

INTERNATIONAL JOINT COMMISSION

IN THE MATTER OF
THE APPLICATION OF THE MADAWASKA
COMPANY

FOR FURTHER ORDER AND DIRECTION IN
CONNECTION WITH THE OPERATION
OF CERTAIN PERMANENT WORKS
BY THE SAINT JOHN RIVER
POWER COMPANY

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CONNECTION WITH THE OPERATION OF
CERTAIN PERMANENT WORKS BY
THE SAINT JOHN RIVER
POWER COMPANY



BRIEF FOR APPLICANT MADAWASKA COMPANY
By LOUIS C. STEARNS and CHARLES G. POWER, Counsel

BACON PRINTING COMPANY
BANGOR, MAINE
JUNE, 1932

INTERNATIONAL JOINT COMMISSION

In the matter of
the application of the Madawaska
Company for further order and
direction in connection with the
operation of certain permanent
works by the Saint John River
Power Company.

The Saint John River Power Company, a corporation existing under the Laws of the Province of New Brunswick, under an order of the International Joint Commission dated the twenty-eighth day of June, 1926, has constructed a dam and certain permanent works at Grand Falls in the Province of New Brunswick. The order in question is similar to an earlier order granted to the New Brunswick Electric Power Commission. This dam is about three miles from the international boundary and the effect of it is to pond the waters of the Saint John River for a distance of about thirty-two miles. Approximately twenty-nine miles, therefore, of boundary waters are affected.

Many years ago a large saw mill was built at Van Buren about twelve miles by the River above the international boundary. This mill was operated almost continuously until 1925. In that year it was purchased by the Madawaska Company and was thereafterwards continuously operated until the summer of 1930 when it was destroyed by fire. During the summer and fall, however, a new mill was built and has since been in operation. It is a substantial enterprise and furnishes the only industry for the town of Van Buren and vicinity.

When the original order was granted to the New Brunswick Electric Power Commission in 1925 certain rights of the Saint John Lumber Company, the then owner of the mill, were protected in a contract with the Power Commission. Before the new order was granted to the Saint John River Power Company, Madawaska Com-

pany had become owner of the property and a new but similar contract was entered into with respect to certain matters. This contract will be hereafter referred to in some detail.

The old mill was dependent upon the waters of the River for steaming purposes and the new mill is dependent on water for the operation of its steam turbines. When the new mill was constructed the intake pipes to pumps were placed on a level which had always theretofore served the mill adequately. During the summer of 1931, again in January, 1932 and still again within a week of this hearing, however, owing to the management of the water by the Power Company, the complete drawing down of the water at Grand Falls and fluctuations incident thereto, it became necessary to stop the mill.

It is apparent that four questions confront the Commission :

1. Has it jurisdiction to act on this application or complaint.
2. Is the Power Company in default in its obligations under the order.
3. The extent of Applicant's damage.
4. What order may the Commission make.

JURISDICTION.

This Commission exists under the provisions of the treaty between the United States and Great Britain relating to boundary waters, done at Washington on the fifth day of May, 1910. The works at Grand Falls were authorized under applications contemplated under Articles 3, 4 and 8 of the Treaty. The object of the Treaty and the creation of this Commission thereunder are too obvious for discussion, the apparent ultimate end being to protect the interests of the high contracting parties of the Treaty and of the citizens of the respective countries.

It is true that the Applicant here is a private corporation existing under the Laws of the State of Maine. If it sought uses, obstruction or diversion of boundary waters not heretofore permitted and required the approval of the Commission, it would be impelled to first make written application to the Government within whose jurisdiction the privilege is desired. It is our contention, however, that in this case we are properly before the Commission as a private corporation seeking redress for injury and damage sustained through the use and management of Saint John waters by the Power Company acting under a valid order of the Commission.

On page 3 of the Order of Approval, Application, Hearings, Agreements, 1926, the following appears:

“1. This Commission therefore orders and directs that the said plans be and the same are hereby approved, and the construction and operation of works in accordance therewith authorized under the provisions of said Treaty, upon and subject to the following conditions:

“(1) That this Commission reserves to itself the right to take jurisdiction in the instances mentioned in the above mentioned agreements of the Applicant with Bangor and Aroostook Railroad Company and Van Buren Bridge Company, and with Madawaska Company.

“(2) That the said Applicant make suitable and adequate provision, to the satisfaction of this Commission, for the protection and indemnity against injury of all other interests on either side of the boundary.

“(3) That the said works shall have such discharge capacity and be so constructed as to permit of the passage of water at all flood stages in no less quantity than would pass down under natural conditions in the international section of the river, and whenever the flow of the river exceeds the discharge through the power house to such an extent as to cause the ponded level of the water surface immediately above the dam to rise above elevation 427.26 (mean sea level datum)—being the operating level shown on sheet number 3 of said plans—the sluices and other works for the passage of water shall be so operated as to provide for the passage of the river flow until the water level at the dam falls to said elevation.

