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The First Century of the International Joint Commission

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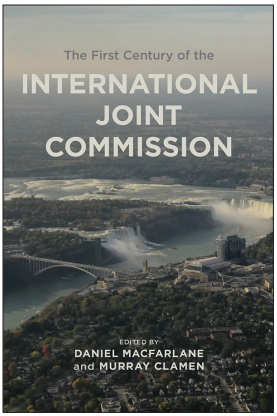

THE FIRST CENTURY OF THE INTERNATIONAL JOINT COMMISSION

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From IWC to BWT: Canada-US Institution Building, 1902–1909

David Whorley

The Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada (the Boundary Waters Treaty for short) is the principal instrument framing Canadian-US relations regarding the two countries' shared fresh water.[1] While formally an Anglo-American agreement, the Boundary Waters Treaty (BWT) is, and was recognized at the time of its development as, essentially a Canada-US arrangement, involving direct negotiations between Canadian and US officials and establishing an international institution that would have exclusively Canadian and US membership. In this respect, Glazebrook accurately observed many years ago that "the process of negotiation, so largely direct between Canadians and Americans, foreshadowed an essential characteristic of the new commission."[2] In place now for over a century, the BWT and the International Joint Commission (IJC) have proven to be durable and useful instruments for helping to prevent and resolve disagreements over shared Canadian and US waters.

The purpose of this chapter is to sketch the origins of the BWT and the IJC, with particular emphasis on the predecessor institution, the International Waterways Commission (IWC). In undertaking such a review, this chapter seeks to understand the process of institutional development between Canada and the United States concerning the management

of their shared waterways by applying a framework on the use, modification, and creation of international organizations (IOs) as supplied by Jupille and Snidal and subsequently applied by Jupille, Mattli, and Snidal.[3] Along the way, the chapter reviews a lesser-known treaty option that was briefly on the table for consideration, the Clinton-Gibbons draft of 1907. As will be seen, the BWT is certainly not the agreement that Canadian and US negotiators set out to develop. The original trajectory of negotiations momentarily pointed toward a more comprehensive and authoritative IO, a binational commission that would have enjoyed a very broad set of decisive powers as initially envisioned. In the end, Canada and the United States opted for a more limited agreement, one that altered the institutional landscape but in doing so did not wholly reject the more modest nature of the IWC. On the contrary, the eventual institutional arrangement at which the parties arrived in 1909 demonstrates notable continuity with this predecessor IO.

Canadian and US actions, from the creation of the IWC through to the finalization of the BWT, demonstrate how institution creation and change can be a messy, complex, and not entirely predictable affair. Given the durability, utility, and steadfast presence of the BWT, there may be some temptation to think that the arrival of something like it was in some way inevitable. In the event, the process of moving from problem identification to institution construction did not proceed in a straight line leading inescapably to the BWT and the IJC, but rather progressed through a number of quite different iterations involving changing conceptions of institutional scope and authority in response to growing tensions over shared Canada-US waterways. The benefits as well as the limitations and risks revealed by earlier stages of institutional development in the form of the IWC and the 1907 Clinton-Gibbons draft contributed to the eventual practicality, flexibility, and longevity of the BWT.

Causes for IO Creation

Irritants at different locations along the international boundary eventually led actors on the Canadian and US sides to recognize the need for a mechanism to help manage shared waters. Dreisziger identifies a suite of Canada-US water-related tensions at the end of the nineteenth and

beginning of the twentieth centuries that focused attention and ultimately led to the creation of an arrangement on all shared waters.[4] Along with the stresses discussed below and the attendant interests involved, the BWT and its predecessor, the IWC, were shaped by a set of ideas in good currency at the time. In this case, ideas related to conservation, itself part of a broader suite of ideas that contributed to Progressive-Era thought, were salient.[5] This chapter is not intended to retrace the history and influence of the Progressive movement or the role of conservationism within it in the early twentieth century. Nonetheless, Canadian and US efforts to build an effective cross-border institution for preventing and resolving water conflict owe something to these ideas.

Conservationism

Like progressivism itself, US conservationism in the late nineteenth and early twentieth centuries was multi-stranded, characterized by the sometimes uneasy cohabitation of utilitarians, favouring the efficient use of natural resources, and preservationists, more committed to the protection of nature for itself on aesthetic grounds.[6] These strands of conservationist thought are sometimes caricatured as falling under two camps led by their respective champions: Gifford Pinchot, chief US forester and an important influence in natural resource conservation and protection in the Roosevelt era, for the utilitarians (sometimes simply termed "conservationists"); and John Muir, founder of the Sierra Club, for the preservationists. This simplified characterization tends to mask a more subtle interplay of ideas between the two streams of thought, something perhaps as complex as the relationship between Pinchot and Muir themselves who, though friends and one-time allies in the conservationist movement, ultimately broke over differing views about natural resource protection and use.[7] Regarding conservationism, Stradling points out that the term "does double (and conflicting) duty—signifying both a movement to promote efficient use and the preservation movement that struggled against that use."[8] Hays describes the conflict between preservationists and conservationists at the time as "between those who favored resource development and others who argued that wild areas and wildlife should be preserved from commercial use," differing views that "pervaded a great number of

resource incidents during and after the Roosevelt administration, and led to mutual suspicion, scorn and distrust. Each group claimed the banner of true conservationism and accused the other of being false standard bearers of the gospel."[9]

For his part, Theodore Roosevelt was influenced by both streams of thought—and was a friend of both Pinchot and Muir—in a presidency that embraced the protection of natural resources.[10] In a 1908 address to open the Conference on the Conservation of Natural Resources, Roosevelt set out the challenge he saw facing the United States, and pointed toward a more utilitarian frame of reference, by observing that "the wise use of all of our natural resources, which are our national resources as well, is the great material question today. . . . The enormous consumption of these resources and the threat of imminent exhaustion of some of them, due to reckless and wasteful use, once more call for common effort, common action."[11] He also pointed out that "we have thoughtlessly, and to a large degree unnecessarily, diminished the resources upon which not only our prosperity but the prosperity of our children must always depend."[12] Facing the end of the US frontier, and the prospect of natural resource limitation and depletion, Roosevelt saw the efficient use of natural resources, and national efficiency in general, as nothing short of a patriotic duty.[13] Similarly, Pinchot defined natural resource conservation as embracing development to deliver "the greatest good to the greatest number for the longest time."[14] These views, while perhaps not recognizable as current-day sustainable development, do bear a certain, if distant, family resemblance.

For its part, the BWT is principally directed toward the establishment of rational rules and a predictable system for dispute resolution in the use of an important resource shared by two countries. Viewed from this perspective, the treaty clearly owes something to the utilitarian stream of Progressive-Era conservationist thought. Putting in place a system of rules for the use of shared resources supports rational and efficient resource development, something that is not feasible when the rights and obligations of the parties are unclear. However, the BWT is also animated by preservationist elements, as is seen perhaps most clearly in the protections afforded Niagara Falls, where both hydroelectric development and the need to protect the natural beauty of the Falls for themselves are present.

The St. Mary and Milk Rivers

Pressure for irrigation in the semi-arid region of Southern Alberta and Montana was an important and early driver for some form of cross-border water arrangement, in particular for the waters of the St. Mary and Milk Rivers (see Heinmiller in this volume). Both rivers originate in Montana and flow north into Alberta. The St. Mary River is part of the Saskatchewan-Nelson system in the Hudson Bay basin. In contrast, the Milk River is a tributary of the Missouri River, part of Gulf of Mexico drainage. The Milk River runs through Southern Alberta for approximately 160 kilometers (about 100 miles) before re-entering Montana.[15] US plans to divert the relatively more abundant and reliable waters of the St. Mary River into the Milk River to irrigate the lower Milk River basin had existed since the 1870s.[16] In 1891, the US Department of Agriculture conducted an assessment of the two rivers and concluded that the United States had the right to divert waters from the St. Mary provided that the water was not appropriated by Canada.[17] Canadian Interior Department officials responded with their own water survey "of a canal to divert the water from the St. Mary River . . . with the object of creating a vested right on our side of the International Boundary, before Americans divert the waters of this stream on their side of the line."[18]

In 1895, stemming in part from the international competition for St. Mary River water, a resolution supported by Canadian and Mexican delegates to the United States International Irrigation Congress, held in Albuquerque, New Mexico, called for the creation of a trilateral commission to adjudicate international water disputes arising between Mexico, the United States, and Canada. This resolution echoed earlier calls by Canadian interests for diplomatic efforts with the United States to protect access to St. Mary River water.[19] Though an 1896 Canadian expression of interest to co-operate with the United States in developing an international commission to resolve transboundary water disputes was not taken up,[20] the need for some form of international agreement to address at least the challenges related to these rivers eventually came to be acknowledged by both sides. While the St. Mary–Milk River diversion was among the first projects to be authorized by the US Reclamation Act of 1902, US officials, recognizing the international challenges they faced on these rivers, were reluctant to

start construction until an international agreement setting out respective rights to the waters on both sides of the border was put in place.[21] In the end, the St. Mary and Milk Rivers would find a place in the BWT.

