Federal Court  Cour fédérale

**Date: 20160602**

**Docket: T-745-04**

**Citation: 2016 FC 618**

**Ottawa, Ontario, June 2, 2016**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**PEMBINA COUNTY WATER RESOURCE DISTRICT, NORTH DAKOTA, CITY OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF WALHALLA, NORTH DAKOTA, CITY OF NECHE, NORTH DAKOTA, TOWNSHIP OF NECHE, NORTH DAKOTA, TOWNSHIP OF FELSON, NORTH DAKOTA, TOWNSHIP OF ST. JOSEPH, NORTH DAKOTA, TIMOTHY L. WILWAND, DENNIS K. SCHALER, RICHARD MARGERUM AND VERLINDA MARGERUM**

**Plaintiffs**

**and**

**GOVERNMENT OF MANITOBA, AND RURAL MUNICIPALITY OF RHINELAND**

**Defendants**

**ORDER AND REASONS**

## I. THE MOTIONS

[1] The Defendant, Rural Municipality of Rhineland [Rhineland], is seeking an order that the Plaintiffs' Amended Statement of Claim be struck out as against Rhineland on the grounds that the Federal Court does not have jurisdiction over the subject matter of the Amended Statement of Claim.

[2] The Defendant, Government of Manitoba [Manitoba], is also seeking an order that the Amended Statement of Claim be struck out as against Manitoba on the grounds that the matters in the Amended Statement of Claim are not within the jurisdiction of the Federal Court. In addition, Manitoba also seeks to amend its Statement of Defence to add the following defence:

> 13. In response to the allegations in paragraph 15 of the Amended Statement of Claim and in reply to the Amended Statement of Claim as a whole, Manitoba states that section 4 of *The International Boundary Water Treaty Act* applies only to waters which in their natural channels would flow across the international boundary from Canada to the United States. The allegations in the Amended Statement of Claim involve only waters which are alleged to flow in their natural channels across the international boundary from the United States to Canada. Accordingly, the Federal Court does not have jurisdiction over the claims in this action. Manitoba pleads and relies on sections 4 and 5 of *The International Boundary Water Treaty Act*.

[3] It is clear that the purpose and focus of both motions is the termination of this action on the grounds that the subject matter of the Plaintiffs' claim does not fall within the jurisdiction of the Federal Court.

## II. BACKGROUND

[4] This action was commenced in April 2004 and involves certain embankments within the road allowance that comprises the southern boundary of Rhineland to the north of the international boundary between Manitoba and North Dakota. In essence, the Plaintiffs allege that, beginning around 1940, portions of the road allowance have been built up to serve as a dike that blocks the natural flow of water across the international border north into Manitoba and is the cause – at least in part – of extensive flooding and damage to the Plaintiffs' lands on the American side of the international border. The Plaintiffs are seeking injunctive relief to have the dike removed as well as damages to compensate them for certain losses they allege to have suffered as a result of the blockage of water by the dike, and the consequent flooding.

[5] The Plaintiffs' claims are predicated on s 4(1) of the *International Boundary Water Treaty Act*, RSC, 1985, c I-17 [*IBWTA*] and the jurisdiction expressly conferred on the Federal Court by s 5 of the *IBWTA*.

## III. RELEVANT RULES, LEGISLATION AND *TREATY* PROVISIONS

[6] Both motions to strike are brought under Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*Federal Court Rules*] which reads as follows:

| **Motion to strike** | **Requête en radiation** |
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| 221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to | 221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans |

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| amend, on the ground that it | autorisation de le modifier, au motif, selon le cas : |
| (a) discloses no reasonable cause of action or defence, as the case may be, | a) qu'il ne révèle aucune cause d'action ou de défense valable; |
| … | … |

[7] Manitoba's motion to amend is governed by Rule 75 of the *Federal Courts Rules* which reads as follows:

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| **Amendments with leave** | **Modifications avec autorisation** |
| 75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties. | 75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties. |
| **Limitation** | **Conditions** |
| (2) No amendment shall be allowed under subsection (1) during or after a hearing unless | (2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas : |
| (a) the purpose is to make the document accord with the issues at the hearing; | a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience; |
| (b) a new hearing is ordered; or | b) une nouvelle audience est ordonnée; |
| (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations. | c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou |

révisées.

[8] Sections 4 and 5 of the *IBWTA* read as follows:

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| **Interference with international waters** | **Altération des eaux internationales** |
| 4 (1) Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters, as defined in the treaty, resulting in any injury on the United States side of the boundary, gives the same rights and entitles the injured parties to the same legal remedies as if the injury took place in that part of Canada where the interference or diversion occurs. | 4 (1) Toute altération, notamment par détournement, des voies navigables du Canada, dont le cours naturel coupe la frontière entre le Canada et les États-Unis ou se jette dans des eaux limitrophes, au sens du traité, qui cause un préjudice du côté de la frontière des États-Unis, confère les mêmes droits et accorde les mêmes recours judiciaires aux parties lésées que si le préjudice avait été causé dans la partie du Canada où est survenue l'altération. |
| **Exception** | **Exception** |
| (2) Subsection (1) does not apply to cases existing on January 11, 1909 or to cases expressly covered by special agreement between Her Majesty and the Government of the United States. | (2) Les cas survenus jusqu'au 11 janvier 1909 inclusivement et ceux qui sont expressément régis par la convention spéciale intervenue entre Sa Majesté et le gouvernement des États-Unis sont soustraits à l'application du paragraphe (1). |
| **Federal Court jurisdiction** | **Compétence de la Cour fédérale** |
| 5 The Federal Court has jurisdiction at the suit of any injured party or person who claims under this Act in all cases in which it is sought to | 5 La Cour fédérale peut être saisie par toute personne lésée ou se constituant en demandeur sous le régime de la présente loi, dans tous les cas visant la |

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| enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act. | mise à exécution ou la détermination de quelque droit ou obligation découlant de la présente loi ou contesté sous son régime. |

[9] The following *Boundary Waters Treaty* [*Treaty*] provisions are also relevant:

| **Article II** | **Article II** |
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| 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. | Chacune des Hautes parties contractantes se réserve à elle-même ou réserve au Gouvernement des différents États, d'un côté, et au Dominion ou aux gouvernements provinciaux, de l'autre, selon le cas, subordonnément aux articles de tout traité existant à cet égard, la juridiction et l'autorité exclusive quant à l'usage et au détournement, temporaires ou permanents, de toutes les eaux situées de leur propre côté de la frontière et qui, en suivant leur cours naturel, couleraient au-delà de la frontière ou se déverseraient dans des cours d'eaux limitrophes, mais il est convenu que toute ingérence dans ces cours d'eau ou tout détournement de leur cours naturel de telles eaux sur l'un ou l'autre côté de la frontière, résultant en un préjudice pour les habitants de l'autre côté de cette dernière, donnera lieu aux mêmes droits et permettra aux parties lésées de se servir des moyens que la loi met à leur disposition tout autant que si telle injustice se produisait dans le pays où s'opère cette |

ingérence ou ce détournement; mais cette disposition ne s'applique pas au cas déjà existant non plus qu'à ceux qui ont déjà fait expressément l'objet de conventions spéciales entre les deux parties concernées.

