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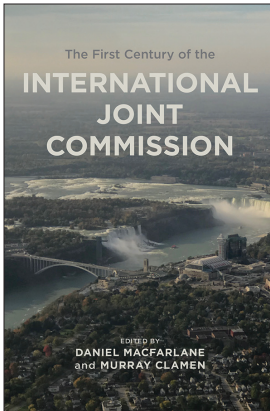
Macfarlane, D., & Clamen, M. (2020). The First Century of the International Joint Commission. [pps. 1-625.] University of Calgary Press, University of Calgary, AB.

<http://hdl.handle.net/1880/111575>

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THE FIRST CENTURY OF THE INTERNATIONAL JOINT COMMISSION

Edited by Daniel Macfarlane and Murray Clamen

ISBN 978-1-77385-108-2

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From “Stakeholder to Rights-Holder”: Re-examining the Role of Indigenous Peoples in the International Joint Commission as the Third Sovereign

Frank Ettawageshik and Emma S. Norman

Introduction

The various contributors to this volume reflect on both the accomplishments of, and the challenges faced by, the International Joint Commission. However, little has been written about how the very framework of the International Joint Commission has limited the participation of Indigenous Peoples in its governance structure, and in fact may have perpetuated a politics of omission and erasure. Certainly, the Boundary Waters Treaty (BWT) and the International Joint Commission (IJC) are products of the time in which they were created; however, it is essential to ask critical questions and reconsider the IJC through a post-colonial lens.

As the editors of this volume point out in their introduction, the signing of the BWT on 5 January 1909 was conducted between two nations—United States and Canada. However, this act, and the subsequent creation of the IJC, set the scope, tone, and trajectory of the commission

as a binational agreement between two sovereign nations, rather than a multinational agreement between multiple nations. The treaty was also established through a Western legal framework, exclusive of Indigenous law.

The fact that millions of Indigenous Peoples lived along the borderland, had occupied the waterways and lands in question for thousands of years, and were (and remain) significantly impacted by the health and well-being of the waterways, was fundamentally ignored in the BWT. The fact that the Indigenous communities that were impacted by the treaty had their own legal structure and governance framework was also not considered. A deep-seated mistrust of both the Americans and the British lingered among Indigenous Peoples, the result of previous treaties ending the American War for Independence and the War of 1812. However, unlike these previous treaties, which at least acknowledged Indigenous existence and rights, there was no mention of these rights in the 1909 BWT. In fact, the IJC itself recognizes that for the first ninety years after the BWT was signed, the IJC was specifically instructed not to engage with Tribes and First Nations—the impact of which are still felt today.¹

The omission of Indigenous Peoples from the BWT and the original formation of the IJC is unsurprising given the time in which they were created. When the BWT was negotiated and signed, a common thought was that Indigenous Peoples in North America were “vanishing Americans.” At the time of the 1909 signing, the Indigenous Peoples of the United States and Canada were facing explicit governmental policies that were designed to eliminate Indigenous cultures and disrupt communities. During this era, residential schools were in full operation, families were separated, languages decimated, and significant cultural traditions such as potlatches outlawed. In fact, at this time Indigenous Peoples were not considered citizens in either the United States or Canada—and they did not have the right to vote in some US states until as late as 1954, and until 1969 in Canada (with Quebec being the final province to grant the right).

The BWT was signed in the wake of the treaties that removed Indigenous Peoples from their traditional territories in the United States and relocated them to reserves (with the guaranteed—but under-protected—access to “Usual and Accustomed” fishing and hunting areas). Devastating policies such as the US Dawes Act of 1887—which aimed to disrupt Indigenous cultures by eliminating communal governance

structures and hunting and gathering practices and institutionalizing individual land-ownership and farming methods—followed these treaties.² Ultimately, the Dawes Act facilitated the transfer of significant portions of reservation land to non-Indigenous occupants, and it had significant impacts on the economic and cultural cohesion of Indigenous communities. In Canada, the Indian Act of 1876 had similar implications—namely the forced removal of First Nations and assimilation into non-Indigenous communities. However, the political landscape is different in Canada, where many Indigenous communities do not hold treaties. The Indian Act has been amended several times, with the most significant changes occurring in 1951 and 1985, which facilitated the removal of the act's most discriminatory sections.³ In all of these cases, it is important to consider the impacts on the governance structure of the impacted Tribes and First Nations.

For example, during treaty time, Indigenous leaders entering into treaty negotiations had a very different relationship with the land than that of the settlers. When tribal leaders were forced to relinquish much of their traditional territory to the federal government/settlers, the tribal communities would likely have assumed that these entities would care for the land as they had. The Western idea of “ownership” was a foreign framework. Rather, Indigenous understanding of ownership entailed a responsibility to protect or care for the land and its resources. This meant that if you occupied or “owned” the land, you would care for it, protect it, and nurture it, and it would, in turn, provide for those who lived on it. In other words, you would enter into a relationship with the land, the water, and the animals. The idea of ownership, of course, had completely different implications for the Western settlers, whose economies were often based on extractive practices that focused on capital accumulation for the benefit of the individual family rather than the wider community. This world view was also instrumental in the practice of dispossessing not only Indigenous land, but impacting Indigenous ways of life.⁴

But in the intervening years, through powerful persistence, the Indigenous Peoples of North America have regained strength in numbers and have developed administrative-political institutions to better engage with, and become leaders in, the non-Indigenous world. In addition, several legal decisions have been decided in favour of supporting treaty-reserved

rights for Indigenous Peoples on both sides of the Canada-US border—including *U.S. v. Washington* 1974 (known as the Boldt Decision), *U.S. v. Michigan* 1978, *Lac Courte Orielles v. Voigt* 1983, *R v. Sparrow*, 1990, 1 S.C.R. 1075 (known as the Sparrow case).⁵ All of these decisions are fundamentally important cases that impacted fishing rights in the United States and Canada.