The Great Lakes

Elsewhere, actions on the Great Lakes also contributed to the sense that Canada and the United States required an international agreement on shared waterways (see Clamen and Macfarlane on Great Lakes–St. Lawrence basin water quantity in this volume). The diversion of Lake Michigan water into the Mississippi River via a canal near Chicago to address that city's sanitation needs, and pressure for hydro-power generation at Niagara Falls and Sault Ste. Marie, all underlined the need for something to facilitate cross-border co-operation.

The city of Chicago had long struggled with challenges related to sanitary sewage disposal. Until the construction of a diversion canal that carried the city's sewage away from Lake Michigan, Chicago discharged its sewage into that lake, which was also the city's water supply, an arrangement that contributed to substantial public health problems related to water-borne illnesses.[22] In 1889, the Illinois legislature passed legislation for the construction of a canal to reverse the flow of the south branch of the Chicago River into the Des Plaines River in order to convey the city's sewage away from Lake Michigan, across the Great Lakes basin boundary and into the Mississippi River, in the Gulf of Mexico drainage system.[23] Construction was completed in 1899 and the canal was operational in 1900. While built to discharge 283 cubic metres of water per second (10,000 cubic feet per second), due to US federal concerns about the speed of flow and possible effects on navigation, by 1902 the US secretary of war had reduced the maximum discharge permitted to 165 cubic metres per second (5,830 cubic feet per second).[24] The discharge of Chicago's sewage was of obvious and immediate concern to downstream recipients of the water, but Canadian reaction to the diversion was slow to develop, notwithstanding the conclusions of a report prepared for the Canadian Department of Marine and Fisheries that the Chicago Diversion would depress lake levels by between 12.5 centimetres (about 5 inches) and 19 centimetres (about 7.5 inches).[25] Nonetheless, concern about drawdown by

the Chicago Diversion and the potential impacts on power and navigation in the Great Lakes would play their parts in shaping the eventual international arrangement between Canada and the United States.

At Sault Ste. Marie, where the St. Marys River connects Lakes Huron and Superior, from an early date both sides had navigation channels in place to circumvent the St. Marys rapids. The first canal was constructed by the North West Company in 1797–8.[26] The structure was destroyed by US troops during the War of 1812 and eventually rebuilt in 1816. Further navigational improvements around the rapids took place on both sides through the middle and late nineteenth century.[27] However, it was plans for hydro-power generation by both Canada and the United States in the 1880s that helped to spur an international waterways agreement. In 1898, the US Army Corps of Engineers reviewed a submission by the Michigan Lake Superior Power Company to the US government for the diversion of 906 cubic metres per second (32,000 cubic feet per second) of water through a power canal for hydro generation and the construction of compensating works in the St. Marys River. Significantly, the officer responsible for the review, Colonel G. J. Lydecker, observed, among other things, that the compensating works proposed would be partially in Canadian waters, and went on to suggest that both the Canadian and US governments should approve such projects that would modify the volume of discharge of Lake Superior waters. Noting the potential for harm to navigation stemming from reduced lake levels, Lydecker recommended the creation of an international commission made up of Canadian and US representatives to investigate and consider the legal and technical matters in such cases and to make recommendations to the governments regarding such projects. Finally, he advised that no projects be approved until his report's recommendations were adopted.[28]

Along with competition to develop hydro generation at Sault Ste. Marie, the politics of hydroelectric generation at Niagara Falls also helped to bring about an international agreement on shared waterways as Canada and the United States sought to develop the Falls. At the same time, growing concerns about the need to protect the Falls from the ravages of overdevelopment for commercial purposes helped to advance the idea that an international arrangement was needed to protect their natural uniqueness. In this respect, the eventual BWT reveals the influence

of both utilitarianism (as we saw, involving the efficient use of natural resources for the future) and preservationism, related to the aesthetic value of nature, elements that progressives believed should be permanently preserved and protected from economic exploitation and despoliation through the excesses of unbridled individualism.[29] In the mid-1880s, both Canada and the United States moved to defend Niagara Falls by creating reservations to protect the area from unsightly commercial and industrial establishments. In 1896, however, the commissioners in New York began to press for federal protection of the Niagara River itself. As companies in New York and Ontario sought to withdraw water from above the Falls, people concerned about preserving their natural beauty grew increasingly alarmed.[30]

While intended to be only a synopsis of the pressures underlying the creation of a cross-border waterways arrangement, this brief survey helps to explain the eventual—though by no means inevitable—arrival of the current agreement. The parties were not obliged in any way to come up with an international organization or a treaty to resolve their problems over shared waterways, and they certainly did not set out to create the BWT. Decisions to co-operate or engage in the risky business of institution building must be understood by the principal actors as rational, promising superior outcomes to non-co-operation or ad hoc co-operation. In the case of Canada and the United States at the turn of the century, the points of tension along the border were perceived by the parties as sufficient to warrant the challenges of building a cross-border water institution. That institution was not, however, the IJC.

The Way We Were

Created by the US Rivers and Harbors Act of 1902, the IWC was the predecessor organization to the IJC. Operating from 1905 to 1915,[31] it differed from the eventual IJC in a number of respects. First, the commission was not based on a treaty, but rather US legislation. Specifically, the Rivers and Harbors Act called upon the US president

> to invite the government of Great Britain to join in the formation of an international commission to be composed of

> three members from the United States and three who shall represent the interests of the Dominion of Canada, whose duty it shall be to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean, also upon the maintenance and regulation of suitable levels, and also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in the said waters.[32]

Second, the commission's scope was limited to the Great Lakes–St. Lawrence system, at least in the US view. Canada interpreted the scope as described in the 1902 legislation to be non-restrictive with respect to the Great Lakes and the St. Lawrence River, believing that the commission's scope could, and should, have included all international waters shared between Canada and the United States. The IWC had fewer powers than the IJC, being limited strictly to investigative and recommendatory roles, having none of the IJC's administrative, quasi-judicial, or arbitral powers. Finally, it remained ambiguous as to whether the commission was permanent, something that posed obvious problems related to ongoing commission oversight of any regulations developed in response to various international waterways problems. Nonetheless, the IWC would mark an important and foundational stage in the management and resolution of Canada-US water issues, and the experience gained under this earlier IO would influence the development of the subsequent BWT and the IJC.

The establishment of the IWC, and later the BWT, can be usefully discussed in the terms of a framework developed by Jupille and Snidal setting out conditions under which actors, primarily states, operating under conditions of bounded rationality, may pursue one of a variety of options around co-operation. They may decide to: 1) use an existing international

organization; 2) select between multiple IOs; 3) engage in institutional change; or 4) create a new institution. Jupille and Snidal outline a general decision sequence in which states decide whether to co-operate to resolve a given issue. A decision to co-operate—that is, not to engage in unilateralism—leads to a question of whether to engage in ad hoc co-operation or the use of an institution. If an institutional approach is preferred, the parties must next determine whether there is an existing "focal organization" available,[33] and whether it might be satisfactory for resolving the particular dispute. If the focal organization is satisfactory, the parties will simply choose to use it, while a finding that it is unsatisfactory leads to a further decision over whether to alter the organizational landscape. If the actors decide not to alter the existing landscape, and assuming there are multiple IOs available for potential use, they will select one as the locus for resolving their problem. Should the parties decide to alter the organizational landscape, they must then decide between modifying an existing institution and creating a new one.[34] Later, Jupille, Mattli, and Snidal named this repertoire of actions the USCC framework for the options of use, selection, change, and creation.[35]

In the context of growing cross-border water tensions, while there was some emerging acceptance of the need for some sort of Canada-US cooperative arrangement, no obvious focal organization existed for that purpose. It was not the case that the institutional field was utterly barren at the time, though it is clear that British and US cross-border water interests had focused nearly exclusively on navigational concerns. Those concerns are reflected in various treaties, including the Treaty of Paris (1783), the Jay Treaty (1794), the Webster-Ashburton Treaty (1842), the Northwest Boundary Treaty (1846), and the Treaty of Washington (1871).[36] While none of these agreements created a focal organization for the purposes of helping to resolve Canada-US cross-border water disputes, Britain and the United States had, at least, firmly institutionalized the principle of free navigation in shared international waters, a norm that would continue to be included in subsequent Canada-US water arrangements.

