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LEGAL IMPLICATIONS OF BOUNDARY WATER POLLUTION

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POLLUTION of boundary waters is of concern to the federal governments of both Canada and the United States and to the border provinces and states. This concern arises from the political responsibility of public authorities to safeguard the public interest in clean water from the point of view of health, recreation, and the conservation of fish and wild life.

The governments of Canada and the United States, by the Boundary Waters Treaty of 1909,[1] set up the International Joint Commission comprising three representatives of Canada and three representatives of the United States, to assist in resolving future problems that might arise in connection with boundary waters. The Treaty was concerned to a large extent with the use of water, the diversion of water, and the control and construction of dams and other works relating to power, navigation and irrigation. There was, however, a single reference to pollution in article IV thereof:—

> It is further agreed 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.[2]

In the fifty-eight years since the Treaty was signed, this statement has been used as a basis for cooperation in investigation and in research rather than for settlement of claims.

The International Joint Commission has no judicial powers,[3] and the whole philosophy of the Treaty has been described as "quite opposed to the concept of an international body with administrative and enforcement functions."[4] Its functions are to investigate and report when requested, with both governments being free to accept or reject its recommendations. When dealing with pollution matters it has done so upon references, pursuant to article IX which provides: "reports of the Commission shall not be regarded as decisions of the question or matter so submitted, either on the facts or the law, and shall in no way have the character of an arbitral award."[5]

The work of the IJC in the field of pollution has been important and its

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1. Boundary Waters Treaty with Great Britain, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548. The Treaty was signed by Great Britain on behalf of Canada which at this date had not acquired control over its external affairs, but it has been implemented entirely by Canadians since its inception. The most convenient text is entitled "International Joint Commission, United States and Canada, Rules of Procedure and Text of Treaty" published in pamphlet form in both Ottawa and Washington in 1965.

2. *Id.* at 2450.

3. Both governments agreed that they would *not* permit construction that might raise levels *unless approved* by the IJC, and this has in practice resulted in the IJC performing what has been called a "judicial function" in relation to such approvals. *Id.* at 2452.

4. *See* Heeney, *Diplomacy With a Difference*, INCO Mag., Oct. 1966, at 22. Mr. Heeney is chairman, Canada Sect., IJC.

5. 36 Stat. at 2452 (1909).

value has been enhanced by its method of operation[6] which has been to include representatives of the authorities having local jurisdiction within Canada and within the United States on its boards and committees. The reason for this is that subsequent implementation of any recommendations of the IJC within both countries, which are federal states, may require legislative or executive action at provincial or state levels of government rather than at the federal level. In the Great Lakes area, for example, the Ontario Water Resources Commission, which is an agency of the Crown in Right of Ontario, has most of the jurisdiction and almost all of the effective powers to control pollution which originates on lands of the province rather than in the boundary waters.[7]

The IJC has been asked to investigate and report in connection with pollution of boundary waters on a number of occasions. These have included an investigation of the Detroit-Windsor area in 1950 which led to a recommendation accepted by both governments that certain objectives for boundary waters quality control be adopted. It embarked upon its current study of conditions in Lake Erie, Lake Ontario, and the international section of the St. Lawrence River in 1964. Upon references to the IJC the first question is normally: "Are these waters being polluted on either side of the boundary to the extent that it is causing or is likely to cause injury to property on the other side?"—in other words the question is framed in the language of article IV of the Treaty. Referring to the later reference, it can be truly said that no one seriously expects the IJC to answer this question other than in the affirmative.[8] However, the inclusion of the question in the terms of the Treaty provision gives a solid base to the Commission's jurisdiction in the Lakes, and this base has not been questioned by the Province of Ontario or by the eight states which border on the Great Lakes. The IJC through its committees of experts has been constantly and cumulatively putting together a considerable body of scientific knowledge concerning pollution in the lakes.

In emphasizing that the Treaty provision has been used as a basis for cooperation in investigation and research rather than for the investigation of claims, it should, of course, be pointed out that either government might ask

6. *See also Statement of M. E. Walsh, chrmn., United States Sect., IJC, Before the Natural Resources & Power Subcomm. of the House Comm. on Government Operations*, 89th Cong., 2d Sess. (1966).

