

INTERNATIONAL JOINT COMMISSION

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## HEARINGS AND ARGUMENTS

IN THE MATTER OF THE  
APPLICATION OF THE RAINY RIVER  
IMPROVEMENT CO. FOR APPROVAL  
OF PLANS FOR A DAM AT  
KETTLE FALLS



WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1913

**INTERNATIONAL JOINT COMMISSION.**

**UNITED STATES.**

**JAMES A. TAWNEY, *Chairman.***  
**FRANK S. STREETER,**  
**GEORGE TURNER.**  
**L. WHITE BUSBEY, *Secretary.***

**CANADA.**

**TH. CHASE CASGAIN, *Chairman.***  
**HENRY A. POWELL,**  
**CHARLES A. MAGRATH.**  
**LAWRENCE J. BURPEE, *Secretary.***

APPLICATION OF RAINY RIVER IMPROVEMENT CO. FOR APPROVAL OF  
PLANS FOR DAM AT KETTLE FALLS.

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LETTER OF TRANSMITTAL.

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DEPARTMENT OF STATE,  
*Washington, April 3, 1912.*

THE INTERNATIONAL JOINT COMMISSION  
OF THE UNITED STATES AND CANADA,  
*Washington, D. C.*

SIRS: I have the honor to transmit for appropriate action under the treaty of January 11, 1909, between the United States and Great Britain, an application in the form of a printed pamphlet accompanied by certain plans and maps, dated February 20, 1912, and addressed by the Rainy River Improvement Co. to the International Joint Commission of the United States and Canada, the Secretary of State, and the Secretary of War, of the United States, requesting the approval of the plans of the proposed dam, and permission to construct the same at Kettle Falls, near the outlet of Lake Namakan, on the northern boundary of St. Louis County, Minn.

In this connection I inclose a copy of a letter of C. J. Rockwood, attorney for the Rainy River Improvement Co., to Francis R. Shunk, major, Corps of Engineers, United States Army, dated February 7, 1911, together with the first indorsement thereon by Maj. Shunk, dated February 16, 1911; the second indorsement by Gen. Bixby, Chief of Engineers, United States Army, dated April 13, 1911; and the third indorsement by Robert Shaw Oliver, Assistant Secretary of War, dated April 14, 1911.

I am, sir, your obedient servant,

HUNTINGTON WILSON,  
*Acting Secretary of State.*

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APPLICATION OF RAINY RIVER IMPROVEMENT CO. FOR AP-  
PROVAL OF PLANS FOR DAM AT KETTLE FALLS.

*To the honorable the International Joint Commission, Washington, D. C., and Ottawa, Canada, the Secretary of State and the Secretary of War of the United States, Washington, D. C.*

GENTLEMEN: The undersigned, Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota for the purpose of improving the navigation of Rainy Lake and Rainy

River by the construction, maintenance, and operation of a dam across Rainy River at section twenty-seven (27), town seventy-one (71) north, range twenty-four (24) west, in Itasca County, Minn., and by means of such dam to maintain the level of Rainy Lake 3 feet or more above the low water level, to improve, and so far as practicable, flood out the rapids at the mouth of Rainy Lake and to equalize so far as practicable the flow of water in Rainy River from its source to its mouth, and prevent the river from falling to its natural low water stage; also by means of the water power created by said dam to supply the public and particularly the village of International Falls and the inhabitants thereof with water and electric light; also to construct and operate a canal or canals for navigation purposes to connect Rainy Lake and Lake Kabetogama and Lake Namakan in said State, also to drive, hold, handle, and tow logs in said Rainy River and Rainy Lake, Lake Namakan, and Lake Kabetogama, and the tributaries thereof, herewith submits a plan for a dam at Kettle Falls across the outlet of Lake Namakan, in St. Louis County, Minn., together with a survey and soundings of Kettle River and the adjacent portions of Lake Namakan and Rainy Lake, and requests approval of the plans and permission to construct a dam in accordance with the act of Congress approved February 24, 1911, and the treaty between the United States and Great Britain, signed January 11, 1909.

Appended to this application and printed herewith are:

1. A copy of the act of Congress above referred to.
2. A copy of the articles of incorporation of Rainy River Improvement Co. and copy of amendment.
3. A certificate by the secretary of the company showing the organization and present officers of the company.
4. The necessary duplicates and copies of this application required by the rules of the International Joint Commission and the Department of War, as well as the plans of the dam and surveys and soundings of the adjacent waters.

RAINY RIVER IMPROVEMENT CO.,  
By EDWARD WELLINGTON BACKUS,  
*President.*

Dated February 20, 1912.

C. J. ROCKWOOD,  
*Attorney for Applicant, 607 Andrus Building,  
Minneapolis, Minn.*

[PUBLIC—No. 418.]

[S. 10596.]

AN ACT To authorize the Rainy River Improvement Company to construct a dam across the outlet of Namakan Lake at Kettle Falls, in St. Louis County, Minnesota.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Rainy River Improvement Company, a corporation organized under the*



laws of the State of Minnesota, its successors and assigns, be, and they are hereby, authorized to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls, in Saint Louis County, Minnesota, at a point suitable to the interests of navigation, in accordance with the provisions of the act approved June twenty-third, nineteen hundred and ten, entitled "An Act to amend an Act entitled 'An Act to amend an Act to regulate the construction of dams across navigable waters,' approved June twenty-first, nineteen hundred and six."

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, February 24, 1911.

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ARTICLES OF INCORPORATION OF RAINY RIVER IMPROVEMENT CO.

For the purpose of organizing a corporation under title one (1) of chapter thirty-four (34) of the general statutes of the State of Minnesota, for 1894, the undersigned do hereby adopt and sign the following articles of incorporation:

ARTICLE I.

The name of this corporation shall be Rainy River Improvement Company. The general nature of the business of the corporation shall be to improve the navigation of Rainy Lake and Rainy River by the construction, maintenance, and operation of a dam across Rainy River at section twenty-seven (27), town seventy-one (71) north, range twenty-four (24) west, in Itasca County, Minnesota, and by means of such dam to maintain the level of Rainy Lake three feet or more above the low water level, to improve, and so far as practicable, flood out the rapids at the mouth of Rainy Lake and to equalize so far as practicable the flow of water in Rainy River from its source to its mouth, and prevent the river from falling to its natural low water stage; also by means of the water power created by said dam to supply the public and particularly the village of International Falls and the inhabitants thereof with water and electric light; also to construct and operate a canal or canals for navigation purposes to connect Rainy Lake and Lake Kabetogama and Lake Namakan in said State, also to drive, hold, handle, and tow logs in said Rainy River and Rainy Lake, Lake Namakan and Lake Kabetogama, and the tributaries thereof.

The principal place of the transaction of the business of the company shall be in the city of Minneapolis, in the county of Hennepin and State of Minnesota.

ARTICLE II.

The time of commencement of this corporation shall be the 21st day of November, 1904, and the period of its continuance fifty (50) years.

## ARTICLE III.

The amount of the capital stock of said corporation shall be one hundred thousand (\$100,000) dollars, which shall be paid in as called for by the board of directors.

## ARTICLE IV.

The highest amount of indebtedness or liability to which said corporation shall at any time be subject shall be the sum of five million (\$5,000,000) dollars.

## ARTICLE V.

The names and places of residence of persons forming this association for incorporation are: Edward W. Backus, William F. Brooks, Augustus E. Horr, Renselaer L. Horr, and Chelsea J. Rockwood, all residing in the city of Minneapolis, in the county of Hennepin, and State of Minnesota; and Horace V. Winchell, residing in the city of Butte, in the county of Silver Bow, and State of Montana.

## ARTICLE VI.

The government of the corporation and management of its affairs shall be vested in a board of directors, of not less than five (5) nor more than nine (9), who shall be elected by the stockholders at an annual meeting thereof, to be held on the second Monday in January of each year, at the office of the company in the city of Minneapolis.

The board of directors shall, immediately after their own election, elect a president, a first vice president, a second vice president, a secretary, and a treasurer of the corporation.

The stockholders of the corporation may make and prescribe by-laws for the government of the corporation, and the board of directors may make and prescribe by-laws not inconsistent with those of the stockholders.

The stockholders may remove any director at pleasure, and the directors may remove any officer at pleasure.

The board of directors may fill any vacancy in their own number until an election by the stockholders. The board of directors may appoint such other officers and agents of the corporation as they deem necessary and may prescribe the duties of all officers and agents. Edward W. Backus, Horace V. Winchell, William F. Brooks, Augustus E. Horr, Renselaer L. Horr, and Chelsea J. Rockwood shall constitute the first board of directors, of whom Edward W. Backus shall be president; Horace V. Winchell, first vice president; William F. Brooks, second vice president; Chelsea J. Rockwood, secretary, and Renselaer L. Horr, treasurer. These directors and officers shall hold office until the annual meeting in January, 1905, and until their successors are elected.

## ARTICLE VII.

The capital stock of the corporation shall be divided into one thousand (1,000) shares of the par value of one hundred (\$100) dollars each.

In witness whereof, we have hereunto set our hands and seals this 24th day of September, 1904.

EDWARD W. BACKUS.	[SEAL.]
WILLIAM F. BROOKS.	[SEAL.]
CHELSEA J. ROCKWOOD.	[SEAL.]
AUGUSTUS E. HERR.	[SEAL.]
RENSELAER L. HERR.	[SEAL.]
HORACE V. WINCHELL.	[SEAL.]

Signed, sealed, and delivered in the presence of—

ALICE A. FELTUS,  
F. J. KOHLER,

*As to all except Horace V. Winchell.*

Signed, sealed, and delivered in the presence of—

W. T. BLEICK,  
W. W. JOHNSTON,

*As to Horace V. Winchell.*

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

On this 16th day of November, 1904, before me, a notary public, in and for said county, personally appeared Edward W. Backus, William F. Brooks, Augustus E. Herr, Chelsea J. Rockwood, and Renselaer L. Herr, to me known to be the persons described in and who executed the foregoing articles of incorporation, and they acknowledged that they executed the same as their free act and deed.

[SEAL.]

ALICE A. FELTUS,  
*Notary Public, Hennepin County, Minn.*

STATE OF MONTANA,  
*County of Silver Bow, ss:*

On this 24th day of September, 1904, before me, a notary public, in and for said county, personally appeared Horace V. Winchell, to me known to be the person described in and who executed the foregoing articles of incorporation, and acknowledged that he executed the same as his free act and deed.

[SEAL.]

D. GAY STIVERS,  
*Notary Public, Silver Bow County, Mont.*

CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION OF  
RAINY RIVER IMPROVEMENT Co.

Edward W. Backus and Chelsea J. Rockwood, do each hereby certify that they are respectively the president and secretary of

Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota, and that said Chelsea J. Rockwood, as such secretary, has the possession and custody of all the records and proceedings of such corporation, including the records of the meetings of stockholders of said corporation; that at a meeting of the stockholders of said corporation held on the 6th day of November, 1908, at which all of the stockholders of said company were present, a resolution was duly adopted in the following words, amending the articles of incorporation of said corporation, namely:

*Be it resolved by the stockholders of Rainy River Improvement Co.,* That article 3 of the articles of incorporation of this company, as adopted on the 24th day of September, 1904, be, and the same hereby is, amended so that the same shall read as follows:

"The amount of the capital stock of said corporation shall be \$10,000, which shall be paid in as called for by the directors."

Also that article 7 of said articles of incorporation be amended so that the same shall read as follows:

"The capital stock of the corporation shall be divided into 100 shares of the par value of \$100 each."

It is hereby further certified that the meeting of stockholders of said corporation, at which said resolution was adopted, was duly called for the purpose of considering such resolution; that all of the stockholders of said corporation were present at such meeting, in person or by proxy, and expressly consented to the holding of such meeting for the purpose of considering such resolution, and that all of the shares of capital stock of said corporation were voted in favor of such resolution, and that the resolution was duly declared to be unanimously adopted.

In witness whereof, the undersigned, as president and secretary of said company, respectively, have by authority and direction of the stockholders of said corporation, executed this certificate, and have hereto affixed the corporate seal of said corporation, this 6th day of November, 1908.

EDWARD W. BACKUS,  
*President of Rainy River Improvement Co.*

[SEAL.]

C. J. ROCKWOOD,  
*Secretary of Rainy River Improvement Co.*

Signed, sealed, and delivered in presence of—

WASHINGTON GRAY,  
F. B. PARSONS.

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

Edward W. Backus and Chelsea J. Rockwood, being first duly sworn, do upon oath say that they are the president and secretary, respectively, of Rainy River Improvement Co., and that said Chelsea J. Rockwood has the custody and possession of the records and proceedings of said corporation; that they have made and signed the foregoing certificate by express authority and direction of the stockholders of said corporation; that they have read the foregoing certificate and that the same and every part thereof is true; and that the resolution embraced in said certificate is a true copy of the resolution adopted by the stockholders of said corporation at a meeting held on the 6th day of November, 1908, and such resolution is

recorded in the records and minutes of said meeting; that said meeting was called expressly for the purpose of considering such resolution; that all of the stockholders of said corporation were present at such meeting in person or by proxy and expressly consented to the holding thereof for the purpose of considering such resolution, and that all of the shares of stock of said corporation were voted in favor of such resolution, and the resolution was declared to be unanimously adopted.

EDWARD W. BACKUS.  
C. J. ROCKWOOD.

Subscribed and sworn to before me this 6th day of November, 1908.  
[SEAL.]

WASHINGTON GRAY,

*Notary Public, Hennepin County, Minn.*

My commission expires January 11, 1909.

UNITED STATES OF AMERICA,  
STATE OF MINNESOTA,  
DEPARTMENT OF STATE.

I, Julius A. Schmahl, secretary of state of the State of Minnesota, do hereby certify that I have compared the annexed copy with record of the original instrument in my office of articles of incorporation of the Rainy River Improvement Co., as recorded in book I-3 on incorporations on page 467, and amendment thereto as recorded in book Q-3 of incorporations on page 570, and that said copy is a true and correct transcript of said instrument and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol, in St. Paul, this 19th day of February, A. D. 1912.

[SEAL.]

\_\_\_\_\_  
*Secretary of State.*

I, C. J. Rockwood, do hereby certify that I am the secretary of Rainy River Improvement Co.; that the organization of the company by the selection of officers and directors was contained and stated in the articles of incorporation of the company, a certified copy of which accompanies this certificate; that the president, first vice president, secretary, and treasurer of the company are the same as were originally named in the certificate of incorporation.

I further certify that the annexed is a true copy of the minutes of a meeting of the stockholders of the company held January 11, 1909, at which Edward W. Backus, William F. Brooks, Warren Curtis, jr., Alexander Smith, Augustus S. Peabody, and R. L. Horr were elected directors of the company.

I further certify that no meeting of the stockholders of the company has since been held and that the directors then elected are now the directors of the company.

In witness whereof I have hereunto set my hand and the seal of the company this 20th day of February, 1912.

\_\_\_\_\_  
*Secretary.*

Annual meeting of stockholders of Rainy River Improvement Co. held at the company's office, Minneapolis, Minn., January 11, 1909, at 10 o'clock a. m.

Present: E. W. Backus, Wm. F. Brooks, H. V. Winchell, and C. J. Rockwood.

The secretary reported the following as the complete list of stockholders of the company, as shown by the books of the company:

	Shares.
E. W. Backus.....	1
Wm. F. Brooks.....	1
R. L. Horr.....	1
C. J. Rockwood.....	1
H. V. Winchell.....	1
Washington Gray.....	1
First Trust & Savings Bank.....	94
	100

On motion, the meeting was adjourned to January 12, 1909, at 10 o'clock a. m., at the same place.

C. J. ROCKWOOD, *Secretary.*

January 12, 1909, at 10 o'clock a. m., the stockholders of Rainy River Improvement Co. met, pursuant to adjournment.

Present: E. W. Backus, Wm. F. Brooks, C. J. Rockwood, and Washington Gray.

Mr. E. W. Backus presented the proxy and power of attorney of First Trust & Savings Bank, trustee, authorizing him to attend the annual stockholders' meeting of the company January 11, 1909, or any adjournment thereof, and to vote the 94 shares of the stock of the company held by said First Trust & Savings Bank, trustee, for the election of the following directors of the company, namely, Edward W. Backus, William F. Brooks, Warren Curtis, jr., Alexander Smith, Augustus S. Peabody, and R. L. Horr, which proxy was duly accepted and ordered filed with the records of the company.

It was thereupon voted to proceed to the election of six directors of the company by ballot. A ballot being taken, Edward W. Backus received 98 votes, William F. Brooks received 98 votes, Warren Curtis, jr., received 98 votes, Alexander Smith received 98 votes, Augustus S. Peabody received 98 votes, and R. L. Horr received 98 votes, and thereupon the six persons last above named were duly declared elected as directors of the company for the ensuing year.

There being no further business, the stockholders adjourned sine die.

C. J. ROCKWOOD,  
*Secretary.*

MINNEAPOLIS, MINN., *February 7, 1911.*

Maj. FRANCIS R. SHUNK,

*United States Engineer, St. Paul, Minn.*

DEAR SIR: In inclose map in triplicate, showing location of dam at Kettle Falls and survey of adjacent portions of Rainy Lake and Nameukan Lake; also a copy of the articles of incorporation and amendments of the Rainy River Improvement Co., certified by the

Secretary of State; also a certificate and copy of minutes showing the organization of the company and an extract showing the present officers of the company.

The company desires approval of the plans for the dam, and submits this application to the Secretary of War through you.

Very truly, yours,

C. J. ROCKWOOD.

[First indorsement.]

UNITED STATES ENGINEER OFFICE,  
*St. Paul, Minn., February 16, 1911.*

1. Respectfully submitted to the Chief of Engineers.
2. The within is an application of the Rainy River Improvement Co. for permission to construct a dam with sluices at the outlet of Lake Nameukan, St. Louis County, Minn.
3. As part of the project the company proposes to close the Canadian channel, as shown in the blue print, with a rock dam. This is a matter in which the United States has no concern, and it is assumed that proper permission has been obtained from the Canadian Government.
4. In the interntional channel shown on the blue print at the site of the dam there is at present a fall of 6.6 feet in a length of 300 feet, making rapids entirely impassable by boats, so that theré is, in fact, no commerce through this channel, except the floating of logs.
5. The proposed dam will be in no way detrimental to the interest of navigation, but on the contrary will effect considerable improvement.
6. I therefore recommend that the desired permission be granted, subject to the following conditions:
  - (1) That the dam be built under the supervision of the engineer officer in charge of the district.
  - (2) That suitable booms for guiding logs through the log sluice shall be provided, and that a fishway shall be constructed in a manner satisfactory to the engineer officer in charge of the district.
  - (3) That a site on the United States side of the river for suitable lock be reserved and transferred to the United States, if desired, free of cost, under the provisions of the act of Congress approved June 23, 1910.
7. Authority of Congress will be required for the construction of this dam. I am informed by the representative of the Rainy River Improvement Co. that a bill authorizing the dam has been introduced in the present Congress.

FRANCIS R. SHUNK,  
*Major, Corps of Engineers.*

[Second indorsement.]

WAR DEPARTMENT,  
OFFICE OF THE CHIEF OF ENGINEERS,  
*Washington, April 13, 1911.*

1. Respectfully submitted to the Secretary of War.
2. An act of Congress approved February 24, 1911, authorizes the Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota, to construct, maintain, and operate a dam across the outlet of Lake Nameukan at Kettle Falls, in St. Louis

County, Minn., in accordance with the provisions of the general dam act, approved June 23, 1910, and application is now made by said Rainy River Improvement Co. for approval of plans for the authorized structure.

3. The plans presented have been carefully considered, and I am of the opinion that, so far as concerns the interests committed to the charge of the War Department, they may receive favorable consideration.

4. The waterway across which the dam is to be built, however, forms a part of the international boundary between the United States and the Dominion of Canada, and comes within the purview of the treaty between the United States and Great Britain regarding boundary waters, which was proclaimed by the President May 13, 1910. This treaty establishes a joint commission to be known as the "International Joint Commission," and provides, inter alia, that in addition to the uses, obstructions, and diversions of boundary waters heretofore authorized no further uses, obstructions, or diversions of such waters on either side of the line, affecting the natural level or flow on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the said International Joint Commission.

5. It is believed, therefore, that before the proposed constructions are definitely approved by the War Department in pursuance of the aforesaid acts of Congress, they should receive consideration and action at the hands of this commission in pursuance of the provisions of the aforesaid treaty.

6. I accordingly recommend that the papers be transmitted to the Department of State, to which department, it is understood, the commission is attached; and that further action by the War Department be deferred until the views and conclusions of the commission have been obtained.

W. H. BIXBY,  
*Chief of Engineers, U. S. Army.*

[Third Indorsement.]

WAR DEPARTMENT,  
*April 4, 1911.*

Respectfully referred to the honorable the Secretary of State, in accordance with the foregoing recommendation.

ROBERT SHAW OLIVER,  
*Assistant Secretary of War.*



## DAM AT KETTLE FALLS—HEARINGS AND ARGUMENTS.

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WASHINGTON, D. C., *April 2, 1912.*

The International Joint Commission met in the Southern Building in Washington, D. C., on the 2d day of April, 1912, at 10.30 o'clock a. m.

Present: Messrs. James A. Tawney, Th. Chase Casgrain, Frank S. Streeter, George Turner, and Charles A. Magrath; L. White Busbey and Lawrence G. Burpee, secretaries.

Presiding: Mr. Tawney.

Mr. TAWNEY. Gentlemen, the commission has convened for the first time in regular session under the rules adopted on February 2 of this year. Up to this time there has been referred to the commission only one application for its approval and that is the application of the Rainy River Improvement Co. I take this occasion to call attention to the fact that this application is referred to the American section of the commission by the Acting Secretary of State instead of being referred to the commission. That, however, is a matter that may not be important. The fact that it is not referred to the commission, but to one section of the commission might be waived. The commission might notify the State Department, however, that the American section, as such, has no jurisdiction over anything except the administration of its own affairs and that applications in the future should be referred to the commission instead of to one section of the commission. I presume that the commission will have to do more or less instructing as to the form of procedure under our rules and the treaty.

I will read the letter of the Secretary of State regarding the application of the Rainy River Improvement Co.

(The chairman thereupon read the letter referred to.)

Now from this application it appears that the Rainy River Improvement Co. has authority from the Government of the United States to construct a dam at the point indicated on the maps that have been submitted as a part of the application. I also learn from Mr. Rockwood, the attorney for the Rainy River Improvement Co., that this dam extends across the international channel abutting on the Canadian side and also abutting on the American side, and the company under another name in Canada has authority from the provincial government for the construction of the dam. Now, if both Governments have authorized the construction of this dam the question arises as to whether or not this commission is called upon to consider the matter at all. Mr. Rockwood is here if the commission want to take up the matter, but I assume that the first question to be decided will be whether or not our approval is necessary. If our approval is necessary, then we would have to proceed under the rules to publish notice and there would be no opportunity for the disposition of the case until we have given notice under the rules.

Mr. TURNER. I think, Mr. Chairman, that before we go that far we ought to consider the form in which this matter is brought to our attention. Our rules are very plain. I do not see how anybody could read them and go wrong as to what ought to be done in order to bring the matter to our attention. The application ought to have been made to the Government of the United States or to the proper department thereof and the application ought to be transmitted to the commission with the request of that department that we take appropriate action thereon. Neither of those things are done in this application. It is addressed to us and transmitted to us by the State Department without any request that we take any action whatever on it. More than that the action of the War Department accompanying this expressly reserves the question of its approval, whereas the last clause of rule 8 of our rules provides that in cases where either of the respective Governments shall have authorized the use, obstruction, or diversion of navigable waters all plans filed as aforesaid shall be accompanied with the approval thereof by the Government, or the proper department of such Government, within whose jurisdiction such waters lie. We made that rule after full consideration and after an intimation on the part of the War Department that it proposed to retain the final say. We were of the opinion that this commission has the final say as to these works and I am still of that opinion, and while we might go on for the sake of doing something and take a case that comes to us as this application did the question is whether or not we ought not to start out right in the beginning and then we will continue right rather than start out wrong which is likely to involve us in a great deal of trouble hereafter. I am willing to do whatever the commission thinks proper about it, but I wanted to bring these matters up for consideration right here.

Mr. MAGRATH. This case was addressed to the commission in Ottawa and there were no plans accompanying the petition as called for by the rules.

Mr. TURNER. I think we should inform the State Department that we can not act upon anything addressed to the American section.

Mr. TAWNEY. I agree with you entirely. It is of the utmost importance that we start right.

#### STATEMENT OF C. J. ROCKWOOD.

Mr. ROCKWOOD. Under the legislation of Congress and with the approval of the plans for the dam in Rainy River by the Secretary of War on the one side and the Department of Public Works on the other the dam was constructed at Fort Francis. It was commenced in 1905 and completed in 1909 or 1910. A large paper mill has been constructed on the Minnesota side, turning out now 200 tons of paper per day, and the construction of a mill on the Fort Francis side has been commenced that will have a capacity of 100 tons per day. Of course they require a large amount of power, and the original contract with Mr. Backus, to which the company succeeded, in terms required the development of all the power that could be developed at that point, both by the construction of the dam itself and by the construction of auxiliary works and storage reservoirs. Rainy Lake is in the neighborhood of 80 miles in length

and 45 miles of it is easterly of the source of Rainy River. Rainy River flows out of Rainy Lake. Forty-five miles of it is east of that point. On a level of 6 to 10 feet higher than Rainy Lake and immediately south of it is another lake of approximately 150 square miles area. It is divided into two sections, although all one lake; part of it is called Kabetogama Lake and part Namakan Lake. Namakan Lake is separated from Rainy Lake by a narrow wall perhaps 500 or 1,000 feet in width, and Namakan Lake is on a level of a few feet higher. The flow of water between the two is in a narrow channel and over rapids that are called Kettle Falls—rapids 200 feet in length. A quarter of a mile or so east there is another channel which in low water is dry, but in high water carries some of the outflow, too. Between the two is what is called "The Island," although in dry weather it is not an island at all, and technically I suppose it is not, which is wholly Canadian territory. The international boundary is in the westerly opening.

Now, this application of the Rainy River Improvement Co. is made in pursuance of an act of Congress passed in 1911 authorizing the construction of the dam subject to approval of the plans by the Secretary of War.

Mr. STREETER. You want the dam at Kettle Falls?

Mr. ROCKWOOD. Yes; at Kettle Falls. A copy of that act is printed in this application.

Mr. TURNER. Do I understand you to say that there had been no Canadian act authorizing the dam at Kettle Falls?

Mr. ROCKWOOD. First the contract of 1905 and then the acts approving those contracts not only authorized this dam but required its construction for the purpose of developing at Fort Francis all the power that could be developed there, and using this and other natural reservoirs to augment the low-water flow. This application—not this identical application, but an application for approval of plans under the act of Congress—was submitted to the Secretary of War immediately after the passage of that act; in fact, it was submitted while the act was pending and was in the hands of the Secretary of War when the act passed. It had the approval of the local engineer, the Chief of Engineers, and the Secretary of War, except that the Secretary of War has taken the position that his final and formal approval should follow the act of this commission. Therefore he has withheld the issuance of a permit. I have not read the indorsements that are on that letter, but I have received a letter from the Chief of Engineers saying that so far as that department was concerned nothing was wanting but the approval of this commission. When I received a copy of the printed rules of this commission I prepared this application. I may have blundered in it. I had no precedent, but I did have the rules. I addressed it to the International Joint Commission, the Secretary of State, and the Secretary of War of the United States, and it seemed to me then and it seems to me now that that is strictly in accordance with the language of the rules. The act of Congress required the approval of the Secretary of War. We have no government in the sense in which Canada and Great Britain has a government, consisting of a cabinet, but each department acts separately; the Secretary of War within his domain represents the government and is the government; the Secretary of State within his domain represents the gov-

ernment and is the government. I may have been wrong, but I think I was right in addressing the application to each of those heads of department with the request that it be transmitted here. After a good deal of delay it did reach this office last night. It was in the hands of the Secretary of State some six weeks ago or more. It was not sent here until last night.

Mr. CASGRAIN. Do I understand, Mr. Chairman, that the application was transmitted to you with this letter from the Secretary of State; that is, the State Department?

Mr. TAWNEY. The application was transmitted by the State Department with that letter. In addressing the application Mr. Rockwood addressed it to the commission and to the Government. Under subsection (b) of rule 6, where any person seeks the approval of the commission, etc., he shall first make written application to the Government within whose jurisdiction the privilege is desired to be exercised to grant such privilege, and upon such Government, or proper department thereof, transmitting such application to the commission, with the request that it take appropriate action thereon, the same shall be filed and be proceeded with by the commission in the same manner as an application on behalf of one or the other of the Governments. All applications by private persons should conform, as to their contents, to the requirements of subdivision (a) of this rule. Of course the mere fact that it is addressed to the commission may be an informality.

Mr. TURNER. I do not see that that amounts to anything at all. The question in my mind is whether or not we ought not to start right and now require this application to be transmitted to the commission, with the request of the department for proper action thereon and with the approval of the plans and specifications by the Secretary of War, as our rules require. Of course we have absolutely no jurisdiction to authorize the construction of a dam across any boundary waters and from one shore to the other, and we could do nothing with this application until a correlative application on the part of the Canadian Government should be brought to our attention.

Mr. CASGRAIN. Mr. Rockwood, do I understand that this dam is to be constructed entirely on American territory?

Mr. ROCKWOOD. The Rainy River Co. dam will go to the center of the stream and the Ontario & Minnesota Power Co.'s dam will go to the center of the stream on the other side, and the two, of course, will form one dam.

Mr. TAWNEY. Mr. Rockwood, the stock of both of these companies is held by a third company?

Mr. ROCKWOOD. That is correct, Mr. Chairman; it is common ownership.

Mr. TAWNEY. Ought not the application then be made in the name of the common owner?

Mr. ROCKWOOD. I think not, Mr. Chairman, for this reason: The common owner is a stockholder in each of the companies, but the rights that have been granted by the Canadian Governments—Ontario and the Dominion—are not entirely to the Ontario & Minnesota Power Co., and that is the only company with which the Canadian Government will deal. The grant on this side on the part of Congress is to the Rainy River Improvement Co., and that is the only company that the departments here will deal with. Then there are

technical and legal reasons beyond that why I think the application should be made by the individual companies. The application on this side has been made in behalf of the Ontario & Minnesota Power Co., as I am informed, by Messrs. Blake, Lash, Anglin, and Cassello, of Toronto, and I saw a short time ago a letter from Mr. Osler, of that firm, saying the application had the approval of the department of public works, and I expected to find it here transmitted from that source in the same way as this case. How it has failed to come here I do not know. In a legal and technical sense the two are independent, although when they are granted the works meet.

The dam goes clear across, so far as our Government and this company can go, but our Government and this company can not go beyond the boundary. Every act that has been passed on either side has referred to a dam across the river, but necessarily the power of the United States stops at the center, and the power of the Ontario and Dominion Governments stops at the center, but the language has been used of a dam across the river.

Mr. TAWNEY. What does the act of Congress authorize?

Mr. ROCKWOOD. It authorizes a dam across the outlet of the lake.

Mr. TAWNEY. Beyond the center of the river it has no authority.

Mr. ROCKWOOD. The application which is here has not been to the Canadian Government.

Mr. MAGRATH. The application that was at Ottawa was transmitted to us by the department of public works, as I understand it, very similar to the manner in which this application has been transmitted here by the State Department. They did not say they approved it. They sent it to us for action. It was Mr. Powell, I believe, that really looked after it. It was transmitted to us to act upon, but they did not say they approved it, and Mr. Powell went over and saw them and said that we had decided here that these matters should be first dealt with by the respective Governments and then that we would deal with them. It was then sent back to them and we are awaiting their action.

Mr. ROCKWOOD. Now, Mr. Chairman, there have been two seasons in the Rainy River watershed drier than were ever known before. The average annual rainfall up there is close to 30 inches. The rainfall of 1910 was in the neighborhood of 10 inches; the rainfall of 1911 was a very little more, if any, although I have not seen the figures for that year. The shortage in the two seasons is, I suppose, at least 30 inches, and it has created a very unusual situation. The streams are at the low-water point, and consequently the amount of power that it has been possible to develop is lower than was anticipated when these works were entered upon, and lower than would have been the case within any other two years in which records have been kept. The most that could possibly be done was to operate the one mill that has been in operation the last two years. The company is now starting on the construction and will have it completed within about a year of the other mill which will require another 10,000 horsepower. It will be absolutely impossible to operate those mills to their capacity unless every drop of water that can be conserved is conserved and used to the best advantage, or we have great increases in rain. Of course, we may not have another season as dry.

Mr. STREETER. The new mill which you refer as being built is the one on the Canadian side?

Mr. ROCKWOOD. Yes, sir.

Mr. TURNER. What is the height of your proposed dam?

Mr. ROCKWOOD. The plans will show approximately.

Mr. TURNER. What extent will it raise the water?

Mr. ROCKWOOD. Not above the high-water mark for the lake.

Mr. TURNER. It will not flood any private lands at all?

Mr. ROCKWOOD. Not any. It will simply restore the water up to high-water mark and discharge it as it is needed.

Mr. CASGRAIN. Then there can be no damage done to lands beyond the dam?

Mr. ROCKWOOD. Not at all. It will not affect any right whatever. If it did affect any private rights we could be enjoined.

Mr. CASGRAIN. It will not back the water up so that the lands above the dams will be damaged at all?

Mr. ROCKWOOD. Not at all.

Mr. CASGRAIN. I suppose you and the Ontario & Minnesota Power Co. are working toward the same end?

Mr. ROCKWOOD. We are.

Mr. CASGRAIN. I can not understand why these gentlemen are not here to join with you.

Mr. ROCKWOOD. I expected to find them here; I do not know why they are not here.

Mr. CASGRAIN. They would be able to tell us whether or not our Government has approved of these plans.

Mr. ROCKWOOD. I suppose I could find out in a little time by wiring or telephoning. I do not know what the delay is as I did not get in this morning until 9 o'clock.

Mr. CASGRAIN. About two months ago they were in a great hurry.

Mr. ROCKWOOD. They are yet. The gentlemen whom you have seen got their inspiration from Mr. Backus, whom I saw last Friday or Saturday. He is at the head and is operating the whole thing.

In the present low stage of the water it is possible to put in a dam and hold the water. If there is a delay it may not be feasible to put the dam in at present, and if it is possible at all it would be at very much larger expense. We have waited now 13 months since the Secretary of War was ready to approve these plans. He waited for the organization of this commission. There were certain things that necessarily consumed a good deal of time, and we may be innocent victims of this unfortunate difference of opinion between the Secretary of War and the commission; that is, the commission thinks the Secretary of War should act first, and the Secretary of War thinks the commission ought to act first. I confess I have not tried very hard to solve that question, but—

Mr. TAWNEY. We ought to know before we proceed whether full and final authority by the Government within whose jurisdiction the project is located has been given. Otherwise, we may go ahead and consider the effect of this on the other side of the line and give our approval or withhold our approval and then have the Secretary of War approve the plans afterwards, or withhold his approval, in which case our work would be entirely useless.

Mr. TURNER. We must know the definite plans in order to frame such approval.

Mr. TAWNEY. Yes; in order to determine the effect of the construction on the other side of the line.

Mr. ROCKWOOD. We are as well satisfied with one procedure as with the other.

Mr. TAWNEY. In this case there is no disapproval from any source that we have heard of. Suppose your company on both sides of the line should have the plans approved by the War Department and by the department of public works and you would go on and build your dam without the approval of this commission, who would complain? Who could complain?

Mr. ROCKWOOD. I do not think that anyone would, because everybody would be satisfied.

Mr. TAWNEY. Have you presented that phase of the matter to the Secretary of War?

Mr. ROCKWOOD. No, Mr. Chairman, I have not done that, because we wanted the approval. We have taken a good deal of pains and a good deal of time to make ourselves entirely regular, and we are anxious to do it. Sooner or later we might be driven to desperation and might take some chances if we do not succeed in getting the approval.

Mr. TAWNEY. You can not proceed without the permit of the Secretary of War.

Mr. ROCKWOOD. No; we do not propose to do that. The law requires that; he is ready to give it.

Mr. TAWNEY. Yes; his letter so states, but in the last paragraph of his letter Mr. Bixby states: "I accordingly recommend that the papers be transmitted to the Department of State, to which department it is understood the commission is attached," which it is not at all, "and that further action by the War Department be deferred until the views and conclusions of the commission have been obtained."

Mr. ROCKWOOD. Well, because of that we are here in the present form and here without the formal approval.

Mr. TAWNEY. You gentlemen on the Canadian side of the commission learn for the first time that you are attached to the State Department of the United States.

Mr. CASGRAIN. Do they want us to simply report when a decision is given? For one, I am not willing to give a decision which would be reversed by the Secretary of War.

Mr. ROCKWOOD. There is no danger whatever of a reversal there or disapproval or difference of opinion. It is purely the technical or the legal question which is to act first.

Mr. TURNER. You are not expecting us to act at this time, are you?

Mr. ROCKWOOD. I was hoping that.

Mr. TURNER. The Canadian Government must be informed of this application and must be heard from regarding it. If it is entirely on the other side of the line that your works are—

Mr. ROCKWOOD. The works of the Rainy River Improvement Co. are entirely on the other side of the boundary.

Mr. CASGRAIN. Suppose you go out and build your dam; what would be the consequence?

Mr. ROCKWOOD. It would be no good; the other application must go through and be approved, too.

Mr. CASGRAIN. Can you not get together? Is there anything which prevents you and the Canadian people getting together and coming before us in a body?

Mr. ROCKWOOD. I expected the other end of the application to be here. We are together, except that by some slip or oversight the other end is not here. If this commission is to be in session for a day or two, I think I can get that application over here.

Mr. TURNER. We are here for the purpose of attending to any matters that may be brought before the commission.

Mr. ROCKWOOD. I am anxious for the opportunity.

Mr. TAWNEY. The Secretary of the Canadian section of the commission addressed this letter to Mr. James B. Hunter, deputy minister of public works, at Ottawa:

Mr. Powell has just informed me that you desire to know what course you should pursue with respect to the application made to the Government by the Ontario & Minnesota Power Co. Mr. Casgrain is in Montreal, but I am desired to say by Mr. Powell and Mr. Magrath that the method of making application to the International Joint Commission was very fully discussed by the commissioners at Washington. Before the establishment of the commission matters such as are relegated to it by the treaty were adjusted by diplomacy between the United States and Great Britain on behalf of Canada, and it was thought by the commissions that only matters which either Canada or the United States desired to bring before it should have the consideration of the commission.

One element which operated on the minds of the commissioners was the matter of costs and expenses. As the sessions of the commission would involve considerable outlay on the part of both Governments, it was thought advisable that each should say what cases on behalf of itself or its subject should be brought before the commission.

In accordance with the procedure laid down by the commission, it will be necessary for the Canadian Government to consider whether or not the application of the Ontario & Minnesota Power Co. is one that should be submitted to the commission. If the Government, or the department, charged with such matters, desires the commission to proceed, action will be taken at once.

In respect to works which would interfere with navigation, the Federal Government, in the opinion of the commissioners, must at some time or other approve of the work so far as its bearing on navigation is concerned, and it appeared to the commissioners that the most opportune time to give or withhold the consent of the Government was before the matter had been taken into consideration by the commission. Otherwise a great deal of time and money might be expended to no purpose.

I am, yours, very truly,

Secretary.

That was sent to the deputy minister of public works, and since that time there has been no communication from that department.

