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## THE ROLES OF LAW AND DIPLOMACY IN DISPUTE RESOLUTION: THE IJC AS A POSSIBLE MODEL

*L. H. Legault\**

I am pleased and honored to be invited to speak to you today on the roles of law and diplomacy in dispute resolution between Canada and the United States. Specifically, I have been asked to address the case of the International Joint Commission (IJC) as a possible model.

Let me make it clear from the outset that I am not a legal scholar. I appear before you as a practitioner, speaking from something close to twenty-five years of involvement in Canada-U.S. affairs as a negotiator and litigator, and now as a member of the International Joint Commission. My views inevitably reflect my background, but are entirely my own, not those of the Commission or of any other body.

What I propose to do is to begin with a quick outline of the roles of law and diplomacy, bringing out the chief strengths and weaknesses of each as I see them. I shall then compare and contrast them with the special characteristics of the IJC, with a view to determining whether the Commission offers anything uniquely helpful that could be more generally adaptable to the resolution of transboundary problems between Canada and the United States.

The first thing to be said about the roles of law and diplomacy – or law and negotiation, which is the same thing – is that they are not mutually exclusive and should not be so considered. This does not mean that negotiations should be constrained by narrow legalistic approaches but it does suggest, at least, that negotiations must be within the general rules and principles of international law. States, of course, are free to take a virtually unlimited range of non-legal factors into account in reaching agreement: for example, the maintenance of good relations, concessions in unrelated areas, or other interests best determined by the parties themselves.

It is for these reasons of flexibility and control by the parties themselves that negotiation is the generally preferred method for the resolution of disputes between states. On the other hand, negotiation also presents serious drawbacks. I shall focus on just three of them. First, negotiation does not neutralize inequality of power between the parties. Second, it does not

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provide for objective and impartial determination of the facts. Third, it does not remove the dispute from the sphere of politics and thus, it can lead to the adoption of extreme and intransigent positions. Political or constitutional processes may put a settlement beyond reach or may even lead to the reopening or rejection of an agreement after its negotiation. This latter factor is made worse when the private interests at stake either become parties to or virtually masters of the negotiations between governments. Think for a moment of the recent Pacific salmon dispute between Canada and the United States.<sup>1</sup> Unhappily, our two countries appear to share a peculiar susceptibility to believing their own propaganda, to the point where being right can count for more than the protection of the real interests concerned. Nothing can be more fatal to reaching agreement.

What, then, are the advantages and disadvantages of resolving disputes by legal proceedings? In addressing this question, I shall deal only with third-party settlement by arbitration or adjudication and not touch upon such other methods as conciliation or mediation.

The advantages of third-party settlement are three-fold. First, inequality of power becomes largely irrelevant. Second, the facts can be decided objectively and impartially. Third, the dispute is removed from the political sphere and even unpopular results are normally accepted.

These advantages are not all as cut-and-dried as they might appear at first glance. Although the arbitrators or judges may consider the facts objectively and impartially, the latter are not usually as well placed to establish, weigh, and balance them as persons who are closer to the situation and have direct knowledge of them. Moreover, third-party settlement is not, as a rule, adapted to the examination and cross-examination of witnesses. Nor does it normally provide for a process of "discovery" or compulsory disclosure of facts or documents on which a party may wish to rely. Although the proceedings are removed from the political sphere, the decision to resort to third-party settlement is not, and third-party settlement may sometimes prove impossible for this reason. Indeed, it is the very fact of taking control away from the parties that makes them reluctant to agree to third-party settlement in so many cases. Where the parties are willing to give up control and the flexibility that goes with it, it is often because they wish to avoid political accountability for a result that may turn out to be less favorable than they might have hoped.

Paradoxically, third-party settlement can be as bad or worse than negotiation in encouraging extreme claims and positions, especially where the law is unsettled. This is because such claims and positions are addressed

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<sup>1</sup> See Tom Kenworthy & Steven Pearlstein, *U.S., Canada Reach Pact on Pacific Salmon Fishing*, WASH. POST, June 4, 1999, at A17.

to a third party who, it may be hoped, might conceivably take a “split-the-difference” approach or be swayed by considerations not likely to influence the other party in a negotiation. On the latter point, I have in mind certain arguments put forward by both Canada and the United States in the *Gulf of Maine* case.<sup>2</sup> These were arguments based on unrelated and non-prejudicial arrangements previously entered into by the two countries. Both parties tried to exploit these arrangements to the prejudice of the other side. Happily, the Chamber of the International Court of Justice (ICJ) rejected these attempts. The point is, however, that adversarial proceedings make it hard for lawyers to leave anything out. In a negotiation, on the other hand, political factors may sometimes impose a greater measure of discipline to avoid widening or sharpening a dispute and needlessly affecting future relations between the parties.