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.

Il est entendu cependant, que ni l'une ni l'autre des Hautes parties contractantes n'a l'intention d'abandonner par la disposition ci-dessus aucun droit qu'elle peut avoir à s'opposer à toute ingérence ou tout détournement d'eau sur l'autre côté de la frontière dont l'effet serait de produire un tort matériel aux intérêts de la navigation sur son propre côté de la frontière.

**Article III**

**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

Il est convenu que, outre les usages, obstructions et détournements permis jusqu'ici ou autorisés ci-après, par convention spéciale entre les parties, aucun usage ou obstruction ou dé- tournement nouveaux ou autres, soit temporaires ou permanents des eaux limitrophes, d'un côté ou de l'autre de la frontière, influençant le débit ou le niveau naturels des eaux limitrophes de l'autre côté de la frontière, ne pourront être effectués si ce n'est par l'autorité des États-Unis ou du Dominion canadien dans les limites de leurs territoires respectifs et avec l'approbation, comme il est prescrit ci-après, d'une

Commission.

commission mixte qui sera désignée sous le nom de « Commission mixte internationale ».

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

Les stipulations ci-dessus ne sont pas destinées à restreindre ou à gêner l'exercice des droits existants dont le gouvernement des États-Unis, d'une part, et le gouvernement du Dominion, de l'autre, sont investis en vue de l'exécution de travaux publics dans les eaux limitrophes, pour l'approfondissement des chenaux, la construction de briselames, l'amélioration des ports, et autres entreprises du gouvernement dans l'intérêt du commerce ou de la navigation, pourvu que ces travaux soient situés entièrement sur son côté de la frontière et ne modifient pas sensiblement le niveau ou le débit des eaux limitrophes de l'autre, et ne sont pas destinées non plus à gêner l'usage ordinaire de ces eaux pour des fins domestiques ou hygiéniques.

**Article IV**

**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

Les Hautes parties contractantes conviennent, sauf pour les cas spécialement prévus par un accord entre elles, de ne permettre, chacun de son côté, dans les eaux qui sortent des eaux limitrophes, non plus que dans les eaux inférieures des rivières qui coupent la frontière, l'établissement ou le maintien d'aucun ouvrage de protection ou de réfection, d'aucun

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| 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. | barrage ou autre obstacle dont l'effet serait d'exhausser le niveau naturel des eaux de l'autre côté de la frontière, à moins que l'établissement ou le maintien de ces ouvrages n'ait été approuvé par la Commission mixte internationale. |
| 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. | Il est de plus convenu que les eaux définies au présent traité comme eaux limitrophes non plus que celles qui coupent la frontière ne seront d'aucun côté contaminées au préjudice des biens ou de la santé de l'autre côté. |

## IV. ARGUMENTS

### A. *Defendants*

[10] The essence of both motions to strike is that the Federal Court does not have the jurisdiction to deal with the claims advanced by the Plaintiffs. This is because s 5 of the *IBWTA* only grants jurisdiction to the Federal Court in cases "in which it is sought to enforce any right or obligation arising or claimed under or by virtue of this Act." The rights and obligations which the Plaintiffs seek to enforce are contained in s 4 of the *IBWTA*.

[11] The Defendants say that, on a plain reading of s 4 of the *IBWTA* in its full context, it is plain and obvious that it is only directed at waters in natural channels in Canada that would normally flow into the United States, but which have been prevented from doing so as a result of some interference or diversion in Canada. This means, say the Defendants, that s 4(1) of the

*IBWTA* has no application to, and is not meant to address, the interference with or diversion of waters that would otherwise cross the international boundary from the United States into Canada, which is the basis of the allegations contained in the Plaintiffs' Amended Statement of Claim.

[12] The Defendants say that when the full legislative context of s 4(1) of the *IBWTA* is examined, it is plain and obvious that s 4(1) has nothing to do with the alleged interference with, or diversion of, waters in their natural channels flowing from the United States into Canada. Subsection 4(1) only deals with the opposite situation, namely, the interference with waters in Canada which, in their natural channels, would flow across the international boundary from Canada into the United States.

[13] The Defendants say that, in their Amended Statement of Claim, the Plaintiffs allege that water flowing in natural watercourses from the United States into Canada has been blocked by a dike or dikes that have been constructed on parts of the road allowance on the Canadian side of the international boundary. The Plaintiffs also allege that the dike or dikes were constructed for the purpose of blocking water flowing in natural watercourses from entering Canada in the knowledge that water that would otherwise flow into Canada would be turned back into the United States. The Defendants say that there is nothing in s 4(1), or any other provision of the *IBWTA*, that gives the Plaintiffs rights and remedies they can enforce in Canada or "any right or obligation arising or claimed under or by virtue of" the *IBWTA* over which the Federal Court has jurisdiction.

[14] As regards its proposed amendment, Manitoba points out that the amendment is intended to formally raise the jurisdiction issue and does not involve any new facts. No further discovery will be necessary because it involves a pure issue of law and, in any event, the jurisdiction of the Federal Court to deal with this dispute must be addressed even if it was not specifically raised in the pleadings.

B. *Plaintiffs*

[15] The Plaintiffs say that the Defendants' arguments are based upon an overly narrow and strict interpretation of the *IBWTA*. They say that such an interpretation leads to absurd results and cannot be reconciled with the *IBWTA*, the *Treaty*, or other federal legislation.

[16] The Plaintiffs say that a plain and purposive reading of the *Treaty* and the *IBWTA* makes it clear that the Federal Court does have the jurisdiction to deal with this matter. In addition, all extrinsic aids to interpretation reinforce that s 4 of the *IBWTA* grants the Plaintiffs recourse as a result of the Defendants' conduct in Canada, and this recourse does not depend upon the direction of the flow of water across the international boundary.

V. ANALYSIS

A. *Introduction*

[17] This action was commenced in 2004, and yet the fundamental issue of jurisdiction has only now been brought before the Court for consideration. We have now had three weeks of trial

and the Plaintiffs have entered the evidence for their whole case except for a few loose ends that will be dealt with when the Court reconvenes to complete the trial in October 2016.

[18] The Defendants raised the issue of jurisdiction in opening statements on the first day of trial. The Plaintiffs were taken by surprise and discussions took place as to whether evidence should be called before the Court made a decision on jurisdiction. In the end – and I think this was appropriate – the parties agreed that the Plaintiffs should be allowed to call their evidence and put in their case. A great deal of work has gone into the preparation for this trial and the Plaintiffs' case could have been jeopardized if the trial was postponed for what could be a significant period of time to decide the issue of jurisdiction.

