

SIR GEORGE C. GIBBONS
AND THE BOUNDARY WATERS TREATY OF
1909

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ABSTRACT

SIR GEORGE C. GIBBONS AND THE BOUNDARY WATERS TREATY OF 1909

By

Harriet E. Whitney

George C. Gibbons (1848-1918) was the main instigator of the Boundary Waters Treaty of 1909. The Treaty provided for the International Joint Commission and certain principles on priority of use and equitable diversion by which the Commission was to govern water disposition between the United States and Canada. Gibbons served as a Canadian diplomat, with the assistance of British Ambassador James Bryce, in conferences with United States representatives (1907-1909), and was the indispensable person in the achievement of the Treaty.

Growing conflicts on the Great Lakes and boundary waters over navigation, diversion for electric power, canals, irrigation, and sanitary uses, led to the first meeting of the temporary International Waterways Commission in May, 1905, to report on these problems. George C. Gibbons, appointed Chairman of the Canadian Section of the Commission in November, worked to get a treaty establishing a permanent joint commission and principles. Delegated by the Canadian Government in January of 1907 to discuss with the United States concurrent legislation on these matters, Gibbons drafted a

treaty with a fellow commissioner (George Clinton on the American Section). This treaty was rejected by Secretary of State Elihu Root, who wanted special commissions or a permanent commission of inquiry. Gibbons, supported by Prime Minister Wilfrid Laurier, continued to press for a treaty along the same general lines of the first draft treaty.

By making concessions on diversion for irrigation and on a Minnesota water power project, Gibbons succeeded in negotiating the Boundary Waters Treaty with Chandler P. Anderson, Special Counsel of the United States Department of State on Canadian matters. The Treaty was signed January 11, 1909, and was approved two months later by the United States Senate, with the additional Smith Resolution protecting private riparian rights in the Sault Rapids between Lakes Superior and Huron.

Gibbons urged the reluctant Laurier to accept the Treaty. He did so one year later, after United States condemnation of private property in the Sault Rapids and after assurances were received in Ottawa, both from Washington and western Canada, that the special agreements on water diversion were not injurious to Canadian interests. The Treaty was achieved largely because of the efforts of the persuasive and persistent Gibbons who convinced Root to see the merit of principles and a strong permanent commission to enforce them. This study is based on research in the personal papers of Gibbons, Anderson, Root, Laurier, and in government papers of Canada and the United States.

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By
122101
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INTRODUCTION

The boundary between the United States and Canada extends over fifteen hundred miles through four of the Great Lakes -- Lakes Ontario, Erie, Huron, and Superior. These four, together with Lake Michigan, comprise the largest freshwater reservoirs in the world.¹ Important in the development of regional resources since the French fur-traders, they in themselves are the greatest resource of all. The peaceful sharing of the lakes and their connecting rivers has been achieved through treaties; chief of these is the Boundary Waters Treaty of 1909, negotiated while Canada was represented in international affairs by Great Britain. It established principles on boundary water use and provided for their implementation by a permanent international joint commission.

This study reviews the work of the man primarily responsible for the treaty, Sir George Christie Gibbons, whose only venture into diplomacy brought him little fame and many headaches. Chairman of the Canadian Section of the temporary

¹Chirakaikaran Joseph Chacko, The International Joint Commission between the United States of America and the Dominion of Canada (New York, 1932), 44.

International Waterways Commission, he saw the need for permanent principles to govern water development along the border and struggled for four years to negotiate the treaty. Canadians owe much to his wisdom in bringing their powerful neighbors to terms on the equal use of the boundary waters for electric power and irrigation, while preserving the rights of navigation. His patience, persistence, and faith in mankind enabled him to withstand the selfish designs of those on both sides of the border who were not so far-sighted as he. A special niche in North American history is reserved for this Canadian-American.²

²This study is confined to those events leading to the Boundary Waters Treaty. It relates the work of the International Waterways Commission only as it concerns the beginnings of this treaty.

I. PRELIMINARIES: PART I

The Great Lakes and the International Waterways Commission

Economic growth in the late nineteenth century brought prosperity to Great Lakes shipowners. Cargoes of iron ore and wheat passing through the channels at Sault Ste. Marie between Lakes Superior and Huron increased at the annual rate of two million tons by the end of the century.³ The sailing fleets had been replaced by iron-hull freighters whose owners gauged profits according to the length of each shipping season and the depths of the channels between the lakes. Seasonal and cyclical variations in water levels determined the weight of cargoes that could be maneuvered through the shallow channels and could mean a yearly loss of hundreds of thousands of dollars.⁴

³International Waterways Commission (I.W.C.), 1905-1915, File 1202, Box 1, Record Group 76, United States Archives (R.G. 76, N.A.). Also see "Freight Traffic on the Sault Ste. Marie Canals," United States, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957 (Washington, 1960), 454. In 1896 net tonnage was 16,239,061 tons; in 1905 total was 44,270,680 tons. Sessional Paper No.19a (C.S.P.), XLVII, No. 12 (1913), Part I, 270.

⁴Annual loss was estimated to be \$1,500,000. or \$3,600. for a single vessel per season for each six inches water surface was lowered. I.W.C. Third Progress Report Dec. 1, 1907 (Washington, 1907), 23-24.

By 1900, shipowners were apprehensive about projects for water diversion which threatened to lower water levels permanently. That year, Chicago, with a population of over one and one-half million people, began operation of a sewage canal, draining Lake Michigan into the Mississippi River system.⁵ At Niagara Falls diversion of water for electric power was increasing.⁶ And in Lake Erie plans were underway for the construction of a submerged dam at the eastern outlet which would affect the water levels of Lake Ontario and the St. Lawrence River.⁷

Such projects infringed on navigation rights protected by treaties dating back to the eighteenth century. Jay's Treaty in 1794 had provided that the citizens of the two countries and the Indians were "freely to pass and re-pass by land or inland navigation," and later on, "to navigate all the lakes, rivers and water thereof, and freely to carry on trade and commerce with each other."⁸ The

⁵The Chicago Drainage Canal, C.S.P., XLVII, No. 12 (1913), Part I, 526.

⁶Rapid expansion of electric power plants occurred at this time with the development of alternating current and generators. High-tension transmission of electric current from Niagara Falls to Buffalo began November, 1896, and electrolytic manufacturing plants were soon built. Merrill Denison, The Peoples Power: A History of Ontario (Toronto, 1960), 18.

⁷Regulations of Lake Erie, C.S.P., XLVII, No. 12 (1913), Part II, 959.

⁸William M. Malloy et al, (eds.), Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers (Washington, 1910), I, 612-20.

Webster-Ashburton Treaty of 1842 stated that the channels in the lower St. Lawrence, the Detroit, and the St. Clair Rivers "shall be equally free and open to the ships, vessels and boats of both parties."⁹ The St. John River on the Maine and New Brunswick boundary was declared "free and open to both Parties and shall in no way be obstructed by either."¹⁰ The portages to the Lake of the Woods "as now actually used, shall be free and open to the use of the citizens and subjects of both countries."¹¹ The Treaty of Washington in 1871 added the St. Lawrence River from the forty-fifth parallel to the sea, declaring it to be "free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada, not inconsistent with such privileges of free navigation."¹²

However, navigation rights would be subordinated to industrial uses if matters were allowed to drift, and the eight states on the southern shores of the Great Lakes and the Province of Ontario on the northern shores continued to sell shore property with riparian rights. Shipping and

⁹David Hunter Miller (ed.), Treaties and Other International Acts of the United States of America (Washington, 1931-48), IV, 367.

¹⁰Ibid., 366.

¹¹Ibid., 369.

¹²Treaties and Conventions Concluded by the United States of America and Other Powers Since July 4, 1776 (Washington, 1889), 488-89.

electric power interests would clash over federal versus state or provincial control of boundary waters, exacerbating tensions already present between the two peoples on the Alaskan boundary question.¹³

There was interest on both sides of the boundary in problems connected with common waters. In 1895 a National Irrigation Congress met in New Mexico and adopted a resolution for the appointment of an international commission to adjudicate with Mexico and Canada "the conflicting rights which have arisen or may hereafter arise on streams of an international character."¹⁴ The Canadian government tried to arrange such a meeting on navigation in the Great Lakes through diplomatic channels but the American Secretary of State insisted that preliminary conditions be met.¹⁵ However, United States Congressmen were concerned about the protection of commerce on the Great Lakes. An army engineer report in 1900 recommending, among other things, an underwater dam in Lake Erie to maintain the water level, led the

¹³The attempt to settle this controversy over the eastern boundary in the Alaskan panhandle by a Joint High Commission failed in 1898; in 1903 President Theodore Roosevelt used pressure on the British representative on a six-member tribunal to get a settlement favorable to the United States; the verdict was greatly resented by Canadians.

¹⁴Mr. Warren, "An Address to the People of the United States," Sept., 1895. United States, 54th Congress, 1st Session, Senate Document No. 253.

¹⁵Sir Julian Pauncefote to Secretary Richard Olney, Sept. 23, 1895; Olney to Pauncefote, Sept. 27, 1895, Papers Relating to the Foreign Relations of the United States (Foreign Relations) (Washington, 1895), 718-19.

Senate to pass a resolution for a temporary international commission "to examine and report upon the diversion of the waters that are the boundaries of the two countries."¹⁶ It disappeared in a House committee, but two years later a similar resolution was insured success by its inclusion in the River and Harbor Bill, a popular appropriation measure and sure to be passed.¹⁷

By the terms of Section Four of this bill an international commission was to be appointed of three members from the United States, who would serve under the Secretary of War, and three:

Who shall represent the interests of the Dominion of Canada, whose duty it shall be to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean, also upon the maintenance and regulation of suitable levels, and the structures thereon, and upon the interests of navigation by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in said waters.¹⁸

¹⁶U. S., Congressional Record, 33, 56th Cong., 1st Sess. U. S., Senate Report No. 461, 56th Cong., 1st Sess.

¹⁷U. S., Statutes at Large, XXXII, 373. In a letter to Secretary of War Elihu Root, the Army Chief of Engineers recommended that the commission not be made permanent but only report on "important hydraulic and riparian questions," Feb. 28, 1902, U. S., Sen. Report No. 658, 57th Cong., 1st Sess.

¹⁸U. S., Statutes at Large, XXXII, 373.

Further instructions were to look into the "advisability of locating a dam at the outlet of Lake Erie. . . [and] make recommendations. . . to an agreement or treaty which shall provide for the construction of the same."¹⁹

The three American Commissioners were appointed by late 1903.²⁰ After the appointment of one Canadian commissioner, a delay of over one year occurred before the other two Canadian appointments were made.²¹ This delay was explained by Canada's Prime Minister, Sir Wilfrid Laurier, as due to the illness of the Minister of Public Works, who had the responsibility for the appointments.²² However, the unpopular Alaskan boundary settlement may have made Canadians reluctant to enter into further negotiations with the

¹⁹ Ibid.

²⁰ The American Commissioners were Colonel O. H. Ernst, Chairman of the American Section, an army engineer who had worked on the Chicago Drainage Canal, as well as the Galveston Harbor project and the Isthmian Canal Commission; George Clinton, a Buffalo lawyer who had served in the New York Assembly as chairman of a canal committee; and Gardner S. Williams, found to have a conflict of interests in his directorship of the Edison Sault Water Power Company and who resigned May 26, 1905. George Wisner, a Detroit civil engineer with experience in Great Lakes surveying, was then appointed. The Secretary of the American Section, L. C. Sabin, a Great Lakes hydraulic engineer, was appointed in August, 1905.

²¹ The Canadian Commissioner was Dr. William King, Dominion Chief Astronomer and a man with much experience, including service on the Boundary Commission of 1872 and the Commission of 1893 on the determination of the Passamaquoddy Bay boundary line.

²² First Progress Report of the Canadian Members of the I.W.C., 1905, C.S.P., XLVII, No. 12 (1913), Part I, 6. Dominion of Canada, I Parliamentary Debates (1906), 6.

Americans.

Canadian hesitation was overcome by the pressure of problems on the joint use of boundary waters. New Brunswick lumbermen had been complaining for some time about Maine lumbermen placing obstructions in the St. John River, making it too shallow for floating logs.²³ Channels along the St. Marys River between Lake Superior and Lake Huron were being used for electric power; further projects contemplated by Canadian and American companies threatened to lower water levels.²⁴ In Minnesota, an electric power project might end navigation in the Lake of the Woods.²⁵ The effects of diversion of water by the Chicago Drainage Canal from the Great Lakes to the Mississippi River was still being debated.²⁶

In January of 1905, Prime Minister Laurier, in the House of Commons, referred to the St. John River as one of the problems to be investigated by the commission.²⁸ But a month later, John Hay, the United States Secretary of State,

²³R. W. Scott to Governor, General, Feb. 1, 1905, C.S.P., ibid., 26.

²⁴Report on the Conditions Existing at Sault Ste. Marie, ibid., 341-48.

²⁵F. B. Loomis to H. M. Durand, Jan. 25, 1905, ibid., 215.

²⁶The Chicago Drainage Canal, ibid., 520. This is a reference to the Chief of Engineers Reports of 1900, 1903, and 1904.

²⁷First Progress Report of the Canadian Members, ibid., 4, 8, 9.

²⁸Ibid., 7.

restricted the investigation to streams tributary to, and the Great Lakes system itself.²⁹ This interpretation eliminated the St. John River which emptied into the Atlantic Ocean, also the Minnesota electric power project, as the Lake of the Woods drained into the Hudson Bay. Canadian leaders tried to get the commission's powers enlarged to include all boundary waters. A lengthy diplomatic correspondence was carried on through the circuitous route required by the colonial status of Canada; the Canadian Governor-General wrote to the British Colonial Secretary who, after due deliberation within the British Government, then corresponded with the American Secretary of State; the reverse procedure further delayed decisive action. But all of these efforts were to no avail. The only concession gained was the promise to submit the question to Congress at the next session. And on this understanding Laurier permitted the Canadian commissioners to proceed with their investigations.³⁰ In a meeting in early June, the commission went over the problems for investigation.³¹ Public hearings were

²⁹ John Hay to Durand, Feb. 24, 1905, ibid., 27.

³⁰ Laurier to T. Côté, June 5, 1905, ibid., 8. The Canadian Commissioners were James Pitt Mabee, K.C., Chairman of the Canadian Section; and Louis Coste, a civil engineer in the Dominion Dept. of Public Works. The Secretary for the Canadian Section was Thomas Côté, a journalist for La Presse, an important liberal newspaper in Montreal.

³¹ First Progress Report of the Canadian Members, C.S.P., XLVII, No. 12 (1913), Part I, 8.

held during the next four months in several cities to give all interested parties opportunity for presentation of views. Two meetings were then held to determine commission action but differences of opinion delayed final decision.³²

George C. Gibbons and Principles

George C. Gibbons was appointed Chairman of the Canadian Section in mid-November of 1905.³³ He had practiced law in London, Ontario, since 1869.³⁴ Prospering with the economic growth of the area, he had become a Queen's Counsel in 1880 and a Bencher of the Law Society in 1896. Well-known for his analyses of trade and tariff questions, he was considered a leading financial lawyer in the dominion.³⁵ A man of action, he exhibited human qualities of friendliness,

³²Minutes of Meetings, Oct. 1905-March 1906, George C. Gibbons papers, Public Archives of Canada, Ottawa (Gibbons Papers, P.A.C.), Vol. 10. Cote to Gibbons, Nov. 25, 1905, ibid., Vol. I.

³³Mabee was elevated to the Ontario Supreme Court on Nov. 21, 1905. Extract from a report of the Comm. of the Privy Council, C.S.P., XLVII, No. 12 (1913), Part I, 218.

³⁴Born in 1848 of Irish and English parents, Gibbons was educated in private and public schools in St. Catharines, Upper Canada College in Toronto, and in the law offices of prominent Queen's Counsels. His education instilled in him an awareness of social responsibility. Alexander Fraser, A History of Ontario: Its Resources and Development (Toronto, 1907), 1026; George Maclean Rose (ed.), A Cyclopaedia of Canadian Biography (Toronto, 1886), 292-93.

³⁵Jesse Edgar Middleton and Fred Landon, The Province of Ontario--A History 1615-1927 (London, 1927), III, 57-58.

warmth, enthusiasm, impulsiveness, and a verve for living which endeared him to his associates. Active in numerous community charities, his fervent Canadianism led him, also, to take a vigorous role in the Liberal Party, where he was known as one of the Big Four in London.³⁶ In the political campaign of Charles Hyman, Gibbons gave dynamic speeches which conveyed his beliefs on liberty and Canada's future, such as the following:

I love the British Crown because as I study her history I see a nation that has fought its way slowly but steadily for the principles of liberty; and one of the bulwarks of liberty is to trade freely, is the right that there should be no monopolists, no combinists.

.
Canada will hold her own when you give her freedom to use her natural resources, but she can never reach her position handicapped by the bondages of protection.³⁷

His aspirations for Canada called for a more independent status in relationship to the Mother Country. Canada's need to be on friendly terms with the United States led him to view anyone who created trouble between the two countries as guilty of a great crime. He understood Canada's dependence on private investors for the development of its resources and the need for companies to get a fair return on risk investment. Yet he also urged his friend Laurier to

³⁶ Henry James Morgan, The Canadian Men and Women of the Times (Toronto, 1912), 443. The Big Four were Charles Hyman, George M. Reid, James C. Duffield, and Gibbons.

³⁷ Undated newspaper clipping in Scrapbook of Elizabeth Campbell Gibbons, London Public Library. She collected newspaper articles on her husband's career.

impose government regulations so that companies with public franchises would carry out their obligations to charge reasonable rates.³⁸ He revered Laurier, calling him the greatest Canadian who ever lived. When the time came to choose a successor to Mabey, it was natural that this loyal supporter was selected to become Chairman of the Canadian Section. He had always refused to stand for political office, yet his convictions on Canadian representatives dealing directly with the Americans induced him to undertake his chairmanship with characteristic vigor.

Upon his appointment Gibbons studied the previous work of the commission. He found that the commissioners had attempted to formulate principles upon which to base their decisions. In October of 1905, an Engineering Subcommittee, composed of George Wisner from Detroit and Louis Coste from Ottawa, had submitted seven principles in a report on conditions in St. Marys River.³⁹ In brief, these stated that the federal governments should have control over boundary waters, that navigation rights were paramount over all other rights, that both countries should have equal rights to the use of one-half of the water less the amount needed for navigation, that water levels had to be maintained, that only channels for commercial use should be undertaken, and that St. Marys

³⁸Gibbons to Laurier, Jan. 22, 1907, Gibbons Papers, Vol. 8, P.A.C.

³⁹Meetings, Sept. Oct. Nov. 1905, R.G. 76, N.A.
See Appendix A for these principles of Coste and Wisner.

River was an international river where riparian owners had to get permits from both governments before diverting, with permits for water use to be revoked upon violations. Although these principles were not approved by the full commission, they were referred for revision to a Judicial Committee, composed of the two lawyers, James Mabee and George Clinton.⁴⁰

Clinton rephrased these principles and added the provisions that plans should be adopted by the two governments in common and that regulations should be enforced by "some authority to be created by international agreement."⁴¹ Although Mabee submitted principles for discussion in a commission meeting, no record of them was kept. Colonel Ernst, Chairman of the American Section, proposed nine rules for discussion in a public hearing on the St. Marys River. Primarily regulatory, they provided for the issuance of five-year permits by the American Secretary of War and the Canadian Minister of Public Works, equal sharing of water not needed for navigation, and a limitation on the amount of water to be reserved for navigation use, with the additional stipulation that the riparian rights of corporations already in existence would not be affected by these regulations.⁴²

⁴⁰Ibid.

⁴¹Paper No. 12b, Draft forwarded by Clinton, Gibbons Papers, Vol. 14, P.A.C. See Appendix B for these rules.

⁴²First Progress Report of the Canadian Members, C.S.P., XLVII, No. 12 (1913), Part I, 138-39. See Appendix C for these rules.

In the commission meeting following the public hearing, Ernst urged the adoption of his rules. When the vote split three to three by nationality, he declared them passed by virtue of his authority as chairman of the meeting. James Mabee, Chairman of the Canadian Section at that time, was unwilling to agree to the equal sharing of the waters not needed for navigation until he had studied each locality. He pointed out that Canadians would give up far more at Niagara Falls than they would get in the St. Marys River. It was then agreed to strike the vote from the minutes and work on a revision.⁴³ After several hours of discussion, a list was formally adopted. Clinton agreed to oversee the typing of the final copy, make minor corrections, and circulate it for the signatures of the commissioners. It was then to be sent by the Secretaries to their respective governments.⁴⁴

Clinton failed to send the copy around as he had promised to do. Upon inquiry from the Canadian Section, Ernst replied that he had decided that another meeting should be called to approve the list of principles.⁴⁵ And yet he was unwilling to have another meeting until Congress acted on the recommendation of the Secretary of War that the "status of the present commission as a permanent executive

⁴³Côté to Gibbons, Nov. 25, 1905, Gibbons Papers, Vol. 1, P.A.C. Also see Minutes of Meeting of Can.Sect., Dec. 1, 2, 1905, ibid., Vol. 14.

⁴⁴Ibid.

⁴⁵Ibid. Also see letter of Sabin to Gibbons, Nov. 20, 1905, ibid., Vol. 5.

board be defined or a new board created," and that the jurisdiction of the Commission be clarified.⁴⁶

Gibbons, as the new Chairman of the Canadian Section, was eager to help to get an enlargement of the powers of the Commission. He wanted a commission meeting to be held in Washington between Christmas and New Year's "with a view to influencing Congress or ascertaining what action Congress will take with reference to the future of the commission."⁴⁷ But Ernst was definite in his refusal:

The only business which the Commission is prepared to discuss at this time, so far as I know, is the question of Regulations at the Sault. Is that correct? As the final adoption of those Regulations is dependent upon the existence of a permanent international board, - that is, upon further legislation by Congress, - I cannot see that there is any necessity for meeting soon to discuss that subject.⁴⁸

Gibbons had to be content with secondhand reports of what was going on in Washington.

Preservation of Niagara Falls

The Canadian Section met several times during the winter. The primary topic of discussion was water diversion at Niagara Falls. Initially not a subject for consideration by the Commission, it had been brought to their attention in

⁴⁶U. S., Secretary of War, Annual Report of the War Depat., I, 59th Cong., 1st Sess., 50-52.

⁴⁷Quoted in letter of Ernst to Gibbons, Dec. 20, 1905, Gibbons Papers, Vol. 5, P.A.C.

⁴⁸Ibid.

the previous June.⁴⁹ By December, Gibbons was spending so much time discussing the use of the falls for electric power Thomas Côté, the Canadian Secretary, accused him of having only that question on his mind.⁵⁰

Gibbons feared that all the power generated on the Canadian side would be exported and controlled by businessmen in New York State before Canadian industrialists acted. In the Progress Report of the Canadian Section, made at this time, it was predicted that:

A very large portion of the power generated on our side of the river at Niagara will, unless some more effectual restrictions are placed upon its removal, soon be permanently diverted to the building up of American factories and the running of American railways.⁵¹

The position taken by the Canadian Section was opposite to the one taken earlier under the chairmanship of Mabee. He had not wanted the adoption of the principle of equitable division of water in the Great Lakes -- Gibbons did. Also for the first time it was recommended that "some treaty arrangement between the two countries" regarding riparian rights on navigable boundary streams be made after the settlement of federal control over these waters.⁵² It was implied that such a treaty would be based on the principles

⁴⁹First Progress Report of the Canadian Members, C.S.P., XLVII, No. 12 (1913), Part I, 39.