Mr. CASGRAIN. Now suppose our Government is relying on rule 9, which states that:

As soon as practicable after an application is made as hereinbefore in rule 6 provided for, the secretary of the section of the commission appointed by the other Government shall forthwith send to such Government a notice in writing that the application has been made and a copy thereof.

It seems to me that our Government must be informed that this application is coming before the commission so that if it has any observations to make or any defense or mark to set up, it should be given an opportunity to do so.

Mr. ROCKWOOD. Upon that point, Mr. Chairman, all I can say is that I sent this application to the Secretary of State a month or six weeks ago with the request that it be filed and transmitted immediately. I supposed that it was done immediately. I found that it



was not and I followed the matter up and finally had a telegram from the Acting Secretary of State saying that it was lost and could not be found—they had mislaid it. A tracer was sent through the express company, and later I had a telegram that it had been located. I supposed then it was on the way. I was surprised when I came here this morning to find that it had not reached this office until yesterday.

Mr. TAWNEY. It reached here about 6 o'clock last evening.

Mr. ROCKWOOD. Now, if the commission is going to be in session for a day or two, I think I can, by using the telegraph or telephone, get that application here, either with formal approval or conditional approval by the department of public works.

Mr. MAGRATH. It is an unfortunate position to be in, I realize that. The rules provide, however, that there is an opportunity to those who see fit to oppose, if any; are we to bear that in mind and to follow out this procedure?

Mr. TURNER. I think the respective applications on each side ought to be served on the other Government in accordance with these rules. Then if the respective Governments were to come in without any delay, as they might do by their counsel, and represent to us that this was in fact authorized by the concurrent actions of the two Governments, that it did not really involve any question of private rights, because it did not involve the raising of these waters above high-water mark, we might take that as a waiver of the two Governments of the requirements of the performance required by these rules and proceed to act.

Mr. MAGRATH. I do not know anything about the location, because the plan does not show it; but it might involve other power interests; it might involve navigation.

Mr. TAWNEY. Our Government has passed it, so far as we are concerned, regarding the navigation question. The Secretary of War recited the fact that navigation is not involved except in so far as its improvement would improve navigation on the river and lake by raising and maintaining a more stable water level in the lake and river.

Mr. CASGRAIN. Some of the interested parties may be relying upon that part of rule 9 which says: "The secretaries shall also, as soon as practicable after the application is made, cause to be published, \* \* \* a notice that the application has been made," and of the nature and locality of the proposed use, construction, or diversion, and that all persons interested therein are entitled to be heard with respect thereto before the commission." Of course, you say that there are no interested parties, but there may be. You may not be aware of some of the interests that may be affected by the construction of this dam.

Mr. ROCKWOOD. I have published a notice of this application in the local papers; I published it three times. I did not publish it in the Canadian Gazette.

Mr. TURNER. Well, we could not take the statements of the applicants here or private persons who are interested, but would we not be authorized to take the statements of the two Governments and proceed then?

Mr. ROCKWOOD. Certainly; if the two Governments would so represent.

Mr. TURNER. Could not that application be served on the Secretary of State here and on the board of public works over there and then the two Governments authorize their representatives to come here and tell us that there were no private interests involved and that there had been mutual action on the part of the two Governments providing this? Then if the papers are in shape, if we do not want to stand on our rights with reference to having the approval of the War Department of this country and the public works of Canada, we could go on and act, but that must at least be done; we can not possibly waive these proceedings until something of that kind is done. This application should be transmitted immediately to the board of public works of Canada.

Mr. ROCKWOOD. I did not understand that.

Mr. TAWNEY. You have not transmitted your application to the Canadian secretary, have you?

Mr. ROCKWOOD. I did not think I would have to, but I sent copies here so that it could be done. I relied upon the department and upon the secretary of this commission. I requested that the Secretary of War send them here and this country send them to Ottawa.

Mr. TAWNEY. That was the rule; you had a right to rely upon that. Of course, the application arrived here only last evening, and it has not gone to the Government yet.

Mr. ROCKWOOD. Now, if I may be permitted I will see if I can get Mr. Osler by telephone—if not I will wire him—and get some information before night.

Mr. CASGRAIN. Would it not be well then to adjourn until to-morrow morning and see whether we can have more information upon the subject?

Mr. TAWNEY. Mr. Rockwood, in telephoning or telegraphing up there you should impress upon him the fact that before this commission can proceed it will want to know from the Government what private interests, if any, are involved, or a representative of the Government to appear here and state to the commission that there are no private interests involved, and also our Government to do the same; otherwise the rule which provides for the publication of notice to protect the rights of private interests on both sides of the line would have to be observed.

Mr. ROCKWOOD. Mr. Chairman, I think that could be covered by a provision that this dam should not be used to raise water above the high-water mark.

Mr. STREETER. What would be the effect of that, if such provision should be incorporated and then you should have a great rainfall and the water should go beyond high-water mark?

Mr. ROCKWOOD. This dam is so planned that it will discharge more water than that natural water every day by opening gates.

Mr. TURNER. Is it not a possibility that there may be lands there that are flooded at high-water mark that it is valuable to have uncovered during low water?

Mr. ROCKWOOD. The public has the right to maintain the water at high-water mark for the improvement of navigation. That is a definite law in Minnesota, and that is the common law of England and Canada, as I understand it, high-water mark being not the highest point to which water ever rises, but the point at which it remains long enough to make its mark.

Mr. TURNER. That is, under the law of the United States individuals could not acquire rights below high-water mark?

Mr. ROCKWOOD. Not as against that public right of navigation for public use.

Mr. STREETER. Can this be said to be an exercise of right for the navigation interests?

Mr. ROCKWOOD. It is both. So far as we are concerned it is for the purpose of using power. That is the only way we have of getting any money back, but, as a matter of fact, this dam and the dam in Rainy River both operate for the benefit of navigation by increasing the low-water flow by doing something toward equalizing the flow, and both Governments have taken that view with respect to the dam below and with respect to auxiliary storage reservoirs that may be created above like this one.

Mr. Chairman, the law of the Dominion of Canada and the Province of Ontario is very similar regarding the distribution of power to the law of our General Government. The Province of Ontario was the riparian owner at Fort Frances and at Kettle Falls, and had the power to sell its land and convey the usual riparian rights. The public rights of navigation and other public rights are under the control and guardianship of the Dominion of Canada, and this contract that I speak of gave the title, upon the performance of its terms, to the land as a riparian owner at Fort Frances, and gave the right to construct this storage at Kettle Falls. As to the public rights of navigation, the works were approved by this act of the Dominion of Canada, and that contract in its recitals was very much more specific than this act is. The contract required generally the development of storage reservoirs, and specifically this one at Lake Namenkan by the construction of the dam at Kettle Falls.

Mr. MAGRATH. I happen to know that there has been a great deal of friction between Mr. Backus and his company and the people out there. I was in the house for three sessions, and I have seen the people come to Ottawa with their complaints. So far as I am concerned, I think we should adhere to the rules. We must get the thing pushed ahead as fast as we can, but we do not want any interests coming here and saying that we have allowed the matter to be dealt with without giving them a full opportunity to be heard. I do not know that any private rights will be interfered with, but there has been some friction.

Mr. ROCKWOOD. That friction was with reference to the use of power at Fort Frances and International Falls, respectively, and the location of works on their respective sides and the distribution of power, and not with reference to any such question as this. I likewise am sure that a telegram would bring approval from the officers at Fort Frances. As I say, they have just made that formal agreement for settling the differences, and the company is to go ahead with this additional mill. It has been approved by a bill or resolution of the Ontario Legislature, and it is to insure the power to operate that very mill that we want to get this dam constructed.

Mr. TAWNEY. Suppose we take a recess until to-morrow morning at 10.30, and you could get in touch with your attorneys at Ontario and they could find out from the Government at Ottawa when the application will be forwarded to the secretary of the commission.

In the meantime we could take some steps, if we could meet this afternoon informally, with respect to the form of this application.

Mr. STREETER. Mr. Chairman, I suggest, with reference to Mr. Rockwood's matter, that that matter be postponed until to-morrow morning until 10.30, and that we do not take a recess but continue in session here for a little while and keep this meeting open.

Mr. TAWNEY. We will take a recess until 2.30 this afternoon.

Mr. STREETER. With the understanding that Mr. Rockwood's matter be postponed until to-morrow morning.

Mr. TURNER. If they have the authority of the Governments as fully as Mr. Rockwood thinks they have, they do not need the approval of this commission.

Mr. TAWNEY. Unless it could be on this ground, Mr. Turner: The Government of the United States can authorize this dam only to the center of this channel. Now, it might be incumbent upon the commission to ascertain whether the company or anybody else was authorized to construct a dam from the center to the land on the Canadian side and whether the two should have the approval of this commission, because one Government, acting independent of the other, of course, could authorize the dam to the center of the stream. Now, so far as that authority or action on the part of our Government is concerned, it might have the approval of the commission and that approval might be given upon the ground that the Canadian Government has likewise authorized a dam on their side.

Mr. TURNER. Each Government authorizing the construction of this dam as an entirety clear across the river amounts to conjoint action of the two Governments authorizing this dam.

Mr. TAWNEY. That was my impression, and that there was no approval needed. The only objection I could think of was the fact that the jurisdiction of each Government was limited to the center of the stream.

Mr. ROCKWOOD. Mr. Chairman, we had exactly a parallel question in Minnesota of this character. A company was organized in Duluth to divert some of the waters that naturally flow north over into a stream flowing south in Lake Superior. In order to do it they had to get their plans approved by the Secretary of War, because they were dealing with navigable waters, and they also had to condemn private property. They commenced the condemnation proceedings, and our Supreme Court held that those proceedings for condemnation could not be maintained at all until the Secretary of War had approved the plans for the improvements. Now, either Government acts with reference to the public rights, and so I understand does this commission. If private rights are involved, questions of flowage, trespass, or other wrongs against private property, we must go into court and acquire title. Any approval given by either Government or by this commission does not give us any charter to go and take possession of private property nor to interfere with private rights. Those matters we must acquire by other means.

Mr. TURNER. If you find you are going to overflow some private party's land, I am not certain that we ought not to require you to make compensation for that.

Mr. TAWNEY. Or protect constructive works.

Mr. ROCKWOOD. It would be entirely proper for any permit or approval to recite that it should not be construed to give the right

to invade private property rights, but if the commission were to take the position that its approval would not be given until those rights had been acquired and the courts took the position that we could not maintain condemnation proceedings until the commission had given its approval, then we would be up against a wall again, each refusing to act until after the other had acted. Now, the question was litigated to an end, and our Minnesota supreme court held that the proper procedure was to get the governmental authority.

Mr. TURNER. That is in the absence of an international agreement between the two countries.

Mr. ROCKWOOD. I think this international agreement relates entirely to public matters and not to private property rights, excepting in one clause which says that in cases of diversion on one side of the boundary it should give the same rights to causes of action on the other side.

Mr. TURNER. What is the object of this treaty in requiring us to hear private parties?

Mr. STREETER. You will find it under Article XII, in the last paragraph, beginning with the words "and all parties interested therein shall be given convenient opportunity to be heard."

Mr. TURNER. You should also refer to Article VIII, which reads as follows:

The commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

And in the following paragraph:

The commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

Mr. ROCKWOOD. I have not given careful study to this treaty with those questions in mind, because none of those questions has arisen in this case so far as I could see.

Mr. TURNER. I would assume that this required us to be informed as to the effect of any proposed works of all interests of every character on this side of the line, and if we found that they were to be injured to make some provision for their protection, either through remedial or protective works or requiring proper compensation to be made.

Mr. ROCKWOOD. Now, on that point, there is, as I said a moment ago, one provision here which expressly refers to that indemnity.

Mr. TAWNEY. There are several classes of cases, Mr. Rockwood. The diversions that fall under Article II, injuries sustained in consequence of the things that are authorized to be done in that article may be redressed in the courts of the country within whose jurisdiction the cause of injury arose. Now, in Articles III and IV there is a different class of cases entirely. First, in Article III, where the obstruction is wholly on one side of the line, the effect of which is to raise the level of water on the other side of the line, the only remedy the inhabitants of the country on the side where the level of the boundary water has been raised have is to come before this commission for protection, either by asking indemnity or protective works. Then,

again, in Article IV, there is another class of cases where waters are obstructed that flow across boundary waters. In those two cases the remedy of the inhabitants on either side injured by reason of the obstruction or diversion or use of such waters is before the International Joint Commission, the only tribunal to which they can go.

Mr. ROCKWOOD. I confess I had not taken that view at all. This is the language of Article II:

It is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs.

To illustrate my understanding of that: This Duluth Co. proposes to divert some of this water naturally flowing to the boundary over into Lake Superior. If they do, they diminish the flow of the Rainy River and diminish it equally on the Minnesota side and on the Fort Frances side, where our power plant is situated. I understand that to mean that our Canadian corporation can go into the Minnesota courts and sue for damages or for an injunction.

Mr. TAWNEY. You are absolutely right, but you will observe that that applies only to cases "where in its natural channels water would flow across the boundary or boundary waters." Now, Birch Lake is wholly within the jurisdiction of the United States. In that case the Canadians who may be injured can come into the courts of the United States and sue for redress of their injuries or recover damages, but that does not apply to the case where the obstruction is on one side of a boundary water, and in the water itself. Take the St. Lawrence, for example, with the Long Sault Rapids, between New York and Canada; there the proposed obstruction would be wholly on one side of the line, but it affects the level of the water on the other side of the line to the injury of people living on that side. Now, people in that case could not go into the United States courts here and obtain redress; they would have to come before this commission, and before that work can be done it must have the approval of this commission, because it affects the rights of the people on the other side of the line in the manner stated in Article III of the treaty.

Mr. TURNER. More than that, Mr. Chairman, it seems to me that Article II has no reference to diversions authorized by this commission; it simply constitutes a river or lake extending from one country into the other, a common water, and giving citizens upon either side of the line the right to resort to the courts of either country where there has been a diversion to the injury of the people.

(The commission at 5 o'clock adjourned to meet at 10.30 a. m., Wednesday, Apr. 3.)

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OTTAWA, DOMINION OF CANADA,  
*Tuesday, October 1, 1912.*

The International Joint Commission met at Ottawa, in the Province of Ontario, on Tuesday morning, the 1st day of October, 1912.

Present: Th. Chase Casgrain (presiding), James A. Tawney, Frank S. Streeter, Henry A. Powell, George Turner, Charles A. Magrath; Lawrence J. Burpee and L. White Busbey, secretaries.

The commission proceeded to the hearing of the application of the Rainy River Improvement Co. for approval of the dam at Kettle Falls.

Mr. C. J. Rockwood, Minneapolis, Minn., and Mr. Glyn Osler, of Toronto, appeared in support of the application.

Mr. Frank H. Keefer appeared for the Ontario Government.

Mr. CASGRAIN (chairman). Mr. Rockwood, what do you purpose laying before the commission this morning?

Mr. ROCKWOOD. I come before you with the hope that the commission may approve of the dam at Kettle Falls.

Mr. CASGRAIN. You represent the Ontario & Minnesota Power Co.?

Mr. ROCKWOOD. I represent the Rainy River Improvement Co., which is in the same interest as the Minnesota & Ontario Power Co., and it is the Rainy River Improvement Co. that makes the application. That company expects to construct the Kettle Falls Dam on the American side, and on the Ontario side the dam will be constructed by the Ontario & Minnesota Power Co. Mr. Osler has had charge of the plans before the department of public works in Canada, and I come without knowing whether the application from the Canadian side is in shape for final action or not.

Mr. CASGRAIN. Mr. Osler, do you come here fully empowered to place the application before the commission?

Mr. OSLER. Well, Mr. Chairman, I understand that you ruled that you would not entertain an application until it had been passed upon by the Government of the country through which the application comes, and that, in our case, is the Government of Canada. I can not say that approval has yet been given by the department of public works of Canada. The matter has been before the public works department for some time, and when I was in Ottawa last week I understood that Mr. Chapleau, the engineer of the department, had been commissioned to examine these plans and pass upon them finally. Mr. Lafleur, the chief engineer of the public works department, assured me he would make every endeavor to have the matter ready to come before you to-day, but as you were going to sit at half-past 10 o'clock this morning, I did not have an opportunity of ascertaining from the public works department what Mr. Chapleau's report on the matter was. We had a plan, which our engineers thought was satisfactory to the subordinate engineer up in Winnipeg, Mr. Earle, and had this prepared as the result of a conference with him, but when the plans were submitted to the public works department, and by them sent out to Mr. Earle, it was stated that Mr. Earle had reported adversely to the plans. I went over his report with Mr. Chapleau, and it is quite apparent on the face of it that Mr. Earle did not appreciate some parts of the plans. For instance, he reported adversely to the plan on the ground that the opening—there are two openings—on the Canadian side was something less than the opening shown on the American side, but an examination of the plan shows that the reverse is the fact. Finally, Mr. Lafleur came to the conclusion that Mr. Chapleau, another of his engineers, was more conversant with the situation, and remitted the matter to him. The result of that is that there has been some considerable delay. I am in hopes that Mr. Chapleau will have found the plan satisfactory. As soon as your meeting this morning is over, I propose to

call on Mr. Chapleau to see whether he is now in a position to approve of the plans.

Mr. CASGRAIN. I wish to call your attention to this rule of the commission:

6. In all cases to be submitted to the commission under Articles III, IV, and VIII of the treaty the method of bringing such cases to the attention of the commission and invoking its action shall be as follows:

(b) Where any private person seeks the approval of the commission for the use, obstruction, or diversion of such waters, he shall first make written application to the Government within whose jurisdiction the privilege desired is to be exercised, to grant whose jurisdiction the privilege desired is to be exercised, to grant such privilege, and upon such Government, or the proper department thereof, transmitting such application to the commission, with the request that it take appropriate action thereon, the same shall be filed and be proceeded with by the commission in the same manner as an application on behalf of one or the other of the Governments. All applications by private persons should conform, as to their contents, to the requirements of subdivision (a) of this rule.

I understand from what you say and from what Mr. Rockwood has said that there is an application by one company which has received the approval of the Government of the United States. That application is before us properly, but, I take it that it would not be much use constructing a dam to the middle of the river unless you had approval for the construction on the other side of the river. You say you have an application which is now pending before the Government of Canada for approval, so that the question of the construction of the dam on the Canadian side may be also brought before us, but that up to the present time you have not been able to secure that approval.

Mr. OSLER. We have not secured that approval up to the present time. I might suggest this: That while perhaps your board would not care to deal with the matter finally, in the absence of some indication of the approval of the Canadian Government, if the chief engineer is in a position to approve the plans to-day, showing that the Canadian Government is not adverse to the construction of the dam, the dam that Mr. Rockwood has applied for permission to construct is of course one affecting the level of the water on both sides, and your board might act upon his application and approve the dam without postponing the hearing, so as to let the time elapse, which must elapse, if we have to take over again all the proceedings before your commission that would otherwise have to be taken after the approval of the Dominion Government was given.

Mr. CASGRAIN. Would not that be approving of this work piecemeal?

Mr. OSLER. I would rather suggest that it would be approving of it as a whole.

Mr. CASGRAIN. Subject to what my colleagues might say, I do not see how we can approve of something which is not before us at all.

Mr. OSLER. The application of Mr. Rockwood shows the whole dam, as I understand it.

Mr. ROCKWOOD. That is so.

Mr. OSLER. That being so, even if the Ontario & Minnesota Power Co. were not proposing to join in the construction of the dam, I take it that you would, upon notice to the Canadian Government, have jurisdiction to deal with that application and either authorize Mr. Rockwood's clients, the Rainy River Improvement Co., to construct



the dam, or refuse your consent. Although the matter is not in such shape that the Ontario & Minnesota Power Co. can come here and ask you to approve the construction of the dam, yet if you are satisfied that the Canadian Government has no objection to the construction of that dam, I would submit there is no reason why you should not deal with it on Mr. Rockwood's application.

Mr. CASGRAIN. What you say may be so, but now that the Canadian Government has these plans before it, don't you think that if we act on Mr. Rockwood's application the Canadian Government might be taken by surprise? Now that your application is before them, they are put on their guard, and it may or may not be that they have some objection to offer, which, of course, they would offer on your application.

Mr. OSLER. I would not suggest that you should deal on my application without some intimation from the public works department that they had approved of the plan, and if we are prepared to furnish you with proper assurances to that effect, then my submission is that it would not be necessary to wait until the lapse of such time as would otherwise be necessary if we had to proceed upon a substantive application.

Mr. CASGRAIN. Your suggestion is that we should adjourn for sufficient time to give you proper opportunity to go to the department and to see what can be done there?

Mr. OSLER. Precisely.

Mr. CASGRAIN. I wish to call your attention to a telegram we received this morning from Watson, Smoke, Chisolm & Smith, barristers, of Toronto:

We understand that matters relating to Rainy River and tributary waters will not be considered by the commission at present session in Ottawa. We are much interested for clients in these matters and wish to be heard on any application to the commission by the Minnesota Power Co. or Rainy River Improvement Co., or other company or individual. Wire answer.

Do you know what their interest is?

Mr. OSLER. I think I can tell you what their interest is. Mr. Watson represents the Rainy River Lumber Co. and some allied river improvement companies, and perhaps some allied lumber companies who are operating on the upper waters which feed Rainy Lake and Rainy River. During the shortage of water about two years ago, the Ontario & Minnesota Power Co., for which I act, found, as we alleged, although it is denied, of course, that the lumber companies for which Mr. Watson is acting had been storing large quantities of water during the season of low water, which prevented us getting the natural flow of the river to which we claim we were entitled. In order to restrain them we applied to the high court of justice in Ontario for an injunction, and our action in the high court in Ontario is now pending against Mr. Watson's clients, the question being whether they are entitled to maintain as against us storage dams for the purpose of driving the rivers in such a manner as to prevent our getting the natural flow of the water.

Mr. STREETER. Those storage dams are in the Province of Ontario.

Mr. OSLER. All in the Province of Ontario. In addition to denying that they are storing the water so as to hurt us, they deny that we are entitled to the natural flow of the river, and they deny that we have the right to maintain our dam at Fort Frances, but that is

a matter that is not before you, and we have not so far heard any objection in respect to our application with reference to Kettle Falls.

Mr. CASGRAIN. These gentlemen may be under a misapprehension, and from what you say probably there may be some change in the situation, but I do not know that the commission would like to proceed to hear you or Mr. Rockwood in the face of this telegram without asking these gentlemen to appear to be heard to-morrow morning and to say anything they may have to say against the granting of your application.

Mr. OSLER. In view of what you say I think we probably could not properly ask you to proceed to-day in the face of the telegram.

Mr. TAWNEY. Let me ask you one question, Mr. Osler. What is now essential to be done in order to make your authority to construct this dam on the Canadian side final, so far as the Government of the Dominion and the government of Ontario are concerned?

Mr. OSLER. So far as the Ontario government is concerned, the plan has been approved by the Ontario government. So far as the Dominion Government is concerned, we have to have the approval of an order in council. The procedure for obtaining that order in council is to apply to the public works department for approval of the plan.

Mr. TAWNEY. You have to obtain an order in council?

Mr. OSLER. The public works department, when it approves of the plans, will take the necessary steps to obtain the order in council, and, as Mr. Casgrain will be able to assure you, that is a matter that could be done very promptly as soon as these plans have been approved. The essential thing is to obtain engineering approval.

Mr. TAWNEY. Do you have to get legislative authority from the Dominion Government?

Mr. OSLER. There is an act of the Dominion Parliament by which any obstructions in navigable waters must be approved by and through the department of public works and by getting the approval of the governor in council—that is, approval under the general act. I think Mr. Casgrain will agree with me in that.

Mr. CASGRAIN. In order to give you full opportunity to see the public works department we will take recess until 3 o'clock this afternoon.

Mr. STREETER. And these gentlemen in Toronto will, I suppose, have an opportunity of being heard to-morrow?

Mr. CASGRAIN. Certainly.

Mr. OSLER. If I may suggest, I think I can find out very quickly whether Mr. Chapleau is satisfied with the plan, because his office is a very short distance from here. If he is not satisfied with the plans, then it is hopeless for us to expect the department of public works to act to-day. I can see Mr. Chapleau and telephone to Mr. Burpee. If Mr. Chapleau says he is satisfied, then it may be some use to bring Mr. Watson here, or otherwise it would not.

Mr. TAWNEY. Mr. Rockwood wants to proceed on the application of his company, as I understand it, without reference to the approval of the Canadian plan.

Mr. ROCKWOOD. I want to proceed to-morrow morning.

Mr. STREETER. And these gentlemen in Toronto may want to oppose that.

Mr. ROCKWOOD. I think that when Mr. Watson is here it will be found that his sole objection relates to the matters that Mr. Osler has called attention to, and which are below the Watrous Island boom.

Mr. CASGRAIN. I have no doubt that Mr. Watson will be able to state what he wants when he gets here. Of course, he may or may not consent to what you are asking for.

Mr. STREETER. In view of the other questions before us, would it not be useful to have Mr. Watson come here and state his case?

Mr. CASGRAIN. We will telegraph him, in any event, to come to-morrow morning.

(The commission resumed at 3 o'clock in the afternoon.)

Mr. CASGRAIN. Have you any further statements to make, Mr. Osler?

Mr. OSLER. After the commission rose this morning I went to Mr. Chapleau's office and found he was out of town. I saw his superior officer, Mr. Lafleur, the chief engineer, and he telegraphed to Mr. Chapleau, asking him to return immediately, and a few minutes ago I saw Mr. Lafleur again, and he told me Mr. Chapleau would be here in the morning. I have an appointment with Mr. Lafleur at half-past 10 o'clock to-morrow morning, which is the earliest appointment he could give me. He has no report from Mr. Chapleau as to the plans.

Mr. CASGRAIN. Then, so far as your application is concerned, we could not consider it this afternoon?

Mr. OSLER. I am afraid not.

Mr. POWELL. I suppose your application is to approve of the plans?

Mr. OSLER. As a matter of fact the application of the Canadian company, which I represent, has not received the approval of the department of public works, so that it can not come before the commission. Inasmuch as the application of the American company is to construct the whole dam and is absolutely in order, the commission might proceed to consider that. In order to do that they would no doubt require to be advised as to the attitude of the Dominion Government. We hope to be in a position to say there is no objection on the part of the Dominion Government or, at least, that such objection as they may take to matters of detail can be met by us. It is Mr. Rockwood's application we will ask you to proceed with to-morrow.

Mr. CASGRAIN. Is that agreeable to you, Mr. Rockwood?

Mr. ROCKWOOD. Yes.

Mr. POWELL. Are these two companies the same?

Mr. ROCKWOOD. They are in the same interest. The company making this application on the Minnesota side is the Rainy River Improvement Co. and on the other side the Ontario & Minnesota Power Co. (Ltd.).

Mr. POWELL. What companies are interested in the falls?

Mr. ROCKWOOD. The Ontario & Minnesota Power Co. on the Ontario side and the Minnesota & Ontario Power Co. on the other side.

Mr. OSLER. It may be a lengthy process to get the department of public works moving, and might I suggest that you would write to the minister and say that Mr. Rockwood is pressing his application. That might assist us in getting them to be ready to go on with the matter.

Mr. TURNER. I do not see how we could urge the Government in that direction.

Mr. POWELL. Do you think it would be effective?

Mr. OSLER. I do not suggest that it is sure to be effective, but every little helps.

Mr. ROCKWOOD. May we inquire whether it is understood we can come back to-morrow afternoon if, as it may turn out, we can not get any result in time for the morning session of the commission?

Mr. CASGRAIN. Mr. Keefer will be here in the morning, and he may have something to suggest that you might want to hear.

Mr. TURNER. If you press the application on behalf of the American company you could proceed with it.

Mr. OSLER. We do not know what the position of the commission would be on that point. If we get the approval of the department of public works that would help.

Mr. POWELL. You don't expect to get a decision from the department that soon, do you?

Mr. OSLER. I do not know whether it is possible or not; I hope it is possible.

(Application deferred until to-morrow.)

The commission resumed its session at 10.30 a. m., October 2.

Present: Th. Chase Casgrain (chairman), James A. Tawney, Henry A. Powell, Frank S. Streeter, Charles A. Magrath, and George Turner. Lawrence J. Burpee and L. White Busbey, secretaries.

The consideration of application of Rainy River Improvement Co. for approval of plans for dam at Kettle Falls was resumed from yesterday's sitting of the commission.

Mr. C. J. Rockwood, of Minneapolis, and Mr. Glyn Osler, of Toronto, appeared in support of the application.

Mr. Watson, of Toronto, appeared for the Rainy River Lumber Co., the Shelvin-Clarke Co., the Shelvin Mathieu Co., the Quetico Lumber Co., and the Martin Improvement Co.

Mr. Watson stated that he was also instructed to represent the Rat Portage Lumber Co. and other companies in which Messrs. Mackenzie & Mann are interested, representing practically all the lumber companies in that district.

Mr. CASGRAIN (chairman). Have you any news for us to-day, Mr. Osler?

Mr. OSLER. Not very good news, I am afraid. I spent an hour or an hour and a half with the chief engineer of the public works department this morning. His assistant, Mr. Chapleau, who was deputed to examine these plans and make his report, says he is not prepared to make a report yet. He suggests there may be little matters to consider as to the general conservation scheme in which the department of the interior is interested, and before dealing with the matter they would like to consider it with the department of marine with respect to matters of navigation, and in the meantime he is not prepared to expedite the matter. I urged the chief engineer that he should at least come and say that subject to such regulations as might be suggested by the other departments after consultation with them, they should let us get on, but he finally said he would not take any action until he had consulted these departments. He also suggested that the hydro-electric commission in

Ontario should be consulted, although I pointed out to him that we had approval by order-in-council of the Ontario government. I found it was quite impossible to get him to take action this morning, and the best thing I could do was to get his promise to call an early meeting of all the departments interested, with a view of seeing what, if any, objections they had, and what, if any, regulations they would require. I urged upon him that such a consideration of the general question of levels and dams in that watershed would occupy a very long time, and that if these other departments desired to embark upon that it would not only postpone the consideration of this matter indefinitely, but would practically anticipate the functions of your commission. But he thought he could not deal with the matter in the meantime. I am afraid we can not present anything from the public works department this morning. I can only suggest that if you should see fit to proceed upon Mr. Rockwood's application you might make an order approving of his plans, and then, if we could get the approval of the department in the course of a few days, Mr. Lafleur promised me to expedite it, and his calling a meeting of the departments interested looks like expedition, then your order might take effect as soon as the approval of the public works department was obtained.

Mr. POWELL. Would it facilitate matters at all, if the commission proceeded to hear and determine the application filed on behalf of the Minnesota & Ontario Power Co. That company could not, or would not, proceed with the construction of the dam until the Canadian Government had authorized the construction of the dam upon the Canadian side, in any event.

Mr. OSLER. That is quite true; but, on the other hand, if we waited until the public works department gives its approval, then it would be necessary to call your commission together again, and it is perhaps a matter of days whether we can get the dam built this year or not. Mr. Lafleur quite agreed with me that to team in supplies and materials for the building of that dam is out of the question after the river freezes. That material must be taken in by water, and unless approval is given in time to enable the company to take in material before the river freezes, then practically the whole construction of the dam is postponed for another year, because when the ice goes out of the river next year it will be a period of high water during which it will be impossible to build.

Mr. TAWNEY. How early does the water freeze over there?

Mr. OSLER. Mr. Rockwood is more familiar with that than I am, but he tells me that you can not depend upon it after the 10th of November.

Mr. WATSON. Perhaps it may expedite matters if I say a word on behalf of those whom I represent. It is just one word I have to say and that is that I am quite unprepared to proceed this morning and to give you the assistance which I am sure you would expect from me, by reason of the absence of instructions from my clients, beyond the general statement that they wish to object and oppose the proposal. Beyond that, instructions have not been given me, and judging from what Mr. Rockwood and Mr. Osler have stated to me, there apparently has been some misapprehension on the part of the managers of the company, because I have been waiting instructions and

they thought the time had not been reached when instructions were necessary. They thought they would receive some personal notice, or notice to their companies, of the application which was filed so that the particulars of that application might be ascertained and steps taken to answer. It appears from what I have learned since I came here that the notice was published in the newspapers and apparently that the application is in accord with the rules of the commission.

Mr. CASGRAIN. I understand that the application which is now made by Mr. Rockwood, is an application of the Rainy River Improvement Co. for approval of the plans of a dam at Kettle Falls.

Mr. ROCKWOOD. That is so.

Mr. WATSON. One further point in regard to that which appears to me to be of special importance is this: This proceeding, as to the dam at Kettle Falls, is the logical sequence of the dam and construction on the Rainy River; it is wholly incident and collateral to that, and the fact is that the dam and the work on Rainy River have never been approved of yet. They are standing in the same position and they are in addition the subject of litigation between the parties. There is a trial imminent in the next court to be held in the ordinary course on the 20th of October. Mr. Osler has informed me that owing to serious bereavement in Mr. Backus's family they may not be able to proceed.

Mr. OSLER. We are not going on.

Mr. WATSON. That makes it more serious from the standpoint of Mr. Osler. This plan is part of a larger plan which would be wholly inoperative and ineffective unless the other is approved of, and nothing can be done in the other matter until the approval of the Dominion Government, by order in council, has been given, and nothing of the kind, so far, has been given. On the other hand, the department of justice has reported against it to the department of public works, and the public works, as I understand, has also reported against it. I do not see how any advance can be made this morning. In addition to that there is the question of want of instructions on my part. If I am at liberty to have a copy of the application and the copy of the plans involved in the proposal, I shall submit them at once to my clients, who are materially interested, and present to you such instructions as may be given to me.

Mr. TURNER. Are you familiar with the treaty and the rules of the commission?

Mr. WATSON. I have perused them; I can not say that I am familiar with them.

Mr. TURNER. You say you had no notice?

Mr. WATSON. I received no notice.

Mr. TURNER. Our rules require you within 60 days after the filing of such application to file a statement as to any fact or facts bearing on the subject matter of the application which would tend to defeat or modify the order of approval sought.

Mr. WATSON. We have not had that notice.

Mr. CASGRAIN. The notice was evidently published.

Mr. WATSON. It was published, yes, and in one sense there may have been a notice, inasmuch as it was published, but I was distinguishing as between that general publication and notice to the companies interested. They thought, there may have been a mis-

apprehension on their part, that they should receive direct notice. I saw Mr. Mathieu last week in the office, and he said that something of this kind might come up, but he had not received any notice.

Mr. ROCKWOOD. I understand the situation on the reference of this Rainy River application to be this: It was filed strictly according to the rules last February, and it came before the commission with the approval of the Secretary of War on our side, on April 2, at the meeting in Washington. The notices were given by one or both of the secretaries of the commission, in accordance with the rules. The 60 days expired long ago. There has been no protest on the part of the companies represented by Mr. Watson. There was no requirement that personal notice should be served on them. We could not anticipate that opposition and as a matter of fact we did not anticipate it. I am as certain as I can be that I have heard this matter discussed many times within the past year when Mr. Mathieu was present, and that Mr. Mathieu had personal knowledge that the company intended to put in this dam at Kettle Falls.

Mr. STREETER. Who is Mr. Mathieu?

Mr. ROCKWOOD. Mr. Mathieu is the general manager of three or four of the companies for whom Mr. Watson appears and he was present at hearings held by the representative of the secretary of war in International Falls and Fort Frances. I can not say that those hearings were heard as to this particular matter; I am not sure they were. They were held with reference to the boom down in Rainy River below International Falls, and I am not certain whether they included this matter, but I do know that this matter was discussed incidentally at those meetings, if not as a principal subject.

Mr. WATSON. Be good enough to pardon me—I have a letter here from Mr. Busbey, date the 24th of September, directed to my firm in answer to a communication, in which he says:

In reference to giving notice of meetings of the commission, it was decided that the people residing in Canada, interested in the question, should be notified by the secretary of the Canadian section of the commission, Mr. Burpee, at Ottawa, while the secretary of the United States section should notify all interested parties on this side of the line.

That confirms, as he says, a letter written to my firm in June last, that we would get notice.

Mr. BUSBEY. That was in reference to the investigation with regard to the Lake of the Woods.

Mr. WATSON. It is an answer to my letter upon this subject.

Mr. CASGRAIN. Let me ask you a question, Mr. Rockwood: Suppose you are absolutely right and that the delays have expired and that your status before this commission is absolutely correct, yet, the Government of Canada has not approved of the plan to extend the dam on the Canadian side, and, is it possible for us to make an order, approving of the construction of the dam, in face of the fact that the Government of Canada, who have had this matter under advisement, have not yet come to any determination?

Mr. TURNER. That is a matter I would like to have some information on.

Mr. ROCKWOOD. I think it is, and for this reason: This notice was served upon the Government. At all events I assume that it was served upon the Government because the rules require the secretaries to serve upon both Governments the notice, and the depart-

ment of public works or any other department of the Canadian Government could have voiced its objection, if it has any, to the application of the Rainy River Improvement Co.

Mr. CASGRAIN. Suppose the department of public works has not done its duty, and suppose all the departments have failed in their duty, what would you do in face of the rule of our constitutional law that the Crown can not be bound by the laches of its servants? Suppose you are absolutely right, yet, in view of the fact that the Government has withheld its approval, how can we give an order authorizing you to construct this dam?

Mr. ROCKWOOD. We are not going to construct that dam until we get approval, as a matter of fact, because half a dam is no good, and we can not construct on the Canadian side until we have the approval of the Canadian authorities. We now have the approval of the government of Ontario and we have no doubt at all about getting the approval of the Dominion Government.

Mr. TURNER. I would like to know whether the order which Mr. Rockwood is now seeking is to build half a dam or to build the entire dam?

Mr. ROCKWOOD. The application addressed to the Secretary of War is necessarily as to that portion of the dam that is on United States soil, and while the plans before the Secretary of War cover the entire stream, yet his authority to approve is limited to the territorial jurisdiction of the United States.

Mr. TURNER. Do you want us to pass an order authorizing you to build half a dam or to build the whole dam? I do not see at the present moment how we could make an order for the construction of half a dam in these waters.

Mr. ROCKWOOD. I am going to try to cover this entire subject and to meet these questions which the commissioners are asking. To show why I am in earnest about it I want to state the situation from the historical standpoint very briefly. In January, 1905, a contract was made between Mr. Backus and the Ontario government, and the contract provided that it should be assigned to a company to be organized, and which was organized, as the Ontario & Minnesota Power Co., and approved as such by order-in-council of the Ontario government. That contract, as I say, was made with the Ontario government, approved by order-in-council, and ratified by an act of the legislature, authorizing the construction of a dam at Fort Frances, and also authorizing the construction and requiring the construction of a dam at Kettle Falls, to be used as a storage dam, for the purpose of reinforcing the flow of Rainy River and developing all the power of which that stream was capable. Now the company made these plans for the development of the power at Fort Frances and International Falls. Of course that was for half a dam, because the jurisdiction of the Ontario government went only to the middle of the stream, but we controlled the other side, so that we were able to put the two half dams together and make a whole. The plans for that dam and for the wheelhouses and the amount of power to be developed were all made with reference to carrying out that contract with the Ontario government and constructing a storage dam at Kettle Falls to increase the low-water flow. That contract had the approval also of the Dominion Parliament, but both the act of Ontario and the act of the



Dominion Parliament provided that the construction should not be proceeded with until the plans were submitted to and approved by the department of public works, respectively, of Ontario and the Dominion.

Mr. WATSON. Approved by the Governor in Council.

Mr. ROCKWOOD. Well, perhaps by the Governor in Council.