In the light of this sketchy review of the roles of law and diplomacy, I now turn to the question of the IJC as a possible model. This will require an examination of the nature, mandate, functions, and procedures of the Commission.

Article VII of the Boundary Waters Treaty of 1909 provides for the establishment and maintenance of a permanent International Joint Commission composed of six Commissioners.<sup>3</sup> Each government appoints three Commissioners, thus assuring equality of membership. The Commission is not an arm of government and Commissioners do not represent, take instructions from, or report to the government that appointed them. This independence is confirmed by Article XII of the treaty, which requires Commissioners to make a solemn declaration in writing that they will faithfully and impartially perform their duties under the treaty.<sup>4</sup> Independence is further confirmed by the Commission’s and the Commissioners’ immunity from judicial process in both countries. The Commission’s decisions – as distinct from its recommendations – are thus not subject to appeal to the courts of either country. They can, in practice, be reversed only by an agreement between the two countries.

Although the Commission is made up of two sections – one Canadian and one American – it acts as a single, unitary body that is intended to work collegially in the common interest of both countries. As will be seen in my later discussion of its functions, the Commission is empowered to serve both as a binational tribunal and as a binational commission of inquiry.

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<sup>2</sup> See *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. United States of America)* 1984 I.C.J. 246 (Oct. 12).

<sup>3</sup> Treaty Relating to Boundary waters between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2449 [hereinafter *Boundary Waters Treaty*].

<sup>4</sup> *Id.* at art. VII.

The very nature of the Commission as I have just described it is responsible for some of its unique advantages. Because it is not a forum for negotiation between the two governments, it avoids the shortcomings of that process. Unlike the State Department and the Department of Foreign Affairs, the Commission can and must examine matters impartially and pursue solutions that rise above contending national interests. Its parity of membership ensures equality. Its permanent character means that for the specific classes of issues pre-assigned to it for final determination, the Commission may proceed without the advice and consent of the U.S. Senate that would otherwise be required for a judicial proceeding. Its independence and immunity insulate it from political pressures. And its binational makeup helps it escape the effects of remoteness associated with third-party settlement.

I turn now from the nature of the Commission to its mandate and functions.

The fundamental mandate of the Commission, as reflected in the preamble to the Boundary Waters Treaty, is to prevent and resolve disputes between Canada and the United States.<sup>5</sup> To discharge this mandate, the Commission is assigned three key functions.

The first of these functions is a quasi-judicial one. Article III of the treaty empowers the Commission to rule upon applications for any new uses, obstructions or diversions of boundary waters in either country that affect the natural level or flow of waters in the other country.<sup>6</sup> Article IV similarly empowers the Commission to rule upon applications for the construction of any works, dams, or other obstructions in rivers that flow from boundary waters, or rivers that flow across the border, if these projects will raise the natural level on the other side of the boundary in the upstream country.<sup>7</sup> The Commission's decisions on such applications are final and binding. Moreover, the Commission may appoint a board of control to oversee and assist in the implementation of an order of approval by which it has authorized a project to proceed.

The second key function assigned to the Commission is an investigative and advisory one. Article IX of the treaty mandates the Commission to examine and report upon the facts and circumstances of transboundary issues referred to it by either government, and to provide appropriate conclusions or recommendations.<sup>8</sup> These conclusions and recommendations, however, are not binding as to facts or law, and final control is thus left with the two

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<sup>5</sup> *Id.* at preamble.

<sup>6</sup> *Id.* at art. III.

<sup>7</sup> *Id.* at art. IV.

<sup>8</sup> *Id.* at art. IX.

governments, who remain free to negotiate any solution upon which they can agree with such assistance as they may find in the Commission's views.

The third key function assigned to the Commission is an arbitral one. Article X provides that the Commission may decide any matter of difference referred to it jointly by the two governments for this purpose.<sup>9</sup> The advice and consent of the U.S. Senate is required before the U.S. government can submit to this legally binding process. No matter has ever been referred to the Commission under this Article.