⁵⁰Côté to Gibbons, n.d., Gibbons Papers, Vol. 12, P.A.C.

⁵¹First Progress Report, C.S.P., Part I, 16.

⁵²Ibid.

implicit in a charter granted by the Secretary of War to the Michigan Lake Superior Power Company in 1902. These were: (1) levels must be maintained, (2) navigation must be protected, (3) the public must reserve the right to use any portion or all of the natural flow in the future.⁵³

In addition to the fear that all facilities for electric power at the falls would be under the control of businessmen in the United States was the apprehension that public clamor for preservation of the falls would end any future development. The greatest influence against further exploitation was the large and powerful American Civic Association in the United States. It undertook a campaign to protect the scenic beauty of the falls with members circulating petitions, writing newspaper articles, and making speeches. Acting on a suggestion of President Theodore Roosevelt, the Association distributed leaflets on "The Impending Destruction of Niagara Falls."⁵⁴ Roosevelt, in his annual message to Congress, stressed the need to preserve the falls and recommended that New York State turn them over to the national government to facilitate cooperative action with Canada.⁵⁵ He later wrote to Secretary of State Elihu Root, urging the

⁵³Ibid., 12. These also appeared in the First Interim Report of the American Section in 1905 but without reference to a treaty. Ibid., 328.

⁵⁴Copy of leaflet, Gibbons Papers, Vol. 1, P.A.C.

⁵⁵James D. Richardson, Compilation of the Messages and Papers of the Presidents (Washington, 1911), XVI, 7393.

continuation of negotiations with the British Ambassador for a treaty along these lines, as "there is no more worthy object before the people at this time."⁵⁶

Public pressure resulted in a congressional resolution for a report from the International Waterways Commission on what is "necessary and desirable to prevent the further depletion of water flowing over Niagara Falls" and "for the preservation of the said Niagara Falls in their natural condition."⁵⁷ The American Commissioners who had postponed meeting for over three months now wanted an immediate recommendation by the Commission to "cancel all charters" at Niagara Falls, except where "works had been constructed."⁵⁸

It was now the Canadian Commissioners who took their turn at procrastination. Although they had been preparing a policy on Niagara Falls for many months they were not yet ready to act. A Dominion Cabinet Subcommittee of Charles Hyman, Minister of Public Works, Charles Fitzpatrick, Minister of Justice, and Allen B. Aylesworth, the Postmaster-General, was formed in January to consider what "steps shall be taken in accordance with the reports of the Commission to definitely settle the whole question of jurisdiction, both as

⁵⁶Roosevelt to Root, Feb. 14, 1906, Elting E. Morison et al (eds.), The Letters of Theodore Roosevelt (Harvard, 1951), V, 154.

⁵⁷U. S., Senate Document No. 242, 59th Cong., 1st Sess., March 15, 1906.

⁵⁸Second Interim Report of the Canadian Section of the I.W.C., April 25, 1906, C.S.P., XLVII, No. 12 (1913), Part I, 334.

to inter-national and inter-provincial power," but it had done little more than to advise Gibbons to gain Ontario Premier James Whitney's assent to the handling of this international issue by Dominion leaders.⁵⁹ Apparently Laurier was waiting for recommendations from the Canadian Section of the Commission.⁶⁰

Clinton's revision of the rules, as agreed upon in the November meeting of the full Commission, had finally been forwarded to the Canadian Section in February.⁶¹ Ambiguously worded and applicable only to the St. Marys River except on federal control of water beds and shores of the Great Lakes, this list of principles was too limited to satisfy the Canadians. There was a definite split between the two sections at this time on development of electric power at Niagara Falls. The Americans wanted to put an end to development -- the Canadians wanted to increase development. A misunderstanding between Gibbons and Clinton occurred when Clinton received an unsigned letter, which he presumed to be from Gibbons, complaining that the Americans were pressing for a treaty to preserve Niagara Falls while they refused to yield on the investigation of all problems along the boundary.⁶²

⁵⁹Hyman to Gibbons, Jan. 30, 1906, Gibbons Papers, Vol. 5, P.A.C. Whitney did agree to this.

⁶⁰Côté to Gibbons, Feb. 19, 1906, ibid., Vol. 1.

⁶¹Clinton to Côté, Feb. 9, 1906, ibid., Vol. 10. See Appendix D for this revision.

⁶²Clinton to Gibbons, April 9, 1906, ibid., Vol. 5.

Louis Coste in the Canadian Section sent this letter -- not Gibbons. An exchange of telegrams clarified the situation.⁶³

Gibbons worked out a set of principles which provided for a treaty upholding the primary right of navigation in the Great Lakes, with diversion for domestic purposes and for the service of locks in navigation canals, a limitation on diversion at Chicago and at Niagara Falls, equal diversion elsewhere of waters not needed for navigation, no action in cross boundary waters to injuriously affect navigation in either country, and a permanent joint commission to apply these principles. He also made reference to a future report on the detrimental effect of a Lake Erie underwater dam. These principles were approved by the Canadian government and incorporated in a report of the Canadian Section.⁶⁴

But the American Section had already recommended legislation forbidding further diversion at Niagara Falls, this to be made permanent by a treaty.⁶⁵ Both sections had to accept a compromise in order to get a joint report. The Canadians were unwilling to negotiate a treaty on Niagara Falls alone. The Americans were unwilling to endorse

⁶³Clinton to Gibbons, April 11, 1906, *ibid.* The letter was mistakenly identified as having been written by Gibbons in an article by Alan O. Gibbons, "Sir George Gibbons and the Boundary Waters Treaty of 1909," *Canadian Historical Review*, XXXIV (1953), 124-38. Gibbons no doubt had similar views.

⁶⁴Second Interim Report of the Canadian Section, *C.S.P.*, XLVII, No. 12 (1913), Part I, 334. See Appendix E.

⁶⁵Report of the American Members of the I.W.C., Regarding the Preservation of Niagara Falls, March 19, 1906, *ibid.*, 440.

principles applicable to all boundary waters. The solution was a reservation by the American Section to the principles listed in the Joint Report, and the Canadian endorsement of them as a basis for a treaty.⁶⁶

The Joint Report on the St. Marys River followed Clinton's earlier report.⁶⁷ Its significance lay in its endorsement by the Secretary of War as a basis for treaty negotiations.⁶⁸ The Department of State in its acknowledgment suggested that such negotiations wait upon reports of the Commission on the several matters then under investigations.⁶⁹ Another consequence of the work of the Commission was the passage of the Burton Bill by Congress. This curtailed further diversion of water at Niagara Falls pending treaty negotiations within a three year period.⁷⁰ The Canadian government was not successful in its attempt at legislation and had to withdraw a bill to license exportation of electricity on its third reading. Premier Whitney was opposed to its

⁶⁶Joint Report of the Commission on the Conditions Existing at Niagara Falls, with Recommendations, May 3, 1906, ibid., 339-40. See Appendix F.

⁶⁷Report on the Conditions Existing at Sault Ste. Marie, with Rules for the Control of the Same, Recommended by the I.W.C., May 3, 1906, ibid., 341-51. See Appendix G.

⁶⁸William Taft to Secretary of State, May 14, 1906, Gibbons Papers, Vol. 5, P.A.C.

⁶⁹Robert Bacon to Secretary of War, July 17, 1906, C.S.P., XLVII, No. 12 (1913), Part I, 403-404.

⁷⁰U. S., Statutes at Large, XXXIV, 626-28.

exclusion of companies in operation at the time.⁷¹

Gibbons had served on the Commission for a little over seven months. He could relish the part that he had played in the progress toward the establishment of principles to be administered by a permanent joint commission. Although he was not alone in his conviction that principles should govern boundary water disposition, he was the most persistent Commissioner in pursuit of this goal. It seemed as if a successful culmination to his efforts for a treaty was not far off. But ten months of frustration and delay lay ahead before any treaty negotiations would be started -- and these would end in failure. Four years lay between him and the final treaty ratification.

⁷¹ Dominion of Canada, I Parliamentary Debates (1907), 1292-96. The debate on this bill on the third reading was interesting, particularly Premier Whitney's objection to an amendment, referred to in the debate. Dominion of Canada, III Parliamentary Debates (1906), 4035.

II. PRELIMINARIES: PART II

International Relations

International relations had a bearing on the progress made towards the Boundary Waters Treaty. Great Britain, from the extreme isolation of 1896, sought firm friendships with several nations, among them, the United States. Various acts indicated British policy: the Venezuelan boundary was settled at the behest of the United States; American intervention in the Cuban rebellion was tacitly accepted; cooperative action on keeping the Chinese market open was offered in 1898; in 1903 the British representative on the Alaskan Boundary Tribunal supported the American position. It was evident that Britain wanted the friendship of this rising world power.

But future Anglo-American relations were endangered by Canadian resentment over the Alaskan boundary settlement. If such feelings continued there was bound to be friction. Important in the improvement of these relations was the appointment, in late 1904, of Earl Grey as Governor-General. Friendlier than his predecessor towards Canada's neighbor, his influence helped to smooth over suspicions and hostile attitudes. Sir Edward Grey, British Foreign Secretary, also helped in the improvement of relations.

The United States was also interested in promoting a policy of friendship across the border. Early in 1906 President Roosevelt wrote to Governor-General Grey that he was anxious to do all he could to "increase the good feeling between Canada and the United States."¹ One of the first acts of the new Secretary of State Root in mid-1905 was a trip to Newfoundland to study the Atlantic fisheries problem at first-hand. That fall he engaged Chandler P. Anderson, a New York lawyer with experience on the Joint High Commission in 1898, as Special Counsel on Canadian issues.² Root wanted to overcome Canadian resentment over his service on the Alaskan tribunal. In the spring he gave a noteworthy speech on mutual institutions and goals of the two countries.³ Grey was greatly impressed by his remarks and found, in a later conference with Root and the British Ambassador, interest in negotiating a treaty or series of treaties on all outstanding issues between Canada and the United States.⁴ He thereupon urged the

¹Roosevelt to Grey, Jan. 19, 1906, Laurier Papers, Vol. 731, P.A.C.

²Anderson was a Harvard Law School Graduate who was admitted to the New York Bar in March, 1890. He served as Secretary for the United States on the Bering Sea Claims Commission 1896-1897 and on the Joint High Commission 1898-1899, and as Associate Counsel for the Alaskan Boundary Arbitration.

³Given at the Pilgrims Day Dinner held in New York City March 31, 1906 in honor of Governor-General Earl Grey. Robert Bacon and James Brown Scott (eds.), Miscellaneous Addresses (Harvard University Press, 1917), 152-60.

⁴Grey to Laurier, April 4, 1906, Laurier Papers, Vol. 731, P.A.C.

British Foreign Secretary to send a Canadian expert to Washington to help the British Ambassador in his negotiations with Root, since he thought there was an opportunity to clean the slate of all controversial issues; even the Atlantic fisheries problem stood a good chance of being "buried forever."⁵ But he thought "paralysis will result" if the Democrats took over the Presidential office.

There is no doubt that the situation at Niagara Falls played an important part in the desire in the United States to settle outstanding differences between the two countries.⁶ Grey noted that the President and Root had that subject "very near to their hearts."⁷ Roosevelt dashed off a note to Root, suggesting that in "this Niagara Falls business" the United States appoint a special ambassador:

Who will negotiate in Canada with a representative of the Canadian Government. Of course this means a reversal of the policy that would have to obtain were England's control of Canada absolute, and all we could do would be to appoint a special ambassador and say we would be delighted to have him conduct the negotiations on Canadian soil. Of course in this event Canada would do the rest and would endeavour to secure the appointment of an ambassador that would look after Canada's interests.⁸

Although this idea was not carried out, Roosevelt may have had some influence on the change in British

⁵Grey to Lord Elgin, April 3, 1906, ibid.

⁶Grey to Laurier, April 14, 1906, ibid.

⁷Ibid.

⁸May 1, 1906, Chandler P. Anderson Papers, Box 68, Manuscript Division, Library of Congress.

ambassadors, since his disrespect for Ambassador Mortimer Durand was one obstacle to improved Anglo-American relations. Roosevelt wrote to the United States Ambassador in London that Durand, "though a high-minded, honest fellow, is simply entirely incompetent for any work of delicacy and importance." The French and German Ambassadors, as well as Root, agreed with him, he continued, and "not one dreams of talking over anything with him save as you might recapitulate it to an ordinary dispatch agent."⁹

Durand was unable to understand wherein he had failed in Washington.¹⁰ But by year's end, arrangements had been made for a new British Ambassador, James Bryce, a notable authority on American government.¹¹ Bryce fitted into the Washington scene easily. In addition to his scholarly enthusiasm for the United States government, his personal zeal for travel endeared him to Americans. He could not see a hill without wanting to climb it. In the several years that he was the British Ambassador in Washington, Americans watched the travels of a near septuagenarian who crisscrossed the country several times to make speeches and welcomed the challenge of fitting his appearances into complex railroad and

⁹To Whitelaw Reid, April 28, 1906, Morison, 251.

¹⁰Esmé Howard, Theatre of Life (Boston, 1936), 107.

¹¹Bryce to "Carnegie", Dec. 24, 1906, Elihu Root Papers, Container 44, Manuscript Division, Library of Congress.

steamship connections. Bryce was "empowered to do all his best to settle outstanding questions between the two countries."¹²

The only recalcitrant in the group was Prime Minister Laurier. Although he saw friendly relations between the United States and Britain as "a necessity of nature," he was reluctant to take any step closer to the leaders in Washington. Suspicious of Roosevelt and aware of the increasing independence of the dominions within the British Empire, his reservations about a satisfactory outcome for Canada in any negotiations counterbalanced the optimism of British and United States leaders. His reluctance was based on past experience. He refused to open formal discussions on a treaty until assured that agreement could be reached on all major issues.¹³ After Root presented possible topics for discussion, Laurier delayed three months before submitting his list.¹⁴

Some Boundary Water Problems

Both Laurier and Root considered the use of international waters as a topic for discussion, as well as logging booms in the St. John River.¹⁵ But Laurier wanted the first

¹²John C. Hopkins et al (eds.), Canadian Annual Review of Public Affairs (Toronto, 1902-1938), 1907, 399-400.

¹³Ibid. Also see letter of Grey to Lord Elgin, April 14, 1906, Laurier Papers, Vol. 731, P.A.C.

¹⁴Laurier to Grey, Sept. 25, 1906, ibid.

¹⁵Ibid.

matter to wait upon the final report of the International Waterways Commission. As for the latter, he suggested that a special commission be set up to handle the St. John River matter since it had been ruled outside the commission's area of investigation.¹⁶

Neither list of topics included a problem which had figured in diplomatic correspondence for over a year, the application of the Minnesota Canal and Power Company.¹⁷ This was a proposal to divert some of the water from Birch Lake and Rainy River in Minnesota which drained into the Lake of the Woods and eventually into Hudson Bay; instead, the diverted water would drain into Lake Superior and furnish electric power at Duluth. Such diversion would lower water levels in the Lake of the Woods and boundary rivers so that a Canadian steamship company could not operate its boats. Technically outside the restricted investigatory powers of the Commission, this problem had nevertheless been considered within its scope by both Canadian and United States authorities. And in May of 1906 Root himself referred this problem to the Commissioners "for an expression of their views."¹⁸

¹⁶James Callahan, American Foreign Policy in Canadian Relations (New York, 1937), 494, 457.

¹⁷Infra, 9. See also Brief submitted by O. H. Simonds June 15, 1906, Gibbons Papers, Vol. 12, P.A.C. and letter of F. B. Loomis to M. Durand, Jan. 25, 1905, C.S.P., XLVII, No. 12 (1913), Part I, 215.

¹⁸Root to Secretary of War, May 14, 1906, ibid., 430.

Here was an opportunity for Gibbons to elaborate on principles to govern questions of boundary water use, regardless of which country was the injured party. The issue was similar to that in the St. John River; that is, citizens in one country affected a river's flow into another country so that injury was done to that country's citizens. It might very well set a precedent for settlement of all such questions.¹⁹

Gibbons and Clinton were delegated at a commission meeting to make a report on the application; before two weeks had passed, Gibbons forwarded two draft reports to Clinton, pressing for quick action.²⁰ Clinton acted as a drag anchor to this impetuosity, explaining that the adoption of principles contrary to the former position of the United States on waters within one country affecting water use in another country necessitated careful consideration of drafts by all commissioners so that unanimous agreement could be reached.²¹

Gibbons was loath to have draft copies circulated to the other commissioners, possibly because he feared consolidation of opinions along national lines.²² His fears had some foundation as there is evidence that Clinton was

¹⁹Hyman to Gibbons, June 8, 1906, Gibbons Papers, Vol. 5, P.A.C.

²⁰Gibbons to Clinton, June 18, June 21, 1906, ibid.

²¹Clinton to Gibbons, July 9, 1906, Aug. 31, 1906, ibid. The death of George Wisner July 3rd and the appointment of his successor, Eugene E. Haskell, on July 24th also caused some delay. Haskell was a Cornell University Professor of Civil Engineering.

²²Clinton to Gibbons, Sept. 26, 1906, ibid.

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influenced by Ernst and was willing to compromise on principles he had earlier supported.²³ He now suggested approval of the application, provided that the company carry out certain remedial works to be set by the Canadian Section.²⁴ Gibbons held firm for the establishment of principles by concurrent action of both countries to cover all cases irrespective of individual circumstances. The final report, rejecting the application, marked the success of his efforts.²⁵

The American Section's compliance on this report was tied in with another application in which the United States might be the injured party. A Canadian company wanted to build regulating works on the Richelieu River within Canada which would affect the water levels of Lake Champlain and possibly cause flooding on the lake shores in New York and Vermont.²⁶ This application could not be rejected without rejecting the application of the Minnesota Company. In both cases it was decided that a treaty was needed to "define the

²³See principles of Clinton in Appendix B, especially No. 8.

²⁴Clinton to Gibbons, Oct. 9, 1906, Gibbons Papers, Vol. 5, P.A.C.

²⁵Joint Report on the Application of the Minnesota Canal and Power Company of Duluth, Minnesota, for Permission to Divert Certain Waters in the State of Minnesota from the Boundary Waters Between the United States and Canada, 1906, C.S.P., XLVII, No. 12 (1913), Part I, 362-63. See also Côté to Gibbons, Nov. 17, 1906, Gibbons Papers, Vol. 2, P.A.C.

²⁶Joint Report on the Application of the International Development Company for Permission to Construct Regulating Works on the Richelieu River, No. 15, 1906, C.S.P., XLVII, No. 12 (1913), Part I, 351-53.

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uses to which international waters may be put by either country without the necessity of adjustment in each instance.²⁷ Gibbons confided to Bryce that the Richelieu River report was instrumental in getting the adoption of the principle that "neither country was at liberty to obstruct the flow of waters which cross the boundary to the injury of public or private interests in the other State."²⁸

The final report on the Minnesota Canal and Power Company application also stressed the need for a permanent commission to decide upon diversions other than for navigation and navigation locks or for domestic and sanitary purposes.²⁹ This was the first report to recognize the permanent use of waters at Chicago for sanitary purposes. Although an earlier report had recommended the limitation of the diversion at Chicago to a maximum of 10,000 cubic feet per second, the Canadian Section now accepted the diversion without a set maximum since Gibbons believed that the United States would not allow excessive diversion. Commissioner William King and Secretary Côté disagreed but Gibbons was convinced that navigation interests in Lake Michigan would assert their rights. He also thought that diversion in Lake Michigan was not the

²⁷Canadian Annual Review, 1906, 630.

²⁸Gibbons to Bryce, March 19, 1907, Gibbons Papers, Vol. 8, P.A.C.

²⁹Joint Report on the Application of the Minnesota Canal and Power Company, C.S.P., XLVII, No. 12 (1913), Part I, 363. See Appendix I.

concern of Canada even though the lake was an integral part of the Great Lakes system.³⁰ He was more confident than many Americans that special interests would block each other's exploitation of the country's resources.

The use of water by each country for domestic purposes was established through practice, as exemplified in the case of Buffalo. Chairman Ernst wrote to Gibbons that only an Act of Congress was required for approval of Buffalo's application to get its water supply from Lake Erie. According to Ernst, the Commission Resolution giving its consent to the construction of a needed tunnel and inlet pier, partly in Canadian waters, "if such could be built without injury to navigation or other public interest," was only to avoid delay on the formal application of the Buffalo Mayor to the Canadian Government.³¹

But the greatest significance of the report lay in two new interpretations. One concerned the Treaty of 1842 on binational rights of navigation from Lake Superior to the Lake of the Woods. A previous interpretation had defined the phrase, "as now actually used," to mean protection of the mode of transportation then used, i.e., canoe travel.³² The Commission now

³⁰Recommendations Agreed Upon by the Canadian Section Nov. 9, 1906, Gibbons Papers, Vol. 10, P.A.C. These were incorporated into the I.W.C. report on the Chicago Drainage Canal, C.S.P., XLVII, No. 12 (1913), Part I, 515-75. See Appendix H.

³¹Ernst to Gibbons, July 5, 1906, Gibbons Papers, Vol. 5, P.A.C.

³²Infra, 3. Anderson's Report on Minn. Canal and Power Co., Decimal Files, Dept. of State, 1718/28.

saw that phrase as a description of the portage route at the time of the treaty and argued that the entire sentence protected the rights of navigation by citizens of both countries, thus prohibiting any diversion which would lower waters in the Lake of the Woods so that it could not be used by steamboats.

The other interpretation was equally important. It set up international comity to govern streams flowing from one country to another. This interpretation contravened the Harmon Opinion given by the United States Attorney General in 1895. 21 Op. 274. According to this opinion, a nation exercised absolute sovereignty over waters within its own territory and could use them regardless of the injury inflicted on another nation's citizens.³³ It was now proposed that "the sovereign power should not be exercised to the injury of a friendly nation or of its citizens or subjects, without the consent of that nation." And it was recommended that common law principles "so far as they are founded in justice and equity, ought, where practicable, to be applied by nations acting in their sovereign capacity."³⁴ It was stated that if there was a breach of comity the country whose citizens were injured could retaliate by engaging in a reciprocal action.

Another problem engaged the attention of the Canadian

³³Joint Report, C.S.P., XLVII, No. 12 (1913), Part I, 364.

³⁴Ibid., 365.

