

INTERNATIONAL JOINT COMMISSION

OPINION

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

Filed under Article III of the Treaty between the United States
and Great Britain, May 5, 1910

OPINION FILED APRIL 18, 1913
AT WASHINGTON AND OTTAWA



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INTERNATIONAL JOINT COMMISSION.

UNITED STATES.

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L. WHITE BUSBEY, *Secretary.*

CANADA.

TH. CHASE CASGRAIN, *Chairman.*
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CHARLES A. MAGRATH.

LAWRENCE J. BURPEE, *Secretary.*

INTERNATIONAL JOINT COMMISSION.

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

**FILED UNDER ARTICLE III OF THE TREATY BETWEEN THE UNITED
STATES AND GREAT BRITAIN, MAY 5, 1910.**

Opinion filed April 18, 1913, at Washington and Ottawa.

This application was filed under the provisions of Article III of the treaty, a copy of which follows:

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 hereinafter 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.

The commission, after inquiry and consideration, felt it necessary to call upon the parties to discuss before it the question as to whether upon the facts as they appear on the record, the case was one which fell within their jurisdiction under the terms of the treaty. Accordingly, on the 18th November, 1912, at Washington, the parties were heard upon the question of jurisdiction, and the commission took further time to consider.

The conclusion to which the commission has come will appear by the following:

On the 9th January, 1905, Edward Wellington Backus entered into an agreement with His Majesty, represented by the Commissioner of Crown Lands of Ontario, by which were given to him, among other rights and powers, the following:

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 the 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 (\$1.00) 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 or other necessary works or structures in connection therewith.

On the 13th January, 1905, letters patent were issued to Mr. Backus and others, constituting them under the Ontario Companies Act a corporation under the name of "The Ontario & Minnesota Power Co. (Ltd.)," and among other powers given by the said letters patent to the said company were the following:

(i) To acquire, purchase, take and hold all the rights, favours and privileges, franchises, benefits, water powers, contracts, or other property, under a certain agreement bearing date on the 9th 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 undertakings by the said agreement assumed by the said Edward Wellington Backus.

By the Dominion Statute 4-5 Edward VII, chap. 139 (sanctioned 20th July, 1905) the above-named corporation was empowered to construct, develop, acquire, and operate the water power now or hereafter existing on the Rainy River at or near the town of Fort Frances, and construct, develop, operate, and maintain works, canals, raceways, water courses, dams, piers, booms in connection with the said water power, including any increase of the said water 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."

This authority, however, was subject to the approval by the Governor General in council of all plans for the building or construction of the works authorized.

The Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota, have applied to the commission "for approval of plans for a dam at Kettle Falls."

The application has constantly been referred to before the commission as an application for the approval of a dam at Kettle Falls across the boundary waters from the American shore to the Canadian shore, and the application gives one of the objects of the construction to be "to improve and so far as practicable to flood out the rapids at the mouth of Rainy Lake, and to equalize so far as practicable the water of Rainy River from the source to its mouth, and prevent the water from falling to its natural low-water stage."

The application moreover refers specifically to and is based on the act of Congress of February 24, 1911, which empowers the Rainy River Improvement Co. "to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls."

The application, which has been pending before the commission since the 2nd April last, has been duly notified to the Government of Canada, and counsel for the Ontario & Minnesota Power Co. (Ltd.) have appeared before us and stated that they have been endeavoring to obtain from that Government the approval of plans submitted for the construction of a dam at Kettle Falls which will join that portion of the dam to be constructed at the same place, on the American side, by the Rainy River Improvement Co. In fact, it has been stated to the commission, and the commission is in full possession of the fact, that these two applications, one of which, the American application, was approved by the Secretary of War, and the other, the Canadian application, is before the Department of Public Works for approval, have a common object, viz., the building of a dam across the boundary waters at the point in question.

The authority conferred by the agreement of the 9th January, 1905, upon Mr. Backus and his associates by the letters patent of the 13th of January, 1905, and the Dominion Statute of 1905, is to build a *storage* dam at or near Kettle Falls, at the outlets of Lake Namakan, of Lake Lower Manitou, and Big Turtle Lake, for the purpose of raising and maintaining the waters of these lakes at or "to a point not higher than the high water mark."