[19] In one way, the Plaintiffs' surprise that the Defendants have now chosen to rely on jurisdiction to defeat the claim is understandable. Manitoba said nothing in its Statement of Defence about jurisdiction and is only now seeking an amendment to include it. Rhineland denies in paragraph 14 of its Statement of Defence that the *IBWTA* has any applicability but does not directly raise want of jurisdiction as a defence. It seems pretty obvious that the Defendants could have raised the issue of jurisdiction in the earlier stages of the proceedings so that it could have been dealt with before either side incurred the, no doubt, significant costs of bringing this matter all the way to trial. The Defendants say that they only became aware of the issue when they began to examine the legislation and the *Treaty* in detail in preparation for trial.

[20] The issue of jurisdiction could have been decided on the basis of the pleadings alone, and did not require discoveries and further evidence. The Court will be in no better position to decide

this matter after a full trial than it would have been when the Statement of Claim was issued, or indeed, than it is at this juncture when the Plaintiffs have almost put in their whole case and the Court has yet to hear any evidence from the Defendants. Consequently, I see little point in allowing matters to go any further now that the Plaintiffs have put in their evidence and the risk of delay lies with the Defendants, who have yet to introduce any evidence at trial but who have now decided to move to strike.

[21] The jurisprudence seems clear that a motion to strike under Rule 221(1)(a) can be brought at any stage of the proceedings. See *Dene Tsaa First Nation v Canada*, [2001] FCJ No 1177; *Safilo Canada Inc v Contour Optik Inc*, 2005 FC 278 at para 21; *Lebrasseur v Canada*, 2006 FC 852 at para 19 [*Lebrasseur*]; *Verdicchio v Canada*, 2010 FC 117 at paras 19-20; *Robertson v Beauvais*, 2011 FC 378 at para 7 [*Robertson*].

[22] It also seems clear that the Defendants are not precluded from challenging the Court's jurisdiction because they have delayed in bringing this motion, or because they have filed their Statements of Defence. See *Robertson*, above, at para 7.

[23] Justice MacTavish also made clear in *Lebrasseur*, above, at para 19, that delay cannot confer jurisdiction on the Court where it does not exist. In fact, it would appear that jurisdiction is a matter that the Court itself must consider even if it is not raised in the pleadings. See *Okanagan Helicopters Ltd v Canadian Pacific Ltd*, [1974] 1 FC 465 at para 3. Hence, it seems to me that there is no real alternative to dealing with this issue at this time.

[24] The jurisprudence is also clear that the test for striking out a claim under Rule 221(1)(a) for want of jurisdiction is whether it is plain and obvious that the claim cannot succeed. See *Siksika Nation v Siksika Nation (Council),* [2003] FCJ No 911 at para 13; *Robertson*, above, at para 8; *Lebrasseur*, above, at para 14.

[25] It is trite law that the Federal Court cannot acquire jurisdiction over any action unless:

a) There is a statutory grant of jurisdiction by the federal Parliament;

b) There is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and

c) The law on which the case is based must be a law of Canada in accordance with s 101 of the *Constitution Act, 1867*.

See *Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 313, 180 FTR 285 (FCTD), aff'd (2000) FCJ No 2042 (FCA), leave to appeal to the Supreme Court of Canada denied [2001] SCCA no 67 (QL) at para 11.

[26] In their Amended Statement of Claim, the Plaintiffs do refer to and rely upon common law rights to some extent, but it is clear that what brings them before the Federal Court is the *IBWTA*:

> 13. The plaintiffs say that in or around 1940, a dike or dikes were constructed on parts of the road allowance for the purpose of blocking or preventing water flowing in natural watercourses from flowing into Canada. Since 1940, the road allowance has been continually built up and extended as a dike so that the dike located on the road allowance extends westerly from a point at the southerly boundary at Emerson through Montcalm and Rhineland for approximately 30 miles, more or less, to a point on the southerly boundary of Stanley.

14. The plaintiffs say the said road allowance was constructed as a dike by the municipal defendants or with their knowledge and consent, either express or implied. Alternatively, the plaintiffs further say that the construction of the dike, as aforesaid, was done for the sole and explicit purpose of blocking water flowing in natural watercourses from entering Canada in the knowledge that water that would otherwise flow into Canada would be turned back into the United States and, more specifically, the lands located in the Townships of Pembina, Neche, Felson, St. Joseph, Walhalla, ~~Joliette, Lincoln and Drayton~~ and within the cities of Pembina, Neche, ~~Walhalla and Drayton~~, with the certain result that damage would be caused to the owners and occupiers of land located therein, including the plaintiffs and to the real property owned by the plaintiffs.

15. The plaintiffs say that the dike constructed by the municipal defendants, or with their knowledge or consent, is illegal and contrary to established common law that prevents a landowner or occupier from interfering with flow of water in a natural watercourse.

16. Moreover, the plaintiffs plead and rely upon *The International Boundary Water Treaties Act* R.S.C. 1985, c. 1-17, s. 4 of which provides:

> *"4.(1) Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters, as defined in the Treaty, resulting in any injury in .the United States side of the boundary, gives the same rights and entitles the injured parties to the same legal remedies as if the injury took place in that part of Canada where the interference or diversion occurs."*

[27] The Federal Court acquires jurisdiction over matters arising under s 4 by virtue of s 5 of the *IBWTA*:

| **Federal Court jurisdiction** | **Compétence de la Cour fédérale** |
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| 5 The Federal Court has jurisdiction at the suit of any | 5 La Cour fédérale peut être saisie par toute personne lésée |

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| injured party or person who claims under this Act in all cases in which it is sought to enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act. | ou se constituant en demandeur sous le régime de la présente loi, dans tous les cas visant la mise à exécution ou la détermination de quelque droit ou obligation découlant de la présente loi ou contesté sous son régime. |

[28] The Defendants say that it is plain and obvious that the Plaintiffs cannot acquire rights and remedies in Canada, and the Court cannot acquire jurisdiction in this action, because the Plaintiffs' claim does not fall within the scope of s 4 or any other provision of the *IBWTA*. In other words, the Defendants say there is no statutory grant of jurisdiction to the Federal Court to deal with this claim.

[29] At this juncture in the proceedings, the issue before the Court is whether it is plain and obvious that the Plaintiffs' claim does not fall within the scope of s 4 of the *IBWTA* so that it cannot constitute a reasonable cause of action because the Federal Court has no jurisdiction to deal with it.

B. *Statutory Interpretation*

[30] I see no dispute between the parties that the principles to be applied in interpreting domestic legislation are clear and well established: the words of an act must be read in their entire context and in their grammatical sense harmoniously with the scheme of the act, the object of the act and the intention of Parliament. See, for example, *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21:

The parties both relied on the approach used in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10.]

