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Does a US Entity Have a Cause of Action (Cognizable by the Federal Court) where a Downstream Road/Dyke in Canada Serves to Prevent Dispersion of the Natural Flow of a Transboundary Stream? Answer: No

By: Nigel Bankes

Case Commented On: *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 (CanLII)

The Pembina River is transboundary stream. Its geography is as follows (at para 6 of the judgement):

> The Pembina River originates in Manitoba and crosses into North Dakota. It then flows eastwards through North Dakota before joining the Red River, which flows northward back into Canada. Within North Dakota, part of the river is "perched" meaning that it is elevated above the level of the surrounding prairie. When the river overflows these elevated banks, as the appellants allege happens "virtually every year," the water should naturally disperse.

The gravamen of the plaintiffs' claim was that (at paras 5 and 6):

> …. in the relevant areas of southern Manitoba, there is a 99 foot wide road allowance running parallel to the international border. In or around 1940, a raised road was constructed within this allowance. The road [blocks] the flood waters of the Pembina River from crossing into Canada.

The defendants ultimately resisted the claim on the basis that the Federal Court lacked the jurisdiction to consider the matter on the basis that there was no existing body of federal law governing the matter. The plaintiffs relied on the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17 (the *BWT Act*) as the source of jurisdiction. That Act as the title suggests implements the terms of the 1909 Boundary Waters Treaty (BWT) (the text of the treaty is scheduled to the statute) between the UK (Canada) and the United States and in fact does so in uncompromising terms (see at paras 44-45). Thus, s. 2 of the *BWT Act* provides that:

> The treaty relating to the boundary waters and to questions arising along the boundary between Canada and the United States made between His Majesty, King Edward VII, and the United States, signed at Washington on January 11, 1909, and the protocol of May 5, 1910, in Schedule 1, are hereby confirmed and sanctioned.

The *BWT Act* also contains two other relevant provisions:

> **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.
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> **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 enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act.

Both the trial judge and the Court of Appeal ultimately agreed that s. 4 did not intend to create a cause of action for persons in the upstream state (on these facts, in the US) who were affected by an obstruction or diversion in the downstream state (on these facts, in Canada) but was instead only intended to provide a cause of action to downstream interests that were affected by diversion activities in the upstream state. While both Courts made heavy weather of reaching this conclusion simply on the basis of s. 4 of the *BWT Act* this conclusion becomes crystal clear when it is understood that s. 4 was a specific implements provision for Article II of the Boundary Waters Treaty.

Article II provides as follows:

> 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.
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> 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.

The historical record recognizes that Article II embodies a compromise. The first part of the clause (the reservation of rights) is understood to be an articulation of the Harmon Doctrine pursuant to which the upstream state claims the liberty to use and divert the waters of a transboundary watercourse while they remain within its territory. The second part of the clause

(the compromise) affords downstream private parties who might be affected (e.g. a licensed user of water with a high temporal priority) with a cause of action on a non-discriminatory basis.

The BWT did deal with activities by the downstream state that change the level of the waters (either boundary waters or transboundary waters) at the boundary (e.g. a downstream dam such as Grand Coulee on the Columbia River which floods back into Canadian territory) but it did so through Article IV which requires that any such activity must have the approval of the International Joint Commission (the IJC) established by the treaty. The treaty, as Justice Nadon writing for the unanimous Court recognizes (at para 65), did not provide a private cause of action for activities covered by Article IV. Instead it contemplated that the IJC would make a compensation order as part of considering an application to approve a project covered by Article IV. The majority supports this conclusion by pointing out (at paras 71-73) that there is one other instance in which the BWT affords parties the protection of the private cause of action created by Article II and that pertains to any damages that might be caused in Canada as a result of diverting the flows of the St Mary River through the Alberta section of the Milk River. As Justice Nadon points out, this provision (Article VI(2)) would hardly have been necessary if Article II were of general application.

The Court is careful to emphasise that it is not ruling that the US plaintiffs have no cause of action; it is merely ruling that the US plaintiffs have no cause of action under federal law because the *BWT Act* (the only federal law considered to be relevant) did not provide a cause of action on these facts. Therefore the Federal Court could not take jurisdiction over the dispute. The plaintiffs (at para 77) might well have a cause of action under the common law in the Court of Queen's Bench in Manitoba.

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