Parliament in early 1907. This was how to force Canadian electric power companies to provide sufficient electricity to meet Canadian needs before exporting to the larger United States market. The earlier attempt to regulate by license requirements had been dropped when existing companies were exempted.³⁵ The new bill, brought in January 11th for its first reading, levied export duties on those companies failing to comply with the conditions of the license to supply power needs in Canada, these duties to be imposed at the discretion of the Governor in Council.³⁶

There were members of Parliament who viewed this bill as facilitating the exportation of power to the United States and who wanted to prohibit all exportation, or limit it to one-half of all power generated in Canada. The amendments supporting these views were defeated, as was the amendment to transfer the licensing authority to the Board of Railway Commissioners. The bill was passed as first proposed by the new Minister of Justice, Allen B. Aylesworth, after consultation with Gibbons.³⁷

During these months Gibbons sought to present a picture of a harmonious, smoothly functioning section to encourage sentiment for a permanent commission. This was difficult, as there was a difference among Canadian members over the

³⁵Dom. of Canada, I Parliamentary Debates (1907), 1295.

³⁶Ibid.

³⁷Telegram, Aylesworth to Gibbons, Dec. 1, 1906, Gibbons Papers, Vol. 5, P.A.C.

Chicago diversion. Commissioner King and Secretary Côté went to see Minister Hyman but he supported Gibbons.³⁸ There was also criticism of the Lake Erie Dam investigation by the new acting Minister of Public Works, Sydney Fisher, who failed to understand why time should be spent on a project so clearly damaging to Canadian interests.³⁹ Later in the spring, Gibbons talked to the Cabinet about the International Waterways Commission as members did not understand its function.⁴⁰

Ever present was the constant friction between Gibbons and Secretary Côté, a man who presumed authority while failing to carry out the routine duties of his office. Côté had a newsman's nose for ferreting out information, as well as a tendency to divulge commission business to cabinet members and others. He wrote reports without authorization and gave advice freely; it did not help that it was usually right. Most irritating were his frequent absences from the office to work on the liberal journal La Presse in Montreal. His expectation of pay for these days compounded the frustration of the scrupulously honest Gibbons. The hopes Gibbons had of getting his

³⁸Côté to Gibbons, Oct. 26, 1906, ibid., Vol. 2. King gave up his seat on the commission Feb. 5, 1907, without letting Gibbons know, indicative of poor communication between the two. Côté to Gibbons, Feb. 18, 1907, ibid., Vol. 5; Gibbons to Côté, Feb. 20, 1907, ibid., Vol. 8; Gibbons to Ernst, Nov. 1, 1907, ibid., Vol. 8. William J. Stewart, Chief Hydrographer of Canada, was appointed April 6, 1907.

³⁹Fisher to Laurier, Feb. 4, 1907, ibid., Vol. 3. Hyman was ill for several months before his resignation Aug. 29, 1907. Hyman to Gibbons, May 22, 1907, ibid., Vol. 5.

⁴⁰Gibbons to Fisher, April 19, 1907, ibid., Vol. 8; Gibbons to Howard, May 2, 1907, ibid., Vol. 3.

resignation were never realized -- the political value to Laurier of the Montreal journalist outweighed the annoyance he caused Gibbons.⁴¹

The Commission by late spring was considering two Canadian projects which might interfere with navigation in the United States. But they are outside the scope of this paper, as Gibbons was by then involved in conferences preliminary to treaty negotiations. This study of his work on the Boundary Waters Treaty must accordingly turn to a review of his efforts as a special commissioner for the Canadian Government.

Gibbons as Special Commissioner

In late January of 1907 Gibbons received special authority by an Order in Council to confer with Washington authorities about a permanent joint commission and the establishment of principles to govern water disposition along the boundary. Gibbons was optimistic that he could achieve some satisfactory arrangement with United States leaders on the use of boundary waters. This confidence arose out of his belief that Canadians had suffered in earlier settlements with the United States because they had not controlled negotiations.

⁴¹Côté to Gibbons, Feb. 2, 1906; Feb. 9, 1906; Feb. 19, 1906; Feb. 22, 1906; March 27, 1906; Côté to Hyman, April 30, 1906; Côté to Gibbons, May 7, 1906; May 8, 1906; May 19, 1906; May 23, 1906; May 29, 1906; June 13, 1906; July 12, 1906; Sept. 17, 1906; Oct. 26, 1906; Nov. 17, 1906; Nov. 23, 1906; Nov. 24, 1906; Nov. 30, 1906; Dec. 19, 1906; Dec. 21, 1906; Dec. 23, 1906, Gibbons Papers, Vols. 1-2, P.A.C.

His own experience in dealing with his southern neighbors had shown him that they would be fair if he never asked for more than what Canada was entitled to and never took less than what Canada should receive.⁴²

Upon receiving the Order in Council he requested the Chairman of the American Section, O. H. Ernst, to make appointments for him with the Secretary of War and possibly the Secretary of State.⁴³ He later complied with Root's suggestion, forwarded by Ernst, that he get in touch with the British Embassy "in order that diplomatic courtesies be observed."⁴⁴

In the first meeting with Secretary Root, Secretary of War William Taft, and Assistant Secretary of State Robert Bacon, Gibbons formed an unfavorable first impression of Root -- "the shrewd American who wants all he can get without being particular about the manner of getting it."⁴⁵ On the other hand, he liked Taft. Perhaps this initial reaction was due to Root's rejection of Gibbons' cherished principles and Taft's acceptance of them. Root, of course, was the abler diplomat and undoubtedly chose the course more advantageous for the United States.

⁴²Gibbons to Fisher, April 19, 1907, ibid., Vol. 8.

⁴³Gibbons to Ernst, Jan. 24, 1907, ibid. The I.W.C. was under the Secretary of War who had jurisdiction over boundary waters.

⁴⁴Ernst to Gibbons, Jan. 31, 1907, ibid., Vol. 5; Gibbons to Howard, Feb. 2, 1907, ibid., Vol. 8; Howard to Gibbons, Feb. 4, 1907, ibid., Vol. 3.

⁴⁵Gibbons to Laurier, Feb. 15, 1907, ibid., Vol. 8.

As was characteristic of him, he had done preparatory work, having had Special Counsel Anderson write a memorandum on the effect of the principles on the national interest.⁴⁶

Anderson pointed out disadvantages that could obtain if the United States were restricted: Equal diversion for irrigation would prevent carrying out a project in the St. Mary and Milk Rivers in Montana; the United States had a greater amount of water in the Great Lakes on its side of the boundary which should warrant special consideration in any division of the waters; there would be loss of control over navigable waters entirely within national boundaries; no attention was given to the adverse effects of raising water levels; and no guarantee was given to the Chicago diversion.⁴⁷ Root, therefore, was disinclined to assent to principles which would limit his bargaining position in future negotiations. The decision of the conference was that Gibbons meet with Ambassador Bryce, soon to arrive in Washington, and then confer again with the two American Secretaries. In the meeting with Bryce, Gibbons found him to be "alive and keen and with an astonishing knowledge of Canadian affairs."⁴⁸ Bryce was a willing listener since he knew that the British Colonial

⁴⁶Root to Anderson, Dec. 24, 1906, Anderson Papers, Box 68.

⁴⁷Anderson to Root, Dec. 28, 1906, *ibid.* This is a memorandum on the seven principles suggested by the Can. Section to govern a treaty. See Appendix E.

⁴⁸Gibbons to Laurier, March 19, 1907, Gibbons Papers, Vol. 8, P.A.C.

Office and Foreign Office wanted "to ascertain the wishes of Canada, and that every possible regard will be shown to what those needs and desires are."⁴⁹

Both Secretary Root and Ambassador Bryce visited Canada that spring, proof of the importance attached by both Great Britain and the United States to bringing about a change in Canadian attitudes.⁵⁰ In a speech to the Canadian Club in Ottawa, Root dwelt on common elements in the heritage of the two countries.⁵¹ Despite some adverse press reports on his visit, the general impression was that the United States was coming closer to Great Britain, appreciated the importance of Canadian friendship, and that better relations were very probable.⁵²

Throughout the spring Gibbons continued to press for principles "which cut both ways."⁵³ Although he spoke in January of obtaining these by reciprocal legislation, he thought even then that only a treaty could settle the controversy over federal versus state control of boundary waters.⁵⁴ He thought of legislation as temporary. Characterizing special commissions

⁴⁹Canadian Annual Review, 1907, 402. From a speech by Foreign Secretary Grey in the House of Commons on March 26th.

⁵⁰Ibid., 398-402.

⁵¹Robert Bacon and James Scott (eds.), Miscellaneous Addresses, 157-61.

⁵²Canadian Annual Review, 1907, 399.

⁵³Gibbons to Aylesworth, Jan. 14, 1907, Gibbons Papers, Vol. 8, P.A.C.

⁵⁴Ibid.

as partisan and unsatisfactory, he was determined to get a permanent joint commission.⁵⁵ In addition, he argued that such a commission need not confine itself to questions on boundary waters but could be an advisory body on all new matters and "might act in a judicial capacity in giving effect to agreements entered into by the two countries."⁵⁶ On matters of difficulty between the two countries, the commission could "ascertain and report upon the facts and recommend action."⁵⁷

From the beginning, Gibbons thought of Clinton as the person in the American Section with whom he could work. No doubt his choice was due to Clinton's legal training, since he saw no use in discussing some questions with engineers.⁵⁸ Gibbons had hoped that Clinton would attend his first meeting with Root.⁵⁹ He had invited Clinton to go to Washington and suggested to Ernst that Clinton be at his meeting with the Secretaries of War and State.⁶⁰ Nothing came of this suggestion but in May Gibbons again indicated his desire to work with Clinton, this time through official channels.⁶¹ Root took up this idea and the stage was set for their conferences.⁶²

⁵⁵Gibbons to Fisher, April 19, 1907, ibid.

⁵⁶Gibbons to Bryce, March 19, 1907, ibid.

⁵⁷Gibbons to Fisher, May 2, 1907, ibid.

⁵⁸Ibid. Two letters were written to Fisher on this date.

⁵⁹Gibbons to Clinton, Jan. 24, 1907, ibid., Vol. 8.

⁶⁰Gibbons to Ernst, Jan. 24, 1907, ibid.

⁶¹Gibbons to Cartwright, May 3, 1907, ibid.

⁶²Root to Clinton, May 17, 1907, Dept. of State, 4934/1A.

On the second May of his tenure as Chairman of the Canadian Section Gibbons had made remarkable progress in increasing Canadian power over boundary waters. Now questions were being referred to the International Waterways Commission for investigation and report; the United States had accepted the necessity for a continuous commission; the reports of the commission were being upheld by both countries. And Gibbons had played an important part in a matter very dear to him, a bill for the control of the exportation of electricity which at the same time permitted Canadian capital to sell surplus power in the American market.

III. TREATY NEGOTIATIONS: FIRST STAGE

Misunderstood Instructions

The purpose of the meetings of the two Commissioners was obscured by vague instructions, was changed as ideas matured, and was misinterpreted by busy government officials. Whether Gibbons and Clinton were supposed to prepare a report on enlarging the powers of the commission for the further study of that body or to prepare a draft treaty is unclear. Out of the confusion created by the interchange of ideas among the personnel of the three governments emerged the Gibbons-Clinton draft treaty, due largely to the efforts of Gibbons who was convinced that a treaty was the only way in which Canada could obtain equal justice with its more powerful neighbor.

Gibbons did have official instructions to proceed to Washington to "endeavour to facilitate some arrangement to carry into effect the recommendations of our Commission and to establish a permanent joint commission."¹ He did not have specific instructions to negotiate a treaty.² Prime Minister

¹Gibbons to Howard, April 13, 1907, Gibbons Papers, Vol. 8, P.A.C.

²The Order in Council stated: "The Minister recommends that Mr. George C. Gibbons. . . be authorized to go to Washington and confer with the United States Government as to whether arrangements can be made for legislation on the part of the United States reciprocal with similar legislation legislation of Canada, providing so far as each country is concerned

Laurier, willing to let events shape most decisions, left in April for the Colonial Conference in England and left behind him acting Prime Minister Sir Richard Cartwright, a man who knew little about the Commission. Gibbons took advantage of this break in leadership and wrote to Cartwright that the Order in Council directed him:

To negotiate with the authorities at Washington with the view to confirming the principles agreed upon by our joint Commission by a treaty or legislation and to create a permanent Commission to give effect to these recommendations and also as I understand it to give this permanent Commission jurisdiction of an advisory character as to all matters of contention between the two countries which hereafter might arise as to the use of international or boundary waters.³

Gibbons went on to explain why a treaty was desired. It would need only Senate confirmation; legislation could easily be reversed later on. When Aylesworth advised Gibbons that the Privy Council had authorized him only to prepare legislation, he replied: "Everyone in Washington agrees that a treaty is better."⁴ Aylesworth did not raise the point again.

Ambassador Bryce's eagerness to cooperate with Canadians may have led to further confusion. He was enthusiastic about all the proposals made by Gibbons at their first meeting and later wrote an ambiguous letter which, on hurried reading,

for giving legislative effect to these recommendations, and that Mr. Gibbons shall report to your Excellency's Government the result of such conference and what arrangements can be made with the Government of the United States for carrying out the said recommendations." Record Group 2, Series I, Vol. 1026, P.C. 33, Jan. 14, 1907.

³Gibbons to Cartwright, May 3, 1907, ibid., Vol. 8.

⁴Aylesworth to Gibbons, July 13, 1907, ibid., Vol. 5.
Gibbons to Aylesworth, July 15, 1907, ibid., Vol. 8.

seemed to connect the boundary waters discussion with two treaties about to be submitted to the Senate.⁵ This may have led Gibbons to count on the Ambassador's full support for a treaty. But, in reality, Bryce himself was not sure as to the procedure to be followed by Gibbons. Months later, he wrote that he thought the Gibbons-Clinton draft treaty was to have been "reviewed by all members of the commission," before submission to the two governments.⁶ By that time, however, the Commission had been bypassed and Bryce was unconcerned about the fact.

Bryce was faithful in reporting to Canada on his conversations with Root. But these diplomatic dispatches referred to many matters; without a Minister of External Affairs to handle them, they turned up in various departments. Gibbons was furious when Côté learned about his meetings with Clinton through the careless handling of this diplomatic correspondence.⁷

Root continued to change his ideas on how the enlargement of the commission's duties could best be accomplished. At first he thought that the commission itself should study and report "what powers might be vested in a commission for dealing with international waters."⁸ By

⁵Bryce to Privy Council, No. 36, May 17, 1907, ibid., Vol. 14

⁶Bryce to Gibbons, Dec. 6, 1907, ibid., Vol. 5.

⁷Côté to Gibbons, June 16, 1907, ibid., Vol. 2; Gibbons to Aylesworth, June 17, June 20, June 24, 1907, ibid., Vol. 8.

⁸Enclosure in Bryce to Privy Council, No. 36, May 17, 1907, ibid., Vol. 14.

mid-May, Root decided that the commission had no power to engage in such discussions and swung over to the view Gibbons had had for many months. This was that Gibbons and Clinton should enter into initial discussions and submit their conclusions to their respective governments.⁹

In elaborating on this idea Root envisaged the two men as considering "the scope of the duties of the Commission, the degree of finality which its conclusions are to receive, the extent to which we shall endeavor to lay down the principles upon which it is to act."¹⁰ At this time he was not sure whether concurrent legislation or a treaty would be better to put these ends into effect. But at no time did he view these meetings as anything more than very informal talks.¹¹ In order to transfer the new commission with broader powers into the Department of State, where it seemed to belong because of its diplomatic character, Root proposed to Bryce that there be two commissions; the old one reporting to the Secretary of War, the new one to the Secretary of State. To further obfuscate matters, he advised that the members of the two commissions be the same.¹²

Upon being invited to meet with Gibbons, Clinton confessed immediately that he was "wholly in the dark regarding

⁹Ibid.

¹⁰Root to Clinton, May 17, 1907, Dept. of State, 5934/1A.

¹¹Root to Clinton, May 25, 1907, ibid., 5934/2.

¹²Enclosure, Laurier to Gibbons, April 23, 1907, Gibbons Papers, Vol. 3, P.A.C.

general purposes of the treaty and the extent of jurisdiction of the commission."¹³ Nevertheless he had some opinions. He wanted a treaty rather than legislation. And he thought that the new commission should have more lawyers on it than the old commission did.¹⁴ But he assured Root that he was eager for more detailed instructions.¹⁵ Gibbons remained determined to get a treaty with principles which would apply to all situations in boundary waters and a permanent commission to enforce them which would also serve as an advisory board on all issues arising between the two countries.¹⁶

The Gibbons-Clinton Draft Treaty

Clinton and Gibbons were unable to get together until mid-June; but the sanguine Gibbons wrote several times to Clinton, suggested their meeting in Washington to confer with "all concerned," and sent him a memorandum on what they were to do.¹⁷ In turn, Clinton criticized the memorandum for the narrow jurisdiction given the commission, went to Washington to get Root's advice, and presented Gibbons with "Proposed Treaty Clauses" at their first meeting.¹⁸

¹³Clinton to Root, May 24, 1907, Dept. of State, 5934/3.

¹⁴Clinton to Root, May 19, 1907, ibid., 5934/2.

¹⁵Clinton to Root, May 27, 1907, ibid., 5934/4.

¹⁶Gibbons to Fisher, May 2, 1907, Gibbons Papers, Vol. 8, P.A.C.

¹⁷Gibbons to Clinton, May 20, 23 (2 letters on this date), 27, 1907, ibid.

¹⁸Clinton to Gibbons, May 24, May 28, 1907, ibid., Vol. 5.

Gibbons saw Root's hand in these clauses: A commission of four members, two from each country, would immediately choose a permanent arbitrator to settle any difference which might arise; all questions referred to the commission would be settled on the "particular circumstances which may arise in each case"; and these decisions could only be enforced through concurrent legislation.¹⁹ The jurisdiction of the commission would cover boundary waters, streams flowing from one country to the other and tributaries of both, with the St. John River specifically excepted. Free navigation for citizens of both countries on all the Great Lakes and the St. Lawrence River "from its source to the ocean" was to be allowed. There would be no diversion or obstruction of boundary waters or waters flowing from one country into the other without just compensation as determined by the commission; the paramount right to divert water for domestic and sanitary purposes and for service of locks for navigation was recognized; in case of diversion for the generation of power, there was to be equal division between the two countries. And, finally, the commission was to make its reports to the Secretary of State and a corresponding Canadian official.²⁰

Gibbons saw that the selection of a standing umpire would defeat the whole object of a joint commission; it would

¹⁹First Draft of Treaty, ibid., Vol. 14. Clinton did not submit this to Root before presenting it to Gibbons.

²⁰Ibid.

encourage reliance upon an umpire.²¹ However, he was hopeful of getting his own way quietly if some issue did not arise "which would set the heather on fire."²² He submitted his treaty clauses to Aylesworth and Cartwright for suggestions before forwarding them to Clinton.²³ He eventually managed to discuss them with the peripatetic Bryce, then enroute from Oklahoma to England.²⁴

These clauses did not seem to differ much from Clinton's and often used the same phraseology. Yet the minute differences were fundamental ones. There was to be a six-member commission which would call upon an arbitrator or arbitrators only if a commission majority could not reach an agreement; the maximum amount of water to be diverted by each country from Niagara River was specified; the consent of both countries would be necessary for diversion or obstruction of boundary waters or rivers crossing the border; and the commission was given power to delineate the boundary line through the lakes. Where irrigation diversion was permitted, the rights of each country and of its citizens "must be equitably protected."²⁵ Waters could not be polluted to the injury of health or property in the other country, and the boundary

²¹To Clinton, July 13, 1907, ibid., Vol. 8.

²²Gibbons to Aylesworth, June 20, 1907, ibid.

²³Gibbons to Cartwright, June 27, 1907, ibid.

²⁴Howard to Gibbons, July 4, July 10, July 24, 1907; E. Marion Bryce to Gibbons, Aug. 15, 1907, ibid., Vol. 5.

²⁵Gibbons' revision of Proposed Treaty Clauses forwarded to Clinton, Aug. 30, 1907, ibid., Vol. 14.

waters included the Columbia River, as well as the bodies of water enumerated by Clinton. In early September Gibbons added a final article which gave the commission power to render advisory reports on all matters of difference between the governments. The St. John River was not mentioned because Gibbons thought that the diplomats could settle that issue later.²⁶

Clinton objected to "certain fixed principles. . . which will become the rigid law of the two countries."²⁷ He thought that this procedure left no scope:

For the adjustment of differences by the commission, and will deprive it of all power to adjust the rights and interests of parties concerned, to the particular circumstances which may arise in any case, for the commission will have nothing to do but to apply the fixed rules laid down without regard to circumstances which may make them inapplicable.²⁸

Yet he did not want to "vest the Commission with too great powers" and in his version he made Congressional action necessary to enforce commission decisions although he saw such legislation "forthcoming, almost as a matter of course."²⁹ It appears that his objection to Gibbons' draft concerned the freedom of the commission to act without any restriction by Congress. In the final draft, reached in one more meeting, Gibbons accepted concurrent legislation for the police powers

²⁶Gibbons to Clinton, Sept. 3, 1907, ibid., Vol. 8.

²⁷Clinton to Gibbons, Aug. 14, 1907, ibid., Vol. 5.

²⁸Ibid.

²⁹Gibbons-Clinton Draft Treaty, ibid., Vol. 14.

See Appendix J.

of the commission.³⁰ This was the only change from Gibbons' version.

Gibbons, pleased with the draft treaty, wrote to Laurier that he had not surrendered on any material point.³¹ It is not surprising that he and Clinton reached a compromise so easily. They were accustomed to discussing commission matters objectively within a framework of common legal terminology and arriving at conclusions acceptable to both sections. Each respected the other's opinions and viewed the draft treaty as a tentative proposal to be further developed. They continued to exchange ideas and later submitted amendments. There was a mutual consideration of public interest by both men and kindred beliefs about social responsibility.

Astute Canadian leaders made two suggestions. Laurier saw the danger in defining the St. Lawrence River from the forty-fifth parallel to the sea as a "boundary water."³² And Bryce took exception to the overlapping of this treaty with the Delimitation of Boundaries Treaty.³³ There was also strong pressure in both countries to develop power in Niagara River below the falls; Gibbons thought it politic "not to preclude ourselves from further development there if it should be

³⁰Ibid.

³¹Gibbons to Laurier, Sept. 24, 1907, ibid., Vol. 8.

³²Laurier to Gibbons, Sept. 26, 1907, ibid., Vol. 5.

³³Gibbons to Clinton, Nov. 26, 1907, ibid., Vol. 8. The Delimitation of Boundaries Treaty on a survey of the entire boundary was sent to Ottawa in May. Aylesworth to Gibbons, July 13, 1907, ibid., Vol. 5.

found advisable."³⁴ These changes were incorporated in amendments and sent to the two governments.³⁵

Gibbons hurried to Washington in December to get quick acceptance of the treaty but ran into opposition. He found that Root had not given up the idea of special commissions for specific problems although, as Gibbons put it, "No one knows better than Root knows that special Commissions are a fraud."³⁶ He characterized Root as "keen, aggressive [sic] and not over scrupulous," a man who wanted "all the advantages he can get."³⁷

Another person took an unfavorable attitude towards the treaty. This was Special Counsel Anderson who, up to now, had drafted all Root's treaties and memoranda relating to Canada. Requested to evaluate the draft, he turned in a generally negative report.³⁸ He noted that banks, shores, and tributary streams of boundary waters were not generally thought to be under international law. He questioned whether Gibbons' principles furnished any guidance on the use of waters tributary to boundary waters or of streams crossing the boundary, leaving the commissioners "free to adopt their own ideas

³⁴Gibbons to Bryce, Dec. 2, 1907, ibid., Vol. 8.

