

THE INTERNATIONAL JOINT COMMISSION  
AND POINT ROBERTS

THE INTERNATIONAL JOINT COMMISSION  
AND POINT ROBERTS: A VENTURE INTO  
A NEW AREA OF CONCERN

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by

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## ABSTRACT

The evolving interdependent nature of the Canada-United States relationship suggests there will exist the need to further search for mutually agreed methods to settle disputes. Whether the International Joint Commission is adaptable to meet contemporary challenges that transcend its traditional concerns is a matter of debate. The Point Roberts reference provides valuable insight into this inquiry. As well, the Point Roberts reference portrays an interesting study into the dilemma facing this community and the dynamics of multi-jurisdictional decision-making processes. The Commission's failure to conclusively resolve the dilemma must be considered in light of the nationalistic overtones of the dispute, the investigative framework erected by the bilateral agency and the set of recommendations proposed by the Commission's advisory board. Although care must be taken interpreting the results from a single case study, the reference does signal both the dangers and potential for the International Joint Commission to become involved with matters outside the realm it has customarily transversed.

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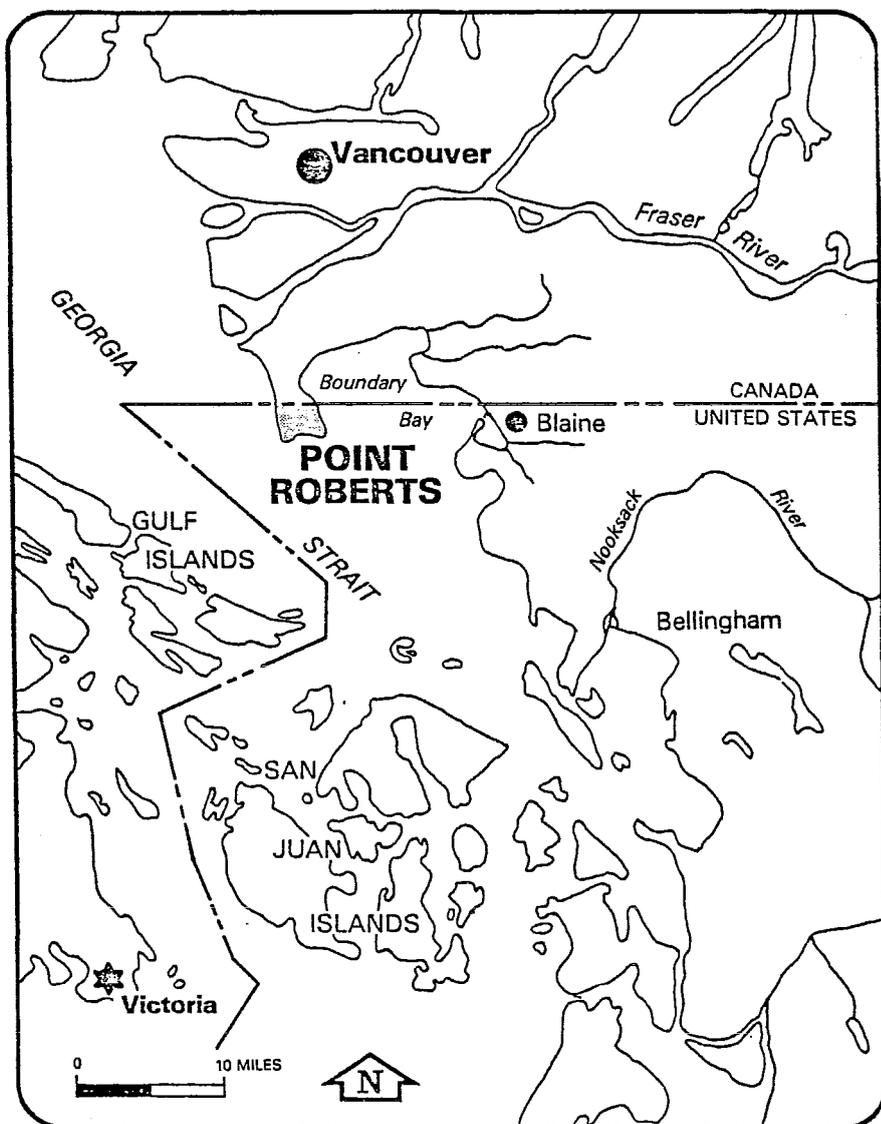
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MAP I: POINT ROBERTS AND ITS ENVIRONS <sup>+</sup>

<sup>+</sup> Richard E. Clark, Point Roberts, U.S.A.: The History of a Canadian Enclave [Bellingham, Washington: Textype Publishing, p. viii.