The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[31] In the present case, s 4 of the *IBTWA* is derived from Article II of the *Treaty* which reads as follows:

| **Article II** | **Article II** |
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| 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 | Chacune des Hautes parties contractantes se réserve à elle-même ou réserve au Gouvernement des différents États, d'un côté, et au Dominion ou aux gouvernements provinciaux, de l'autre, selon le cas, |

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.

subordonnément aux articles de tout traité existant à cet égard, la juridiction et l'autorité exclusive quant à l'usage et au détournement, temporaires ou permanents, de toutes les eaux situées de leur propre côté de la frontière et qui, en suivant leur cours naturel, couleraient au-delà de la frontière ou se déverseraient dans des cours d'eaux limitrophes, mais il est convenu que toute ingérence dans ces cours d'eau ou tout détournement de leur cours naturel de telles eaux sur l'un ou l'autre côté de la frontière, résultant en un préjudice pour les habitants de l'autre côté de cette dernière, donnera lieu aux mêmes droits et permettra aux parties lésées de se servir des moyens que la loi met à leur disposition tout autant que si telle injustice se produisait dans le pays où s'opère cette ingérence ou ce détournement; mais cette disposition ne s'applique pas au cas déjà existant non plus qu'à ceux qui ont déjà fait expressément l'objet de conventions spéciales entre les deux parties concernées.

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

Il est entendu cependant, que ni l'une ni l'autre des Hautes parties contractantes n'a l'intention d'abandonner par la disposition ci-dessus aucun droit qu'elle peut avoir à s'opposer à toute ingérence ou tout détournement d'eau sur l'autre côté de la frontière dont l'effet serait de produire un tort matériel aux intérêts de la

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| navigation interests on its own side of the boundary. | navigation sur son propre côté de la frontière. |

[32] The Defendants say that the words of s 4 of the *IBWTA* are precise and unequivocal and so must play a dominant role in the interpretation process. In their view, a plain reading of s 4 of the *IBWTA* shows that it is clearly directed at waters in natural channels in Canada that would normally flow into the United States, but which have been prevented from doing so as a result of some interference or diversion in Canada. This means that s 4 of the *IBWTA* can have no application to the present case which is clearly based upon the blockage of waters flowing from the United States into Canada. The principal purpose of this lawsuit is to remove the allegedly obstructive dike on the Canadian side of the international border so that waters are free to flow north into Canada.

[33] Section 4 of the *IBWTA* is based upon Article II of the *Treaty*, which was signed in Washington on January 11, 1909, and makes clear, say the Defendants, that s 4 only deals with waters flowing south across the international boundary, and so does not encompass the basic premise of the Plaintiffs' claim.

[34] There is no dispute that the claim is based upon the interference or diversion of "waters in Canada." But there is dispute as to whether these waters are being diverted "from their natural channels." That issue is not presently before me so that, should I deny these motions to strike, the Plaintiffs could still face jurisdictional problems later in the process when the Court has heard and considered full evidence on point. In these motions, however, the jurisdictional focus is the direction of flow of the waters.

[35] The Defendants say it is plain and obvious that s 4 of the *IBWTA* only encompasses waters flowing from Canada into the United States and point to the words in the English version "which in their natural channels would flow across the boundary between Canada and the United States…." The Defendants say these words clearly refer to waters flowing from Canada into the United States. The Plaintiffs say "not so," they clearly refer to waters that flow in both directions and so encompass a blockage of flow in Canada that prevents waters crossing the border from the United States into Canada, which is the basis of this action.

[36] Dealing with the English language version, in a plain and grammatical sense, it seems to me that under s 4 the "waters" have to be in Canada when the blockage occurs, and if the waters are being prevented from flowing north (which is the allegation in the claim) then they have already crossed the international boundary before they are blocked. Hence, they cannot be waters that "would flow across the boundary." It is true that such a blockage could cause the waters to pool on the United States' side of the border, but if they are pooled in the United States, then they cannot be "waters in Canada."

[37] Section 4 of the *IBWTA* does not specifically say "which in their natural channels would flow across the boundary (from) Canada and (into) the United States…." But it is clear that s 4 only encompasses "waters in Canada." It is not waters in Canada that are the alleged source of the damage to the Plaintiffs' property in this case. It is waters that remain in the United States and do not flow north across the border. The Plaintiffs allege that these waters do not flow across the border because their natural channels have been blocked on the Canadian side. Even if this can be substantiated in evidence, such waters are not "waters in Canada." If they were waters in

Canada, they could not be flooding the Plaintiffs' lands. It might be alleged that it is the interference or diversion of "waters in Canada" that is causing waters in the United States to pool and damage the Plaintiffs' lands, but that means that it is not waters flowing across the boundary that is causing the damage; it is waters in the United States that are not flowing north across the boundary.

[38] The French language version of s 4(1) of the *IBWTA* reads as follows:

> 4 (1) Toute altération, notamment par détournement, des voies navigables du Canada, dont le cours naturel coupe la frontière entre le Canada et les États-Unis ou se jette dans des eaux limitrophes, au sens du traité, qui cause un préjudice du côté de la frontière des États-Unis, confère les mêmes droits et accorde les mêmes recours judiciaires aux parties lésées que si le préjudice avait été causé dans la partie du Canada où est survenue l'altération.
>
> (2) Les cas survenus jusqu'au 11 janvier 1909 inclusivement et ceux qui sont expressément régis par la convention spéciale intervenue entre Sa Majesté et le gouvernement des États-Unis sont soustraits à l'application du paragraphe (1).

[39] It is immediately apparent that the French version is somewhat different from the English version. It seems to me that the following distinctions can be made:

a) The French version refers to "des voies navigable du Canada," while the English version refers to "any waters in Canada";

b) Within the first distinction, it is also notable that the French version uses "du Canada," while the English version uses "in Canada";

c) The operate verbs in French are in the present tense ("coupe" and "se jette") while the English version says "would flow";

d) The English version uses "any interference or diversion" while the French version refers to "toute altération," but also particularizes with "notamment par détournement."

[40] I see no dispute between the parties regarding the governing rules and legal principles that are applicable when comparing the French and English versions of a statute.

[41] Section 13 of the *Official Languages Act*, RSC, 1985, c 31 (4th Supp) makes it clear that both versions are equally authoritative expressions of the law.

[42] Where discrepancies occur between the different versions they must be reconciled in accordance with the "common meaning" principle established in *R v Daoust*, 2004 SCC 6 at paras 26-31 [*Daoust*]. In *R v Quesnelle*, 2014 SCC 46 at para 53, the Supreme Court of Canada also referred to this as the "shared meaning" principle. As I understand this principle, the Court must – in the event of any discordance between the two versions – attempt to discover a shared or common meaning. As the Supreme Court of Canada put it in *Daoust*, above:

> 28 We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning": *Bell ExpressVu*, *supra*, at para. 29. If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions: *Côté*, *supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: *Côté*, *supra*, at p. 327; see *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at p. 863.

[43] *Daoust* also teaches (at para 29) that if neither version is ambiguous, or if they both are, then the common meaning will normally be the narrower of the two versions.