Mr. OSLER. Which acts on the recommendation of the public works department.

Mr. ROCKWOOD. I am possibly speaking with technical inaccuracy, but they were, at all events, to be approved by both Governments. The dam was built, the wheel pits have been made, the wheels have been put in, the investment has been made with reference to the use of power that can be developed, not only at Rainy Lake but by the reinforcement through this storage dam. Later a new contract was entered into between the company and the Province of Ontario, by which the company agreed to build a paper mill on the Fort Frances side. The town of Fort Frances, with the approval of the Government, required the construction of an additional paper mill on the Fort Frances side, and the construction of that paper mill is going on on the face of that contract. You saw the paper mill on the Fort Frances side when you were there. As part of that scheme we submitted our plans for this dam to the Secretary of War and got his approval.

Mr. STREETER. Do you mean the dam at Kettle Falls?

Mr. ROCKWOOD. Yes; the dam at Kettle Falls.

Mr. CASGRAIN. What is the statute?

Mr. OSLER. Chapter 139, Ontario, 1905, and chapter 132, Dominion Statutes, 1905.

Mr. CASGRAIN. Is that the statute which authorized the construction of the dam at Kettle Falls?

Mr. ROCKWOOD. Yes.

Mr. CASGRAIN. I do not see that Kettle Falls is mentioned. It says, "Provided that no work authorized by this section shall be commenced until the plans thereof have first been submitted to and approved of by the Governor in Council."

Mr. OSLER. I think you will find in subsequent sections that there is power given to develop on the watershed as well.

Mr. TURNER. It gives power to construct, develop, operate, and maintain works, canals, raceways, dams, etc., and buildings in connection with such power, including any increase of said power on Rainy River, by storage or otherwise, which the company now has or may hereafter have power to construct.

Mr. ROCKWOOD. That is the Dominion act, but it refers in substance to the Ontario incorporation, and that incorporation refers to this particular contract, and it all goes back to the obligation we assumed to put in this dam. We have made all our plans and investments with reference to it.

Mr. CASGRAIN. Are you quoting the investment as a reason why we should approve of the plans?

Mr. ROCKWOOD. Certainly I am.

Mr. CASGRAIN. Why do that before you got this approval?

Mr. ROCKWOOD. We have found, Mr. Chairman, that if we waited for everything to be done we would be in hot water with the government of Ontario, the town of Fort Frances, and all the rest, and

because we were supposed to be doing nothing we have had the community of Fort Frances on our backs. We actually had threats of war, and we had to protect our property by force.

Mr. OSLER. And by injunction.

Mr. ROCKWOOD. By injunction and by actual force to prevent raids on our property by the people of Fort Frances, who thought we were not investing money fast enough on their side of the line. They actually used violence. Now, Mr. Chairman, we made these two applications almost simultaneously, and we got the approval of our Government promptly. On this side approval has been delayed. I do not undertake to explain the causes of the delay, much less do I want to comment on them. The time may have been necessarily consumed, but I can not say as to that. At all events, we have agreed with the people of Fort Frances to erect this paper mill and to operate it, and we are asking to be allowed to do that now. The contract has been made for the mill, the machinery has been purchased, and the construction is going ahead. In the winter of 1910-11, and again in the winter of 1911-12, there was not water enough to operate one mill on the Minnesota side.

Mr. CASGRAIN. Is that the mill at International Falls?

Mr. ROCKWOOD. Yes. In the winter of 1910-11, the company spent a great many thousand dollars—I think more than \$50,000—buying pulp to operate that mill, because of the low stage of water in the Rainy River. The water is better this year, but it is still low, and if we can not put in this reenforcing dam at Kettle Falls one or both of these mills will be partly or wholly idle in the winter of 1913-14, a year hence, when the Fort Frances mill will be ready to operate. It means not only a great loss to this company, but it means a loss to the two communities. They are depending on that mill, not only for employment for the population which is there now, but for the new population which they expect to come in. The people in these two communities are depending on these mills.

Mr. CASGRAIN. Just suppose that the Canadian Government should refuse to approve, where would our order be?

Mr. ROCKWOOD. We must wait until we get the approval of the Canadian Government, but if we get the approval of these plans by the commission we will know what the attitude of this commission is, and then, before we get the approval of the Dominion Government, we might perhaps take a little chance and go ahead and put the material on the ground.

Mr. TAWNEY. Mr. Rockwood, I would like to ask you if you have considered this question under Article III of the treaty, which reads:

#### ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as heretofore provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry

on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

Article IV reads:

The high contracting parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Now, what is meant by "special agreement" as referred to in Article XIII:

In all cases where special agreements between the high contracting parties herein are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

Now, suppose the Congress of the United States has authorized the construction of this dam on the American side, and the legislative department of the Dominion Government has likewise authorized the construction of the dam on the Canadian side—having received all this, has this commission anything whatever to say about the approval of these plans?

Mr. CASGRAIN. Of course the legislation on our side is subordinate to that very important condition in section 1, which says that no work shall be commenced under that section until the plans thereof have been first submitted to and approved by order in council.

Mr. TURNER. And the legislation will be complete on the Canadian side when the company has that approval.

Mr. TAWNEY. So far as I am concerned, it appears to me that if we have the power to approve we would also have the power to disapprove, but how could this commission disapprove of what the Governments of both nations have approved?

Mr. ROCKWOOD. That question was raised at the April meeting of this board in Washington, and while I have not thought it necessary to urge that view, it has seemed to me that it is the correct view; that this commission acts as an arbiter in case of difference between the Governments, and that this commission would not disapprove what both Governments have approved.

Mr. TAWNEY. And when you get the approval of the Dominion Government, then you will have all the legislation that is necessary, as well as the approval of the administrative department of the Governments of both countries for the construction of this dam.

Mr. ROCKWOOD. That is true, but it is also true that nobody knows yet to a certainty what this treaty means in that respect; there has been no authoritative construction of the treaty, and our Secretary of War, whether correctly or incorrectly, took the view that he would

send the matter to this commission, and when he gave his approval he gave it with reference to the action of this commission.

Mr. POWELL. He gave it, subject to the approval of this commission.

Mr. ROCKWOOD. Now, the Secretary of War may have been wrong in assuming that his action must have the approval of this commission. The act of Congress did not require the approval of this commission, but only the approval of the Secretary of War. If he was wrong in sending it to the commission for action, then that condition in his consent was not binding.

Mr. TAWNEY. It is for the commission to say, in the first place, whether this is a case which comes within the jurisdiction of the commission under this treaty.

Mr. ROCKWOOD. Yes. Now, Mr. Chairman, we want to keep peace with this commission, we want to keep the peace with the Secretary of War, we want to keep the peace with the department of public works in Canada and with the Governor in Council.

Mr. TAWNEY. And you want the people of Fort Frances to keep peace with you?

Mr. ROCKWOOD. And I am afraid the people of Fort Frances will not keep peace with us unless that mill is running.

Mr. CASGRAIN. If what Mr. Tawney says is correct, then we have nothing to do with the matter at all; we can not entertain the application or act upon it in any way.

Mr. ROCKWOOD. This application comes here, after publication in accordance with the rules of the commission. The Government has had its opportunity to object and it is not objecting.

Mr. CASGRAIN. We can not assume that in face of what Mr. Osler said this morning. It looks as if the Government of Canada were going to object.

Mr. TURNER. If the Government of Canada had been brought in here to consider the obstruction of the waters simply upon the American side alone and did not object, that might be one phase of it, but here you are asking for the authorization of a dam clear across the river on both sides, and how can we give you that authorization until Canada has acted? Unless Canada has acted, I am very strongly of the opinion that we can not authorize you. If you are satisfied Canada is going to act affirmatively, you would be perfectly safe, I should think, in going up there and getting your materials in.

Mr. CASGRAIN. We are not throwing obstacles in your way, Mr. Rockwood; we would like to help you. We understand the importance of the matters you have put before us, but, on the other hand, we would not like to do a thing which we had not the right to do.

Mr. ROCKWOOD. While I think of it, I want to say a word about the 60 days' notice. I take it that applies only in case the issue is joined, and here no issue is joined.

Mr. POWELL. I do not think we could give judgment by default in such a case as this; it is not like an interlocutory judgment for nonappearance.

Mr. ROCKWOOD. Might I ask whether the commission is likely to hold any sitting in the near future?

Mr. CASGRAIN. If it is necessary and useful, we certainly shall. We will have a meeting within six weeks anyway.

Mr. ROCKWOOD. The frost may come in six weeks or even in two weeks.

Mr. MAGRATH. Could you not take the material in on the ice?

Mr. ROCKWOOD. It is not possible; an ice road is the worst road in the world for crossing drifting snow. This is a dam across the main channel, requiring 500,000 feet of heavy timber. It is not possible to get that in except by water.

Mr. CASGRAIN. You have not convinced me that our giving an order now would help you in any way.

Mr. ROCKWOOD. It would not, except in this way; it would not be sufficient of itself, and we would have to go on and get something else, but if we had that order we would know at least that we could feel sure of getting the approval of this commission.

Mr. STREETER. Suppose you felt reasonably sure that if you got the approval of the Canadian authorities no further approval on the part of this commission would be necessary, would not your task be less difficult?

Mr. ROCKWOOD. It would, if we could have that assurance.

Mr. WATSON. If it were thought that the occasion called for any expression of approval by your commission, we would like an opportunity of being heard on the merits.

Mr. STREETER. You should not draw any such inference from anything I said, because it would not be justified.

Mr. TURNER. The only expression of opinion would be that in case the two Governments concurred in authorizing this dam, the possibility is that this commission would have nothing to do with it.

Mr. TAWNEY. Suppose, Mr. Rockwood, this commission on the application should dispose of that application by saying that it had no jurisdiction, all you would have to do would be to get your authority from the Canadian Government to build the dam.

Mr. ROCKWOOD. If the commission expresses the view that when we have the approval of both Governments we can go ahead, that ends the matter here.

Mr. POWELL. I, for one, would not express that opinion.

Mr. STREETER. I should like to hear argument on the question as to our jurisdiction in that event.

Mr. POWELL. You see there are two phases of the corporation; first, there is the phase which does not empower to do anything, but creates the corporation a person to do a certain thing provided it gets the power to do it, and then it says it may do those things which the company now has or may hereafter have the power to construct. There is the empowering clause. In other words, it incorporates the company a person to do business without being ultra vires.

Mr. OSLER. May I suggest that the act of the Dominion Parliament was not an incorporating act; it was an empowering act. The company was incorporated by letters patent under the general act of the Province of Ontario.

Mr. CASGRAIN. It says that in the preamble.

Mr. OSLER. Having that corporate existence with power to do the various things it required to do in the development of the river, it was met with the objection that it might construct works in an in-

ternational stream without the statutory authority of the Dominion Parliament. Therefore, the company already had a corporate existence, with a corporate power to do these works, but, as was thought, lacking the exceptional power to do them, they came to the Parliament of Canada for that very purpose, and I take it that it was certainly intended to give the company that power.

Mr. POWELL. Is clause 1 of the Dominion act verbatim with the clause of the Ontario act?

Mr. OSLER. The Ontario act came about in another way; the Ontario act was passed after the Dominion act. First, the company was incorporated by letters patent under the general powers, including the power to construct these works. It is then that it made the contract that has been referred to with the Ontario government, by which it acquired the right to construct the works upon the land in question which was vested in the Ontario government. It, therefore, acquired title from the Ontario government, and then having acquired title and having corporate power to do the work by virtue of these letters patent, it required the permission of the Dominion authorities, and it came to the Dominion Government for the purpose of getting this act, which was passed. Then, that act having been passed, was passed in terms slightly different from those contained in the contract with the Ontario government. The Dominion Parliament was not content to give it power to carry out these works on all the terms set out in the contract with the Ontario government. Objection had been made by other interests. The Dominion act was therefore, at the time it was passed, somewhat inconsistent with the contact with the Ontario government. To remedy that state of affairs, the provincial government of Ontario, in the following year, 1906, introduced a bill and passed an act which is, in its essential clauses, verbatim with the Dominion act. It ratified the contract, but there was a discussion on the question of the export of power and the two acts are absolutely verbatim except that the board of railway commissioners was authorized with authority in the Dominion act to regulate the export of power, and in Ontario the lieutenant governor in council was vested with that authority. The Ontario act slightly altered the original contract. Mr. Watson said we had no authority to construct the works at Fort Frances. I should say that in pursuance of the Dominion act of 1905 we submitted plans which were approved by order in council of the Dominion Government of the 19th September, 1905, and in the course of the execution of the work there were some changes of a very minor character, which were not previously approved. For instance, the work is constructed across the old canal way which had not been used. We are, under the terms of the approval, to permit that to be used for navigation if the Government so desire at a later date, and in that case our work will have to be altered accordingly.

Mr. CASGRAIN. They would have to be blown up, I should think.

Mr. OSLER. We had authority to block the head of that canal by one gate, and that gate would have to come out if it is to be used for navigation. We found it more feasible to put in six gates across there, and these six gates would have to come out. That is substantially the principal change.

Mr. POWELL. Would it be too much trouble for you to make out a little tabulated statement of what you have stated now? I would like to have it.

Mr. OSLER. After the meeting in Fort Frances Mr. Rockwood wrote to me that one of the commissioners had asked him to furnish him with the contracts and also certified copies of everything that had been done on the Ontario side.

Mr. CASGRAIN. And on the part of the Dominion, too.

Mr. OSLER. Everything in connection with the matter. Immediately on receipt of Mr. Rockwood's letter I took steps to do that, but we have to get copies of the plans and agreements certified, and I find that some of the legislation is out of print. However, that work is progressing, and one of my clerks has accumulated a very considerable amount of material, but I do not want to hand it in until it is complete.

Mr. ROCKWOOD. I wrote to Mr. Osler the moment I was directed to do so. There was no lack of diligence.

Mr. WATSON. With your permission, I have just one word to add. I repeat that this morning I am not in a position to present proper argument on behalf of my clients before your commission, for the reason that has been mentioned, that we have not had the notice we expected. Possibly that may be due to a misapprehension, but at all events the matter so far as it has been heard is necessarily heard in an ex parte way. But I would present to you the view that until plans have been approved of by the Governor in Council according to the provisions of the statute your commission is not properly seized of the question, and the jurisdiction of the commission does not arise until then, and in that respect the applicant has no proper status before you. It goes without saying, from the experience of all of us, that judicial bodies—and this is in the highest sense a judicial body—do not act if there is a chance of their order being nugatory. If an order were made in this case now it might be absolutely nugatory, for the reason that the Government, which has so far withheld its approval of the plans, might maintain that position. Our view is that the Government will maintain that position, as we have made representations to the minister of public works and the minister of justice and the members of the Government in that view. So far our representations have prevailed and the approval has been withheld. After the approval is given, if it is given at all, will be the time for this commission to take action.

Mr. OSLER. Are you speaking of Kettle Falls; have you been opposing our application with respect to Kettle Falls?

Mr. WATSON. Not Kettle Falls, because we had no notice of that; but I repeat that Kettle Falls is comparatively a small part of a larger proposition and it necessarily depends upon that larger proposition, but as soon as the matter has a status before this commission we will be prepared to act. If the ruling of the commission is that the applicant has a status now or at any other time, then we will be prepared as early as possible to present in writing to your commission the answer from our standpoint. We will endeavor to use all necessary diligence in that respect, and we will follow it up, if you give us permission, by appearing before you to endeavor to sustain it.

Mr. ROCKWOOD. Perhaps I am not entitled to understand Mr. Watson, but so far I am wholly unable to understand how the dam at International Falls, and a departure in the details, if there was a departure from the original plans—I am unable to understand how that has the slightest relation in any physical or legal sense to the construction of a dam at Kettle Falls, 45 miles distant from it, and relating to waters of different levels. I can not see any connection between the two, and I confess that I am unable to understand why Mr. Watson suggests to this commission—

Mr. WATSON. I hope to make it clear for you.

Mr. ROCKWOOD. I wish you could. I do not understand why it is suggested to this commission that six gates, instead of one, crossing that old canal should be any reason for not acting on this application with respect to Kettle Falls. I said yesterday, and I still think, that there is some confusion in the minds of Mr. Watson's clients. I have never heard a syllable of objection from any source to the dam at Kettle Falls, and I have listened for it, and I do not hear it now. It is suggested that perhaps there will be an objection, but as yet I have not heard a single objection pointed out.

Mr. CASGRAIN. Speaking for myself, there is this great objection, that your plans have been before the Dominion Government for a considerable while, and for some reason or other there is no approval. I think we must take notice of that.

Mr. ROCKWOOD. I did not mean to say that that was not a reason why this commission should delay action, but I repeat again that I have not heard from the department of public works nor from any other source any suggestion that the dam at Kettle Falls is not to be built. I heard the details discussed and I heard it suggested that modification in the details might be necessary, but I have not heard it suggested that it was not to the interests of not only ourselves but the entire public that this dam should be built. That was the thought at all our meetings, as I understood it; that the development of the storage capacity of the upper waters of Rainy River was going to tend toward the promotion of every interest along that waterway, including the interests that Mr. Watson represents.

Mr. TAWNEY. Was there any suggestion to change the location of the dam?

Mr. ROCKWOOD. Not so far as I remember.

Mr. POWELL. You are dominus litis; you have the conduct of the litigation, so to speak; if you had a chancery case that had to be set down the duty would be on you to move the court to set it down. The rule says that the final hearings and applications shall be at such time and place to be fixed by the chairman of the two sections. The onus was on you to make application to the two chairmen to set the case down, and you have not done it.

Mr. CASGRAIN. I do not know about that; I think Mr. Rockwood came before us in April and suggested that he wanted this case set down at the earliest possible moment.

Mr. ROCKWOOD. I did that at the meeting in Washington, and I understood all the time that it would be heard at this meeting.

Mr. POWELL. I was not aware that there was any order setting this case down for here. Is there any such order?

Mr. ROCKWOOD. We were always ready to meet any issue that might be raised, and no such issue was raised.



Mr. MAGRATH. Looking at this from what I regard as the practical viewpoint, Mr. Rockwood represents very heavy financial interests that are much concerned with this application going through. I realize that we should endeavor to deal with this question as quickly as possible, in view of the great financial interests that are involved, but at the same time I realize that we have before us, on reference from the Governments of both nations, certain questions in connection with the Lake of the Woods and tributary waters which I hope will, when disposed of, do much to give Mr. Rockwood and his interests what they have in view. I hope also our decision on this matter will do much to protect the interests that Mr. Watson is representing here. I do not think it would be wise for us to dispose of those applications of Mr. Rockwood at the present moment without having heard from our engineers who are now on the grounds investigating for us and preparing data bearing on these questions. For instance, I am not prepared to say at the present time that the power interests would be best served by a dam at Kettle Falls. I do not know anything about it. We are carrying on investigations at the present time in an endeavor to get the very best information along these lines, and I think we would be justified in calling upon our engineers to push forward with these features, so that we may be in a position to deal intelligently with these questions and get rid of them just as quickly as we can. I fully sympathize with Mr. Rockwood's position, but we have a very broad question before us, involving these very questions which he has raised, and I do not think it would be wise for us to start in to deal with only two links of a very long chain without the fullest evidence necessary to deal with the whole matter.

Mr. TURNER. I do not think we should keep these very important interests held up in the air on the supposed action of this commission if we have not jurisdiction. I am thoroughly satisfied in my own mind that we have not a particle of jurisdiction to consider this application at all, even if the Canadian Government assents. I think it might conduce to what these gentlemen want, if that is the view of the commission, to have that view expressed and proper action taken.

Mr. CASGRAIN. We will have to take some time to consider that phase of it.

Mr. TURNER. If anyone wishes to be heard on that point, I suppose they have a right to be heard.

Mr. POWELL. That is, as to the question of jurisdiction.

Mr. TURNER. This is an application to approve of a dam clear across the river. Under Article III of the treaty we have no jurisdiction, except to consider obstructions on one side of the boundary waters, which affect the level or the flow on the other side. Then, there is the further reason suggested by Mr. Tawney, that if they finally get the legislative action and the approval of the departments of the two Governments that is perfect and complete in itself and it does not require any confirmation from us. True, it is not contemplated that there should be any obligation on our part to give or to withhold our approval.

Mr. WATSON. In deference to what the commission may properly expect from me, I would not feel justified toward myself in attempting to argue these questions which I conceive are of very great importance, and it would be necessary for me to have some time to con-

sider the matter. I have not had an opportunity of doing more than practically giving the matter a bare perusal in a hurried way under the terms of the treaty, and I would not assume for one moment to stand before you and upon that mere perusal of the terms of the treaty present to you matters so involved as these are.

Mr. TURNER. If the commission should reach the conclusion that it has no jurisdiction, probably it would be in accordance with what you desire as opposing the application.

Mr. WATSON. Quite so, but so far as any argument on that point is concerned I would like to have time to consider it.

Mr. TAWNEY. Do I understand you to raise the question of jurisdiction?

Mr. WATSON. I do.

Mr. STREETER. Do you claim we have no jurisdiction?

Mr. WATSON. I say you have no jurisdiction at the present time to deal with the matter. Assuming that the Government of Canada does give its approval, my offhand reading of the matter would lead me to the view that then this commission still has the power to deal with the matter.

Mr. STREETER. Do you think that if the United States Government and the Canadian Government in this case, authorizes the construction of the dam on both sides of the line across these waters, and approve of the plans, that this commission has power to disapprove of these plans?

Mr. WATSON. I am inclined to the view that if it is necessary at all to apply to this commission that the commission must consider the question from all standpoints.

Mr. STREETER. That does not answer the question I put. In case the Government of both countries authorized the construction of this dam and approve of the plans, it is necessary for anybody to apply to this commission for approval? What is the occasion for coming to this commission if both Governments agree in approving?

Mr. WATSON. I should not consider myself to be in a position to express an opinion on that, because I have not had an opportunity to consider it.

Mr. STREETER. You would not feel like giving an opinion offhand?

Mr. WATSON. No.

Mr. STREETER. I would like to be satisfied on that point.

Mr. WATSON. The matter is too important to present an argument on it without consideration. I would like to be heard later on the subject.

Mr. POWELL. The act speaks of: "By storage or other methods waters tributary to Rainy Lake, which the company now has or may hereafter acquire." In view of the wide rules attached to construction, as to territorial limitation on the application of a statute, would you say that Kettle Falls would be included at all in these words?

Mr. WATSON. Offhand, I should think not.

Mr. POWELL. That is the idea that is floating in my own mind.

Mr. TURNER. Suppose that be true and that there is no statute on this side authorizing a dam, have we any jurisdiction to consider the application for putting a dam clear across the river?

Mr. WATSON. I should think not.

Mr. TURNER. If there is authority which may be made perfect and complete by Executive action, that is one feature of it; if there is not that authority, then we have an application before us to authorize a dam across the river from one side to the other, which is wholly beyond our jurisdiction.

Mr. POWELL. Supposing two riparian owners or one riparian owner on both sides would have the right under the common law of both countries to erect a dam, which we will suppose did not interfere with navigation, the question of interference with navigation would be up to our Government and to your War Department.

Mr. TURNER. I am speaking of the treaty which under Article III only authorizes us to consider applications for the use, obstruction, and diversion of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line. That is not the case of a dam clear across the river; that is obstruction on one side of the river which affects the level on the other side. That is the only character of case which may be brought before us under Article III. We have to authorize a dam across the whole river upon the application of a party on either side. We have the right to authorize an obstruction upon the American side, upon the application of an American citizen or company, if it affects the natural level or flow of the river on either side. We have the right conversely to consider an application of that kind on the part of a Canadian, but an American can not come in and ask us to authorize a dam clear across the river to the Canadian side, nor could a Canadian do the same on his side of the river.

Mr. ROCKWOOD. I want to suggest that every act of Congress that has so far been passed, of which I have any knowledge, for dams across boundary waters, authorizes in terms a dam across the river; it does not say a dam to the international boundary line, but a dam across the river. The Canadian act and the Canadian contract use the same terms. Now, necessarily each one of these acts and every such contract is of necessity limited in its operation and in the legal sense limited in its terms to the territorial jurisdiction. Now, our application was addressed to the Secretary of War and the authority of the Secretary of War stops at the boundary, but the picture showed the dam extending across, and, of course, his authorization does not follow to the margin of that picture. It stops at the boundary, and, I think, this application in that phase of it comes before you in exactly the same interpretation that the Secretary of War would have to put upon it, namely, it is an application addressed to the Secretary of War, coming up to you through him, for a dam to the boundary over which he had jurisdiction.

Mr. TURNER. That is because Congress purports to extend the authority clear across because it is in the nature of reciprocal legislation between the two countries. But we must go back for our authority to the terms of this treaty between the two Governments to see what we have the right to consider. We have no right to consider the reciprocal legislation of the two countries with reference to a complete dam; we have the right only to consider uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties of the waters on either side of the line affecting the natural flow or level of boundary waters on the other

side of the line. They are not here with an application for half a dam, and if they were the question would arise whether this tribunal would consent to the building of half a dam in any water; they are here with an application to approve of a dam clear across the river.

Mr. ROCKWOOD. I have not understood that the Rainy River Improvement Co. is here for anything else than the construction of half a dam.

Mr. TURNER. Here is your application; you ask for approval of plans to construct a dam in accordance with the act of Congress.

Mr. ROCKWOOD. Yes; but the act of Congress stops at the boundary and the drawing of a picture clear across does not affect the power of Congress any more than it involves the boundary of the United States. While it is true that this action by the two legislative bodies is reciprocal, in the sense that each one has acted, it is not reciprocal in the sense that one legislation refers to the other. In every legal sense the action of Congress is taken wholly in ignorance of the act of the Ontario Legislature and the Dominion Parliament, and in every legal sense Canada has acted without any reference to the action of Congress, and the two in every legal sense are independent. I have always understood it so; I understand it so with reference to the dam at International Falls, and there has never been any reciprocal action in any one of the acts with reference to the legislation on the other side.

Mr. STREETER. This commission may have jurisdiction, but let me ask you this: Suppose your company gets full authority and permission on the Canadian side, as you have already got it on the United States side, so that your authority was full and complete other than the approval of this commission, and then you came to this commission and we disregarded the approval of both Governments and disapproved of your application and said you could not build the dam, what would your position be then with reference to our jurisdiction to make such an order? I do not ask you to answer that now; you can consider it during the recess for luncheon.

After the recess for luncheon the discussion was continued.

Mr. CASGRAIN. Unless it is of great importance to Mr. Osler to get away to-night, and as Mr. Watson is technically in default, we might say, between now and to-morrow morning he might look over the treaty and present any answer he may wish.

Mr. TURNER. In view of Mr. Watson's statement it may be well to give him until to-morrow morning to answer.

Mr. OSLER. I have an engagement in Montreal which has been pending before Chief Justice Davidson for some time, but I think, so far as we are concerned, I can safely leave the matter in the hands of Mr. Rockwood.

Mr. POWELL. Do I understand this is a final consideration of the whole question?

Mr. CASGRAIN. It is a consideration of the question whether or not we have jurisdiction.

Mr. TURNER. It would be final if we determine we have no jurisdiction.

Mr. OSLER. If you should come to that conclusion, that would be perfectly satisfactory to my people. Our application was made to this commission as a matter of greater caution, and, as I understand

it, upon the suggestion of the War Department that it was necessary. My own view of the situation is that it is not necessary.

Mr. STREETER. Some of us have been recent enough in the practice of law to enable us to assume that if we come to that conclusion it would be satisfactory to you; we are not unmindful of the way counsel look at these things.

Mr. WATSON. Before the adjournment there were two points upon which I think we were asked as counsel to express what might be called a running comment. Although I do not wish to be considered as expressing a definite or concluded opinion, yet I might express a running opinion, as it strikes me; my view is, as having regard to the legislation—

Mr. CASGRAIN. In view of what you said that you were not prepared to present any argument to the commission, in view also of the fact that technically, probably you are in default, and also of the vast interests that are at stake here, we would like to hear you to-morrow morning on the question whether or not, under the circumstances of this case, the commission has jurisdiction. Would you be prepared to present to the commission to-morrow morning an argument saying we have jurisdiction under the facts disclosed before us?

Mr. WATSON. I would very much like to be excused from presenting an opinion to-morrow morning because the time is a little short. The circumstances and conditions call for more consideration than I could give it before to-morrow morning. I think, with regard to Kettle Falls, that it is not within the four corners of the Dominion act, but it is a matter that requires very careful consideration, and if it is not within the four corners of the Dominion act, then it is not in a position to be presented to you at all, and you have no jurisdiction upon that subject. I refer to the Dominion act, chapter 139 of 1905. In the absence of legislation upon the point the Dominion Government has no jurisdiction to give any approval by order in council; I submit that an order in council may be issued only in pursuance of legislation by Parliament, and that the Dominion Government has no jurisdiction to issue an order in council in the absence of a legislative enactment. I conceive that that is a condition precedent to the jurisdiction of this commission, so that offhand—and it is entirely offhand, and I would not undertake to argue the case offhand—I express the opinion that you have no jurisdiction, and that without legislation the Dominion Government has no jurisdiction to pass an order in council. As I say, that is my view offhand, after a hurried reading of the statute, together with the terms of the treaty. And if this commission has jurisdiction in the premises, then, I think, there should first be the approval of both Governments, and I also think that the spirit of the original constitution of this commission is that this commission should also give its approval. These are the two points I have in mind.

Mr. TAWNEY. In a case where the two Governments have by legislation and by administrative action approved of a single project, that extends from one territory to the other, if this commission has the power to approve then it necessarily has the power to disapprove. Is it conceivable that this commission has the power to disapprove of a mutual act of both Governments?

Mr. WATSON. Having regard to the terms of the treaty and the constitution of the commission I think it was not within contemplation that the approval of the two Governments would take effect and be operative until it was approved by this commission; that is my view offhand.

Mr. TURNER. If Mr. Watson wants to argue it this afternoon, I would be willing to hear him, but if he does not, I would be in favor of giving him until to-morrow morning to present such views as he may wish to the commission.

Mr. WATSON. I would like very much if you could see your way to letting the matter stand to a subsequent meeting when these questions may be better considered. Speaking for myself, I think if that were done I would be in a position to give more assistance to you.

Mr. CASGRAIN. This matter came up before the commission for the first time on the 2d day of April last. This application was then presented and it was duly advertised in the newspapers. From what I saw during our visit to the Rainy River district, I can say that it has been well known for a long while that an application was pending before the commission for the construction of a dam at Kettle Falls; everyone seemed to know all about it up there.

Mr. OSLER. It has been advertised half a dozen times in the local papers at Fort Frances.

Mr. CASGRAIN. Your clients, Mr. Watson, must surely have heard of it before; you must take into consideration the vast interests that are at stake here.

Mr. WATSON. Then I am constrained to ask, as a matter of indulgence, if not of right, because it is a matter of very great importance to represent chiefly if not the whole business interests, apart from the Minnesota & Ontario Power Co., of that whole district; everything is centered in their business and in their interests; they are the life and soul of the whole district for hundreds of miles around in connection with the lumbering interests, so that from their standpoint the matter is of equal importance to them as it is to this company.

Mr. TURNER. Coming here to oppose this application, what interest have you in maintaining our jurisdiction? I understand you wish to be heard in support of our jurisdiction.

Mr. WATSON. No; I have not said that, I think; at least I had not intended to say it.

Mr. TURNER. Then, I must have misunderstood you. I thought the chairman asked you if you desired to be heard in support of the jurisdiction of the commission.

Mr. WATSON. It is my mistake. I thought I was asked if I desired to be heard on the question of jurisdiction. Offhand, with regard to Kettle Falls, I do not think this commission has jurisdiction.

Mr. STREETER. Suppose the Canadian Government should approve of this, do you think we would have jurisdiction?

Mr. WATSON. In my view the Government has no power by order in council to approve or disapprove.

Mr. CASGRAIN. Do you not think that the commission is sufficiently informed on the point, and probably we may be able to give a decision to-morrow on this question.

Mr. TAWNEY. We may not be able to render a decision but we may be prepared to take it under consideration.

Mr. WATSON. Assuming, for the purposes of argument, that it might be determined that you had jurisdiction, I would ask to be heard on the exercise of that jurisdiction and I am not prepared to proceed with that.

Mr. TAWNEY. Of course that is understood.

Mr. WATSON. I am quite sure that my clients, the different lumber companies, have material interests that are opposed to the proposition.

Mr. CASGRAIN. If we maintain that we have jurisdiction, then, of course, it would be open to you to proceed with any objection you may wish.

Mr. WATSON. Yes; and of course I would like a further opportunity to present my views on the question.

Mr. CASGRAIN. You may make your application when we decide whether or not we have jurisdiction.

Mr. STREETER. Do you want to be heard in support of the proposition that the commission has jurisdiction? Do you, Mr. Rockwood, want to be heard in support of the proposition that the commission has jurisdiction?

Mr. ROCKWOOD. No, Mr. Chairman; I can state very briefly what I think about that. It seems to me that the preamble and the treaty make it perfectly plain, or at least very plain, for I will not say there is not room for an argument the other way, but it seems to me plain from the treaty that this commission is formed in order to settle disputes.

Mr. CASGRAIN. So far as I am concerned, I would like to hear some argument in favor of sustaining our jurisdiction.

Mr. ROCKWOOD. Mr. Osler stated our position, if I did not, this morning. We are here not because we thought we had to come here, but as a matter of precaution. We did not try to settle that question for ourselves. We did not want to get into difficulties and we submitted this application. If you have jurisdiction, then we hope for a favorable result on our application.

Mr. TAWNEY. You have proceeded on the theory that the jurisdiction has not been properly interpreted?

Mr. ROCKWOOD. Yes. We were not able to determine in our own minds whether it was safe for us to stay away and so we came. If you think you have jurisdiction, then we are here to support the application; if you think you have not jurisdiction, then we are quite content.

Mr. WATSON. Would it be convenient to you, personally, Mr. Chairman, in the event of this being determined that there is jurisdiction, and at the same time to consider the application for postponement of the hearing and to fix a date to-morrow morning, in my absence?

Mr. CASGRAIN. You will not stay here?

Mr. WATSON. I will stay if it is necessary, but I had an engagement for to-morrow.

Mr. TURNER. Our rules provide that, upon showing, the time may be enlarged for any proceeding.

Mr. WATSON. I can state without any hesitation that upon the merits of the application it is absolutely necessary that I should have further instructions in order to answer the application on its merits, if it is to be heard.

Mr. CASGRAIN. I think, Mr. Watson, I can say that if we come to the conclusion that we have jurisdiction we will give you ample opportunity.

Mr. WATSON. Thank you; then it will not be necessary for me to appear to-morrow.

(The commission then went into private conference.)

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WASHINGTON, D. C., *November 18, 1912.*

The International Joint Commission met at Washington, D. C., on Monday, November the 18th, 1912.

Present: James A. Tawney (presiding); T. Chase Casgrain, K. C.; George Turner; H. A. Powell, K. C.; Mr. Frank S. Streeter; Mr. C. A. Magrath. Mr. L. White Busbey, Mr. L. J. Burpee, secretaries.

KETTLE FALLS DAM—JURISDICTION OF THE COMMISSION.

The International Joint Commission proceeded to the hearing of argument on the jurisdiction of the commission with reference to the application of the Rainy River Improvement Co. for approval of plans for a dam at Kettle Falls, resumed from the meeting of the commission held at Ottawa, Canada, in October of the present year.

Mr. George H. Watson, Toronto, and Mr. R. J. Powell, counsellor at law, Minneapolis, appeared for the Rainy River Lumber Co., the Shelvin-Clarke Co., the Shelvin Mathieu Co., the Quetico Lumber Co., the Martin Improvement Co.

Mr. Watson stated that he was also instructed to represent the Rat Portage Lumber Co. and other companies in which Messrs. Mackenzie & Mann are interested, representing practically all the lumber companies in that district.

Mr. JOHN THOMPSON, K. C., of Ottawa, appeared for the Dominion of Canada.

Mr. FRANK H. KEEFER, K. C., of Port Arthur, Ontario, appeared for the Province of Ontario.

Mr. TAWNEY (chairman). As you gentlemen were informed by the order of the commission at Ottawa, the further consideration of the question of jurisdiction in this matter is to be taken up and considered at this meeting. We feel, due to the importance of the question, that all the members of the commission should be present during the argument and Mr. Powell, of New Brunswick, has not yet arrived. He will be here at 2 o'clock, and unless it would seriously inconvenience you we would prefer to have the hearing deferred until 2 o'clock this afternoon.

Mr. WATSON. That is quite agreeable to us.

Mr. THOMPSON. I understand that Mr. Keefer is to ask for an adjournment. If it is the intention of the commission to grant such an adjournment, possibly it might be disposed of now. Personally, I am prepared to go on, but I understand that Mr. Keefer is not.

Mr. KEEFER. I have taken the matter up with the honorable the minister of Crown lands for the Province of Ontario, who acts for Ontario in this matter. The question is as to the jurisdiction of this commission over an international dam. The Ontario government



realizes the importance of the question, and the only instructions I can get with regard to the matter so far is that the Ontario government would like the commission to give them a longer time to consider both the question of policy and the effect of the section of the treaty involved in the question. I have come here under these instructions to ask if it would be possible to allow the matter to stand.

Mr. CASTRAIN. For how long?

Mr. KEEFER. Just as long as you can reasonably allow the Ontario government to come to a decision. The government has not yet come to a decision on the point as to what their policy may be.

Mr. WATSON. Sir James Whitney, the premier of Ontario, is in England and will be absent for a month.

Mr. KEEFER. The premier has gone to the old country and he is accompanied by the minister of education.

Mr. TAWNEY. I think perhaps, Mr. Keefer, the proper way to get at it would be to bring the matter up again at 2 o'clock, and then if you desire to make a formal application for a continuance of the consideration of the question the commission can consider the application, and if it can be granted we will adjourn the hearing until such time as you desire.

(The commission then adjourned until 2 o'clock.)

On resuming at 2 o'clock.

Mr. TAWNEY. The commission has before it the application of the Rainy River Improvement Co. and the Ontario & Minnesota Power Co. for approval of a dam to be constructed near the outlet of Lake Namakan, at Kettle Falls. At Ottawa the commission considered the question of whether or not this dam, abutting, as it does, on United States and Canadian territory, could be built until the applicants have the authority of both Governments for it. The question arose as to whether this commission would have jurisdiction to approve or disapprove of the action of both Governments, and the further consideration of the question was deferred until this meeting in Washington to-day. I may say that the applicants, by counsel, in both the United States and Canada, have notified the commission that they do not wish to be heard further on the subject. If there are any gentlemen present who desire to be heard further on the subject of the jurisdiction of the commission, we would be very glad to hear them now. When the matter was called this morning Mr. Keefer, representing the Ontario government, stated that he desired to present an application for a further postponement of the consideration of this question, and he was informed that an opportunity would be given him now to do so. We will, therefore, first hear Mr. Keefer's application for a postponement.