It is, of course, relevant to enquire whether the Commission applies rules and principles of public international law when acting in either its quasi-judicial or advisory capacity. The answer is that, for the purposes of the Commission's mandate, the Boundary Waters Treaty establishes the applicable international law for waters in the boundary region. In following the requirements of the treaty, the Commission is applying the appropriate rules of international law. When, for example, the Commission is asked to approve a project in boundary waters or in a transboundary river, it must apply the rules or principles that the governments of Canada and the United States have set out in Article VIII of the treaty and that they have agreed will govern such cases. The code found in this article leaves little if any room for the application of other rules of international law.

There are, however, cases in which the Commission may have to consider other requirements of international law. These arise most frequently under Article IX references, when the Commission is asked to examine and provide recommendations on issues of concern along the border.<sup>10</sup> In these situations, governments normally want the Commission to examine all relevant factors that could help in preventing or resolving disputes, although the governments can focus or restrict the scope of the Commission's inquiry. The Commission has just completed its final report on a reference with respect to the protection of the waters of the Great Lakes. Although the governments did not specifically ask the Commission in that reference to look at international law issues, the Commission decided that it should examine whether the requirements of international trade law prevent governments from protecting the waters of the lakes. It found that they do not.

The procedures followed by the Commission in pursuing its functions are similar in many ways in both quasi-judicial and advisory cases.

Decisions by the Commission call for the concurrence of at least four Commissioners to ensure that decisions can be reached only if at least one Commissioner from each country agrees. In practice, however, almost all decisions are taken by consensus. This is a remarkable achievement. Equality

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<sup>9</sup> *Id.* at art X.

<sup>10</sup> *Id.* at art IX.

of membership, it might be thought, could all too easily lead to an equal division of three against three. John Read, the only Canadian ever to have served as a judge of the World Court, once declared, "from an abstract point of view, it could be proved beyond all reasonable doubt, that [the Commission] could not possibly work," given the lack of a neutral umpire. In fact, over a period of almost ninety years, the Commission has divided along national lines in only two cases out of 117 and has usually reached unanimous agreement.

Another striking feature of the Commission's procedures is joint fact-finding. In both quasi-judicial and advisory proceedings, the Commission normally establishes a board to advise it on issues that arise with respect to the matter at hand. These boards are composed of an equal number of members from each country, who are often drawn from federal, provincial, or state government agencies but may also come from the private sector. Whatever their background, board members are expected to act in their personal and professional capacity and not as representatives of their government or their employer. Like the Commission itself, the boards seek to work on the basis of consensus.

This method of dealing with factual issues is almost certainly more reliable and more effective than any method normally available in a third-party settlement or negotiation. It is reinforced by the fact that Article XII of the treaty empowers the Commission to compel the attendance of witnesses and take evidence on oath.

Joint fact-finding is a most important element in building consensus not only within the Commission itself but also within the communities that may be affected by the Commission's decision or recommendations. Another consensus-building measure lies in the provisions of Article XII of the treaty, which require the Commission to give a "convenient opportunity to be heard" to any party in any matter before the Commission.<sup>11</sup> To this end, the Commission holds public hearings where all who wish to do so may express their views before the Commission reaches a decision or submits its recommendations. In the same spirit of consensus building, the Commission invites and facilitates the engagement of provincial, state, and municipal governments in its consideration of transboundary issues of concern to them. Again, these procedures represent advantages not offered by negotiation or third-party settlement.

Over almost ninety years, the Commission has developed a rich body of practice in addressing transboundary water and environmental issues

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<sup>11</sup> Boundary Waters Treaty, *supra* note 3, at art. XII.

assigned to it under the Boundary Waters Treaty, the Great Lakes Water Quality Agreement,<sup>12</sup> and other agreements. For example:

- A. In its 1931 report on the Trail Smelter reference, the Commission provided the governments with recommendations for remedial measures to reduce emissions from the smelter at Trail, British Columbia and proposed a formula for the payment of compensation to cover damages suffered in the United States. The advice that the Commission brought to bear on this issue helped to avert a serious conflict.<sup>13</sup>
- B. In 1944, the IJC was asked to investigate the potential for greater use and development of the Columbia River and, in 1959, to recommend principles for the apportionment of downstream benefits, relating particularly to power generation and flood control. The Commission's response to these references helped the governments to conclude the 1961 Columbia River Development Treaty.<sup>14</sup>
- C. In the Garrison Diversion and Flathead references of 1975 and 1985, respectively, the Commission was asked to advise the governments whether certain proposed projects – the first in the United States and the second in Canada – would contravene the prohibition against transboundary pollution in Article IV of the Boundary Waters Treaty. The Commission recommended against the construction of both projects, and neither has been built.
- D. Most recently, the Commission completed a yearlong study of consumptive uses, diversions, and exports of the waters of the Great Lakes. On February 22 of this year, it submitted its report to the two governments, with comprehensive recommendations for the protection of these waters.