[44] It also seems clear that in testing the shared or common meaning, or in deciding which version to prefer if there is no shared or common meaning, the Court can rely upon the usual

interpretive techniques to conduct a textual, purposive and consequential analysis which will reference admissible extrinsic aids in order to determine legislative intent. See *Sullivan on the Construction of Statutes* (6th ed.) at para 5.55.

[45] If I apply these principles to the present case, it seems to me that while there are clear distinctions in terminology between the French and English versions of s 4(1) of the *IBWTA*, their ordinary or common meaning for the issues at stake in this claim remain the same. Crucially, whether we are talking about "voies navigables" or "any waters," the statute is dealing with waters "in Canada." "Du" in the French version could have a possessive meaning but, in this context, it seems clear that the geographical meaning is intended. And, as I said earlier, the problems complained of by the Plaintiffs in this action are not connected to waters in Canada that cross the border or have crossed the border. They are caused by waters in the United States that pool in North Dakota and do not cross the border.

[46] In this case, I think the common or shared meaning of the two versions for material purposes of these motions is clear.

[47] In other words, I do not see how to avoid the conclusion that the wording of s 4 is sufficiently precise and unequivocal that the ordinary meaning of these words must play a significant role in interpretation. I do not think that the words themselves can support more than one reasonable meaning.

[48] The *Treaty* is attached as Schedule 1 to the *IBWTA* and we know that s 4 is derived from Article II of the *Treaty*. There is some general wording in Article II that supports the Plaintiffs' case in these motions:

> …[B]ut 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.

[49] This provision omits the words "which …would flow across the boundary between Canada and the United Stated or into boundary waters…" in the English version of s 4(1) of the *IBWTA*.

[50] These words, however, have to be read in the context of Article II as a whole, which is clearly intended to assert and confirm that Canada and the United States retain:

> …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...

[51] If Canada diverts waters in their natural channels "on its own side of the line which in their natural channels would flow across the boundary" those waters would have to be flowing south from Canada into the United States. The rights of injured parties are derived from "any interference with or diversion of their natural channel of such waters on either side," but "such waters" can only mean waters which Canada or the United States has blocked on its own side of the border which would otherwise "flow across the border."

[52] I think I have to conclude that Article II of the *Treaty* supports the Defendants' interpretation of s 4 of the *IBWTA*.

[53] As the Defendants point out, the *Treaty* does, in fact, specifically address the actual situation faced by the Plaintiffs as alleged in their Amended Statement of Claim. Article IV of the *Treaty* reads as follows:

| **Article IV** | **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. | Les Hautes parties contractantes conviennent, sauf pour les cas spécialement prévus par un accord entre elles, de ne permettre, chacun de son côté, dans les eaux qui sortent des eaux limitrophes, non plus que dans les eaux inférieures des rivières qui coupent la frontière, l'établissement ou le maintien d'aucun ouvrage de protection ou de réfection, d'aucun barrage ou autre obstacle dont l'effet serait d'exhausser le niveau naturel des eaux de l'autre côté de la frontière, à moins que l'établissement ou le maintien de ces ouvrages n'ait été approuvé par la Commission mixte internationale. |
| 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. | Il est de plus convenu que les eaux définies au présent traité comme eaux limitrophes non plus que celles qui coupent la frontière ne seront d'aucun côté contaminées au préjudice des biens ou de la santé de l'autre côté. |

[54] Significantly, for interpretation purposes, Article IV does not provide for a process whereby injured parties in either country might seek legal redress for any damages suffered if the agreement referred to in Article IV is breached. The Plaintiffs seek to overcome this difficulty by alleging, in effect, that s 4 of the *IBWTA* also encompasses the circumstances referred to in Article IV. But clearly the High Contracting Parties under the *Treaty* conceived of Article II and Article IV as dealing with two distinct situations and there is no indication in the *Treaty*, the acceptance of the *Treaty* by Canada, or in the *IBWTA* that these two distinct situations would give rise to the same rights to injured parties over which the Federal Court would have general jurisdiction. Section 5 of the *IBWTA* gives the Court

> … jurisdiction at the suit of any injured party or person who claims under this Act in all cases in which it is sought to enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act.

[55] The only rights and obligations relied on by the Plaintiffs in their Amended Statement of Claim that are relevant for purposes of jurisdiction are those arising under s 4 of the *IBWTA*. So unless s 4 can be said to encompass rights or obligations derived from Article IV, or any other article of the *Treaty* apart from Article II, there is no basis for the Federal Court to assume jurisdiction other than in the case of injuries suffered as a result of the situation set out in s 4. Section 4 clearly only deals with waters that flow across the international boundary in natural channels. It does not deal with the situation envisaged in Article IV of the *Treaty* where dams and obstructions on one side of the border have the effect of raising "the natural levels of waters on the other side of the boundary," which is the fact situation alleged by the Plaintiffs in their Amended Statement of Claim.

[56] This reading of s 4(1) of *IBWTA* is also supported by the legislative history and Parliamentary debates that accompanied the enactment of the provision into Canadian law. On the record before me, it appears that s 4 has remained substantially unchanged since Bill No. 36 was first enacted in 1911.

[57] Hansard reveals that the House of Commons went into committee to deal with the establishment of the International Joint Commission under the *Treaty*. During this process, various articles of the *Treaty* were discussed.

[58] The Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11 reveal a focus on irrigation issues and the protection of downstream owners who could be injured by upstream diversion. It would appear that Canadian negotiators had been unable to convince the United States to adopt the simple principle of common law that "water flows and ought to be allowed to flow":

> **By the Minister of Public Works:**
>
> Then it provides that:
>
> > Each of the high contracting parties reserves to itself 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.
>
> I may say that that is simply an affirmance of what has always been contended by the United States to be international law, and of what I do not think has been disputed by the jurists of this country, that is to say that so far as the waters which are wholly situate within the country are concerned, that country may make a diversion of these waters and prevent them from flowing into the boundary waters.

…

The United States have contended that it is a principle of international law that any country has the right to divert waters in its own country subject always, I may say, to the question of navigation... This being the view which is taken by the United States and which, so far as I am aware, is not disputed on the part of this country, it is very important to bear in mind that the clause to which I am now inviting the attention of the committee goes on to provide:

> Any interference with or diversion from their natural channels 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 two cases expressly covered by special agreement between the parties hereto.

Therefore, hon. gentleman will see that as to all future cases the citizens of either country are placed in exactly the same position as a riparian proprietor lower down the stream would be placed in regard to any diversion of water by a private riparian owner further up the stream by which his rights would be interfered with. In other words, both nations, by the latter clause of this article, making provision for the recognition and payment by the country whose subject cause the injury, recognize that there would be the same obligation to make payment for that injury as if it was a question between citizens of the same country.

…

It is provided that the people of Alberta shall have the same right to proceed in the courts of the United States as they would have to proceed in the courts of Alberta if the diversion had taken place in Alberta, that is to say the United States will have a perfect right to divert the water yet that diversion must be subject to the right of the person lower down the stream, whether in the United States or in Canada, to the same right of action against the upper riparian proprietor as if both people were subjects of the same country.