#### STATEMENT OF MR. FRANK H. KEEFER, K. C.

Mr. KEEFER (for the Ontario government). Mr. Chairman and gentlemen of the commission, I wish to state briefly how the Province of Ontario looks upon this matter, and I wish to add that the Province of Ontario has no desire to in any way delay or impede the action of the commission. In the first place, it is quite probable that almost every matter that will come before your commission will vitally affect the Province of Ontario and even to a greater extent than it will affect the Dominion of Canada. The fact is that from Minnesota

on the west to the eastern extremity of New York State whatever is peculiar or local to any one State is also peculiar and local to the Province of Ontario, and her interests are therefore vital in this matter. Prior to this treaty Ontario had exclusive jurisdiction over many matters which were relegated to you, and the Province is just awakening to the fact that certain questions over which she exercised sovereign authority in the past are being transferred now to this independent tribunal. I do not see that Ontario has the slightest objection to that, but the fact is that as a cabinet the government of Ontario has not had an opportunity to consider the matter. I do not fancy that the Province of Ontario would have any objection whatever to a permanent independent tribunal dealing with these matters, particularly a tribunal such as the one I am now addressing, and, more especially, if that independent and permanent tribunal had what I might call full jurisdiction. But Ontario is beginning to realize that under the treaty there are certain things to be referred to you and certain things that are not referred to you, and it would seem at first sight that the things that are not referred to you require reference just as much as the things which are referred. For instance, under articles 3 and 4 of the treaty you had undoubted jurisdiction over what I might call dams on either side of the international waters, but it is doubtful—at all events, if it were not doubtful the question would not be argued before you—it is doubtful whether, having jurisdiction over either side of the boundary, you have or have not jurisdiction over a dam running straight across the international waters. Again, your commission apparently has jurisdiction over dams controlling the outflow of the international waters under section 4, such as, for instance, this Kenora or Keewatin Dam, which we visited a short time ago; but it seems doubtful, or it may be more than doubtful, if you have jurisdiction over the inflow. For instance, it seems doubtful whether you have jurisdiction over such questions as might arise in the Birch Lake problem, although, of course, you have such jurisdiction for sanitary purposes. The Province of Ontario is carefully studying the treaty, I believe, with a desire to carry out the purview of the recitals, which is to avoid disputes between the two countries. That being the situation, with the question of the jurisdiction of this international dam coming up before you and in view of the impossibility of having a full cabinet conference on account of the premier of Ontario and one of his ministers being absent, I had to ask you, on behalf of my Province, to grant me the indulgence of an enlargement, so that the government of Ontario may have an opportunity of considering the engineering and legal questions involved and to lay down a line of policy. I am at present without instructions to argue the question; I am not appearing here with any idea of delay, but we want first to make sure that we are right and then we can go ahead.

Mr. CASGRAIN. Very soon after our meeting in Toronto the government of the Province of Ontario got notice that this question would come up to-day. There are a number of legal luminaries in the Ontario cabinet with whom you could have consulted, Mr. Keefer, and it seems to me you had sufficient time to enable you to argue the question now.

Mr. KEEFER. I can not gainsay that.

Mr. CASGRAIN. Don't you think it is presuming on our generosity to ask us to again defer the argument? We have had the case before us now for a long while, and, speaking for myself, I would be sorry to see it put off again.

Mr. TAWNEY. Suppose that the commission should now consider the question of its jurisdiction, and if it finds that it has jurisdiction, it could then fix the time and place for the hearing of the question on its merits. Thus the Government of Canada and the government of Ontario would be given time to put in an answer to the application, if they desire to do so. On the other hand, if the commission should find that it has no jurisdiction, and for that reason return the application to the Government from which it came, the interests of the Province of Ontario would not be affected one way or the other.

Mr. KEEFER. I think offhand that such a proceeding might suit the Province of Ontario, unless, indeed, we had some argument to advance on the question of jurisdiction.

Mr. TAWNEY. If the commission held it had jurisdiction and fixed a time and place for hearing on the merits of the application, the provincial government would not be debarred from again raising the question of jurisdiction before the final disposition of the case on its merits.

Mr. KEEFER. Of course, I have no right whatever to speak of what the policy of the Province of Ontario might be, but both parties are no doubt very anxious about the matter. If, for instance, on this question you have no jurisdiction over international dams, I say that the Province of Ontario is very anxious that there should be in some commission like yours absolute and permanent jurisdiction for all time to come. As I have said, the Province of Ontario is vitally affected in these matters, but, of course, when it comes to giving up that which it had heretofore exclusive authority over the Province must be very cautious about its procedure. Heretofore, with the exception of navigation, all the questions involved here were under the jurisdiction of the Province and were parts of her very life—her transportation life, her industrial life, her water powers, the white foam of the country and her future resources, the fisheries and so forth. These were all under the exclusive jurisdiction of the Province and not under the Dominion, who has made this treaty, and, and although Ontario in no way desires to block the exercise of that power so transferred, and although it is our desire to carry out the recitals of the treaty, yet Ontario wants to know exactly what she is doing, and if she is voluntarily coming in under the treaty she would like to know what it may involve. She feels at present that it is inequitable that under this treaty there should be control of the outflow of waters through our territory and no control over the inflow of waters through American territory. These are questions the Province of Ontario desires to consider and as to how far it is advisable either to ask you gentlemen to report upon these matters in the way of asking for amendment and to what extent. As a government the Province of Ontario has not yet dealt with these matters. Although apparently Ontario is mov-

ing slowly, she is trying to move on sure and final lines and in the interests of the objects of this treaty.

Mr. TURNER. I presume you would rather present your argument on this question of jurisdiction while the tribunal had an open mind on the question than after we had decided and come to a conclusion.

Mr. KEEFER. Yes; I may say that on the question of jurisdiction I had two views. I first had one view and now I have others. It is wise to consider how far the treaty has given you jurisdiction over international dams.

Mr. TURNER. Could you present your argument in writing within a reasonable time so that we might determine the matter?

Mr. KEEFER. I shall do so. I think that my request for adjournment is reasonably fair in view of the vital interests which are concerned, and in view of the fact that your decision now may become a precedent in other matters.

Mr. CASGRAIN. I understand that Mr. Thompson, representing the Government of Canada, had an application to make that will probably fit in with the application that has just been made by Mr. Keefer.

Mr. TAWNEY. Have you any application, Mr. Thompson, in reference to the Kettle Falls Dam proposition?

Mr. THOMPSON. In the event of this question being proceeded with, I was prepared to argue as to the jurisdiction on behalf of the Dominion of Canada. I will submit that the commission has jurisdiction in such matters as the international dam which the applicants propose to construct.

Mr. TAWNEY. Have you filed any answer to the application?

Mr. THOMPSON. That is what I want to speak about this morning. I have filed an answer in regard to the Kettle Falls Dam. I am in the same position with regard to that as I am in the case of the Watrous Island boom.

Mr. TAWNEY. You will have to make application to the commission to have the answer received, because the time for filing has expired under the rules.

Mr. THOMPSON. If it is not out of order, I wish to make such an application now. I ask now for leave to file a response to the application of the Rainy River Improvement Co. to construct a dam at Kettle Falls, notwithstanding the lapse of time.

Mr. CASGRAIN. You might tell us what that answer is; it may have some bearing on the question we are now considering.

Mr. THOMPSON. The answer is a very short one and reads as follows:

IN THE MATTER OF THE APPLICATION OF RAINY RIVER IMPROVEMENT CO. FOR APPROVAL OF PLANS FOR DAM AT KETTLE FALLS.

*To the honorable the International Joint Commission, Ottawa, Canada, and Washington, D. C.*

GENTLEMEN: The Government of the Dominion of Canada submits that the proposed works or obstructions will affect the flow of both Namakan and Rainy Lakes and should not be allowed for the following reasons:

1. The question of the regulation of the level of Lake of the Woods having been referred to the International Joint Commission for investigation and report, it would be inadvisable to grant the request of the applicants while this question is under consideration.

2. The Government of the Dominion of Canada has not approved of the plans of the applicants.

Dated at Ottawa, this 13th day of November, 1912.

The Honorable C. J. DOHERTY,  
*Attorney General for the Dominion of Canada,*  
 By JOHN THOMPSON,  
*His Solicitor Herein.*

Mr. THOMPSON. I should like now to make my application to file this answer.

Mr. TAWNEY. The following order will be made:

Upon hearing an application on behalf of the Dominion of Canada for leave to file an answer to the application of the Rainy River Improvement Co. for approval of plans for a dam at Kettle Falls:

It is ordered that rule 10 of the Rules of Procedure of the International Joint Commission provides that within 60 days after the filing of any application, the other Government may file a statement with the commission setting forth any fact or facts bearing on the subject matter of the application, and tending to defeat or modify the order of approval sought; and

Whereas the delay for filing such statement on behalf of the Government of Canada has long since expired; and

Whereas the Government of Canada now applies for leave to file such statement which raises important questions of fact; and,

Whereas under article 23 of the said rules the commission may extend the time for the filing of any paper; and

Whereas substantial justice requires that the time shall be extended for the filing of such statement by the Government of Canada:

The commission then grants the application now made on behalf of the Government of Canada, and allows the filing of a statement on behalf of the said Government nunc pro tunc, provided that the said statement be filed at once and time be given to the applicant to reply to such statement.

Mr. TAWNEY. When will you be able to file that answer?

Mr. THOMPSON. I will file it to-morrow and have it printed in the meantime.

Mr. TURNER. I suggest that we should hear the gentlemen who are present on the question of jurisdiction, and then we may be able to settle how much time they should have to file briefs.

Mr. TAWNEY. How soon, Mr. Keefer, would you be ready to submit your brief?

Mr. KEEFER. At present the premier of Ontario and one of his cabinet ministers are in the old country and will not return for a month. I could only get my instructions when they are present; I could not submit a brief before that.

Mr. TURNER. Is the attorney general absent?

Mr. KEEFER. The attorney general is not absent.

Mr. TURNER. This is merely a question of law.

Mr. KEEFER. It is more than a question of law for the Province. They are considering it from the point of view of policy, as well as considering the engineering and legal questions involved.

Mr. TURNER. That might govern the position that you want to take, but it could not cover the legal end of it.

Mr. KEEFER. I can not controvert that. I think the Province of Ontario would like, if it can, to lay the foundations broad and wide on this application, so that if you have not the jurisdiction you could get some jurisdiction. There must be a settled line of policy about that. It is not only a question of law, but there is a question of the widest character involved.

Mr. CASGRAIN. Do you think we could suggest that we should be given wider powers?

Mr. KEEFER. I should think so; it might be a very wise thing to do.

Mr. TAWNEY. You spoke a moment ago about this treaty having taken away from the Province of Ontario the powers they had hitherto exercised with respect to matters within their exclusive jurisdiction; is it not a fact that, even under this treaty, there could be no improvement or development or utilization of boundary waters—wholly within the jurisdiction of Canada, so far as Canada is concerned, and within the jurisdiction of Ontario, so far as Ontario is concerned—without the authority of the Dominion on one hand or of the Province on the other? Would the Dominion Government act independently of the authority of the Province?

Mr. KEEFER. I can not answer whether the Dominion Government would or would not; sometimes they might and sometimes they might not. It depends possibly on the policy of the two Governments, and as to whether they are in harmony or in discord. I think the Province of Ontario should be given a little time to consider the matter. Ontario never realized, until this question came up, the vast importance of the different questions that may come before you, and Ontario almost alone, of all the other Provinces of Canada, is vitally interested. We desire to carefully consider it from all its different points of view, and then to come before you and state her position, but so far she has not done so. That is all I can say.

Mr. POWELL. This one point is entirely separable from the other.

Mr. KEEFER. One would think so, but suppose I should come forward here and argue that you have jurisdiction over international dams.

Mr. POWELL. Suppose you do or suppose you don't, that can not determine the grounds of policy by the Province of Ontario. This is purely a matter of the interpretation of the treaty.

Mr. KEEFER. As I said to Senator Turner, that is quite right, but before Ontario takes ground one way or the other, and knowing the importance your decision may have upon this question as a precedent, she ought to know what she is doing. I fancy Ontario would not be adverse if she, after consideration, should find you have not the jurisdiction over international dams, and she might come forward and say that in her view it is unwise that any private company should be given the power to build straight across an international stream, and not be governed by some such tribunal as yours, and ask that you make a report recommending that you should have jurisdiction. Of course, I can not say what the policy of the Province would be, but that might be her policy.

Mr. CASGRAIN. Is not the Province of Ontario, like all the other Provinces of the Dominion, protected by the Dominion Government?

Mr. KEEFER. It is quite true, Mr. Casgrain, that the Provinces are supposed to be protected by the Federal authority, but we have on our side of the line, just as there is on this side of the line, a very strong feeling as to what might be called State rights. We have had many questions go to the imperial privy council as to in what authority the jurisdiction should lie with respect to fisheries and minerals, for instance. It has been found that all these rights are pretty much, with the exception of navigation, within the Province. Here comes a treaty negotiated by the Federal authorities, which

suddenly deprives Ontario of the control of these things, which she has thought for many years to retain.

Mr. POWELL. This treaty has been negotiated by the sovereign power of the empire, which overrides all questions of provincial jurisdiction.

Mr. KEEFER. There is no question but that the treaty has been made. I point out why Ontario wants to proceed carefully and properly.

Mr. CASGRAIN. This treaty was proclaimed in May, 1910, and we have been organized since 1912, and every time we met an application has been made by some parties interested to have the questions coming before us postponed. The consequence is that we have not done very much. If public opinion should become aroused on these matters, I am inclined to think that we shall be blamed for the delay, and not the parties who have appeared before us asking for it.

Mr. KEEFER. I quite conceive the force of what you say and it is quite true, but as to delay I can assure you that the Province of Ontario is not marking time.

Mr. CASGRAIN. I do not allege that.

Mr. KEEFER. The Province of Ontario is proceeding very carefully, and I think I may say for the first time she is considering where she stands.

Mr. CASGRAIN. But here is the treaty proclaimed in 1910, and we have been organized since 1912. We had a meeting in Ottawa on the 1st of October last and this very question was put down for hearing at this sitting of the commission, more than a month and a half afterwards. I put it to you, representing the Province of Ontario, whether this is showing diligence on the part of the Province.

Mr. KEEFER. I suppose I must take the responsibilities on my shoulders as counsel. I can only repeat that I have no desire whatever to delay your proceedings. I can not say more. I am only acting under definite instructions to urge for such delay as you can give us for the presentation of the provincial views.

Mr. MAGRATH. We have no question before us at the present time depending on our decision in connection with this matter.

Mr. TAWNEY. We have an application before us, and the first question raised on it was the question of jurisdiction.

Mr. KEEFER. I should think in answer to the objection of the Hon. Mr. Casgrain, that it might be put in this way as regards the question of delay and the jurisdiction. It seems to me fairly clear that before this tribunal deals with the confirmation of plans and other matters, the tribunal should be satisfied that these plans are satisfactory to the Governments of both countries, and as I understand from Mr. Thompson, that the Dominion of Canada are objecting for certain reasons concerning navigation, etc., to the confirmation of the plans for this dam as at present before you. If that be the case, and if credence is to be given to the soundness of the objection, perhaps I am not hindering the adjudication at all by asking for a delay. Suppose you should deal with the question of jurisdiction now on this matter, would you be any further ahead. I might supplement my previous grounds by mentioning that point. I do not think there would be much harm done by granting my application, if the Dominion Government comes forth and says she desires delay.

Mr. TAWNEY. Unless the commission should construe that it did not have jurisdiction and refer the application back to the Government from which it was received, leaving the parties to proceed under the authorities of both Governments, which they would have to do in any event, the commission would not then be responsible for the delay in the final determination of the question whether or not it would consider the application. If we should determine to refer this question back to the Government, it is quite possible that the government of Ontario might like to be heard and to suggest possibly what recommendations the commission should see fit to make.

Mr. TURNER. We could not make any recommendation on an application of this kind, we either have to grant it or to deny it, it does not come to us under section 9 of the treaty.

Mr. KEEFER. Under the latter part of the reference I think it is within your jurisdiction to make some report in the matter, as affecting the levels of the Lake of the Woods. Of course, this dam will affect the level of the Lake of the Woods very materially. I do not think we will lose very much time if you grant my application in view of the fact that Canada is asking for nonconfirmation.

Mr. TAWNEY. Do you suppose you could file a brief within two or three weeks?

Mr. KEEFER. I will file it within whatever time you say, but I must frankly state that I am pretty sure that the minister from whom I received my instructions would like very much to have a full cabinet council, with the premier at the table.

Mr. CASGRAIN. It does not require a full cabinet council to consider a question of law.

Mr. KEEFER. Of course, I must take what you give me. I am merely presenting my argument and I thank you for the indulgence you have extended to me.

Mr. CASGRAIN. It seems to me that such a matter would be in the hands of counsel.

Mr. TURNER. I move that we give the Province of Ontario 30 days within which to file a brief in the matter, and we can hear the other counsel right now on the question of jurisdiction.

It was ordered,

That the Ontario government be allowed 30 days from this date in which to file with the commission, through its counsel, a brief on the question of the jurisdiction of the commission to hear and determine the application of the Rainy River Improvement Co. and the Ontario & Minnesota Power Co., for the construction of its dam at the outlet of Lake Namakan, at Kettle Falls, St. Louis County, Minn., and in the Province of Ontario.

Mr. KEEFER. Thank you very much.

#### ARGUMENT OF MR. GEO. H. WATSON.

Mr. TAWNEY. We will hear the other gentlemen who are here to discuss the jurisdiction.

Mr. WATSON. I would submit to you that from every standpoint it is not desirable that the argument should be heard. Speaking for the clients that my learned friend Mr. Powell and I represent, I would protest quite as strenuously as I can against a piecemeal



argument. We are certainly very much interested in any argument that may be advanced by the Ontario government, and we would therefore have to advise our clients that it would be quite material that we should be present when the Ontario government was heard by your board.

Mr. TAWNEY. My understanding is that the Ontario government is simply given the privilege to file a brief on this question. I think perhaps our order should require them to serve a copy of this brief on the applicants, and also upon the parties who are opposing the application.

Mr. CASGRAIN. And you say you would like to have an opportunity of answering that?

Mr. WATSON. Quite so; that does not relieve me or my learned friend from responsibility in the matter.

Mr. TAWNEY. And 10 days can be allowed for you to make your reply after you receive that brief.

Mr. WATSON. And it would be very important for us to be given an opportunity to be heard in answer to anything that might be advanced by the Ontario government.

Mr. TAWNEY. The Ontario government is not to be heard orally.

Mr. WATSON. Well, they will advance a written argument.

Mr. TAWNEY. You have 10 days to reply to that.

Mr. WATSON. We would like very much not to be urged to present our argument until the Ontario government files its brief with its argument. We do not desire to be forced into the position of speaking beforehand.

Mr. TAWNEY. The difficulty about that is that the Ontario government does not know yet on which side of the case they will argue.

Mr. WATSON. That is the reason we do not want to present our argument until we have heard from them. There is another important reason and it is this: The attorney general of the Province of Ontario has been given a formal written notice that these matters which are at issue here on this question of jurisdiction before your board will be tried before the Supreme Court of Judicature in an action which is now pending, and the attorney general has been called upon in that action to state his position on the question of jurisdiction. Their answer has not yet been given in that action.

Mr. CASGRAIN. You do not mean the jurisdiction of this tribunal?

Mr. WATSON. Not the jurisdiction of this commission, but the jurisdiction of the Province by way of legislation or otherwise in respect to international waters. This is a matter that directly concerns the issue before this commission. All those matters are brought up and are now of record in an action which is pending in our courts. This is an action which was brought by the Ontario & Minnesota Power Co. in December of 1911, an action which might and ought, in the ordinary course, have been tried in June of this year. That company, however, did not proceed with the trial for some reason best known to itself. The sittings of our court were held on the 20th of last month (October), the action should have been brought to trial by that company then, but it was not brought to trial and the action is still pending.

Mr. CASGRAIN. Do I understand you to say that the decision in that case will affect the jurisdiction of this commission?

Mr. WATSON. Of course, the jurisdiction of the Ontario Legislature, the jurisdiction of the Dominion Parliament, the jurisdiction of any commission, I should think, including this commission, in so far as concerns the adjudication of, or the passing of legislation with respect to international waters, would be subject to review, as it always has been, by the courts of the Province in which the issue is raised. I mean to say, that the courts are not debarred or precluded from pronouncing upon the issues as to the legal rights of the parties by reason of an act of Parliament, if that act of Parliament is ultra vires, and no more would it be precluded from adjudicating, and adjudicating finally, by the determination of this commission, if this commission did not decide within its jurisdiction. It would be competent for the court and it would be its duty, notwithstanding the dignity and great international importance of this commission, it would be competent for the court to make its own finding on the matter. I assume that this commission would not be on any higher ground than the Parliament of Canada or the legislature of a Province, for the purpose of determining it by the court, whether it was acting intra vires or ultra vires.

Mr. CASGRAIN. With a view of getting information, may I ask how the question of jurisdiction arises in this case?

Mr. WATSON. It arises in connection with the construction of the dam at International Falls and Fort Francis.

Mr. CASGRAIN. Does someone contend that the Province of Ontario had the right to pass a statute authorizing the construction of the dam?

Mr. WATSON. The Ontario & Minnesota Power Co., the plaintiffs in the action, contend that the Dominion Parliament had jurisdiction and that the Ontario Legislature had jurisdiction, and their issues are wide enough to admit contention and evidence that this commission has jurisdiction, so when all these matters are all in issue in this action.

Mr. CASGRAIN. What does the defendant say?

Mr. WATSON. We deny the jurisdiction. We have not been called upon, as a matter of pleading, to deny the jurisdiction of this commission.

Mr. CASGRAIN. But you deny the jurisdiction of the Province and the Dominion?

Mr. WATSON. We expressly deny it, and in connection with that, having denied it, under the rules of our court it is our duty to notify the attorney general of Canada and the attorney general of the Province that the issue is being raised, so that the Dominion Government and the Ontario government would have an opportunity of being heard and that notice has been served. That is an additional reason why, at all events, when the Province of Ontario is asserting its jurisdiction we prefer not to be called upon to present our argument now. At all events, we think we should not be called upon to present our argument until such time as the arguments are presented on behalf of the Ontario government as well as on behalf of the Dominion Government. There will be no time lost in this way. There will be no inconvenience and no more expense, because I would have to advise our clients that we should be here. There would be nothing gained, so far as I can see, for proceeding, and, on

the other hand, there would be nothing lost by delay, and we have much at stake.

Mr. TAWNEY. May I make this suggestion: Under this treaty a dam of public improvement may be constructed on either side of the line by authority of either Government, with the approval of this commission. Now, under this treaty the Government of the United States, through the War Department, has submitted to the commission for its approval a certain proposed project, namely, the construction of a dam at the outlet of Lake Namakan, and the fact is referred to that this obstruction or dam will extend across the center or boundary line to the Canadian shore. That application was filed here last April and notice of the application was served on the Dominion Government, and I assume it was served on the Ontario government; it was served on all parties interested.

Mr. WATSON. By publication; yes.

Mr. TAWNEY. And although the rules specially required that answers to all applications shall be made within 60 days from the date of service, not until to-day and after the lapse of time has there been any answer or any notice to the commission that the matter would be controverted at all by the Dominion Government. The matter was considered informally to a certain extent at Ottawa whether or not the commission had jurisdiction to approve or disapprove of that which required the affirmative action of both Governments. Now, it would be natural for those who are interested in the application to feel that the commission in further delaying the determination of this question was not facilitating the determination of the first question which the commission has been called to determine. Further delay would, in my opinion, give the impression that the commission was not accomplishing what it was created to accomplish, and that it was to be made a sort of a football between the parties in order to enable one or the other to gain advantage. We do not want the public to get the impression that by reason of granting requests for delay on the part of parties who come before the commission that we are neglecting our duty. It seems to me that all of these collateral questions which have been raised this morning are entirely independent of the question of our jurisdiction to hear and determine an application for approval of a project which extends from one side of the line to the other and which can be constructed only by authority of the two Governments. I fail to see where any right would be prejudiced in any event if the commission proceeded with the evidence that appears on the face of the record to consider the question of jurisdiction. If it finds it has no jurisdiction it will so decide. If, on the contrary, it finds it has jurisdiction it will fix a time and place for the hearing of the issues between the applicant and those who are opposed to the application. Speaking for myself, as a member of the commission, I would like to dispose of this question without any further delay if we can do so without injuring the rights of anybody on either side of the line. For that reason the hearing of the question of jurisdiction was continued until to-day, when notice was given to everybody interested to appear here. The applicant, having submitted to the jurisdiction, has notified the commission that he has nothing more to offer on the question of jurisdiction. Personally I would like to have the matter disposed of one way or the other, so as to avoid any ground for

complaint that we are not proceeding diligently with the matters which have been referred to us.

Mr. WATSON. It could only be under a misapprehension that any criticism would be made by the public or any member of the public as to want of diligence on the part of the commission in proceeding with this matter. For my own part, I do not think there would be any misapprehension about that.

Mr. TAWNEY. The application has been on file since last April; the applicant having no knowledge of any opposition to it would expect the commission to proceed, and he would have just grounds for complaining if there is any delay now.

Mr. WATSON. It was in my own mind that Mr. Keefer and the Province of Ontario, whom he represents, should have been expected to be prepared to proceed to-day, and I am quite surprised they are not, but at the same time surely it relieves your board of responsibility when the Province of Ontario comes forward by its counsel, as it has done to-day, and asks for an adjournment. The delay is not asked at the instance of individuals or contestants as to particular commercial rights or interests, but it is asked by the government of the important Province of Ontario, and that Province must take the whole responsibility for the delay, and no doubt the Province is quite satisfied to do so. I would have been glad if the matter had proceeded, but as you have directed that counsel for Ontario need not proceed to-day, I would like that we should not be called upon.

Mr. TAWNEY. We have not directed that the case should not proceed.

Mr. WATSON. So far as the government of Ontario is concerned, you have.

Mr. TAWNEY. We have given them 30 days to reply, and extended to you 10 days to make a reply to them.

Mr. WATSON. You can see that it would be embarrassing for us to proceed to argue now and then to present another argument in reply to the argument which is to be presented in 30 days hence. We want to make our whole argument at the one time.

Mr. STREETER. Representing these lumber companies, do you come here to represent that this commission has jurisdiction or that it has not jurisdiction?

Mr. WATSON. It has not jurisdiction in this particular case. From what people may observe from time to time with respect to Government matters, I am inclined to think that the Province of Ontario was likely to present the argument that the commission has jurisdiction. That makes it of greater importance that we should be present, and that our argument should be heard then. We would certainly have an opportunity, as you say, on the presentation of the brief, but we would like very much to be excused from making our argument piecemeal, making an argument now and an argument later which may arise upon matters which may be subsequently submitted.

Mr. TAWNEY. This is a concrete proposition, namely, whether or not this commission has jurisdiction over the question of the construction of an international dam, a dam extending clear from one shore to the other. I can not see how a question of jurisdiction between the Ontario government and the Dominion Government has

any bearing at all upon the question as to whether or not this commission, having been created by the supreme power of both nations, shall or shall not have jurisdiction in any concrete case submitted to it. I can not see how a question of jurisdiction between the Dominion Government and the Ontario government has any relevancy whatever to any question now before us.

Mr. TURNER. I understand that the Dominion of Canada, through its counsel, will argue that this commission has jurisdiction, and you, Mr. Watson, will have an opportunity of answering the Dominion of Canada and to make a full exposition of your views. If Mr. Keefer should add anything additional, you will have another opportunity to controvert that.

Mr. WATSON. Quite so. We all know from experience in courts of litigation that we necessarily hold back until everyone is ready to proceed and to state his case. That is the system which has prevailed in every judicial tribunal from the beginning of the world to the present time.

Mr. CASGRAIN. What prejudice would you suffer if the Ontario brief was put in and you had 10 days within which to answer it? I have no doubt that you can make before us a very able and exhaustive argument. It is true that the Ontario government will have an opportunity beforehand of answering your argument when they hear it, and if your argument is sound, as I have no doubt it will be, no harm can be done and you will have the right to reply to the Ontario government. I do not think that the fact that the Ontario government will have an opportunity of putting in a brief within 30 days can prejudice you in any way.

Mr. WATSON. I am entirely in the hands of the commission. I have presented my supposition and I submit as gracefully as I can to the direction of your board.

Mr. STREETER. I think you should revise one statement that you made, namely, that the Ontario government has to take the responsibility of this delay.

Mr. WATSON. At this time; yes.

Mr. STREETER. Some of us are inclined to think that it would be the commission that would be held responsible.

(The commission decided that the argument of Mr. Watson against the jurisdiction should be heard now and that Mr. Watson should proceed.)

Mr. WATSON. I am glad to be able to say, Mr. Chairman and gentlemen, that I shall not feel called upon to present what might be thought an exhaustive and lengthy argument in regard to the subject matter of this application, and for the reason that I conceive that the direct issue which arises upon this hearing is a very plain and simple one. For our clients, we may be in a position and no doubt are in a position quite different from the position of Mr. Keefer as representing the Ontario government. As representing the Province, he may have more consideration, not merely matters of terms and conditions by way of protection or otherwise, but matters of provincial policy for consideration, whereas to-day, upon this application, we are entirely free from any such matters of consideration. The question before us to-day is wholly and entirely a question, as I understand it, as to whether or not the application of the Rainy River Improve-

ment Co., as made and as of record, is within the four corners of the treaty under which this board obtained and holds its powers. In respect to that, a reference has been made during the sitting to the proposition as to the application of the Ontario & Minnesota Power Co. In order to clear the air entirely I point out, as the fact is, that there is no application here by the Ontario & Minnesota Power Co. That company is not to-day directly or indirectly before your board for any purpose. That company is not here as parties interested or in any other way and there is certainly no application on their behalf. They are therefore not here to be heard upon any application of theirs and have no status to be heard, much less to make an application or to advance their proposition: The application, therefore, is one solely and entirely by the Rainy River Improvement Co. The application is of record and it is only one application, namely, to construct and maintain a dam across a boundary river; that is, from side to side of a boundary river, not Rainy River, but Kettle River, which is at that point an international boundary river between the two countries.

Mr. TURNER. That stretch of water is called Kettle River?

Mr. WATSON. Yes; and that is an international water boundary between the Dominion of Canada and the United States at that point.

Mr. CASGRAIN. Reading the application, it says:

The undersigned, Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota for the purpose of improving the navigation of Rainy Lake and Rainy River, for the construction, maintenance, and improvement of a dam across Rainy River, etc.

The application is made for approval of plans for the construction of a dam at Kettle Falls across the outlet of Lake Namakan in St. Louis County, Minn.

Mr. WATSON. That is explainable, and I had the same difficulty when I first read it. You will observe what you have read is a recital of the corporate powers as obtained from the State of Minnesota. That is, they have a charter, the same as if we obtained a charter under the general act incorporating companies. There is this recital and why the recital is put there may be a matter of comment. It is rather ingenious as laying the foundation for subsequent difficulties I should think. But, however, it is there in a very skillful and ingenious way, but I submit it has no legal effect whatever.

Mr. CASGRAIN. I suppose you would have to read the application in connection with the acts of Congress to authorize the improvement company to construct a dam across the outlet of Lake Namakan at Kettle Falls.

Mr. WATSON. Quite so. This recites certain charter powers from the State of Minnesota, and then the operative part of the application is on the second page, namely, that this company with such charter powers submits a plan for a dam at Kettle Falls across the outlet of Lake Namakan in St. Louis County, in the State of Minnesota. That means across the outlet; it says across the outlet, but it is identical with the width of Kettle River. It is not expressed in clear language here, but it is the same thing. A reference to the plan and a reference to the map and geographical position shows that the dam is across Kettle River at that point. So that the application that is before the board is for the construction of a dam across a boundary river from one side of the river to the other, from the American side to the Canadian side of the river. Really, Mr. Chair-

man, after consideration, having had the opportunity to consider the matter which you kindly gave me on the last occasion your commission met in Ottawa on the 2d of October, I think I am not going too far when I submit to you that it is hardly a controversial matter or a matter of contention upon the interpretation and construction of the articles of the treaty, that in such a case you have no jurisdiction. I submit that there is no provision in the treaty that gives authority to this board to deal with such an application. I submit to you advisedly and as strongly as I can, that there is no reasonable pretence or ground for a serious argument in support of this application. It has to be borne in mind—it is no doubt in the mind of you all at this moment—that the question of the jurisdiction of any forum, constituted by statute, is considered and determined under rules which are quite different from rules which apply to the interpretation of the statute as to its general effect in matters of policy, and how it is to be carried out, and what effect is to be given to particular provisions. In this latter case reference, as we all know, is not infrequently made to surrounding conditions and circumstances for the purpose of enabling these forums to reach and determine what was the true intention of Parliament or the true intention of the parties to the statutory enactment. But that rule does not apply to the question of jurisdiction. The question of jurisdiction must be determined, and must always be determined, having regard to the words of the statute which grant the authority. There is no possibility of adding to these words by any circumstances or conditions or adding of authority. The moment the adding of any authority is suggested, then it becomes a matter of further legislation, and, therefore, in a proposition such as this, of jurisdiction or of no jurisdiction, the question to be determined quickly and closely upon the words to be used and the meaning of those words so used.

Mr. CASGRAIN. Do you think that rule applies as pertinently to the construction of treaties as it does to the construction of statutes, giving jurisdiction?

Mr. WATSON. I have thought of that considerably, and although I am not able to refer you to any decision upon that point, yet I have failed altogether to observe how there can be any distinction made between the two.

Mr. CASGRAIN. In the case of the attorney general for Canada and the attorney general for the Province of Ontario the question was considered in 1907, and Mr. Watson intimated that that rule of law should not be so strictly applied to a treaty as it would be to a statute.

Mr. WATSON. According to my recollection, that was for the purpose of determining the general effect of the whole treaty, as distinguished from a closely cut question of the jurisdiction of the forum to determine a particular point. Here the question is: Has this commission jurisdiction to determine this application? Reference is made therefore to the terms of the treaty which, limited by statute as it is, which is a statutory provision giving statutory authority, so that you are here not with any inherent jurisdiction of any kind whatever. There can be no claim on the part of the commission to any jurisdiction whatever, unless the jurisdiction is on record and is shown by the words of the enacting clause. Now, then, having in mind that the application is one for the construction of

a dam from one side of the river to the other side, the words of article 3 are before us. That article, in effect, contains three provisions. The first is:

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted—

That is in respect to the construction and maintenance of a dam. Then there is provision 2:

Or hereafter provided for by special agreement between the parties hereto.

That is another sort of application; there is no special agreement between the parties; there is an absence of an agreement; there is a dissent on the part of the Dominion Government, as expressed in the answer which Mr. Thompson has filed. Then follows what I may call provision No. 3, and it says:

No further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission to be known as the International Joint Commission.

That is plain. No obstruction, or use, or diversion on either side of the line shall be permitted, except with your approval. But that is not an application for the use or obstruction or diversion on one side of the line; it is wholly distinct and apart from that. The application here is, and the claim is, that you have jurisdiction to pass upon a dam that is from one side to the other side, clean across the river, and that is not contained in that article of the treaty.

Mr. POWELL. Is it not an obstruction of water on one side—that is, so far as from the boundary line to the American shore is concerned? Is not that an obstruction of waters on that side of the line? That portion of the same between the boundary line and the American shore certainly obstructs the flow of waters on the American side. There is no question about that. Does not that fulfill the other conditions that it affects the natural level or flow of the boundary waters on the other side?

Mr. WATSON. Yes.

Mr. POWELL. Does it any more cease to be so because the Canadians are doing wrong also. My point is, how on earth can the actions of the Canadians on their side of the line affect the question so far as the American side of the line is concerned, unless you go on the principle that was adopted in the common law—that if you pounded a man half to death he was entitled to damages, but if you killed him entirely he was entitled to none; that is the only legal analogy I know.

Mr. WATSON. And very apt it is, and that may be a matter of importance as affecting the merits of the question. I do not understand that your observation is applied to the question of a construction as affecting jurisdiction, because a construction for the purpose of jurisdiction of this commission is a construction on one side only. There is the whole point. It is a construction on one side only.

Mr. POWELL. And is that construction on one side destroyed because it happens to be extended on the other side?

Mr. WATSON. It gets you outside the words of the article and is therefore outside of your jurisdiction.



Mr. POWELL. Oh, that is a very technical construction. Your argument is, that if the structure is built only halfway across and ends there it is within our jurisdiction, but the moment you get beyond that, and the structure extends across the river, our jurisdiction ceases. Would not that be a rather technical and absurd construction to put upon the treaty?

Mr. WATSON. No.

Mr. CASGRAIN. I suppose the answer to that would be that this is not an application to build on one side of the river, but an application to build essentially across the river, and therefore, this application can not come before us on the approval of one Government only, but it must be indorsed by both Governments.

Mr. WATSON. Quite so. It would be useless and futile to proceed with it unless it is put across the whole river.

Mr. POWELL. Without differing from Mr. Casgrain, I would call attention to the fact that this is not a matter of an application one way or the other, but a question, as to whether a certain work is to be legalized or not, no matter what Government brings it forward. Now, if that work which is an obstruction, is to be tolerated, if it only goes halfway across, how can you argue that it can not be tolerated if it goes the whole way across?

Mr. WATSON. Just a moment; I fail to follow your question as applied to the construction of the act.

Mr. TURNER. Is it not impossible to construe this application, which in turn extends from shore to shore, as an application to build halfway across?

Mr. WATSON. It is not the kind of application that is provided for by the treaty; it is not within the terms of the treaty; there is something outside of that; it is some new condition which is not provided for.

Mr. POWELL. The application is simply a way of bringing the thing before us. Without regard to the application at all, would not a structure halfway across that river be a matter in respect to which we have to give our consent.

Mr. WATSON. Of course this commission has passed rules which govern its procedure. Rule 6 is very specific and is in conformity with and is prepared manifestly with the greatest possible care and follows the enacting clause of the treaty for the purpose of defining the procedure within the limits of jurisdiction, and you will observe that rule 6 says:

6. In all cases to be submitted to the commission, under Articles III, IV, and VIII of the treaty, the method of bringing such cases to the attention of the commission and invoking its action shall be as follows.

And there is no other rule and there is no other article of the treaty in which there is a provision made for the hearing or consideration or determination by this commission of any matter whatever.

Mr. POWELL. That would go to the procedure and not to the jurisdiction itself.

Mr. WATSON. It refers to the articles which give jurisdiction and these are the only articles which do confer jurisdiction.

Mr. WATSON. This commission has no inherent jurisdiction. Constituted as this commission is in its personnel, and having regard to the important matters which no doubt it was considered would be

dealt with by this commission, one would have expected a much broader and wider enactment of jurisdiction and authority than we find on record in the treaty. The jurisdiction of the commission is exceedingly narrow, exceedingly limited, and we cannot get away from the fact that it is limited to those Articles III, IV, and VIII, and XIII, for all the powers that it can possibly exercise and possess, and beyond that the commission has no power. Of course, you have your judgment and your discretion, but, as I submit, you are unable to exercise any judgment or discretion unless it is within the express enactment of one of these articles, namely, Article III, Article IV, Article VIII, and Article XIII.

Mr. TAWNEY. You do not include Article X.

Mr. WATSON. Article X is a matter of procedure.

Mr. TAWNEY. Under Article X, any question submitted by the two Governments, the commission has power to finally determine.

Mr. WATSON. Quite so, and under Article IX it is permitted to make a special report, but then only upon the invitation or request of either Government. So that the proposition that was made by Mr. Keefer that your commission should report specially, I think, is not a sound proposition, and I should think—speaking for myself—that the commission would not be likely to report gratuitously or voluntarily, or at all, unless upon a formal request and solicitation by the Government, which, of course, would not be the government of Ontario but would be the Dominion Government or the Government of the United States. The Ontario government has no status to take such a position; it has no rights that could be affected in the way mentioned.

Mr. TURNER. I did not know that the chairman of the commission suggested that we could proceed that way under Articles IX and X.

Mr. TAWNEY. Oh, no. Mr. Watson was enumerating the articles under which the commission had power, and omitted to refer to Article 10, but of course the jurisdiction in Article X is entirely independent from the jurisdiction under Articles III, IV, and VIII.