The creation of the IWC, then, is an example of international organization building where no focal institution is available or seems appropriate for the task. The main alternative for co-operation available at the time to Canada and the United States was likely that of ad hoc co-operation—that

is, non-institutionalized, bilateral co-operation in the absence of an IO. Canadian actors sought to avoid non-institutionalized approaches to addressing cross-border water issues with the United States for fear that results over the longer run would be to Canada's disadvantage.[37] In Jupille and Snidal's framework, institutional creation is the most risky and costly of the options described. They note that, because "institutional creation is difficult and costly, actors will pursue it only when the stakes are high."[38] The brief synopsis of the various Canada-US cross-border water challenges provided above supports the view that a set of substantial issues required resolution, something that seems to have justified for both parties the choice to take on the costs and risks of IO building.

While Canada eventually decided to participate in a binational commission with the United States under US legislation, the Canadian side of the IWC never fully reconciled itself to a commission whose scope was limited to the Great Lakes and the St. Lawrence River. In March 1905, the Canadian IWC chairman and commissioners met to discuss topics they wished to propose to their US counterparts for the IWC's consideration. Those matters included the waters of the Columbia River; the St. Mary and Milk Rivers; the waters and streams emptying into the Rainy River; the Saint John River and tributaries in New Brunswick and Maine; the St. Croix River between Maine and New Brunswick; and those of the Great Lakes and the St. Lawrence River. The range of this work was indicative of Canada's wider sense of what the commission's jurisdiction should have been.[39]

At a meeting of the commission in May 1905, the US side presented a letter from the acting US attorney general confirming for US commissioners that the wording of the River and Harbors Act, " 'including all of the waters of the lakes and rivers whose natural outlet is by the River St. Lawrence to the Atlantic Ocean' [were] intended as a limitation to what precedes them."[40] The Canadian side's approach of accepting the limited mandate while pressing for its modifications accurately reflected the prime minister's views as communicated to the first Canadian chairman of the IWC, James Mabee. In June 1905, Prime Minister Laurier wrote to Mabee that "it would be of no use to persist in our contention, and the Government therefore are of the opinion that the commissioners had better proceed even in this limited way." However, in the next sentence the

prime minister revealed his continued interest in addressing issues beyond the Great Lakes–St. Lawrence system: "At the same time, the Canadian Commissioners would do well to call the attention of the Commission to the conditions of things which exist on the River St. John, and the necessity of prompt joint action there."[41]

Over its relatively brief existence, the IWC carried out a wide range of useful and important work that dealt not only with shared Canada-US waters, but also international boundary delineation, the latter eventually being carried out under a separate treaty.[42] Along with boundary delineation work that would continue after the commencement of the BWT, the IWC considered and made recommendations to the Canadian and US governments on matters that included: diversion of waters at Sault Ste. Marie; operation and impact of the Chicago Diversion; the use and apportionment of waters at Niagara Falls; construction of regulatory works on the Richelieu River; construction of the Detroit River tunnel; regulation of Lake Erie levels; tunnel and inlet pier construction for the city of Buffalo's waterworks; and construction of a diversion for power generation affecting Rainy River and Lake of the Woods. While the IWC carried out groundbreaking work to help Canada and the United States address cross-border water issues, one of the more interesting plotlines of this period involves the continued pressure to expand the IWC's jurisdiction, in essence an effort at incremental IO change.

In February 1906, reporting to George C. Gibbons, the new chairman of the Canadian side following Mabee's appointment to the Ontario bench, Canadian commissioner Louis Coste summarized a conversation with Canada's minister of public works: "Mr. Hyman is of the opinion that the full Commission should investigate all questions touching international waterways—agree if we can—and report fully to the two Governments facts, causes and effects, and suggest rules, regulations, even treaties—in a word—suggest a policy."[43] At the IWC's meeting in Toronto in early March, a window began to open for Canada to expand commission jurisdiction when the US chairman of the IWC presented a letter from the US secretary of state suggesting the possibility of a treaty for the use of waters at Niagara Falls:

> It seems desirable, therefore, to press forward the negociation [*sic*] for such an agreement without any avoidable delay. May I ask you to ascertain whether the Joint Commission is now prepared to make such a report as may furnish the basis upon which the State Department and the [British] Ambassador may take up and proceed with the negociation?[44]

Niagara Falls seems to have represented for the United States a distinct kind of water issue, one in which not only powerful competing interests existed for the use of the resource on both sides of the border, but that included a pressing need to protect the unique beauty of the Falls themselves, a powerful public idea and something that offered leverage to the Canadian side. While the Canadians might have shared US views about the beauty of Niagara Falls, they also understood the Falls as part of a broader suite of water challenges, something that contributed to their sense that a general arrangement was needed for the settlement of all Canada-US water issues, including Niagara.

Late March 1906 found the Canadian side working up a set of strategic resolutions for presentation to their US counterparts for adoption that attempted to take advantage of the opening presented by the US interest in a separate treaty for Niagara Falls. While the resolutions touched on the Falls, their broader intent was for a comprehensive deal on all shared Canada-US waters. Accordingly, the draft Canadian resolutions began: "Whereas in the opinion of the Commission it is desirable that the whole question of uses and diversions of water adjacent to the boundary line between the United States and Canada should be settled by a treaty between the United States and Great Britain."[45] The points that followed outlined broad principles, specifically: the paramountcy of water for navigation and the allowance for diversions for domestic purposes and the service of locks; allotment in equal proportion for diversions for uses that did not affect navigation; a declaration that diversions such as that at Chicago would be "wrong in principle" and prohibited in the future; limitation of flows at Chicago to 10,000 cubic feet per second; the importance of the scenic beauty of Niagara Falls and their value in power generation; and limitations on Canadian and US diversions at Niagara Falls and tributary waters.[46]

In April 1906, in advance of the approaching IWC meeting, the Canadian side shared its resolutions with its US counterparts, including US commissioner George Clinton. On April 17, Gibbons received a sympathetic review of the resolutions from Clinton: "I received a copy of the resolutions and find that the general principles announced in them is in accordance with my ideas and I believe with those of [US chairman] Colonel Ernst and [US commissioner] Mr. Wisner."[47] Similarly, in his response to the Canadian secretary of the IWC, Clinton expressed similar personal views, noting "the general principles enunciated seem to be proper and within our jurisdiction." He closed by saying "you will understand that I am simply giving my personal opinion and that this is not an official letter."[48]

Gibbons presented a slightly modified set of resolutions at the 26–28 April 1906 meeting of the IWC. The reaction of US chairman Ernst differed somewhat to that of Commissioner Clinton. Ernst objected to the resolutions on the grounds that they "went beyond the jurisdiction conferred upon the American members and beyond the scope of their functions."[49] Gibbons pressed the case, indicating that "the Canadian Section was not prepared to recommend a treaty covering Niagara Falls alone, but desired that all other questions arising on the boundary waters should be considered at the same time."[50] The Canadian side's efforts to engage US interest in Niagara Falls as part of a broader and more formal waterways arrangement made some tentative headway by getting their ideas before the Canadian and US governments. On April 28, the IWC sought to agree on a report on Niagara Falls with the US chairman expressing his side's interest in joint action on them, while the Canadian side continued "to express the strong view that all matters referred to in the resolutions presented by them at the meeting 26th inst. should be dealt with as a whole."[51] The eventual binational report to the governments, issued 3 May 1906, outlined the importance of the Falls, set limits for diversions on the Canadian and US sides, set a maximum discharge for the Chicago drainage canal, and recommended that these measures be reflected in a treaty. The report went on to note, among other things, that while the Canadian Section concurred with the above measures, any treaty dealing with Niagara Falls "should also establish the principles applicable to all diversions or uses of water adjacent to the international boundary and of all streams which flow across

the boundary."[52] There followed the Canadian resolutions and the US side's opinion that they fell outside of the commission's legislated scope.