…

... I am sure the committee will realize that there are very few cases - perhaps there would never be a case - where this question would arise except in the case of waters which are used for the purpose of irrigation. The question might arise between the inhabitants of Montana, Alberta and Saskatchewan, because a person or company in Montana might divert certain waters which flowed to the northward and use these waters for the purposes of irrigation. The result might be to deprive a Canadian living lower down the stream upon the Canadian side of the boundary of water which would be very necessary for the purpose of irrigation...

…

Diversions are not likely to take place except for your irrigation. There might be some slight diversion in regard to the development of power, but the water so diverted is again turned into the streams, and the flow is not reduced. In the case of irrigation and is different because when water is taken from a stream and used for irrigation it flows over and sinks into the land and is lost to the stream...

- Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11at pp. 870, 871 and 879

**By the Minister of Justice:**

I take, with each one of my colleagues, the fullest responsibility for recommending the acceptance of the Treaty which is under consideration. The question which has to be considered as a practical question, and coming to a conclusion on that point, was, whether or not we were better off with such an international arrangement as this is, then we should be without any at all. It is all very well for the learned leader of the opposition, to cite us the opinion of a very well-known text writer, stating that a nation is not allowed to divert a river which crosses the boundary between its territory and that of another nation, if such diversion will injure property the territory of the down-stream nation. That is a very good principle; it is exactly the principle of law which would be enforced as between an up- stream riparian owner, who was seeking to divert, and a down-stream riparian owner, who was to be hurt by it, if the two properties were in the same country. But how are you going to enforce such a provision of international law - if it be a settled principle of international law - when the property injured is in a different country from that in which the diversion takes place... We thought that, inasmuch as the common law of England is the basis alike of the law of all our Canadian provinces, except Quebec, and of the various boundary states of the United

States, we might well appeal to that common law and might well urge that, just as in either Ontario or any of the border states of the Union no down-stream owner would be allowed to be injured by an up- stream diversion, nor any up-stream owner allowed to be flooded out and submerged by some down-stream obstruction, so the same rule ought to apply in all flowing streams whether flowing out of the United States into Canada or out of Canada into the United States. And, speaking for myself, I will say at once, that I would have been much better pleased if that rule had been applied. But when you are making a bargain of any kind, whether it be an international treaty or a compromise between two individuals, you have got to get the best terms you can secure, and frequently you have to compromise, and do a considerable amount of give-and-take. Now, we could not induce the representatives of the United States in this matter to go the length we would like to go, the length of declaring the principle of common law that water flows and ought to be allowed to flow. But we have induced them to go a considerable distance. Supposing they had been willing to affirm the principle that I have alluded to, and to declare that there should be no diversion, then what would have been the remedy? The right of the down-stream man would have been either to prevent the diversion upstream which would hurt him, or to have compensation paid him for injury if that diversion was allowed to take place. We could not induce the United States to go the length of preventing the injury, of giving our Canadian down-stream owner a right to enjoin the intended diversion up-stream. It was said that no diversion could take place except by legislative authority, no matter whether that diversion was in Canada or in the United States, and it is not right that a sovereign legislature, whether in Canada or the United States, should be restrained from doing what it thinks is in the interest of its people. Therefore there cannot be any question of preventing a diversion if a legislature decides upon it. But wherever a diversion takes place, on whichever side of the boundary, if the effect is to injure the property of a riparian down-stream owner in the other country, we will agree to put that man in exactly the same position he would have been in If there had been no boundary at all...

- Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11 at pp. 908-910

**By the Prime Minister of Canada:**

The view presented by my hon. friend the Minister of Justice will, I hope, on reflection strike my hon. friend the leader of the opposition as the only view which could be accepted by us. I must

> say that it was only after careful and exhaustive consideration on my part that I agreed to accept the Treaty as it has been written... But in this case, whether we liked it or did not like it, the United States had taken the position that international law provides that, except in matters of navigation, the upper power has the right to use the water within its own territory as it thinks best. What were we to do? They might do so, and if they did so, they might do it to our injury and we had no recourse whatever. Was it not wiser, then, under such circumstances to say: Very well, if you insist upon that interpretation you will agree to the proposition that if you do use your powers in that way you shall be liable to damages to the party who suffers. At the same time we shall have the same power on our side, and if we choose to divert a stream that flows into your territory you shall have no right to complain, you shall not call upon us not to do what you do yourselves, the law shall be mutual for both parties and both parties shall be liable to damages. What wiser course could have been adopted? We could have said: Alright, we do not accept your principle of international law. Therefore, we should have no Treaty and the United States could have diverted the waters of Rainy River without our having any recourse whatsoever ... Very well, if you insist upon your view of it we want our law the same as your law and the consequences will be the same on either side.
>
> • Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11 at pp. 911-912
>
> [emphasis added]

[59] I was particularly concerned at the hearing of these motions to review evidence that would explain why the *IBWTA* only provides s 4 recourse to parties on the other side of the border when the interference or diversion prevents water from flowing across the border (the Article II situation), but does not provide rights and remedies to those who suffer injury as a result of the Article IV situation. It seems to me that serious injury or damage could occur in either situation and it is not obvious why legal recourse should be allowed for claims related to Article II but not those related to Article IV. It would seem that Canada would have preferred both downstream and upstream protection but the United States would not agree:

**By the Minister of Justice:**

> ...so the same rule ought to apply in all flowing streams whether flowing out of the United States into Canada or out of Canada into the United States. And, speaking for myself, I will say at once that I would have been much better pleased if that rule had been applied.
>
> But when you are making a bargain of any kind, whether it be an international treaty or a compromise between two individuals, you have got to get the best terms you can secure, and frequently you have to compromise, and do a considerable amount of give and take. Now, we could not induce the representatives of the United States in this matter to go the length we would like to go, the length of declaring the principle of common law that water flows and ought to be allowed to flow. But we have induced them to go a considerable distance.

- Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11 at p. 909

**By the Prime Minister:**

> Americans are very good and very fair neighbours, but they always stand for their own view of things and in this matter they did. They said: This is international law and we do not admit any other interpretation than this one. It was no use to argue with them.

- Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V., 1910-11 at p. 912

[60] So it would seem that the kind of upstream protection which the Plaintiffs think they should have in the present case was not acceptable to the United States, although it would have been to Canada.

[61] It seems to me that the Parliamentary record supports the Defendants' reading of s 4 of the *IBWTA*; it only covers downstream situations where there is interference or diversion of

"waters in Canada" that would otherwise flow across the border into the United Sates (the Article II situation) and not the Article IV situation. This means that s 4(1) has no application to the allegations set out in the Amended Statement of Claim which are concerned with interference, diversion and blockage of waters that have crossed – or have been prevented from crossing – into Canada. It follows that the Federal Court has no jurisdiction to deal with this claim. It is notable that the Plaintiffs have not requested any consent to amend their claim. From this I take it that no amendment can cure the problems set out above.