Mr. WATSON. I am much obliged to you for calling my attention to that. I omitted to refer to it.

Mr. CASGRAIN. Would you say that the application now before us is an application to build half a dam?

Mr. WATSON. That is not the application.

Mr. CASGRAIN. Suppose that in virtue of the Statute IV and V, Edward VII, the Ontario & Minnesota Power Co. came before us with an application to build the other half of the dam, and the plans were approved by the Government of Canada, would you say then that we had jurisdiction?

Mr. WATSON. Not under that act, and if you pardon me, I intend to refer to that act and to refer to that very point, but I would like to make my observations in order. Article III I have read, and in view of the words of the article, I repeat what I submitted, namely, that the application for the construction of this dam from side to side is not within the terms of that article, and therefore the application, as I submit, has no status before you, and the applicants can not ask for your action. There is another observation which is perhaps not material but I think it may be of some importance, namely, as to whether or not, when an application is made and when it affects the natural flow of boundary waters on either

side of the line, it shall not be granted except by authority of the United States or of the Dominion of Canada as the case may be. The treaty refers to the "party affected and with the approval." I submit as the technical and grammatical construction of that article, that the moment it appears that the application which is made for the construction of an obstruction or the use of an obstruction or dam on one side, and it is made to appear as it must necessarily appear practically in all cases, that that will interfere with the level or flow of the water on the other side, then nothing shall be done unless the parties so affected by the level shall give its authority, whether it is the United States or Canada, whatever way it may happen. You see the way the article reads:

No further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada, within their respective jurisdictions.

I submit that what I am contending for is the proper and technical and grammatical construction of these words, and it is not necessary at all that I should go that far.

Mr. TAWNEY. Let me ask you if these logical conclusions from your interpretation, would not be that no improvement could be made on either side of the line, by the authority of either Government, unless the other Government also gives its authority in the matter?

Mr. WATSON. Absolutely so.

Mr. CASGRAIN. Would not that be by agreement between the two Governments?

Mr. WATSON. That may be another idea of it.

Mr. POWELL. Why, that would cut out our jurisdiction altogether.

Mr. WATSON. Not under Section VIII. At all events, it is very poorly drawn.

Mr. TAWNEY. Suppose one obstruction is wholly within the jurisdiction of either Government, and the Government having jurisdiction authorized the obstruction, but in making that obstruction it affects the level or flow of water on the other side of the line, you say that construction within the jurisdiction of that Government could not be made without the approval of this commission?

Mr. WATSON. Quite so.

Mr. TAWNEY. And, in considering whether or not the approval should be granted, it is the duty of this commission to take into consideration the effect of changing the level or changing the flow of water on the other side of the line. If that be the correct interpretation of that article, is not the language which you have read from it entirely unjustifiable?

Mr. WATSON. That is a matter of policy and principle which may be very easily conceded. I was taking it rather from the technical or grammatical construction of the words. I quite agree that your observation is important and would have expected it to be the intention of the parties, but that intention is not expressed here. There is no provision in this treaty for anything more than an obstruction or dam on one side of the line. That is the only thing that is here for the purposes of your jurisdiction.

Mr. CASGRAIN. That comes pretty near to what I have stated just now. Suppose the proper authorities in the United States had given

authorization to construct a dam to the middle of the stream, as far as the jurisdiction of the United States would go. Suppose again, that on the other side, the department of public works of Canada, representing the Government of Canada, should agree to this obstruction or this use of the river, and to disturbing the level and the flow of the water, where would our jurisdiction come in? Would there not, in such a case, be an agreement between the two Governments which would oust our jurisdiction completely? Why should we be consulted when both Governments agree to do a certain thing?

Mr. WATSON. The language is very badly expressed.

Mr. CASGRAIN. We can not help that.

Mr. WATSON. That is quite so, but I can not help thinking that it must have been intended that this commission would in such cases exercise a discretion or judgment in the matter. I should think it was not intended that you were to be merely a commission for the purpose of preparing a record. The suggestion is startling, that with such a tribunal as this, appointed under such a treaty between two great nations, and appointed to consider matters of such importance, that the commission was constituted merely as a court of record, such record as might be made by your registrar or your secretary, without exercising any judgment or discretion on your part. And yet, as Mr. Casgrain has suggested, it is not at all free from doubt on the words of the article. However, we are not concerned with that to-day.

Mr. TAWNEY. Are we not concerned in this clause of the treaty, as to whether the improvement can be made only by authority of both Governments, that improvement extending clear across the boundary line? In a case where both Governments have agreed upon the improvements on both sides of the line, have agreed upon the plans for such improvements, what would there be for this commission to approve or disapprove of?

Mr. WATSON. Of course. Article VIII reads:

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which, under Articles III and IV of this treaty, the approval of this commission is required, and in passing upon such cases, the commission shall be governed by the following rules or principles which are adopted by the high contracting parties for this purpose.

Mr. TAWNEY. Can you conceive of there being any necessity for submitting, for the approval of this commission, a proposition where both Governments have by special agreement authorized this improvement to be made?

Mr. WATSON. I can, indeed, Mr. Chairman, from what I conceive to be the highest possible standard and ground; that is, to overcome political conditions and be subject to a tribunal and the jurisdiction and judgment of a tribunal that is wholly free from political or party conditions of any kind and regards solely and entirely, not merely from a national standpoint but from an international standpoint. The forum is the highest forum that could be constituted by nations, and it is surely of a standard that should be maintained, and it must have been. It is impossible to conceive that such governments as the Governments of Great Britain and the United States could have entered upon and passed a treaty and appointed a commission without having in mind that it may be given such jurisdiction as would serve the nations alike, free altogether

from political conditions, so that there should be an independent and strong national and international forum and the exercise of that jurisdiction.

Mr. TAWNEY. Do I understand you to argue that this commission has the power to revoke the joint agreement of both nations?

Mr. WATSON. The power to improve, it should have. Mr. Chairman, I regret to say that it falls far short of what it should be as it is expressed. It should certainly go as far as you have indicated and as far as I have endeavored to indicate. Whether it does or not is another matter. It, I fear, has been so loosely expressed that it does not. It is like a great deal of legislation that we have in our province and in the Dominion of Canada—I will not speak of Congress or the State legislatures—but it is framed without any regard to efficiency. It is framed in the loosest and most vague way, and it is in the interest chiefly of members of the legal profession.

Mr. CASGRAIN. Mr. Watson, will you allow me to put this concrete question: Here we have the application of the Rainy River Improvement Co. approved by the proper department of the United States Government. Supposing under the statute which has been quoted the department of public works approves of the plans which are submitted to it for the construction of the other half of the dam and they come before us and ask us for an approval of this dam, where does the necessity come to remove any dispute between the two Governments?

Mr. WATSON. I will come directly to that after making one more observation. The application recites the act of Congress. I point out to you, in passing, that the act of Congress as passed is plainly beyond the jurisdiction of Congress, because the act is the same as the application. The act is an act for the construction of a dam across the river from side to side. Congress had no power to pass such enactment. It never had. It is like many a piece of legislation where you can pick out and save one clause or one enactment as valid and intra vires and disregard and declare another act ultra vires. This one piece of legislation if it is bad in part is bad altogether. It is clearly bad in so far as it attempts to be legislation.

Mr. POWELL. Supposing the Parliament of Canada had enacted exactly the same legislation, between the two jurisdictions, would not the power be complete?

Mr. WATSON. From side to side?

Mr. POWELL. Yes.

Mr. WATSON. No; it is an excess of jurisdiction.

Mr. POWELL. That is, if the Congress of the United States had enacted that and the Parliament of Canada had enacted it also, would not that be complete?

Mr. WATSON. It is completely wrong from the foundation on, and this commission, therefore, in the exercise of this jurisdiction, can not make it right.

Mr. POWELL. As a matter of fact, this may be wrong, but for 30 or 40 years the Legislature of the Province of New Brunswick and the Legislature of Maine have each incorporated in exactly the same language and with precisely the same power log-driving companies on the St. Johns River, going its whole length, and that has been tested in our courts and it has always been conceded that the combination of the two gave the power.

Mr. WATSON. I think it is safe to say that you were not consulted as counsel for the Government to revise the enactment.

Mr. POWELL. If I had been I would have supported the enactment, I think.

Mr. TAWNEY. Before you leave that point, Mr. Watson, and while you are discussing Article III, I want to ask whether you have given any consideration to this thought: The language used is that such improvement shall not be made except by the authority of the United States or the Dominion Government, with the approval of the International Joint Commission. Here is a question that I think affects our jurisdiction, although I do not know what the sense of the commission on the subject might be. In submitting this application to the War Department of the United States Government it is not given absolute authority. In the fifth paragraph of the letter from the Acting Secretary of War it says:

It is believed, therefore, that before the proposed constructions are definitely approved by the War Department in pursuance of the aforesaid act of Congress it should receive consideration and action at the hands of this commission in pursuance of the provision of the aforesaid treaty.

Mr. WATSON. I was not aware of that, and I do not think our friend Mr. Powell was.

Mr. TAWNEY. The question that occurred to my mind is whether or not before this commission can proceed to consider any application under Articles III and IV the authority of the Government within whose jurisdiction the improvement is to be made shall not be final and complete.

Mr. WATSON. I have taken it for granted, and did not have any thought to the contrary. I should think there is no question whatever that it must be clear and unqualified approval and authority, not subject to any reservation, but unreserved and unqualified in order to be within the provisions of the treaty and the words that are there used. In a case of this kind that must be given first by the applying Government and next, if the effect of it is to increase the natural flow or to lessen the flow of boundary waters, there must be the same unqualified approval of the Government whose waters, or the levels of whose waters, are affected.

Mr. TAWNEY. Would you say that the unqualified approval of the Government within whose jurisdiction the improvement is to be made is a precedent to the approval of this commission?

Mr. WATSON. I do not think it is capable of any other construction. I do go so far as to think that following upon such approval this commission has a duty, obligation, and discretion to exercise, not merely as followers, but as an independent, judicial forum.

Mr. POWELL. These two requirements are not one conditional upon the other. It is difficult to conceive of their being given at the same time. There is no order of precedent; we might give ours first, or they might give theirs first.

Mr. WATSON. I would not read it that way.

Mr. POWELL. Then that is not a point of jurisdiction.

Mr. WATSON. Yes; it is a point of jurisdiction; that is, you are not called upon or justified in exercising your jurisdiction until certain conditions have arisen.

Mr. POWELL. Two things are required; first, the consent of the Government; second, our consent. It does not say that theirs should

be first or that ours should be first. I think we have a rule or an understanding that in these matters, to avoid our investigation being abortive, that we would ask the consent of the Government before we undertake it. Your view in that regard is a correct one.

Mr. WATSON. I think there ought to be not merely the consent, but that it ought to originate with the Government and not merely upon the suggestion of this commission, but that it ought to originate with either Government and the Government should, in a case of this kind, put this commission into action.

However, Mr. Chairman, you will have to pardon me, if you please, for entering upon these discussions which are rather matters of principle and policy and which are not, as you will recognize, within the brief from my clients who are concerned only as to this particular application at the present time and the words of the statute as applied to it.

Mr. TAWNEY. The question I asked you has particular reference to this application, because the language referred to is contained in the letter of transmittal to this commission.

Mr. WATSON. That matter is of very great importance and I should say without hesitation that the matter is not properly, according to our view, before the commission under a reference such as has been read by the chairman. With regard to the Dominion legislation I wish to point out to you that the Dominion legislation, such as it is, has no bearing whatever upon the application that is now before this board for consideration. The application that is before the board for consideration is by the Rainy River Improvement Co. There is no legislation, directly or indirectly, in favor of the Rainy River Improvement Co. The Rainy River Improvement Co., the applicant, has no authority of any kind, good, bad, or indifferent, from the Dominion Parliament or the Dominion Government.

Mr. TURNER. Nor from the government of Ontario?

Mr. WATSON. No; quite so. The act which has been referred to is one which does not apply in the consideration of this matter. It could not possibly be applied. It is an act passed at the instance of and promoted by the Ontario & Minnesota Power Co. That company is not before this commission at all.

Mr. POWELL. We can not look at the personnel of the company.

Mr. WATSON. No; you can not take that into consideration. Now, in view of the discussion which we have had here I feel that it is a matter of necessity for me to take this opportunity to refer to the enactments contained in chapter 139, 4 and 5 Edward VII, assented to on the 20th of July, 1905. I wish to point out that it is not only the fact that this statute is wholly inapplicable for consideration on the present application by the Rainy River Improvement Co., but it is wholly inapplicable even assuming that the application were by the Minnesota Power Co. This statute contains the usual recital, and section 1 reads:

The company may construct, develop, acquire, own, use, and operate the water power now or hereafter existing on the Rainy River at or near the town of Fort Francis.

It is limited to that. It continues:

In the district of Rainy River, in the Province of Ontario; and may construct, develop, operate, and maintain works, canals, raceways, watercourses, dams,

piers, booms, dikes, sluices, conduits, and buildings in connection with the said power, including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake.

That has no application to this at all.

Mr. CASGRAIN. Why not?

Mr. WATSON. Because the statute says, "including any increase of the said power on Rainy River."

Mr. CASGRAIN. Now, Mr. Watson, it says, "on waters tributary to Rainy Lake." I understand that Kettle River flows into Rainy Lake. It seems to me that this statute, 4 and 5 Edward VII, when it speaks of the powers which the company now has or may hereafter have to construct are the powers which were given to the company by the letters patent of Ontario which permitted this company to take over all the power that Mr. Backus had and, among other powers, was this very power of building storage works in the Namakan Lake or Kettle River.

Mr. WATSON. Let us see, just for a moment, if you please. Taking those words again, "including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake." Now, can it be said that Kettle River, which is an international boundary river, is within the definition of a tributary to Rainy Lake?

Mr. CASGRAIN. I should think so; why not?

Mr. WATSON. It is not a tributary. It is the international boundary described the same as other international boundaries, and it is impossible, as I submit, to speak of an international boundary river as being a tributary to a lake, and particularly to a lake such as this small lake like Rainy Lake. That is not intended. There are many little creeks and small rivers running into the lake distinct from the international boundary line. It refers to those and not to Kettle River.

Mr. TURNER. You do not make that very plain to me, that is, why an international river can not be a tributary to some lake.

Mr. WATSON. Bear in mind that reference is made here in the first place to Rainy River, and to Rainy River as an international river; it is dealt with specially that way, as an international river and by the name of Rainy River. Then, can it be said that, logically or properly, another provision would be made for another international river, having regard to the course of it, and merely describing it as a tributary to a small lake? I should think not.

Mr. STREETER. If Kettle River were all in Canada, would you then say it was a tributary of Rainy Lake? Does it cease to be a tributary to Rainy Lake simply because it happens to run between the two countries?

Mr. WATSON. Being within the recognized and well-known class of international boundary waters it can not be properly classed as a tributary to a lake.

Mr. CASGRAIN. I was taking this as an argument in your favor. If you convince me that I am wrong, you have weakened your case in my opinion.

Mr. WATSON. Follow a little further, if you please; it says, "by storage or other works \* \* \* which the company now has." It had no authority at that time.



Mr. CASGRAIN. Excuse me, but I think it had. If you read that statute you will see that it was passed by the Dominion Government to confirm, as it were, letters patent given by the Ontario government.

Mr. WATSON. That is absolutely ineffective.

Mr. CASGRAIN. The powers which it had at that time were given to it by the charter which was granted to the company by the Ontario government.

Mr. WATSON. Does it not go without saying that the Ontario government had no jurisdiction in the world to grant a charter that conveyed or gave franchises on international waters such as this?

Mr. CASGRAIN. Mr. Keefer said it did.

Mr. WATSON. I do not think my learned friend would be very serious in that contention. Our own courts are very full of decisions upon that point. Of course, the Ontario Legislature has no jurisdiction of any kind in regard to matters of navigation. Navigation has been held by the privy council, and I think by the Supreme Court of the United States as well, to include the driving and rafting of logs and timber.

Mr. POWELL. What privy council case is that?

Mr. WATSON. It is 1907.

Mr. POWELL. Does the general word "navigation" include that?

Mr. WATSON. It upheld a decision of the Supreme Court of Canada. This statute to which I previously referred says, "which the company now has," and that must be taken as legal power which the company now has, "or may hereafter have power to construct." It could get that power to construct across the river only from both nations. It could get the power to construct half-way across the river as proposed only from the Dominion Parliament, and there has been no such legislation, so that there was no enactment giving them the authority that is within the words "it now has." It has never since had authority, so that so far as storage is concerned it is wholly unauthorized to-day.

Mr. STREETER. Your position, then, Mr. Watson, is that the act of the Ontario government giving them power to cross there would not be good to the extent of the jurisdiction of that government; that is, to the territorial line.

Mr. WATSON. It would not be by reason of the terms and provisions of the act which contained a manifest interference with navigation matters over which they had no control. Of course, the Province owns the soil or land to the middle of the stream or river, and that is its territorial jurisdiction. With regard to other matters, and more particularly with regard to navigation, as recognized under the British-North American act, the matters of navigation are within the jurisdiction of the Dominion Parliament.

Mr. TAWNEY. The right to use the waters subject only to the question of navigation is an absolute right, is it not, in the riparian owner, whether such owner is an individual or a State or a Province?

Mr. WATSON. Quite so; and there is introduced again the operation of the Ashburton treaty, and I call your attention to the fact that the Ashburton treaty is in no way repealed, modified, or varied by the present treaty. This is supplemental with regard to particular matters, but under that treaty the waters of all international rivers are to be free and open to the use of all citizens and subjects

of both nations without interference and without interruption. The Dominion Parliament has no jurisdiction to pass any legislation that clashes with the terms of the Ashburton treaty.

Mr. POWELL. Does it not say, "subject to such regulations as may be made by the sovereign power of the State?"

Mr. WATSON. I think it is as wide as that. It has been so interpreted by one of the learned judges, a member of the judiciary of our Province, Judge Muller, who as chief justice of the common pleas division of the high court has considered the whole matter and has held that the State of Minnesota had no jurisdiction to pass any legislation that interfered or clashed with the terms of the Ashburton treaty.

Mr. POWELL. What you say is absolutely correct with regard to the St. Johns River.

Mr. WATSON. I may say to you that that decision is now the subject of a pending appeal to the court of appeals. I was engaged in the case for the defendants in the action, who were successful. I sought to apply the principle and rule which I think has been properly applied and given effect to—that is, that the terms and conditions of that treaty are paramount to the acts of all legislation and of all powers, and they will remain so until repealed or modified. To this day they have never been modified, much less repealed, and therefore it comes down to a further and stronger and more important point which may have to be taken, although I trust not, that this commission has no jurisdiction under the treaty with the assent of the Dominion of Canada and the United States Government to authorize any obstruction or impediment in that river that is in conflict with the terms of the Ashburton treaty, which is paramount to the present treaty under which you act, and that in acting you must have regard, not merely for the terms of this treaty but the terms of the earlier treaty, which are still in force and which control to the extent of its enactments.

Mr. TURNER. You are ousting us again, I see.

Mr. WATSON. I am submitting that there is no jurisdiction. These are matters again involving no jurisdiction.

Mr. TURNER. In any case?

Mr. WATSON. In any case, no jurisdiction. Of course, that is broader than a mere consideration of this application.

Mr. TURNER. Do you not think that the treaty between the two Governments, being subsequent to the Ashburton treaty, is really the treaty under which we should act and which should govern?

Mr. WATSON. I submit not, because you will observe that the treaty recites in the first place conditions and rights which are expressly consistent with the words of the Ashburton treaty, and it is subject to those conditions and to those rights that this commission is authorized and may exercise its functions and duties.

Mr. TURNER. It provides for the doing of certain things and the authorization of the doing of those things which you say are contrary to the Ashburton treaty. If that is the case, is not that an amendment to the Ashburton treaty?

Mr. WATSON. You do not amend in that way.

Mr. TURNER. Can not you amend a treaty by implication, the same as anything else?

Mr. WATSON. I do not think an express provision such as that applies unless there is a direct inconsistency, for the reason that I mention that there is the recital which is the preservation of the right under the earlier treaty, and what is given under the present treaty is subject to that recital and the preservation of those rights.

Mr. POWELL. It says it shall be free and open to the citizens of both countries.

Mr. CASGRAIN. I have almost come to this conclusion, that the 4th and 5th Edward VII contains concurrent legislation, in the sense of Article XIII, and that there being concurrent legislation there was a mutual arrangement between the United States and Canada as to the construction of this dam, and that on that head, therefore, the power or the authority or jurisdiction of this commission was ousted. I am free to say that you have, to a certain extent, made me believe that I am wrong.

Mr. WATSON. I am unfortunate, then.

Mr. STREETER. I would like to understand your position better, Mr. Watson. Do you argue that if we wish to do certain things under this treaty that we must go back to the Ashburton treaty and see that in doing those things we do not run contrary to the Treaty of 1842? Is that your idea? Do you believe that when we look at this treaty and find authority to do certain things in it that we are really governed by the language of the Ashburton treaty rather than by the language of this one?

Mr. WATSON. If it is understood by you that the Ashburton treaty is still in force and effect, that it has not been repealed, and that it has not been expressly modified, then I think before acting under this present treaty you would give effect to what is in your mind as to the provisions of the earlier treaty and would not do an act which was in conflict with the terms of the treaty which remained unrepealed.

Mr. STREETER. Must we not assume, and are we not bound to assume, that these two Governments when they negotiated and passed this last treaty, did have the Ashburton treaty in mind and modified it by the provisions of this one?

Mr. WATSON. If they intended to do so, I think they did not give effect to their intentions.

Mr. STREETER. Can we assume that these two Governments gave power in this treaty and intended the commissioners appointed under it to be governed by a treaty of 1842?

Mr. WATSON. I think you are obliged to assume that the enactments which are in force were intended still to be applicable and in force, and that you would read this and use this only so far as it could be used consistently with the other, which is the earlier enactment.

Mr. STREETER. In other words, notwithstanding the modification of the Ashburton treaty by the terms of this treaty, this commission is still to assume that it must depend upon the Ashburton treaty rather than upon this one? Is that your idea?

Mr. WATSON. My view is this, that it must remain present to your mind that that treaty is still in full force and effect and equally be present to your mind the terms and conditions of that treaty, so that

nothing could be enacted or given effect to that is inconsistent with the terms and conditions of the earlier treaty unrepealed.

Mr. POWELL. Assuming that you are absolutely correct in that, does that contradict the terms of the Ashburton treaty as to free and open navigation?

Mr. WATSON. I think it does.

Mr. POWELL. Take private individuals in connection with the crossing of a stream. Is it not a fact that all such individuals are called upon to do is to afford some ample means for the logs going through, and, consistent with that, they can dam it, create reservoirs, and do what they please? That is supported by the privy council in even a Scotch case, where lumbering interests are not as strong as here.

Mr. WATSON. The case of the Rainy Lake Boom Corporation *v.* The Rainy River Lumber Co., which was decided by Chief Justice Muller, and in which judgment was given on the 11th of September, 1912, is a direct authority in support of the proposition that I am advancing. That judgment is now pending in the court of appeals for determination.

Mr. POWELL. I will call your attention to an authority which we might regard as higher. In 1883 a question arose under the Ashburton treaty with regard to the Maduxnakik River, a tributary of the St. Johns. The United States complained of the erection of a dam by a man named Baird. The matter was carried in the forum. The correspondence went on for three or four years and it was decided that Canada had a perfect right to put a dam there so long as they afforded means for the logs of the Americans to do down the Maduxnakik River and that it was not an obstruction to free navigation. If Mr. Muller has decided the other way, he has decided as against that case.

Mr. TAWNEY. Our Government in considering this application, Mr. Watson, and submitting it, states that in the international channels shown on the blue print at the site of the dam there is at present a fall of 6.6 feet in the length of 300 feet, making rapids entirely impassable by boats, so that there is, in fact, no commerce through the channel except the floating of logs. In granting the permit for the construction of the dam they make suitable provisions or require that the dam should be so constructed as to afford free navigation of logs through sluiceways. If that is done, would there be any conflict then with regard to the Ashburton treaty as regards the rights of the public on both sides of the line?

Mr. WATSON. I understand you mean to state that it would not be possible to urge that there was any obstruction?

Mr. TAWNEY. The right of navigation which is protected under the Ashburton treaty and which is still to be protected under the exercise of the authority of the existing treaty; that it is not an obstruction.

Mr. WATSON. There is no obstruction; of course that might be, but at the same time the Ashburton treaty is not limited to the use of the word "navigation." It is wider and says the use and enjoyment as well of waters.

Mr. TAWNEY. Use in connection, however, with navigation.

Mr. POWELL. It says that it shall be free and open to the use of the citizens.

Mr. WATSON. Yes; that is for all purposes. However, Mr. Chairman, I should apologize for these remarks, for it is beyond and outside the question that is really before you. It may be before you in respect to other matters for consideration, but it is not really material in connection with this application, which is a very plain and simple one, and which, as I have submitted, is not within the terms of the treaty or any article of the treaty, and that is surely sufficient for the purpose of determining this case; and in determining this case you do not go outside of it, I suppose, or make any other adjudications except what are necessary for the actual determination of the case. This application is for a dam across the river and therefore has no basis. It is not supported by proper authority, and I submit that it should be refused, and refused without condition. I submit also that there is no occasion for a special report. I say that for this reason, that if the time ever comes—that is, if this commission should hold that it had jurisdiction—then we will, as I understand, afterwards be entitled to be heard upon the merits of the case, and I make the observation now that I hope there may not be any report such as has been suggested, for the reason that I am sure the merits of the whole matter are such as do not justify or call for any intervention by your commission, Mr. Chairman, or by any judicial authority in support of the application. It will be found when the time is reached that things are very strongly in favor of lumbering interests which, if these dams are made, must necessarily be largely destructive of their interests. It is to be borne in mind that the storage dam must be a dam all the way across the river, and it is of no purpose or utility of itself, and it is only in conjunction with the large proposition at International Falls, on Rainy River, which to-day stands as a wholly unauthorized construction, maintained without legal authority, and if the plaintiffs, I venture to say, will proceed with their action the determination of the issues in that action will establish that that dam, which is not now before this commission at all, so far as I know, that is the large dam, has been constructed and is being maintained without any authority whatever, and that this company is wholly a trespasser upon the waters.

Mr. TAWNEY. That is upon the Canadian side?

Mr. WATSON. Yes.

Mr. POWELL. There is a question I would like to get your opinion on, Mr. Watson. Article XIII is simply for more abundant caution than the treaty. Now, this section under discussion says, "shall be made by authority of the United States or the Dominion of Canada." Does that mean, or does it not mean, when it speaks about an agreement between the two parties, that there shall be a complete agreement and that the mode of building the dam and the requirements to meet the necessities of navigation shall be all agreed upon? The main thing is to provide for navigation. Take this particular case; Canada has not completed the legislation at all. The statute says in accordance with plans to be approved by the board of public works. It has not given its approval, and apparently it is not going to. In view of that state of affairs, could we say that there was an agreement between these two powers?

Mr. WATSON. I think there is an absence of it.

Mr. POWELL. Then in your view we would not be precluded, so far as Article XIII is concerned, from going into this investigation?

Mr. WATSON. You can not deal with it as a matter about which there is an agreement, and you can not deal with it on the basis that there is concurrent or reciprocal legislation.

Mr. POWELL. In other words, it is not covered by Article XIII.

Mr. WATSON. Decidedly not; there is no special agreement.

Mr. CASGRAIN. On that point, then, we would have jurisdiction, Mr. Watson?

Mr. WATSON. No. There is no concurrent jurisdiction. There is no reciprocal legislation, and there is no agreement for this proposed dam across the river.

Mr. POWELL. Assuming that the other point was against you, it would only be taken out of our jurisdiction by the fact that the high contracting parties had not in some way agreed with respect to the matter. Now, can you say that there has been a full agreement between the high contracting parties when the department of public works of the Government of Canada does not agree to anything?

Mr. WATSON. Article XIII is a mere definition of special agreement.

Mr. CASGRAIN. Supposing that our Government, having before it the plans of this Rainy River Improvement Co., as to the dam, and supposing the plans are submitted to it by the Ontario & Minnesota Navigation Co. to construct the other part of the dam, and those plans are approved by our Government, do you not think there would be a mutual understanding by both?

Mr. WATSON. That would support an application by the Ontario & Minnesota Power Co. to construct the dam within Article III, but, of course, that is not here.

Mr. CASGRAIN. There is no doubt about that.

Mr. TAWNEY. Mr. Powell, do you wish to proceed with your argument at this time?

Mr. R. J. POWELL. I would prefer, Mr. Chairman, to take it up in the morning.

Mr. TAWNEY. Mr. Thompson, do you wish to be heard at this time?

Mr. THOMPSON. I would prefer that Mr. Powell follow Mr. Watson, thus completing the statement of their side of the case, before I make my argument in reply.

Mr. TAWNEY. Very well, then. As it is now nearly 5 o'clock, and we had decided to close at that hour, we will now adjourn until 10 o'clock to-morrow morning, at which time we will hear Mr. Powell.

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WASHINGTON, D. C., *November 19, 1912.*

The International Joint Commission, pursuant to adjournment, met at 10 o'clock a. m., all members of the commission being present.

#### ARGUMENT OF MR. R. J. POWELL.

Mr. POWELL. In view of the length to which my learned friend, Mr. Watson, extended his argument yesterday, I feel that there is very little left that I can say to this commission in support of the position that we take that in the case under discussion this commission has no jurisdiction. At the same time, I feel it proper to say

that I have considerable hesitancy, not to say diffidence, in presuming to address this commission at all on so vital and profound a subject, realizing, as I do, that the commission itself, made up of men whose experience and judgment and learning far transcends by own. However, clients of mine have millions invested along these boundary waters, and, representing them as I do generally, I feel that it is my duty not only to them but to the State to render such assistance as I may to this commission to arrive at a proper and sane and sound view as to its powers and duties and authorities under this treaty.

Now, it goes without saying that to the treaty we must look for the powers of a body specially created as this body is, and I think that we would save time if I may be permitted to proceed by elimination and taking up the treaty point out rapidly the unquestionable jurisdiction or authorities which the commission possesses, bringing us down to the disputed question in the third paragraph. I wish to observe and call the commission's attention to the fact that by the second article of the treaty the jurisdiction of this commission over waters flowing into boundary waters is expressly reserved or taken away. The jurisdiction over such waters as flow into boundary waters is reserved to the high contracting parties.

Commissioner POWELL. Except navigation.

Mr. POWELL. Yes; but as to the waters flowing in, the respective parties may obstruct them and completely divert them if they see fit, subject to the right of action in the parties injured on the other side of the boundary. Now, passing the third article for a moment, it will be observed that the fourth article of the treaty is limited to waters flowing from boundary waters and waters flowing across the boundary, so that boundary waters themselves are not involved in the fourth article of the treaty. We can dismiss the provisions, then, of the fourth article from our consideration entirely at this time. The fifth article applies to Niagara only. The sixth article applies to the River St. Mary and the Milk River, and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan only, as I understand it. Article VII creates this commission. Article VIII is merely supplemental of Articles III and IV, giving express jurisdiction to this commission to hear and determine and pass upon or approve the cases enumerated and provided for in Articles III and IV, and providing for the sequence or preferences in matters of that character, and the rules of procedure, etc. Article IX gives this commission jurisdiction in cases of a request by one of the high contracting parties only to examine questions submitted and to report the facts and recommendations of the commission, but it does not give the commission any jurisdiction whatever to determine the questions involved.

Mr. TAWNEY. For your information, Mr. Powell, permit me to say that the interpretation of the treaty by the two Governments is that under Article IX one Government may request that a question be referred, but it is not referred except by the consent of the other Government, so that the two Governments interpret Article IX as meaning that in order to refer a question to the commission it requires the concurrent action of both Governments.

Mr. POWELL. I would defer certainly to the profound authority of the high contracting powers.

Mr. TAWNEY. In that connection, may I ask you your judgment on this proposition, speaking with reference to the Birch Lake proposed diversion into the St. Louis River; would it not be competent for the two Governments, notwithstanding Article II, to refer that question of the diversion of that lake to this commission?

Mr. POWELL. Absolutely. Article II reserves the exclusive jurisdiction to the respective Governments, but Articles IX and X contemplate controversies that are not enumerated in any other provision.

Mr. CASGRAIN. While the two Governments have been adopting that policy of the concurrent action, does it preclude either Government from making a reference under Article IX without the support of the other Government?

Mr. TAWNEY. It is so construed by the counsel for our State Department, at least. They have proceeded upon that interpretation.

Mr. POWELL. The distinction, however, which I was drawing in passing was that under Article IX this commission is merely a referee to find the facts and report upon them and make recommendations, but with no power whatever to determine. However, under Article X, when both Governments request and submit a question to this commission, it then is endowed with most tremendous powers. I want to say now, supplementing some remarks that Mr. Keefer made yesterday, that this commission is a novel proposition, and I think on both sides of the border we are only waking up to the enormous advancement that has been taken in the creation of the commission and of the powers invested in the commission. Here we have a Hague tribunal in a sense, and under Article X it may hear and determine, and while it is expressly provided that the high contracting parties may be bound by the determination, it might not be in due accord with sovereignty for them to do that, but there is the intent that the determination shall be final, because it provides that in case of an even division the seventh man may be called in and his determination shall be final upon the question submitted. Now, neither Article IX nor Article X interest us here at the present time, although they may become involved in the event of a disagreement. Article XI merely provides for the filing of records, Article XII provides for the organization of the commission, and Article XIII, which is of very vital importance in my view, as applied to Article III, is supplemental of Article III as defintory of what is meant in said third article. That brings us back, then, to the third article that involves the very interesting question which the commission has raised.

It seems to me in that connection that the question raised has gone outside, perhaps, of the strict issue that is framed by the application, but in view of the importance of the subject I think we are not making any mistake in considering the broad, general question, although in a sense we are discussing a moot problem. I hardly feel that it is strictly involved here. Now, let us proceed a little further by elimination under the third article. In the first place, "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted"—now, those are eliminated from the supervision or approval of this commission, I think—"or hereafter provided for by special agreement"—those cases of special agreement



are eliminated—"no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission." Now, the use or the obstruction or the diversion wholly and unquestionably upon either side of the line, wholly and unquestionably intended to be indulged in and enjoyed and used on one side of the line, is unquestionably within the terms of this article subject to the approval of the commission. Now, the power to approve is the power to disapprove; one supplements the other. Hence, when we reach the problem that is before us that becomes important.

The query before us is this, whether or not where an application contemplates an entire obstruction across the entire stream the commission has jurisdiction? We have narrowed the matter down to that question. It is true that the application here is by the Rainy River Improvement Co., without any showing whatever that that company has any right, privileges, or authorities on the other side of the line, being a Minnesota corporation. At the same time, its application and the authority under which it presumes come before this commission. The act of Congress is an authority to construct an entire structure. I do not think it is worth while for us to enter into any discussion as to what might happen if they had applied for half a dam or for a dike out to the middle of the stream. They did not to that. The thing that is before us is an application for the entire dam.

Mr. CASGRAIN. That has been admitted by the parties who have been before us.

Mr. POWELL. It is obvious that a structure of this character can not be approved by this commission until it has been approved, authorized, the treaty says, by the respective Governments. Where that is a structure which will extend across the entire stream it must have not only the authority of one of the high contracting parties, but the authority of both. Now, that authority may be given by supplemental treaty, which is referred to in Article XIII, or it may be by concurrent legislation. We could assume a case where similar bills are introduced in our Congress and in the Dominion Parliament and passed on the same day and referred to the engineers for report upon the practical questions involved in the construction, which would be concurrent legislation, although it would still be concurrent if it were not at the same time. However, it may be by the terms of Article XIII reciprocal, and reciprocal legislation might be years apart, although I do not apprehend that was what was meant. Reciprocal legislation, or legislation of such a character that everyone would assume that it had reference one to the other, and both relating to the same enterprise, would be unquestionably reciprocal.

Now, when a structure of this character is approved, and it can not be entertained for a moment until it is authorized by the respective Governments, it must be authorized either by a supplemental treaty or by reciprocal or concurrent legislation, and when that is done we

have a case of a special agreement; in other words, have a case that is expressly taken from the power of this commission by the high contracting parties by the provisions of Article III, that in the case of special agreements hereafter entered into by either of these methods the approval of this commission need not be obtained, because if it could be invoked the power to disapprove must necessarily, as a matter of law, follow. Now, it is impossible for me to bring myself to the view that the high contracting parties in creating this commission created a body that was superior to the sovereignties that created it—a body that could examine into a question of the erection of a structure which both parties had agreed to and disapprove it or approve it. Jurisdiction is never given in cases where it is unnecessary and not needed. Especially in a profound matter of this character it can not be presumed that this commission was created with powers that were useless. It is endowed with powers that are expected to be of value and to be utilized in controversies between the respective Governments. Hence in a structure of this character it can not be entertained at all until it is approved and authorized by both Governments, and when it is authorized by both Governments then the commission has nothing to say about it. That, it seems to me, is the logical conclusion we must arrive at in a question of this kind.

Now, suppose, for instance, that one of the parties authorized the structure—and I mean the high contracting parties—but the other neglected or declined to authorize it. If it neglects to authorize it, the commission can not proceed, because it can not proceed until authority has been given by the Governments that are interested, and in this case both are. If it actively objects to the authority and refuses to give it, then certainly the commission can not proceed, because it could not give approval and override the direct refusal of the other party. So, it seems to me, that logically we can not arrive at any other conclusion than that this treaty was never intended to endow this commission with power and authority to superintend matters of that sort, that being left by the terms of the treaty to special agreement to be taken up by the several Governments and held in that way.

Incidentally that brings us back in passing to a consideration of the Webster-Ashburton treaty, which is prior to this treaty.

Commissioner POWELL. Before you pass to that I would like to ask you a question. Might not the agreement between the high contracting parties be of a general nature with respect, for instance, to the erection of a dam across the river?

Mr. POWELL. As I understand your question, Mr. Commissioner, it assumes that in both Governments there existed general legislation giving general powers, but requiring that the details be passed upon by the engineering department or some other department by reference on one or the other or both sides of the line.

Commissioner POWELL. Supposing that those details had not been agreed upon, would not our jurisdiction apply?

Mr. POWELL. I do not think so. I think it is very clear that where the agreement either is in special legislation or general legislation and the details are left to some administrative body on one or the other side of the line, that is for those departments to determine and pass upon, and the general question is removed by this legislation giving the authority.

Commissioner POWELL. But where they have not agreed upon these details or where they disagree as to details?

Mr. POWELL. There, I think, is a case that comes absolutely and flatly under Articles IX and X. That is what those articles were provided for.

Mr. TAWNEY. Is it not a fact, Mr. Powell, that under the law of both countries, when general authority is given for an obstruction across or in navigable waters, the plans and the specifications for that obstruction must be approved under the law by some administrative department of the Government?

Mr. POWELL. Unquestionably.

Mr. TAWNEY. But in this particular case it is a fact, is it not, that the plans and specifications submitted to both Governments is for the completed dam, so that if those plans and specifications are approved as submitted—

Commissioner POWELL. But the United States War Department has approved and the department on our side of the line has not approved.

Mr. TAWNEY. In this case they have not approved, but the same plan has been submitted to both Governments, and if approved as submitted we would have a special agreement.

Commissioner POWELL. But in this particular case it is approved by one and not by the other.