It is worth observing that the historical record shows some openness from the US side regarding Canada's interest in expanding the commission's scope. As it was, the US attorney general's interpretation of the US legislation simply amounted to a binding constraint on the US commissioners. As seen, US commissioner Clinton was sympathetic, at least on a personal level, to the objective of expanded scope for the IWC. Regarding the Canadian resolutions, Clinton wrote to US chairman Ernst urging "some intimation from the Secretary of State as to his views regarding the extent to which it would be proper for us to go, in laying down principles which will apply to other boundary waters than those included in the St. Lawrence system."[53] Clinton's particular willingness to engage on the question of scope can also be seen in his report to US colleagues at an October 1905 meeting of the US side, during which he summarized his earlier meeting with Secretary of War Taft. Clinton had raised Canada's expectations around scope expansion for the IWC, to which Taft responded with an endorsement of the US attorney general's views on jurisdiction, though he added that he felt the jurisdictional limits would be extended or further clarified, a position that may well have contributed to Clinton's receptivity to Canada's views.[54] Finally, the US side's December 1906 progress report pointed out that

> the Canadian government has from the beginning desired that the Commission should consider all questions which may arise concerning the international waters from the Atlantic to the Pacific. To enable the American members to do this, further legislation by Congress is necessary. It would seem proper to comply with the wishes of the Canadian government in this respect.[55]

All of this to say that while the Canadian commissioners certainly pressed actively to have the IWC's scope expanded, it was also the case that the US side had not foreclosed on the matter but was awaiting higher-level direction that could enable the IWC to address it. As it was, the US side felt

unable to disregard the US attorney general's interpretation of the legislation, a reasonable enough position.

Annus Mirabilis

Canadian pressure to expand the IWC's scope and formally adopt a set of general principles for governing the use of shared Canadian and US waters was showing some results in the spring of 1906. That year would prove to be an important one in putting the two countries on track for negotiations over what would eventually be the BWT. The United States found itself agreeing to a modest expansion in the commission's scope, if on an apparently ad hoc basis, when faced with the challenge of an application from the Minnesota Canal and Power Company to divert waters that fell outside of Great Lakes–St. Lawrence River drainage. The US decision to include in this case waters from the Hudson Bay basin within the IWC's scope would contribute substantially to the cause of a broader treaty that embedded core principles for the management of all international waterways.

The project proposed to divert water from the Birch Lake basin in Minnesota for power generation, something with implications for the Rainy River and the Lake of the Woods. The intention was to divert about 17 cubic metres of water per second (600 cubic feet per second) to generate some 22,400 kilowatts (30,000 electrical horse power). In its joint report, the commission noted it had been slowed in taking up the matter due to, among other things, the fact that its jurisdiction "had been placed in some doubt by the construction given by the Government of the United States to the Act of Congress under which the Commission was organized," but that the jurisdictional hurdle had been removed with a supporting referral from the US secretary of war.[56] In May 1906, US Secretary of State Elihu Root, responding to pressure to see the IWC take up the proposal, had written to the secretary of war to request that referral.[57] With this seemingly small action, the US government had agreed that expanding the commission's scope was possible after all. The incremental step of modifying the scope of an existing IO would lead to a key commission report on the Minnesota Canal and Power Company, one that made a number of important contributions to advancing a broader treaty.

In its examination of the case, the commission was clear that the project would offend both the letter and the spirit of the Webster-Ashburton Treaty in light of the impact expected on navigable waterways. It also ventured into useful analysis of national rights to use water, finding that international law had established that "the exercise of sovereign power over waters within the jurisdiction of a country, cannot be questioned." But it went on to outline its sense that "it would seem that comity would require that, in the absence of necessity, the sovereign power should not be exercised to the injury of a friendly nation or of its citizens or subjects, without the consent of that nation."[58] The report's recommendations noted that

> as questions involving the same principles and difficulties, liable to create friction, hostile feelings and reprisals, are liable to arise between the two countries, the Commission would recommend that a treaty be entered into which shall settle the rules and principles upon which all such questions may be peacefully and satisfactorily determined as they arise.[59]

That treaty, it declared

> should define the uses to which international waters may be put by either country without the necessity of adjustment in each instance by treaty, and would respectfully suggest that such uses should be declared to be: (a) Use for domestic and sanitary purposes. (b) Service of locks used for navigation purposes. (c) The right to navigate.[60]

Finally, the IWC recommended that the proposed treaty "should prohibit the permanent diversion of navigable streams which cross the international boundary or which form a part thereof, except upon adjustment of the rights of all parties concerned by a permanent commission and with its consent."[61]

As 1906 drew to an end, both Canada and the United States were moving to start negotiations on a waterways treaty that would embody

certain principles under a permanent commission, principles based on the earlier Canadian proposals, here transformed into joint recommendations from the IWC. In December of that year, Secretary of State Root forwarded Chandler Anderson—a New York lawyer who advised the State Department and would come to play a decisive role in the eventual BWT—the Canadian resolutions from the May 1906 IWC report on Niagara Falls for review.[62] While Anderson expressed certain reservations about some of Canada's proposals, he noted that

> It would seem to be desirable that a commission should be appointed to deal with all the questions arising with respect to the use of boundary waters and waters tributary thereto and flowing therefrom on both sides of the line, and that the authority of such commission should be limited to the applications of principles agreed upon by treaty.[63]

On the Canadian side, George Gibbons pressed Prime Minister Laurier to move forward with treaty negotiations, to which Laurier agreed. Clinton and Gibbons were assigned lead roles for the United States and Canada, respectively, in developing a new arrangement for the purposes of addressing Canada-US international water issues.[64]

With the decision to proceed with treaty negotiations, Canada and the United States had ended one stage of their relationship as it pertained to cross-border waterways institution building and entered another. In Jupille and Snidal's terms, in launching the IWC the parties had decided to engage in institution building in the absence of an obvious focal organization for taking up matters pertaining to shared waterways. However, as seen, IO creation and change can be complex and untidy. In this case, Canada accepted the offer to participate in the establishment of an IO with whose terms of reference it did not fully agree, but which proved a serviceable enough arena in which to pursue its objectives as they pertained to shared waters with the United States and whose mandate constraints it sought to modify. That is, in some respects, the IWC period demonstrates a mix of the various modes outlined by Jupille and Snider. It was first and foremost a clear example of IO building, but that stage was followed very quickly by efforts at IO change, seen in pressure to expand the

organization's scope, at least by the Canadians. When viewed in terms of Jupille and Snidal's framework, the decision to include within the IWC's scope work that pertained to the Hudson Bay basin looks like a satisfactory IO—at least from the US point of view—being employed in a novel way in an area that until that point had been beyond its formal competence. The parties engaged in satisficing behaviour by modifying an existing IO that had developed a certain stock of credibility as an emerging focal organization. The employment of the IWC in this modestly innovative means of ad hoc scope expansion is a variety of incremental change to the institutional landscape, but, critically, one that would help to enable larger changes that were not fully predictable when the US secretary of state made his request to the secretary of war to refer the Minnesota Canal and Power Company to the IWC.

Throughout, the IWC was not a passive object, but rather played an important role in its own change. Jupille and Snidal note that "IOs themselves might be active players in processes of institutional change. In some cases, IOs may position themselves in new areas of operations. This may result from a desire to expand organizational goals . . . or from a 'battle of ideas' within the IO where internal norm entrepreneurs successfully redefine an organization's purpose."[65] The IWC, its relative newness at the time notwithstanding, seems to have exemplified this process.

It is not the intention of this chapter to retell the details of the negotiations that led to the specifics of the current treaty (see Denning in this volume) or to review its structure in any detail. Yet even at the distance of more than a century, it remains perhaps a debatable point as to whether the BWT negotiations were an example of IO change or more fundamental IO creation. It is suggested here that, in its final form, the BWT is better viewed as an incremental alteration on the then-existing institutional landscape occupied by the IWC, and less the creation of a wholly new IO.[66] However, the window was briefly open for something quite different from the IWC, and was set out in the 1907 Clinton-Gibbons draft treaty. In the end, though, the BWT and the IJC emerged as elements in a more modest bilateral arrangement, one that shares much with the predecessor focal organization. The next section introduces and briefly reviews the surprising 1907 Clinton-Gibbons draft.