“2. And this Commission doth hereby reserve to the Applicant and to all parties having claims for injuries in respect of said works other than the parties to said agreement the right to apply for such further order, direction or action with reference to such claims as may seem proper.”

The full text of the contract between the Power Company and the Madawaska Company is appended hereto. For the present discussion a few sections only may be pertinent. As a part of the preamble the following appears:

“WHEREAS said construction and maintenance immediately will cause certain occupation of and injury to the property of the Madawaska Company, and

“WHEREAS said construction and maintenance and the operation of said works may result in certain future injuries to property of the Madawaska Company, and

“WHEREAS the Power Company wishes to make adequate provision for the protection and indemnity of the Madawaska Company with respect to occupation of and injury to its property which it may suffer from the construction and maintenance by the Power Company of such permanent works as may be approved by the International Joint Commission, and from the operation of such works. *****

“1. The Power Company agrees that it will pay the Madawaska Company all damages which it shall suffer of whatsoever name, nature and description due to the raising and maintaining of the level of the Saint John River to the mean level (430) as shown on the plans filed with the International Joint Commission *****.”

Apparently when the contract was executed the sole thought in the minds of the framers was injury which might be caused by flowage, and no consideration was given to the possible injury which might be caused by fluctuation, although it is perfectly apparent that fluctuation might well be more burdensome than flowage. At first blush it might be argued that the Applicant under this contract is without redress except for flowage. The answer to this suggestion lies in paragraph 6 of the contract which reads as follows:

“6. The Madawaska Company hereby grants the Power Company the right to *maintain its dam and works as set out and described by its above mentioned application* to the International Joint Commission and the plans filed therewith, and to flow such of its property as is thereby shown to be flowed.”

The grant by the Madawaska Company under paragraph 6 in consideration of the obligation of the Power Company was that the latter might maintain its dam and works as set out and described in the above mentioned application to the International Joint Commission. Paragraph 6 is as binding as is paragraph 1.

On page 15 of the Order of Approval, Applications, Hearings, Agreements, 1926, the following appears under *Effect of Proposed Works on International Waters*:

“By means of the main dam above described it is proposed to hold the upstream pondage at an operating level corresponding to high water mark at Grand Falls, but at no time above such elevation.

“During the freshet period, the river will rise to high water stage through the ordinary natural process as heretofore, but during the low water period the effect of the dam at Grand Falls *will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high water mark.* The condition described is plainly indicated in the profile sheet, Plan No. III, submitted herewith.

“The upper profile on this sheet indicates the position taken by the water surface during the period of high water flow. As previously mentioned, this purely natural condition will not be interfered with by the proposed dam.

“On the same sheet is shown, first, the natural profile of the water surface under minimum and normal summer stages, and, second, the upstream pondage level which will result from maintaining high water level at the dam itself during all stages of flow.

“It will be seen that at the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream, until at Van Buren, Maine, the ponded level is only twelve feet above low water mark, and about fourteen feet below the natural maximum water level, and finally reaches a point near St. Basil, New Brunswick, where the two levels coincide.”

The Applicant contends that the above constitutes a representation by the Power Company which it had a right to rely on. It is true that a provision was not made for the assessment of damages save for high water level but the grant itself was based on the representation that the level would be as stated above, viz., that the water at Van Buren would be maintained twelve feet above normal low water level and that “this purely natural condition will not be interfered with.” Clearly fluctuations described by Mr. Lacroix are not natural conditions. If the Power Company does not conform to this condition as far as it may within its power, its right to build or maintain its dam as far as the Madawaska Company is concerned wholly fails.

If by any chance there is fallacy in this reasoning that we may come here under the original contract, we maintain that the Commission still has jurisdiction because the rights reserved with respect to the Madawaska Company could not be exhausted by a single con-

tract. The effect of this would be to most seriously penalize the Applicant through a mere oversight by the draftsman of the contract. In this connection it will be noted that under paragraph 2 of the Order, all parties having claims for injuries in respect to said works other than parties to said agreement may apply for further order, direction and action. We say the Commission should look to the substance rather than the mere language of this paragraph. A careful perusal of all the testimony taken will indicate that it was the thought of all parties that everyone's rights should be fully cared for. In connection therewith, note on page 39 of the Order of Approval, Application, Hearings, 1925, the statement of Mr. Lewin :

“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.’

“Now, I submit that the tribunal for the adjudication of these damages and this compensation is your honorable Commission and none other.”

