from Lake Ontario. The IJC set the flows to reduce flooding to shoreline communities, improve commercial shipping and generate electricity. Fifty years later, the IJC is reviewing whether the flow regime should be updated to reduce environmental impacts and achieve other objectives.

*1972: Great Lakes Water Quality Agreement*²² – The IJC conducted a scientific study that helped officials in both countries agree on actions they would take to clean up the Great Lakes and meet their Treaty commitment regarding pollution. Substantial improvements resulted from building sewage treatment plants and reducing industrial discharges.

Scientists working together on both sides of the border found other problems that led to a new agreement in 1978 and subsequent amendments, the most recent being in 2012.

*1975: Garrison Diversion Project*²³ – Canadians objected to an irrigation project in North Dakota because they were concerned that the transfer of water from the Missouri River basin could introduce new fish, parasites and diseases to the detriment of fishing in the Hudson Bay basin. The IJC recommended against building the portions of the project that could affect water flowing into Canada until the risk of transferring organisms could be eliminated or the two countries agreed that it was no longer a concern.

*1984: Ross Dam on the Skagit River*²⁴ – Many citizens objected to a proposal by the Seattle City Light Company to increase the height of Ross Dam because it would flood more than 2,000 hectares of a prime recreational area in British Columbia. The IJC brought Seattle and British Columbia officials together to negotiate an agreement. Often referred to as a “paper dam”, the agreement gave Seattle access to power from British Columbia at costs similar to the financing for the High Ross Dam. It also included environmental enhancements in the Skagit River valley.

¹⁹ *Docket 51 Columbia River - U.S. Reference*, INT’L JOINT COMMISSION (IJC) (1944), http://www.ijc.org/en/_Dockets?docket=51.

²⁰ *Lake Ontario-St. Lawrence River Plan 2014*, INT’L JOINT COMMISSION (IJC) (2014), www.ijc.org/files/tiny_mce/uploaded/LOSLR/IJC_LOSR_EN_Web.pdf.

²¹ *Id.*

²² The Great Lakes Water Quality Agreement between the United States of America and Canada concerning Great Lakes Water Quality, Can-U.S., 15 April 1972, 11 I.L.M. 694.

²³ Garrison Diversion Project Proposals, GOV’T OF MANITOBA WATER STEWARDSHIP DIVISION, https://www.gov.mb.ca/waterstewardship/water_info/transboundary/potential.html.

²⁴ Ross Dam, INT’L JOINT COMMISSION (IJC), http://www.ijc.org/en/_Dockets?docket=46.

*1985: Flathead River Reference*²⁵ – U.S. citizens objected to a proposed mountaintop-removal coal mine in British Columbia because they were concerned it could pollute the Flathead River and decimate the trout fishery. After studies and public consultation, the IJC recommended that the mine not be approved until potential impacts on the fishery were eliminated and both sides found the other risks to be acceptable.

*1999: Great Lakes Water Uses*²⁶ – A proposal to ship Lake Superior water to Asia by tanker ignited a political firestorm throughout the Great Lakes basin. The IJC recommended policies to protect the lakes from increased consumption of water inside the basin as well as removals from the basin. These recommendations encouraged action by the Great Lakes states and provinces and helped them develop effective policies.

The IJC under the IWI has also been resolving some disputes, without a direct reference from governments, using its boards' expertise and resources working with local people.

For example people on Rainy Lake, between Ontario and Minnesota, could not understand why the gates of the dam at the outlet of the lake were not all open during the spring runoff to avoid upstream flooding. Using IWI funds, the local IJC board developed a simulation that allowed people to adjust the gate setting and see its effects at different lake levels. People could see for themselves that the level of Rainy Lake needed to reach a certain height so that opening the gates would increase the outflow of the lake. The public could see that only at high lake levels was the dam able to discharge a larger volume of water more quickly. This helped reduce tension between the utility company and the public when the public realized the utility's procedures were helping reduce upstream flooding.

In 1981, a new fishway was put into the St. Croix River between Maine and New Brunswick that allowed for a resurgence of spawning alewives, an important food source for many freshwater and marine species. Unfortunately, this coincided with a drastic decline of smallmouth bass upstream in Spednic Lake. In response to concerns that the growing alewife population was harmful to smallmouth bass, the State of Maine ordered the closure of fishways on the Maine side of the river.