7. The Ontario Water Resources Commission Act, Ont. Rev. Stat. c. 281 (1960). Provincial jurisdiction is broadly based on its powers over property and civil rights, municipal institutions and management of the public lands. The implementation within Canada of recommendations of the IJC by federal action is clear in matters of dams or diversion that may affect lake levels, and which come within federal powers over navigation and shipping. As regards pollution in the non-tidal waters of the Great Lakes Basin federal authority is largely confined to direct discharge to navigable waters from boats. Federal powers based on Health and Inland Fisheries are largely theoretical, and for a variety of practical and historical reasons are not likely to be asserted within the Great Lakes Basin, except in support of IJC activity.

8. Because of the gravity and urgency of the situation in Lake Erie the IJC put out an interim report in December, 1965, that described this situation as "serious and deteriorating." IJC Interim Report (1965).

the IJC to investigate a specific case of injury by trans-border pollution. However, the terms of reference would be drafted to require this, and there is a very big question, whether either government would be at all likely to authorize such a reference.

The provisions of article IV that boundary waters "shall not be polluted on either side to the injury of health or property on the other"[9] would be directly relevant to such a claim. This can best be illustrated by the hypothetical case of a United States citizen who claimed to have been injured as a result of the pollution of waters by a Canadian corporation. The United States citizen would take his claim up with the State Department. The State Department would consider it from the point of view of the obligations of Canada, a sovereign state, to prevent its citizens or corporations from causing injuries to citizens of another sovereign state, namely the United States.

The limits of the obligation of the state in international law are "to exercise due diligence to prevent internationally injurious acts on the part of private persons."[10] International law is at best a vague concept. It is dependent on the willingness of the state charged to adhere to principles generally recognized by sovereign states, and not to invoke its national sovereignty in denial thereof—in which event the claimant state would have no effective means of enforcing its claim, short of force, power politics or war. Apart from "internationally injurious acts" in the nature of an international delict or wrong, an important source of international law is the so-called "conventional law;" *i.e.*, law established on the basis of the practice of states as evidenced by treaties, conventions, exchange of notes, and the like. Similar conventions between states throughout the world tend to have a cumulative effect and established a rule of international law.

In the hypothetical case, if the State Department considered the claim of the United States citizen to be meritorious, it would "espouse" the claim and "make the claim its own" and present it through diplomatic channels to the Canadian government. It would be received by the Canadian government not as a claim of the United States citizen but as a claim of the United States government. The Canadian government might decide to pay compensation or it might dispute the facts, probably on the ground that the injury of the United States citizen was not in fact caused by the Canadian corporation. Either government might decide to refer the claim to the IJC whose technical staff might be able to investigate, and if the Commission found some causal connection between the injuries sustained by the United States citizen,[11] and acts of the Canadian corporation, it might make some recommendation. Such recommendation would not bind the Canadian government but might influence it to a decision to pay

9. 36 Stat. at 2450.
10. 1 L. F. Oppenheim, International Law 365 (8th ed. 1955).
11. Its findings would depend on the terms of reference. The latter might call for a report on other matters, for instance the currents, the quality of the water, the sources of and flow of tributary waters, other sources of pollution in the area, and the like.

compensation to the United States government which would in turn compensate the United States citizen.

The United States espoused a similar claim of land owners in the state of Washington who were injured by sulphur fumes from the mine of the Consolidated Mining and Smelting Company at Trail, British Columbia.[12] This claim, which was for air pollution rather than water pollution, was across the border but the causal connection was established and there was no mingling of polluting materials such as occurs in the Great Lakes. Nevertheless, in theory at least, the State Department might decide to espouse a claim based on the pollution of water.