Mr. POWELL. Our position is this: In the absence of that approval they do not come before this commission with authority. That, it seems to me, is the sensible and logical method, and the ground upon which this commission should stand. It seems to me that we are blazing a trail, you might say, along some untried lines, and the commission should be reluctant to extend by construction its jurisdiction beyond the clear intent of the treaty under which it is acting. When there is another treaty by which the jurisdiction of the commission may be invoked it seems to me that the commission should not entertain for a moment that it has jurisdiction originally to entertain. In that connection, after a very exhaustive and careful perusal of this treaty, I am frank to say that I am more impressed by what was left out than what was put in. I would not presume to criticise the eminent gentlemen who drew it and passed it, but there are some things I would like to see in it, and the most vital is the lack of supervisory powers of this commission. Our difficulties on these streams are not in the manner of the initiating of these enterprises and obstructions, but the difficulties come in the operation of them. That, of course, is entirely outside of the question, and I may be presumptuous in suggesting it, but it seems to me that that is something that should be remedied. When an obstruction is such that this commission has the power to approve it this commission should have the power to superintend it.

Mr. TAWNEY. To supervise its operation?

Mr. POWELL. To supervise its operation and control the matter.

Mr. TURNER. Do you not think the courts on either side could enforce any conditions that this commission would make?

Mr. POWELL. My experience is that our courts in questions of that character are extremely slow, and my experience has been that our War Department on this side is a thousand times slower. When there is a case, as we have had it on that river up there, where there

was a most flagrant disregard for the rights of everybody in the handling of booms and dams, there is no relief anywhere. We could go to the majors and the generals, their cousins and their aunts and the major-domos, and eventually we got nowhere, and 20,000,000 feet of logs were held in the river there for two solid seasons, and could not get out because of this maladministration of an obstruction in a boundary stream. That is the reason that we object here to things of this character. It seems to me that the power to supervise, the power to act with promptness and efficiency, ought to be lodged in somebody big enough and powerful enough, and with the backing of both Governments, to straighten things of that character out, and then leave the questions of detail to be fought out in the courts if the parties see fit to go there.

Now, while I might extend and elaborate the propositions that I have advanced here, I do not believe I could make it very much stronger. The point that is in my mind is that a case which calls for the approval and authority of both Governments must necessarily have the approval and authority of both Governments before it can come before the commission at all. And when it has it is conferred by a special agreement. I mentioned the Ashburton treaty, and it may throw some light upon the international view as to that boundary stream. I was struck in examination and consideration of the subject with the same remarkable situation in regard to a boundary stream covered as this one was by that treaty. The line was made the center of the stream, which would be the main channel of the stream, but the stream was made absolutely open and free to both parties. That, in effect, neutralized that stream and made its control joint in a limited sense. While I do not think it would go to the extent, and I would not go so far as to argue, that it gave both Governments joint control of the soil, perhaps, there was in a limited sense a joint control of the use and operation of the stream. Along that line, there is a very interesting case that would throw some light upon the respective rights of the parties and the character of the river, which arose in the St. Marys River, in Florida, some hundred years ago, more or less.

A French ship laden with merchandise intended for American ports arrived off Charleston and found that the French tonnage duty passed by Congress made it almost prohibitive for the ship to enter at that port. It went down to St. Augustine, Fla., which was in Spanish territory, and learned that it was the intention of Spain to establish a subordinate port of entry at a little place, where there were no people at all, on the Spanish side of the St. Marys River, the obvious intent and purpose being to enable ships to land there and smuggle their goods across. This ship proceeded up the St. Marys River, which was the boundary stream, and in doing so passed along the American side where there was a better channel. It was technically in American waters. It traveled up that stream for a number of miles and then anchored at the Bell River on the Spanish side. It was seized for violating our laws for entering American territory without entering ship. The Supreme Court of the United States in that case—I think it was the case of the *Apallom*, in 9 Wheaton, although I will give the exact citation later—held that under a treaty of that character, making it open and free to the shipping of both countries, that territory was

in a sense neutral territory, and it did not come into the United States in passing through United States waters in that way, although the ultimate intent, undoubtedly known to the captain, was to smuggle the goods across the boundary in defiance of American laws. Now, that seems to be, I think, the international view, and the view that we would take of this stream. That being the case, any obstruction under international law on the American side prior to this treaty under which this commission is acting could unquestionably be placed there by the United States, but subject to the right of protest on the part of the other Government if it were detrimental to the interests of the other Government, and vice versa, both parties having that right of protest, and it is in recognition of that right that this commission was organized to act. But in a case of an entire structure extending from shore to shore, joint action, if not joint concession at least joint action, the authorities say, would be necessary to construct it. That is the general principle of international law with regard to a case of that character, and that condition, if you please, Mr. Chairman, was not changed in any respect by this treaty under which we are operating, but it was in recognition of it that this treaty was adopted.

This takes me back again to the fundamental proposition upon which I base my view that this commission has no jurisdiction in such a case; that where the obstruction or structure is such that it must necessarily require joint action, either by treaty or reciprocal or concurrent authority, then it is one that calls for a special agreement under Article XIII, and the commission is without authority to proceed, because it is expressly taken away from it.

Now I will make just one more remark in closing, and that is in regard to the Watrous Island boom.

Commissioner POWELL. Another question before you take up the Watrous Island boom case. Take Articles III and XIII and construe the two together, and bearing in mind what Article III says, does not the mere use of the words "concurrent legislation" lend color to the view that they contemplated some such case as this? Otherwise, why "concurrent" or "reciprocal legislation"? If it were intraterritorial entirely there would be no necessity of any concurrent legislation. Then again, go back to Article III and notice the fact that there is left out all matters of special agreement, in view especially of the very general words of the preamble of the act that all disputes of every kind and nature between the Governments or the citizens of either Government shall be disposed of under this treaty, on the doctrine of the application that you mention, is it not fair to assume that they eliminated from Article III the subject matter of special agreements does give us jurisdiction?

Mr. POWELL. That is my idea. That is the point I am making; the fact that it did say nothing about the construction across a stream except in cases following the preamble where a dispute has arisen and is covered under Articles IX and X.

Commissioner POWELL. Supposing that that would include all these joint territorial matters, if I may use the phrase; if those are excluded by Article III, were it not for that exclusion would they not come within our jurisdiction? If so, then it would include these international matters which affect territorial jurisdiction.

Mr. POWELL. I can not agree that it is the position of Article III to exclude all these joint territorial matters. Article III relates only to joint boundary waters. The joint boundary waters is the only thing that Article III is relating to.

Commissioner POWELL. But I am speaking about the extension into the two. Each legislative power is legislating for its own territory, presumably. Now, what is the need of concurrent legislation if it contemplates purely one territory and not both?

Mr. POWELL. I do not apprehend that that was what was meant. When we speak of special agreements I think they had in mind cases where something affected both territories.

Commissioner POWELL. There is another question I would like to ask you, and that is this: Taking these words as they are, and I do not care how literally you take them, is there anything in the words as given here in Article III which looks to the purpose, the object, the motive, or the power of or by which this work is to be constructed?

Mr. POWELL. I think not.

Commissioner POWELL. It is purely and simply the obstruction, independent entirely of the motive or object for which it is constructed or the power by which it is constructed.

Mr. POWELL. I agree as to that.

Commissioner POWELL. Then take the case of a bridge with a number of piers stretched across the river. Say that half are in American territory and half in English territory; would not the piers in the American territory be an obstruction and must they, too, not be considered as an obstruction in American waters independent of the motive for which they were put there or the power by which they were put there?

Mr. POWELL. There is a further limitation that that question leaves out, and that is this: That the only obstructions, uses, and diversions that are contemplated by Article III are those which affect the natural level or flow on the other side of the boundary.

Commissioner POWELL. But the piers would do that to a certain extent. You can not narrow the channel of a stream by a pier without interfering with the velocity of the stream.

Mr. POWELL. No. However, the point I make is this, and I think it answers your question: That where a structure is of such character that it extends outside of the territorial jurisdiction of one of the high contracting parties, it must necessarily have some authority from the other high contracting party. It can not be extended otherwise. And the instant you bring in that authority of the other party you have your concurrent legislation and agreement.

Commissioner POWELL. Take a hypothetical case. Supposing that the Americans authorized the construction of a pier out to the territorial division or boundary line, and by accident or design the parties had trespassed on the territory of the other high contracting party, say, 10 feet. There is not a construction limited exclusively to one side, but it is one that by accident or design has gone across 10 feet into the territory of the other. Would the fact that it goes over the boundary line 10 feet take it out of our jurisdiction?

Mr. POWELL. I do not think so if it went there by accident.

Commissioner POWELL. If by design, would it?

Mr. POWELL. Yes.

Commissioner POWELL. Would you not then be forced to this position, Mr. Powell, that what was wrongfully done under an act of one high contracting party, which is extraterritorial and consequently a nullity, would deprive us of our jurisdiction?

Mr. POWELL. No; that is not the point as I understand it. It is this: A structure which is designed by its terms and by the use for which it is put—

Commissioner POWELL. But what business is it of ours what the design is? We are not dealing with designs, with motives, or with schemes. We are dealing with facts, with obstructions that exist. That gives us our jurisdiction. Supposing there were a pier on the Canadian side of the river. It is there and I do not care what its object is and we have jurisdiction over it, have we not?

Mr. POWELL. Unfortunately, that brings me back to the suggestion I made a while ago. You have jurisdiction to approve it in advance, but you have no jurisdiction to remove it.

Mr. CASGRAIN. But the question put to you by Commissioner Powell did not relate to this case at all, I think.

Mr. POWELL. I think I can clear that point. I will admit without question that where an application comes before this commission touching an obstruction, the commission is not bound to inquire in advance as a jurisdictional prerequisite as to what the intent was. They undoubtedly would have jurisdiction to that extent and the fact that it might go one way or the other is purely hypothetical; but the point is that where there is clearly a case that must extend across, where the plan is a comprehensive one, and where it must call for the authority of both Governments, then you have a case where this commission has no jurisdiction, because it can not take jurisdiction until it is approved, and when it is approved it can not take jurisdiction because it is approved.

Mr. TURNER. You made an admission that we had nothing to do with the design. Have we not everything to do with the design?

Mr. POWELL. Perhaps I did not state what I had in mind. I had in mind this: That as a matter of jurisdiction as to whether the commission can examine into it at all and the matter comes before the commission in which it is not clear that it is one that calls for joint authority, then the commission would unquestionably have jurisdiction to examine into the design and the purpose of the structure, etc.

Mr. TURNER. Does this tribunal approve anything except the design?

Mr. POWELL. That is all, but the point I had intended to make was this: From the plans and specifications filed here it is exclusively shown that it is the structure that requires joint action. The great question, I think, that is before this commission is whether or not, where both Governments approve, this commission can disapprove, and whether if there is a case calling for joint action, and one Government approves and the other does not, the commission has anything to say about it at all.

Commissioner POWELL. You mean by government, not executive government, but the state?

Mr. POWELL. I mean the sovereign power.

Commissioner POWELL. I was not putting forward the contention at all that we have nothing to do with this act. I am simply speaking of our jurisdiction alone.

Mr. POWELL. That is what I had in mind. We split hairs when we consider as to whether you have jurisdiction to think of it or whether you have jurisdiction to proceed after you have authority.

Now as to that boom, I am forced by the logic of the argument that I have already made and by the construction of the treaty which I have placed here to take the same position in regard to the boom that I have taken in regard to the dam, and I do it with regret; because I am frank to say that I would much prefer that this commission did have jurisdiction of structures of that character, and not only jurisdiction to approve or disapprove, but jurisdiction to superintend.

Mr. TAWNEY. Mr. Powell, you were not present yesterday when the Government of Canada filed a statement in reply to the application of the Watrous Island Boom Co.

Mr. POWELL. I knew it had been filed, however.

Mr. TAWNEY. Under our rule, the applicant will have time in which to file a reply statement, and when the issue is finally joined, then the commission will fix a time when they will take up for consideration the Watrous Island Boom Co. Of course, if you have any expression regarding the matter that any of the members of the commission would like to hear at this time, you may proceed with your statement in that regard.

Mr. POWELL. It would be outside of the issue, then, in view of what has been done, and I will not take the commission's time any further. I wish to thank the commission for its very courteous treatment.

Mr. CASGRAIN. I think we have to thank you.

Mr. POWELL. It is a novel question, and one in which I feel very incompetent to participate.

Commissioner POWELL. I think you have acquitted yourself very well.

#### ARGUMENT OF MR. JOHN THOMPSON, K. C.

Mr. JOHN THOMPSON (for Canadian Government). Mr. Chairman and members of the commission, Mr. Watson yesterday based his argument to you on two grounds, one on the want of jurisdiction and the question of principal generally, and the other as to the imperfection of the present application. The Government of Canada is not particularly interested in this Kettle Falls application, as such; at all events, that is something which we can discuss later, if you decide to have jurisdiction, when the merits of the application come before you. But the Canadian Government is interested in the principle involved; the principle of constructing what I might call an international dam. If it should be the intention of this commission to decide upon this particular application and to reject it on its merits and defects, I shall not take up the time of the commission in arguing the question of jurisdiction. As I say, I am not particularly interested in this particular dam, but I am interested as counsel for the Government of Canada in the general principle with regard to the construction of such dam. I do not know whether the commission at present is prepared to give any intimation as to whether they will form their judgment on the principle involved or on the merits, if there should be such, in this particular application.

Mr. POWELL. We have heard argument on both.

Mr. THOMPSON. Argument was addressed to you on both branches. I would not take up the time of the commission now if I inferred



they were simply going to proceed on the merits or demerits of this specific application.

Mr. TURNER. I assume this commission will have to determine whether or not this application presents a case which gives it jurisdiction.

Mr. THOMPSON. Quite so.

Mr. TURNER. And that it will be necessary to look at the application in determining the question.

Mr. THOMPSON. There are, of course, two sorts of defects, one which is curable, and the other which is not curable, and this commission in investigating the application might decide that this specific application has defects which might be cured. For instance, it has not yet secured the approval of the Government of Canada to its plans. That is a defect which can be cured. On the other hand, Mr. Watson recited certain objections, which, if the commission decided in one way, might be held incurable, such, for instance, as the revocation of the charter of the applicants, after the charter was made. That, generally speaking, would be a defect which could not be cured, because the incorporated company being out of existence could not secure approval by the commission of its plans.

Mr. CASGRAIN. Speaking for myself, I am not going to decide any general question of the jurisdiction of this commission in this case, unless I see I am absolutely obliged to do so. I am going to decide this case upon the facts as they are presented to us here in this application.

Mr. THOMPSON. I would not desire to take up your time if I thought I was safe in leaving the question of principle for future discussion.

Mr. TAWNEY. I think you had better proceed to discuss the questions which have been presented on either side, if you desire to do so.

Mr. THOMPSON. Then I would suggest that when you are forming your judgment, you might separate the defects, if there are such in this application, from your decision on the question of principle. In other words, if you decide that there are defects which are curable in this application, you might decide that you have or have not jurisdiction if these defects are cured or if they are not cured. I submit that while this particular application is not one in which the Dominion of Canada is particularly interested, especially at this stage, yet, there are questions which will arise in the very near future in which the Government will be very materially interested, and on that ground I submit that the judgment of the commission should state very clearly whether it is a question of principle which causes the commission to reject or allow this particular application, or whether it is because of a defect in the application itself.

Mr. TURNER. I do not remember that counsel on either side urged any technical defect. I think their arguments all went to the question of principle.

Mr. THOMPSON. That may be so, but my impression was that Mr. Watson was urging the rejection of this application, on the ground that the application by the Rainy River Improvement Co. to the United States Government was one which concerned a dam extending across the whole river, that the act of Congress authorized them to build that dam across the whole river, and that that act was null and void because it presumed to deal with territory not in the United

States, and his argument was that because it assumed to do so, therefore this act was null and void in toto.

Mr. TURNER. Yes; I think your are right about that.

Mr. THOMPSON. If that is a defect it is a defect in this particular application, and my observations at first were that if you held this as a defect which is curable or incurable, your decision should be separate on the general question of the application to build an international dam. I only want to argue the question of principle; I am not interested at the present time in the merits or defects of the Rainy River Improvement Co. application.

Mr. TAWNEY. You can proceed on the question of principle.

Mr. CASGRAIN. In the state in which the case is at present, the Dominion Government not having approved of the plans for the completion of the dam on the Canadian side, is it possible for this commission, in view especially of the defence which you put in, to proceed to give any approval of the plans, the approval of which is applied for by the Rainy River Improvement Co.

Mr. THOMPSON. I think not, sir.

Mr. CASGRAIN. I think that is a vital question. Why should we go into a discussion of this very important and far-reaching question of the jurisdiction of the tribunal when preliminary to that we can not give any approval of these plans?

Mr. STREETER. I would suggest that it is possible there may be some difference of opinion among the commissioners as to that, and I for one would like to have Mr. Thompson proceed with the discussion of the general principle involved.

Mr. POWELL. Especially, Mr. Casgrain, in view of the fact that the adjournment of this discussion at Ottawa was on this particular point. The adjournment was made to allow for further argument on this point, and it is a point specially before us to-day and which these gentlemen were brought here to discuss.

Mr. CASGRAIN. Surely we are not going to have a discussion now on the general jurisdiction of this commission.

Mr. POWELL. We would be putting ourselves in a strange position if we invited these people to come here to present their argument and then tell them that we would not hear them.

Mr. CASGRAIN. The altered circumstance is that since that time the Dominion of Canada has put in a defense.

Mr. THOMPSON. I submit that this treaty should be interpreted in a broad and liberal manner, and I refer to the proclamation. This proclamation covers two cases of dispute which are now existing, those which may arise, not only between the respective Governments, but also—and this is important—between the inhabitants of both countries. It gives the private individual a right of redress which he may not otherwise be able to secure from either Government. The treaty reads:

Whereas a treaty between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, to prevent disputes which are now pending between the United States and the Dominion of Canada—

These are important words, I submit—

involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other, along their common frontiers.

Further on it says:

The United States of America and His Majesty the King of Great Britain and Ireland, of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either, in relation to the other, or to the inhabitants of the other.

Now, sirs, in view of that preamble can it be said that there are any cases unprovided for by this treaty? In light of that preamble let us look at Sections III and XIII. An application of this nature to construct what I might call an international dam—that is, a dam extending from country to country—is a matter of much greater importance; it is one which might and probably is of much greater nuisance to many people using the boundary waters than a dam extending a short distance into the boundary water, and which only slightly raises the level on the opposite side. Let us look at Articles III and XIII, bearing in mind the broad, general words of the preamble of the treaty. Article III refers to the uses, obstructions, and diversions heretofore permitted, affecting the flow and level on the opposite side, and says that no other diversions or obstructions will be allowed without the consent of the Government and the approval of this commission. That does not cover all cases of obstructions or diversions; there are certain other diversions which are referred to in Article III, and these are set out and defined in a general way in Article XIII. Article III referred to obstructions which the respective parties agreed not to do; it is a negative proposition. Article XIII refers to certain things which the contracting parties to this treaty may agree to do. I submit that in view of the words of the proclamation and the general tenor of the words in Article III with Article XIII it does not, as my friend, Mr. Powell, of Minneapolis, contends, refer to the construction of such a work as an international dam; it refers to works of a public nature which require the consent, direct agreement, or mutual arrangement by the contracting parties to the treaty. In other words, my contention is that Article III refers to diversions, constructions, and uses by private individuals, and Article XIII refers to works of a public nature. It is common knowledge that for years past this question of damming Lake Erie, in order to raise the level, has been under discussion by eminent engineers. That would necessarily, from the nature of the work, require it to be a public undertaking. It is one which would have to be undertaken by both Governments. One Government alone, by constructing a dam to the international boundary, could not raise the level in anything like a satisfactory manner if an increased level were desired. I submit that it is just such a dam as that which may be necessary in Lake Erie that is contemplated by Article XIII of the treaty. Article XIII refers to direct agreements between the parties. Such a dam would be an instance in point; it would be by direct agreement between the Governments to construct a dam for their mutual advantage.

Mr. TAWNEY. Before you leave that point, let me ask you, is Article XIII anything more than a definition of what is meant in Article III by the use of the words "or hereafter provided for by special agreement between the parties"?

Mr. THOMPSON. I submit that it is. My argument now is that I submit that it provides for structures or obstructions which both Governments consider to be in the interests of the respective countries, and should be carried out, and which necessarily should not be submitted to this commission for its approval, because it would be beneath the dignity of two sovereign States to submit to the approval of a commission, a creature of their own making, works which they mutually consider beneficial to the countries, and for that reason I submit Article XIII refers to works of a public nature and not to dams such as the one in question.

Mr. CASGRAIN. You have noticed the words here, "all cases where special agreements between the high contracting parties are referred to in the foregoing articles." Does that confine it to Articles III and IV?

Mr. THOMPSON. No, sir; the words "special agreement" are referred to in other articles.

Mr. POWELL. It occurs in two or three other sections. It was mentioned in Article II, Article III, and Article IV.

Mr. THOMPSON. I submit that it really does not affect my proposition because my contention is that the preamble sets out that all questions should be settled by this commission and a dam such as the one contemplated must come under either Article III or Article XIII.

Mr. TAWNEY. Do you claim that the preamble confers any jurisdiction whatever upon the commission?

Mr. THOMPSON. Not the preamble. I was arguing from the general rule of the interpretation of the statutes, that if there is any ambiguity in the enacting clauses, one refers to the preamble to throw light upon such ambiguity, and my contention is that as this preamble, the recital of the treaty itself, specifically refers to the fact that this treaty is passed for the purpose of settling all disputes which have arisen or may arise, not only between the Governments but also between the inhabitants. I submit in view of these very general words—and more general words could not possibly be used—a dam such as the present one is certainly contemplated by the treaty, is not left suspended in the air, and must come under Articles III or XIII. My argument is that an international dam is not one which has been referred to in this treaty in Article XIII; I submit that your commission has the jurisdiction under Article III. It is quite possible, in the case of the Kettle Falls Dam, that both Governments could mutually agree by direct agreement or reciprocal legislation, to construct such a dam as an international work conjointly by both Governments. But, in the absence of any such direct agreement or reciprocal or concurrent legislation, in the absence of their constructing it as a public work, I submit it is competent for this commission to pass upon the expediency, the advisability, and to inquire into the damage if any that such a dam may cause to the inhabitants on one side or the other of the boundary line.

Mr. TAWNEY. That is based on the assumption that both Governments have authorized it.

Mr. THOMPSON. That is it, sir; and it is because that question is still in doubt—to my mind it is not really in doubt—that I raised the preliminary question as to whether you wished to hear argument on the general principles.

Mr. CASGRAIN. Have you there 4 and 5 Edward VII?

Mr. THOMPSON. Yes. It appears to me that this application is undoubtedly not ripe for hearing by the commission.

Mr. TAWNEY. Your argument in favor of this commission having jurisdiction is based upon the fact that if both Governments authorized the construction of this dam, that then before the parties can proceed to the construction of the dam the approval of this commission would be necessary and the commission would have jurisdiction to approve. Is that your opinion?

Mr. THOMPSON. That is my opinion, sir. I am not prepared to say that there is any order of precedence in this matter. I disagree with my friend, Mr. Watson, on that point, who contended that the authority of both Governments, or in the case of half a dam, a dam extending to the international boundary or any other obstruction, the consent of the Government was first necessary and that that was a condition precedent to any application being made to this commission for approval. I submit there is no hint of any such order of precedence in Article III of the treaty.

Mr. TAWNEY. Except the way in which the authority is expressed—the precedence which is given to authority of both Governments has got no weight in determining the question of precedence.

Mr. THOMPSON. I think not, sir. I think the Governments were referred to first because that would be the natural order in which the applicant would proceed. I can quite conceive that if the applicant offhand came to this commission for approval of a dam, this commission would say: We will not entertain this, because while we may approve of it, either Government, or, in the case of what I might call half a dam, the Government of the country interested might throw it out and our work would be null and void. That is the only indication which I find in the treaty of the order to be followed by the applicant. What my impression of the reading of the treaty is, that this is not a condition which from the words of the treaty would cause the application to be rejected by this commission, on the ground that the applicant had not first secured approval of the Government.

Mr. TURNER. If the authority of the Government does not proceed in the application to this commission, then the commission might be dragged all over the country, up and down this boundary line, from the Atlantic to the Pacific, by any Tom, Dick, and Harry who might want to initiate projects that the Government had not authorized.

Mr. THOMPSON. Yes, sir.

Mr. TURNER. Do you think the treaty intended us to enter on any such course at the mere initiative of private parties?

Mr. THOMPSON. I am not prepared to say that the respective contracting parties were considering the feelings of the commission at the time.

Mr. TURNER. Were they not considering to some extent the ability of the commission to deal with these matters?

Mr. THOMPSON. I dare say they were considering the natural order of procedure; in regard to your suggestion that any Tom, Dick, or Harry might make an application to the commission, the same would apply with regard to the Government, and then of course the Government would be dragged all over the country in the same way.

Mr. TURNER. The Government does not go all over the country.

Mr. THOMPSON. They send their officers.

Mr. TAWNEY. They must first obtain legislative authority before the administrative department of the Government acts. Is it not a fact that one of the reasons why the treaty provides for the approval of the commission after mentioning authority by the two Governments, that the two Governments made this treaty and created this commission for the purpose of settling questions which may arise, by reason of either Government exercising its authority over boundary waters within its jurisdiction, it might affect the rights and interests of people on the other side, and until that authority is given and the plan for it is approved, there is no way whereby the extent of the injury on the other side could be ascertained, and, for that reason, they contemplate the approval of the commission following the authority and the approval of the plans under which that authority is exercised.

Mr. THOMPSON. That would be the logical manner to proceed.

Mr. TAWNEY. It is reasonable. Suppose that the two Governments contemplated that approval by the commission should be of a subject which has been authorized, the effect of the construction of which project on the other side of the line could be ascertained from the plans of the project as approved by the administrative department and as authorized by the legislative department, so that our approval necessarily would follow the authority of either of them within whose jurisdiction the proposed work is to be located.

Mr. THOMPSON. I think, sir, that that is the natural manner in which to proceed, but I submit—I am speaking generally now and not with reference to this specific application—I submit that would not be a fatal defect in the application. It is certainly open of course to this commission to refer any such application back, but what I say now is that I do not consider that fact that the applicant came here before he applied to his Government should be a fatal defect which would cause the absolute rejection of this application by this commission. Of course, it would be open to the commission to reject it or to postpone it, but if it were a bona fide application, I submit that the procedure adopted by this commission would be to postpone the application and not reject it; postpone it until he secured proper legislative authority from the country in which he was operating.

Mr. CASGRAIN. I see by Section I of 4 and 5 Edward VII, chapter 39, an act respecting the Ontario & Minnesota Power Co (Ltd.), certain powers are given to the company to construct and develop, etc., dams, canals, raceways, and so on, provided that no work authorized by this section shall be commenced till the plans thereof have been submitted to and approved by the Governor in Council. Supposing the Governor in Council, having before it a true statement of affairs as they exist, the application which is made or the approval of plans which has been given by the authority of the United States, approves of the plans of the Ontario & Minnesota Power Co. for the construction of this dam; the plans are submitted to the privy council and the privy council approves of these plans, where does this commission come in? Would you not say that under Article XIII of the treaty there has been a special agreement between the parties, either by reciprocal legislation or by concurrent legislation?

Mr. THOMPSON. The language is very specific on that point.

Mr. CASGRAIN. Article XIII reads:

## ARTICLE XIII.

In all cases where special agreements between the high contracting parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

Do you not think that if acting on this act, which I have quoted to you, the privy council approved of the plans submitted, knowing the facts as they are today, that would be a mutual arrangement expressed by concurrent or reciprocal legislation?

Mr. THOMPSON. I submit not. I am dealing now with this specific instance, of course. In the first place, the Ontario & Minnesota Power Co. statute was passed in 1905, years before this treaty came into effect. The Rainy River Improvement Co. bill before Congress was passed in 1911, six years afterwards. Now, sir, could that be said to be concurrent legislation?

Mr. CASGRAIN. But that statute had no effect until the plans had been approved.

Mr. THOMPSON. That is very true and the Parliament of Canada can only be assumed to be legislating with regard to its own territory up to the international boundary. A further point with regard to the concurrency or reciprocity of this legislation is that it was the Rainy River Improvement Co. that applied to Congress and they were given certain powers. It is another entity, entirely, that applies to the Parliament of Canada for permission to do certain works, and the powers contained in this statute which they obtained from the Parliament of Canada are entirely different from the powers which were contained in the legislation obtained from Congress.

Mr. CASGRAIN. That is a question of fact, and I have looked up the statutes. But if you go to the genesis of it you will find that the powers asked for by the Rainy River Improvement Co. are exactly the powers which the Ontario & Minnesota Co. are asking for. It is a confirmation of an agreement between Backus and the government of Ontario, which agreement was taken over by the Ontario & Minnesota Power Co. in virtue of a charter which was granted to the company by the Ontario government, and this Federal statute was granted to confirm the powers which Ontario had granted to the Ontario & Minnesota Power Co.

Mr. THOMPSON. That, apparently, is what is all underneath, but I submit that in interpreting these statutes we ought not to consider what Mr. Backus or his associates intended or wish to do.

Mr. CASGRAIN. I will tell you why I do that. It refers to letters patent in the first place, and it says:

In connection with said power, including the increase of the said power on Rainy River, by storage or waters contributory to Rainy Lake which the company now have or may hereafter have.

The company had some powers and these powers are to be found by reference to the charter of the company and to the agreement which that charter permitted the company to take over from Backus. You will find that the powers are exactly the same for the Canadian side as those which are asked for by the Rainy River Improvement Co. on the American side. It seems to me that if that is the state of

the case in future, if the Government of Canada approves of these plans, then this statute is concurrent or reciprocal legislation. It could have no effect before the plans are approved. I may be wrong, but my present view is that there would be under the circumstances a special agreement between the parties, and that, therefore, the powers of this commission quoad this specific case would be ousted.

Mr. STREETER. I am not fortunate enough to have reached any conclusion on this, and I would be very glad to have Mr. Thompson express his views fully on this question of principle.

Mr. CASGRAIN. I hope I have not, by anything I have said, curtailed the liberty we have given Mr. Thompson to express his views fully before the commission.

Mr. THOMPSON. It was because of that possible doubt that in opening I asked whether the commission would proceed to give its judgment on the merits or demerits of this application.

Mr. CASGRAIN. I have certain doubts in my mind and I would like you to remove them, and that is the reason I am putting the question.

Mr. THOMPSON. I will do so so far as I am able to, and I suggest there is only one element of mutuality in this legislation which was obtained by the applicants. The only common ground of mutuality is that the Rainy River Improvement Co. and the Ontario & Minnesota Power Co. were both empowered to construct certain works for the purpose of developing power somewhere in the district of Rainy Lake. That is the only ground of mutuality.

Mr. TAWNEY. You say "somewhere"; should you not say "anywhere" in Rainy Lake?

Mr. THOMPSON. No, sir. The statute, 4 and 5 Edward VII, authorizing them to construct works for power purposes at or near the town of Fort Francis, and, sir, that they may construct storage or other works on streams tributary to Rainy Lake.

Mr. TAWNEY. That would mean anywhere.

Mr. THOMPSON. In that general district; yes, sir. I am speaking from memory, but my impression is that the act of Congress is not in the same words. As I pointed out, the legislation obtained in the United States was by the Rainy River Improvement Co., that is one entity with certain powers; the legislation obtained in Canada is by the Ontario & Minnesota Power Co., and if it were not that we had knowledge from other sources that it is Mr. Backus and certain associates who are interested in the general scheme, could we by any means say that the entities are identical?

Mr. TAWNEY. Is it necessary, in your judgment, that they should be identical?

Mr. THOMPSON. I think not necessarily, sir, but if I pointed out that the interests were the same, then there would be some ground to say that there is concurrent or reciprocal legislation or some direct agreement. But where we have the entities separate and distinct and the powers separate and different there is only one ground of mutuality, and that is the general power to construct works in the Rainy River district. I submit that is not a sufficient ground of mutuality; that the legislation can not be called in this instance either concurrent or reciprocal to bring it within Section XIII. Now, sir, there is only one other point.

Mr. POWELL. What are the differences? I see one is to complete the work in accordance with the provisions of a certain act; the other



is to complete the work in accordance with the requirements of the department of public works of Canada, and your argument is that there is no guaranty that they mean the same thing.

Mr. THOMPSON. There is no concensus ad itum in any respect.

Mr. POWELL. The only common thing is the obstruction of some kind.

Mr. THOMPSON. Yes.

Mr. POWELL. And you say it should be more specific and show the obstructions to navigation?

Mr. THOMPSON. My contention is that, in order to bring the legislation within concurrency and reciprocity, either the applicants or the corporation incorporated by the statute must be the same; must have the same powers and be authorized to carry on their work in respect to the specific authority which they require. Otherwise, as in this case of the Ontario & Minnesota Power Co. and the Rainy River Improvement Co., there is only one element of mutuality, as I pointed out, and that is power to do some work in that large district. That is all I have to say on that point. I submit, in view of this preamble and recital, Articles III and XIII are exhaustive; that they are intended to cover all outside questions which may arise and all possible questions of dispute, not only between the parties but between the inhabitants. Is not this a very happy instance of the dispute which the preamble contemplates, a dispute between the inhabitants? Here we have the Rainy River Improvement Co., another name for Mr. Backus and his associates, who have expended vast sums of money in developing the resources of that country; and, on the other hand, we have Mr. Powell and Mr. Watson, representing numerous lumber companies, private individuals, objecting to these works, which they say will injure them in their business. Is not that exactly what was contemplated by this treaty? Was it not contemplated by it to prevent disputes between the inhabitants of the two countries with regard to any question which might arise over the diversion or obstruction of these streams? Now, sir, under Article III it is practically clear, in spite of Mr. Watson's suggestion, that this commission has been ousted from all jurisdiction. I submit it is abundantly clear that this commission can authorize the construction of the dam from the United States boundary out to the center of the river if it had the approval of the United States Government. It is abundantly clear, and that is beyond question, that that is what was intended by Article III.

Now, supposing to-day you authorized Mr. Backus to build a dam to the center of the stream from the Canadian side, he requires first of all to get the consent of the Canadian Government and then the approval of this commission. He constructs his dam, and to-morrow the level of the river is affected on the other side. Suppose he has a magic ring and overnight he constructs his dam. Could not he or any other person to-morrow come before your commission and say: I wish to construct a dam from the American side to the center of the stream. He would have to apply to the War Department of the United States for authority of the plans, because that, under this treaty, is a dam which would alter, or had already altered, the level and flow of the stream. Suppose he builds his dam to-day on the Canadian side under your authority, could not he again—next year, we will say—apply to the War Department for authority to build

from the United States side to the boundary line, and would not he necessarily be obliged to come to this commission under Article III for your approval, because he would then be altering the level on the other side? And if that is so, is it not a mere juggling of words to say that because I have in this case to apply to-day to build a dam from one side to the other that you will reject my application? Whereas, if I apply to-day you will grant me one side, and if I apply, say, next year you will grant me the other, and I receive my application which will then enable me to complete my dam. Is it not a mere juggling with words to say that in the one instance you reject my application because it dams the entire stream, but that in the other case my separate applications are allowed, although the obstruction in the stream is exactly the same. Mr. Watson intimated that this commission has no jurisdiction and that this treaty under which this commission has been formed is inoperative and powerless so far as it abrogates in any respect the provisions of the Washington treaty. Now, sir, if we apply the ordinary common rules of interpretation of the statutes to this instance, is not the ordinary interpretation to this effect: That if there is an already existing statute and there is a subsequent statute passed which either directly or indirectly affects the provisions of the entire statute, that then the provisions of the prior statute, in so far as they conflict with the subsequent statute, are thereby either repealed or modified. The Washington treaty was made between the United States and Great Britain, and in this instance the treaty is between the same two high contracting parties; and I submit, therefore, that if the provisions of this treaty conflict with or modify the provisions of the Washington treaty, then in so far as they do conflict or modify them the provisions of the Washington treaty are thereby modified or repealed.

Mr. TAWNEY. Before you conclude I wish to refer to one statement you made that is of some interest to me. You referred to this being a case of a controversy between the inhabitants of the two countries. Assuming that both Governments have authorized it and that there is a controversy between the inhabitants of the two countries that is not settled and for the settlement of which this commission has been created, do you think that where the two Governments have by reciprocal agreement or legislation referred to in Article III of the treaty and Article IV, and defined in Article XIII, that any controversy between the inhabitants could thereafter be brought before this commission under this treaty?

Mr. THOMPSON. No, sir; and I touched upon that in my argument when I pointed out that under Article III practically all cases of obstructions, diversions, or uses were provided for.

Mr. TAWNEY. Each sovereignty is the guardian of its own people.

Mr. THOMPSON. Yes, sir.

Mr. TAWNEY. And the presumption is that in granting authority for a structure where the two have mutually agreed they have taken into consideration the rights and interests of the inhabitants of both countries.

Mr. THOMPSON. Perhaps I did not make my argument quite clear, but I pointed out that by the interpretation clause Articles XIII and III covered all possible cases of dispute; that practically all cases of dispute which may arise over obstructions, uses, or diversions of boundary waters are to be settled, first, by the authority of the

Government and then by the approval of the commission, which showed clearly that Article III referred to cases where the obstructions, uses, and diversions were to be made by private individuals; and I pointed out that there was an exception made, for instance, in the case of the Lake Erie Dam. I pointed out, citing that case, that there might be instances where the Governments were directly interested in making an obstruction, diversion, or use of boundary waters, and that in such an instance Article XIII provides that by direct agreement between the parties such an obstruction may be made, namely, by agreement between the contracting parties.

As I pointed out, it would be beneath the dignity of the sovereign powers when they both agreed upon a work that they should then be obliged to submit it to the commission, and it was in view of that, I argued, that Article XIII in all probability referred to works of a public nature. I also pointed out that I could not conceive of either Government being so solicitous for the welfare of a private corporation that the two Governments would make any direct agreement with reference to that private individual to enable him to obstruct, use, or divert the boundary water. My contention is that Article XIII is there as an enabling clause for the Government to reach an independent agreement with regard to international public works. That is all I have to add.

#### REPLY BY MR. WATSON.

Mr. WATSON. May I ask if, under your procedure, I have the right to be permitted to make an observation in reply? If not, I would ask, as a matter of indulgence, to be heard for a few moments.

Mr. CASGRAIN. You have the privilege of proceeding.

Mr. WATSON. I wish to make one or two observations. I point out what I think is very material, and that is that the Government of Canada, representing as it does, so far as this proceeding is concerned, one of the high contracting parties, has announced to your commission that it has not passed any concurrent or reciprocal legislation. That announcement is on record from one of the high contracting parties, and in view of that I submit to you that your commission would naturally and properly have regard to the statement of the party through its counsel that no reciprocal and no concurrent legislation has been passed. I am content with that. I think that wipes out every consideration of the present hearing.

Mr. TAWNEY. Let me ask you this question: If that be true, then, irrespective of the facts before the commission, the commission would be bound by the declaration, oral or written, of either of the high contracting parties, and that could oust this commission from jurisdiction at any time? Once the matter is submitted by the high contracting parties to this commission, is it not the province of this commission to determine the questions that are involved, and whether there is reciprocal legislation or not is a matter for the decision of this commission, after the matter has been once submitted to them, and the decision may rest upon the construction of what legislation they have enacted.