Thus, in this chapter, we examine the history of Indigenous communities' involvement in the IJC. The evolution from an "excluded role" to "invited participants" has been a slow process and is part of a wider backdrop of societal change and the politics of recognition. In an attempt to shed light on this process, we examine some critical questions: To what extent was the IJC a tool of settler colonialism? Was the IJC a product of the state's thinking, or was it quicker to incorporate Indigenous voices into its governance structures, compared with other governmental entities of the time? We explore the historical context of the lack of direct engagement with Tribes, the implications for Indigenous Peoples, and we provide a road map for the IJC to move forward.

We investigate two distinct time periods—the pre-International Watershed Initiative period (1909–99) and the post-International Watershed Initiative period (2000–present). These periods could arguably be defined as colonial and post-colonial periods, with the caveat that the process of decolonization is ongoing and much work remains. For the first period, we draw on two case studies—hydro-power projects on the Columbia River and the St. Lawrence Seaway and Power Project—to examine the tensions between state/colonial politics and Indigenous rights. In the second period, we identify other steps toward gaining a greater Indigenous voice and involvement in IJC affairs, including the establishment of Indigenous seats on some of the International Watershed Boards.

Although progress has been made, we maintain that in the "post-colonial era" the IJC needs to continue to work to reform and decolonize its own institutional body. An important step in this regard is recognizing the sovereign status of Indigenous governments; indeed, rather than treating Tribes and First Nations as "stakeholders," we argue for the IJC to treat First Nations as "rights-holders." Ultimately, transforming the IJC from a binational structure to a multinational structure would be a significant

step toward acknowledging sovereign status for Indigenous Peoples and a significant step toward reconsidering the colonial structure of the IJC.

For the Love of Power: Indigenous Peoples and the IJC (1909–99)

In the early 1900s, when settler-colonial thought dominated the governance structure of North America, the idea of consulting Indigenous communities was not in the IJC’s—or any other governmental agencies’—lexicon. The IJC would be called in to help mitigate issues, but these issues were viewed through the lens of state priorities. The development of hydro-power, for example, was a state priority for much of the early twentieth century. The push to harness rivers’ energy was seen as a national priority, and such was wrapped up in politics and economic growth under the guise of “progress.” These massive projects were framed as a way to stimulate post-Second World War economies through job creation, provide a source of “clean energy” to growing cities, control flooding, and highlight new-found engineering techniques.

Absent from these considerations, however, was the potential impact on the Indigenous communities who bore the disproportionate impacts of hydro-power development. And while Indigenous Peoples were the most negatively impacted by these projects, they had the least representation. This continues today. The role of the IJC during this era was to set up technical solutions, or to mediate issues. Although Indigenous groups were deemed “non-political” bodies, their lack of representation was, in its essence, political. It was political because the membership and purview of the IJC reified colonial practices based on settler privilege and extractive economies. This is not to say there were no calls for greater inclusion. For example, Treaty 3 First Nations specifically demanded that they be included as participants in management schemes adopted for Shoal Lake area. Tribes of the Columbia River basin have also called for greater inclusion. However, structural governance barriers continue to limit genuine and meaningful engagement.

Thus, a critical question is whether the IJC helped buttress the mindset that Indigenous groups’ relationship with the Columbia River and their

right to an intact ecosystem were less valued compared to modern hydro-electric projects that would—seemingly—benefit the wider (i.e., settler) society? The cases of the Columbia River and the St. Lawrence Seaway and Power Project are both important examples of how hydro-power projects moved ahead at the great expense of Indigenous Peoples and their cultures, and were an affront to both inherent and acquired rights (through treaty negotiations). A turning point, arguably, can be seen in the Great Lakes Water Quality Agreement and the International Watershed Initiative, in which Indigenous communities have become more engaged in the governance process and the shaping of outcomes.

Roll On Columbia, Roll On

On the Columbia River, the impacts of hydro-power development had—and continue to have—significant impacts on Indigenous communities (see Moy and O’Riordan’s chapter in this volume). The most notable impacts include the blockage (and decimation) of salmon runs, and the displacement of Indigenous Peoples from their traditional homelands. The flooding of Celilo Falls, or Wy’am, and the waterways of the upper Columbia were perhaps the most significant losses. Wy’am was the longest continuously inhabited settlement in North America, with more than fifteen thousand years of recorded settlement.⁶ The area was a significant fishing area, because of the access to salmon as they migrated upstream. Dip-net techniques were created at the falls to capture the returning salmon. The area was a place of mercantile exchange, where thousands of Indigenous Peoples from throughout the Americas came to trade their goods. Flooding this area impacted both the economies and cultural fabric of the region. It also asserted the primacy of colonial settler values over Indigenous values.