These few examples illustrate the complexity, importance, and controversial nature of the issues with which the Commission must deal. They illustrate also that the Commission's permanence, equality of membership, independence, impartiality, and its binational but unitary nature have all served it well. So have its procedures, most notably consensus

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<sup>12</sup> Canada-United States Great Lakes Water Quality Agreement, 1978 Can. T.S. No. 20; 30 U.S.T.S. 1383.

<sup>13</sup> Trail Smelter: United States v. Canada, Arbitral Tribunal, Montreal, Apr. 16, 1938 and Mar. 11, 1941; U.N. REP. OF INT'L ARBITRAL AWARDS 3 (1947) 1905.

<sup>14</sup> Columbia River Development Treaty.

building through joint fact finding, public participation, and the engagement of local governments. Together, these features make the Commission truly one of a kind as a system for the settlement of disputes.

This system works hesitantly at times, perhaps even painfully. To everyone's satisfaction in every case, certainly not. But in most cases it resolves disputes. And it is hard to quarrel with a long record of success.

The time has now come to address the question whether the Commission can serve as a model for the resolution of disputes between Canada and the United States. The relevance of the Commission as a potential model for other countries is, of course, quite another matter but is not on our agenda today.

If, then, the question were whether the Commission model can be adopted *holus-bolus* as a permanent general mechanism for the resolution of a broader range of Canada-U.S. disputes, the answer would appear to be a definite no. The reasons for this conclusion are simple. First, one of the two countries' most prolific sources of problems – international trade – is already endowed with its own dispute-settlement systems under NAFTA and the WTO. Second, the Commission itself, in any event, already has the general jurisdiction to hear any and every dispute whatever that may be jointly referred to it by Canada and the United States under the arbitral provisions in Article X of the Boundary Waters Treaty. As I pointed out earlier, that article has never been invoked. Thus, it seems highly improbable, if not impossible, that the two governments would ever agree to the establishment of a new tribunal of general jurisdiction – especially compulsory jurisdiction. This view is further borne out by the cold reception the governments accorded to the scheme of compulsory third-party settlement proposed some twenty years ago by the Canadian and American Bar Associations to deal with legal disputes between Canada and the United States. In fact, if the International Joint Commission itself did not exist today, the odds are that it could not be invented.

The Commission, however, can serve as a model in less ambitious ways. Its use of joint fact finding and consensus building procedures has proven to be of great value in the resolution of disputes submitted to the Commission. These procedures address one of the critical weaknesses inherent in both negotiation and third party settlement. Although the Canadian and U.S. governments have previously involved interest groups in negotiations of concern to them, I do not believe that the experience has been a productive one. The problem appears to be that these groups simply become part – sometimes the driving part – of an adversarial process.

The boards appointed by the Commission to assist in both quasi-judicial and advisory cases work in a very different way. Their members serve in a

personal and professional capacity, not as representatives of any group. They seek to establish the facts in an objective manner. They look for points of agreement, not disagreement. All of this may sometimes be very difficult, but it has worked more often than not. It is worth trying outside the Commission framework as well.

Still, the best inspiration that might be drawn from the Commission model is greater use of the Commission itself in its advisory capacity. Although the two governments have certainly kept the Commission busy over the past three years, Article IX offers ample room for further references to the Commission on virtually any transboundary issue. I personally would like to see the two governments call upon the Commission more often, and on non-traditional issues.

The traditional issues referred to the Commission are, of course, transboundary questions relating to water and the environment. The fact that the Commission has specialized in these areas is one of the reasons for the success it has enjoyed. Nevertheless, this should not discourage some ventures into new areas. The Commission has demonstrated a good deal of flexibility in adapting to new circumstances during its almost ninety years of existence. Moreover, those many years have given it a certain momentum, a built-up collegial will to succeed that should enable it to meet fresh challenges in the 21<sup>st</sup> century. After all, no one would wish to see the old ship hit the rocks on his or her watch.