In the hypothetical case it would be unnecessary to decide whether water pollution was a valid claim in international law because by Article IV of the Boundary Waters Treaty, Canada and the United States have in effect agreed to "the ground rules" of the international law that would be applicable.[13]

When the International Joint Commission by its terms of reference is required to investigate pollution under the pollution clause of article IV of the Treaty, but without any specific international claim espoused by either government having been referred to it, it is nevertheless obliged to assign some meaning to the word "injury" as used in this article. In its report of September 10, 1918, upon the general question of pollution of boundary waters, which had been referred to it by a joint reference of both governments in 1912, the Commission said:

> The Commission regards the word "injury" when used in the reference or treaty as having a special significance—one somewhat akin to the term "injuria" in jurisprudence. It does not mean harm or damage but harm or damage which is in excess of the amount of harm or damage which the sufferer, in view of all the circumstances of the case, and of all the co-existence rights (if it is permissible to use the term in this connection) and of the paramount importance of human health and life, should reasonably be called upon to bear.

The Commission then went on to find that there was transboundary pollution causing such an injury in the Rainy, Detroit, Niagara and St. John Rivers. It

12. The claim was referred by both governments to the IJC but its unanimous recommendations were rejected by the United States. Subsequently the governments by convention agreed on an amount of damage payable up to January 1, 1932 and set up an arbitral tribunal to decide a number of questions including damage in subsequent years. *See* [1963] 1 Can. Y.B. Int'l L. 213; *see also* Decision of the Trail Smelter Arbitral Tribunal, 35 Am. J. Int'l L. 684 (1941).

13. A similar view was expressed by J. L. MacCallum, Solic., Canada Sect., IJC, referring to the Boundary Waters Treaty: "This fifty-six year old treaty and the machinery it created have come to be regarded with some degree of envy by other nations confronted by problems of international river development. In most cases governments must face such difficulties without the advantage of prior agreements on the ground rules or the international law applicable, and with no international body in existence to assist in working out a technical solution of mutual advantage. The Indus, the Nile and the Jordan Rivers are cases in point." *The International Joint Commission*, 72 Can. Geog. J. 76, 79-80 (1966).

did not state who were the particular "sufferers" since this was not required by its terms of reference.

It is difficult to conceive of either government presenting a claim to the other in respect of an "across the border pollution," within the area of the Great Lakes. It is most likely that the State Department would refuse to espouse the claim of a United States citizen in this area on the grounds that the size of the lakes, the movement and intermingling of waters, and the large number of municipalities and industries on their shores are such that it would be most unlikely that his injury could be traced to the Canadian corporation, and on the further grounds that it was unlikely to be accepted by Canada. Also, it would be a waste of time of the IJC to ask it to investigate an injury caused by pollution that might very well have been caused or contributed to by United States sources.

It might be suggested that the Canadian government would have greater grounds for espousing claims of Canadians against the United States in respect of the pollution of a body of water such as Lake Erie, as the pollution on the American side is greater, but this is a distinction without a difference, because the problem of establishing a causal connection between specific acts of pollution and particular damage sustained is really beyond the capacity of experts to determine. They are more likely to assert negatively that a connection has not been established.

The difficulty with most trans-border pollution is that it is of the sort that does not permit of a legal remedy in respect of damage to private individuals or corporations. Accordingly, it is of concern chiefly to governments as guardians of the public interest in clean water for reasons of health, recreation and the conservation of fish and wild life.

In conclusion, mention might be made of legal aspects of a different type of pollution where the discharge of the material that impairs the quality of water is immediate, demonstrable, temporary in occurrence and limited in extent. Such discharges are likely to involve the law of negligence and consequential damage—for example, a boat on a holiday cruise burning up in a fire following the negligent discharge of flammable material. It is possible also to envisage situations where the discharge was continuous and proximate with the causal connection more easily established. In such situations relief may be had in the law of nuisance on proof of special damage. There are similar principles common to the municipal (domestic) law of both countries and also established rules of conflict of laws on the selection of forum and substantive law. The practical consideration in regard to pollution of this sort is that the discharge of the material as well as the locus of the suffering of damage are likely to be wholly within Canada or wholly within the United States. However, citizens of each country have access to the courts of the other.