Important to note here is that the construction of dams along the Columbia was also in direct violation of the 1855 treaties between the US government and the Columbia River Tribes, according to which Tribes were guaranteed access to “Usual and Accustomed,” or U and A, areas reserved for tribal fishing and hunting. Guarantee of access to U and A areas was the condition under which many Tribes signed away the majority of their landholdings. The dams were also a violation of the Royal

Proclamation of 1763, which laid down the rules of engagement with Indigenous Peoples in Canada—in particular, by assigning sovereign status to Indigenous nations (even if this was not actualized in either practice or policy). Indigenous Peoples up and down the Columbia River basin are considered Salmon People. Fishing for salmon is at the heart of cultural identity—taking the salmon runs away in essence challenges the very structure of these cultures.

As the IJC did not engage in direct dialogue with Indigenous communities during the early twentieth century, we argue that it, too, contributed to the narrative that the use of the river for hydro-power was more significant than the cultural and spiritual use of the river. That is, the benefits of power generation were perceived as more important than preserving Indigenous ways of life.

That being said, the IJC as an administrative arm of the BWT was not empowered to negotiate or work with Indigenous communities in either Canada or the United States. The separation of administrative duties between government entities arguably entrenched colonial policies and practice. In some cases, when governmental actors on the ground would be poised to work with Indigenous communities in their region, pathways of engagement did not exist. In interviews with one of authors of this chapter, IJC staff indicated that the officials who wanted to engage with Indigenous communities were—for decades—discouraged from doing so. These responsibilities were relocated to federal government agencies, such as Indigenous and Northern Affairs Canada and the US State Department. Because of this systemic division, Indigenous Peoples' calls to be included more directly in the IJC went unheeded. This lack of inclusion is deeply entrenched and will be difficult to overcome, undoubtedly requiring time and sustained effort from the IJC to make a meaningful shift.

Exacerbating any potential trust-building efforts is the fact that earlier calls for inclusion from Indigenous communities were ignored. For example, in April 1998, at a workshop in Castlegar, British Columbia, participants articulated the possible establishment of an International Watershed Board in the upper Columbia River basin. This board would function as a way to coordinate planning and decision-making functions. However, because of the limitations of the reference system and lack of political will the board did not materialize. In June 1999, Tribes and First

Nations throughout the Columbia basin again met to discuss the role of the IJC and to explore the possible establishment of an International Watershed Board. In that meeting, First Nations and tribal representatives shared that they felt that they did not have a voice in the process and were not involved in decision-making. The Indigenous communities in the Columbia basin, however, have been very successful at developing their own tribally-controlled organizations—such as the Columbia River Intertribal Fish Commission and the Upper Columbia United Tribes. Both inter-tribal organizations have been instrumental in developing regional recommendations to inform the renegotiation of the Columbia River Treaty, currently underway.⁷

Beyond the ability to negotiate or engage, the scope of the Columbia River Treaty, and the IJC's involvement in it, was indeed narrowly defined. The key focus of the treaty (and the subsequent involvement of the IJC technical processes) was on flood protection, financial distribution, and the overall operations of hydro-power facilities. This narrow focus, again, counters both an ecosystem approach and an Indigenous cultural approach, which embraces a holistic framework. It also contributes to the politics of erasure by dismantling ecological systems that support the social and economic structure of a community—in this case the Indigenous communities of the Columbia River—and this has had devastating and long-lasting impacts on the well-being of those communities. The construction of the dams were also in direct violation of the negotiated terms of the 1855 treaties between the United States and the Confederated Tribes of the Umatilla, the Confederated Tribes of Warm Springs, and the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe. Each of these treaties included provisions that secured the right to fish, both on reservation land as well as at the U and A fishing places. For example, in the Warm Springs Treaty, the following right was reserved: "The exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other U and A stations, in common with citizens of the United States."⁸

As the Columbia River Treaty is currently undergoing renegotiation, some of these deficits have been dealt with through a regional recommendation process. Indigenous leaders and communities throughout the Columbia River basin participated in that process and influenced the

recommendations aimed at modernizing the treaty. These regional recommendations include greater inclusion of Indigenous rights throughout the basin, a call for recognition of ecosystem function, and increased mechanisms to address climate change.⁹ Certainly, the regional recommendations and the process by which they were made are an important step in widening the process of inclusion.

However, as the formal negotiations between Canada and the United States began, the federal parties ultimately did not invite Tribes or First Nations to participate, despite the fact that recommendations put forward were greatly influenced by Indigenous participation, and the Indigenous Peoples along the Columbia are most impacted by the changes to the river. Rather, those invited to the table included federal representatives, utility companies, and state agencies. The omission of Indigenous Peoples from the formal negotiations was a significant missed opportunity to right past wrongs; to shift from a binational to a multinational approach; and to decolonize the treaty.¹⁰ The omission begs the question: What will it take for mechanisms rooted in colonial framings to change? Is change even possible? Or, should effort be directed at alternative, non-state mechanisms? To help answer these questions, we turn to a second historic example of a hydro-power development installed without consulting local Indigenous communities, the St. Lawrence Seaway and Power Project (which is also discussed in detail in Clamen and Macfarlane's chapter in this volume).