[62] I come to these conclusions with considerable reluctance. Both sides have expended considerable time and resources in bringing this matter to trial. But there is no point in increasing the expenditure if the Court feels it clearly does not have jurisdiction to deal with the claim.

C. *The Plaintiffs' Arguments*

[63] With considerable learning and skill, the Plaintiffs have urged the Court to adopt a more expansive interpretation of s 4 of the *IBWTA* that would bring their claim within the jurisdiction of the Court. I will attempt to explain in brief why I do not think this is possible.

[64] First of all, I think it is worth stating with regard to my conclusions on these motions that:

a) I make no finding that the Plaintiffs have not suffered injury and loss that should be compensated;

b) I make no finding that the Defendants are not liable in law for the Plaintiffs' losses or that the Plaintiffs are not entitled to the relief they are seeking; and

c) I make no finding that the Plaintiffs have no alternate recourse in Canada where they can pursue their claims. The Court of Queen's Bench of Manitoba is an obvious possibility.

[65] My only finding in these motions is that the Federal Court lacks the jurisdiction to hear the Plaintiffs' claim and to grant the relief sought by the Plaintiffs because s 4 of the *IBWTA* does not cover the situation outlined in the claim whereby waters are blocked in Canada but only after they cross the border from the United States into Canada, or are pooled in the United States and do not cross the border into Canada. It could be that the Federal Court lacks the jurisdiction to hear this claim for other reasons (e.g. because the waters are not blocked in their natural channels) but other reasons are not before me.

[66] The Plaintiffs have brought to the Court's attention general jurisprudence dealing with the interpretation of treaties and the interpretation of statutes. The Plaintiffs point out that "Canadian courts have become receptive to considering legislative history by looking at a wide range of supplementary materials" and that the Court should adopt a "purposive approach" so that "the legislation as a whole and the purpose of the particular provision should be identified and taken into account in every exercise of statutory interpretation." I have no problem in accepting these general propositions and I do note that neither of the Defendants takes issue with them either.

[67] When these principles are applied to the *Treaty*, the Plaintiffs place particular emphasis upon language in the Preamble and the Proclamation which says that the parties wish to make provision, by the *Treaty*, for the inhabitants of either side of the border, including "provision for the adjustment and settlement of all such questions as may hereafter arise."

[68] The Plaintiffs then assert the following:

70. Article 11 of the Treaty then makes it clear that the application of the Treaty is not only to boundary waters but all waters which flow across the international boundary in their natural channels:

> *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.

71. Article II explicitly provides that any interference with or diversion from their natural channels of waters on either side of the boundary, will result in a remedy for those on the other side of the border. It is evident that while there remains jurisdiction and control only for each of the High Contracting Parties and the States or Provinces over the use and diversion on their own side, if they interfere or divert such waters, or some other person within the country does so without right, and injury is caused, the remedy to the injured party is available in accordance with the laws of the country in which the diversion or interference was made.

> 72. Article II does not, as argued by the Defendants, contain any reference and cannot be interpreted to contain a restriction requiring consideration of whether the injured party is upstream or downstream in order to ground jurisdiction.
>
> 73. It is the Plaintiffs' submission that the effect of Article II is supported by Article IV which reads:
>
> > *Article IV*
> >
> > The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not perm it 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.
>
> 74. Article IV provides that Canada and the United States will not permit any dams or obstructions in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the border. The Article cannot be read alone as having no application lo the rights and remedies under the Treaty. It must be read purposively, and in support of the Plaintiffs' interpretation of Article II.
>
> [footnotes omitted]

[69] In my view, the Plaintiffs are misreading Article II of the *Treaty*. The words "such waters" clearly refer to "all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters." On the Canadian side, this can only

mean waters that flow south across the boundary and, on the United States' side it can only mean waters that flow north across the boundary. This is the language that appears in s 4 of the *IBWTA*. On the Canadian side, if the waters did not flow south across the boundary then "diversion" could not give rise to injury in the United States. And if the waters are flowing north across the boundary they are not waters over which Canada has exclusive jurisdiction until after they cross the border and, after they cross the boundary, such waters cannot cause injury in the United States. Waters which pool in the United States and are blocked from crossing the boundary are not "such waters" because they are not waters over which Canada has "exclusive jurisdiction and control."

[70] So, in my view, the Plaintiffs are wrong to assert that Article II provides that "any interference with or diversion from their natural channels of waters on either side of the boundary, will result in a remedy for those on the other side of the border."

[71] I also cannot agree that the effect of Article IV supports the Plaintiffs' position. Article IV deals with an entirely different situation from the one set out in Article II. This is why they appear in separate articles. The Plaintiffs say that Article IV cannot be read alone as having no application to the rights and remedies under the *Treaty*. They say it must be read purposely, and in support of the Plaintiffs' interpretation of Article II.

[72] The truly striking feature about Article IV is that the situation it is intended to deal with is controlled by requiring approval of the International Joint Commission. It does not say, as Article II does, that injured parties will have legal recourse on the other side of the boundary.

Any "purposive" approach to interpretation has to take account of these distinctions. It seems obvious that the High Contracting Parties must have had a purpose for distinguishing these two different situations, otherwise the same language would have been used in both articles.

[73] Section 4 of the *IBWTA* only enacts Article II into Canadian law. It says nothing about Article IV. This is why I cannot agree with the Plaintiffs' assertion that "Section 4 recognizes, and brings into effect in Canada the procedural remedy for the rights under the *Treaty* to those parties in the United States that are injured by interference or diversion of waters in Canada." For reasons already given, I think it is clear that s 4 of the *IBWTA* cannot be read in this way. Article IV leaves the International Joint Commission to approve and deal with dams and obstructions that "raise the natural level of waters on the other side of the boundary…." This is the situation of which the Plaintiffs complain in this action. Article IV does not require Canada and the United States to give injured parties procedural rights in each other's courts. This does not mean that parties in the United States who are injured as a result of situations described in Article IV do not have the right to seek redress in Canada. But it does mean that any such rights do not arise through the enactment of s 4 of the *IBWTA* or any other provision of that statute. By virtue of s 5 of the *IBWTA*, the Federal Court can have no jurisdiction to deal with claims that do not arise (procedurally) under that Act.

[74] The Plaintiffs also argue that the Defendants' interpretation of s 4 of the *IBWTA* cannot be accepted because it would result in an absurdity and would thus offend the general presumption that the legislature does not intend its legislation to have absurd consequences. In effect, the alleged absurdity is that the Defendants' interpretation leaves the Plaintiffs, and

anyone else in their position, without a remedy. They also say it would mean that "North Dakota could construct an obstruction across any international river, including the Pembina River, immediately south of the international boundary" and cause problems in Canada for which there would be no recourse.

