

Chapter 21

AVOIDING CONFLICT BY MANAGING WATER THROUGH COOPERATION: INTERNATIONAL, NATIONAL, REGIONAL/LOCAL COOPERATION

International Models, International Joint Commission

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“What is it that makes the IJC so successful?”

The International Joint Commission and the Boundary Waters Treaty are something that Canadians and Americans do not know very much about but for those who do, they hold it very dear to them. As an expression of the importance of this forum, and water in general, all the Commissioners that are currently appointed (there are two vacancies) are here today, including: the new United States Chairman, Dennis Schornack; Canadian Chairman, the Right Honourable Herb Gray; Commissioner Robert Gourd from Montreal, Commissioner Jack Blaney from Vancouver, as well as my counterpart, the United States Section Secretary, Gerald Galloway.

21.1 Origin, mandate and role of the International Joint Commission (IJC)

The IJC has a very rich history. It goes back to the late 1800s with Congresses in Canada and the United States and some very farsighted people who thought that water problems between Canada and the United States could be best solved with a permanent institution and some principles that would be enshrined in an agreement, which eventually became known as the Boundary Waters Treaty. This was an imperial treaty between Canada, or Great Britain originally, and the United States. One of our Commissioners noted yesterday that there has not been since then a Treaty that the United States has signed that has given equal status to a foreign country.

Of late, we have had a number of people from different countries all around the world visit our offices in Ottawa and Washington. They are trying to figure out what it is about this organization that makes it work. When we are asked the question, “What is it that makes the IJC so successful?”, we show them the photograph in Figure 1; although there is no boundary there, right in the middle of the dam is the boundary between Canada and the United States, with the Province of Ontario on one side and the State of New York on the other. This is a perfect example of how the IJC works.



Figure 1. Canada/USA Border on Dam.

The IJC has been around for 100 years and in that time we have conducted well over 100 different studies and projects, for both governments. There is an international Board of ten people that oversees the management of the structure in Figure 1. They are binational, experts from Canada and the United States, and they work together in their personal and professional capacities. They share information and data and they are not beholden to their agencies or their governments. They are part of our team. When you describe how the IJC works to engineers from the former Soviet Republic or from Indonesia or any parts of Africa or South America, they are very impressed. They simply cannot imagine how data and information could be shared between two countries in a way that they could not in their home countries. In my opinion, that is the hallmark of the organization.

In the map of Canada and the United States in Figure 2, the shaded areas represent the major trans-boundary basins between the two countries. There are over three hundred streams, lakes, and rivers that either cross or form the border between the two countries. This means that someone, in the distant past, decided that they could give up their sovereignty to both Canada and United States, to an independent bilateral organization to help prevent and resolve disputes. Starting at the left hand side is the Columbia River Basin; there are three Boards there that are active. Moving towards the east, is the Souris River Basin and the St. Mary and Milk River Basins. We are also active in the Rainy Lake area. The Great Lakes take up an enormous amount of our time and energy and we have water control functions there as well as some special responsibilities under the Water Quality Agreement. Further east is the St. Croix Basin.