Mohawks and the St. Lawrence Seaway and Power Project

The St. Lawrence Seaway and Power Project is another poignant example of how Canadian and American state interests paved over Indigenous rights. In this case, the desire for hydro-power and navigation superseded Indigenous rights and title to water access, and this had devastating and long-lasting consequences for communities that for millennia had relied on the St. Lawrence River for sustenance. As a result of this controversial construction project, thousands of people were relocated. In particular, two Mohawk communities were severely impacted by the Seaway project: the Akwesasne and the Kahnawake tribal communities. These Tribes'

political demarcations complicated the negotiations over the construction of the Seaway, since the Akwesasne hold reserve land both in Canada and the United States and the Kahnawake hold reserve land only in Canada. This jurisdictional fracturing impacted who would negotiate with which federal government. In addition, it severely impacted the two Tribes' relationships with each other.

The Kahnawake community lost the most land—the La Prairie dike ran parallel to the shore, effectively cutting off the community's access to the water. In the construction of the seaway, they also lost one-sixth of their 262 acres. As Daniel Macfarlane eloquently reflects, "this would be problematic for any community accustomed to river access, but it was particularly disruptive for a community that for hundreds of years based its culture and way of life on access to the river. *Kahnawake* translates as 'on the rapids,' and the seaway robbed the community not only of territory but also its meaning."¹¹

This is another important example of how the drive for economic gain and power development overpowered Indigenous communities whose way of life is intricately tied to the water. The development of the Seaway not only severed access to the water, it also destroyed critically important habitat. Although the Seaway project was completed in the 1950s, the individual communities in its path continue to face issues stemming from its operation. The Akwesasne Mohawk community did not lose as much ancestral land as the Kahnawake, but it was directly downstream from the new power dam as well as the major industrial producers—and their toxins—who were attracted to the New York State side by the new supply of hydroelectricity. In the 1970s, the Akwesasne provided the IJC with a laundry list of ecological impacts resulting from the operation of the St. Lawrence Power Project, such as fish and land erosion, though these were not sufficiently addressed.¹²

However, in the twenty-first century, the consultations that led to Plan 2014, a revised method of operating the dams and controlling water levels on the upper St. Lawrence River and Lake Ontario, arguably did a better job of including Akwesasne perspectives.¹³ Moreover, in 2018 the federal government and the Akwesasne arrived at a \$45 million settlement to compensate the Indigenous groups for the impacts of this megaproject.

Nonetheless, changing the local aquatic and terrestrial ecosystems has torn at the cultural fabric of the community for upwards of half a century.

Opportunities Moving Forward: Contemporary Involvement of Indigenous Nations in the IJC (2000–Present)

For the majority of the IJC's existence, systemic and structural barriers have discouraged Indigenous involvement. Over the past two decades, the commission has evolved in its thinking and its engagement with Indigenous issues, as has been demonstrated by several developments. In the years since 1909, Tribes, First Nations, and Métis have fought for acknowledgment of treaty rights and Indigenous governance, resulting in many interactions with the IJC. Examples include the changes made in 1987 to the Great Lakes Water Quality Agreement, which, while not calling for any direct Indigenous involvement, nevertheless resulted in Indigenous representatives helping to develop Lakewide Action and Management Plans (LAMPs) for each of the boundary Great Lakes. One example of the widening of opportunities for Indigenous Nations' involvement with the IJC came at a meeting at Niagara-on-the-Lake, Ontario, in May 2019. At this meeting, the IJC staff arranged for a meeting of Indigenous Peoples representatives from the Midwest to the St Lawrence to talk for a day and a half about the historical IJC/Indigenous relationship and where that relationship should, and more importantly, could, go. The groups explored how to better work with Tribes and to what extent Tribes, First Nations, and Métis could use the IJC to assist in the fulfillment of their sacred duties to the natural world, the earth, fire, air, water, and all the beings who live as a part of that natural world. Chapter co-author, Frank Ettawageshik of Little Traverse Bay Bands of Odawa attended this meeting and found that while there were few if any definitive projects decided, all agreed that the meeting was a historic event that helped the parties move toward working together by recognizing the value of Indigenous science and philosophy.

On an individual level, there is no prohibition against the appointment of an Indigenous person to the IJC, or to any of its subsidiary bodies. Dr. Henry Lickers, environmental science officer with the Mohawk

Council of Akwesasne, served on the Great Lakes Science Advisory Board. Additionally, there have been other Indigenous appointments to IJC bodies. After several nominations over the past several terms, Dr. Henry Lickers became one of three commissioners appointed by the Canadian government in 2019, and the first Indigenous citizen to be appointed a commissioner in the IJC's history. This newly appointed group of commissioners will be holding a series of consultations and listening sessions throughout the United States and Canada, and as part of this outreach, they are prioritizing visiting Indigenous Nations. One of the first meetings was with the Indigenous communities of Michigan, including the twelve federally recognized Michigan Tribes, which was hosted by the Little Traverse Bay Bands of Odawa Indians. This meeting was held on 25 July 2019 at the Little Traverse Reservation in Petoskey, Michigan. Additional outreach was held on 20 July 2019 by the GLWQB Public Engagement Workgroup during the Midwest Alliance of Sovereign Tribes quarterly meeting at the Isabella Reservation near Mt. Pleasant, Michigan, hosted by the Saginaw Chippewa Indian Tribe.