Again please note in the same record on page 66 request by Mr. Hackworth :

“We would like to have a provision incorporated in the order which will make it possible that all interests on the United States side of the boundary which may be adversely affected by the project shall be compensated, and provision made for the construction of any necessary protective works.”

Again, on page 87, Mr. LaFleur :

“I have, and I would be very glad to give you my views. I am disposed to think that you have power to fix indemnity, but supposing you have not that power, I should think the indemnity could be settled by the Exchequer Court of Canada.”

On page 90 of the same record Mr. LaFleur makes this statement :

“Then the second requirement of the United States Government is that all interests on the United States side be compensated. I presume by that my friend meant all private interests. Well, that we are ready to do. We are ready to submit to an order securing compensation to the owners of these lands.”

On page 127 of the same record Mr. Biggar, representing the Dominion Government, makes this suggestion :

“That having regard to that situation it is perfectly clear what the treaty was intended to do. It was intended to avoid such a case as has occurred with the Alberta & British Columbia Irrigation Company to prevent either country carrying out works in a stream which produce the effects in the particular way to which the treaty is limited in the other country which was injurious to people in that country, and to empower the Commission to impose upon the promoters of the works conditions requiring them to pay these damages to be incurred in the other country, and to prevent them from being left without any remedy; but that it did not go beyond that.”

It is true that all this discussion principally contemplated damages caused by the raising of the waters; on the other hand, the Treaty under Article 3 stipulates:

“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.”

Fluctuation or abrupt lowering of the water, or the use of the water, or the affecting of the natural level or flow, is all within the Treaty. If within the Treaty, then it is likewise within the authority of this Commission. It would clearly be within the authority of the Commission if the point were raised by an application through the State Department. We say it is now before the Commission because the works were constructed under its order under certain conditions which have been violated.

POWER COMPANY'S DEFAULT.

Let me refer again to the following:

"But during the low water period the effect of the dam at Grand Falls will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high water mark. *****

"It will be seen that the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream, until at Van Buren, Maine, the ponded level is only twelve feet above low water mark. *****"

What is the proof that there has been default by the Power Company? For many years prior to and from 1925 until the summer of 1931 there was at all times sufficient water in the River to serve the Applicant's pumps. During the season of 1931 and twice since to suit its own purpose and convenience, the Power Company so managed and drew down the water that the Applicant, notwithstanding the expenditure of a substantial sum of money, had to close its mill for eleven (11) days. It might be asked how could water be drawn below the natural level. How this is effected appears in explanation by Lacroix found on page 5 of the Record:

"Mr. Lacroix. When we became short of water to run the four turbines during the dry season, for instance, before closing one turbine they drew the total of the water in the river. It seems that the water is being sucked down so fast that it is not as before the dam was built up. The river was drying, in, say forty days; in the summertime, but now they can dry that river in four or five days. That is what happened last summer, that is what happened in January, and that is what happened last week. Last week they stopped me three days. I brought a complaint. Then they went to Temisquata Lake and opened the gate and filled up their pondage. It seemed that they sucked the water fully from the river before opening the lake to Madawaska. The lake is about sixty-five miles above; and, of course, they are interested in using the water there as much as possible. They suck the river as low as possible."

And again we find on page 10 of the Record:

"Mr. Lacroix. They loaned me a big pump from their paper mill and they put it in the channel way about 300 feet from the mill. They pumped the water to my steam turbines for a few days.

"Mr. Kyte. When they ceased pumping what happened?

"Mr. Lacroix. The river was dry; the channel was far away from the mill, and I could not finish my work, so they loaned me a pump and helped me install the pump in a little narrow space in the river, and we succeeded in drawing the water for awhile. But as soon as the water came up all this work stopped. As soon as they filled up their pond again all this work was out. This was only temporary. Of course, criticism about it was made by the Town of Van Buren because I could not employ their men. This mill has existed for twenty-five years, and there is no record of our having to stop on account of low water. They always found a way to run us around. Now in eight months we have been stopped three times already. We were stopped last August and we were stopped last week. In January, of course, it was during the holiday season, but they dried up the river; if we had not been stopped on account of the holiday we were stopped anyway."

And on page 11 of the Record:

"Mr. Lacroix. Last summer was a dry season. We had a freshet during December, and last November was wet. I do not know what the reason was this winter. We were up against it last week again. It seems that they have got no reserve water to furnish the four turbines. They have three or four turbines rolling, but days come when they can not furnish water for the four turbines. Therefore, they dry the river before stopping one of the wheels. After awhile they have to stop the wheel anyway. Last summer, after the dry season, they had to stop one wheel. They had to stop one of these wheels because the reserve above was not enough.

"It seems to me that they had in mind to dam Fish Lake. However, they did not dam Fish Lake. Therefore, they are going as far as they can, and when they do not see any other way they stop part of their power; but they stop that sometimes a week or two weeks too late for us. If they were stopping a little earlier it might be all right."