³⁵Clinton to Root, Dec. 3, 1907, Dept. of State, 5934/10.
³⁶Gibbons to Laurier, Dec. 16, 1907, Gibbons Papers, Vol. 8, P.A.C.

³⁷Ibid.

³⁸Report on the Draft Treaty Relating to International Boundary Waters Proposed by George Clinton and George Gibbons, transmitted to Root Dec. 9, 1907, Anderson Papers, Box 68.

of justice and equity in the decision of questions arising thereon which practically amounts to a power to legislate." As he saw it, the principles "tend rather to raise questions than to settle them" and failed to set priority in water uses.

Anderson also pointed out that the consent of both countries would still be required for other diversions; hence the need for special agreements was not eliminated. There was no provision made for the enactment of special legislation and he doubted whether the Senate would approve a treaty which conferred unprecedented powers on another body. He thought that federal and state laws were adequate in all cases except where waters were divided by the boundary. He could see no reason to permit Canadians free navigation on Lake Michigan without a similar concession from them. And there was no provision for possible injury resulting from elevation of water levels by dams. It was his conclusion that the commission should be given jurisdiction only over contiguous boundary waters, based upon specific principles decided upon by the two governments, with a stipulated priority among these plus allowance for local conditions.³⁹ He later suggested that at Niagara, the United States should not permit an export tax to be imposed by Canada on any power generated in boundary waters.⁴⁰

³⁹Ibid.

⁴⁰Anderson to Root, Jan. 30, 1908, Dept. of State, 5934/13-17.

The Canadians were adamant in wanting "principles which shall govern everywhere."⁴¹ Root had no doubt foreseen this trend and had tried in June to get Canadian approval of an irrigation project in Montana. At that time he had handed a fourteen-point paper to Bryce to be used as a basis for agreement. The project proposed the diversion of water from the St. Mary River in Montana into the Milk River, which also began in Montana, flowed into Canada, and then returned to the United States, at which point the water was to be used for irrigation. The gist of the paper was that Canada would not use the water diverted into the Milk River while it flowed through Canada.⁴²

Even earlier, Bryce had commented, in reference to this project: "It would be a pity. . . to prejudice in any way such action as a reconstituted Commission might take in the case of the river."⁴³ He made no official comment on it in June. Now in December Laurier questioned Gibbons why all such boundary irrigation projects could not be handled by the commission.⁴⁴ Gibbons replied that they could, and so could boundary delineation through the lakes. But, he added, "The matter will fiddle along month after month, if left to the

⁴¹Gibbons to Laurier, Jan. 8, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁴²No. 88, June 15, 1907, Dept. of State, 5150/1-2.

⁴³Bryce, No. 134, June 7, 1907, Gibbons Papers, Vol. 14, P.A.C.

⁴⁴Laurier to Gibbons, Dec. 9, 1907, ibid., Vol. 3.

British Ambassador, and I very much doubt even then of his being able to accomplish anything."⁴⁵ He was convinced that Canadians should meet with Americans without the intervention of Englishmen.⁴⁶

Laurier modified these ideas. He proposed to Bryce that, instead of six separate commissions proposed in the three treaties under negotiation, there be only one, the permanent Waterways Commission, which could supervise the Milk River project, and the marking of the boundary through the Great Lakes, as provided in the Delimitation of Boundaries Treaty.⁴⁷ Laurier did not agree with Gibbons on direct negotiations with the United States leaders without British help. Yet he did want a Canadian to enter into the formal talks. In his letter to Bryce, he praised the "active and energetic" Gibbons who, "familiar with all the aspects of the question and [with] his thorough knowledge of all local conditions," would be of great assistance to Bryce in clinching matters to a prompt and definite issue.⁴⁸ Bryce included Gibbons in his next visit with Root.

⁴⁵Gibbons to Laurier, Dec. 21, 1907, ibid., Vol. 8.

⁴⁶Gibbons to Laurier, Jan. 8, 1908, ibid.

⁴⁷Laurier to Bryce, Dec. 24, 1907, ibid., Vol. 3.

⁴⁸Ibid.

The Root (Anderson) Draft Treaty

Early in January, Gibbons and Laurier knew that the Gibbons-Clinton draft treaty was not going to be sent to the United States Senate.⁴⁹ Root saw no possibility of its being passed in its present form. No one knew better than he what would be acceptable to the Senate. Since 1905 he had had an invitation to attend the weekly sessions of the Committee on Foreign Relations.⁵⁰

Canadians hoped that the amendments which Root promised would improve the treaty's chances of approval.⁵¹ These amendments proved to be an entirely new draft treaty. The work of Special Counsel Anderson, it provided for a joint commission of inquiry of six members who, after taking oaths to "carefully and impartially examine all questions," were to investigate all matters of difference along the common frontier referred to it by the two governments, conduct hearings, and turn in majority, minority, or separate reports, according to the sentiment of the members. These reports and recommendations were not to be regarded as final decisions or as arbitral awards.⁵²

⁴⁹Grey to Laurier, Jan. 8, 1908, Laurier Papers, Vol. 733, P.A.C.

⁵⁰Philip C. Jessup, Elihu Root (New York, 1938), I, 544-45.

⁵¹Gibbons to Bryce, Jan. 6, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁵²Dept. of State, 5934/18a.

Bryce, representing Canadian wishes in negotiations with the United States, gave Root arguments for the strong and impartial permanent commission of the Gibbons-Clinton draft. Such a commission, he argued, would either handle arbitrations based on principles or "in a give and take spirit having regard to local circumstances."⁵³ But Root did not think the time was ripe for setting up principles, as he saw many unexplored questions which had great significance for water disposition. Bryce at least wanted to get the duties of the proposed commission of inquiry enlarged to all questions needing arbitration between the two governments; also, if minority reports were prepared, that all commissioners would see these. Root agreed to both points. His concurrence supported Bryce's feeling that, if it were not for the "practically irrepressible" Senate, he could dispose of all outstanding negotiations in a week with Root and the President.⁵⁵

On his scheduled trip to Canada, Bryce hoped to get a final draft of the Treaty acceptable to all parties. In February, still hoping to get the two sides to agree on some compromise, he telegraphed Gibbons to come to Washington. Gibbons dropped everything and hurried once more to that city,

⁵³Bryce Report, Feb. 3, 1908, Dept. of State, 5934/78-80.

⁵⁴Ibid.

⁵⁵Grey to Laurier, Jan. 8, 1908, Laurier Papers, Vol. 733, P.A.C.

determined that it would not be through any neglect on his part that negotiations failed.⁵⁶ He promised Laurier that he would hold firm to only two conditions -- principles and a permanent board. On his arrival he found out that the new draft treaty omitted principles and made the commission an ineffective advisory body, with no powers of final decision and enforcement.

Gibbons met twice with Root and Bacon, one of these times without Bryce. Root had returned "to his old idols."⁵⁷ "How petty he can be," was Gibbons' reaction to Root's argument that Canada had departed from the principle of equal diversion at Niagara.⁵⁸ But he allowed no personal feelings to mar the accord he had worked so hard to build. Root had conceded the marking of the boundary line through the Great Lakes by the commission. And he had included all matters along the common frontier.⁵⁹ Gibbons argued persuasively that the only way to remove boundary waters from politics on both sides of the border was to establish principles and a permanent commission with power to make decisions. His own convictions were reinforced when Assistant Secretary Robert Bacon supported him.⁶⁰ On the principle of injury to another country's private and public interest by stream diversion,

⁵⁶Gibbons to Laurier, Jan. 31, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁵⁷Ibid.

⁵⁸Ibid.

⁵⁹Gibbons to Laurier, Feb. 11, 1908, ibid.

⁶⁰Ibid.

Gibbons made the point that it did not matter how it was settled, whether each country diverted to the injury of the other country, or the reverse, as long as the principle was uniformly applied. When he left Washington this time, he was sure that Root understood the Canadian determination to stand firm for their rights. He asked Laurier if he thought Canada should accept the half-loaf offered by Root.⁶¹ Optimistically, he added that he thought they were "nearer than ever before to a proper understanding."⁶²

⁶¹Gibbons to Laurier, Feb. 11, 1908, ibid.

⁶²Ibid.

IV. TREATY NEGOTIATIONS: SECOND STAGE

Root and Canadian Firmness

As Secretary of State, Root saw the main object of diplomacy, "To keep the country out of trouble. . . in the right way."¹ In pursuit of the national interest, he was logical in his ideas, disciplined in expression, controlled in actions, and never showed excitement or annoyance.² A meticulous worker with perfectionist goals, he spent long hours of preparation, often to the point of physical and mental exhaustion.³ As a result of his labors, his mastery of diplomatic issues was superb. Typical was his first meeting with James Bryce as the new British Ambassador, when his resumé of the position of both countries was so thorough that Bryce realized his own understanding of his country's policy was inferior to that of Root's.⁴

¹ Philip C. Jessup, Elihu Root (New York, 1938), II, 4.

² This is based on a description of Root given by Esmé Howard in Theatre of Life (Boston, 1936), 139, which is quoted by Jessup in Root, II, 86.

³ Ibid., I, 161.

⁴ Ibid., II, 85-86.

The settlement of issues with Canada was an administrative policy carried out mainly by Root. It is impossible to determine whether he was following President Roosevelt's wishes or his own, as the two men worked in close collaboration during this period. Root went over every important speech made by Roosevelt between 1901 and 1909, yet gave credit for all policies to his superior.⁵ But Root's attitude throughout their association remained that of a more mature person towards a man who was thirteen years younger than himself and often needed counsel.⁶

Roosevelt wanted good relations with the Canadians and yet managed to offend Laurier in early 1908 with what Laurier called a "smart Yankee trick."⁷ As a result, Laurier was reluctant to concede anything to Americans, whom he viewed as "selfish, self-seeking and as caring only for Canada in so far as it may serve their own purpose to be friendly."⁸ This attitude slowed up progress towards a treaty when time was running out.

⁵Ibid., I, 470.

⁶Ibid., I, 191.

⁷Laurier sent William Lyon Mackenzie King to Washington, at Roosevelt's request, on the problem of Oriental immigration. He was furious when Roosevelt's letter acknowledging the visit twisted the request and a proposed mission to Britain so that the initiative appeared to come from Canada, along with other mistakes. This necessitated a third visit by King to get this letter marked 'private and confidential' so that it could not be used in any future parliamentary investigation. R. Macgregor Dawson, William Lyon Mackenzie King (Toronto, 1958), 155, 158.

⁸King recorded these views of Laurier's in his Diary, ibid., 154.

Influential American senators were becoming impatient about the delay in the approval of the application of the Minnesota Canal and Power Company, the St. Mary and Milk Rivers project in Montana, and other matters.⁹ And Root saw a chance to resign the Secretaryship when Roosevelt would leave office in 1909.¹⁰ So chances for ratification of a treaty might be less favorable after that. Nevertheless, time had to be spent in reassessment of positions and in working out acceptable solutions to the outstanding issues.

Laurier made sure that irrigation problems in cross-boundary waters were considered within the domain of the commission by both the Canadian and American sections.¹¹ There also arose a difference of opinion between the British and the Canadians on powers of the commission. *Chargé d'affaires* Esmé Howard wrote to Grey that a commission to settle all future questions was impossible of attainment but he predicted that a Canadian head of any kind of commission would naturally

⁹For example, Senator Knute Nelson of Minnesota wrote to Root about the damage done in his state by the Canadian dam in the Roseau River. Root to Anderson, Jan. 7, 1908, Anderson Papers.

¹⁰The social obligations had proved too onerous for his wife and he himself had spent several weeks in a sanitarium the preceding summer. Jessup, Root, II, 138; I, 505.

¹¹Laurier to Gibbons, Jan. 27, 1908, Gibbons Papers, Vol. 13, P.A.C.; Gibbons to Laurier, Jan. 31, 1908 (two letters of this date), ibid., Vol. 8.

become important as an adviser on Canadian questions to the British Embassy in Washington.¹² The Canadians made no reply to this.

Root tested the unity of the Canadians and the British when he sent Bryce a memorandum, stating that he was going to approve the Minnesota application, as the company's proposed remedial works removed any cause for objections.¹³ As Root pointed out, the company would take a year to work out its preliminary plans; in that time the two countries, either together or separately, could continue study of a general improvement plan for Rainy River.¹⁴

Bryce protested. Overruling the decision of the Commission on this matter "would tend to prejudice the prompt and easy settlement of other boundary questions between the two countries."¹⁵ He pointed out that the year's grace would not be that in fact, since the company would thus be given support for its plan. Root did not go ahead with approval but the company attorney kept reminding him of the application.¹⁶ It was apparent that, despite differences over the type of commission needed, the Canadians and British were in close

¹²Howard to Grey, Feb. 28, 1908, Laurier Papers, Vol. 733, P.A.C.

¹³Root to Bryce, Jan. 13, 1908, Dept. of State, 1718/34-35.

¹⁴Ibid.

¹⁵Bryce to Root, Jan. 21, 1908, ibid., 1718/38.

¹⁶O. H. Simonds to Root, April 8, 1908, ibid., 1718/42; May 30, 1908, ibid., 1718/43.

agreement.

The Canadians, through Howard, let the State Department officials know that, if the tables were reversed, the United States would want to know the nature of the proposal.¹⁷ The answer was that such an inquiry should be asked for formally. A communication was drafted by Gibbons and Aylesworth on the subject of boundary waters and, after a delay in Ottawa, was finally sent on to Washington in late March.¹⁸ It was immediately forwarded to Anderson who, in turn, drafted Root's formal reply which was not sent to Bryce until the summer.¹⁹

Canadians again stated their support of principles applicable all along the boundary with a permanent commission to enforce them, with the added provision that, if the United States could not accept the suggested principles, they should submit their own.²⁰ Anderson defined the essential difference between the two draft treaties as one of the commission's final authority. He objected to a commission deciding policy,

¹⁷Howard to Grey, Jan. 28, 1908, Laurier Papers, Vol. 733, P.A.C.

¹⁸Gibbons to Aylesworth, March 13, 1908, Gibbons Papers, Vol. 8, P.A.C.; Aylesworth to Gibbons, March 17, 1908, ibid., Vol. 6.

¹⁹Draft of proposed note to British Ambassador, Anderson Papers, Box 68.

²⁰Grey to Bryce, n.d., sent with minor changes to Root, March 23, 1908. The first memo is in the Gibbons Papers, Vol. 14, P.A.C.; the second is in Sen. Doc. No. 118, 85th Cong., 2nd Sess.

making concessions, and using discretion in such matters, since these were part of treaty-making powers belonging to the President.

Anderson contended that principles should distinguish between national rights in boundary waters and in tributary waters, as well as in waters flowing across the boundary. There should be a distinction, he thought, between temporary and permanent diversions and a determination of priority in water use for navigation, canals, sanitation, irrigation, power and domestic demands, dependent upon local conditions. In addition, there should be a limitation set on the total amount to be diverted on each side of the boundary, and conditions should also be established on miscellaneous matters, such as raising water levels, constructing remedial works, and storing water. The justification given for the suggested commission of inquiry was that it would find out what principles should be established by reviewing a number of cases.²¹

In February, Root submitted a tentative treaty dealing with Niagara diversion alone, indicative of its significance.²² This draft treaty gave the United States a larger amount of water than heretofore, plus the use, export tax-free, of one-half of the power generated by Canada on the amount

²¹Draft of proposed note to British Ambassador, Anderson Papers, Box 68. This note was sent by Root to Bryce in June, 1908.

²²Root to Bryce, Feb. 15, 1908, ibid. Enclosure, Memorandum for the Provisions of a Convention for the Preservation of the Falls and the Rapids of Niagara River.

in excess of the United States total. No Canadian comment was made officially on this draft treaty. Gibbons faced another old problem when a bill was introduced in the House of Representatives to grant permanent water rights in the Sault Rapids to a Michigan electric company.²³ He asked O. H. Ernst, Chairman of the American Section, to speak to Congressman Theodore Burton on the matter.²⁴

In May, Laurier inquired of Gibbons, "Anything new?"²⁵ Bryce also felt the tension of inaction and raised the question of formal discussions on a treaty with Root.²⁶ Root was agreeable but little progress could be made as neither Bryce nor Root had anything new to offer. Root reiterated his position; the Senate would not accept principles which had not been developed out of cases examined by a commission of inquiry. Bryce, in his reports to Governor-General Grey, also supported a commission of inquiry, arguing that eventually it would become very effective in the settlement of disputes.²⁷ But he was powerless to proceed along these lines without a new directive from Ottawa. None was forthcoming.

²³N. W. Rowell to Gibbons, March 19, 1908, Gibbons Papers, Vol. 6, P.A.C.

²⁴Gibbons to Ernst, March 24, 1908, ibid., Vol. 8.

²⁵May 6, 1908, ibid., Vol. 3.

²⁶Bryce to Root, May 5, 1908, Dept. of State, 5934/21.

²⁷Grey to Laurier, July 23, 1908, Laurier Papers, Vol. 733, P.A.C.

After several fruitless meetings, Root welcomed the suggestion that Gibbons enter the discussions.²⁸ Bryce hoped that Gibbons could come up with a solution to the Minnesota matter. Laurier had complete confidence in Gibbons in this "most delicate matter," and Bryce left Washington on a scheduled trip through the Great Lakes.²⁹

The Canadian position on the adoption of principles was as strong as ever. Aylesworth advised Gibbons that he should not accept half-way suggestions. Gibbons was confident of success "if we have the nerve and self-respect to maintain our position."³⁰ To Bryce he wrote: "They have got to be taught to play the game fairly."³¹ Gibbons still saw Root as a "clever quibbler" who sought advantage by keeping matters in "an indefinite shape" while placing the blame on the "wicked Senate."³²

This meeting of Gibbons with Root, Assistant Secretary Bacon, and Special Counsel Anderson was successful. It was agreed that principles to be applied by a joint commission should be adopted, with the exact arrangement to be

²⁸Bryce to Gibbons, May 22, 1908, June 8, 1908, Gibbons Papers, Vol. 3.

²⁹Laurier to Gibbons, June 9, 1908, ibid.; Bryce to Gibbons, June 8, 1908, ibid.

³⁰Gibbons to Laurier, June 13, 1908, ibid., Vol. 8.

³¹Gibbons to Bryce, June 13, 1908, ibid.

³²Gibbons to Laurier, June 13, 1908, ibid.

worked out by Anderson and Gibbons.³³ It may have been the concessions of Gibbons in a preliminary memorandum which moved the discussion to this point.³⁴ In his memorandum he specifically exempted irrigation cases from the principle of equal diversion, and was willing to change his previous opinion on the Treaty of 1842.³⁵ He also proposed that the treaty be subject to termination on one year's notice. On the problems of obstructions and diversion in cross-boundary streams, he suggested that charters be obtained from each government in order to protect public and private interests in both.³⁶ Lake Michigan and Georgian Bay were to be included in the Great Lakes waters open to navigation by both countries. And the commission would investigate and report upon all matters referred to it.

Gibbons argued that unless the commission was given "governing principles and power to make final decisions," it would "become a farce."³⁷ Applicants turned down by the

³³Gibbons to Laurier, June 22, 1908, ibid.

³⁴Memoranda for Mr. Root, Dept. of State, 5934/31. Received by the Secretary of State June 18, 1908.

³⁵Infra, 33-34.

³⁶Unknown to Gibbons, Anderson had written to Root June 2nd that a solution to this problem might be to treat any damage in the other country caused by diversion of a cross-boundary stream as if it occurred within the country where the diversion took place. Anderson Papers, Box 68.

³⁷Memoranda for Mr. Root, Dept. of State, 5934/31.

commission would only put pressure on their own governments. He argued that the two countries would have to work together to control use of the water. He gave an example. The Canadian Section had recently rejected an application of a Canadian company to divert water from Lake Erie across Canada to Lake Ontario. And he asked what the consequences might be if the two countries did not work together on such problems. The warning was clear to anyone familiar with shallow Lake Erie and its importance in the Great Lakes system.

But the conference was a strain on the patriotic Gibbons who had to listen to a long harangue by Root "about the unfriendly attitude the Canadians had assumed towards the Americans for many years in Parliament and through the public press."³⁸ In writing to Laurier, Gibbons elaborated:

He broke out and talked for fifteen minutes about the unfriendly attitude that had been displayed by Canadians generally towards the United States for many years, not only in the Press, but on the floor of the House and at public banquets. He said that one party seemed to vie with the other in saying nasty things and all seemed to imply that the American people had always over-reached them heretofore and were lying in wait to do so again.

He spoke about the freedom with which people, who had not resumed "responsibilities" of a nation, were able to talk. He said that it was unbearable; denied that we had been put to any unfair disadvantage by the Alaska award or by the Webster-Ashburton Treaty.

He was quite excited through the whole of his harangue and had evidently prepared this speech for my benefit and to be delivered in the presence of

³⁸ Gibbons to Bryce, July 3, 1908, Gibbons Papers, Vol. 8, P.A.C.

Mr. Bacon and the others who were there.³⁹

Gibbons did not reply in kind but told Root that what he said showed that irritation did exist -- which was only another reason why a different course of action should be adopted. Root agreed and plans were then made for Anderson and Gibbons to work together on this.⁴⁰ To Laurier's inquiry as to the seriousness of Root's attack, Gibbons wrote that it was real enough, caused by his having "to recognize the existence of another power on this continent having equal rights," and that it was hard for Root to accept our "joint control of the Great Lakes system for all time to come."⁴¹

Both Bryce and Howard advised Canadian leaders to accept a commission of inquiry at the time when Gibbons persuaded Root to agree to principles and a permanent board to enforce them, as well as other concessions, such as opening Lake Michigan to navigation by the Canadians.⁴² Thus Gibbons proved his point that Canadians should represent Canada in international affairs.

³⁹July 6, 1908, ibid.

⁴⁰Ibid.

⁴¹Laurier to Gibbons, July 8, 1908, ibid., Vol. 3; Gibbons to Laurier, July 9, 1908, ibid., Vol. 8.

⁴²Gibbons to Howard, July 30, 1908, ibid., Vol. 8; Grey to Laurier, July 23, 1908, Laurier Papers, Vol. 733, P.A.C.; Howard to Gibbons, July 26, 1908, Gibbons Papers, Vol. 3, P.A.C.

The Gibbons-Anderson Draft Treaty

New York was the scene of the first meeting of Gibbons and Anderson in late August.⁴³ Gibbons was jubilant in his report of the treaty discussed by the two. It will establish "our position as a nation more effectually than anything that has been."⁴⁴ He wrote that, although the treaty was very broad in its terms, it was sure of passage through the Senate since Root was virtually a member of the Committee on Foreign Relations -- according to Anderson. Laurier agreed that such a treaty "would be the greatest benefit ever bestowed on Canada during the last fifteen years," but that it would have to be turned down.⁴⁵ He had just received Root's dispatch rejecting principles and a treaty would not be acceptable in Canada without them. He asked Gibbons to draft a reply to Root's paper.⁴⁶

It was up to Gibbons to clear up the matter, to explain to Laurier that his interview with Root in which an

⁴³Gibbons called on Anderson in New York City in late July when Anderson was on vacation. Anderson to Gibbons, July 31, 1908, ibid., Vol. 6.