In 2007, the International Upper Great Lakes Study had positions reserved for Indigenous representatives on its Public Interest Advisory Group. These positions were only partially filled due to continuing mistrust of the IJC on the part of Great Lakes First Nations communities. However, it should be noted that the 2000 IJC review of the Lake Ontario–St. Lawrence River Order did have Indigenous participation on its study board, its environmental technical work group, and in collecting and compiling information, as well as assisting with the administration of contracts and other functions. When the Great Lakes Water Quality Agreement was amended in 2012, the reconstituted Great Lakes Water Quality Board added four Indigenous representatives, two each from Canada and the United States. These positions have been continuously filled.

The Great Lakes Water Quality Board has taken significant steps toward greater inclusion and diversity within its structure. However, this intellectual opening requires constant tending through relationship-building and genuine collaboration, and trust will not come easily. One recent example that highlights the issue of the IJC's meaningful engagement with Indigenous communities comes from the account of an IJC staff member:

The IJC has hired a contractor to do a wetlands study in the Great Lakes Basin who has attempted to reach Tribes, First Nations and Métis with very little response so far. The last I was aware . . . only three had responded to their letter requesting input. The report deadline is fast approaching. There are approximately 185 Tribes and First Nations in the basin, so three is a very poor level of input. I've had several conversations with a friend of mine who has been working with the contractor to help them, but the contractor did too little too late to properly get the input they were requesting. This is a typical problem for the IJC when dealing with Tribes and First Nations.¹⁴

This account shows that although a desire for inclusion has materialized, a tremendous amount of work still needs to occur to bring about genuine engagement.

International Watersheds Initiative

A marked shift in the governance structure of the IJC occurred through the conception of the International Watersheds Initiative (IWI). The IWI was officially unveiled on 21 October 1997 with *The IJC and the 21st Century*.¹⁵ That report responded to the governments' reference by identifying a series of environmental and social concerns that the countries would likely encounter in the coming years. The report also addressed the institutional challenges associated with managing dynamic environmental issues as well as the challenges associated with governmental downsizing and jurisdictional fragmentation.

The report suggested that the establishment of permanent International Watershed Boards in major transboundary basins would “provide much improved mechanisms for avoiding and resolving transboundary disputes by building a capacity at the watershed level to anticipate and respond to the range of water-related and other environmental changes.”¹⁶ Specifically, these IJC boards would adopt an integrative ecosystem approach that would involve local interests and build capacity at the watershed level to address transboundary water issues facing the Great Lakes basin in the

twenty-first century. This would also provide a mechanism to address the asymmetrical governmental relations between Canada and the United States, which do not have equivalent authority or responsibilities.

These boards provide a significant opening for Indigenous representation at the board level. This is important, particularly as the previous boards had limited diversity—and certainly a lack of Indigenous representation. Specifically, the boards were tasked with:

- assessing and reporting on the state of the watershed every two years;
- employing the science necessary to make recommendations on emerging or existing issues;
- coordinating International Watershed Board activities with those of current federal, state, provincial, and local governments and NGOs; and
- providing an information network for the diverse community of interests and entities within a major transboundary watershed.

This approach differs from earlier IJC governance models as it attempts to view borders as hydrological rather than political; it includes sub-national players, and it adopts a “proactive” rather than a “reactive” approach.

Although the framing of the IWI as binational approach continues to temper the IWT’s ability to connect and unify international watersheds, politically, the initiative has made great progress in asserting the need to think about long-term, preventive governance. The IJC was also very cognizant of the need to include actors at all levels of governance, while at the same time avoiding duplication.

On 10 March 1998, the Canadian minister of foreign affairs and the US secretary of state accepted the principle of International Watershed Boards. Eight months later, the governments asked for a reference—pursuant to article ix of the BWT—to:

- define the framework of the operations of the International Watershed Boards;
- recommend the location of the first board;
- identify cost of the projects;
- indicate possible sources of funding; and
- encourage the commission to utilize the existing expertise of the governments and non-governmental sources at multiple scales to complement the activities with the IWI.

Additionally, the IWI boards were designed to work with the already established IJC boards—in particular, the control boards in the specific watershed—when appropriate. However, for those regions that have not had a reference (including British Columbia and Alaska), the prospects for creating a new board are low. A guiding framework for the IWI boards is to move beyond binational discussions to embrace greater public participation. The premise behind this approach is that local people—as delineated at a watershed scale—often remain in the best position to resolve difficult transboundary environmental situations. As one senior IJC staff member reflected:

The original Boards were not set up well to handle public participation. It can't just be two federal representatives making decisions, imposing them and telling us, 'Well, trust us. It's good for you.' This [the Watersheds Initiative] is the right decision for us.¹⁷

From the start, the boards were directed to have at least one meeting annually with the public to receive comments and answer questions. In some cases, this was a satisfactory approach; however, overall it represented a minimalist approach to public involvement and participation. The IJC attempted to broaden its jurisdictional scope by including “all the various levels of government and non-governmental actors” into their watershed

model. This enhanced multi-jurisdictional approach placed greater emphasis on engaging local actors in the governance structure.