In connection with Mr. Lacroix's statements, please note on page 9 of the Record letter from this Commission:

"Dear Sir:

"With further reference to your telegram of August 25, 1931, announcing the closing of the Madawaska Company Mills because of lowering of the water level of the St. John River by the St. John River Power Company and asking if anything can be done towards raising the water level and maintaining the minimum: On August 25, 1931, your telegram was repeated to the Secretary of the International Joint Commission at Ottawa. In response to that telegram a letter has just been received reading in part as follows:

' * * * owing to drought conditions prevailing in Northern New Brunswick the St. John River Power Company has found it inadvisable to maintain the pond above the Grand Falls dam at the upper operating level (elevation 427.26) as fixed by the International Joint Commission in its Order of June 28, 1926. I am informed, however, that the pond is at an elevation in excess of what it would have been under similar conditions of flow before the Grand Falls Dam was constructed.

'Since writing this I have been informed that arrangements have been made by the two Companies whereby equipment will be provided to overcome the difficulties.'

This communication makes obvious the fact that the Power Company apparently claims the right to so utilize the waters as to convene its business without reference to the lawful and legitimate enterprise of the Applicant. We contend that the law of reasonable use as between riparian owners and users of water fully applies in this case. The Saint John River cannot and should not become the property of any one enterprise. With the rights it has acquired from this Commission, it must likewise assume burdens. If by spilling of occasional water the business of the Applicant may be carried on, so long as that water is in the possession of the Power Company it should be spilled. The criterion is not wholly what is advisable for the Power Company but what is best for every one.

The Power Company through its engineer Mr. Acres, as appears on page 46 of the Order of Approval, 1925, made a statement and representation:

"The idea of the regulation is simply this, that while we do not anticipate for the time being to any appreciable extent bettering the maximum of flood stages on this portion of the river,

at the same time we undertake that those stages will not be deleteriously affected. In other words, that the freshet levels will rise and fall naturally in a state of nature as if the works at Grand Falls are not there.

“I might qualify that with this statement, that even with the initial stages of operation there will be some benefit derived by the natural flood stage due to the fact of our natural storage on Temiscouata lake, which is one of the natural basins on the Madawaska river just below Van Buren, and to the extent with which the spring run-off of the Madawaska river is moved in the Temiscouata lake, to that extent will the flood stages in the St. John be benefited.”

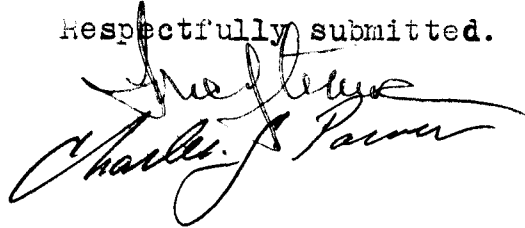
It appeals to us that this is a part of the grant to the Company. As graphically appears from Mr. Lacroix's statements, the construction and maintenance of the works as handled and managed has been a substantial detriment. It is true the Power Company has presented here certain records indicating high and low water mark over a period of years. Without any desire to belittle official records, we cannot but again call your attention to the fact, and it is uncontradicted, that this mill has been operated year in and year out for many years with sufficient water for its engines and to move its logs to the jack ladder. We submit that all these matters and statements set forth in the application and in the records of the hearing are binding upon the Power Company. If there has been breach you have plainly power to act to direct the Power Company to fulfill the obligations which go with this extraordinary grant. We suggest the following relief :

- (A) That the Commission expressly assert its right to supervise the management of the waters of this river, so that all interests on said river may be protected as fully as possible against fluctuations and unnatural water conditions arising through the construction and maintenance of this power plant.
- (B) If by the management of the waters of the main river at Grand Falls unnatural conditions are created, the Power Company must, insofar as it can, remedy these conditions by the utilization of its stored waters at Temiscouata Lake.
- (C) That the Power Company be directed at all times so far as it can through the manipulation of its dam at Grand Falls and Temiscouata Lake to *maintain a level as nearly as it can to the higher operating level* and always higher than low water mark as it existed prior to the erection of the

works; that it so manage its water as to prevent and avoid fluctuation in the level of the water to a greater extent than would exist in the river in its natural state.

- (D) That you may decree that the Power Company reimburse the Applicant its expense incurred to the extent of \$2,000.
- (E) That it pay the Applicant such damages as accrue to it through eleven (11) days shut down of its mill, to be determined by agreement of the parties, if possible; otherwise by the Commission on further hearing.

Respectfully submitted.

A handwritten signature in cursive script, appearing to read "Charles J. Pomeroy". The signature is written in dark ink and is positioned below the typed text "Respectfully submitted."