Notes on a Road Not Taken

In the process of creating a new waterways treaty, a draft arrangement was briefly considered that differed markedly from the eventual BWT, and was a product of considerable deliberation by the Canadian and US negotiators Gibbons and Clinton. It is intriguing to review the Clinton-Gibbons draft (see Appendix 2 for the full text) and compare it to the final 1909 treaty as it contains elements for a more authoritative set of institutional arrangements, more binding outcomes, and an international commission with a greater decision-making role than the eventual IJC.[67]

Gibbons and Clinton signed off on the draft on 24 September 1907 before forwarding it to Secretary of State Root and Prime Minister Laurier. The draft agreement makes an international commission the central decision-making and advisory body for all matters of difference pertaining to a wide range of subjects, boundary waters among them, and, unlike the eventual BWT, might have established a positive obligation for the parties to make referrals to it. The draft is brief, containing only seven articles, but its scope is broad. Article i declares that Canada and the United States seek to settle all matters existing or which may arise concerning

> the use and diversion of boundary waters of the United States and Canada, and in relation to the protection of fisheries therein, the improvement of navigable channels, the location of the boundary line, the construction of new channels for navigation, the improvement and maintenance of levels therein, and the protection of the banks and shores of such waters.

The draft also expresses the parties' desire that navigation rules and the rules for signal lights for vessels in boundary waters be uniform and that boundary water uses, including power, should be "regulated by joint rules of the United States and the Dominion of Canada, and that such rules must be enforced by joint action of both countries." Article v provides specific directions to the international commission on boundary delineation through Lakes Ontario, Erie, St. Clair, and Huron, and connecting waters.

Unlike the BWT, the Clinton-Gibbons draft makes no explicit distinction between waters that lay along the border and waters that flow across it—a major difference. Both types are simply termed "boundary waters," which are defined in article iv as including "Lake Superior, Michigan, Huron including Georgian Bay, St. Clair, Erie and Ontario; the connecting and tributary waters of said lakes, the river St. Lawrence from its source to the ocean; the Columbia River and all rivers and streams which cross the boundary line between the Dominion of Canada and the United States, and their tributaries." The draft includes a prohibition on transboundary pollution similar to that found in the 1909 treaty, an element of some foresight. Clinton notes in his cover letter to Root transmitting the 1907 draft that the anti-pollution language was inserted "to take care of cases which are likely to arise in the future when the North West becomes more densely populated." He then adds with a note of caution, "perhaps the language is too strong."[68]

As in the BWT, navigation is the paramount application for boundary waters, save for domestic and sanitary uses. The hierarchy of uses set out in the BWT is absent, though the central importance of navigation compared to power and irrigation is maintained along with the commitment that navigable boundary waters shall remain forever free for navigation.[69] In instances where the use of power generation is permitted in waters that lay along the border, the primacy of navigation is upheld and "as far as possible, the right to use one half of the surplus waters available for power purposes shall be preserved to each country, its citizens or subjects." Similarly, for instances where diversion of boundary waters for irrigation is permitted, navigation retains its priority, though unlike the power generation provisions of article iv no clear allocation formula is provided for the balance, only that "the rights of each country affected and of its citizens and subjects be equitably protected."

Article iv of the Clinton-Gibbons draft makes specific mention of diversions related to Niagara Falls, limiting diversions from the Niagara River and Lake Erie of more than 524 cubic metres per second (18,500 cubic feet per second) by the United States, and 1019 cubic metres per second (36,000 cubic feet per second) by Canada. Here, Lake Erie is included within the scope of source waters for diversion, whereas in the

BWT, Lake Erie is mentioned only in terms of the objective of not appreciably affecting the lake's level.

The international commission outlined in the Clinton-Gibbons draft differs noticeably from the IJC. Article i of the draft declares that the parties, in seeking to settle questions existing or arising pertaining to the wide range of matters covered in the article (noted above), deem it wise "that a permanent international commission be appointed with full powers in the premises: therefore the high contracting parties agree that all such questions and matters as they may arise shall be referred by them to a commission to consist of six commissioners, three appointed by the President of the United States, and three by his Britannic Majesty." In requiring that all matters as they arise be referred to the commission, article i, in addition to laying out a wide range of matters for potential consideration by the commission, might also have created a positive obligation for the parties to refer matters of difference, something that is not the case with the BWT.

Article iii of the 1907 draft treaty further delineates the international commission's decision-making authority, noting that "the commission shall have the power to consider and determine all questions and matters related to the subject specified in Article I which may be referred to it by the High Contracting Parties," perhaps suggesting some discretion on the part of the parties in making referrals to the commission. On the other hand, it is entirely possible to read article iii as supportive of a positive obligation on the parties to refer under article i and conferring on the commission the power to "consider and determine" once a matter has been mandatorily referred to it. Whether article iii moderates the article i obligation of the parties to refer matters as they may arise, what is clear is that the commission's role was not to be confined to reviewing, reporting, and recommending, as was the case for the IWC. Clinton and Gibbons intended the commission to decide questions of difference on a wide range of matters.

The second part of article iii speaks again to the decision-making role of the commission, along with its enforcement powers:

> The decision of the Commission upon matters submitted to it shall be enforced by the High Contracting Parties; and for

> the purpose of enforcing any rules and regulations, which may be adopted by the Commission, pursuant to the powers conferred upon it by this treaty, the Commission may exercise such police powers as may be vested in it by concurrent legislation of the United States and the Dominion of Canada.

Commissioners under the Clinton-Gibbons draft are required to work impartially and "decide, to the best of their judgment and according to justice and equity, without feeling, favor or affection to their country, on all matters as shall be laid before them," similar to the provisions of the BWT.

Notably, and in contrast to the IJC, the draft agreement drives the commission toward decision-making even in cases where a majority of commissioners is unable to reach agreement. Article ii declares that "the majority of commissioners shall have power to render a decision, but in case a majority do not agree, the commission shall select an arbitrator or arbitrators to whom the matters of difference may be referred and whose decision shall be final." For matters outside of those covered in article i, article vi provides for similar arbitral appointment for matters referred to the commission for decision. The BWT retains a vestigial element of the Clinton-Gibbons provisions for an arbitral backstop in its unused—and probably unusable—article x. There is capacity for the IJC to receive referrals from the parties on matters beyond the scope of the treaty's article ix referral provisions. Article x directs the parties to refer to an "umpire" matters of difference on which the commission is unable to decide. Whatever else it might be, article x is peripheral to the main work of the IJC, and was probably destined to be so with its high barriers to use. In contrast, the arbitral backstop measures in the Clinton-Gibbons draft pertained to the core decision-making areas of the commission. The commission that begins to emerge in the Clinton-Gibbons draft would certainly have been something of a departure from the IWC, one with broad powers of decision and with arbitral backstop provisions to ensure resolution of questions. When viewed in terms of Jupille and Snidal's framework the new commission would have been a substantial alteration to the institutional landscape indicative of a rejection of the IWC.

On 15 October 1907 the US State Department forwarded the Clinton-Gibbons draft to Chandler Anderson—encountered earlier—for review and comment. His subsequent extensive recommendations to Secretary of State Root, based on his concerns about the scope and authorities set out in the draft document, substantially shaped the eventual treaty. Anderson's review and subsequent role as lead negotiator for the United States—replacing Clinton in this capacity—arguably did more than any other individual intervention to fashion a number of core elements of the BWT as we have come to know them. In making this claim, it is not the intention here to diminish the undeniably important role that George Gibbons played in helping to bring about a comprehensive waterways treaty between Canada and the United States, a view expressed by, among others, Elihu Root. On this point Whitney notes about Gibbons that "of all those connected with the events leading to the final Boundary Waters Treaty, it was he who showed the greatest dedication to the adoption of principles to govern water use in a treaty with a permanent joint commission to apply them."[70]

However, it was nevertheless Anderson's decisive intervention in late 1907 that perhaps more than anything else transformed the Clinton-Gibbons draft into the BWT. His efforts and successes with the BWT were things for which Anderson apparently felt under appreciated. In 1910, Anderson expressed some frustration in response to a congratulatory letter he received about the completion of the BWT from Charles Henry Butler, a lawyer and the reporter of decisions of the Supreme Court of the United States. In his reply, Anderson informs Butler "that Mr. Root always refers to this treaty as the Anderson-Gibbons Treaty," and notes further he was "much interested, but not altogether surprised" to learn "that in Canada Mr. Gibbons is receiving entire credit for it. As a matter of fact the original treaty was prepared by me without consultation with Mr. Gibbons, and after being submitted to Mr. Root was forwarded to Gibbons without change." Anderson goes on to belittle Gibbons's role further in his reply to Butler.[71] However unattractive Anderson's bitterness might seem, his asperity may be, in retrospect, understandable in light of the plaudits given to Gibbons, and Anderson's own publicly under-recognized role in fashioning the BWT. Root was, himself, in fact, well aware of Anderson's central role in the resolution of a range of Anglo-American matters, and

recognized his contributions in a letter to him in 1909 as Root was preparing to leave the State Department to take up his role as US Senator for New York:

> Before leaving the office of Secretary of State, I wish to express to you the very high estimate which I put upon the service you have rendered to the country in the negotiations relating to the numerous questions between the United States and the British colonies in North America. The successful conclusion of which has been reached in the negotiation upon the many widely different questions which existed would have been impossible if it had not been for your industry, clearness of vision and sound judgment.[72]

It is useful to review Anderson's report on the Clinton-Gibbons draft briefly given his impact on the final treaty.