## I. INTRODUCTION

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### [1] The Canada-United States Relationship

The intimacy, breadth and depth of the relationship make it certain that there will always be problems between our two countries, large as well as small, ... This is a condition of continental cohabitation.<sup>1</sup>

The nature and extent of Canada-United States transnational relations have been the subject of much scrutiny. The magnitude, continuity and complexity of the relationship illustrate the mutual-ity and compatibility of interests between the two neighbouring states. Since World War II, this unique international phenomenon has been documented frequently in a variety of ways in both official and scholarly literature. Such notions as "special relationship",<sup>2</sup> "partnership", and "interdependence"<sup>3</sup> tend to sustain the perception that the relationship is the prototype for international co-operation.<sup>4</sup>

Apart from the notable lack of overt or prolonged conflicts, one of the more exceptional features of the relationship is the common and concerted effort by both countries to face their problems in the spirit of bilateralism. As a result, mechanisms external to the relationship are usually rendered unnecessary for the settlement of their disputes.<sup>5</sup>

The machinery that exists to deal with bilateral differences is in many respects as complex and varied as the relationship

itself. In the first instance, the well-developed diplomatic networks continue to manage the bulk of Canada-U.S. relations with particular regard to the negotiation, bargaining and settlement of binational conflicts.<sup>6</sup> The channels of bureaucratic intercourse, the formal and informal communications between federal, provincial and state authorities, together with the usual interactions of administrative and non-governmental agencies, enhance the binational conciliatory framework. This phenomenon has been labelled the "ideology"<sup>7</sup> or the "diplomatic culture"<sup>8</sup> of the Canadian-American relationship.

In addition, a great many common institutional linkages exist between the two nations. These institutional networks that have evolved over the course of Canada-U.S. relations vary greatly in their nature, powers, and functions. For instance, some of the joint institutions are essentially consultative and as such provide only for casual co-ordination of policies. Representative of this category are the Canada-United States Ministerial Committee on Trade and Economic Affairs as well as the Canada-United States Inter-Parliamentary Group. Others, such as the International Boundary Commission and the Roosevelt Campobello International Park Commission, are purely technical or administrative in nature.

The joint institutions handle a variety of issues of mutual concern.<sup>9</sup> There are currently eight institutions dealing with defence and related matters ranging from the NATO Regional

Planning Group to the Civil Emergency Planning Committee. Four other joint agencies exist to oversee fishing interests while the International Joint Commission has jurisdiction over boundary waters and other matters along the common frontier.

Despite the existence of numerous bilateral agencies, there is an absence of any general and comprehensive institution or formal mechanism for the purpose of resolving disputes and avoiding conflicts. Those institutional networks existing at present tend to accommodate limited and narrow aspects of the Canada-U.S. relationship with the focus on relatively well-defined subject-matter. This permits the joint agencies to achieve a considerable degree of familiarity within their specialised fields of endeavour. F.J.E. Jordon notes the importance of this characteristic since a comparable degree of familiarity "would be difficult if not impossible to achieve at the general diplomatic level."<sup>10</sup> He states further that:

This is not to suggest that such specialised agencies supplant the regular channels of diplomacy; rather, they are supplemental and in many cases provide preparatory services for traditional negotiations and consultations.<sup>11</sup>

Considering the degree to which Canada-U.S. relations have expanded in scope and complexity during the last twenty years, some commentators have argued that there has been a corresponding absence in bilateral institutional growth.<sup>12</sup> In particular, there has been no institutional expansion to deal with

the areas of science and technology, energy and resources, health, education and transportation. It is clear that these are multi-faceted fields whose implications extend beyond traditional department parameters. For this reason, these complicated areas of inquiry may not fit conveniently into the jurisdictional mandates of existing joint agencies.