The current (and proposed) IWI boards show the potential for coverage along the Canada-US border. Following IJC protocol, in order for the boards to be established, political support from both countries and sub-national stakeholders is necessary. In 2005, the commission identified three existing boards that could apply the IWI concept: those of the St. Croix River (New Brunswick, Maine), the Red River (Minnesota, North Dakota, and Manitoba), and the Rainy River (Minnesota and Ontario). In 2007, the commission added a fourth pilot international board for the Souris River (Saskatchewan, Manitoba, and North Dakota).¹⁸

In 2007, the International St. Croix River Watershed Board became the first official International Watersheds Board, and in 2013 the International Rainy Lake of the Woods Watershed Board became the second. The Red River and Souris River Boards remain pilot IWI boards. To date, the existing International Watershed Boards have only been established where there were existing IJC boards (it is unclear if this will remain as an informal prerequisite for participation in the IWI).¹⁹ The latest board—the International Rainy Lake of the Woods Watershed Board—has made significant progress in reframing its governance body to explicitly include Indigenous representatives—something that the previous boards had not done. This board is the first to have designated Indigenous membership, with the position currently held by Chief Brian Perrault of the Couchiching First Nation. His contribution is important, as he brings with him not only sustained knowledge of the place, but also leadership experience in both tribal and federal government. Throughout his life he guided, fished, and hunted on the lake and sounding area. He also has served for Treaty 3 Tribes, represents the ten First Nations communities in his region, and has worked for the federal government for almost two decades with Indian Affairs Canada. As of March 2016, he has served as chief of the Couchiching First Nation.

The board has also made progress in diversifying its membership, namely by designating an equal number of government and non-government members. In addition, the board emphasizes the need to have the majority of its members “living within or connected closely to the basin.”²⁰ If the other established boards follow suit, this would represent

great progress in widening the purview of the IWI to be more inclusive, and it would help work toward actualizing a post-colonial framework of transboundary governance. Gains have also been made through the Great Lakes Water Quality Board, as described below.

Great Lakes Water Quality Board

In the fall of 2016 the Great Lakes Water Quality Board (GLWQB) held a meeting in Thunder Bay, Ontario, that proved to be an important contribution to the IJC. The focus of the meeting was Indigenous rights and philosophy relating to the lakes and the natural world. Indigenous water protectors, traditional leaders, elected leaders, and other citizens of Indigenous citizens, helped to explain to the GLWQB the differences in world views that have led to disagreements in the past. The program was well received and inspired subsequent action aimed at addressing these ongoing issues.²¹

At its April 2017 meeting, the GLWQB adopted a policy for Indigenous engagement. This is an important evolution of the IJC governance model, and it lays out a model of Indigenous Peoples Engagement Principles and Practices. The context for this shift was the ambitious expectations for engagement with First Nations, Métis peoples, and Tribes in the governance and management of water quality in the Great Lakes basin that Canada and the United States had established while negotiating the Great Lakes Water Quality Agreement in 2012.

The preamble to the agreement states that “while the Parties are responsible for decision-making under this Agreement, the involvement and participation of State and Provincial Governments, Tribal Governments, First Nations, Métis, Municipal Governments, watershed management agencies, local public agencies, and the Public are essential to achieve the objectives of this Agreement.” This commitment is reflected in subsequent clauses relating to the implementation of the agreement by the parties, and to the annexes.

Specifically, article 7 details the IJC’s responsibilities under the agreement, and tasks the commission with engaging tribal governments, Métis, and First Nations peoples in relation to data, scientific research, and the provision of advice to the parties. Under article 8, relating to the

composition and mandate of the GLWQB the agreement specifies that the board may include representatives from tribal governments, First Nations, and Métis peoples. In response, the commission's Directive to the Great Lakes Water Quality Board specifies that the Canadian members should include one member from First Nations and one from the Métis peoples, and that the US members should include two members from Tribes. The GLWQB can and should serve as an example of how people working within the constraints of Western institutions can engage deeply and genuinely with Indigenous Peoples in the Great Lakes Basin. To that end, general principles were written to guide the GLWQB's work:

1. First Nations, Métis, and Tribes are not “stakeholders.” Within the distinct legal landscapes of the United States and Canada, First Nations, Métis, and Tribes hold distinct rights. This makes striving for a nation-to-nation relationship appropriate. In its work, including its deliberations, research and advice to the commission, the WQB will recognize the ways in which Tribes, Métis, and First Nations are distinct rights holders, and will act accordingly.
2. Tribes, First Nations, and Métis peoples have diverse interests, needs and concerns, distinct knowledge and ways of knowing, and their own institutions for governance. Differences also exist among the various Tribes, Métis communities, and First Nations in the basin. In its work, including its deliberations, research and advice to the commission, the WQB will recognize these interests, needs and concerns, distinct ways of knowing and institutions for governance.

