SAINT JOHN RIVER POWER DEVELOPMENT: SOME INTERNATIONAL LAW PROBLEMS[1]

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Today I want to consider in rather a random way an international law problem of particular concern to New Brunswick. In recent years there has been intense interest in developing the power potential of the Saint John River. The river is, we know, an international waterway, and its development may, I suggest, involve complex questions of international law.

My decision to speak on the topic was prompted by reading the papers on the international legal problems of the Columbia River, presented last September at the Banff meeting of the Canadian Bar Association. Quite frankly, I have not had time to do the research a scholarly paper on this difficult subject would require. But my preliminary study indicates there are issues involved that press for prompt investigation here in New Brunswick. All I want to do now is to raise the issues.

In his paper at Banff, Professor Maxwell Cohen of McGill referred to ". . . the Canadian advantage which the Columbia River gives to her at this moment of national development". It is precisely this "Canadian advantage" which has caused me some concern as a New Brunswicker. Canada's position as the up-river country on the Columbia may be an advantage; if so, however, the position of Canada, and New Brunswick in particular, as the down-river country on the Saint John, may be a disadvantage. Let me explain why.

The Columbia advantage is derived from the so-called *Harmon Doctrine*. In his paper at the Bar convention, Professor Bourne of the Law Faculty of the University of British Columbia, said that the essence of the Harmon doctrine, is "that a state may do as it pleases with the waters in its territories without regard to down-stream interests". This doctrine, in a modified form, is incorporated in Article 2 of the *Boundary Waters Treaty, 1909*.

Under the Boundary Waters Treaty the International Joint Commission of the United States and Canada was constituted. This Commission has both compulsory and voluntary jurisdiction. Its jurisdiction is compulsory in the sense that certain works must

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be approved by the Commission before they can be undertaken. Under Article 3 no uses or obstructions or diversions of boundary waters on either side of the line affecting the natural level or flow of boundary waters on the other side of the line may be made, except by authority of the United States or Canada within their respective jurisdictions and with the approval of the International Joint Commission. Under Article 4, each party agrees that it will not permit the construction on its side of the boundary of any obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in trans-boundary rivers, the effect of which would be to raise the natural level of waters on the other side of the boundary unless the construction is approved by the International Joint Commission. Any other difference arising between the parties along the common frontier is referrable to the Commission for examination and report whenever either the United States or Canada requests such a reference. Finally, any differences arising between the two countries may be referred for decision to the Commission by the consent of both parties.

The term "boundary waters" is defined in the Treaty 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 . . . ." But boundary waters do not include tributary waters flowing into boundary waters, or waters flowing from boundary waters, or the waters of rivers flowing across the boundary.

Now, I shall return to Article 2, which, as I have said, incorporates the Harmon doctrine, at least in modified form. This Article provides "that each of the High Contracting Parties reserves to itself, or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any Treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary, or into boundary waters". So far this Article states the Harmon doctrine. Under its terms, either the American federal government or the government of the State of Maine would have exclusive jurisdiction over the use and diversion of waters in the State of Maine forming part of tributaries of the Saint John River and of the Saint John itself before it becomes an international boundary river. There is, however, a limitation. This jurisdiction is exercisable subject to any treaty provisions existing at the date of the Treaty. The Webster-Ashburton Treaty, concluded in 1842, does, I think, affect Article 2. The Webster-Ashburton Treaty provides that where the Saint John River is declared to be the line of boundary, the navigation of the river

shall be free and open to both parties and shall not be obstructed. Further, certain products of the forest or of agriculture, grown on any of those parts of the State of Maine watered by the Saint John River or by its tributaries, have free access into and from the river and its tributaries having their sources within the State of Maine. This free access extends down to the mouth of the River. Similarly, the inhabitants of the territory of the Upper Saint John in Canada have free access to the river for their produce where it runs wholly through the State of Maine.

A further restriction on the exercise of the exclusive jurisdiction and control is contained in Article 2 itself. The Article provides, "It is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary resulting in any injury on the other side of the boundary shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs."

The precise scope of this reservation has given rise to differences of opinion. It is not my purpose to attempt to resolve these differences. Hon. William Pugsley, who, as Minister of Public Works was responsible for piloting the implementing statute through Parliament in 1911, explained the clause in question:

> The words of the Treaty are that in case of any injury caused by diversion of waters from their natural channel on either side of the boundary resulting in any injury on the other side of the boundary this shall give rise to the same rights and entitle the injured parties to the same legal remedies as if the injury took place in the country where such diversion or interference occurs. In case that injury took place in one of the United States, the party whose property was injured would have a legal right. He would have the right to go into the courts of the state and recover damages.

A bit later in his speech, he seemed doubtful whether proceedings by a Canadian should be initiated in the American federal or state courts. He said, however, that he didn't think it made any difference; to use his words, "that there is a legal remedy under the Treaty is beyond question". In the United States, the general rule is that treaties are self-executing and override conflicting state law. To determine precisely what rights would be available to a New Brunswicker injured in this Province by a diversion in Maine would involve careful examination of the rights he would have were he injured in Maine. This would necessitate a study of American federal law, including constitutional law, and applicable state law.

The Article contains a further general reservation: neither of the High Contracting Parties surrendered any right it had to object to interference or diversion of waters on the other side of the boundary, the effect of which would produce material injury to navigation interests on its own side of the boundary. Even the Harmon doctrine conceded such a right of objection.