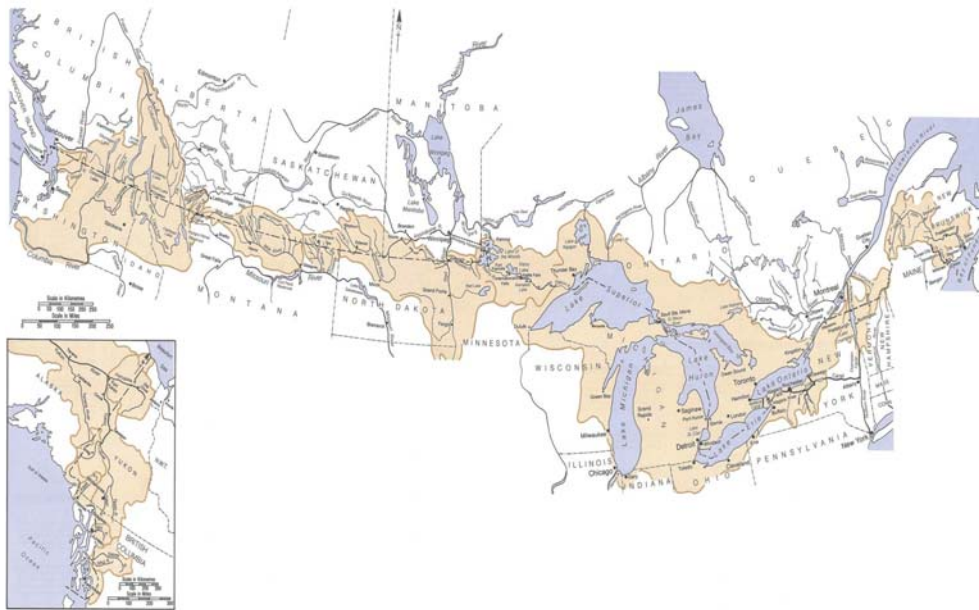


Figure 2. Map of Canada and the United States and Major Trans-Boundary Basins.

21.2 The Boundary Waters Treaty

The Boundary Waters Treaty was signed in 1909. The man on the right in the photograph, Sir George Gibbons, (Figure 3) was one of the leaders that helped to develop the terms of the Treaty and helped to make sure that it was signed.

THE BOUNDARY WATERS TREATY (1909)

- ORIGIN – BORDER CONFLICTS OVER USE OF TRANSBOUNDARY WATERS
- SCOPE – MORE THAN JUST BOUNDARY WATERS; DEALS WITH THE CANADA-UNITED STATES TRANSBOUNDARY ENVIRONMENT
- PURPOSE – PROVIDES THE PRINCIPLES AND MECHANISMS TO HELP PREVENT AND RESOLVE DISPUTES ALONG THE BOUNDARY

Sir George Gibbons



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Figure 3. The Boundary Waters Treaty 1909 – Sir George Gibbons.

21.3 Key principles of the treaty

In its origin, this treaty was really attempting to deal with conflicts over the use of transboundary waters but, as it has come to be implemented, the scope has become much broader. Basically, we deal with what we call the transboundary environment and we have in the past, and continue to, do work on air issues as well. David Schindler (Chapter 2) mentioned a study called PLUARG (which stands for Pollution from Land Use Reference Group). That study was actually undertaken by the IJC; it lasted quite a few years and dealt with land-use activities and pollution from the activities taking place in the Great Lakes. The Mission Statement that was developed several years ago for the IJC identifies our purpose as ‘to prevent and resolve disputes along the boundary’. That is the essence of the Commission.

Table 1. Key Principles of the Treaty.

SOME KEY PRINCIPLES OF THE TREATY

- EQUAL AND SIMILAR RIGHTS TO THE USE OF BOUNDARY WATERS
- ORDER OF PRECEDENCE OF USE – SANITARY/DOMESTIC, NAVIGATION, POWER GENERATION/IRRIGATION
- STRUCTURES/DIVERSIONS NOT TO AFFECT LEVELS AND FLOWS ON THE OTHER SIDE
- MUST NOT POLLUTE WATER ON EITHER SIDE TO THE INJURY OF HEALTH OR PROPERTY ON THE OTHER SIDE

THE
INTERNATIONAL
JOINT
COMMISSION
AND
THE
BOUNDARY
WATERS
TREATY
OF 1909

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The Treaty itself is a very remarkable document. I will briefly highlight a few of the key principles (see also Table 1). One key principle is that it gives equal and similar rights to the use of boundary waters, a very remarkable thing in this day and age. There is also a principle that deals with

“One of the most remarkable aspects of the Treaty is the question of polluting water so as not to result in the injury of health or property on the other side.”

precedence of use. At the time that the treaty was signed, sanitary and domestic use and the municipal water supply were predominant concerns. Other principles deal with navigation, power generation and irrigation. If you read this document, it is amazing that the word ‘environment’ or ‘ecosystem’ does not appear. Nevertheless, the Commission, in other parts of the document, is told to take into account all interests and also the word pollution is there.