Anderson's December 1907 paper to the State Department is directed primarily toward reducing the scope of the Clinton-Gibbons draft and curtailing the authority of the international commission. He found that "the extent of the jurisdiction proposed to be conferred upon this international commission is in some ways without precedent." Anderson advised the elimination of fisheries and boundary demarcation from the scope of the treaty since these matters were already under treaty negotiation elsewhere. He expressed concern about the judicial authority that was proposed for the commission, pointing out a development he viewed as worrying, believing that the judicial functions

> show a notable departure from the course heretofore followed by this Government in delegating by treaty judicial powers to an international commission. In such treaties it has been customary to limit the exercise of the judicial powers of such a Commission to some particular question already at issue and involving matters not wholly within the jurisdiction of either of the parties to the treaty, or over which neither of the parties alone had undisputed control.[73]

The problems for Anderson lay in the fact that the Clinton-Gibbons draft would extend authority of the international commission over waters that were entirely within the United States, and within the competence of state and federal authorities to manage, and that the draft treaty was open-ended in granting the commission the power to decide on all matters of difference that might arise in the future.

With respect to the jurisdictional concern, Anderson noted that waters flowing across the boundary and waters tributary to boundary waters were wholly within the jurisdiction of the individual parties. Similarly he found that improvement of navigable channels, construction of new channels, and riverbank and shoreline protection for boundary waters as set out in the draft treaty were all matters for exclusive jurisdiction. He recommended that the authority of the international commission be confined to the uses of contiguous boundary waters—that is, waters that lay along the international border, as would be subsequently defined in the BWT. On this point Anderson drew a connection to the Chicago drainage canal and the St. Mary and Milk Rivers, noting that if such waters were to fall under the broad classification of boundary waters, as set out in the Clinton-Gibbons draft, "the right of exclusive control over them would be lost and Canadian consent to the diversion of them would be necessary." Overall, given the scope of the Clinton-Gibbons draft, Anderson observed that it was "unlikely that the approval of the Senate would be given to a treaty delegating to an international commission such unrestricted powers over matters wholly within the borders of the United States."[74] The US Senate had long guarded its authorities and prerogatives pertaining to advice and consent with respect to treaties under article ii, section 2 of the US Constitution, and had demonstrated some enthusiasm for amending international agreements.[75]

Anderson also expressed concerns about the extent of the commission's discretion, since it would be under-constrained by the terms of the proposed agreement. He noted that in addition to the oath of office that commissioners would be required to take, the only other provisions of the treaty that would guide the commissioners in making decisions were found in the series of principles contained in the draft, though he believed that these principles fell short in this respect. As seen, they tended to focus on the centrality of navigational uses in boundary waters,

non-interference with natural flow to the injury of the other party, and a requirement for equitable treatment where diversions for irrigation are allowed. In Anderson's view, the draft treaty did not establish sufficient guiding principles and therefore left "the commissioners free to adopt their own ideas of justice and equity in the decision of questions arising thereon, which practically amounts to a power to legislate." He urged that principles to guide the international commission not be left to the discretion of the commission itself but rather be agreed to in advance by the parties and incorporated in the treaty, and he was particularly interested in an order of precedence for various uses of boundary waters.[76]

Anderson's views decisively influenced the outlook of the US government, particularly those of Secretary of State Root. The eventual BWT differentiated between boundary waters and waters flowing across the boundary (with limited roles for the IJC with respect to the latter), made provision for special agreements by the parties, and clarified the obligations around referrals. The IJC's judicial function is limited to uses, diversions, and obstructions in boundary waters. The BWT's article x arbitral powers for matters falling outside of the article ix referral provisions have never been engaged, and would be challenging to use even if the parties were ever to be so inclined given that, among other things, their use would require the advice and consent of the US Senate and approval from the Canadian governor in council.

In the 1907 draft, the negotiators took IO creation in a direction that simply was not feasible for the US government, suggesting that Clinton seemed to misjudge the intentions of the State Department and the political space that was available for him to work within. It is interesting to compare Clinton's sanguine outlook about the power of the commission described in the draft text to the somewhat alarmed response from Anderson. In a letter to Root, Clinton observes:

> The decisions of the commission will, therefore, necessarily be the law of the land, so far as they do not contravene acts of Congress or the rights of individuals protected by the Constitution. Nevertheless, the action of Congress would be necessary from time to time to enable the commission to perform its duties, and the questions which may come

> before the commission may be of such a nature as to require legislation to enforce them. It would seem to me that such a treaty, being an international obligation, can hardly be ignored by Congress and the legislation necessary to preserve the good faith of the United States, by carrying out the decisions of the commission, will be forthcoming, almost as a matter of course.[77]

In retrospect, the United States was ultimately more interested in IO modification rather than more comprehensive redesign and construction efforts, something it viewed as unnecessarily risky. As expressed by Anderson, the US concerns centred on the extensive power of the new organization, loss of US sovereignty, and the potentially unfavourable and/or unpredictable distributional consequences that could have resulted for the United States. Jupille and Snidal point out that "actors must also be willing to tolerate the potentially substantial risk of opening the Pandora's Box of institutional creation, unmoored as it is from existing institutions."[78] On this point, in reviewing the Clinton-Gibbons draft, Anderson moved forcefully in essentially urging the secretary of state to slam that box shut and drive toward a more limited treaty, something with a greater resemblance to the status quo arrangement under the IWC.

Conclusion

While not the destination initially intended by Canadian and US negotiators, in light of the BWT's subsequent record, the change in direction was perhaps no bad thing for the two countries. Anderson's intervention can be seen as a prudent move that has, on reflection, benefited both Canada and the United States. In its relative modesty, the BWT shares much with the IWC, and it is here that the distinction between institutional change and institutional creation becomes murky, a point allowed by Jupille and Snidal.[79] The experience of arriving at a more modest international arrangement demonstrates some of the potential risks involved in IO creation. In this case the United States found itself flirting briefly with the prospects of a powerful and under-constrained international commission and what it viewed as unacceptable risks to sovereignty. It moved

accordingly to mitigate those risks by seeking to fashion a more limited agreement.

There are clear continuities between the BWT and the IWC, including substantial scope for discretion by the parties and more-limited commission powers. Yet the two organizations are different. The IJC is certainly vested with broader authorities compared to its predecessor IO, but it is by no means the powerful decision-making commission at the heart of the 1907 Clinton-Gibbons draft. In the end, the BTW and its commission seem more like the products of incremental changes that built upon the experience of the IWC era rather than a substantial rejection of it. While the IJC is a less powerful and far-reaching commission than that contemplated in 1907, with its reduced authorities and protections for sovereignty of the parties, the IJC, like the IWC before it, instantiates the important feature of flexibility.

More than a century after the current treaty was fashioned, it is difficult to say that something like the Clinton-Gibbons draft, with its broad scope and stronger commission, would have rendered better service or enjoyed the same longevity as the BWT. A more authoritative commission framed primarily as a decision-making organization with a broad mandate, and that obliged the parties to refer questions to it for binding resolution might well have been able to render a decision that satisfied a particular interest to a water dispute at any particular moment. However, it seems doubtful that such an IO would necessarily have been better than the current arrangement, particularly if a goal is to promote stable and amicable relations in the resolution of disputes over the longer run. It seems more probable that something like the Clinton-Gibbons draft, if adopted, would have failed long ago, probably after imposing an unacceptable loss on one of the parties in a polarizing win-lose outcome, though such speculative history is a perilous undertaking and always open to question.