⁴⁴Gibbons to Laurier, Aug. 25, 1908, ibid., Vol. 8.

⁴⁵Laurier to Gibbons, Aug. 28, 1908, ibid., Vol. 3.

⁴⁶Ibid.

agreement on principles had been reached, had come after Root sent the letter in which he rejected principles.⁴⁷ Gibbons advised not responding to this since, as he expressed it, "It is a good deal better to let him come down easily than to attempt to force him off his perch,"⁴⁸ Laurier agreed that silence on the matter was best.⁴⁹

Meanwhile Root had received Anderson's draft treaty but thought it necessary "to talk with some of the Senators about it before we take any steps towards committing ourselves."⁵⁰ Root's request meant that Anderson had to write to Gibbons that he was "unexpectedly delayed in completing the draft," and later, that the delay was caused by Root's slowness in approving the draft.⁵¹ Gibbons saw no danger in this delay. His elation sang through his letters. The treaty was "the greatest advance ever made by diplomacy" and would prevent these two peoples from getting:

Up a decent sized row if they wanted. The Court would suppress all natural desires in this regard.

⁴⁷ Gibbons to Laurier, Aug. 31, 1908 (3 letters of this date), ibid., Vol. 8.

⁴⁸ Ibid.

⁴⁹ Laurier to Gibbons, Sept. 12, 1908, ibid., Vol. 3.

⁵⁰ Root to Anderson, Sept. 2, 1908, Anderson Papers, Box 68.

⁵¹ Anderson to Gibbons, Sept. 4, Sept. 9, 1908, Gibbons Papers, Vol. 3, P.A.C.

Its advantage to us is unlimited. The United States is big enough to be honest. If they accept this proposal it will mean that they are willing to renounce the advantage which their size gives them and accept the better and more chivalrous position of fair dealing.⁵²

He saw a permanent board removing from the realm of diplomacy "a lot of comparatively trivial matters which, small as they are, without such machinery would be constant causes of friction."⁵³ And he now saw Root as "a man of great ability. . . . With a stupid man there would have been no hope, but a clever one must come to the conclusion which we desire."⁵⁴ His optimism declined when he heard nothing from Anderson for over a month. In November, to Bryce's inquiry, preliminary to his discussion with Root, on treaty negotiations, Gibbons had to admit ignorance about the points which were holding up progress, since he thought agreement had been reached on all major ones.⁵⁵

In Washington, the draft treaty was being scrutinized and analyzed by several persons. On record is the praise of Third Assistant Secretary of State Alvey A. Adee for the care, thought, and research it showed, and for its practicality, along with a recommendation for the clarification of some

⁵²Gibbons to Howard, Sept. 10, 1908, ibid., Vol. 8.

⁵³Gibbons to Howard, Sept. 22, 1908, ibid.

⁵⁴Ibid.

⁵⁵Gibbons to Bryce, Nov. 2, 1908, ibid.

vague phrases by the department solicitor.⁵⁶ Also, Ernst was questioned about the maximum diversion permitted at Chicago and whether any other diversion was possible in the Great Lakes system which would materially affect water levels.⁵⁷ The answer to the first question was that the Chicago diversion was set at 333 1/3 cubic feet per second for 100,000 people; therefore, it could be increased with population growth, i.e., 20,000 c.f.s. for a population of six million, and so on. The answer to the second question, in essence, was that two other possible diversions would affect levels: across the Niagara peninsula in Canada, and diverting those waters naturally tributary to Lake Superior into Hudson Bay.⁵⁸

Gibbons finally received a telegram from Anderson on November 8th, forwarding draft provisions on Niagara, and a few days later, the draft treaty itself.⁵⁹ The proposed treaty followed Anderson's ideas as stated in his memorandum.⁶⁰ Boundary waters were defined as waters through which the international boundary passes and "the

⁵⁶ A. A. Adeo to Root, Oct. 9, 1908, Dept. of State, 5934/44-45.

⁵⁷ Anderson to Ernst, Oct. 30, 1908, Anderson Papers, Box 68.

⁵⁸ Ernst to Anderson, Nov. 3, 1908, ibid.

⁵⁹ Telegram, Anderson to Gibbons, Dept. of State, 5934/56A; Anderson to Gibbons, Nov. 12, 1908, Gibbons Papers, Vol. 3, P.A.C.

⁶⁰ Infra, 65.

navigation of all such waters shall forever remain free and open." The right of navigation was extended to Lake Michigan and canals connecting boundary waters "as long as this treaty shall remain in force."⁶¹

Article II reserved to each country exclusive jurisdiction and control over the use and diversion of waters in its own territory which flowed across the boundary or into boundary waters. Any damage done through interference with or diversion from these waters was to be handled as if such injury or damage took place within the same country as the diversion.

The International Waterways Commission was to have six members, three to be appointed by the President, by and with the advice and consent of the Senate and one of these was to be a lawyer and one an engineer. The manner of Canadian appointment was left blank. Outside of government works for the improvement of navigation, no diversion or obstruction of boundary waters was to be made unless approved by the commission, which was to be governed by the rules of "equal and similar rights" in the following order of priority, subject to special agreements and local conditions:

- (1) Uses for necessary domestic and sanitary purposes.

⁶¹The United States claimed to have terminated Canadian right of navigation on Lake Michigan, based on Article XXVIII of the Treaty of 1871, by the Special Message of President Harrison to Congress Feb. 2, 1893, Richardson, Messages, XIII, 5770-781.

- (2) Uses for navigation, including the service of canals for the purposes of navigation.
- (3) Uses for irrigation and for power purposes; and among the latter uses, those involving temporary diversions shall have precedence over those involving permanent diversions of such waters.⁶²

There was to be no pollution on either side to the injury of health or property in the other country; remedial works were to be under the supervision of the commission with protection and indemnity of interests. Majority reports, or separate if necessary, were to be made, and the two governments would adjust any matters of difference and then write a protocol for the commission to carry out. Questions along the frontier could be referred by the governments for reports. Miscellaneous matters, such as meeting place, oaths, salaries, and public hearings were also provided for. Special agreements on Niagara, St. Mary and Milk Rivers, and the Chicago Drainage Canal were to be included in separate articles.

This draft treaty showed Anderson's ability to draft international proposals, based on his years of experience and study of international law. It was closely reasoned and admirably written. The treaty followed the general lines of the Gibbons-Clinton draft but the changes were significant. The jurisdiction of the commission was restricted to boundary waters and to future uses of cross-boundary waters. Principles to be applied by the commission

⁶²Draft, International Waterways Treaty, Anderson Papers, Box 68.

to boundary waters could be superseded by special agreements. By designating Lake Michigan as a tributary water, it was excluded from the authority of the commission. He balanced free navigation by the Canadians there with the United States use of the Welland Canal. In setting up priority in water use, he put domestic and sanitary uses before navigation, based on use by the greatest number of people. He equated irrigation and power uses; but (as he explained to Root) boundary waters were not being used for irrigation, so this provision meant little.⁶³ No provision was made for the commission to submit their disagreements to arbitrators or to report upon matters in dispute between the two countries. There is no evidence that Gibbons saw that the treaty removed obstructions in the upper St. John River in Maine from the jurisdiction of the commission. He had already agreed to drop any objection to the Minnesota Canal and Power Company's project.⁶⁴

Gibbons wrote to Anderson that the draft was in "good shape" but apprehension caused by the unnecessary delay may have caused him to add: "For either side to obtain advantages would not in the end be to its gain."⁶⁵ He sent copies to Aylesworth and Laurier with the comment,

⁶³Anderson to Root, Aug. 26, 1908, ibid.

⁶⁴Ibid.

⁶⁵Gibbons to Anderson, Nov. 14, 1908, Gibbons Papers, Vol. 8, P.A.C.

"They have yielded to our every contention."⁶⁶ In line with his earlier thinking, he soon suggested the commission serving as a board of arbitration on any matter in dispute and this was added to the draft.⁶⁷

Hastening to New York City at Anderson's request for a conference, Gibbons arrived with a severe cold and had to wait over Thanksgiving Day as he had overlooked that national holiday in the United States. During the weekend he managed to go over the treaty with Anderson, later with Bryce, and then made the long train ride back to London. Within a few weeks, in answer to Bryce's solicitous inquiry about his health, he replied that he was "all right again and will not delay the completion of my portion of the work an instant."⁶⁸

The next few weeks were precious ones. Root was urging the rapid signing of the treaty so that it could be submitted to the Senate the first part of January. Bryce reminded Gibbons that the treaty had to be approved by the English government before it could go to the Senate, although he anticipated no delay in London since the Foreign Office was disposed to approve whatever Canada wanted.⁶⁹

⁶⁶Gibbons to Laurier, Nov. 16, 1908, ibid., Vol. 3.

⁶⁷Gibbons to Anderson, Nov. 24, 1908, Anderson Papers, Box 68.

⁶⁸Bryce to Gibbons, Dec. 11, 1908, Gibbons Papers, Vol. 6, P.A.C.; Gibbons to Bryce, Dec. 14, 1908, ibid., Vol. 8.

⁶⁹Bryce to Gibbons, Dec. 11, 1908, ibid., Vol. 6.

But Gibbons himself met with a "little hitch in the Washington business," as he explained to Laurier.⁷⁰ He could not accept the drafts of Article II on cross-boundary waters nor the one on Niagara River. He found, as Bryce predicted, that any problem connected with cross-boundary waters always made Root most difficult.⁷¹ Gibbons from the beginning had insisted on an additional clause in Article II to protect navigation rights in each country. First he had suggested:

The foregoing provision shall not be construed as an agreement authorizing diversions on either side which in their effect would be productive of material injury to the navigation interests on the other side.⁷²

Anderson thought this renewed a difficulty which they had been trying to avoid in regard to the Chicago Drainage Canal and so he omitted it in his next draft. But he suggested that Gibbons might be able to suggest another solution.⁷³ Gibbons then proposed:

Nothing in this Article is intended to authorize diversions in one country which will seriously interfere with public rights of navigation in boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary; and while each of the High Contracting Parties reserves its sovereign right of dealing with such diversion, each recognizes that it is desirable that such right

⁷⁰Gibbons to Laurier, Dec. 10, 1908, ibid, Vol. 3.

⁷¹Bryce to Gibbons, Nov. 6, 1908, ibid.

⁷²Revised draft of Art II, Dec. 2, 1908, Anderson Papers, Box 68.

⁷³Anderson to Gibbons, Dec. 5, 1908, ibid.

should not be unnecessarily exercised to the injury of public interests in such boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary.⁷⁴

And he added, in a reference to the Chicago diversion, "It will be a little hard to explain to our people why we should not be permitted to obstruct if you are permitted to divert." However, he continued, he was quite content "to waive this very important point for the sake of the general treaty and because I feel that, as a whole, Mr. Root is dealing with the matter fairly and in a broad spirit."

Anderson then suggested an acceptable sentence:

It is understood, however, that neither Government intends by the foregoing provision to surrender any right, which it may have, to object to any diversion of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.⁷⁵

Gibbons explained to Laurier that Article II was a compromise and was aimed at the protection of private interests while maintaining public interests.⁷⁶ His insistence on an additional clause, he wrote to Premier Whitney, was to control further diversions, as at Chicago.⁷⁷ Another difficulty arose over the clause on the Chicago diversion.

⁷⁴Gibbons to Anderson, Dec. 10, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁷⁵Anderson to Gibbons, Dec. 14, 1908, *ibid.*, Vol. 3.

⁷⁶Gibbons to Laurier, Dec. 16, 1908, *ibid.*, Vol. 8.

⁷⁷Gibbons to James Whitney, Jan. 22, 1909, *ibid.*

Gibbons proposed the following:

It is hereby agreed that, so long as this treaty remains in force, the amount of water which shall be taken from Lake Michigan for the Chicago Drainage Canal shall not exceed the average rate of 10,000 cubic feet per second.⁷⁸

This suggestion did not meet with Root's approval, and Anderson submitted:

It is agreed on the part of the United States that the permanent diversion of water from Lake Michigan for the Chicago drainage canal shall be limited to an amount which shall not lower the level of the Great Lakes System more than (8) inches below the normal mean low water level during the portion of the year when navigation is open.⁷⁹

Root was dissatisfied with both clauses and Gibbons agreed to omit the article entirely, no doubt following his earlier thinking on this matter.⁸⁰ The greatest trouble came over Niagara River. At first Root tried to get control over Canadian exportation of electric power but Gibbons refused to allow the United States to dictate Canadian relations with private corporations.⁸¹ Anderson's next draft at first seemed satisfactory to Gibbons.⁸² He wrote to Bryce that Anderson had dropped the objectionable clauses.⁸³ But when

⁷⁸Gibbons draft, Nov. 24, 1908, ibid., Vol. 14.

⁷⁹Proposal to Root, Nov. 24, 1908, Anderson Papers, Box 68.

⁸⁰Infra, 32.

⁸¹Gibbons to Laurier, Dec. 16, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁸²Gibbons to Anderson, Dec. 10, 1908, Anderson Papers, Box 68.

⁸³Gibbons to Bryce, Dec. 14, 1908, Gibbons Papers, Vol. 8, P.A.C.

he read the draft carefully he was amazed to find that new figures had been used, giving the United States a great advantage below the Falls.⁸⁴ Nor could he see why the way was left open for further diversion after two years when the commission was to allow modifications or additions at government request; if the other government did not disapprove within three months, these changes were to become permanent.⁸⁵ He explained once more that the greater amount allotted to the Canadians above the Falls was only an apparent advantage since it allowed for the Chicago diversion and was made necessary by the greater flow over the Canadian Falls. He admitted that he hated to haggle over these matters and settled the matter with his proposal to omit any reference to diversion below the Falls, thus relying upon the general principle of equal division.⁸⁶

The article on the St. Mary and Milk Rivers project was settled in a conference with former commissioner William King, who had been working on this problem for several months with F. H. Newell of the United States Department of the Interior. King and two members of Parliament agreed that one of two drafts would be satisfactory.⁸⁷ These provided for

⁸⁴Gibbons to Anderson, Dec. 15, 1908, ibid.

⁸⁵Ibid. Also Draft of Provisions for the Preservation of the Falls and Rapids of Niagara River, Art. V, Anderson Papers, Box 68.

⁸⁶Gibbons to Anderson, Dec. 16, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁸⁷Gibbons to Aylesworth, Jan. 8, 1908, ibid.

an equal division of the combined waters of the two rivers. Laurier wanted the water in each river to be divided equally but accepted Gibbons' explanation that such a division was impossible.⁸⁸

Gibbons, upset by this snag and parliamentary criticisms, confided to Aylesworth that he thought he had been treated "most abominably," since he had communicated all along just what he was doing and had gotten a treaty which was to Canada's advantage.⁸⁹ It rankled, when all he seemed to get for his efforts was disapproval. Perhaps the strain of keeping up with his own legal business plus another hurried trip to Washington and last-minute changes in the treaty led to this outburst. Perhaps his realization that he had donated his services without pay also grated.⁹⁰

But Gibbons rejoiced in putting Canada "in the position of a nation and giv[ing] her, for the first time in her history, fair play in her dealings with the American people."⁹¹ There were expressions of appreciation from many. Grey wrote that he regarded the signature of the treaty as a

⁸⁸Ibid.

⁸⁹Ibid.

⁹⁰According to his own account, he spent four weeks, all together, in Washington in 1907-08 which cost him an amount of money equal to what the government paid him for his services and travel expenses. This was \$50.00 and \$7.50 a day, respectively. Gibbons to Hon. Wm. Harty, M.P., June 27, 1908, ibid., Vol. 8. I have a record of 13 visits made by Gibbons to Washington or New York City from February 1907 through March 1909. It is interesting to note that Anderson did not visit Canada in connection with these treaty negotiations.

⁹¹Ibid.

great personal triumph for Laurier and his ramrod Gibbons.⁹² And he thought of its possible rejection as a national calamity. Laurier offered Gibbons his "sincere gratitude for the labour, energy and hard work which you have given us for the last three years."⁹³ Bryce also praised him, especially for his great service in the early stages of the treaty.⁹⁴ The treaty was approved in the Canadian Privy Council January 9th.⁹⁵ Root and Bryce officially signed the treaty January 11th. It was presented to the United States Senate on the following day.⁹⁶

⁹²Grey to Laurier, Jan. 12, 1909, Laurier Papers, Vol. 734, P.A.C.

⁹³Laurier to Gibbons, Jan. 12, 1909, Gibbons Papers, Vol. 3, P.A.C.

⁹⁴Bryce to Gibbons, Jan. 20, 1909, ibid., Vol. 3.

⁹⁵Telegram, Gibbons to Bryce, Jan. 9, 1909, Gibbons Papers, Vol. 3, P.A.C. The Colonial Office made several minor changes. Grey to Laurier, Jan. 8, 1909, Laurier Papers, Vol. 734, P.A.C.

⁹⁶Confidential Executive Message, 60th Cong., 2nd Sess., Anderson Papers, Box 69.

V. DEBATE

The Senate and the Smith Amendment

The second session of the 60th Congress after Christmas to March, 1909, was chaotic, with the Republicans splitting into conservative and progressive factions. Discord was the order of the day and no major legislation was passed. It was hardly a propitious time to present a treaty; but, early in January, both Secretary Root and Special Counsel Anderson hoped that there would be no serious objections to the Boundary Waters Treaty.¹ Senator Lodge, who was a close friend of both Root and President Roosevelt and who sometimes served as acting chairman of the Committee on Foreign Relations, promised to do his best to get senate approval of the treaty.

The special agreements in the treaty had been made with senatorial support in mind. Article V on Niagara Falls allowed for future diversion below the falls while the omission of any reference to the Chicago diversion permitted future increases there.² Both of these arrangements were

¹Anderson to Gibbons, Jan. 14, 1909, Gibbons Papers, Vol. 3, P.A.C.

²Infra, 80-81.

satisfactory to local interests. Article VI provided for the sharing of the waters of the St. Mary and Milk Rivers as originally proposed in the irrigation project of several years' planning.³ And, finally, the Minnesota Canal and Power Company, under the provisions of Article II, would be able to get approval of its application.⁴ The State Department had worked since 1904 to get Canadians to agree to this diversion project.⁵ In December, Anderson had drafted a note for the British Ambassador to transmit to Root on the signature of the treaty.⁶ It precluded any future British objection to the diversion:

His Majesty's Government will not further urge the objection heretofore raised against the diversion of waters in the State of Minnesota, tributary to the boundary waters between the state and Canada, on the ground that such diversion is in contravention of Article II of the Treaty of August 9, 1842 between Great Britain and the United States.⁷

Anderson tried to get a similar statement from the Canadian

³Infra, 82-83. Appendix L, Art. VI.

⁴Infra, 63. Appendix L, Art. II.

⁵Gibbons must have questioned the reason for the company's continued reapplications after rejections by the Minnesota Supreme Court, the War Department, the Canadian Government, and the I.W.C. His explanation to Laurier was that the company, unable to meet interest payments on its bonds, blamed its financial shortcomings on the War Department's rejection of its application. In order to exonerate the administration of any responsibility, according to Gibbons, the State Dept. now wanted the permit to be granted. Gibbons to Laurier, Feb. 25, 1909, Gibbons Papers, Vol. 8, P.A.C.

⁶Anderson to Bacon, Dec. 20, 1908, Dept. of State, 1718/49-50.

⁷Ibid.

government but failed. Gibbons, in a telegram to Anderson, did waive Canadian right to object to the Minnesota diversion.⁸ But he could not get Laurier to agree to such a waiver. The Prime Minister refused to bind his government to any secret agreement on Article II.⁹ No special agreement covered the Sault Rapids between Lake Superior and Lake Huron. A report by the International Waterways Commission in the spring of 1906 had recommended equal division of surplus waters for power purposes there.¹⁰

In January, 1909, when the Senate Committee on Foreign Relations began executive hearings on the treaty, Senator William Alden Smith from Michigan objected to equal division in the Sault Rapids. A Michigan concern, the Chandler Dunbar Electric Company, had constructed works in the bed of the stream at a point where the major portion of the water flowed on the United States side of the boundary. It was obvious that Smith was interested in protecting the company's riparian rights. The revelation that the greater flow of water on the Michigan side of the boundary was caused by a recently constructed bridge caused the initial support

⁸Gibbons to Anderson, Jan. 10, 1909, Anderson Papers, Box 69. Telegram reads: "Distinctly understood all right to object Minnesota waved [sic] save as protected by article two. You can rely will never hear of contention again."

⁹Laurier to Gibbons, Feb. 15, 1909, Gibbons Papers, Vol. 3, P.A.C.

¹⁰See Appendix G, No. 4.

given him by his colleagues to dwindle away.¹¹

Smith then found a vulnerable spot for attack -- states rights. He argued that the treaty overrode Michigan's territorial rights in the St. Marys River. With this argument he convinced two southern Democrats on the committee, Augustus Bacon from Georgia and Hernando Money from Mississippi, that such was the case. Anderson telegraphed Gibbons about the possibility of division of the waters at the Sault Rapids "on the basis of territorial ownership," but Gibbons held out for equal division.¹²

Smith turned to a personal attack on Anderson, accusing him of working for and protecting the interests of William Vanderbilt in a Niagara electric power company. Anderson wrote a denial to Secretary of State Robert Bacon, whereupon Smith threatened to reveal Vanderbilt's connections with a Niagara power company if this letter were read to the Senate.¹³ During this incident, Lodge and Smith nearly came

¹¹Ernst to Anderson, Feb. 2, 1909, ibid. Also Brief Outline of the Situation, Anderson Papers, Box 20.

¹²Telegram, Gibbons to Anderson, Feb. 1, 1909, ibid., Box 69; Gibbons to Laurier, Feb. 1, 1909, Gibbons Papers, Vol. 8, P.A.C. Anderson appeared before the committee Jan. 30th to answer questions on the brief he had prepared as Root left the State Dept. Jan. 27th to enter the Senate.

¹³The accusation was entirely without foundation; Anderson's father, dead some twelve years, had worked for Vanderbilt but Chandler Anderson had never met Vanderbilt, nor had he had anything to do with the original allocation of water at Niagara Falls. The matter was settled when Smith gave a retraction to the press. Anderson to Lodge, Feb. 17, 1909, Anderson Papers, Box 20; Anderson to C. B. Warren, Feb. 15, 1909, ibid.; Statement in Washington Herald, Feb. 16, 1909, ibid., Box 1.

to blows.

The treaty was in trouble unless some concession could be made to Smith and his supporters. At the request of Secretary Bacon, Anderson prepared an interpretive provision on riparian rights in the Sault Rapids which might meet Smith's demands.¹⁴ This resolution, to be inserted in the resolution of ratification, confirmed riparian rights in the rapids, subject to navigation requirements. The following note was agreed upon in a meeting of Secretary Bacon, Ambassador Bryce, Anderson, and Smith:

Resolved (two-thirds of the Senators present concurring therein) that the Senate advise and consent to the ratification of the treaty between the United States and Great Britain, providing for the settlement of international differences between the United States and Canada signed on the 11th day of January 1909.