Although there may be institutional "gaps" within the matrix of the Canada-U.S. relationship, it is doubtful whether new binational mechanisms for dispute settlement and conflict avoidance will be forthcoming rapidly. As John Sloan Dickey and Whitney H. Shepardson state, such initiatives are slow to develop due to two paradoxical concerns:

Canada fears such agencies would be dominated by the United States; the United States fears they would complicate and impede its freedom of action within as well as outside the relationship. Neither country is ready to entrust matters of concern to large new joint authorities. 13

Since it is unlikely that new bilateral agencies will be established, one can only speculate as to the potential for broadening and reforming the jurisdictional prerogatives of the existing institutions.

It is in regard to this desire to fortify existing institutions that the International Joint Commission [I.J.C.] has acquired greater relevance over the last few decades. Of all the existing permanent joint institutions between Canada and the

United States, the I.J.C. is not merely the oldest but further boasts the most notable record of achievement.<sup>14</sup> Since the inception of the I.J.C., the entire domain of boundary waters has been placed under its guidance and influence. The Commission has built a reputation as an impartial and productive body while earning the respect and confidence of the national governments. The I.J.C.'s record of success has been so impressive that some observers have been led to argue that its jurisdiction should be extended to cover bilateral concerns in areas outside its traditional matters of concern.<sup>15</sup>

The I.J.C. was created pursuant to article VII of the Boundary Waters Treaty of 1909.<sup>16</sup> The Treaty outlines the jurisdiction, objectives, functions and the governing principles of the Commission. In effect, the Boundary Waters Treaty established a regime for the management of all boundary and transboundary waters. In creating the I.J.C., the Treaty also provided a mechanism for the investigation of other matters concerning the 5,000 mile-plus Canada-U.S. common frontier.

The continued relevance and durability of the I.J.C. has been due in part to its broad legislative mandate which has permitted the Commission to act as a viable force for dispute settlement and conflict avoidance. In a fundamental way, the Treaty has provided the Commission with the opportunity to respond and adapt, throughout its many decades of operation, to the changing needs and expectations of the national governments. This cir-

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cumstance has led certain authorities to suggest that:

... the Boundary Waters Treaty was only a beginning and that it has, over the years, been a living instrument which has been expanded by the liberal use of Article IX and by other agreements which are supplementary to the Treaty. Through this process of expansion, the concept has developed that there are limitations on what one country can do to another. Each outgrowth of the Boundary Waters Treaty and each new reference to the I.J.C. adds to the institutional framework which is being developed to implement this concept. 17

One of the more significant adaptations the Commission has endured in response to binational needs involves the changing focus of its work. The early perception of the Commission as primarily a quasi-judicial body<sup>18</sup> has gradually given way to the current view that is basically an investigative agency. Prior to 1944, the Commission dealt with a total of forty-nine cases. Thirty-eight of these cases came under the Commission's quasi-judicial powers for approval of certain projects granted under article VIII of the Boundary Waters Treaty. These powers command the I.J.C. to pass upon and render binding decisions on all applications for certain uses of the three classes of water defined under the Treaty: boundary waters; waters flowing from boundary waters; and waters flowing across the boundary.<sup>19</sup> The remaining eleven cases put before the Commission were references for investigation pursuant to article IX. From 1944 to the present, there have been only twenty applications for Commission approval as compared to the total of thirty-five references brought before the Commission.<sup>20</sup> Moreover, this trend towards the exercise of

review  
I.J.C.  
1944-1945

the Commission's investigative function is much more defined when we note that those twenty applications for approval made after 1944 involved issues of relatively minor importance.<sup>21</sup>

The recent trend indicates that references now comprise the major work of the Commission. At least one scholar suggests "this reflects the increased willingness and desire of the two governments to employ the I.J.C. for a widening range of common problems and tasks."<sup>22</sup> Indeed, considering the potential for additional institutional linkages in the Canada-United States relationship, there is some support for the view that the I.J.C. should expand its sphere of influence to cover contentious matters beyond those of boundary waters. As a former chairman of the I.J.C. explains:

The International Joint Commission has established a substantial record of accomplishment in an important area of United States-Canada affairs. It has demonstrated that the machinery devised by the authors of the Boundary Waters Treaty ... is capable of reaching mutually acceptable solutions in one area of our complex relationship. It is not surprising, therefore, that from time to time, proposals have been advanced for extending the Commission's field of action - or at least its method - to other areas of our relations. There is no barrier in the Treaty to such a development. 23

It is precisely this question of whether the I.J.C. should be permitted to extend its "field of action" and which type of issues and areas it should address that is a continuing matter of controversy today.