In 1946 the United States and Canada joined in a reference under Article 9 of the Treaty for the purpose of an investigation by the International Joint Commission to determine whether greater use could be made of the Columbia River system. Professor Cohen says that the Commission was confronted with fundamental differences in points of view between the American and the Canadian sections of the Commission. He states that these views now rest on two main conceptions:

> First and foremost, article II, according to Canada, gives the upstream state 'exclusive' control including the right of diversion and only a claim for damages within some kind of procedure not yet really explored in detail by either party, is available in a Canadian or British Columbia court to injured parties in the United States — although the Exchequer Court is referred to specifically in the Boundary Waters Treaty Act of 1911. A second proposition is to the effect that such Canadian rights under the treaty mean that if the United States desires to increase its utilization for power of the Columbia River within the United States, and if this is possible only by the construction of storage dams etc. in Canada, then Canada is entitled to compensation not only for the cost of the dams, but for (1) the additional value in terms of flow that leads to power generated in the United States and (2) Canada is entitled also to a share of the power so generated in the United States. This is now known as the 'downstream benefits' theory.

If Canada were successful in establishing these two main conceptions she would obviously derive a bargaining advantage in relation to the Columbia. However, once established, the conceptions would seem on the surface at least to give the United States a bargaining advantage in relation to the Saint John. As you know, the International Joint Commission did undertake a study of the power potential of the Saint John River at the request of Canada and the United States. It appeared that full utilization of the river's power resources might involve the ultimate construction of four principal power dams, three in New Brunswick, at Morrill, Beechwood and Hawkshaw, and one in Maine, at Rankin Rapids. Two sites could also be developed on tributaries, at Fish River Falls and Castle Hill. Operation of these sites would require storage facilities along the upper reaches of the Saint John and on some of its tributaries. Of these sites, Rankin Rapids in Maine has the greatest potential. If the Canadian case respecting the Columbia were accepted, it would mean, if I may paraphrase Professor Cohen, (1) that, subject to the Webster-Ashburton Treaty, the United States or Maine could divert or otherwise use the waters of the Saint John and its tributaries in Maine, subject only to ill-defined claims for damages by adversely affected parties in New Brunswick, and (2) that if Canada, or more particularly New Brunswick, desired to increase its utilization for power of the Saint John River, and if this were possible only by the construction of power sites and storage dams in Maine,

then the United States would be entitled to compensation for the additional value in terms of flow that leads to power in Canada, and to a share of the power so generated in Canada. Thus the so call "downstream benefits" theory, of advantage to Canada on the Columbia, possibly could work to our disadvantage on the Saint John.

Because of this possibility we in New Brunswick owe it to ourselves to make a careful study of the legal implications of Article 2 of the *Boundary Waters Treaty*. Such a study takes on added importance today when one considers that the Borden Commission on energy resources has already commenced its hearings. I hope that any submissions from New Brunswick will not be confined to engineering and economic factors, but will encompass vital legal factors as well. It is also important to note Professor Cohen's statement that in May, 1956, the Canadian and American governments announced they would undertake a major re-examination of their boundary waters problems and of the Treaty itself. It is vital that such re-examination should in no way neglect New Brunswick's position in relation to the Saint John. Of course, the study I suggest might reveal that physical, technical and economic factors on the Saint John so differ from those on the Columbia that the "downstream benefits" doctrine is not really disadvantageous to us: but we should find out.

It may be well to point out, before concluding, that the problems of the Saint John may involve questions of constitutional law and federal policy as well as international law. In 1955 when the government of British Columbia was proposing to issue a licence for power development on the Columbia, the federal government intervened through the *International River Improvements Act*. Section 4 provides, "No person shall construct, operate or maintain an international river improvement unless he holds a valid licence therefor issued under this Act." The provinces are bound by the Act. The term "international river" is defined to mean "water flowing from any place in Canada to any place outside Canada", and "international river improvement" means "a dam, obstruction, canal, reservoir or other work the purpose or effect of which is (i) to increase, decrease or alter the natural flow of an international river, and (ii) to interfere with, alter or affect the actual or potential use of the international river outside Canada". This statute obviously affects rivers other than the Columbia. The St. Francis River rises in Quebec, is wholly within that Province for part of its course, then becomes an international boundary river, and finally discharges into the Saint John. Half the waters that flow from that part of the St. Francis lying wholly within Quebec into that part forming the international boundary flow from Canada to a place outside. Therefore, it would seem

that before dams could be erected on the St. Francis or on Boundary Lake in Quebec, a federal license would have to be obtained. It might also be argued that a river, wholly within Canada, but which empties into the Saint John at a point where the Saint John forms part of the international boundary, might be considered an international river. This would depend on whether it would be held that water leaving the tributary and entering the Saint John becomes part of the Saint John immediately on entry, or whether a current coming out of the tributary would retain its identify until it becomes thoroughly merged. In the latter case, it might be argued that water in a current flowing out of the tributary and across the international boundary would be water flowing to a place outside Canada. I think this highly unlikely, but possible.

Conclusion

In this talk I have attempted to show that certain international law problems — particularly those concerning the Saint John River and the development of its power potential — are of utmost importance to our Provincial economy. I have urged careful study of these problems here in New Brunswick. Such study is vital if the interests of the Province are to be fully understood and safeguarded.