This brief review of the institutional choices that brought Canada and the United States eventually to the BWT also points to the fact that the people involved mattered, and that different principal actors would probably have brought about different outcomes. Again, the perils of speculative history notwithstanding, we can ask: What outcomes might have emerged had Canada's first chairman of the IWC, James Mabee, not been appointed to the bench, thereby creating an opportunity for the arrival of

George Gibbons? Would Mabee have been as determined as Gibbons in pressing for a comprehensive waterways treaty? Similarly, on the US side the shift from Clinton to Anderson in the role of lead negotiator perhaps did more than any other single thing to bring about the now-familiar features of the BWT.

In the Minnesota Canal and Power Company case, the IWC noted the friendly nature of the Canada-US relationship and that a waterways treaty should emerge from this circumstance. Canada and the United States continue to enjoy the benefits of a long and peaceful relationship, one that is perhaps without equal in the world. As Thompson and Randall note, "no other pair of neighbors can claim as successful and mutually prosperous relationship as has evolved between the United States and Canada over the past two hundred years. The countries share not only a continent but also an interwoven culture, political, and economic heritage."[80] It is perhaps specifically because of this closeness that a modest and flexible arrangement like the BWT has been able to function as well as it has. The treaty is both symptomatic of the friendly binational relationship and an ongoing contributor to its continuation.

While the temptation to create a stronger or more authoritative institution may persist for some, the IJC has over the course of its long life become a key focal organization for helping to prevent and resolve Canada-US water conflicts. Nonetheless, it may be possible to imagine again incremental change to the current BWT/IJC arrangement. However, short of a crisis, and with the stock of credibility that resides in the commission and the treaty, it is difficult to envisage the parties embarking on a major alteration to the institutional landscape in the foreseeable future.

Notes

1 The views expressed in this chapter do not necessarily reflect those of the Government of Canada.

2 George P. de T. Glazebrook, *Canadian External Relations: An Historical Study to 1914* (London: Oxford University Press, 1942), 254.

3 Joseph Jupille and Duncan Snidal, "The Choice of International Institutions: Cooperation, Alternatives and Strategies" (Paper presented at the annual meeting of

the American Political Science Association, Washington, DC, September 2005). Jupille, Walter Mattli, and Snidal subsequently applied the framework comprehensively in *Institutional Choice and Global Commerce* (Cambridge: Cambridge University Press, 2013).

4 N. F. Dreisziger, "The International Joint Commission of the United States and Canada: A Study in Canadian-American Relations" (PhD diss., University of Toronto, 1974).

5 Robert H. Wiebe, *The Search for Order, 1877–1920* (New York: Hill and Wang, 1967).

6 Kurkpatrick Dorsey, *The Dawn of Conservation Diplomacy: U.S. Canadian Wildlife Protection Treaties in the Progressive Era* (Seattle: University of Washington Press, 1998).

7 Char Miller, *Gifford Pinchot and the Making of Modern Environmentalism* (Washington, DC: Island Press, 2001), 132–41.

8 David Stradling, *Conservationism in the Progressive Era: Classic Texts* (Seattle: University of Washington Press, 2004), 13.

9 Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920* (Pittsburgh: University of Pittsburgh Press, 1959), 189.

10 Douglas Brinkley, *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America* (New York: Harper Collins, 2009).

11 Theodore Roosevelt, *Address of President Roosevelt at the Opening of the Conference on the Conservation of Natural Resources at the White House, Wednesday Morning, May 13, 1908 at 10:30 O'Clock* (n.p.: Adamant Media Corporation, 2007), 17.

12 Ibid., 24.

13 Ibid., 47.

14 Gifford Pinchot. "The Fight for Conservation" in *Conservationism in the Progressive Era: Classic Texts*, ed. David Stradling (Seattle: University of Washington Press, 2004), 22.

15 The International Joint Commission, *International St. Mary–Milk Rivers Administrative Measures Task Force: Report to the International Joint Commission* (April 2006), 10, https://ijc.org/en/media/1532.

16 R. Halliday and G. Faveri, "The St. Mary and Milk Rivers: The 1921 Order Revisited," *Canadian Water Resources Journal* 32, no. 1 (2007): 77–9.

17 Dreisziger, "The International Joint Commission of the United States and Canada," 17.

18 Ibid., 19.

19 Ibid., 17–24.

20 Ibid., 24.

21 Donald J. Pisani, *Water and American Government: The Reclamation Bureau, National Water Policy and the West, 1902–1935* (Berkeley: University of California Press, 2002), 14–15.

22 Stanley A. Changnon and Joyce M. Changnon "History of the Chicago Diversion and Future Implications," *Journal of Great Lakes Research* 22, no. 1 (1996): 100–18. It should be noted here that the figure of ninety thousand deaths often attributed to an outbreak of waterborne diseases in Chicago in 1885 is apocryphal. The correction was set out by Libby Hill of Northeastern Illinois University in "The Making of an Urban Legend," *Chicago Tribune*, 29 July 2007. On 22 August 2007, the *Tribune* issued something of a belated clarification regarding its contributions to the legend over the years, noting that "outbreaks of killer diseases truly did play havoc with Chicago and its people: stockyards runoff, water-borne sewage, spoiled food and lethal bugs variously brought dysentery, smallpox, diphtheria, influenza and other contagions to the city. Chicago did not, though, suffer deaths of Black Plague proportion in 1885." The author is grateful to an anonymous reviewer of this chapter for drawing his attention to the contested death toll.

23 Dreisziger, "The International Joint Commission of the United States and Canada," 26–7.

24 Changnon and Changnon "History of the Chicago Diversion," 105.

25 Dreisziger, "The International Joint Commission of the United States and Canada," 28–9.

26 William R. Willoughby, *The St. Lawrence Seaway: A Study in Politics and Diplomacy* (Madison: University of Wisconsin Press, 1961), 8.

27 Ibid., 32–5, 50–1.

28 Dreisziger, "The International Joint Commission of the United States and Canada," 32–3.

29 Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (Oxford: Oxford University Press, 2003), 164–5.

30 Dreisziger, "The International Joint Commission of the United States and Canada," 35–6; Daniel Macfarlane, "'A Completely Man-Made and Artificial Cataract': The Transnational Manipulation of Niagara Falls," *Environmental History* 18, no. 4 (October 2013): 759-784.

31 While the legislation dates from 1902, the work of the commission did not begin until 1905 due to delays on the Canadian side. The IWC's final meeting was 29–30 April 1915 in Buffalo, New York.

32 US River and Harbors Act, 13 June1902, ch. 1079, §4, 32 Stat. 373.

33 A focal institution is in essence an existing and obvious "go-to" organization. According to Jupille and Snidal, it is a feature of status quo conditions in which an IO exists that is "widely accepted as the 'natural' forum for dealing with a particular cooperation problem. This may be for reasons of habit, cognitive limitation, socialization . . . organizational culture, or simply a generic satisficing decision style." Jupille and Snidal, "The Choice of International Institutions," 13.

34 Ibid., 15.

35 Joseph Jupille, Walter Mattli, and Duncan Snidal, *Institutional Choice and Global Commerce* (Cambridge: Cambridge University Press, 2013), 19.

36 L. M. Bloomfield and Gerald F. Fitzgerald, *Boundary Water Problems of Canada and the United States* (Toronto: Carswell, 1958), 2–7.

37 Reflecting on his concerns about more ad hoc approaches to Canada-US transboundary water co-operation, Gibbons explained to Laurier in February 1908 that "what we did not want and could not stand was that one principle should be applied to [the United States'] advantage through the pressure of their politicians in one place, and another principle to equal advantage in another." Letter to Sir Wilfrid Laurier, 11 Feburary 1908, George Christie Gibbons fonds, MG30E71 vol. 3, Library and Archives Canada, Ottawa.

38 Jupille and Snidal, "The Choice of International Institutions," 37.

39 International Waterways Commission, "Minutes of the Proceedings of the Meeting Held by the Canadian Section of the International Waterways Commission, March 7, 1905," George Christie Gibbons fonds, MG30E71, vol 15, Library and Archives Canada, Ottawa.

40 International Waterways Commission, "Memorandum of Proceedings at Preliminary Meeting of the International Waterways Commission, Held at Washington D.C., May 25, 1905," George Christie Gibbons fonds, MG30-E71, volume 14, Library and Archives Canada, Ottawa.

41 International Waterways Commission, "Minutes of the Proceedings of the International Waterways Commission, June 14, 1905," George Christie Gibbons fonds MG30E71, vol. 14, Library and Archives Canada, Ottawa.