[2] The Relevance of the Point Roberts Reference

In theory, the I.J.C. may itself possess the legislative mandate required to extend its jurisdiction. However, one may wonder whether, in practical terms, the Commission would be capable of the same degree of success in handling other bilateral issues that it now enjoys with boundary waters concerns. For whatever reason, the I.J.C. has had only limited opportunity to face the challenge of new or different areas outside its traditional field of inquiry. The Point Roberts reference is one of the few such opportunities that presented itself to the Commission.

On April 21, 1971, the national governments of Canada and the United States informed the I.J.C. that they had agreed to request the Commission:

...to investigate and recommend measures to alleviate certain conditions of the life of residents of Point Roberts, in the State of Washington, existing by reason of the fact that the only connection by land between Point Roberts and other territory of the United States is through Canada. 24

The mandate of the Commission was to examine various problems affecting this small community. These matters included customs' laws and regulations, the supply of almost all of the essential services, law enforcement and "any other problem found to exist on account of the unique situation of Point Roberts." 25

At least one commentator on the reference had suggested that the case represented "...a broadening of an I.J.C. investigation far beyond the Commission's traditional concerns...[and marked] an advance in the settlement of United States-Canadian difficulties as well as a welcome expansion of the I.J.C.'s dispute settlement responsibilities."<sup>26</sup> These remarks are lent historical support upon a cursory review of prior Commission casework. Of the some ninety-one dockets handled by the I.J.C. before the Point Roberts reference, almost all of the cases were concerned with the uses or diversion of waters along the Canada-U.S. boundary.<sup>27</sup> Indeed, the only case which seems out of place is the Point Roberts reference. It is plain that the Point Roberts reference represented the first real opportunity for the I.J.C. to enter into a "new area of concern."<sup>28</sup>

It was therefore only to be expected that there would be curious anticipation awaiting the Commission's study of the problems of this tiny U.S. northwest coast community. By 1974, the advisory board appointed by the I.J.C. to study the matter had submitted two reports to the Commission. The advisory board reports recommended, inter alia, the establishment of an international conservation covering approximately three thousand [3000] square miles of both Canadian and American territory.

Later in 1974, the I.J.C. submitted its interim report to the national governments. The I.J.C. therein argued that the

recommendations of the board were completely unsatisfactory to the local residents. This dissatisfaction had been established in the course of the Commission's discussions with local officials and residents in attendance at the public hearings held in the Point Roberts vicinity. The report of the Commission further detailed how the Point Roberts dilemma was anything but resolved.

In the final report [1977] of the Commission, it was stated that little progress had been made on issues pertaining to Point Roberts during the previous two years. In addition, there was no evidence that any significant progress would be made in the foreseeable future.<sup>29</sup>

From the time of the initial announcement that the problems of Point Roberts would be referred to the I.J.C., the reference has come to be regarded as an anomaly. The apparent failure of the Commission to have made any visible headway in the resolution of the dispute seemed only to confirm this perception. Some commentators have suggested that the governments may have been ill-advised to have referred the matter to the I.J.C. in the first place.<sup>30</sup> This argument looks beyond the unique circumstances of the reference and assumes that it was precisely the limitation of I.J.C. jurisdiction to boundary water issues that had been an important element in the successful history of the Commission.<sup>31</sup> According to this view, when it comes to matters outside the realm

of boundary waters, the I.J.C. may be overreaching itself in that its expertise and competence is inadequate to deal with more extensive concerns.