The adaption of these principles is an important step in re-envisioning the governance practices of actors within the IJC, and beyond. The following are examples of practices aimed at ensuring that the GLWQB can respect these principles and the expectations established by the 2012 additions to the Great Lakes Water Quality Agreement:

1. The Agreement states that the WQB “may” include representatives from Tribal Governments, First Nations, and Métis peoples. The WQB views Indigenous representation as essential and strongly support the commission’s Directive.
2. In providing advice to the International Joint Commission, the WQB will seek opportunities to highlight the distinct perspectives of Tribal, First Nations, and Métis peoples, and to account for distinct concerns among Indigenous Peoples in the Great Lakes basin.
3. In specifically seeking the advice and insight of key government and non-government actors in the basin in relation to its studies, reports, advice and other work, the WQB will ensure that Tribal, First Nations, and Métis peoples are engaged as “rights holders” rather than “stakeholders” or members of the “general public”. In practice, this will involve identifying and consulting with official Tribal, First Nations and Métis representatives.
4. Public engagement and outreach are important aspects of the work of the WQB. In designing public outreach and engagement activities such as panels and presentations, the WQB will strive to ensure that the customs of Tribal, First Nations, and Métis peoples are appropriately recognized. Similarly, in designing surveys to seek the perspectives of key actors in the basin, the WQB will ensure that Tribal, First Nations, and Métis peoples are adequately represented in samples.
5. The WQB will strive to ensure that Indigenous knowledge from Tribal, First Nations, and Métis peoples are included in its work plans, research and deliberations, and advice provided to the IJC, and that this knowledge is treated appropriately according to the customs of the knowledge holders.

6. External consultants play a key role in helping the WQB deliver the work defined in its approved work plans. Terms of reference for consulting projects will be designed to reflect the principles and practices outlined in this document.²²

In the fall of 2017, discussions were ongoing to fully implement this policy. When it was adopted, members of the GLWQB expressed hope that other IJC bodies would adopt similar policies, and that these policies would move the IJC to adopt a policy affecting all of its activities. While there remains much work to bring better engagement with Indigenous Tribes, First Nations, and Métis, the efforts of the GLWQB indicate that the IJC has come a long way since its establishment in 1909.

Conclusion and Reflections

So, to what extent has the IJC been a tool of settler colonialism? Was it a product of the state thinking of the time, or was it quicker to incorporate Indigenous voices into its governance structures, at least compared to other governmental entities of the time? Or, more specifically, was it the case that the IJC helped buttress the mindset that Indigenous groups' use of a river was unproductive compared to modern hydroelectric and water-control projects that would benefit the wider (i.e., settler) society? The answer to these questions is far from straightforward. A key consideration is that the IJC was explicitly directed to not engage with Tribes and First Nations for the first ninety years after the BWT was signed. This systemic lack of engagement for almost a century—regardless of the cause—will undoubtedly require tremendous structural work to reverse.

During that time of exclusion, individuals with the IJC did, to their credit, attempt to find ways to “work around” the policy and to consult with Indigenous communities. However, these efforts were on a limited and inconsistent basis. Could there have been more mavericks, pushing against the structure and advocating for structural change within the IJC to promote equity of representation? Of course. However, rather than dwelling on what could have been, it is more important to take the lessons from this different era and apply them productively to making changes today.

Certainly, over the past nineteen years since the “non-engagement” policy was lifted the IJC has made some steps toward reconciliation. The incorporation of Indigenous voices within the Great Lakes Water Quality Agreement, for example, was an important step in this direction, as was the increased involvement of Indigenous actors through the International Watershed Initiative. And yet action is still needed.

In both Canada and the United States, the treaty rights of Tribes, First Nations, and Métis have been upheld by numerous court decisions at all levels. Unfortunately, the need for inclusion of Indigenous representatives was not a part of the international consciousness at the time of the 1909 BWT. But the concept of only two governments having the rights and the responsibilities for the stewardship and protection of the waters and natural resources is outdated. Many conflicts need significant input from Indigenous nations if they are to be effectively resolved—indeed, in some cases, it is simply impossible to resolve these disputes without such input.

Indigenous nations have proven repeatedly that the application of traditional knowledge and technology benefits not only Indigenous citizens but all of the citizens of the boundary waters areas, and beyond. The deep and sustained place-based knowledge of Indigenous cultures can provide important context and nuanced insights into natural systems. Providing space for this knowledge to influence, ground, and impact IJC management systems (and other mainstream institutions) will provide important opportunities for improved human-natural relationships. Indigenous nations have also repeatedly demonstrated a willingness to devote time and resources toward achieving these benefits. It has often been said by Indigenous leaders that they have a sacred duty to protect the waters, and that it is not possible to protect Indigenous waters without protecting everyone’s waters.