Resolved further as a part of this ratification that the United States approves of this treaty with the understanding that nothing in this treaty shall be construed as affecting or changing any existing rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals and further, that nothing in this treaty shall be construed to interfere with the drainage of wet swamp and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will, in effect, form part of the treaty.¹⁵

¹⁴Brief Outline of the Situation, ibid., Box 20.

¹⁵The meeting was held Feb. 20th. Secretary Bacon, in a letter to Gibbons, explained that the resolution in no way changed riparian rights, as already agreed to. These were the same as before the treaty, provided that riparian owners did not interfere with navigation by changing the

Bryce wanted to insure Canadian rights and arranged a meeting for Gibbons, Anderson, Root and himself on February 26th.¹⁶ At this meeting the following phrase was inserted after "navigation canals":

And without prejudice to the right of Canada to take within its own territory not exceeding one-half of the total amount of the waters flowing from Lake Superior into the St. Mary's River available for power purposes.¹⁷

Gibbons agreed to the treaty going through "in the best shape possible," counting on a letter of clarification from the Secretary of State to the British Ambassador "reserving our right to use of half the water."¹⁸ The resolution, as amended in the meeting Gibbons attended, had been handed to Smith on February 28th. It was returned to Secretary Bacon March 1st in the following form:

Without prejudice to the existing rights of Canada and the United States each to use the waters of the St. Marys River within its own territory.¹⁹

Anderson wired Gibbons that the change was "very exasperating but regarded here as wholly immaterial and not changing meaning of form previously proposed."²⁰ Root admitted level of the water. He also referred to the statement on draining swamps as "perfectly harmless," and only inserted to insure the support of Sen. Knute Nelson of Minnesota. Bacon to Gibbons, Feb. 20, 1909, Gibbons Papers, Vol. 3, P.A.C.

¹⁶Telegram, Bryce to Gibbons, Feb. 20, 1909, ibid.

¹⁷Draft Resolution as Modified, Anderson Papers, Box 69.

¹⁸Telegram, Gibbons to Anderson, March 1, 1909, ibid.;
Telegram, Gibbons to Root, March 2, 1909, Gibbons Papers, Vol. 3, P.A.C.

¹⁹Draft Res. as Modified, Anderson Papers, Box 69.

²⁰Anderson to Gibbons, March 1, 1909, ibid.

that any rewording of the amendment would arouse the suspicions of the very large private interests involved.²¹ As he saw the alternatives, it was better to have the treaty approved with the resolution than to try to get Senate approval later, thereby chancing a public discussion and new difficulties.²²

The Senate advised ratification of the treaty with Smith's last revision of the resolution March 3rd.²³ Gibbons, who did not know about the latest change in the resolution, had already asked Bryce to get the letter of clarification on equal division of the waters in the Sault Rapids from Secretary Bacon.²⁴ This proved to be impossible with the change of administrations. However, Bryce drew up a memorandum of his conversation with Bacon and Root, held the day after Bacon left office. According to this memorandum, approved by Root, the resolution did not give a private company the right to change the flow of water in a navigable channel, so Canada

²¹Root to Bryce, March 2, 1909, ibid.

²²Bryce to Gibbons, March 5, 1909, Gibbons Papers, Vol. 3, P.A.C.

²³Treaty Series, No. 548 (Washington, 1910). Some senators had been upset by Canadian press releases on the possible charging of export taxes on electric power to the United States but Canadians promised that no changes would be made during the life of the treaty. Anderson to Lodge, Feb. 6, 1909, Anderson Papers; Anderson to Gibbons, Feb. 6, 1909, Gibbons Papers, Vol. 3, P.A.C.

²⁴Gibbons to Bryce, March 2, 1909, ibid.

retained all its previous rights.²⁵

The new administration's Secretary of State, Philander Knox, acknowledged the obscurity of the Smith Resolution and suggested resubmitting the treaty to the Senate to get the resolution rescinded.²⁶ Misgivings over the wisdom of this action prevailed since it was obvious that the resolution actually did not alter Article III.²⁷ Gibbons wrote to Laurier that he "never intended to give up our absolute right to the use of one-half of the water in the St. Marys River," since this was the first principle agreed upon by Clinton and himself.²⁸ In April, he and the Minister of Justice, Allen B. Aylesworth, went to Washington to confer with Attorney-General George W. Wickersham on the opinion to be given on the Smith Resolution.²⁹ This opinion confirmed

²⁵Memorandum, ibid., Vol. 14. This was enclosed in a letter of Bryce to Gibbons, March 6, 1909, ibid., Vol. 3.

²⁶Gibbons to Innes, March 9, 1909, ibid., Vol. 8.

²⁷Root prepared a list of eleven points on the use of boundary waters which stated the "equal and similar rights" of each country to build works in its own territory, if there was no interference with water use on the other side of the boundary. Memorandum written by Secretary Root in his own handwriting in March, 1909, Anderson Papers, Box 69.

²⁸Gibbons to Laurier, March 15, 1909, Gibbons Papers, Vol. 8, P.A.C.

²⁹Ops. Atty. Gen 295 (1909); Anderson to Wickersham, Anderson Papers, Box 69. Gibbons originally had not foreseen the possibility of either country using the water on its side of the boundary in the Sault Rapids without constructing a dam and thus affecting water levels on the other side. Gibbons to Anderson, Feb. 22, 1909, Anderson Papers, Box 69.

equality of use by the two countries above and below the Sault Rapids and riparian rights in the rapids, subject to navigation rights. Congress already had provided for condemnation of private property in the rapids.³⁰

Canada and the Treaty

Prime Minister Laurier had hesitations about the treaty almost as soon as he agreed to it.³¹ He cautioned Gibbons that "we must make sure of our ground before we commit ourselves."³² He disliked the fact that the commission had not been given jurisdiction over the St. Mary and Milk Rivers -- he had not wanted a special agreement.³³

From the beginning Laurier had also felt uneasy about Article II in the treaty.³⁴ The Smith Resolution confirmed his suspicions that in some way the treaty was contrary to Canadian interests and he telegraphed Bryce that Canada

³⁰U. S., Statutes at Large, XXXV, 820. The clause read: "The right to the flow of water and riparian, water power, and other rights, now or hereafter owned by the United States in the St. Marys River in Michigan shall be forever conserved for the benefit of the Government of the United States, primarily for the purposes of navigation and incidentally for the purpose of having the water power developed. . . ."

³¹Telegram, Laurier to Gibbons, Dec. 21, 1908, Gibbons Papers, Vol. 3, P.A.C.

³²Gibbons to Laurier, Jan. 2, 1909, ibid.

³³Ibid.

³⁴Laurier to Gibbons, Jan. 12, 1909, ibid.

would need time for consideration of the effect of the new interpretation.³⁵ He had previously questioned why the commission's powers had not been extended to diversion of cross-boundary waters in Article II and he worried about how he would defend this article in the House of Commons.³⁶ He thought of it as a surrender of public interests, and argued that "running waters cannot be diverted to the detriment of the country into which they flow."³⁷ But Gibbons assured him that there had been no surrender of public interests; the only change was that, in case of diversion of streams, compensation should be made to private individuals, according to the laws of the state or province where the diversion was made.³⁸

The overworked Gibbons appealed to his friend across the border, George Clinton, for a brief on the treaty and legal books.³⁹ Sending only advice and books, Clinton pointed out that Great Britain had insisted on "sovereign control over waters wholly within its territory," in the negotiations relating to the lower St. Lawrence.⁴⁰ And he

³⁵Laurier to Bryce, March 3, 1909, Anderson Papers, Box 69.

³⁶Laurier to Gibbons, Jan. 12 and 14, 1909, Gibbons Papers, Vol. 3, P.A.C.

³⁷Laurier to Gibbons, Jan. 27, 1909, ibid.

³⁸Gibbons to Laurier, Jan. 28, 1909, ibid., Vol. 8.

³⁹Gibbons to Clinton, Jan. 26, 1909, ibid.

⁴⁰Clinton to Gibbons, Jan. 29, 1909, ibid., Vol. 6.

explained:

The exercise of sovereign power may produce injury to the citizens of a friendly nation and, whether or not the causing of such injury would give the other nation a right to redress by war or reprisal, it is quite clear that comity and national justice should prevent the exercising of the sovereign power in such cases. . . .⁴¹

Gibbons used this argument but Laurier continued to refer to Article II as a weak part of the treaty, "a very serious source of trouble."⁴² He worried about the emphasis Washington leaders put on Canadian abrogation of Article II in the Treaty of 1842.⁴³ Gibbons, on the other hand, felt bound by his promise that Canada would no longer insist that this article protected navigation rights in the water passage to the Lake of the Woods.⁴⁴ He argued that "the whole thing is a shadow from which we have nothing to fear."⁴⁵ In one letter to Laurier he flared up:

Between all the fires I am distraught. When I was asked to undertake the negotiation of this treaty I was told that our then position was helpless; that the Americans simply did as they pleased, and that unless some arrangement was made would continue to do so.⁴⁶

After describing the concessions made by both sides to arrive

⁴¹Ibid.

⁴²Laurier to Gibbons, Feb. 9, 1909, ibid.; April 20, 1909, ibid., Vol. 3.

⁴³Laurier to Gibbons, Feb. 15, 1909, ibid.

⁴⁴Infra, 68.

⁴⁵Gibbons to Laurier, Feb. 25, 1909, ibid., Vol. 8.

⁴⁶Gibbons to Laurier, Feb. 18, 1909, ibid.

at Article II, he concluded:

Am I to understand you now as repudiating my arrangement? If so, of course, I must communicate it to the other side and that will end the treaty. Tremendous pressure has been brought on their side in opposition to this Article Two.⁴⁷

Laurier replied calmly that he did not care whether the Treaty of 1842 was in or out, only that "it should be done in the light of day."⁴⁸ And he viewed the United States decision to retain the clause, "subject to any treaty provisions now existing with respect thereto," as a reversal of their former position. "You will agree with me that we would be in a singular position if, whilst the Treaty of 1842 was not interfered with by the new arrangement that we were not to make use of it," he continued.⁴⁹

Gibbons was eager to explain the treaty to Canadians in the face of newspaper articles, often critical, about the United States Senate hearings.⁵⁰ Laurier's letter advising against a speech before a Canadian Club was dated on the

⁴⁷Ibid.

⁴⁸Laurier to Gibbons, Feb. 19, 1909, ibid., Vol. 3.

⁴⁹Ibid. In the same paragraph in the treaty is this provision: "But this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties thereto," which is a restriction on the earlier phrase.

⁵⁰Ottawa Citizen, Jan. 14, 1909; The (London) Times, Jan. 28, 1909; the Toronto Evening Telegram, Jan. 28, 1909. The Canadian newspaper articles had a negative effect on the Senate hearings, Bryce to Gibbons, Feb. 3, 1909, ibid., Vol. 6.

same day that Gibbons spoke to the Toronto Canadian Club.⁵¹ Since the treaty had not yet been sent to Canada, his talk was premature and added to the opposition's criticism of the publicity given to the treaty before its approval by the British Government.⁵² Laurier did approve of Gibbons' appearance before the Ontario Cabinet, where all members favored the treaty except M.P. Adam Beck "who grouched away again."⁵³

Laurier had been facing parliamentary demands to bring in the treaty since it had first been presented to the United States Senate.⁵⁴ He asked for and received permission from the British Government to lay the treaty before the House of Commons at an early date.⁵⁵ This took place on March 15th.⁵⁶ The debate on May 14th found many members

⁵¹Laurier to Gibbons, Feb. 22, 1909, ibid., Vol. 3.

⁵²The Globe, Feb. 23, 1909, 1. The topic was brought up in the House of Commons Feb. 25th and May 14th, 1909. Dom. of Canada, I Parl. Debates (1909), 1563; IV Parl. Debates (1909), 6590.

⁵³Gibbons to Laurier, Feb. 6, 1909, Gibbons Papers, Vol. 8. Beck, Chairman of the Hydro-Electric Power Commission in Ontario, wanted Canada to keep its electric power for its own use and he tried to get public pressure against exportation. Gibbons knew that the Canadian market needed only 80,000 h.p. while Canadian companies could supply 440,000 h.p. Beck also urged diversion of water from Lake Erie to the Jordan River across the Niagara peninsula which Gibbons said would lower Lake Erie 6 inches. Gibbons to J. J. Foy, Toronto Barrister, Jan. 30, 1909, ibid.

⁵⁴House of Commons, Jan. 25, 26, 29, Feb. 2, 4, 5, 17, 25, March 5, 10, 1909. Dom. of Canada, Parl. Debates.

⁵⁵Laurier to Gibbons, Feb. 11, 18, 1909, Gibbons Papers, Vol. 6, P.A.C.

⁵⁶Journal, House of Commons, XLIV, 1909, 162.

from the Canadian ridings affected by the special agreements speaking against the treaty. They were critical of the delay in the original appointments of commissioners, possible patronage appointments, the cursory attention given by the commission to power development at Niagara Falls, exportation of electric power, adoption of United States engineering figures on Niagara Falls, and Gibbons' lack of diplomatic experience.⁵⁷

Laurier in his speech stressed the importance of a joint commission to preserve and regulate the use of boundary waters as he thought that, without a commission, Canadian objections to diversion would be ignored. He again voiced his reservations about the exercise of absolute national sovereignty over a cross-boundary stream to the detriment of another country. And he declined to commit himself on the Smith Resolution and whether he would "advise His Majesty the King to ratify this treaty."⁵⁸

Robert Borden, leader of the opposition, brought up the question of whether legislation required by the treaty should be passed by dominion or provincial parliaments. It was his contention that the Canadian and not the British Parliament should have the responsibility of treaty approval in contrast to Laurier's view that the treaty-making power for the dominions rightly rested in the Crown, except for

⁵⁷Dom. of Canada, IV Parl. Debates (1909), 6583-6650.

⁵⁸Ibid.

treaties of commerce and those affecting the revenue.⁵⁹

Meanwhile, Gibbons was anxiously awaiting approval of the treaty by the Canadian Government. He knew that Bryce, Aylesworth, and the Governor-General viewed the treaty favorably as putting Canada in a better position than heretofore.⁶⁰ It was Laurier who hesitated, now because of the special agreement on the St. Mary and Milk Rivers. Western Canadians who had large irrigation projects were disturbed by the treaty. Part of their opposition arose out of confusion as to the consequences of the American diversion of the St. Mary River in Montana into the Milk River. The amount of water to be diverted and the division of the waters during different seasons of the year was complex. Dr. William King presented a memorandum in the fall of 1909 which changed the definition of the Milk River to include all tributaries but this led to further confusion.⁶¹ In December, a delegation, consisting of the British Ambassador, the Minister of Public Works, and King, called at the United States Department of State to find out about the construction of reservoirs, as had been promised, on the headwaters of the St. Mary River, and the Rainy River in Minnesota, as well as an investigation for a similar

⁵⁹Ibid., I, 640.

⁶⁰Grey to Gibbons, April 17, 1909, Gibbons Papers, Vol. 6, P.A.C.

⁶¹King to Pugsley, Nov. 15, 1909, C.S.P. 19e, XLIV, No. 10 (1910), 64-65.

project on the St. John River in Maine.⁶² Anderson called on Ambassador Bryce to confirm these projects verbally.⁶³ Secretary of State Knox followed this up with a letter to Bryce, assuring him that the United States intended to follow through on its promises.⁶⁴ King continued to study the United States proposal and its effect on Canadian projects.⁶⁵ Finally, in the spring, the Canadian Government heard from the West that the ultimate effect of the St. Mary and Milk Rivers project would not be injurious to Canadian interests.⁶⁶

The treaty was ratified by Great Britain March 31, 1910 and by the United States April 1, 1910 with an exchange of ratifications May 5th and the official proclamation of the treaty May 13th.

⁶²Memorandum, Dept. of State, 5934/95.

⁶³Bryce to Grey, Dec. 15, 1909, C.S.P., XLIV, No. 10 (1910), 64-65.

⁶⁴Jan. 3, 1910, Dept. of State, 5150/15.

⁶⁵C.S.P., XLIV, No. 10 (1910), 81-82.

⁶⁶T. G. Shaughnessy to Pugsley, March 4, 1910, ibid., 83-84.

VI. THE BOUNDARY WATERS TREATY

Eulogy and Reality

The Boundary Waters Treaty was hailed in both countries. The United States Secretary of State called it "one of those fortunate arrangements which is equally advantageous to both parties."¹ The Governor-General saw the treaty as a triumph for Gibbons personally and for Canadian diplomacy.² Root hoped that the International Joint Commission would set an example to the world of what a judicial board could accomplish, in contrast to a diplomatic one, and thus do away with the need for a Hague tribunal.³ His statement, two decades later, that the commission was the reason for the continuance of peaceful and friendly relations between the United States and Canada, is a testament to its success.⁴

The treaty solved a difficulty Canadians had faced

¹Knox to Bryce, March 30, 1910, Dept. of State, 711.42155/103.

²Grey to Laurier, Jan. 8, 1909, Laurier Papers, Vol. 734, P.A.C.

³Gibbons to Laurier, Aug. 25, 1908, Gibbons Papers, Vol. 8, P.A.C.

⁴Root to Anderson, Sept. 9, 1935, Anderson Papers, Box 101.

in the Alaskan boundary settlement -- that the British were reluctant to jeopardize their relations with the United States in representing Canadian interests. Canadians realized it was not to their advantage to create friction between the two nations. Canada's security depended as much upon the mutual amicable relations of the United States and Britain as it did upon her own relations with each of them. Canadians would suffer if a conflict over water division in the Great Lakes led to international tension -- the treaty prevented this possibility.

Furthermore, it was an important step in the evolution of Canadian national status. That Canadians could meet with representatives of the United States, albeit with British assistance, and work out a sensible course for future relations was important in the development of national consciousness. The eventual achievement of Commonwealth status came from such advances. Important in this evolution was the establishment of the Department of External Affairs in the spring of 1909.⁵ Gibbons played a part in publicizing the delays and blunders of the dominion departments in handling diplomatic correspondence which led to the new department.⁶

⁵James Eayrs, "The Origins of Canada's Department of External Affairs," in The Growth of Canadian Policies in External Affairs by Hugh L. Keenleyside et al (Duke Univ., 1960), 14-32.

⁶Gibbons, in his talk to the Canadian Club of Toronto in February, described the circuitous route of diplomatic communication, as told him by Root. This was quoted in an article in The Globe Feb. 23rd, and read in the House of Commons May 14, 1909. Dom. of Canada, IV Parl. Debates (1909), 6590.

A precedent on international cooperation in water power development was set by the treaty. Gibbons described how the Canadians had approached the problem:

The Canadian contention during the whole of the negotiations was that there was no right of property but a common right of use of these waters, and that the only satisfactory way to deal with the question was to adopt the principle of equal division without regard to the volume of flow on either side of the boundary line at any particular point.⁷

Equal division of waters shared in common was a fundamental principle. Implementation of impartial principles by a permanent commission provided for changes in their interpretation as industrial development brought new problems. A joint commission to supervise projects insured equitable adjustment to local conditions. The treaty set up a practical procedure for discussion of issues and their resolution on a level proportional to their importance, thus preventing minor controversies from becoming major ones.

Most important to the successful operation of the commission was the willingness of both Canadians and Americans to share the common waters for their mutual profit. The realization by most North Americans that exploitation of boundary water resources by either country would result in disadvantage to both was fundamental to the success of the treaty. The public interest required observance of international comity and consideration by the Commission of all

⁷Address of Gibbons at the 1916 Meeting of the Canadian Bar Association, Gibbons Paper, Vol. 14, P.A.C.

protests regardless of nationality. Indifference to the advantages of cooperative development would have meant the eventual failure of the commission.

Gibbons led in this development of North American cooperation. Of all those connected with the events leading to the final Boundary Waters Treaty, it was he who showed the greatest dedication to the adoption of principles to govern water use in a treaty with a permanent joint commission to apply them. Enthusiastic about Canadian development, confident that the treaty would benefit Canada, he energetically pursued his goal of a treaty without allowing obstacles to weaken his determination. The part he played from late 1905 to mid-1910 was significant in making the treaty a reality. It was due to his persistence that discussions were continued in 1908, after a stalemate; his memoranda to Root with the necessary concessions enabled the two sides to reach an understanding. In the final United States Senate hearings, it was his telegram approving passage of the treaty with the Smith Resolution that influenced members of the State Department to continue their support of the treaty. Although he was not an experienced diplomat, his comprehension of Canadian needs enabled him to visualize the far-reaching effects of a permanent commission and to accept the changes necessary to accomplish this.

His was the best diplomatic course possible in the circumstances of March, 1909 -- to rely upon the assurances

of Root and others that riparian rights would not be asserted by the United States and to agree to the treaty as approved by the Senate. And his perseverance was instrumental in bringing the cautious Laurier to accept the treaty. It was his firm conviction that the adoption of principles was the only way in which the two countries could share common waters. The years have proved him right.

The service Gibbons performed for Canada and Britain was recognized by knighthood in early 1911. Governor-General Grey congratulated him personally for "bringing these vexed and dangerous questions to so satisfactory an issue."⁸

Bryce wrote enthusiastically of "the work they had done to promote peace and good relations between Canada and the United States."⁹ Root praised his "personal ability and force of character."¹⁰ Anderson expressed his appreciation of "your unfailing courtesy and fairness in all our dealings" and thought they were entitled to congratulate themselves.¹¹

He did find fault later, in a letter to a friend, that Gibbons was getting all the credit for the treaty in Canada. As he expressed it:

⁸Grey to Gibbons, April 17, 1909, ibid., Vol. 6.

⁹Bryce to Gibbons, April, 1913, ibid., Vol. 3.

¹⁰Root to Gibbons, May 16, 1910, ibid.

¹¹Anderson to Gibbons, Jan. 14, 1909, ibid.

The original treaty was prepared by me without consultation with Gibbons, and after being submitted to Root was forwarded to Gibbons without change. Since then the only changes which were made in it were in phraseology, in the omission of one article, and in the addition of another article relating to the St. Mary and Milk Rivers in Montana, except that the article relating to Niagara Falls was adopted from a draft of another treaty prepared by Root and myself and previously proposed, which related wholly to the situation at Niagara Falls.¹²

Commissioner Clinton took a different view. He wrote to Gibbons that he viewed the Boundary Waters Treaty as a "revision of the draft we prepared," which he thought should be called the Gibbons-Clinton Treaty, since Gibbons had made the greatest contribution to it.¹³ The record of the 1908 negotiations, carried on by Gibbons and Anderson, clearly show that Anderson was responsible for the first draft. However, it must be remembered that Anderson had evaluated the Gibbons-Clinton Draft Treaty before that. And, even earlier, he had written a memorandum on the principles listed in the report of the Canadian Section under the chairmanship of Gibbons.¹⁴ Some of these principles had previously appeared in a sub-committee report of two engineers, one from Canada and one from the United States. To accept one man's authorship of the treaty is impossible when so many

¹²Anderson to Charles H. Butler, May 9, 1910, Anderson Papers, Box 69.