Another view considers the Point Roberts reference to be a success, albeit a limited one.<sup>32</sup> It is argued that the reference may not have reflected properly the potential of the I.J.C. to expand its investigatory mandate. Although the Commission failed to make a proposal that could have led to an ultimate solution, the I.J.C. nevertheless did assess and articulate the various aspects of the situation facing Point Roberts residents while locating those obstacles lying in the path of any near-term solution. This view further holds that, given the appropriate operational reforms, the I.J.C. could in fact accommodate effectively an expansion of its responsibilities that would permit it to handle a wider spectrum of important bilateral issues.<sup>33</sup>

### [3] Purpose and Argument of Thesis

There are many issues arising from the Canada-U.S. relationship which suggest the inadequacy of existing diplomatic and institutional means for settling disputes or avoiding conflicts. It is the purpose of this thesis to examine the potential for the I.J.C. to extend its authority and influence beyond its traditional spheres of involvement so that it might address broader bilateral concerns. This envisaged extension of the Commission's influence would require it to "step out" of its usual ambit of

responsibility and explore new bilateral "terrain". It may be surprising to learn, however, that there has been little opportunity to observe the Commission functioning outside its traditional parameters: To date, there is perhaps only one case in the history of the I.J.C. where it has been asked to explore a non-traditional concern - the Point Roberts reference. In exploring the experience of the Commission with this reference, it should be possible to discern the theoretical and practical difficulties posed by an expansion of I.J.C. responsibilities. It should further be possible to understand why the Commission failed to arrive at a satisfactory solution to the problems faced by residents of Point Roberts.

But before the Point Roberts case may be examined in detail, it will first be necessary to establish the ways in which this reference constitutes an "exception" to the cases normally brought before the Commission. To accomplish this task, it is imperative to clarify the notion of the I.J.C.'s "traditional parameters of concern". This notion gains substance upon review of two aspects of the Commission: the first involves the powers, functions and organisational features of the Commission as conferred upon it by its authorising statute, the Boundary Waters Treaty; the second aspect deals with the evolution in the nature of Commission work over the past seventy-five years. It shall be demonstrated that the Boundary Waters Treaty does in fact provide

the I.J.C. with a broad jurisdictional mandate. It may indeed be stated that, in theory, the Commission can be understood as a general mechanism for dispute settlement and conflict avoidance within the Canada-U.S. framework of relations. However, the practice of Commission work reveals that its broad legislative mandate has remained for the most part an unrealised potential. Further, in delegating matters to the Commission, the national governments have been highly selective in terms of both the nature and subject-matter of the assigned tasks. In general, the Commission has been summoned to consider only those matters that can be characterised broadly as relating to "boundary waters uses". That the matter be "technical" in nature has proven to be another important consideration for the governments in deciding whether to refer cases to the Commission. By insisting that there be some minimum "technical" element to a case, the governments have tried to make better use of the I.J.C.'s fact-finding capabilities as well as its scientific, engineering or otherwise technically-oriented expertise.

The significance of the Point Roberts reference is that it was a case that did not fall within the traditional limits of Commission deliberations. The Point Roberts case involved the I.J.C. in a non-boundary water dispute that required the Commission to venture far beyond the mere technical considerations of the matter.

Once the Point Roberts Reference has been put into proper context in regard <sup>to</sup> the work of the I.J.C., it will be necessary to explore in more detail the dilemma facing residents of Point Roberts. In order that the work of the Commission be assessed properly, it will be essential to investigate the underlying historical, economical, and social basis of the Point Roberts peninsula. This, in turn, will help explain the process by which the Point Roberts case came to be referred to the Commission and the actual manner in which the I.J.C. conducted its investigation of the reference.

It shall be demonstrated that the geographical peculiarity of the Point Roberts peninsula, isolating it in physical terms from the United States, raised a political question ultimately. This question was what level of government ought to be responsible for the well-being of the community, a quandary that was all too familiar to Point Roberts residents. In the early 1950's, the general problem surfaced over how this tiny U.S. community could survive an increasingly dominant Canadian presence.

With the announcement of the Point Roberts reference, the I.J.C. was faced immediately with a seemingly intractable situation. Its objective would be nothing short of reconciling local animosities and conflicting priorities among various jurisdictions that had been smoldering for over twenty years. The board the I.J.C. appointed to investigate the situation attempted to by-pass the stalemate. The board proposed the creation of a three-thousand [3000] square-mile international conservation area.

This international arrangement would feature a binational administrative nucleus encompassing the troubled 4.9 square miles of Point Roberts. The residents of the community, however, perceived this plan as tantamount to surrendering Point Roberts to Canada. As a result, the board's proposal was rejected overwhelmingly by the residents, the people most affected by the plan, as soon as it was released to the public.