With IWI funding, the International St. Croix Watershed Board sponsored a report to analyze lake-level management and meteorological conditions during the time period when the bass population crashed. The findings provided a scientifically supported explanation that natural conditions, not a resurgence of alewives, were to blame for the decline of the bass population in Spednic Lake. A plan was proposed to reopen the fishway to the alewives while monitoring the basin's smallmouth bass population. Although the plan was not implemented, it

²⁵ Docket 110 Flathead - Reference, INT'L JOINT COMMISSION (IJC), April 15, 1985, <http://www.ijc.org/files/dockets/Docket%20110/Docket%20110%20Flathead%20Can.%20Reference%201985-02-15.pdf>.

²⁶ Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States, INT'L JOINT COMMISSION (IJC), Feb. 22, 2000, <http://www.ijc.org/files/publications/C129.pdf>.

initiated extensive discussions on the issue and in 2013, Maine legislated the re-opening of the fishway to alewives, thereby allowing them access to the basin.

Because of its success in resolving these and other disputes, IWI has given practice to resolving disputes the likes of which have found their way into other Treaties between these two countries, and no doubt other countries as well. The framers of NAFTA studied the BWT and the IJC's form of dispute resolution. Over the years there were disputes that arose. Indeed, there were some pretty thorny issues, one being the Columbia River in the early 60s, that kept the media occupied for years as the two countries tried to figure out how to apportion water on the rivers that crossed the border.

In a forward to the 1958 book, *Boundary Water Problems of Canada and United States*²⁷, authors Bloomfield and Fitzgerald state:

The current controversy between Canada and the US on the development of the Columbia River Basin has somewhat obscured the fact that for almost half a century these two neighbours have successfully used the IJC as an instrument for the prevention and settlement of disputes in regard to boundary and transboundary waters.

By the time of that 1958 book, the IJC had dealt with some 72 dockets in its quasi-judicial role of handling matters where obstructions or diversions could occur. The power to deal judicially with matters is an important role and in that the IJC has the capacity to compel witnesses, take evidence under oath, make orders (which it has never done), and order costs and even compensation. I might add it cannot be sued and its orders are not appealable, nor subject to judicial review.

Today the docket numbers over 130, so the IJC has a credible track record of resolving the peace, solving the disputes, and maintaining order along this vast border, so much of being water. Would there have been peace for all these years without the BWT and the IJC? Perhaps — but it must be remembered that more wars have been fought over borders than anything else, and sometimes, even the most insignificant of issues becomes an irritant that can escalate to large proportions. It is not the friendly relations which led to the resolution of all these issues that have come and gone in the past century, but rather it is the resolution of all these issues that has led to friendly relations. The BWT was the instrument of peace; the IJC the vehicle by which it could be ensured.

As for that country lawyer from London, George Gibbons would be honoured for his accomplishments, knighted by King George V two years later. It would be Sir George Gibbons whose name adorned Gibbons Park in London, and whose daughter's family home would become Gibbons Lodge, now the home of Western's President.

In conclusion, again from Bloomfield and Fitzgerald:

The spirit of international cooperation displayed by Canada and the US in the functioning of the Commission should serve to show other countries

²⁷ LOUIS M. BLOOMFIELD & GERALD F. FITZGERALD, *BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES* (1958).

that the settlement of the boundary and trans boundary water problems can be peacefully worked out between good neighbours.

On June 7, 2009, the Commission and the Governments of Canada and the United States held a ceremony on the Rainbow Bridge over Niagara Falls to recognize and celebrate the 100th anniversary of the Boundary Waters and the enduring peace between our two nations. On that occasion Lawrence Cannon, then Canada's Minister of Foreign Affairs, stated:

Canada and the United States have shared — and jointly managed — the boundary that exists between our two countries without a major incident for a hundred years. This is no small accomplishment; I don't think you could say this about too many neighbours, so it's indeed remarkable and significant.

U.S. Secretary of State Hilary Clinton echoed:

The friendship between the people of the United States and Canada is the strongest in the world. There is no border that is longer and more peaceful; there is no greater trade between two nations. There are so many values that we share in common, and today we celebrate a treaty that helped to make this friendship possible 100 years ago.

There are half a dozen bridges at Niagara, each a bridge of friendship. They could see them all — and through the mist over the falls they could see the Peace Bridge.