One of the considerations upon which this grant is made is thus expressed in the agreement:

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 a plan of development;

AND WHEREAS the purchasers (Backus and his associates) 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 the river at such high water mark, thereby rendering available a large amount of power on the Canadian side of the river, for municipal purposes and for the operation of pulp and paper mills, flour and grist mills and other manufacturing establishments.

The same Mr. Backus who appears as one of the incorporators of the Ontario & Minnesota Power Co. is also one of the incorporators and the president of the Rainy River Improvement Co., and it was stated over and over again to the commission by counsel for both companies, which are really one and the same group under different names, that the object of the application was to construct a dam across the boundary waters and that there was no question of constructing a dam on one side only; in fact, it was suggested to the commission that it give its approval conditionally upon authority being subsequently obtained from the Dominion Government to build on the Canadian side.

The application is therefore not one respecting the "use, obstruction, or diversion" of boundary waters on one side of the line the effect of which would be to affect "the natural level or flow" on the other side; admittedly, the purpose in view is the obstruction of the whole river with the result that the natural level or flow of the waters will be affected on both sides.

This purpose and view must have been before the Government of Ontario when it agreed to give Mr. Backus and subsequently the Ontario & Minnesota Power Co. the right to build a storage dam and also before the Dominion Parliament when it passed the act 4-5 Edward VII, chap. 139; but these legislative bodies knew that their powers were bounded by the dividing line between Canada and the United States and that if the dam were to be constructed legislative authority would have to be obtained from Congress. It is inconceivable that any other view of the situation could have been taken.

With such facts being in existence and of public notoriety, the Rainy River Improvement Co. obtained from Congress on the 24th February, 1911, an act authorizing it "to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls."

Based upon this act of Congress, the Rainy River Improvement Co., after having obtained the approval of its plans by the competent authority in the United States, makes the present application to the commission.

This application is governed by Article III of the treaty of May 5, 1910. Article IV of that treaty is confined in terms to "obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary" and has no relevancy to applications for the use, obstruction, or diversion of waters that are strictly boundary waters within the definition of that

term as found in the preliminary article of the treaty. Since there are no provisions in the treaty which confer independent, automatic jurisdiction on the commission save and except those contained in Articles III and IV, it follows that the jurisdiction of the commission to consider and determine the present application must be found, if found at all, in Article III of the treaty. That article, when supplemented by Article VIII, vests in the commission jurisdiction to approve or withhold its approval, or to grant its approval on conditions, to "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," and applications to the commission for its approval of uses, obstructions, or diversions of boundary waters must show the proposed uses, obstructions, or diversions to be of the kind and character described in that article in order to vest the commission with jurisdiction to act on the application. It is proper to observe in this connection that an international commission finds its authority to act in the treaty creating it or in supplemental treaties defining its powers, and that any action taken by it beyond the terms of the treaty, fairly construed, would be *coram non iudice* and void. It would bind neither Government.

Now, looking at Article III of the treaty, its terms are plain, simple, and direct. They authorize the intervention of the commission in one class of cases, and one class only, namely, uses, obstructions, or diversions of boundary waters on either side of the boundary in such waters, which affect the level or flow of such waters on the other side of the boundary. The utility and propriety of such a treaty provision between the two countries arises out of the fact that each Government is supreme on its own side of the boundary in such waters for municipal purposes, and that uses, obstructions, and diversions of such waters, authorized by the respective Governments on their side of the line, often result in injurious consequences on the other side, thus leading generally to irritation and resentment, and in some cases to serious international controversy. By placing the entire matter under the control of an International Joint Commission, and requiring its consent to uses, obstructions, or diversions of such waters on either side, and clothing it with power to make its consent to such uses, obstructions, or diversions on either side conditional on the construction of remedial or protective works on the other side, or on the making of suitable and adequate provision for protection and indemnity against injury to interests on the other side, it was sought to bring the uses of boundary waters on each side of the line under a common control, which should consider the rights and interests of the people of each country in every case, and, where

necessary, make provision for their protection. Thus the rights of each nation would be amply protected and the possibility of irritating controversy would be entirely removed. The utility and propriety of such control is confined, necessarily, to cases where either Government, acting singly on its own side of the line, authorizes uses, obstructions, or diversions of boundary waters on that side which affect the level or flow of the waters on the other side, and hence the treaty in plain and unambiguous terms confines the power of the commission to that class of cases.