With that in mind, the IJC needs to continue its engagement with Indigenous nations and to seek ways to think, and act, beyond a two-nation system and to embrace one that will involve the full spectrum of governments whose rights and responsibilities extend across the boundary waters. Looking to the future, we offer the IJC the following suggestions for fostering Indigenous engagement:

- Consider restructuring the IJC from a binational to multinational body, one whose leadership is drawn equally from Canada, the United States, and Indigenous nations. Granted, this may require the federal governments amending the BWT. Alternatively, the possibility of working within the BWT's original structure through a series of proclamations or guiding notes, delivered under the aegis of the IJC, may prove possible, given the uncertainties (and possible pitfalls) of reopening the treaty in this current political climate. The key is to reassess the treaty through a post-colonial lens and offer suggestions for systemic changes that would include Indigenous nations on a more holistic and balanced level.
- Consider Indigenous nations as rights-holders rather than stakeholders.
- When dealing with First Nations, Métis, and Tribal governments, engage early and engage often.
- Building trust requires ongoing engagement; if done correctly it can stave off potential conflict in the future.
- Seek out at least one Indigenous representative on each side of the border for each watershed board, but recognize that that person may not be able to speak for all of the Indigenous nations that they represent.
- Recognize that multiple knowledge systems exist—this is particularly important in relationship to water.
- Refrain from seeing water as a “resource”—rather, view it as a “life source.” Many Indigenous nations and communities consider water as a gift from the creator to be protected and honoured.
- Indigenous communities have a long history with water protection, and in many cultures, such as the Anishinaabe, this work often is often reserved for women

“water protectors.” Consider diversity of gender, as well as ethnicity, when exploring leadership positions and nominations for open positions. Although the IJC has improved gender balance over the past twenty years, this point remains important to underscore.

- Recognize that Indigenous governance systems existed prior to European settlement and the development of the IJC. These relationships were also based on contracts and treaties, although they were often recorded in oral history and ceremony rather than on paper. Take the time to learn about these prior and ongoing Indigenous-based governance structures, which are place-based and culturally relevant.
- Currently, the IJC is set up to serve in an advisory capacity under references and in a quasi-judicial capacity under applications. In the future, it is important to share the lessons learned more broadly, with governmental and non-governmental groups.

In short, empower the IJC to work within its existing structure to take small steps toward inclusion and reconciliation with Indigenous communities. However, in the long-term we support a considerable structural change from a binational to a multinational model. Although significant steps have been made in the past two decades, more work needs to occur. It is the hope of the authors that this work occurs in a timely and steadfast fashion.

Notes

- 1 International Joint Commission (hereafter IJC), “International Joint Commission and First Nations,” PowerPoint Presentation (Ottawa: IJC, 2007).
- 2 General Allotment Act (or Dawes Act), Act of 8 Feb. 1887 (24 Stat. 388, ch. 119, 25 USCA 331), Acts of Forty-ninth Congress, Second Session, 1887.
- 3 Indian Act, S.C.1876, c. as amended by 1880, and 1894, and 1920, and 1927, and 1951, Indian Act at Can LII. 22 October 2013.

- 4 A. Simpson, "Settlement's secret," *Cultural Anthropology* 26, no. 2 (2011): 205–17; L. R. Simpson, "Anticolonial strategies for the recovery and maintenance of indigenous knowledge," *American Indian Quarterly* 28, no. 3–4 (2004): 373–84.
- 5 *R v. Sparrow*, 1990, 1 S.C.R. 1075; *United States v. Washington*, 1974, 384 F. Supp. 312 (W. D. Wash. 1974).
- 6 Richard White, *The Organic Machine: The Remaking of the Columbia River* (New York: Hill and Wang, 1995).
- 7 Alice Cohen and Emma Norman, "Renegotiating the Columbia River Treaty: Transboundary governance and Indigenous Rights," *Global Environmental Politics* 18, no. 4 (2019): 4–24.
- 8 Columbia River Inter-Tribal Fish Commission, "The Founding of the CRITFC" (2019), <https://www.critfc.org/about-us/critfcs-founding/>.
- 9 Ibid.
- 10 M. Marchand, Presentation to Vine Deloria, Jr., Indigenous Studies Class (Northwest Indian College, Lummi Nation, 2018).
- 11 Daniel Macfarlane, *Negotiating A River: Canada, the U.S., and the Creation of the St. Lawrence Seaway* (Vancouver: UBC Press, 2014), 126.
- 12 Ibid., 205–6; Daniel Macfarlane and Peter Kitay, "Hydraulic Imperialism: Hydro-electric Development and Treaty 9 in the Abitibi Region," *American Review of Canadian Studies* 47, no. 3 (Fall 2016): 380–97.
- 13 Murray Clamen and Daniel Macfarlane, "Plan 2014: The Historical Evolution of Lake Ontario-St. Lawrence River Regulation," *Canadian Water Resources Journal / Revue canadienne des ressources hydriques* 43, no. 4 (December 2018): 416–31.
- 14 The individual quoted here has requested that their name be withheld; telephone interview with authors, 31 October 2017.
- 15 IJC, *The IJC and the 21st Century* (Washington, DC, and Ottawa: IJC, 1997).
- 16 Ibid., 30.
- 17 Personal communication with author, 12 May 2007.
- 18 IJC, *Transboundary Watersheds* (Washington, DC, and Ottawa: IJC, 2000).
- 19 Emma S. Norman, *Governing Transboundary Waters: Canada, the United States, and Indigenous Communities* (London: Routledge, Earthscan Series of Water Resource Management, 2015).
- 20 IJC, "Great Lakes Water Quality Board—194th Meeting" (Thunder Bay, ON: IJC, 2016).
- 21 Ibid.
- 22 IJC Great Lakes Water Quality Board, "Indigenous Peoples Engagement Principles and Practices" (April 2017), http://ijc.org/files/tinymce/uploaded/WQB/WQB_IndigenousEngagementPolicy_20170420.pdf.