42 In April 1908, the US secretary of state and the British ambassador to the United States signed the Treaty Between the United States and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada from the Atlantic Ocean to the Pacific Ocean. Article 4 of that treaty directed the IWC "to ascertain and accurately re-establish" the Canada-US boundary from where the 45th parallel intersects the St. Lawrence River to the western shore of Lake Superior. See International Boundary Commission, "Treaty Between the United States and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada from the Atlantic Ocean to the Pacific Ocean," available at http://www.internationalboundarycommission.org/uploads/treaties/treaty%20of%20 1908%20(english).pdf.

43 "Letter from Coste to Gibbons," February 1906, George Christie Gibbons fonds, MG30E71 volume 15, Library and Archives Canada, Ottawa.

44 International Waterways Commission, "Minutes of the Proceedings of the Meeting Held by the International Waterways Commission, March 6, 7, 1906," George Christie Gibbons fonds, MG30E71 vol 10, Library and Archives Canada, Ottawa.

45 International Waterways Commission, "Minutes of the Proceedings of the Meeting Held by the Canadian Section of the International Waterways Commission, March 23, 1906," George Christie Gibbons fonds, MG30E71, vol 10, Library and Archives Canada, Ottawa.

46 Ibid.

47 International Waterways Commission, "Minutes of the Proceedings of the Meeting Held by the International Waterways Commission, April 26–28, 1906," Records of the US Section of the International Water Ways Commission, RG 76, 76.2.6, Box 2. US National Archives, College Park, MD.

48 International Waterways Commission, "Letter from George Clinton to Thomas Coté," 16 April 1906, George Christie Gibbons fonds, MG30E71 vol 1. Library and Archives Canada, Ottawa.

49 International Waterways Commission, "Minutes of Meetings, April 26–28, 1906, Held at the Office of the American Section, 328 Federal Building, Buffalo, N.Y," Records of the US Section of the International Water Ways Commission, RG 76, 76.2.6, Box 2. US National Archives, College Park, MD.

50 Ibid.

51 Ibid.

52 Parliament of Canada, Sessional Papers, 1906. Paper 19c, "From the International Waterways Commission on Conditions at Niagara Falls, and their recommendations in relation thereto."

53 International Waterways Commission, "Minutes of Meeting: American Section International Waterways Commission, April 25, 1906," appendix J. Records of the US Section of the International Water Ways Commission RG 76, 76.2.6, Box 1. US National Archives, College Park, MD.

54 International Waterways Commission, "Minutes of Meeting, American Section, International Waterway Commission, October 28, 1905," Records of the US Section of the International Water Ways Commission RG 76, 76.2.6, Box 1. US National Archives, College Park, MD.

55 International Waterways Commission, *Second Progress Report, December 1, 1906*. Records of the US Section of the International Water Ways Commission RG 76, 76.2.6, Box 2. US National Archives, College Park, MD.

56 International Waterways Commission, "Report of the International Waterways Commission Upon the Application of the Minnesota Canal and Power Company of Duluth, Minnesota, for Permission to Divert Certain Waters in the State of Minnesota from the Boundary Waters Between the United States and Canada." Records of the US Section of the International Water Ways Commission RG 76, 76.2.6, Box 12. US National Archives, College Park, MD.

57 "Letter from Secretary of State Root to Secretary of War Taft, May 14, 1906." Records of the US Section of the International Waterways Commission RG 76,76.2.6, US National Archives, College Park MD.

58 International Waterways Commission, "Minnesota Canal and Power Company." Records of the US Section of the International Water Ways Commission RG 76, 76.2.6, Box 12. US National Archives, College Park, MD. "Letter from Secretary of State Root to Secretary of War Taft, May 14, 1906." Records of the US Section of the International Waterways Commission RG 76,76.2.6, US National Archives, College Park MD.

59 Ibid.

60 Ibid.

61 Ibid.

62 Anderson had some familiarity with Anglo-American matters pertaining to Canada. In 1903 he had been assistant counsel for the Alaska Boundary Tribunal. From 1905 to 1910 he served as a legal advisor for the State Department on Anglo-American negotiations of Canadian questions. He would go on to be the US agent for the North Atlantic coast fisheries arbitration in 1910, followed by counsel for the State Department 1910 from 1913, then arbitrator for American-British pecuniary claims. He continued in this way, taking on a series of high-profile international positions, throughout his career. Chandler Anderson died on 2 August 1936.

63 Chandler Anderson, "Letter to Elihu Root," 28 December 1906. Chandler P. Anderson Papers, 1894-1953, Office File, Box 13. United States Library of Congress.

64 F. J. E. Jordan, "An Annotated Digest of Materials Relating to the Establishment and Development of the International Joint Commission," 12–19, https://ijc.org/sites/default/files/A69.pdf.

65 Jupille and Snidal, "The Choice of International Institutions," 35.

66 It will be noted that the IJC was of course a separate organization from the IWC and that, therefore, the existence of two separate organizations at the end of the day is an argument in support of the view that the arrival of the IJC was an instance of IO creation, and not simply change. However, the negotiators were aware that a new treaty would likely lead to the effective end of the IWC as the new treaty and IO would be in conflict with the US law that established the IWC. Clinton expressed this point of view to Root in September 1907 noting that "I think, after very careful consideration that the existence of the treaty commission [in the Clinton-Gibbons draft] necessarily negatives the continuance of the International Waterways Commission, inasmuch as there would certainly be conflicts of jurisdiction." This situation meant that the IWC was never likely to be a site for substantial organizational modification given the legal constraints posed by the Rivers and Harbors Act of 1902. It is argued here that the arrival of a new IO in the form of the IJC is still an example of IO change rather than IO creation if one looks to the substantive roles of the IJC and its predecessor commission, which, while different, demonstrate considerable continuity. Letter, Clinton to Root 25 September 1907. Chandler P. Anderson Papers, Office File 1894-1953, Box 12. US Library of Congress.

67 There is a methodological challenge that may be raised in treating the 1907 draft as though it were final treaty text and holding it to that standard. The draft text contains certain ambiguities that might have been clarified en route to finalization, had the Clinton-Gibbons draft proceeded further. However, it should also be allowed that plenty of final texts have been ambiguous, sometimes deliberately so. Nonetheless, the 1907 draft as we have it should be taken seriously as a sincere effort by the negotiators to craft a viable treaty to respond to challenges as they understood them at the time. Among other things, doing so offers an opportunity to observe the less-than-straightforward route the parties took in reaching the eventual BWT, what elements from the draft survived, and what got left on the cutting room floor.

68 Clinton to Root, September 25, 1907. Chandler P. Anderson Papers, Office File 1894-1953, Box 13. US Library of Congress.

69 Some copies of the September 1907 Clinton-Gibbons draft declare that navigable boundary waters "shall be for free *from* navigation by the citizens and subjects of both countries" (italics mine)—a typographical error.

70 Harriet E. Whitney, "Sir George Gibbons and the Boundary Waters Treaty" (PhD diss., Michigan State University, 1968), 104.

71 Chandler Anderson. Letter to Charles Henry Butler. 9 May 1910. Chandler P. Anderson papers. Office File, Box 14. US Library of Congress.

72 Elihu Root. Letter to Anderson. 26 January 1909. Chandler P. Anderson papers. General Correspondence, Box 4. US Library of Congress.

73 Chandler Anderson, "Boundary Waters. Report on Draft Treaty by George Clinton and George C. Gibbons of the International Waterways Commission," 1907, Chandler P. Anderson Papers, Office File, Box 13. US Library of Congress.

74 Ibid.

75 The Hay-Pauncefote Treaty (1901) related to the construction of an isthmian canal (ultimately the Panama Canal), the Hay-Bond Treaty (1902) on Newfoundland reciprocity, and the Hay-Herbert Treaty (1903) on delineating the Alaska-Canada boundary, among others, had all experienced concessions to the US Senate. Ronald Reter, "President Theodore Roosevelt and the Senate's 'Advice and Consent' to Treaties," *The Historian* 44, no 2 (August 1982): 483–504.

76 Anderson, "Boundary Waters. Report on Draft Treaty by George Clinton and George C. Gibbons on the International Waterways Commission," 1907, Chandler P. Anderson Papers, Office File, Box 13, US Library of Congress.

77 Clinton to Root, September 25, 1907. US Library of Congress, Chandler P. Anderson Papers, Office Files, 1896-1933, Box 13.

78 Jupille and Snidal, "The Choice of International Institutions," 38.

79 Ibid., 19.

80 John Herd Thompson and Stephen J. Randall, *Canada and the United States: Ambivalent Allies*, 4th ed. (Athens: University of Georgia Press, 2008), 333.