Mr. Watson. It would occur to me that a commission appointed as this is, by the two high contracting parties, acting under the direction of the two high contracting parties, one-half of the members being appointed by one party and the other half being appointed by

the other party, that the moment a submission is made by an authority so high as one of the contracting parties, that there is no reciprocal or concurrent legislation, that the whole commission would be at a standstill with regard to that subject and would not feel at liberty to contest a matter of so much importance in the exercise of its jurisdiction. However, that is a matter for your judgment and discretion.

Mr. CASGRAIN. You are relying on the statement that the Government of the Dominion of Canada has not approved of the plans of the applicant.

Mr. WATSON. Yes; and counsel representing Canada stated here to-day that there is no concurrent or reciprocal legislation. That statement is on record. That statement is made of record by the pronouncement made by counsel for the Dominion of Canada. One other point. Mr. Thompson, representing the Government of Canada, referred to what he deemed a proper interpretation of the articles of the treaty, and he bases his argument upon what he is pleased to refer to as the preamble of the treaty. But I point out to you that there is no preamble to this treaty; it is not the same as a statutory preamble.

Mr. POWELL. That would make it worse for you.

Mr. WATSON. No; it makes it much better for us.

Mr. POWELL. It is in the treaty.

Mr. WATSON. It is not in the treaty at all. The treaty is limited to the articles, and what Mr. Thompson refers to is some proclamation by the President of the United States announcing the treaty.

Mr. CASGRAIN. Oh, no.

Mr. POWELL. There is more than that in it.

Mr. WATSON. Let us look at it. He says it is a proclamation and he makes it a proclamation, and then he recites.

Mr. CASGRAIN. His Majesty the King says the same thing.

Mr. WATSON. Assuming he does, it is not a part of the treaty.

Mr. POWELL. Yes; it is.

Mr. WATSON. It is proclamatory, merely.

Mr. POWELL. Oh, no; the proclamatory part stops at the first paragraph, and then there is given the treaty in *haec verba*.

Mr. WATSON. They say they agree upon the following articles, and the articles are contained in the enacting clauses.

Mr. CASGRAIN. Read the treaty as we got it from Great Britain. The preamble is part of the treaty.

Mr. WATSON. I see; it is different from the copy I have; it affords more time for the contention of Mr. Thompson than it would appear in reading what I had before me. But still it is subject to the comment and to what I regard as the principle which has been settled by the highest courts in our different countries, and that is, for the purposes of jurisdiction reference is made and is limited to the enacting powers of the operative and enacting clauses, and they must be voided, as a matter of jurisdiction, outside of the enacting clauses, and particularly where there is no ambiguity, and it can not well be argued that here the articles are in any way ambiguous. A word with reference to Article XIII: I would point out to you, respectfully, that Article XIII would appear to be no different than what is usually known as the interpretation clause which appears in all our statutes, and I think in the statutes of the United States also—the interpreta-

tion clause which precedes the enacting clause, and that clause interprets the other clauses. Article XIII is no more than and no less, as I submit, than an interpretation of the word "agreement" without any enacting clause or any operative or enabling clause attached to it. It merely interprets the other clauses. With reference to the assent of the governor in council or even of the Government of Canada, I point out to you what I think is manifest, that neither the Government—that is, the executive—nor the governor in council, representing, nominally, the Government, has any jurisdiction whatever; that the whole jurisdiction is founded in Parliament, and that that can be made apparent solely and only by the act of Parliament duly passed and assented to. So that, as has been stated by Mr. Thompson, on behalf of the Government, there is here an absence of any legislative enactment leading to reciprocal or to concurrent legislation.

Mr. POWELL. Let me understand you. Your point is this, is it—that the order or decision of the public works department of Canada must be taken as part and parcel of the statute itself?

Mr. WATSON. It must be in pursuance of the statute.

Mr. POWELL. Not only in pursuance, but when it is done it is part of the statute and must be construed as an act of the high contracting party under Article XIII.

Mr. WATSON. Quite so.

Mr. POWELL. I do not think there would be much doubt about that.

Mr. WATSON. Just a word about the application. Mr. Thompson had in mind the form of the application, rather than the substance of it, when he referred to curable and noncurable defects. This present case is not a case of any defect in form. The fact is, that the application in substance is not defective, but the application in substance and as presented is outside the terms of the treaty and therefore, I submit, beyond your jurisdiction. I have a word to observe with regard to matters of report and matters of reservation suggested by Mr. Thompson. That is, that your commission should hold in abeyance the further consideration of the matter on the ground that it was not within the four corners of the treaty. I submit to you respectfully that this application has to be dealt with by this tribunal, judicial in its character, in the same way as all applications and proceedings are dealt with by the judiciary and by the courts duly constituted. It should either be granted or refused. You are not an advisory commission particularly in the interests of individuals, commercial interests, or otherwise, and any observations that might be sought to be made would be merely obiter dicta, and in that sense and from the highest standpoint undesirable, I submit, in the interests of all parties.

Mr. TAWNEY. Either you misunderstood Mr. Thompson or I did. You say he said that this should be rejected on the ground that it is not within the four corners of the treaty. The request of the Canadian Government for deferring a decision now on the matter is based on the fact that this is, in a sense, involved in an investigation of the Lake of the Woods question, which is now under consideration and being investigated by the commission, and which question has been referred to us by both Governments. His contention is that it was part of a general scheme. That is, as I understood him. It appears to me as entirely outside the matter of this application.

Mr. WATSON. The whole Canadian interest is centered in the clients which we represent as being the substantial interests, commercial and otherwise, of that whole northern district. That district is of no importance except in so far as it is represented by the large lumbering interests engaged there and whom we have the honor to represent in this proceeding.

Mr. POWELL. I would like to get an understanding of your contention. You would contend, as a matter of principle, that the two or three bridges across the St. Croix River, one of the boundary lines between Canada and the United States; that the bridges across the St. John River, over the international division; that the bridges across the St. Lawrence River and across the Niagara River and between the international waters on Rainy Lake, and all such bridges are beyond our jurisdiction, and that is to be cut out from consideration by us, on the simple ground that they stretch from shore to shore. That was the logical conclusion of your argument.

Mr. WATSON. I hardly think so.

Mr. POWELL. I do not know how you will get out of it.

Mr. WATSON. I think your question involves other considerations of a great deal of importance, and I ventured, if I might say, rather as amicus curia, to make a suggestion, but I would like to be excused, even as amicus curia, from answering your questions.

Mr. POWELL. Before the commission rises, I would like to have it definitely understood, and Mr. Watson joins with me in that, with regard to our status before this commission. As I understand the matter, the question came up at Ottawa, and the question of jurisdiction was adjourned here, and for the purpose of having it argued. Up to the present time we have not appeared on the record with written objections on behalf of the various clients we represent. I want to be assured that we are not losing any rights by not doing that if the commission should consider the proposition on its merits.

Commissioner POWELL. Do you want to put in an answer?

Mr. POWELL. Yes.

Mr. TAWNEY. In the event of our concluding that we have jurisdiction.

Mr. WATSON. It was stated by the chairman at the sitting at Ottawa that in the event of a determination that your commission had jurisdiction, a further opportunity would be given to speak on the merits.

Mr. TAWNEY. Yes.

Mr. WATSON. And as I understand it, that is the way it is on the record now.

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#### MEMORANDUM BY COUNSEL FOR PROVINCE OF ONTARIO.

*To the International Joint Commission for the Province of Ontario, pursuant to direction at Washington of the International Joint Commission:*

##### KETTLE FALLS DAM—RE JURISDICTION OF THE COMMISSION.

The Province of Ontario respectfully submits that, inasmuch as it developed upon the argument at Washington in November last, by the counsel for the Dominion of Canada, that the Government of the Dominion of Canada does not approve of the proposed plans of the international dam at Kettle Falls, and gave its reason why such approval was not given, that, therefore, there is no concrete case before the commission relating to the question of the jurisdiction of an international dam; and that, as one of the high contracting parties have

not as yet approved of the proposed international dam at Kettle Falls, until such be done, the question of jurisdiction as to such dam is purely an academic one, and the Province of Ontario, therefore, respectfully submits that it is not necessary to argue a hypothetical case on the question of jurisdiction.

Dated at Port Arthur, Canada, this 31st day of December, A. D. 1912.

FRANK H. KEEFER,  
*Of Counsel for the Province of Ontario.*

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**STATEMENT OF GLYN OSLER.**

RE ONTARIO & MINNESOTA POWER COMPANY, LIMITED.

1. On the 17th February, 1904, His Majesty, represented by the commissioner of Crown lands for the Province of Ontario, made a contract with Mr. Edward Wellington Backus, and those associated with him, for the sale of certain lands necessary to develop the water power on the Rainy River at Fort Frances, on the Ontario side, upon the conditions stated in the agreement, one of which was that half the power capable of development from the water power should be reserved for use on the Canadian side. The contract hereinafter mentioned, dated January 9, 1905, having superseded and taken the place of this contract of 1904, it is not set out in detail and is merely mentioned as part of the history of the transaction.

2. It was found impossible to finance the undertaking if half of the power were absolutely and unconditionally reserved for use on the Canadian side so that no revenue could be had from it until a market on the Canadian side should be created. There was at that time no market whatever on the Canadian side and no prospect of such a market in the near future and the reservation would have resulted in keeping half the power practically idle.

3. Mr. Backus having satisfied the minister of Crown lands of his inability to finance the proposition on this basis, a new contract was made on the 9th January, 1905, approved by order in council dated the 13th January, 1905, for the sale of the lands described being the water power lots on the Canadian side at Fort Frances upon the terms and conditions set out in it and in lieu of the absolute reservation of one-half of the power it was provided (clause 8) that four thousand horsepower should be retained and reserved for use on the Canadian side and that when the whole of this quantity should be in use the company would furnish additional power on the Canadian side which was not unleased or not in permanent use. A copy of the agreement with the order in council approving of it is attached.

4. It was recited in the agreement of the 9th January, 1905, that the purchasers were to form a joint stock company under the Ontario companies act for the purpose of taking over the agreement and assuming the obligations of the purchaser. Accordingly on the 13th January, 1905, the Ontario & Minnesota Power Company, Limited, was incorporated by letters patent under the Ontario companies act. A copy of the letters patent of incorporation is attached. Subsequently by letters patent dated the 25th April, 1911, the powers of the company were extended and a copy of the supplementary letters patent is attached.

5. The agreement of the 9th January, 1905, having been transferred by Mr. Backus and his associates to the company, the transfer was approved and the incorporation of the company for the purposes of the agreement of the 9th January, 1905, was approved by order in council of the 1st February, 1905.

6. Collaterally to the agreement of the 9th January, 1905, Mr. Backus had agreed to erect a flour or pulp mill, to be completed in two years after the completion of the dam. This was a personal agreement not included in the terms of the agreement for the purchase of the water power and lands, and on the 20th November, 1906, it was reduced to writing and a bond conditioned in the sum of \$25,000 was furnished by Mr. Backus as security for the performance of this agreement. A copy of the agreement and bond is submitted.

7. On the 20th July, 1905, the Parliament of Canada passed an act, 4 and 5 Edward VII, chapter 39, authorizing the construction of works in the Rainy River at or near Fort Frances upon the terms and conditions set out in the act, including the provision that the water power should be so developed that there should not be "less of the said power or electrical energy available for use on the Canadian side of the international boundary line than on the American side, and subject to the provisions of this act such power or electrical energy shall be delivered on the Canadian side as and when demanded."

The board of railway commissioners was authorized to fix the price of power and to authorize the export thereof. A copy of the act is attached.

8. On the 13th of September, 1905, the plans of the company's proposed works were approved by order in council of the Dominion Government (a copy of which is attached), upon conditions protecting navigation, fishing interests, etc.

9. It will be observed that the provisions as to export of power inserted in the act passed by the Parliament of Canada were somewhat different from those contained in the agreement between the company and the commissioner of Crown lands for Ontario. In the following year, 1906, the Legislature of Ontario passed an act, chapter 132, of the Statutes of 1906, by which the agreement of the 9th January, 1905, was varied and provisions were made as to the export of power in exactly similar terms to those contained in the act of the Parliament of Canada, except that the fixing of the price and the authorization of power were reserved to the lieutenant governor in council instead of to the board of railway commissioners. The lands covered by the agreement were also varied, and upon condition of certain expenditure being made the time for completion of the works was extended to the 1st of January, 1908. It will be observed that the marginal note opposite section 6 of the act is obviously wrong. A copy of the act is attached.

10. On the 27th of January, 1909, an order in council was passed by the lieutenant governor of the Province of Ontario (copy inclosed), approving certain changes in the plans which had originally been approved by the Province in the agreement of the 9th January, 1905.

11. The time for the completion of the company's works was extended by the following acts of the Legislature of Ontario up to the 1st January, 1910:

7 Edward VII, chap. 23, sec. 33.

8 Edward VII, chap. 33, sec. 61.

9 Edward VII, chap. 26, sec. 12.

12. On the 18th January, 1910, an order was made by the board of railway commissioners for Canada authorizing the export of 6,000 electrical horsepower to the United States under the provisions of the Dominion act of 1905, and on the 2d of June, 1910, an order in council was passed by the lieutenant governor of the Province of Ontario, under the provisions of the Ontario act of 1906, authorizing the export of 6,000 horsepower to the United States.

13. The company has also had since the summer of 1910 a license under the electricity and fluid exportation act, 6 and 7 Edward VII (Dominion), chapter 16, authorizing the export of 3,500 horsepower.

To summarize the company's position it will be seen that by virtue of the letters patent incorporating it, and the supplementary letters patent, the company has corporate existence with power to develop hydraulic and electric power. By its agreement with the Ontario government, the former owner of the water-power lands on the Canadian side, as varied by the statute of 1906, the company has acquired a sufficient title to the lands necessary to carry on its operations upon the Canadian side, and by virtue of the Dominion legislation of 1905 it has received the permission which was considered necessary in order to entitle it to construct its works in international boundary waters, and notwithstanding the possible obstruction of navigation. It will of course be observed that the permission to so construct its works is upon terms which protect the navigation interests (see conditions of order in council of the 19th September, 1905).

GLYN OSLER.

15TH NOVEMBER, 1912.

COPY OF AN ORDER IN COUNCIL APPROVED BY HIS HONOUR THE LIEUTENANT GOVERNOR  
THE 13TH DAY OF JANUARY, A. D. 1905.

Upon the consideration of the annexed report of the honourable the commissioner of Crown lands with reference to certain amendments which have been suggested to the contract entered into between His Majesty the King, acting by the commissioner of Crown lands, and E. W. Backus and his associates regarding the development of the water power at Fort Frances, in the district of Rainy River, the committee of council advise that the accompanying agreement embodying said amendments and in other respects to the same effect as the said contract bearing date the 9th day of January, 1905, and which has been executed by the commissioner on behalf of His Majesty the King and by E. W. Backus



on behalf of himself and his associates be approved of by your honour and the execution thereof by the commissioner affirmed.

Certified:

S. LONSDALE CAPREOL,  
*Clerk, Executive Council.*

*Contract, 9th day January, 1905.*

This indenture made in triplicate this ninth day of January, A. D. 1905, between His Majesty, represented by the honourable the commissioner of Crown lands for the Province of Ontario (hereinafter called the "government") of the first part, and Edward Wellington Backus, of the city of Minneapolis, in the State of Minnesota, lumberman, and those associated with him (hereinafter called the "purchasers") of the second part.

Whereas the Rainy River, in the district of Rainy River, forms the international boundary between the Province of Ontario, in the Dominion of Canada, and the State of Minnesota, one of the United States of America, which said river in the neighborhood of the town of Fort Frances forms a valuable and extensive water power.

And whereas the municipal council of the town of Fort Frances and the municipal council of the township of McIrvine and the residents of the said town and township have at various times petitioned the Government to develop or procure the development of the said water power, so that the same might be utilized for municipal purposes and for manufacturing and milling in the said municipalities, thereby assisting in the development of the said municipalities and of the surrounding district.

And whereas application has been made by the purchasers for a grant in fee of such lands adjacent to the said river and of such lands covered by the said river and of such privileges as are necessary to enable the purchasers to develop the said water power and to render the same available for municipal, manufacturing, and milling purposes.

And whereas the said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary, and it is therefore in the public interest to adopt such plan of development.

And whereas the purchasers are the owners in fee simple of the lands and water power on the Minnesota side of the international boundary opposite the said town of Fort Frances and are desirous of obtaining from the government of the Province of Ontario a grant in fee of the lands and power on the Canadian side of the international boundary for the purpose of developing the water power to the full capacity of the stream from side to side at high-water mark and of utilizing such storage facilities as may be available for maintaining a large amount of power on the Canadian side of the river for municipal purposes and for the operation of pulp or paper mills, flour and grist mills, and other manufacturing establishments.

And whereas it is necessary in order to carry out such a scheme of development that the purchasers should be permitted to construct a storage dam at the outlet of Lake Namakan, at or near Kettle Falls, on the international boundary, and set aside sufficient lands for the construction and maintenance of the said dam, and that they should also, if necessary, be in a position to create storage reservoirs on Upper and Lower Manitou Lake and Big Turtle Lake, under conditions satisfactory to the Government by the construction of the necessary dams for that purpose, with the view of maintaining a more regular and uniform flow of water over the falls at Fort Frances, by reinforcing the waters of Rainy Lake.

And whereas, the construction of the said dams and the maintenance of the waters of Rainy Lake at a higher level during the low-water period will be of greater advantage to navigation.

And whereas it is expedient and desirable in the interest of the town of Fort Frances, of the said township of McIrvine, and of the public generally, that the said water power be speedily developed to its full capacity and that an agreement be entered into to that end upon the terms and subject to the conditions and stipulations herein contained.

And whereas the purchasers intend to form a joint-stock company under the provisions of the Ontario companies' act for the purpose of acquiring the

said lands and water power, and of taking over and acquiring this agreement and all the benefits and advantages appertaining thereto, and of assuming the obligations hereby incurred by the purchasers, and of carrying on the development and operation of the said water powers.

Now this indenture witnesseth, that it is hereby agreed by and between the purchasers and the Government as follows, that is to say:

1. The Government agrees to sell and the purchasers agree to buy the following lands and lands covered by water, being all and singular those certain parcels or tracts of lands and premises situate, lying, and being in the town of Fort Frances and adjacent thereto, and being composed of the lands and lands covered by the waters of the Rainy River shown and set out in the plan and description hereunto attached, bearing the signature of the commission of Crown lands for Ontario, which said plan and description are hereby made part of this agreement, the lands in question being colored red on the said plan, together with the lands or lands covered by water heretofore conveyed by the town of Fort Frances to His Majesty the King, for the purposes of this agreement, together with all water powers and privileges, and all rights, easements, and appurtenances thereto belonging or appertaining, for and in consideration of the sum of five thousand dollars (\$5,000.00) of lawful money of Canada, payable in cash on the execution and delivery of this agreement, and in further consideration of the covenants and requirements hereinafter contained and of the special agreement to supply power or electrical energy to the town of Fort Frances and the township of McIrvine, as hereinafter set out, to such extent as the said town or township may require.

2. The purchasers covenant and agree to construct a dam, conduit, or such other works on or near the said river at Fort Frances, in accordance with the plans hereto attached, sufficient to develop power to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works), according to the plans hereto attached, approved of by the lieutenant governor in council, and which are hereby made a part of this contract, such dam to be built of solid masonry or concrete, and to be of such character and of such dimensions as will make the same amply strong and safe for the purposes intended and such works will be of such design as will fully provide for sufficient waste weirs to obviate danger in time of floods or freshets. The dams, head gates, waste weirs, and works in connection therewith or incidental thereto, shall not be proceeded with unless and until the plans, drawings, and specifications for the same shall have been submitted to and approved of by the lieutenant governor in council, which said plans, drawings, and specifications shall show the precise site and location of the said work:

Provided, however, that notwithstanding anything hereinbefore contained, and notwithstanding the approval of the plan hereto attached, the waters of Rainy River shall not at any time be raised to a higher level than may be authorized by the Government, and the height of water to be maintained in the said lake and the use or nonuse of the flash boards as shown on said plans shall at all times be subject to such control and direction by the Government as in the opinion of the Government may be necessary to ensure safety and protection of property.

3. All power houses and building machinery and appliances necessary for developing the total power capable of development on the Canadian side of the said river, in accordance with said plans, shall be erected as fast as required for use and maintained on the Canadian side of the international boundary, provided that the plans and location of such power houses shall be subject to the approval of the lieutenant governor in council.

4. The purchasers covenant and agree to commence the said dam and other works forthwith after the approval of the plans, drawings, and specifications by the lieutenant governor in council, and to fully complete the said dam and works in accordance with said plans, drawings, and specifications by the first day of January, 1907, and to develop and render available for the use on the Canadian side of the river, by the said date, the total amount of horsepower to be capable of development, in accordance with said plans, at the said point (including increase in such power by reason of the construction and maintenance of storage dams or works) as provided in paragraph two hereof.

And the purchasers further covenant and agree to expend upon such works the sum of fifty thousand dollars (\$50,000.00) within the nine months from the date hereof, as above provided, then this agreement shall be null and void, and all the money paid by the purchasers shall be forfeited.

The purchasers covenant and agree that they will from and after the said first day of January, 1907, deliver power to the said town of Fort Frances and to the township of McIrvine, by the method A, B, or C, hereinafter described, at the election of such municipalities, or either of them, for municipal purposes and for public utilities, but not for commercial purposes, which said power shall be kept constantly in operation and available twenty-four hours each day (save and except such time as may be necessary to replace machinery or for repairs), and the corporation shall have the right to elect to take the power or any portion of it (A) by cable or belt or other means of conveying the same direct from the power house of the purchasers; (B) by waves of electrical energy delivered on the wires of the said corporation at the said power house; or (C) by electrical energy delivered to the premises of the corporations, or to such other premises as the corporations may specify, the same to be delivered within three miles from the power house of the purchasers. The corporations shall be entitled to take such portion or portions of the said power as the corporations may desire by any of the methods of delivery above mentioned, and for such purpose the purchasers shall instal all water wheels, electrical and other machinery, shafting, motors, connections and appliances, with other attachments necessary to deliver the said power as required by either or all of the methods above mentioned, excepting that the corporation or the public users may be required to furnish the electrical motors for propelling the machinery on or within their own premises, and the said power shall be supplied to the said municipal corporations for the purposes aforesaid at a specially favorable rate, which shall not in any event exceed twelve dollars (\$12.00) per horsepower per annum where the same is taken under method A, or fourteen dollars (\$14.00) per horsepower per annum where the same is taken under method B. In the event of the said corporations requiring the said power or any portion thereof to be delivered under method C, the purchasers may charge, in addition to the rate fixed for delivery by method B, such sum as may be mutually agreed upon or determined, as herein provided, to cover the extra expense only necessarily incurred in such distribution. In the event of the said corporations taking such power or any portion thereof at the power house of the purchasers, the said corporations shall have the right of entering upon the lands and premises of the purchasers for the purpose of erecting all necessary connections, belts, cables, poles, or wires, or other means of conveying or carrying said power, and for the purpose of repairing, maintaining, or operating same from time to time, and for all other purposes necessary to satisfactorily procure the delivery of such power, and for such purposes to enter the purchasers' power house and premises as occasion may require, and no extra charge for rent shall be payable by the said municipalities for the use and occupancy of the lands and premises of the purchasers required for all poles or other structures or works of the municipalities for the transmission and distribution of the said power.

Provided, that the purchasers shall not be required to deliver power to the said municipalities in less quantities than fifty horsepower at any one time, or by any one of the above-mentioned methods.

Provided further, and it is specially agreed that should the corporations at any time deem the prices demanded by the purchasers excessive or more than sufficient to allow the purchasers a fair profit, and in the event of the corporations or either of them being unable to agree with the purchasers as to such prices or as to any other matter arising in respect to the carrying out of these presents, the same may be referred to the lieutenant governor in council, who may settle and determine the same, and his findings shall be final and binding upon the parties in the same manner and to the extent as if it were included in and a part of this agreement.

Provided, however, that such prices and conditions as may be determined or agreed upon from time to time shall remain in force for at least five years before being subject to readjustment.

Provided also, that the corporations shall in all cases give the purchasers three months' notice in writing of the amounts of power required and of the method of delivery by which it is desired the same shall be delivered.

6. The purchasers further covenant and agree that they will at all times sell or rent and distribute to any person, firm, company, or corporation making application therefor, any power or energy reserved for use on the Canadian side of Rainy River and not already in use, at such prices and on such conditions as may be agreed upon between the parties, or in case of disagreement

at such prices and on such conditions as may be fixed by the lieutenant governor in council, and the purchasers shall provide and maintain all such generators and transmitters, machinery, and appliances as may be requisite for the delivery of such power or energy by any of the methods A, B, or C referred to in paragraph five hereof, and shall afford to parties buying or renting power or energy from them all reasonable and necessary access to their buildings, lands, and premises for the purpose of erecting and maintaining wires, cables, or other means of carrying or conveying such power or energy, and shall erect such poles, wires, and other appliances as may be necessary for the distribution of power by the method C, provided that the purchasers shall not be obliged to erect new appliances, or to extend their appliances, for the purposes of delivering power by the method C to any party declining to accept and pay for at least one hundred horsepower, or declining to furnish, if required, reasonable security for the payment of the purchase price or rent for such horsepower for such period as may be necessary to recoup the purchasers' outlay in providing such appliances, the method of distribution of such power and the appliances to be used to be subject to the approval of the lieutenant governor in council, and the streets, squares, lanes, or other public places along or across which such power is to be carried to be subject to the approval of the municipal council of the town of Fort Frances or of the township of McIrvine, as the case may be.

Provided, that parties requiring power from the purchasers shall give them three months' notice in writing of the amount of power required and of the method of delivery by which it is desired the same shall be delivered.

7. It is further agreed by and between the parties hereto that the fixing of the maximum prices herein provided for delivery of power to the said municipalities of Fort Frances and McIrvine forms a part of the consideration for this agreement, and for the transfer of the said lands, power, and privileges, and that the same shall not be used to the prejudice of the purchasers in any reference to the lieutenant governor in council to establish the price at which power shall be sold to other consumers, but the lieutenant governor in council shall be at liberty to fix said prices at such figures as to him may seem just and proper.

8. It is further covenanted and agreed that they will at all times retain and reserve for use on the Canadian side of the international boundary line four thousand horsepower, and will render the same permanently available for use on the Canadian side. Provided further, that when and as soon as the said four thousand horsepower so reserved shall be leased or in permanent use, the purchasers will lease to any person, firm, or company on the Canadian side of the said boundary line any further power which may be required on the Canadian side and which may be unleased or not in permanent use.

9. The purchasers further covenant and agree that in leasing, selling, or otherwise parting with such power, or any portion thereof, they will provide by contract therefor that such power so leased, sold, or parted with, or any part thereof, shall not be farmed out or sold or leased at any greater price or remuneration actually paid therefor to the purchasers, and the purchasers shall not sell or otherwise dispose of the said power in any way that would deprive the public of the benefit of the prices to be fixed or determined as herein provided.

10. The purchasers further covenant and agree that in no case shall leasers or users of power or energy on the Canadian side of the international boundary line be charged higher rates or be subject to more onerous conditions than users or lessees of like amount of power on the Minnesota side.

11. The purchasers covenant and agree that they will keep their work constantly in operation, so as to render power leased or sold by them available to the purchasers or lessees for twenty-four hours each day (save and except such time as may be necessary to replace machinery and for repairs).

12. The purchasers shall have the right to construct a storage dam at or near Kettle Falls at the outlet of Lake Namakan, and also at the outlet of Lower Manitou Lake and of Big Turtle Lake, subject to such regulations and conditions as may be imposed by the lieutenant governor in council, and may raise the water of the said lakes to a point not higher than the high-water mark as ascertained by an officer appointed by the Government, and maintain them at such point, and the Government agrees to lease to the said purchasers in perpetuity at a rental of one dollar per annum such an area of land as may be found necessary at or near the said Kettle Falls for the purpose of constructing the said storage dam and other necessary works or structures in connection therewith.

Provided, that if it should be made to appear to the satisfaction of the lieutenant governor in council that there is a bona fide and substantial demand for power in the neighborhood of the said Kettle Falls which might be supplied therefrom, the purchasers, upon being required to do so by the lieutenant governor in council, shall, by works constructed and water wheels and other necessary machinery and appliances installed on the Canadian side of the international boundary line, develop the water power at the said falls to the full extent to which the same may be developed on the Canadian side of the international boundary line, as determined by the Government engineer to be appointed for such purpose, or to such smaller extent as may be directed, and within such time as may be specified by the lieutenant governor in council. The height of water to be maintained in the said lakes shall at all times be subject to the control of the lieutenant governor in council.

Provided further, that if the purchasers shall at any time develop a water power at Kettle Falls, the total amount of power so developed on the Canadian side shall be retained for use on the Canadian side and shall not at any time be diverted or used elsewhere, and all the terms and conditions herein contained with reference to power at Fort Frances shall apply to the said power at Kettle Falls, save and except the conditions as to supplying power to the town of Fort Frances and the township of McIrvine, provided that the rights of the purchasers as to the storage of waters in the upper and lower Manitou Lake and Big Turtle Lake shall not include any rights in or to the water powers at or near the respective outlets thereof or at or near the site or sites of any dam or dams constructed by the purchasers, but the Government shall be free to deal with such water powers as occasion may require, reserving to the purchasers the right of storing the waters of the said lake subject to such conditions and regulations as to the Government may seem necessary and proper.

Provided, however, that if the purchasers are of opinion that there is not a bona fide and substantial demand for power in the neighborhood of the said Kettle Falls, they may decline to develop the water power, in accordance with the provisions of this section, and on their so declining, the lieutenant governor in council shall have the power to determine all their right, title, and interest in, to, and of the said Kettle Falls or the lands adjacent thereto and all their rights and privileges thereto herein set forth, and may lease the said power at Kettle Falls to any other person or company or dispose of it as may seem best, and that the default of the purchasers under this section shall not operate as a forfeiture of any of their rights, privileges, or franchises granted under the other clauses of this agreement.

13. It is further covenanted and agreed that any matters of dispute not herein specially provided for between the purchasers and the said municipalities of Fort Frances and McIrvine, or between the purchasers and lessees or purchasers from them of water power, shall be subject to the determination and direction of the lieutenant governor in council.

14. It is further understood and agreed that this agreement and the sale to the purchasers is made subject not only to the terms hereinbefore specified, but subject also to the following terms and conditions:

(a) All the rights of the Dominion of Canada or the Province of Ontario as to navigation on the said river or rivers and the said lakes, and to the improvement thereof by the construction of a lock or canal, or locks or canals, or otherwise, are reserved and excepted, and the Government of the Dominion of Canada or of the Province of Ontario shall have full power to enter upon the said land and premises and to construct, maintain, or repair any canal, lock, dam, or other work or works necessary or desirable for the maintenance and improvement of navigation upon the waters affected thereby, without let or hindrance, and without compensation.

(b) The right of timber owners and others is reserved to float logs and timber down the said river, or rivers and lakes, for which purposes slides or other necessary works, according to the plans approved by the Government, are to be constructed by the purchasers.

(c) The purchasers shall construct proper fishways if required by the proper authorities.

15. The purchasers covenant with the Government that they will not at any time or any place deposit, empty, run, or turn into, or permit to be placed, deposited, emptied, run, or turned into, the said river or rivers, or the said lakes, any sawdust, chemicals, refuse, or matter of any kind which may have the effect of polluting the said waters or of destroying, harming, or driving away the fish therein.

16. The Government agrees that as soon as the said dam at Fort Frances is completed and is in readiness for water wheels for one-half of the total quantity of power available for use on the Canadian side of the river, as hereinbefore provided, a patent from the Crown shall issue to the purchasers of the said lands and of the said power, subject to the forfeiture or breach of any of the conditions herein contained.

17. It is distinctly understood and agreed that the lands, rights, and privileges mentioned in this agreement are confined solely to lands, rights, and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed lands not the property of the Crown in Ontario and not under the control and administration of the said Government, and if damage is done by the erection of any dam or the construction of any works under this agreement no recourse shall be had against the Government in respect thereof.

18. The joint-stock company to be incorporated by the purchasers shall be composed of such persons and shall have such an amount of capital stock and such proportion paid up as shall be satisfactory to the Government. It shall assume all liabilities and engagements which are assumed and entered into herein by the purchasers, and the Government shall accept its personal liability instead of that of the purchasers in all respects, except the agreement to expend the first fifty thousand dollars (\$50,000.00) as hereinbefore set out, and except as aforesaid the purchasers' liability shall cease and determine when such liabilities and engagements have been assumed by such joint-stock company. It is understood and agreed that the purchasers shall give to Canadian lines of railway and steamboats the preference in the carriage of all goods and articles produced by them on the Canadian side of the said international boundary line at such rates not higher than those charged by other lines or steamboats from or between the same point or points.

19. It is further understood and agreed that nothing herein contained shall affect the rights of the inhabitants of the town of Fort Frances, or the township of McIrvine, or of the public to free access to the shore and waters of the said Rainy River and Rainy Lake and the use of the said waters for municipal and domestic purposes, and that the purchasers shall not interfere with any street or streets now open or that may hereafter be opened to the said river, nor with any wharves, docks, or other structures now erected or hereafter to be erected for the purposes of navigation, but excepting, however, from operation of this clause the construction of such buildings and works as are authorized under the terms hereof.

20. It is further understood and agreed that failure on the part of the purchasers to carry out or comply with any of the conditions herein contained or any order or direction of the Government or the lieutenant governor in council made hereunder, after due notice given and after a reasonable time has been given within which the purchasers may comply with the conditions in respect of which such default has been made, shall cause a forfeiture of the lands, rights, and privileges in this agreement mentioned, but the Government may, at its option, require the payment of a penalty not exceeding one hundred dollars (\$100.00) per diem while the default has continued.

21. This agreement shall be binding not only upon the parties hereto but upon their heirs, executors, administrators, successors, and assigns.

In witness whereof the commissioner of Crown lands has hereunto set his hand and seal, and the parties of the second part have hereunto set their hands and seals.

(Sgd.) A. C. MACKAY.

(Sgd.) EDWARD WELLINGTON BACKUS. [SEAL.]

Signed, sealed, and delivered in the presence of—

(Sgd.) GEO. W. YATES. [SEAL.]

[L. S.—Wm. Mortimer Clark. F. E. Latchford, attorney general.]

PROVINCE OF ONTARIO.

Edward the Seventh, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

*To all to whom these presents shall come, greeting:*

Whereas, the Ontario companies' act provides that with the exceptions therein mentioned the lieutenant governor of our Province of Ontario in coun-

cil may by letters patent under the great seal create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends.

And whereas by their petition in that behalf the persons herein mentioned have prayed for a charter constituting them a body corporate and politic for the due carrying out of the undertaking hereinafter set forth.

And whereas it has been made to appear to the satisfaction of our Lieutenant governor in council that the said persons have complied with the conditions precedent to the grant of the desired charter and that the said undertaking is within the scope of the said act.

Now therefore know ye that by and with the advice of the Executive Council of Our Province of Ontario and under the authority of the hereinbefore in part recited statute and of any other power or authority whatsoever in us vested in this behalf we do by these our Royal Letters Patent, create and constitute the persons hereinafter named, that is to say, Edward Wellington Backus of the city of Minneapolis, in the State of Minnesota, one of the United States of America, lumberman; Alexander McKenzie, bookkeeper; William Hollywood Templeton, gentleman; George Franklin McFarland, law student, and Robert Alexander Grant, barrister at law, all of the city of Toronto, in the county of York, and Province of Ontario, and any others who have become subscribers to the memorandum of agreement of the company, and their successors, respectively, a corporation for the purposes and objects following, that is to say: (a) To acquire by lease, purchase or otherwise, and to maintain, utilize and develop water powers and other powers for the production of electricity, and of electric, pneumatic, hydraulic and other power or force for any purpose for which electricity or power can be used; (b) To construct or acquire by lease, purchase or otherwise and to maintain and operate works and appliances for the production of electricity, and of electric, pneumatic, hydraulic, or other power or force, and lines of wires, poles, tunnels, conduits, conductors, meters, devices, works, and appliances for the sale, distribution, delivery, and transmission, under or above ground of electricity and electric, pneumatic, hydraulic, or other power or force, and therewith to convey, conduct, furnish or receive such electricity, current, power or force, to or from any company or companies at any place through, over or under any lands or waters; (c) To acquire by lease, purchase or otherwise, electricity, electric, pneumatic, hydraulic, or other current, power or force, and to store, use, supply, furnish, distribute, sell, lease, or otherwise dispose of the same as well as electricity, current, power, or force produced by the company; (d) To construct or acquire by lease, purchase or otherwise, and to operate in connection with the works, lines and business of the company and for the purposes thereof lines of telegraph or telephone, or other works and means of communication; (e) To aid by way of bonus, loan, guarantee or otherwise, any industry or enterprise using or agreeing to use power supplied by the company or supplying or agreeing to supply power to the company, and to acquire stock in any corporation carrying on or having power to carry on any such industry or enterprise, and the bonds, debentures or other securities or obligations of any such corporation and to act as agent or manager of any such industry, enterprise, or corporation; (f) To sell, lease, or otherwise dispose of from time to time any of the assets or property of the company; (g) To enter into, perform and carry out any agreement with any power company authorized to do or perform or exercise any of the powers conferred upon the company for the purchase by and sale and transfer to the company of the whole or part of the rights, powers, franchises, assets, property, business, and undertakings of such other company and for the assumption and payment by the company of the whole or parts of the contracts, obligations and liabilities of such other company; provided always, that such agreement shall not be entered into unless the same be approved of by the votes of two-thirds of the shareholders of the company present or represented by proxy at a special general meeting called for considering the same, and further provided that the rights of bondholders or other creditors of such other company and of all persons having any claims or demands against such company or any lien, charge or security upon any of its properties or assets shall not be prejudiced by said agreement or by the carrying out thereof but shall remain and be enforced as if such agreement had not been made; (h) To issue as paid up and non-assessable stock shares in the company as consideration for any such purchase or in payment of any contract, franchise, property, undertaking, privilege, right or power which may be assigned or transferred to it or which it may acquire or to engineers or contractors or for rights of way, material, plant, buildings or lands, or the construction or equipment, of the

works or any part thereof, or for services rendered in placing or assisting to place or guaranteeing the placing of any of the shares or other securities of the company or in or about the promotion of the company or the conduct of its business; and (i) to acquire, purchase, take, and hold all the rights, powers, and privileges, franchises, benefits, waters powers, contracts or other property under a certain agreement bearing date the ninth day of January, A. D. 1905, between His Majesty the King, represented by the honourable the commissioner of Crown lands for the Province of Ontario of the one part, and the said Edward Wellington Backus and his associates of the other part and to assume the obligations, liabilities, conditions, and undertaking by the said agreement assumed by the said Edward Wellington Backus, the corporate name of the company to be The Ontario and Minnesota Power Company, Limited. The share capital of the company to be three million dollars, divided into thirty thousand shares of one hundred dollars each; the head office of the company to be at the said city of Toronto, and the provisional directors of the company to be Edward Wellington Backus, Robert Alexander Grant and Alexander McKenzie, hereinafter mentioned.

In testimony whereof we have caused these our letters to be made patent and the great seal of our Province of Ontario to be hereunto affixed.

Witness: His honour William Mortimer Clark, &c., &c., &c., lieutenant governor of our Province of Ontario, at our Government house in our city of Toronto, in our said Province, this thirteenth day of January, in the year of our Lord one thousand nine hundred and five, and in the fourth year of our reign.

By command:

THOMAS MULVEY,  
*Assistant Provincial Secretary.*

[First indorsement.]