¹³Clinton to Gibbons, Jan. 30, 1909, Gibbons Papers, Vol. 6, P.A.C.

¹⁴Anderson to Root, Dec. 28, 1906, Anderson Papers, Box 68.

different men contributed lists of principles and draft treaties.

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Several writers have reviewed the achievements of the International Joint Commission since its inception. A Secretary of the Commission, Lawrence J. Burpee, has described it as "the closest possible union consistent with political independence."¹⁵ He wrote that, if such a commission had existed between Austria and Serbia, World War I might have been avoided.

A political scientist, Robert A. MacKay, was more realistic in his evaluation of the commission's effectiveness. He saw merit in the permanent tenure of the commission which facilitated the development of an esprit de corps and a spirit of independence from contemporary governmental policy, making the commissioners more like judges on an international court. He also praised the simplicity and directness of the procedures to handle disputes. Private parties could present their cases through counsel in public hearings; yet provision was made for action by the two governments and for legal activities by the commission members. He pointed out that,

¹⁵Lawrence J. Burpee, "An International Experiment," The Dalhousie Review, 3, 163-179.

up to 1928, only four investigations had been carried out under Article IX, and that the Commission had never operated under Article X, which nevertheless, may have served as a safety valve. He attributed the success of the Commission to its continuous supervision of cases with the opportunity to change decisions according to circumstances.¹⁶

C. Joseph Chacko wrote a detailed study of the International Joint Commission in 1932, in which he analyzed the authority of the commission. His account of the beginnings of the Commission is short and based on printed sources, as he did not have access to the papers of Gibbons, Anderson, and Root; nor did he refer to government papers in Canada. According to Chacko, the Boundary Waters Treaty was the result of the efforts of Root and Bryce with the assistance of five others, last of whom is Gibbons.¹⁷ James Simsarian wrote an article on the diversion of waters and gave primarily one side of the negotiations leading to the treaty, as he did his research in the Anderson papers. He regarded Andersons as the person responsible for the treaty.¹⁸ On the other hand, Alan O. Gibbons utilized the papers of Gibbons and presented

¹⁶Robert A. MacKay, "The International Joint Commission Between the United States and Canada," American Journal of International Law, 22 (1928), 292-318.

¹⁷C. Joseph Chacko, The International Joint Commission Between the United States of America and the Dominion of Canada (New York, 1932).

¹⁸James Simsarian, "The Diversion of Waters Affecting the United States and Canada," American Journal of International Law 32 (1938), 488-518.

a Canadian perspective on the negotiations. But he did not study these closely enough to find out who was the main motivator for the treaty.¹⁹

In this study from the first investigation of the problems of boundary waters in 1900 to the ratification of the Boundary Waters Treaty, I have attempted to clarify the actions of the various participants. At the turn of the Century problems in boundary waters led to the temporary International Waterways Commission. George C. Gibbons recognized the significance of water resources in Canadian development. As Chairman of the Canadian Section, he sought to insure equal treatment for both Canada and the United States in the Great Lakes system and boundary streams. Delegated by Prime Minister Laurier to confer with Washington authorities on a permanent joint commission and the implementation of principles to govern water use, he negotiated a treaty which was rejected by Secretary of State Root. Gibbons refused to accept special commissions or a permanent commission of inquiry, as advocated by Root. By making concessions on irrigation waters and on a Minnesota water power project, Gibbons got the Boundary Waters Treaty of 1909. As the first Canadian diplomat of this century his indomitable and generous spirit set an example for future Canadians -- who can serve his country better?

¹⁹Alan O. Gibbons, "Sir George Gibbons and the Boundary Waters Treaty of 1909," Canadian Historical Review, XXXIV (1953), 124-138.

APPENDIX A

Report of Louis Coste and George Wisner¹

Gentlemen:

Your Engineering Committee appointed June 14, 1905, to collect all data and information affecting matters at Sault Ste. Marie and on the St. Marys River within the scope of the Commission, and to report as early as practicable, and [sic] has the honor to report as follows:

I

GENERAL PRINCIPLES INVOLVED

The general principles involved in making an equitable division of the waters of the international rivers, and which are made the basis of this reports, are:

1. That Article II and Article VII of the Convention of 1842 between the United States and Great Britain, better known as the Webster-Ashburton Treaty, and Articles XXVI and XXVII of the Treaty of Washington 1871, show that it was the intention of the two governments that the whole of the St. Lawrence System of Waterways should be common to ships, vessels and boats of the two countries, and that in a general way the people of the United States and the people of the Dominion of Canada are co-partners in that part of the St. Lawrence and Great Lakes System which is along or contiguous to the boundary line between the two countries, and that both for navigation and commercial purposes they have equal rights to the uses of the waters of the system.

2. That the St. Marys River being an International river and "in law" a navigable river, the bed of the river and the control of the water are vested in the two governments of the United States and the Dominion of Canada and therefore the riparian owners have no right to use or divert water from the river without a grant confirmed by joint action of the two governments.

3. That the governments of the United States and Canada have a right to regulate the level of the International Lakes and Waterways at and between such elevations as are best

¹Presented at Meeting of I.W.C. at Buffalo, Oct. 27th and 28th, 1905. Gibbons Papers, Vol. 12, P.A.C.

adapted for the interests of navigation and that companies using the water for any purpose must so construct their works that such levels can be maintained.

4. That inasmuch as to all intents and purposes the two countries, the United States and the Dominion of Canada, have under various clauses of the Treaties of Ghent 1814, Webster-Ashburton 1842 and Washington 1871, equal rights of navigation and commerce upon the St. Lawrence and Great Lakes System, that on all boundary rivers of the system the water shall belong in equal shares to the two countries.

5. That the government of either country shall not grant permits for the use of the water of the International Waterways for any purpose in excess of one-half the natural flow, less the amount needed for navigation purposes. That the use of water for the benefit of navigation is paramount to that of any other interest, except for domestic supply.

6. That in the interests of navigation it is important that the levels of the lakes and rivers forming the International System of the St. Lawrence and Great Lakes be maintained at proper elevations and that inasmuch as the deepening through the shoal parts of the International Waterway will lower the said levels, only such channels as are absolutely required for the commerce of the two countries be undertaken in the best possible location, irrespective of whether these channels are in the United States or in Canada, and that in every case these channels shall be free to all ships, vessels or boats of the two countries.

7. That the different companies claiming vested rights to the use of water of the International System of Waterways, must settle all disputes as to ownership before permits to take water from the channels are granted, and any attempt to take more water than rightfully belongs to the country in which the works are located, should constitute ample reason for revoking the permits of all companies involved in such an attempt.

APPENDIX B

To the International Waterways Commission:¹

Your Committee appointed to prepare a more formal expression of the principles enunciating [sic] in the first division of the report of the Subcommittee on Conditions at Sault Ste. Marie, and the reasons for the adoption of such principles by this Commission, and further to report suggestions as to the form of the rules and regulations contained in the fifth division of said report, would respectfully report and recommend the adoption of the following:

I

GENERAL PRINCIPLES

The history of diplomatic action of the Governments of Great Britain and the United States, included in treaties and otherwise, of the Dominion of Canada, that the waters of the Great Lakes, Lawrence river, together with such channels and canals as have been and may be constructed, shall be free to navigation and commerce of the United States and Canada; this policy recognizing the right of both countries to the use of these waters. From this, and from equitable and just principles which should govern the action of both countries, it follows that:

1. Plans should be adopted in common for the improvement of the waterways described, in the interests of navigation, whether the improvements involve the construction of channels, the regulation of speed of vessels, the maintenance of lights and buoys, the protection of the shores, the diversion of water from natural courses, the use of water for power or other purposes, the construction of bridges crossing the waterways or the erection of works in the said waterways by either Government or by individuals.

2. In carrying out such plans each country should perform its portion of the work at its own expense.

3. No person should be permitted to erect structures in the narrow waterways without the consent of both countries.

4. No waters necessary for navigation of the waterways, in their present condition or as they may exist hereafter, should be diverted or impeded, or their flow accelerated, by any individual except with the consent of both countries.

¹Paper No. 12b, Draft forwarded by George Clinton, Nov. 8, 1905, Gibbons Papers, Vol. 14, P.A.C.

5. All surplus waters, that is waters not needed at present, or in the future, for navigation purposes, should be equally divided between both countries, and the use thereof by residents of either country should be governed by regulations adopted internationally and promptly enforceable by some authority to be created by international agreement.

6. The interests of navigation upon said waterways are paramount to all other interests and should be carefully preserved, and to avoid international complications, and to enable the United States and Canada to fully carry out, without hindrance and with promptness, the principles herein enunciated, the beds of all waters connecting the Great Lakes and of the Saint Lawrence should be, and should be kept under the control of the respective countries, to the exclusion of the exercise of common law riparian rights without their consent.

7. No permits or grants, of land under water, franchises, easements, rights to use water or to erect structures in the waterways should be made by either country where they might by any possibility conflict with the enforcement of the principles herein laid down.

8. The right of the two countries to maintain, regulate and raise the levels of the international waterways in the interests of navigation is incontestable, but no work should be undertaken without mutual consultation and agreement by the two countries nor should any work be undertaken which will not be for the benefit of both.

9. Canals and channels aiding or improving the navigation of the waterways, constructed by either country, should be free in all respects for navigation by the residents of both countries, and all tributary waters and canals within or constructed by the Provinces of the Dominion of Canada or the States of the United States should also be free except so far as customary internal regulations, customs laws, port regulations, and internal policy may make it necessary to regulate the use of such tributaries and canals, and no burden affecting their use should be imposed upon the residents of one country which are not imposed upon the other otherwise than as may be necessary for the purpose of enforcing internal laws and regulations.

In enunciating these principles the committee uses the words "individual" and "persons" as including not only natural persons but all corporations, associations and partnerships.

. DRAFT FORWARDED BY MR. CLINTON:

APPENDIX C

Public Hearing of I.W.C. held at Buffalo, N.Y., Nov. 10, 1905 as regards the uses and conditions of the waters of St. Marys River.¹

Chairman Ernst. . . . "We have drawn up a series of rules and regulations, more to give a starting point for the discussion than anything else. These are not authoritative in any sense, they have not been adopted by anybody. They are presented to this meeting for discussion, and they read as follows:--

RULES

1. Neither the government of the United States nor the government of Canada shall grant permits for the use of the water of St. Mary river in excess of one-half the natural flow less the amount needed for navigation purposes.

2. The amount needed for navigation purposes shall for the present be assumed at 4,000 cubic feet per second, but neither government shall permanently alienate its right to increase that amount indefinitely.

3. The level of Lake Superior shall be maintained as nearly as possible between the elevation 601.5 and 603.0 feet above mean tide at New York, as established and understood at this date by the United States Lake Survey Office at Detroit, Michigan.

4. Hereafter no corporation or person shall be permitted to divert water from the St. Marys river, or excavate any channel or erect any structure therein, without the joint approval of the Secretary of War of the United States, and the Minister of Public Works of Canada; and such approval shall not be given until said corporation or person shall have submitted full plans of all their works to the International Commission, and until said commission shall have reported thereon. PROVIDED, That until such plans can be submitted and reported on, the Michigan Lake Superior Power Company, now operating power works at Sault Ste. Marie, Michigan, may use 8,500 cubic feet per second, and no more, and the Chandler-Dunbar Company, at the same place, may use 4,000 cubic feet per second, and no more, and the Lake Superior Power Company, at Sault Ste. Marie, Ontario, may use 7,000 cubic feet per second, and no more, all under the same rules and conditions as those under which they have heretofore exercised these privileges; and PROVIDED FURTHER, That this

¹C.S.P. XLVII, No. 12 (1913), Part I, 138-139.

rule shall not apply to contracts now in force for the excavation of channels by either government for the benefit of navigation.

5. Plans for the diversion of water must include such remedial and controlling works in the bed of the stream as may be necessary to maintain level, and must provide a suitable passage for logs over the rapids.

6. Before a permit to use or divert water be granted, the corporation or person seeking said permit shall, by a proper instrument, bind itself or himself to abide by the regulations hereafter prescribed and by any reasonable modification thereof which may from time to time be recommended by the International Commission and approved by the Secretary of War of the United States and the Minister of Public Works of Canada.

7. Permits to divert water for power purposes shall be for a period not exceeding five years, and at the end of that period shall lapse unless renewed.

8. Nothing herein contained shall be held to affect any existing riparian or other rights of any person or corporation, or the existing remedies therefor, or any action at law or equity now pending. All remedies herein provided shall be cumulative, and shall be without prejudice to any other remedies, either of the United States or Canada, or of individuals, for failure of the power companies to maintain the levels for navigation purposes.

9. Corporations or persons using the water of St. Marys river for power purposes shall operate them under the following

REGULATIONS

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APPENDIX D

Report upon the Conditions Existing at Sault Ste. Marie,
with Rules and Regulations for the Control of the Same,
Recommended by the International Waterways Commission.¹

Upon the organization of the Commission it found the most pressing matter coming within its jurisdiction under the broad provisions of the Act of Congress which provides for its creation, was the regulation of the use by private corporations of the waters of St. Mary's River in connection with the control of those waters for the protection of navigation at present and in the future. The commission, therefore, proceeded to an investigation of the local conditions by special committees and the study of all data obtainable. After thorough consideration of all the information which could be obtained, and after hearing all parties interested in the use of the waters at Sault Ste. Marie, including navigation interests, the Commission is satisfied that the rules and regulations recommended herein, governing the use, or interference with the natural flow, of those waters, will do entire justice to private interests and, at the same time, fully protect commerce and navigation.

It is the opinion of the Commission that the Great Lakes must be regarded as inland seas. This is not only the tenor of the decision of the Courts in this country, but the character of the lakes themselves, and of the immense commerce which passes over them, gives them all the essential attributes of the sea so far as commerce is concerned. From the fact that the lakes are all connected by natural navigable channels, except Lakes Erie and Ontario, which are connected by a canal, it is apparent that they are physically and commercially interdependent and should be regarded as constituting a physical and commercial entity. The channels connecting the Great Lakes, including the St. Marys River, while commonly called "rivers" are not properly so named, but are in fact "straits" having all the characteristics of ocean straits, physically and from the point of view of navigation. These considerations lead the Commission, when examining into conditions in one locality, to keep in view, and to endeavor to conserve, the public interests involved in the navigation of all the Great Lakes and their connecting and tributary waters.

The extent of the commerce on the Great Lakes is well

¹Sent by Clinton to Côté Feb. 9, 1906. Infra, 20.
Gibbons Papers, Vol. 14, P.A.C.

illustrated by the statement of fact that the amount of freight carried upon Lake Superior, which passed the locks
 Page 12

RECOMMENDATIONS

The Commission would respectfully recommend:

1. That no permits should be granted for the use of the waters of the Great Lakes or connecting channels, or for the erection of structures in, under or over, or the occupation in any manner of, the said waters until plans have been submitted to the Commission for its investigations and recommendations: and that no further permits for the use of the waters of St. Marys River be granted before compliance with the rules and regulations hereinafter recommended.

2. That steps be taken to increase the lockage facilities at the Sault Ste. Marie by the Government of the United States or the Dominion of Canada, or both, without unnecessary delay.

3. The Commission further recommends that no grants, permits or concessions should be made, which directly or by operation of law may, in any manner, affect the right of the United States or of Canada to control the beds and adjacent shores of the Great Lakes or their connecting waters, and especially that none should be made which, legally or equitably, may be the means of adding to the expense of acquiring lands or rights for the purpose of making improvements in aid of navigation, or which may give an equitable right to compensation in case of the removal of structures in any navigable waters.

4. As the Commission regards the interests of the United States and of Canada in the preservation of the lake levels, and in the improvement of the channels and the conservation of the water supply for purposes of navigation, as identical and as incapable of efficient protection without joint and harmonious action on the part of both Governments, it recommends that the rules and regulations which may be adopted be given the force and effect of law, and that some joint body be created which will have power to enforce and change them, and which will also have power to make further recommendations and rules and regulations, generally, governing the use and diversion of the waters of the Great Lakes, their connecting and tributary waters, by private individuals or corporations, with power to enforce and change the same, or that such powers be vested in the existing International Waterways Commission, subject to such restrictions and reservations as may be deemed advisable.

The Commission has adopted unanimously the following resolutions:

RESOLVED:

That this Commission recommends to the Secretary of War of the United States and the Minister of Public Works of

Canada, the following Rules and Regulations to govern the use of water at the Sault Ste. Marie.

1. No person shall place any structure in, over or under the St. Marys River, nor shall any person place any obstruction in said river or make any excavation in the bed thereof, or divert water therefrom, until plans for the work shall have been submitted to the International Waterways Commission, nor until consent shall have been given by the Secretary of War of the United States and the Minister of Public Works of Canada. All work must be done in accordance with the plans approved by the Commission and subject to its supervision and inspection; and no water shall be used or diverted until the completed work shall have been approved by the Commission.

2. Permits granted by the Secretary of War and by the Minister of Public Works, shall be revocable upon the recommendation of said Commission whenever the Commission shall deem revocation necessary in the interests of navigation; and persons own expense, abolish, or add thereto, or construct other works for the protection of navigation interests whenever the said Commission shall order the same to be done; and said works and the plans therefor shall be subject to the approval of said Commission. Permits to use or divert water shall be granted by the Commission in its discretion, shall be revocable at its will, and shall be for terms not exceeding twenty years.

3. Persons now using or diverting the waters of St. Marys River shall forthwith submit complete plans of all their works existing and proposed, and until such plans have been approved by the Commission they shall not use or divert that waters of said river in excess of the amount now actually used or diverted by them.

4. Plans for work contemplating the use or diversion of water, must include such remedial and controlling works as may be necessary to maintain levels, Such works must provide for (1), compensation equal to the amount of water to be used or diverted, (2), complete stoppage of flow through canals and works, (3), passage of the amount of water naturally flowing through the section occupied by the remedial works, (4), passage of logs over the rapids.

5. The level of St. Marys River above the rapids, shall be maintained between the elevations 601.7 and 603.2 feet above mean tide at New York according to the system of levels established by the U.S. Government in 1903, and the approval of plans of works by the Commission and the consent of the Secretary of War and Minister of Public Works to construct works or to use or divert water shall in no way relieve the owners and persons operating such works from the duty of maintaining said level.

6. Nothing herein contained shall be held to affect any existing riparian or other rights of any person or government, or the existing remedies therefor, or any action at law

or in equity now pending.

All remedies herein provided shall be cumulative, and shall be without prejudice to any other remedies, either of persons or governments, for failure of persons operating under permits, to maintain the levels for navigation purposes.

Nothing herein contained shall be held to affect the exercise of the right of any executive officer of either the United States or Canada, acting under the laws of his respective country, to prevent the placing or cause the removal of any obstructions in St. Marys River, or to otherwise preserve or restore the navigability of any part thereof.

7. Persons using or diverting the water of St. Marys River shall operate under the following:

REGULATIONS

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APPENDIX E

From Second Interim Report of the Canadian Section of the International Waterways Commission April 25, 1906.¹

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Whereas, in the opinion of this commission it is desirable that the whole question of the uses and diversions of the waters adjacent to the boundary line between the United States and Canada, and the uses and diversions of all streams which cross the international boundary between the said countries should be settled by treaty.

Therefore, this commission recommend that a treaty be had between the United States and Great Britain, in framing which it should be recognized, that:

1. In all navigable waters the use for navigation purposes is of primary and paramount right, and therefore diversions should not be permitted which interfere with such use.

2. The Great Lakes system, on the boundary between the United States and Canada, and finding its outlet by the St. Lawrence to the sea, should be maintained in its integrity, and no diversions of water tributary to such streams should be permitted by either country, except as hereinafter provided.

3. Permanent or complete diversions of such waters are wrong in principle and should hereafter be absolutely prohibited. The diversions by the Chicago drainage canal should be limited to the use of not more than 10,000 cubic feet per second.

4. Diversions of international waters elsewhere than at Niagara river or the Niagara peninsula should only be permitted,

(a) For domestic purposes and for the service of locks in navigation canals.

(b) Temporary diversions, where the water taken is returned again, only on the recommendation of a joint commission; such diversions not to interfere in any way with the interests of navigation and to be allotted in equal proportions to each country and so that each may have a like benefit.

5. It should be declared to be a principle with

¹C.S.P., XLVII, No. 12 (1913), Part I, 338-39.

relation to the use of all navigable rivers and streams crossing the international boundary that no obstruction or diversion should be permitted, either on such rivers or their tributary streams, which will interfere with navigation in either country.

6. As to the diversions from Niagara river and on the Niagara peninsula:

(a) In the opinion of this commission it would be a sacrilege to destroy the scenic effect of Niagara falls unless and until the public needs are so imperative as to compel and justify the sacrifice.

(b) It is possible to preserve its beauty and yet permit the development on the Canadian side of the Niagara river itself and elsewhere by diversions on the Niagara peninsula to Lake Ontario of water for power purposes to the extent of not more than 36,000 cubic feet per second, exclusive of water required for domestic uses, and for the service of locks in navigation canals.

(c) It is likewise possible to allow the diversion of waters for power purposes on the American side to the extent of 18,500 cubic feet per second, exclusive of the amount required for domestic uses, and for locks in navigation canals, without serious injury to the scenic aspect of the falls.

(d) Your commission are of opinion, therefore, that for the present the diversions should be limited to the quantities mentioned in subsections b and c.

(e) This would give an apparent advantage to Canadian interests, but, as the diversion is not of serious injury to the falls and does not materially affect the interests of navigation, it is more than counterbalanced by the complete diversion of 10,000 cubic feet by way of the Chicago drainage canal to the Mississippi river.

7. Magnificent as are the scenic effects of the falls of Niagara, the commercial value of the power which its waters can produce is so very great, and the future need may be so pressing, that, in the opinion of your commission, it will be sufficient that a treaty with regard to the diversions there should be limited to the period of twenty-five or thirty years.

8. As to non-navigable streams flowing in either direction across the international boundary line, diversion for irrigation or other than 'innocent uses,' be allowed so that each country shall have an equal benefit from such diversions and that a joint commission shall have power to deal with and regulate such uses.

Suggestions have been made that the mean level of Lake Erie can be raised by the erection of a dam at the mouth of the Niagara river, but to this course strong objection is made by the parties in interest at Montreal and elsewhere who apprehend

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APPENDIX F

Joint Report of the Commission on the Conditions Existing at Niagara Falls with Recommendations May 3, 1906¹

The Honourable, the Minister of Public Works of Canada, and the Honourable, the Secretary of War of the United States:

The International Waterways Commission has the honour to submit the following report upon the preservation of Niagara falls:-

The commission has made a thorough investigation of the conditions existing at Niagara falls, and the two sections have presented reports to their respective governments setting forth these conditions, to which attention is invited. The following views and recommendations are based upon a careful study of the facts and conditions set forth in these reports:

1. In the opinion of the commission, it would be a sacrilege to destroy the scenic effect of Niagara Falls.

2. While the commission are not fully agreed as to the effect of diversions of water from Niagara falls, all are of the opinion that more than 36,000 cubic feet per second on the Canadian side of the Niagara river or on the Niagara peninsula, and 18,500 cubic feet per second on the American side of the Niagara river, including diversions for power purposes on the Erie canal, cannot be diverted without injury to Niagara falls as a whole.