[75] There is no evidence before me to suggest that the Plaintiffs, or anyone else in their position in the United Sates, are without legal recourse in the event that their case cannot be pursued in the Federal Court. The Plaintiffs are asserting the torts of negligence and nuisance. I am not ruling that the Plaintiffs cannot pursue these claim in Canada, I am simply ruling that the Federal Court has no jurisdiction to hear them. Nor is there any evidence that if North Dakota obstructed the Pembina River and caused injury in Canada that the injured parties would have no recourse unless the Federal Court assumes jurisdiction. The Plaintiffs' allegations of absurdity are not proven.

[76] The Plaintiffs also say that the Defendants' interpretation of s 4 requires the Court to add words to that provision:

> 89. Additionally, the submissions of both Defendants as to the meaning of section 4 and Article II relies upon language or words that are absent from the provision, and must be added. In essence it would require this Court to amend the section, by both deleting and adding text. For example:
>
> > 4 (1) Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow from Canada ~~across the boundary between Canada and the~~ into the United States or from Canada into boundary waters, as defined in the treaty, except those portions of boundary waters in Canada, resulting in any injury on the United States side of the boundary, gives the same rights and entitles the

> injured parties to the same legal remedies as if the injury took place in that part of Canada where the interference or diversion occurs.
>
> 90. Principles of statutory interpretation again apply to counter this argument. While it is possible to "read down" legislation, Sullivan explains that "in resolving interpretation disputes, courts often reject a proposed interpretation on the grounds that to accept it would require the court to add words to the legislative text".
>
> 91. Had the signatories to the Treaty or the Parliament of Canada intended such a meaning, it would have been expressly stated, as it was in the federal *International River Improvements Act*, enacted in 1955, in which Parliament considered and adopted definitions from the IBWTA including "boundary waters" and "transboundary waters", but defined an "international river" as follows:
>
> "**international river** means water flowing from any place in Canada to any place outside Canada;"
>
> 92. It follows that if Parliament intended to create the distinction argued by the Defendants, they would have amended or enacted section 4 in the same manner as they have in similar federal legislation.
>
> [emphasis in original, footnotes omitted]

[77] As previously explained, no additional words are required to give s 4 the meaning ascribed to it by the Defendants. "Waters in Canada" could only be blocked in their natural channels and prevented from flowing across the international boundary if those waters are flowing south into the United States.

[78] The Plaintiffs also refer to Hansard as an external aid to support their interpretation of the scope of s 4 of the *IBWTA*. They point to language which they say makes it clear that Parliament intended to make provision for the settlement of all questions which are likely to arise involving the rights, obligations and interests of either side, along their common frontier. For example, they

point to Mr. Pugsley's saying that "All this *Treaty* does is to provide an equitable mode for the people of each country to obtain compensation from the peoples of the other country in case their rights are in any way affected" (p 879), and Mr. Aylesworth's explaining that the *Treaty* would place inhabitants on each side of the border suffering injury in the same position as if they were citizens of the country in which the diversion took place:

> 100. The Bill proceeded to second reading in the House on May 16, 191l. In further discussions concerning the Treaty, Mr. MaGrath stated (and quoted from Mr. Pugsley):
>
> > "Now about that principle, which is referred to in my opening remarks, and which is to be applied in dealing with future water questions along our boundary, we find that article 2 of the treaty dealing with streams flowing across the boundary consists of four features. 1st. It provides that each government shall absolutely control the waters within its own boundaries, notwithstanding the fact that they may flow into or from the adjoining country. 2nd. That interests which may be injured on one side of the boundary through the diversion of a stream on the other, that the injured interests may cross over into the other country and seek redress in its courts. In short, that vested rights on one side must be honoured on the other. That is the opinion of the Minister of Public Works, who in dealing with this resolution stated at page 898 of the unrevised Hansard:
> >
> > > Mr. MAGRATH. One more question. I understood the minister's opinion is that under that article, vested rights against a stream on one side of the boundary must be honoured on the other side?
> > >
> > > Mr. PUGSLEY. Exactly, that is the spirit of the treaty, that is what it is intended to provide, and it is giving an absolutely new right to subjects of the two countries.
>
> 101. Mr. Pugsley sometime later in the debate, in further explanation of the amendments to the Bill of the first five sections of the IBWTA, states:

> "Also, it gives us power to make this provision with regard to a citizen of the United States claiming redress in the courts of our own country for any wrong which he may have suffered by reason of the diversion of water where the injury takes place upon the other side of the line. Therefore, it is clear that it is not only the right, but it is our duty to make those provisions which are contained in the first five paragraphs of the amended Bill."

> 102. The Hansard transcripts are therefore helpful to appreciate the understanding of Parliament or the provisions of the Treaty. However, as the submissions were made during the House debates, some care must be taken to appreciate the context in which the speeches were made. Upon a thorough review of the debates, it is submitted that there is no basis upon which to conclude that the exchanges in Parliament change the express wording of section 4 in a manner that removes the right of the Plaintiffs to a remedy in the Federal Court.
>
> [footnotes omitted]

[79] All such general statements have to be read in the full context of the Parliamentary debate during the first and second readings of the Bill. As I have discussed above, the full context makes it clear that it is only Article II of the *Treaty* that is being enacted into Canadian law, through s 4 of the *IBTWA*.

D. *Manitoba Amendment*

[80] The amendment proposed by Manitoba is not opposed because both sides are in agreement that it is not necessary for the purposes of Manitoba's motion to strike. I concur with this assessment.

## VI. Conclusions

[81] In accordance with Rule 221(1)(a) of the *Federal Courts Rules*, I conclude that Rhineland and Manitoba have established that it is plain and obvious that the Plaintiffs' claim as set out in the Amended Statement of Claim cannot succeed in the Federal Court for want of jurisdiction and should be struck.

[82] The Plaintiffs have made no request to amend and the Court is of the view that the jurisdictional problem cannot be cured by way of amendment.

## ORDER

**THIS COURT ORDERS that**

1. The Amended Statement of Claim is struck against both Rhineland and Manitoba and the action is dismissed without leave to amend.
2. The parties may address the Court on the issue of costs for both the action and these motions. This should be done, initially at least, in writing, with the opportunity for both sides to comment upon the costs proposal of the other side.

"James Russell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-745-04 |
| **STYLE OF CAUSE:** | PEMBINA COUNTY WATER, RESOURCE DISTRICT, NORTH DAKOTA, CITY OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF WALHALLA, NORTH DAKOTA, CITY OF NECHE, NORTH DAKOTA, TOWNSHIP OF NECHE, NORTH DAKOTA, TOWNSHIP OF FELSON, NORTH DAKOTA, TOWNSHIP OF ST. JOSEPH, NORTH DAKOTA, TIMOTHY L. WILWAND, DENNIS K. SCHALER, RICHARD MARGERUM AND, VERLINDA MARGERUM v GOVERNMENT OF MANITOBA, AND RURAL MUNICIPALITY OF RHINELAND |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | APRIL 26, 2016 |
| **ORDER AND REASONS:** | RUSSELL J. |
| **DATED:** | JUNE 2, 2016 |

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|---|---|
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