The principles governing our interpretation of this treaty or international contract are no other or different than those now universally applied in the interpretation of all contracts and agreements whether between private individuals or public authorities. The principle is frequently expressed by the phrase, "the true interpretation of the terms of a contract is the ascertainment of the intention of the parties, determined by the weight of competent evidence."

The only evidence of the intention of the high contracting parties to be considered by us is the provisions of the treaty itself. From a careful examination of these provisions we are unable to find that the two Governments intended to confer upon this commission jurisdiction or control over such an "obstruction" as a dam to be built in boundary waters from shore to shore across the international boundary line as here proposed, and we are compelled to hold that as the treaty now stands we have no jurisdictional power to act upon the application before us.

There is another aspect of the case which deserves attention. It has already been stated that the application of the American company is made in virtue of an act of Congress approved February 24, 1911, while the Canadian company, viz, the Ontario & Minnesota Power Co. (Ltd.), bases its demand for approval of the application now pending before the Government of Canada on the powers conferred upon it by the letters patent above recited and the Canadian Statute 4-5 Edward VII, chap. 139.

It must be observed that in the two articles of the treaty above quoted exception is made of any works which have heretofore been permitted or may hereafter be provided for "by special agreement between the parties hereto."

Article XIII of the treaty defines what is meant by the term "Special agreement" used in Article III.

"Such agreements," says the treaty, "are understood and intended to include not only direct agreements between the high contracting parties, but also *any mutual arrangements* 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."

It is evident, from the reading of the Dominion statute, that the Parliament of Canada, when it enacted chapter 139 of the statute 4-5 Edward VII, had before it the letters patent incorporating the Ontario & Minnesota Power Co. (Ltd.), and when it speaks of the powers of construction which the company "now has or may hereafter have," it clearly means the powers conferred upon it by the proper authority, viz, the government of the Province of Ontario, one of which powers is the construction of the dam at Kettle Falls.

After the passing of the Dominion act, Congress gave its authorization, such as was necessary, to the construction of the dam by the act hereinabove referred to.

As already stated, the powers conferred by the Dominion statute can only be exercised by the company after the plans of the proposed works have been approved by the governor in council. The operation of the act is suspended until such approval has been obtained. It is reasonable to assume that both companies acting in conjunction and having a common object or purpose in view, the plans approved by the governor in council will be for the construction, not of a part of the dam, but of the dam across the river such as contemplated by the application. In other words, the plans to be dealt with by the Dominion authorities must, in order to meet the requirements of the situation and the wishes of the parties, correspond with each other. When this approval has been obtained and the Dominion statute brought into operation there will be a 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."

There will then be no dispute to be adjusted or settled for which purpose the treaty, according to the preamble, was passed.

The commission, in the present instance, is not dealing with a case of a supposed obstruction which extends further across than the boundary line in waters common to both countries, but with a concrete case of an application for the approval of a dam spanning the stream with abutments on the American and Canadian shores.

In such a case the construction of a dam is one which admittedly must be authorized by both Governments, and such authorization when fully granted will obviously exclude the necessity or propriety of any action by the commission. If the commission under the treaty has the power to approve the construction of a dam it must also have the power to disapprove, and obviously the two Governments did not intend to confer upon the commission the power to disapprove of a work the construction of which they had mutually authorized by legislative grant.

By the foregoing opinion it is not intended to hold that the construction of the proposed dam or the effects of such construction could not under the treaty be referred to the commission for its approval under Article IX at any time before final authorization by both Governments of the construction of the dam, or that in case the two Governments do not agree upon the plans on which the dam may be built such plans may not be referred to the commission for its approval under said Article IX.

The application must be dismissed.

Opinion by Mr. Casgrain.

Mr. Tawney, Mr. Streeter, and Mr. Turner concur.

Mr. Powell and Mr. Magrath dissent.

O R D E R .

**IN THE MATTER OF THE APPLICATION OF THE RAINY RIVER IMPROVE-
MENT CO. FOR APPROVAL OF PLANS FOR A DAM AT KETTLE FALLS:**

The matter of the above application having been heretofore fully argued by counsel upon objections to the jurisdiction of the commission to hear and determine the said application, and, after full consideration, it appearing to the commission that it has no jurisdiction to hear and determine the said application, it is now

Ordered, That the same be, and hereby is, dismissed.