3. The commission, therefore, recommend that such diversions, exclusive of water required for domestic use or the service of locks in navigation canals, be limited on the Canadian side to 36,000 cubic feet per second, and on the United States side to 18,500 cubic feet per second (and in addition thereto, a diversion for sanitary purposes not to exceed 10,000 cubic feet per second, be authorized for the Chicago Drainage canal), and that a treaty or legislation be had limiting these diversions to the quantities mentioned.

The effect of the diversion of water by the Chicago Drainage canal upon the general navigation interests of the Great Lakes system will be considered in a separate report.

The Canadian section, while assenting to the above conclusions, did so upon the understanding that in connection

¹C.S.P., XLVII, No. 12 (1913), Part I, 339-40.

therewith should be expressed their view that any treaty or arrangement as to the preservation of Niagara falls should be limited to the term of twenty-five years and should also establish the principles applicable to all diversions or uses of waters adjacent to the international boundary, and of all streams which flow across the boundary.

The following principles are suggested:

1. In all navigable waters the use for navigation purposes is of primary and paramount right. The Great Lakes system on the boundary between the United States and Canada and finding its outlet by the St. Lawrence to the sea should be maintained in its integrity.

2. Permanent or complete diversions of navigable waters or their tributary streams, should only be permitted for domestic purposes and for the use of locks in navigation canals.

3. Diversions can be permitted of a temporary character, where the water is taken and returned back, when such diversions do not interfere in any way with the interests of navigation. In such cases each country is to have a right to diversion in equal quantities.

4. No obstruction or diversion shall be permitted in or upon any navigable water crossing the boundary or in or from streams tributary thereto, which would injuriously affect navigation in either country.

5. Each country shall have the right of diversion or irrigation or extraordinary purposes in equal quantities of the waters of non-navigable streams crossing the international boundary.

6. A permanent joint commission can deal much more satisfactorily with the settlement of all disputes arising as to the application of these principles, and should be appointed.

The American members are of opinion that the enunciation of principles to govern the making of a general treaty is not within the scope of their function; moreover the jurisdiction of the American members is restricted to the Great Lakes system.

Signatures of the Commission

APPENDIX G

From Report on the Conditions Existing at Sault Ste. Marie,
with Rules for the Control of the same, recommended by the
I.W.C. May 3, 1906¹

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The commission would respectfully recommend:

1. That no permits shall be granted for the use of the waters of the St. Marys river, or for the erection of structures in, under or over, or the occupation in any manner of the said waters until plans have been submitted to the commission for its investigation and recommendation; and the use of the waters under such permits shall not be allowed except upon compliance with the rules hereinafter recommended.

2. The commission further recommends that no grants, permits or concessions should be made, which directly or by operation of law, may, in any manner affect the right of the United States or of Canada, to control the bed of the St. Marys river, below high water mark, and especially that none should be made which, legally or equitably, may be the means of adding to the expense of acquiring lands or rights for the purpose of making improvements in aid of navigation, or which may give an equitable right to compensation in case of the removal of structures in said river.

3. That steps shall be taken to increase the lockage facilities at Sault Ste. Marie without unnecessary delay.

4. That the governments of the United States and Canada reserve all water necessary for navigation purposes, at present or in the future, and the surplus shall be divided equally between the two countries for power purposes.

5. As the commission regards the interests of the United States and Canada in the preservation of the lake levels, and in the improvement of the channels and the conservation of the water supply for purposes of navigation as identical and as incapable of efficient protection without joint and harmonious action on the part of the two governments, it recommends that the rules hereinafter set forth be adopted, and that a joint commission be created to supervise their enforcement, or that such powers be vested in the existing International Waterways Commission, subject to such restrictions and reservations as may be deemed advisable.

¹C.S.P., XLVII, No. 12 (1913), Part I, 348-49.

APPENDIX H

Recommendations agreed upon by Canadian Section Nov. 8, 1906¹

The waters of Lake Michigan in the United States, as the waters of Georgian Bay in Canada, and the waters of Lake Superior partly in the United States and partly in Canada, all form sources of supply of the Great Lakes System, finding their way by the Saint Lawrence to the sea.

The right of navigation of these waters is common to both nations, and even as to the portion of the Saint Lawrence River which lies wholly within Canadian territory the right is given by Article XXVI of the Treaty of 1871 to the citizens of the United States in common with the citizens of Great Britain. It is therein declared that such river "where it ceases to form the boundary between the two countries from, to, and into the sea shall forever remain free and open for the purposes of commerce to the citizens of the United States.

In the opinion of your commission, therefore, the interests of navigation in these waters are paramount subject only to the right of use for domestic purposes.

Your Commission concede the right to the Sanitary District of Chicago to use the waters of the said Lake only in so far as it is absolutely essential that they should do so for domestic uses, including the right to preserve the health of the city by a drainage canal if other means cannot be provided.

The preservation of the levels of the Great Lakes System is in the opinion of your Commission of the utmost importance, and the Federal Governments controlling navigation should so regulate diversions as to limit the same to the domestic uses aforesaid.

The Canadian Members of this Commission feel in dealing with diversion from Lake Michigan, that they are not called upon, nor would it be within their province to limit such uses or to suggest, much less dictate what system should be adopted by the Sanitary District of Chicago with a view to minimise the amount of water which they are to divert. They are of the opinion that it must be left to the Federal Government of the United States to protect the interests of navigation.

¹Gibbons Papers, Vol. 10, P.A.C.

APPENDIX I

From Joint Report on the Application of the Minnesota Canal and Power Company, of Duluth, Minnesota, for Permission to Divert Certain Waters in the State of Minnesota from the Boundary Waters between the United States and Canada, 1906¹
 Nov. 15, 1906

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Conclusions

The commission has arrived at the following conclusions:

1. While the work proposed by the applicant will be of great advantage to the interests served, it will interfere with public and private interests in Canada, and the commission see no public necessity for it.

2. The proposed diversion will injure the interests of various classes of persons, namely residents of the United States having property rights in the State of Minnesota, residents of the United States having property rights and interests in Canada and in the boundary waters, residents of Canada having property rights and interests in Canada, and municipalities in the Dominion of Canada. The rights and interests which will be affected are divisible into two classes, namely, those which depend upon navigation directly or indirectly and those which depend upon the use of waters of the various streams and lakes for power purposes.

3. The proposed diversion will affect injuriously navigation upon the boundary waters between the United States and Canada, above mentioned, and upon navigable waters in Canada connecting said boundary waters; but,

4. So far as water-power interests on the international boundary or in Canada are concerned, which depend upon the supply from the Birch lake drainage area, although remedial works at locations above Rainy lake may be constructed, the total amount of water can be stored and used for power purposes upon the boundary and connecting waters located wholly in Canada, will be diminished.

5. The applicant, the Minnesota Canal and Power Company of Duluth, Minnesota, under the decision of the Supreme Court of Minnesota, above cited, apparently has not the power to utilize the permit it seeks to obtain, but possibly may acquire

¹C.S.P., XLVII, No. 12 (1913), Part I, 367-68.

that power. It would seem, therefore, that the permit which the applicant seeks, ought not in any case to be granted before it secures authority under the laws of Minnesota to utilize it.

6. That the rights and interests of the residents of Minnesota which may be affected by the proposed diversion, are of so much less importance than the interests which will be promoted by the proposed works of the applicant, that they do not furnish a sufficient reason for refusing the permit sought, inasmuch as full compensation must be made to such persons under the laws of Minnesota.

7. Neither the State of Minnesota nor the United States can provide the adequate means by which money compensation can be ascertained and made to the owners of the interests in Canada which may be injured, and it follows that individuals sustaining injury would be relegated to litigation. This is a violation of the principle of law that private property shall not be taken for public use, unless provision for compensation can be made without litigation and its attendant delays and expense.

8. So far as remedial works are concerned, it is sufficient to say that there is no jurisdiction in the United States or in the State of Minnesota to provide for or permit the erection of the necessary remedial works in Canada.

9. That although it might be advisable to grant the permit applied for, in case the applicant should acquire the powers necessary to utilize it, if objections arising from international relations did not exist, treaty provisions, international comity and the impossibility of providing just means of assuring adequate compensation for injury to interests in Canada, or of preserving navigation unimpaired on the boundary streams, without concurrent action of both governments concerned, lead us to the conclusion that the permit should not be granted unless the full protection of all interests not cared for by the laws of Minnesota be secured by concurrent action of the United States and Canada.

RECOMMENDATIONS

1. The commission would, therefore, recommend that the permit applied for be not granted without the concurrence of the Canadian government.

2. As questions involving the same principles and difficulties, liable to create friction, hostile feelings and reprisals, are liable to arise between the two countries, affecting waters on or crossing the boundary line, the commission would recommend that a treaty be entered into which shall settle the rules and principles upon which all such questions may be peacefully and satisfactorily determined as they arise.

3. The commission would recommend that any treaty which may be entered into should define the uses to which

international waters may be put by either country without the necessity of adjustment in each instance, and would respectfully suggest that such uses should be declared to be:

- (a) Use for necessary domestic and sanitary purposes.
- (b) Service of locks used for navigation purposes.
- (c) The right to navigate.

4. The commission would also respectfully suggest that the treaty should prohibit the permanent diversion of navigable streams which cross the international boundary or which form a part thereof, except upon adjustment of the rights of all parties concerned by a permanent commission, and with its consent.

Signatures of the Commission

APPENDIX J

Gibbons-Clinton Draft Treaty submitted to the Secretary of State and the Prime Minister September 24, 1907

PROPOSED TREATY CLAUSES

Article I

Whereas questions have arisen and may hereafter arise involving the use and diversion of the boundary waters of the United States and Canada, and in relation to the protection of the fisheries therein, the improvement of navigable channels for navigation, the improvement and maintenance of the levels therein, and the protection of the banks and shores of such waters; and whereas it is desirable that the rules of navigation upon navigable waters forming a part of the boundary between the United States and the Dominion of Canada, and the use of signal lights of vessels navigating said waters should be uniform, and whereas the use of joint rules of the United States and the Dominion of Canada, and such rules must be enforced by joint action of said countries; and whereas it is deemed wise by the high contracting parties, in order to settle all such questions now existing, or which may hereafter arise, and to dispose of all other matters above mentioned, that a permanent international commission be appointed with full powers in the premises; therefore the high contracting parties agree that all such questions and matters as they may arise shall be referred by them to a commission to consist of six commissioners, three to be appointed by the President of the United States, and three by His Britannic Majesty; and the high contracting parties agree to appoint the commissioners as soon after the ratification hereof as may be convenient. In case of the death, absence or incapacity of a commissioner, or in the event of a commissioner omitting or ceasing to act as such, the President of the United States or His Britannic Majesty, respectively, shall name another person to act as commissioner in the place or stead of the Commissioner originally named.

Article II

The Commissioners shall meet in Washington at the earliest convenient time after they shall have been named, and

¹Gibbons Papers, Vol. 14, P.A.C.

shall, before proceeding to do any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to justice and equity, without feeling, favor or affection to their country, upon all such matters as shall be laid before them on the part of the governments of the United States and of His Britannic Majesty, respectively, and such declaration shall be entered on the record of their proceedings.

After having organized the commissioners may meet at such times and places as they may appoint. They shall give all parties interested in matters which come before them, convenient opportunity to be heard, and may take evidence on oath when deemed necessary. They may adopt such rules of procedure as may be in accordance with justice and equity and may make such examinations in person and through agents, or employees, as they may deem advisable.

The majority of the commission shall have power to render a decision, but in case a majority do not agree, the Commission shall select an arbitrator or arbitrators to whom the matters in difference may be referred and whose decision shall be final

The Commission may employ secretaries, engineers and other assistants, from time to time as it may deem advisable. The salaries and personal expenses of the Commissioners shall be paid by their respective governments, and all other expenses, including the pay of arbitrators, shall be paid equally by the high contracting parties, who shall make proper provision therefor.

Article III

The Commission shall have power to consider and determine all questions and matters related to the subject specified in Article I which may be referred to it by the High Contracting Parties.

The decision of the Commission upon any matters submitted to it shall be enforced by the High Contracting Parties; and for the purpose of enforcing any rules and regulations, which may be adopted by the Commission, pursuant to the powers conferred upon it by this treaty, the Commission may exercise such police powers as may be vested in it by concurrent legislation of the United States and Dominion of Canada.

Article IV

It is agreed as follows:--

1. The expression "boundary waters" as used in this treaty includes the following described waters, to wit: Lake Superior, Michigan, Huron including Georgian Bay, St. Clair, Erie, and Ontario: the connecting and tributary waters of said lakes, the river St. Lawrence from its source

to the ocean; the Columbia River and all rivers and streams which cross the boundary line between the Dominion of Canada and the United States, and their tributaries.

2. All navigable boundary waters, and all canals and channels connecting the same or aiding in their navigation, now existing or which may hereafter be constructed are and shall be forever free for navigation by the citizens and subjects of both countries, ascending and descending, subject to such just rules and regulations as either of the High Contracting Parties may, within its own territory, impose, provided that such rules and regulations shall not discriminate between the citizens or subjects of the High Contracting Parties.

3. The right to use said waters for navigation is paramount to all other rights, except that of use for necessary domestic and sanitary purposes and the service of canals for purposes of navigation.

4. Where diversions of water are permitted for the purpose of generating power, upon waters along the line of the international boundary, the interests of navigation must be fully protected, and, as far as possible, the right to use one half of surplus waters available for power purposes shall be preserved to each country, its citizens or subjects.

5. Where diversion for irrigation is permitted the paramount right of navigation must be preserved and the rights of each country affected and of its citizens or subjects must be equitably protected.

6. The said waters must not be polluted in one country to the injury of health or property in the other.

7. No water shall be diverted from the Niagara River or from Lake Erie by way of the Niagara Peninsula in excess of 18,500 cubic feet per second in the United States, and 36,000 cubic feet per second in the Dominion of Canada, except for necessary domestic and sanitary uses, and for service of canals for purposes of navigation.

8. Solely for the purposes of this treaty, the expression "Navigable boundary waters" shall be taken to mean all such boundary waters as are subject to public use for the transportation of property, in accordance with the common law as recognized in the Dominion of Canada and in the United States: and the Commission is authorized and empowered to determine the navigability of streams, as matter of fact, when it becomes necessary to do so in matters referred to it.

9. No diversion or obstruction of boundary waters in, or by, either country, which shall materially interfere with the natural flow thereof, to the injury of the other country, or of its citizens or subjects shall be permitted without the consent of such other country.

10. The words "citizens" and "subjects" as used in this treaty shall be deemed to include individuals, corporations, joint stock companies, associations and partnerships.

Article V

The Commission is hereby empowered and directed to ascertain the boundary line between the United States and the Dominion of Canada through lakes Ontario, Erie, St. Clair, and Huron, and the waters connecting the same as laid down by the Commissioners appointed under the treaty of Ghent, as nearly as possible, and to delineate the same upon modern charts and to describe it in writing, and, so far as practical, by reference to fixed monuments which the Commission may locate and erect and which shall be described that they can be readily found.

The Commission shall by report, signed by the Commissioners, designate the boundary line so ascertained by it and shall cause to be prepared proper maps delineating the same. They shall file their report together with such maps, in duplicate with the Secretary of State of the United States and with the Minister of Public Works of the Dominion of Canada.

The boundary line as ascertained and reported by the Commission shall be the boundary line between the United States of America and the Dominion of Canada, through the waters last above mentioned.

In case a majority of the commission shall not be able to agree on the location of the boundary line through the waters last above mentioned, in whole or in any part, they shall make joint or several reports in duplicate, to the government of His Britannic Majesty and to that of the United States, stating in detail the points on which they differ.

Article VI

AND WHEREAS it is desirable that the said Commission, when formed, should have authority to deal with all other matters, which shall, by consent of both the contracting parties, be submitted to it for decision or which shall with such consent, be referred to it with a view to having the said Commission consider and report thereon with such recommendations as they may think advisable.

NOW THEREFORE the High Contracting Parties agree that the said Commission shall, as to all matters so referred to them for decision, have the same powers as are given to them with respect to the subjects mentioned in Article I of this treaty.

As to such matters as are not referred to them for decision the said commission shall consider and report upon the facts, with such recommendations as they may see fit.

In case a majority of the Commission cannot, in matters so referred to them for decision, agree upon findings, they shall appoint one or more arbitrators as provided in Article I, but as to all other subjects referred to them if the majority cannot agree upon conclusions, the views of the members shall be embodied in separate reports to be submitted to both the High Contracting Parties.

Article VII

The Commission with all its powers conferred and duties imposed by this treaty shall continue during the pleasure of both of the high contracting parties; but if either of the parties desires to terminate this treaty it shall give to the other at least one year's notice in writing before doing so. For all the purposes of these articles the Dominion of Canada shall be deemed to represent His Britannic Majesty.

All reports and communications of the Commission are to be made to the Secretary of State of the United States and to the Prime Minister of the Dominion of Canada.

APPENDIX K

The Root (Anderson) Draft Treaty¹

Draft of Proposed Treaty for the Appointment of a Joint Commission of Inquiry with Respect to Questions Arising Between the United States and Canada Along Their Common Frontier

The United States of America and His Majesty Edward the Seventh of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King and Emperor of India, being equally desirous that provision may be made for an impartial and expert examination under their joint direction, whenever desired on either side, with respect to questions or matters of difference affecting the mutual relations of the United States and the Dominion of Canada and arising along their common frontier, with a view to securing harmonious and mutually acceptable action on both sides in dealing with such questions or matter, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed their respective plenipotentiaries as follows:

The President of the United States of America,
Elihu Root, Secretary of State of the United States
and

His Britannic Majesty, the Right Honorable James
Bryce, O. M., His Britannic Majesty's Ambassador
Extraordinary and Plenipotentiary;

who, after an exchange of their full powers, which were found to be in good and due form, have agreed upon and concluded the following articles:

Article I

A Joint Commission of Inquiry, composed of six Commissioners, three on the part of the United States and three on the part of Great Britain, shall be referred from time to time for examination and report any questions or matters of difference arising between the United States and the Dominion of Canada involving inhabitants of the other along their common frontier, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

¹Anderson Papers, Box 69.

The Joint Commission of Inquiry hereby constituted is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate if called for, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

The reports of the Commission shall not be regarded as decisions of the questions or matters submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

Article II

The three Commissioners on the part of the United States shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and in case of the death, resignation, or incapacity to act of any of such Commissioners, or their successors, the vacancy thus caused shall be filled in like manner.

The three Commissioners on the part of Great Britain shall be appointed by _____ and in case of the death, resignation, or incapacity to act of any of such Commissioners, or their successors, the vacancy thus caused shall be filled in like manner.

It is the desire of the High Contracting Parties that, so far as may be convenient, one of the commissioners appointed on each side shall be a lawyer of experience in questions of international and riparian law, and one an engineer well versed in the hydraulics of the Great Lakes.

It is further agreed that the Commissioners on each side shall be appointed as soon as may be after the ratification of this treaty.

Article III

The Commission shall hold the first meeting and organize at such time and place as may be required by the reference to it of any questions or matters for examinations and report, as above provided, and when organized the Commission may fix the times and places for its meetings, subject to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before proceeding with the work of the Commission, make and subscribe an oath or declaration in writing that he will carefully and impartially examine and report upon all questions and matters referred to the Commission as provided by this treaty, and such oath or declaration shall form part of the permanent records of the Commission.

Article IV

The Commission may employ secretaries, engineers, and other assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commissioners shall be paid by their respective Governments, and all other expenses shall be paid in equal moieties by the High Contracting Parties.

Article V

The Commission shall give all parties interested in questions and matters which come before it convenient opportunity to be heard, and may take evidence on oath when deemed necessary. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

Article VI

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports, each to his own Government.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Article VII

All reports and communications of the Commission shall be made to the Secretary of State of the United States and to the (?) Prime Minister of the Dominion of Canada.

Article VIII

This treaty shall remain in force for years after its date and thereafter until terminated by a twelve months' written notice, given by either High Contracting Party to the other.

APPENDIX L

The Boundary Waters Treaty¹

Treaty Between the United Kingdom and the United States of America Relating to Boundary Waters and Questions Arising Along the Boundary Between Canada and the United States.

Signed at Washington, January 11, 1909

(Ratifications exchanged at Washington, May 5, 1910)

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the United States of America, 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, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a Treaty in furtherance of these ends, and for that purpose have appointed as their respective Plenipotentiaries.

His Britannic Majesty, the Right Honourable James Bryce, O.M., his Ambassador Extraordinary and Plenipotentiary at Washington; and

The President of the United States of America, Elihu Root, Secretary of State of the United States;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

PRELIMINARY ARTICLE

For the purposes of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing

¹Robert Borden, Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of America 1814-1913 (Ottawa, 1915), 185-195.

from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Article I

The High Contracting Parties agree that the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this Treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory, and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof.

Article II

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but 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; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

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 harbours, 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

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.

Article V

The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the

construction of power plants on the United States' side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this Treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

Article VI

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this Treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly-constituted reclamation officers of the United States and the properly-constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

Article VII

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

Article VIII

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 and principles which are adopted by the High Contracting Parties for this purpose.

The High Contracting Parties shall have, each on its own side of the Boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

- (1) Uses for domestic and sanitary purposes;
- (2) Uses for navigation, including the service of canals for the purposes of navigation;
- (3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

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.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the

minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Article X

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action, will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of The Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

Article XI

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor General of the Dominion of Canada, and to whom shall be addressed all communications of the Commission.

Article XII

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this Treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States and Canadian sections of the Commission may each appoint a secretary, and these shall act as joint secretaries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission, incurred by it, shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses, and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this Treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

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.

Article XIV

The present Treaty shall be ratified by His

Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof. The ratifications shall be exchanged at Washington as soon as possible, and the Treaty shall take effect on the date of the exchange of its ratifications. It shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either High Contracting Party to the other.

In faith whereof the respective plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of January, in the year of our Lord one thousand nine hundred and nine.

James Bryce.
Elihu Root

PROTOCOL OF EXCHANGE*

On proceeding to the exchange of the ratifications of the treaty signed at Washington on January 11, 1909, between Great Britain and the United States, relating to boundary waters and questions arising along the boundary between the United States and the Dominion of Canada, the undersigned plenipotentiaries, duly authorized thereto by their respective Governments, hereby declare that nothing in this treaty shall be construed as affecting, or changing, any existing territorial, or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory; and further, that nothing in this treaty shall be construed to interfere with the drainage of wet, swamp, and overflowed lands into streams flowing into boundary waters, and also that this declaration shall be deemed to have equal force and effect as the treaty itself and to form an integral part thereof.

The exchange of ratifications then took place in the usual form.

In witness whereof, they have signed the present Protocol of Exchange and have affixed their seals thereto.

Done at Washington this 5th day of May, one thousand nine hundred and ten.

James Bryce
Philander C. Knox.

*The British Ratification of this further Instrument was deposited with the United States Government on July 23, 1910.

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