Letters patent under the Ontario companies' act incorporating the Ontario and Minnesota Power Company, Limited, received Nov. 2, 1910. Central office. Recorded this 8th day of February, A. D. 1905, as Number 68.

[Second indorsement.]

PROVINCIAL REGISTRAR'S OFFICE,  
*Toronto, May 16th, A. D. 1910.*

I hereby certify the within to be a true and faithful copy of the record of the original letters patent as entered in liber 82 as Number 68.

JOHN H. USSHER,  
*Deputy Registrar of the Province of Ontario.*

[J. M. Gibson. (Seal.) "J. J. Foy," Attorney General.]

PROVINCE OF ONTARIO.

George the Fifth, by the grace of God, of the Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, King, defender of the faith, Emperor of India.

*To all to whom these presents shall come, greeting:*

Whereas the Ontario companies act enacts that the lieutenant governor in council may from time to time direct the issue of supplementary letters patent to a corporation embracing any or all of the matters in the said act set forth; and

Whereas by its petition in that behalf the Ontario and Minnesota Power Company, Limited, has prayed for supplementary letters patent for the purpose of extending the powers of the said company; and

Whereas it has been made to appear that the said company has complied with the conditions precedent to the grant of the desired supplementary letters patent:

Now therefore know ye that under the authority of the hereinbefore in part recited statute and of any other power or authority whatsoever in us vested in this behalf.



We do by this our royal supplementary letters patent extend the powers of the Ontario and Minnesota Power Company, Limited, as follows: (a) To carry on business as manufacturers of any and all kinds of manufactured products or articles in the manufacture of which hydraulic or electric power can be used; (b) to construct, build, buy, lease, acquire, or operate pulp mills and paper mills; (c) to carry on the business of manufacturers of and dealers in wood, wood pulp, pulp and paper of all kinds, raw materials of all kinds used or which may be used in the manufacture or treatment of pulp or paper, articles and products of all kinds made from or in the course of the manufacture of pulp and paper, or in the manufacture of which pulp or paper are or may be used, or which may be conveniently manufactured in connection with the operation of any pulp or paper mill; (d) to acquire by purchase, lease, license, or otherwise from the Crown, corporations, or individuals and to hold, sell, assign, lease, license, or otherwise dispose of trees, timber, and wood of every description, mill sites, timber limits, and lands upon which trees, timber, or pulp wood may be growing, timber licenses and the right to cut any trees, timber, or pulp wood, and to acquire and hold timber licenses granted by the Crown; (e) to carry on the business of manufacturers of timber, logs, pulp wood, and lumber; to cut timber, logs, pulp wood, trees of all kinds, and timber, and to carry on lumbering operations, either for the company or for others, and to convey, drive, float, or otherwise transport the product of such operations and to construct, build, and acquire all such works as may be necessary or convenient for the purpose of all or any such operations; and (f) to carry on the business of general merchants, traders, and dealers in all kinds of merchandise.

In testimony whereof we have caused these our letters to be made patent and the great seal of our Province of Ontario to be hereunto affixed.

Witness: His honour John Morison Gibson, a colonel in our militia of Canada, &c., &c., &c., lieutenant governor of our Province of Ontario, at our Government house, in our city of Toronto, in our said Province, this twenty-fifth day of April, in the year of our Lord one thousand nine hundred and eleven, and in the first year of our reign.

By command:

"W. J. HANNA,"  
*Provincial Secretary.*

[Indorsement.]

Dated 25th April, A. D. 1911. Supplementary letters patent to the Ontario and Minnesota Power Company, Limited, extending its powers. Recorded this 5th day of May, A. D. 1911, as Number 8 in Liber 13.

JOHN F. C. USSHER,  
*Deputy Provincial Registrar,*  
*Provincial Secretary's Office, Toronto, Ontario.*

This indenture, made in triplicate, this 20th day of November, A. D. 1906, between His Majesty, represented by the honourable the commissioner of crown lands for the Province of Ontario (hereinafter called the "Government"), of the first part and Edward Wellington Backus, of the city of Minneapolis, in the State of Minnesota, lumberman, of the second part.

Whereas on the 9th day of January, A. D. 1905, an agreement was entered into between the parties hereto, by the terms of which the Government agreed to convey to the party of the second part, and his associates therein called the purchasers, certain parcels of land and land under water embracing the water power of Rainy River at Fort Frances, in the Province of Ontario, upon the terms and conditions mentioned in said agreement; and

Whereas it was at the time agreed that the party of the second part should erect a flouring and grist mill, or an oatmeal mill, or a pulp mill, or other manufacturing industry as hereinafter particularly stated; and

Whereas it was understood that such agreement should be reduced to writing and signed and executed by the parties;

Now this indenture witnesseth, that in consideration of the premises and in consideration of the execution of said agreement of January ninth, 1905, said Edward Wellington Backus does hereby covenant and agree that he will erect and equip, or cause to be erected and equipped, on the water power on the Ontario side of the Rainy River, at Fort Frances, a flouring or oatmeal, or a flouring and oatmeal mill, having a capacity of at least one thousand barrels of flour or oatmeal, or both, per day of twenty-four hours; or in lieu thereof, erect and equip, or cause to be erected and equipped a pulp mill, or other

manufacturing industry that will require in operation the same amount of power as such flouring or oatmeal or flouring and oatmeal mill, and have the same completed and ready for operation within two years after the completion of the dam mentioned in the second and fourth paragraphs of said agreement of January ninth, 1905.

It is understood that the two years within which said mill is to be built shall begin to run from the time of the actual completion of said dam, and that the time for such completion has been extended to January first, 1908. Further extension of time as to the dam, if any, shall also extend equally the time for performance of this agreement.

This agreement shall be binding not only upon the parties hereto, but upon their heirs, executors, administrators, successors, and assigns.

In witness whereof the commissioner of crown lands has hereunto set his hand and seal, and the party of the second part has hereunto set his hand and seal.

Signed, sealed, and delivered in the presence of Washington Gray, F. B. Parsons, as to Edward Wellington Backus.

Know all men by these presents, that we, Edward Wellington Backus, William Frederick Brooks, and Augustus Estes Horr, all of the city of Minneapolis in the State of Minnesota, are jointly and severally held and firmly bound unto His Majesty Edward the Seventh, King of Great Britain and Ireland, etc., his heirs and successors, in the sum of twenty-five thousand dollars lawful money of Canada, to be paid to the said King Edward the Seventh, his heirs and successors, for which payment to be made, we bind ourselves jointly and severally and our respective heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this twentieth day of November, A. D. 1906.

Whereas an agreement has been entered into bearing date the twentieth day of November, A. D. 1906, a copy of which agreement is hereto attached, between his said Majesty, represented by the honourable the commissioner of crown lands for the Province of Ontario, thereafter called the government, of the first part, and the said Edward Wellington Backus, of the second part, by the terms of which, amongst other things, Edward Wellington Backus has agreed to erect and equip, or cause to be erected and equipped, on the water power on the Ontario side of the Rainy River at Fort Frances, a flouring or oatmeal or flouring and oatmeal mill, having a capacity of at least one thousand barrels of flour or oatmeal per day of twenty-four hours; or in lieu thereof to erect and equip or cause to be erected and equipped a pulp mill or other manufacturing industry that will require in operation the same amount of power as such flouring or oatmeal, or flouring and oatmeal mill, and have the same completed and ready for operation within two years after the completion of the dam mentioned in the second and fourth paragraphs of said agreement.

Now the condition of this obligation is such that if the said Edward Wellington Backus shall well and truly erect, or cause to be erected and equipped, the said mill or mills or other manufacturing industry, according to the terms and conditions of the said agreement, and in all respects keep and perform all other terms and conditions or stipulations as in said agreement set forth to the satisfaction of the government of the lieutenant governor in council of the said Province of Ontario, then this obligation to be void, otherwise to be and remain in full force and virtue.

EDWARD WELLINGTON BACKUS.  
WILLIAM FREDERICK BROOKS.  
AUGUSTUS ESTES HORB.

Signed, sealed, and delivered in the presence of Alice A. Feltus, F. B. Parsons (as to E. W. B. and W. F. B.); Emily E. Horr, Annette E. Leavitt (as to A. E. H.).

[Extract from a report of the committee of the honourable the Privy Council, approved by the Governor General on 19th September, 1905.]

On a report dated 11th August, 1905, from the minister of public works stating that in January, 1905, Mr. Edward Wellington Backus, of Minneapolis, made an application for himself and those associated with him under chapter 92 of the Revised Statutes of Canada, for the right to construct a power dam across the Rainy River from a point in the town plot of Alberta, now the town of Fort Frances, to a point in the city of Minnesota, U. S., opposite the said

town of Fort Frances. The minister further states that with this application were also transmitted to the department of public works plans showing the nature of the work to be performed, one being a sketch showing the location and the other showing details of the mode of construction of the work.

The minister further states that on the 19th January, 1905, the said E. W. Backus made with the government of the Province of Ontario a certain agreement whereby the applicants obtained from the government of the said Province a grant in fee of lands and power on the Canadian side of the international boundary for the purpose of developing the water power there and utilizing storage facilities with a view of creating a large amount of power for the operation of mills and other manufacturing establishments, the consideration of such acquisition being stated in the agreement at \$5,000.00, the agreement in question containing several conditions as regards the character and dimensions of the works; the raising and maintaining of the waters of Rainy Lake; the use or nonuse of flashboards; the construction of power houses; the expenditure of \$50,000.00 on the works within nine months from the date of the agreement; the delivery of power to the town of Fort Frances after the 1st January, 1907, for municipal purposes and for public utilities; the operation and delivery of said power; the rate at which it shall be furnished; the intervention of the lieutenant governor in council concerning the price of the power or energy to be created, and several other agreements of different kinds always bearing upon the delivery and price of the energy to be manufactured out of the works approved by the agreement. That the agreement also in clause 14 thereof reserves and excepts all the rights of the Dominion of Canada in navigation and the improvement thereof by the construction of locks, dams, canals and otherwise, the Government of the Dominion or the Province of Ontario to have the power to enter upon the premises and maintain and repair such canals, locks, dams or other works for the improvement of navigation without compensation. It is also agreed that no sawdust, chemical or other refuse of any kind shall be placed or deposited in the river.

That the application so made by Mr. E. W. Backus on behalf of the Ontario and Minnesota Power Company was referred to the chief engineer of the department of public works for report, and that the officer in question stated that in so far as the construction of the dam is concerned it would in no way interfere with navigation above or below the falls of Fort Frances, but would, in fact, be an improvement; that the dangerous rapids two miles above Fort Frances would be flooded, thereby improving materially the navigation; that the freshet waters stored in Rainy Lake could be let out during the season of low water, thereby also considerably improving the navigation of the river between Fort Frances and Lake of the Woods; and that the only objection that could be raised to the proposed elevation of the dam is provided for by a proposed revetment wall to be constructed by the company, and also by a clause in the act of incorporation of the company which makes all damages to lands caused by their works a charge to be borne by them.

The resident engineer quotes the opinion of the Chief Engineer of the United States Army, who says that the height of the dam appears to him unobjectionable provided that the said dam is operated so as not to reduce the flow of Rainy Lake during the lowest water season. That in addition to this report obtained from the engineer of the department of public works the matter was referred to the department of justice, and that it reported that in so far as the Dominion Government was interested in the proposed works it had to consider them in so far as they affected the navigation, and in so far as they affected the fishing, and also in so far as they could affect an unfinished canal and lock at the place where the dam is to be erected.

That at the session of Parliament just closed the Ontario and Minnesota Power Company have obtained an act by which the company is authorized to construct and operate a water power now existing at Fort Frances and build all necessary works for that purpose provided no work so authorized shall be commenced until plans thereof shall have been submitted to and approved by the governor in council.

The act in question contains several clauses referring to the production of power or electric energy, the delivery thereof, the construction of power houses, etc., the settlement of the price for power by the board of railway commissioners; a clause is also inserted to prevent the diversion of that energy for use in the United States without an order of the said railway commissioners, the board having full jurisdiction to enquire into the matter as

often as necessary and to prescribe any action on the part of the company not inconsistent with the act passed, etc.

That on communication with them on the matter the department of marine and fisheries have sent to the department of public works a plan of the fishway which they think should be erected by the company in connection with their works, the said fishway to be built subject to the inspection and approval of an officer of the department of marine and fisheries.

The minister recommends, in view of the above application of the Ontario and Minnesota Power Company, this agreement with the government of the Province of Ontario, a copy of which is hereto annexed, of the act passed by the Parliament at its last session and of the reports made by the chief engineer of the department of public works, and the report of the department of justice, that authority be given to approve of the plans submitted by the said company subject to the following conditions, viz:

1st. That the company shall not, in the execution of their works, construct them in such a manner that they will in any way interfere with the navigation of the Rainy River, either above or below the point where the works are to be constructed, at any time during the season of navigation; and that they shall not increase the height of water either by the construction of the dam itself or by placing flashboards upon the said dam in such a way as to reduce the natural depth of water below said dam, nor generally will they interfere in any way detrimental to the said navigation.

2nd. That at any time during the construction of the works, or after their construction or during their operation, the minister of public works shall have the power when it shall appear to him necessary, after a proper examination, to regulate the retention or flow of the water by or over the dam, to enter on the works for such investigation, and also to have the right to make such regulations and issue such instructions as may to said minister appear advisable and necessary in the interest of navigation.

3rd. That the permission be granted subject to the conditions inserted in the agreement between the government of the Province of Ontario and the applicants and also subject to all the conditions and reservations expressed in the act of Parliament passed at its last session respecting the Ontario & Minnesota Power Company, Limited.

4th. That no work will be done under the permission to be given to the company which will in any way interfere with the lock, canal, or other works of a public nature already executed at Fort Frances by the Government of Canada, nor will any bridge or any other erection or construction of any nature whatsoever in, over, or across said lock, canal, or other works be built, nor generally shall any use be made thereof except by permission in writing given to that effect by the minister of public works.

5th. That no work for the construction of any dyke or retaining wall provided on the plans submitted by the company shall be commenced until the detailed plans thereof shall have been submitted and approved by the minister of public works.

6th. That should it appear necessary to the minister of public works during the course of construction of the works hereunder to be authorized to cause said works to be interrupted for any changes, alterations, etc., as to him may appear advisable, then the company will immediately cause the said works to be stopped forthwith and will carry out any alterations or changes which may be ordered by the said minister and will conform in every way to the directions of the said minister.

7th. That the company shall provide in the execution of their works for the construction of the necessary fishway, upon a plan and in a manner approved by the department of marine and fisheries, the officers of that department to have, for that purpose, the right of entering upon the work and seeing to the proper construction of the said fishway in accordance with whatever plans and specifications they may prepare.

The committee submit the same for approval.

(Signed) JOHN J. MCGEE,  
*Clerk of the Privy Council.*

The Honourable the MINISTER OF PUBLIC WORKS.

Compared: V. T. A., S. J. H.

Certified a true copy.

L. H. COLMAN,  
*Acting Secretary, Department of Public Works of Canada.*

[Department of attorney general, Ontario. Copy of an order in council approved by his honour the lieutenant governor, the 27th day of January, A. D. 1909.]

Upon consideration of the report of the honourable the minister of lands, forests, and mines, dated January 21st, 1909, wherein he states that the Ontario & Minnesota Power Company, Limited, has made certain changes in the plans for the development of the water power on the Rainy River at Fort Frances covered by the agreement between His Majesty and Edward W. Backus et al., dated 9th January, 1905, and has filed blue-print plans showing such changes. The changes have reference to—

1. The enlargement of the power house so as to increase the capacity from 7,000 to 9,000 kilowatts.

2. The substitution of six floodgates at the head of the Canadian canal for one, to insure greater safety and convenience in handling the flood waters. The number of the waste gates on the northerly wing of the dam has been made ten instead of eight as originally planned.

3. The log sluice has been removed from the apex of the dam to near the southwest corner of the power house, and is twelve feet in width instead of six feet two inches. The apex of the dam has been made to conform to a curve instead of an angle.

4. Instead of a crib dyke along the bank of the Rainy River above the dam an earth embankment faced with riprap has been substituted. The object of this to permit a railway to be laid down on the embankment for the purpose of handling and unloading logs and other timber.

The minister is of opinion that the proposed changes are in the public interest and recommends that they be concurred in, and that the plans which the company has submitted showing the same be approved of, upon the following conditions:

1. If in the operation of the log sluice the capacity of the same proves insufficient the company will, on the request of the department, equip one or more of the wasteway openings with log sluices.

2. The department shall be notified before the construction of the railway embankment along the edge of the river is begun; shall have the right of inspecting the same from time to time as it progresses, and should the works not prove to be safe and suitable for the required purpose the company will make such changes as the department may direct.

The committee of council advise that subject to the conditions mentioned above the changes recommended by the minister be approved by your honour.

Certified.

W. V. CURREY,  
*Asst. Clerk, Executive Council.*

CHAPTER 132.—An act respecting "The Ontario and Minnesota Power Company, Limited."

Assented to 14th May, 1906.

Whereas chapter 139 of the statutes of Canada of 1905 was passed on the petition of the Ontario and Minnesota Power Company, Limited; and whereas certain provisions thereof as to the supply of power in Canada from the water power on the Rainy River at or near the town of Fort Frances are in the interest of the Province of Ontario; and whereas, notwithstanding the provisions in the said statute contained, it is contended that the company are not bound thereby, but are entitled to deal with the said water power freed from the restrictions in respect thereof imposed by the said act; and whereas the lands described in Schedule "A" hereto form a part of the water front of the town of Fort Frances, and were hitherto vested in the corporation thereof, and were by them conveyed to the Crown in the interest of the Province of Ontario to enable the Crown to deal therewith as the needs of the vicinity might require in assisting the establishment and operation of such industries at the said town of Fort Frances, requiring the use of power as would be for the public benefit; and whereas by a certain agreement, dated the 9th day of January, 1905, made between His Majesty of the first part and Edward Wellington Backus, of the city of Minneapolis, lumberman, and those associated with him, of the second part, acting on behalf of a company then to be incorporated, the Crown representing the Province of Ontario agreed, in certain events and subject to certain conditions, to convey the said lands to the said parties of the second part, but

no provision was made for the protection of the interests of the said town of Fort Frances in respect of the purposes for which the said town conveyed the lands to the Crown; and whereas it is claimed the said agreement was entered into without the consent of the corporation of the town of Fort Frances and without any notice to them, although the same interferes most seriously with the rights of the said town; and whereas the Ontario and Minnesota Power Company, Limited, have been incorporated and have taken over the rights of the said parties of the second part to the said agreement; and whereas it is desirable to make certain provisions as to some of the matters contained in the said chapter 139 of the statutes of Canada of 1905 and to restore the said lands to the Crown to be dealt with as hereinafter provided, and to embody in this act certain provisions already agreed upon relating to the development of industries at the town of Fort Frances aforesaid; and whereas the said company is desirous of securing an extension to the time fixed by said agreement for the full and final completion of the works therein referred to.

Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Notwithstanding the provisions to the contrary (if any) contained in the said agreement dated the 9th day of January, 1905, made between His Majesty, of the first part, and the said Edward Wellington Backus and those associated with him, of the second part, the company shall from the water power now or hereafter existing on the Rainy River at or near the town of Fort Frances, in the District of Rainy River, including any increase thereof from time to time, provide power or electrical energy for use on the Canadian side of the international boundary line concurrently as it provides power or electrical energy for use in the United States, so that from time to time, except as provided for by order of the lieutenant governor in council, there shall not be less of the said power or electrical energy available for use on the Canadian side of the international boundary line than on the American side, and subject to the provisions of this act such power or electrical energy shall be delivered on the Canadian side as and when demanded.

2. The power house, generators, transmitters, machinery, appliances, and connections necessary for the delivery by the company of such power or electrical energy for use on the Canadian side of the international boundary line shall be on the Canadian side thereof.

3. In case of any dispute as to the price for power or electrical energy in use or to be provided for use upon the Canadian side of the said international boundary line or the methods of distribution thereof or the time within which or the conditions upon which the same shall be furnished for use, such dispute shall be settled by the lieutenant governor in council on the application of any applicant for power or of the company or of the town of Fort Frances.

4. No part of the power or electrical energy to be provided for use on the Canadian side of the said boundary line shall be diverted to or used in the United States without the order of the lieutenant governor in council made on an application, of which two weeks' notice in writing shall have been served upon the mayor and clerk of the town of Fort Frances, or, in the absence of either one of them, upon a member of the town council in his stead; and if on any such application it shall appear to the lieutenant governor in council that there is not a reasonable prospect of the utilization within a reasonable time of power or electrical energy unemployed, though actually available for use on the Canadian side, an order may be made permitting the diversion of the whole or part of such unemployed power or electrical energy on such terms and conditions, including the time during which such diversion may continue, as to the lieutenant governor in council may seem proper or expedient. The terms and conditions so imposed shall be absolutely binding on and enforceable against said company; and in event of the company not strictly adhering to and complying with the said terms and conditions, the permission granted may be withdrawn by the lieutenant governor in council.

5. The lands described in Schedule "A" hereto shall remain vested in the Crown, to be dealt with in connection with the development of the said water power and the establishment or operation of such industries at the town of Fort Frances requiring the use of power as would be for the public benefit, in such manner as the lieutenant governor in council may from time to time direct, absolutely freed from the provisions of the said agreement and from any claims or demands whatsoever on the part of the Ontario and Minnesota Power Company, Limited.

## COMPANY TO ERECT FLOUR MILL, ETC.

6. In the event of the said company extending between the date of the passing of this act and the 1st day of January, 1907, the sum of at least \$40,000 in the construction of the works mentioned in said agreement of 9th January, 1905, the time fixed for full and final completion of said works shall be extended to the 1st day of January, 1908, and the said agreement shall be read as if the words "first day of January, 1908," appeared therein instead of "first day of January, 1907," wherever the latter words are used or referred to in said agreement.

## SCHEDULE "A."

All and singular that certain parcel or tract of land described as follows:  
Commencing on the east limit of the town plot of Alberton at the distance of one chain due south of an iron post planted at the southeast angle of lot No. 164, thence westerly in a straight line to a point in the west limit produced of Butler Street; said point being one chain due south from an iron post planted at the southeast angle of lot No. 161; thence westerly in a straight line to a point in the easterly limit produced of Mosher Street, distant one chain to south of the southwest angle of lot No. 155; thence westerly to a point in the easterly limit, produced of Crowe Street, being one chain due south of the southwesterly angle of lot No. 147; thence southwesterly to a point in the easterly limit, produced of Armit Street, said point being one chain due south of the southwest angle of lot No. 66; thence southwesterly to a point due south one chain from the southwesterly angle of Lot No. 64; thence westerly to a point one chain due south of the southwest angle of lot No. 14; thence westerly to a point in the east limit of Victoria Street produced, situate one chain south of the southwest angle of lot No. 16; thence due south to the water's edge of the Rainy River; thence northeasterly and easterly along the water's edge of the said Rainy River to its intersection with the easterly limit of the town plot of Alberton; thence due north along said limit to the point of commencement, reserving thereout the production of Armit Street and Mosher Street to the water's edge of Rainy River.

CHAPTER 7.—An act respecting the Ontario and Minnesota Power Company.

Assented to 24th March, 1911.

Whereas the Ontario and Minnesota Power Company, Limited, did, on the 2nd day of June, 1910, enter into an agreement with His Majesty the King, represented therein by the honorable the minister of lands, forests, and mines, in the said agreement referred to as "the Government," which agreement is set forth in the schedule to this act;

And whereas in the said agreement it was provided that the said Ontario and Minnesota Power Company, Limited, irrevocably and without power of revocation requested the Government to obtain at the next ensuing session of the legislature an act to ratify and confirm the said agreement and making the terms thereof binding upon the parties thereto, and providing also for the issuing of a perpetual injunction order in the event of a breach of the order in council referred to in said agreement, or of any of the terms of the said agreement;

And whereas it is expedient that an act be passed for such purpose,

Therefore His Majesty, by and with the advice and consent of the legislative assembly of the Province of Ontario, enacts as follows:

1. The agreement set out in the schedule hereto is ratified and confirmed and declared legal and valid for all purposes from the date thereof, and the parties thereto are authorized and empowered to do any and all acts necessary to carry out and give full effect to the said agreement in all respects, and in the event of a breach of the order in council referred to in the said agreement, or of any of the terms of the said agreement, it shall be lawful for the high court of justice, or a judge thereof, immediately to issue a perpetual injunction restraining the said the Ontario and Minnesota Power Company, Limited, from a further or continuing breach of the said agreement or of the said order in council or of either of them.

## SCHEDULE.

This indenture made in duplicate this second day of June, 1910, between His Majesty the King, represented herein by the honorable the minister of lands,

forests, and mines for the Province of Ontario (hereinafter called the Government), of the first part, and the Ontario and Minnesota Power Company, Limited (hereinafter called the company), of the second part.

Whereas, by an act of the Ontario Legislature passed in the sixth year of His late Majesty's reign and chaptered 132, it was amongst other things enacted that the lieutenant governor in council might, upon an application made to him and on its appearing that there was not a reasonable prospect of the utilization within a reasonable time of power or electrical energy unemployed, though actually available for use on the Canadian side of the Rainy River at or near Fort Frances, make an order permitting the diversion of the whole or part of such power or electrical energy on such terms and conditions, including the time during which such diversion might continue as to the lieutenant governor in council might seem proper or expedient;

And whereas the dam, powerhouse, generators, transmitters, machinery, appliances, and connections necessary for the delivery by the company of power or electrical energy for use on the Canadian side of the international boundary line and elsewhere have been erected and installed on the Canadian side thereof, as required by section 2 of the said act and by the agreement referred to in said act dated the 9th day of January, 1905, between His Majesty, of the first part, and Edward Wellington Backus of the city of Minneapolis, lumberman, and those associated with him, of the second part;

And whereas an application has been made by the company to the lieutenant governor in council for an order in council, which the company desire to be passed after the execution of this agreement (a copy of which proposed order in council is attached hereto and marked "A"), temporarily permitting the diversion of such power to the United States in the quantities and upon the terms and conditions set forth;

And whereas it is of the utmost importance to the Government and the people of the Province that no power or electrical energy should be permitted to be diverted to the United States, except as provided in the said order in council, and that the said diversion should at once cease upon the request of the Government; and as there is no adequate means of ascertaining the precise damage which may result from a greater diversion of such power or electrical energy otherwise than is so provided, or which may result from the company continuing to divert when requested to cease, and the parties hereto have agreed to fix now the amount to be payable as damages without proof of any damage;

And whereas industries may be established on the Canadian side desirous of utilizing the power so intended to be diverted, and such power should be fully available for them whenever required or desired, at a reasonable price;

And whereas the said order in council permitting the said company to divert power to the United States is to be passed, because there appears to be now on hand and available for use a quantity of electrical horsepower or energy in excess of what is required for use at present on the Canadian side, and it is explicitly understood between the parties hereto that the said order is to be for a temporary purpose only, and the right to divert may be revoked at any time.

This indenture witnesseth that it is hereby agreed by and between the company and the Government as follows:

In the event of the company disregarding or not complying with that part of the said order in council which forbids the diversion of power or electrical energy either wholly or in a larger or greater quantity than is from time to time specifically permitted, they shall pay forthwith to the Government as liquidated damages, and not as a penalty, the sum of \$50,000 (fifty thousand dollars) and shall also pay the sum of \$100 (one hundred dollars) per diem for every day on which such breach of the said order in council continues, and such sums shall be recoverable by the Government from the company as ascertained and liquidated damages and not by way of penalty, and it shall not be required in any action or upon any claim or demand hereunder to give evidence or proof of any actual damage.

It is further agreed by the parties hereto that the company shall in the event of a breach of the said order or of any of the terms of this agreement consent to an order from a court or judge of the high court of justice for an immediate perpetual injunction restraining them from a further or continuing breach of this agreement and the said order in council or either of them, the remedy by way of an injunction shall be in addition to the right of the Government to



collect and receive the said sum of \$50,000 (fifty thousand dollars) and \$100 (one hundred dollars) per diem.

And it is further agreed that in addition to all other remedies the said Government may, upon a breach of the said order in council, or of any of the terms and conditions thereof, or of any of the terms of this agreement, on five days' written notice to the company, or to its agent or employee in charge or in apparent charge of its plant at Fort Frances, Ontario, authorize the sheriff, or such other officer as it may appoint, to enter upon the premises of the said company and to take such measures and do such acts and use such force as shall be necessary to prevent all diversion of electric current to the United States, or to any part thereof.

And it is further agreed that the said company does hereby irrevocably and without power of revocation request the Government to obtain at the next ensuing session of the legislative assembly for Ontario legislation to ratify and confirm this agreement, and make the terms thereof binding upon all the parties hereto, and providing also for the issuing of a perpetual injunction order as hereinbefore set forth.

And it is further agreed by and between the parties hereto that no works, or building, or plant which have been or which may hereafter be erected or installed by the company on the American side shall be deemed, or by the company be claimed, to have been so erected or installed in consequence of anything in this agreement or in the said order in council.

It is further agreed that the price for power or electrical energy supplied or to be supplied to applicants for or users of power, or to prospective applicants or users by the company on the Canadian side and the time within which, and the conditions on which the same shall be furnished for use and the methods of distribution thereof shall from time to time be fixed by the hydroelectric power commission of Ontario upon the application of any such user, applicant, prospective user or applicant, of the town of Fort Frances, of the Township of McIrvine, or on the application of any municipality, person, firm, or corporation interested; and the price, time, terms, conditions, and methods may be so fixed by the said commission at any time either before or after a request or demand for power or electrical energy has been made upon the company by any person, firm, corporation, or municipality.

And it is further agreed that the power or electrical energy to be exported by the company shall be measured by instruments installed or to be installed by the company, and such instructions shall from time to time be subject to the approval of the Government and subject to the inspection of the representative of the Government from time to time and at all times, and the said representative may at all reasonable times test such instruments for the purpose of determining their accuracy, and in the event of the said instruments at any time proving inaccurate the company shall at its own expense have the said instruments put into proper working condition, or shall replace the said inaccurate instruments with new approved ones in proper working order.

And it is further agreed that the maximum amount of electrical power or energy to be temporarily diverted to the United States shall not at any time exceed the horsepower indicated in the said order in council or in the notice or notices from the minister of lands, forests, and mines referred to in such order, as determined by a curve-drawing polyphase wattmeter.

Provided that a temporary diversion of power in excess of the horsepower indicated in the said order in council or in the notice or notices in this clause referred to, for a time not exceeding fifteen minutes continuously and not occurring more than twice in any one period of twelve hours, shall not be deemed a breach of this clause.

And it is further agreed that the temporary diversion to the United States for twenty-four hours or less of power or electrical energy in excess of the amount authorized by the said order in council, due to accident or the negligence of the company's servants, shall not be deemed a breach of this agreement, but the burden of proof of such diversion being due to such accident or negligence shall be upon the company.

And the said company doth hereby covenant and agree with the Government that it will furnish a sufficient surety or sureties to the satisfaction of the Government before the order in council referred to herein is signed.

And it is further agreed that the term "company" and the term "Government" herein shall extend to and include their and each of their respective successors and assigns.

In witness whereof these presents have been duly executed under seal.

[SEAL.]

F. COCHRANE,  
*Minister of Lands, Forests, and Mines for the Province of Ontario.*

Signed, sealed, and delivered in the presence of—

GLYN OSLER,

*As to execution by the Ontario and Minnesota Power Company, Limited.*

EDWARD BAYLY,

*As to execution by the Minister of Lands, Forests, and Mines.*

THE ONTARIO AND MINNESOTA POWER COMPANY, LIMITED.

[SEAL.]

By E. W. BACKUS, *President.*

[Copy of an order in council approved by his honor the Lieutenant governor, the 2nd day of June, A. D. 1910.]

Upon the recommendation of the honourable the minister of lands, forests, and mines, the committee of council advise that pursuant to the application of the Ontario & Minnesota Power Company, Limited, made under section 4 of the act passed in the 6th year of the reign of His late Majesty and chaptered 132, the said company having entered into an agreement with His Majesty dated the 2nd day of June, 1910, a copy of which is submitted herewith, the said company be permitted to divert temporarily to the United States so much power or electrical energy not exceeding in all six thousand horsepower (as determined by a curve-drawing polyphase wattmeter) as shall leave at least one thousand horsepower constantly available and unemployed for use or in use on the Canadian side, said diversion of electrical energy to be permitted and to continue only until the expiration of thirty days after the said company has received notice in writing from the minister of lands, forests, and mines to discontinue such diversion or the said company has received a notice or notices in writing from time to time from the said minister to discontinue diverting such quantity as shall be specified in such notice or notices.

Certified.

J. LONSDALE CAPREOL,  
*Clerk, Executive Council.*

CHAPTER 152.—An act respecting the Ontario & Minnesota Power Company, Limited.

Assented to 16th April, 1912.

Whereas the Ontario and Minnesota Power Company, Limited, has by petition represented that it was duly incorporated by letters patent under the great seal of the Province of Ontario, dated the 13th day of January, 1905; that supplementary letters patent have been granted to the said company on or about the 25th day of April, 1911; and whereas the said company has by its petition prayed that it be enacted as hereinafter provided; and whereas it is expedient to grant the prayer of the said petitioners:

Therefore His Majesty, by and with the advice and consent of the legislative assembly of the Province of Ontario, enacts as follows:

1. The company shall have the right, and it is hereby empowered to enter upon, take, and expropriate, without the consent of the owners thereof, the lands required for and in connection with the construction and operation of a paper mill within the following area; that is to say: Lots A, B, C, D, F, G, H, and X and the south thirty-four feet four inches of lots I and J, as shown in the original plan of the town plot of Alberton in the town of Fort Frances, and the lands bounded on the north by Nelson Street between Mowat Street and Portage Avenue and Sinclair Street between Portage Avenue and Victoria Avenue, and on the east by Portage Avenue between Nelson Street and Sinclair Street, and Victoria Avenue between the river and Sinclair Street, and on the south and west by the Rainy River and a part of Mowat Street.

2. A map or plan of the land intended to be taken so far as then ascertained and a book of reference in which shall be set forth (a) a general description of the said lands; (b) the names of the owners and occupiers so far as they can be ascertained; and (c) everything necessary for the right understanding of

such map or plans shall be made and filed in the office of the local master of land titles at Fort Frances.

3. For the purpose of this act subsections 7, 12, and 14 of section 59 and sections 61 to 68 of the Ontario railway act, 1906, shall, so far as practicable, *mutatis mutandis* apply to the company and to the exercise by it of the powers herein conferred, and wherever in the said sections the word "railway" occurs, it shall for the purposes of the company and unless the context otherwise requires, mean the said paper mill.

4. In case the company does not, within one year after the passing of this act, proceed to expropriate and serve notice of expropriation, pursuant to section 68 of the said Ontario railway act, upon the owners of the said lands or such part or parts thereof as the company shall desire to take, then the right and power of expropriation hereby given shall at once cease and be determined, and the said company shall not thereafter have the right to proceed to expropriate any lands or interests in respect to which notice has not been served within the time hereby limited; but this section shall not impair or limit the obligation of the company to serve notice of expropriation within thirty (30) days as provided in a certain agreement between the company and the town of Fort Frances, dated the 15th March, 1912.

9 Edw. VII, chap. 26, sec. 12: Section 6 of the act passed in the sixth year of His Majesty's reign, chaptered 132, being an act respecting the Ontario and Minnesota Power Company, Limited, as amended by the statute law amendment act, 1907, section 33, and the statute law amendment act, 1908, section 61, is hereby further amended by striking out the figures "1909" in the sixth and eighth lines thereof and substituting therefor the figures "1910."

7 Edw. VII, chap. 23, sec. 33: Section 6 of the act passed in the 6th year of His Majesty's reign, chaptered 132, is amended by striking out the figures "1907" in the third line thereof and substituting therefor the figures "1908," and by striking out the figures "1908" in the sixth and eighth lines thereof and substituting therefor the figures "1900," but this enactment shall not come into force or have effect until an order of the Lieutenant governor in council shall have been passed declaring the same to be in force.

8 Edw. VII, chap. 33, sec. 61: Section 33 of the statute law amendment act, 1907, is amended by striking out the figures "1900" in the sixth line thereof and substituting therefor the figures "1909."

[4-5 Edward VII.]

CHAPTER 139.—An act respecting the Ontario and Minnesota Power Company (Limited).

(Assented to 20th July, 1905.)

Whereas the Ontario and Minnesota Power Company, Limited, has by its petition represented that it was incorporated by letters patent under the great seal of the Province of Ontario dated the thirteenth day of January, one thousand nine hundred and five, under "the Ontario companies act," being chapter 191 of the Revised Statutes of Ontario, 1897; and whereas the said company has prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The company may construct, develop, acquire, own, use, and operate the water power now or hereafter existing on the Rainy River at or near the town of Fort Frances, in the district of Rainy River, in the Province of Ontario, and construct, develop, operate, and maintain works, canals, raceways, water courses, dams, piers, booms, dykes, sluices, conduits, and buildings in connection with the said power, including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake which the company now has or may hereafter have power to construct; provided that no work authorized by this section shall be commenced until the plans thereof have first been submitted to and approved of by the governor in council.

2. The company shall, from the said water power, including any increase thereof from time to time, provide power or electrical energy for use on the Canadian side of the international boundary line concurrently as it provides power or electrical energy for use in the United States, so that from time to time, except as herein provided, there shall not be less of the said power or electrical energy available for use on the Canadian side of the international boundary line than on the American side, and, subject to the provisi

act, such power or electrical energy shall be delivered on the Canadian side as and when demanded.

3. The power house, generators, transmitters, machinery, appliances, and connections necessary for the delivery by the company of such power or electrical energy for use on the Canadian side of the international boundary line shall be on the Canadian side thereof.

4. In case of any dispute as to the price for power or electrical energy in use or to be provided for use upon the Canadian side of the said international boundary line, or the methods of distribution thereof, or the time within which or the conditions upon which the same shall be furnished for use, such dispute shall, notwithstanding the provisions of section 13 of the railway act, 1903, be settled by the Board of Railway Commissioners for Canada on the application of any user or applicant for power, or of the company, or of the town of Fort Frances.

5. No part of the power or electrical energy to be provided under this act for use upon the Canadian side of the said boundary line shall be diverted to or used in the United States without the order of the said Board of Railway Commissioners, made on an application of which two weeks' notice in writing shall have been served upon the mayor and clerk of the town of Fort Frances, or, in the absence of either one of them, upon a member of the town council in his stead.

6. The said Board of Railway Commissioners shall have full jurisdiction to inquire into and hear and determine any application of the company for leave to make such diversion, and if, and so often as, it appears to the said board on such an application that there is not a reasonable prospect of the utilization within a reasonable time of power or electrical energy unemployed, though actually available for use, on the Canadian side of the international boundary line, the board shall make an order permitting the diversion of the whole or part of such unemployed power or electrical energy, and may impose such terms and conditions, including the fixing of the time during which such diversion may continue, as the board may deem expedient.

7. The board may order and require the company or any person to do forthwith, or within or at any specified time, and in any manner prescribed by the board, so far as is not inconsistent with this act, any act, matter, or thing which such company or person is or may be required to do under this act, and may forbid the doing or continuing of any act, matter, or thing which is contrary to this act; and shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction under this act, or otherwise for carrying this act into effect, have all such powers, rights, and privileges as are vested in a superior court.

8. The practice and procedure under this act on applications to the board shall be as nearly as possible that followed on applications thereto under the railway act, 1903, and otherwise shall be subject to the direction and control of the board.

Filed November 18, 1912.