Another remarkable part of the document is its flexibility. Any structure or diversion that affects water levels and flows on the other side, has to be approved by the Commission, unless the governments agree that they do not want to give it to the Commission. That is another aspect of the Treaty that perhaps people are unaware of. One of the most remarkable aspects of the Treaty is the question of polluting water so as not to result in the injury of health or property on the other side. That article of the Treaty has been the cornerstone of many decisions that the Commission has made with respect to references from governments.

21.4 Commission roles

The Commission actually performs only two roles. The Treaty itself created the Commission as a permanent body to help both governments. We have a quasi-judicial role, which has been reduced somewhat in the past couple of years. For example, we rule on new uses of construction and diversions of water. If we give our approval, it is usually through an Order of Approval and we create a binational Board to help us administer that. The second role that has grown much stronger over time, particularly in the past ten or twenty years, is what we call references or studies; that is, we have an investigatory or advisory function where we report to governments with a series of recommendations and advice to help prevent and resolve disputes. Generally, the governments give us the terms of reference that they would like us to investigate. Our recommendations are not binding. However, because they come through a process that is binational and that is wedded in science, and from an organization that has had a good track record for the most part, governments have a hard time not accepting these recommendations.

There is a third role, which has never been used, and it has to do with binding arbitration.

21.5 Structure of the IJC

With regard to our structure, we have six Commissioners, three from Canada and three from the United States, appointed by the Prime Minister of Canada and the President of the USA. The IJC is a creature of the Treaty, it is formed by the Treaty, and it is not a creature of government. We do not take instructions from governments; we are independent of governments and we are unitary. We are permanent; that is, we are on staff 24 hours per day, 7 days per week, 52 weeks a year, administering Orders of Approval and monitoring structures. We like to think that we are objective because what we do is based on sound science and we try to bring in the best experts. Although we have two headquarter offices, Ottawa and Washington, with a third office in Windsor to help us under the Great Lakes Water Quality Agreement, everything we do is by consensus. The electronic age allows us to be more unitary and we can communicate frequently and electronically. What I really want to emphasize are the binational boards, task forces, study teams and other committees. They are the backbone of this organization. Without the volunteer people that act on these Boards and the advice that they give us (and there are many people in this room that have functioned in that capacity and served the IJC), we would be a hollow shell. It is these people that give us the advice that we need to do our job.

21.6 How the Commission interfaces with others

We receive our mandates from references that come to us through governments or, if there is a project that governments feel they want us to approve, they will send it to us for examination and a possible Order of Approval. We examine the science and develop a common base of knowledge. Seeking public views is another aspect of the Treaty that is equally important; that is, we have to provide the opportunity to give everyone a chance to be heard. In the early 1900s, I do not know how people perceived public participation, information, communication and involvement, but in this day and age

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this process has undoubtedly changed remarkably. We use many different kinds of techniques from web-based to consultations, to public meetings, and formal and informal public hearings. This is really the hallmark of the Commission; in everything we do, the public has expectations and we try to meet these expectations by getting out and hearing what they have to say. Frankly, the recipe is very simple; we create a group of experts and we take the knowledge out to the public. We listen to them and then we put it all together and come up with recommendations from the IJC. The role of the public is central to this. We seek consensus; we do not vote. We operate by consensus and we instruct our Boards to do the same in almost every situation and to act in the common good of both countries.

21.7 Achievements of the Commission

I have described applications and how we rule on those and have Orders of Approval that are monitored by binational Boards. In many cases, we oversee some very significant structures. The photograph in Figure 1, for example, is of a dam that actually helps to regulate water levels from Lake Ontario into the St. Lawrence and down through the estuary. To do this is no small feat, but it keeps this issue off the tables of governments in both Canada and the United States within an institution that is very well-respected.

One of our major achievements, since 1972, is to oversee the implementation of the Great Lakes Water Quality Agreement; we have a special office in Windsor to help us with this responsibility. The Great Lakes Water Quality Agreement is probably the paramount environmental agreement in the world. There are many things about the agreement that need improvement but I can tell you that the work that we have done and the reports that we have generated (we are currently in the process of issuing our 11th report) have been critical in helping to steer governments’ activities in the Great Lakes and helping to ‘clean them up’.

We also have a role in alerting governments to emerging issues, whether they be water exports or air quality problems. We try to do that from time to time, both in a formal and informal way. We rely on our Boards and task forces for this. You have heard about all of the agencies cutting back; we are also in some ways directly and indirectly affected by that. We rely on those very scientists, engineers, lawyers, geographers and historians that work in those agencies to do the work for us. The fact that they are disappearing from the agencies makes our job that much more difficult.

21.8 Recent work of the IJC

How do we interface with other organizations? We definitely have to interface with governments at all levels. We have formal semi-annual meetings where we meet with all our technical groups and we review their progress; they tell us their problems and we give them solutions. We also have formal executive meetings where the Commissioners meet approximately every two months. In addition, we meet with others such as industry, environmental non-government organizations, academia, citizens and First Nations through board meetings, public hearings and other kinds of special meetings that are set up for that purpose. We do try to interact with other organizations; for example, with the North American Commission for Environmental Cooperation, on air, alien invasive species and other issues, and with the Great Lakes Fishery Commission and the Great Lakes Commission. We have also played a role in helping to create the Great Lakes Water Quality Agreement, and we oversee its implementation, in addition to the Columbia River Treaty.

In Table 2 I have illustrated two formal splits, along national lines, simply to indicate that we are not always harmonious. However, those particular two questions were raised a long time ago, in the 1920s, when life was different. I think it is safe to say, that over the past 60 to 70 years, the Commission has been unanimous in all of its decisions.

Table 2. The Commission’s Record Over 9 Decades.



21.9 The IJC in the 21st Century

Both governments recently asked us to reflect on the good work that we have done in the past and to give them a sense of where we might be more helpful in the future. The following is a list of what we consider to be the elements of success for the IJC:

- Consultation and consensus building: We reach out to the public and they help inform us.
- Providing a forum for public participation: We provide a forum for public participation. We have formal hearings but we also use other kinds of vehicles to get public input and to inform the public of what we do.
- Encouragement of local government: We are more and more engaging local governments. We have people at the municipal level on some of our Boards, and we are seeking more membership from that community.
- Joint fact finding: This is probably the most essential part of what we do. We bring together people with expertise from both countries to work in the common interest of both governments; that is, they are not acting in those kinds of parochial lines and in their personal, professional capacity. That, to me, is the best example of how an organization can function.
- Objectivity and independence: We are objective and independent of governments. That may be a unique feature that may not be achievable in other parts of the world, but it makes our job a lot easier.
- Flexibility: We are flexible and the Treaty is flexible; this has been shown over 90 years in terms of how we have evolved and the kinds of recommendations that we have put out.

Further information about the IJC is available on our website, www.ijc.org.

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21.10 DISCUSSION FOLLOWING THE PRESENTATION

21.10.1 Why does the IJC not address groundwater issues?

Alfonso Rivera, Chief Hydrogeologist, Geological Survey of Canada, Natural Resources Canada, Hull, Quebec,

During the very extensive consultations that we did across Canada for groundwater related issues, we mentioned the IJC as an international model for cooperation. We were asked, several times, the following question: “Why does the IJC not mention groundwater in their reports?” Can you comment on that?

Murray Clamen

That is a very good question. In fact, our legal advisors are struggling over that issue right now. I would not want to give you a definitive answer, other than to say that there are some people who believe the Treaty covers groundwater and there are others who believe that it does not. We are involved in groundwater issues when we do specific studies. For example, groundwater was an important aspect of the Flathead reference study in British Columbia. In the Great Lakes, where we did a study of water use, the interaction of groundwater and surface water was also an important element. There is no doubt in my mind that, as we move across the country from watershed to watershed and we get more involved in issues, groundwater issues are going to continue to be prominent. In fact, it is probably going to be one of those issues that we discuss in more depth, with governments, to find out just how much they want us involved. There very well may be a legal interpretation of the Treaty, at least on our side, which says that groundwater is covered. That is why I say it is flexible; it may well be that this flexibility is what will allow us to deal with groundwater.