The proposal for the creation of an international conservation area failed to gain community support for a variety of reasons. In general terms, it was simply too disproportionate a remedy to the problems it was proposing to solve. Further, the plan failed to guarantee the specific and fundamental demand of the residents: that Point Roberts remain an autonomous community of the United States.

Yet these deficiencies of the proposal go only part way in explaining its rejection. From the beginning of its work at the Point, it would appear evident that the I.J.C. failed to recognise the extraordinary nature of the reference in comparison with previous casework. The Commission failed to adjust to the non-technical nature of the reference - it could not adapt its problem-solving capabilities to the substantive issues of the case.

The concluding chapters of this thesis shall illuminate some of the lessons to be learnt from the Point Roberts reference. The importance of this case is not limited to whether

the I.J.C. was able to resolve the difficulties of a small coastal community. The reference, as a unique case brought before the Commission, was interpreted initially as evidence of the willingness of the national governments to extend the influence of the I.J.C. to other areas of the Canada-U.S. relationship. However, the inability of the Commission to recommend any solutions for the governments to consider crushed the optimistic hope that the reference might be the harbinger of a trend. Indeed, from the time the Commission concluded its work under the reference, the Point Roberts case has come to be regarded as an anomalous and unsuccessful experiment. It has provided empirical support for the view that the I.J.C. should restrict itself to areas of proven competence.

It shall later be argued that the Point Roberts reference offers clear warning of the dangers issuing from an expansion of I.J.C. responsibilities beyond its traditional parameters of concern. However, it would be premature to conclude from the experience of Point Roberts that the Commission should not enjoy a wider role in Canada-U.S. affairs. The failure of the I.J.C. to resolve this particular dispute cannot be explained entirely by the mere fact that the case did not pertain to boundary waters. Rather this failure must be attributed to the inapplicability of the Commission's customary problem-solving techniques. When it proceeds under a reference, the I.J.C. is applying those methods designed for the impartial study and investigation of factual

material. From its findings, the Commission is to prepare recommendations for the consideration of the national governments. Yet, at Point Roberts, the need for an impartial investigation of fact was peripheral to the main thrust of the reference. By delegating to the I.J.C. the task of recommending solutions to the Point Roberts matter, the governments were expecting it to assume a far more interpretive and decisive role than it had played previously. But the nature of this expected role was inconsistent with the design of the I.J.C. to conduct itself as an investigative agency. In the end, the reference tells us very little about how the Commission could perform, were it so oriented, in a non-traditional situation. However, the case does expose the dangers in employing the I.J.C. to operate beyond the scope of its investigative techniques.

In sum, the question still remains open as to whether the Commission is adaptable to other bilateral issues where its techniques are more appropriate. The necessary implication of this proposition is whether Point Roberts was in fact a proper case for the I.J.C. to conduct a trial expansion into non-traditional areas.

#### [4] Methodology

This thesis is presented as a case study. All efforts were made to reconstruct the facts, circumstances and various positions of the interested parties at the time of the reference. A substan-

tial amount of material was obtained from the files on the Point Roberts reference kept at the offices of the International Joint Commission in Ottawa, Ontario. Included in this material were the various reports made by the Commission and its advisory board together with the voluminous transcripts of the I.J.C. public hearings held in the Point Roberts vicinity in 1973. Of course, it should be mentioned that not all of the files have been made public and were thus unavailable for study. However, the library of the Commission provided ample and excellent material with respect to other cases that have come before it. Attempts were also made to locate and contact various members of the I.J.C.'s board but were of only limited success. Fortunately, a member of the board as well as a former Commissioner of the I.J.C. itself were kind enough to provide insight into the Point Roberts reference.

Further, several Members of Parliament from the Province of British Columbia were contacted, including Donald Munroe, Benno Friesen, Tom Siddon, and R.L. Wenman. Mr. Wenman was a member of the British Columbia Legislature prior to and during the time of the reference.

Various residents, organisations and officials of the Point Roberts vicinity were similarly contacted. Carolyn Price, editor of the Point Roberts and Delta communities' newspaper, The Ocean Star, very graciously made current as well as past copies of the newspaper available. Richard E. Clark, a local histo-

rian, was also very helpful in referring both his published and unpublished socio-historical works on Point Roberts. Discretion shall be employed when noting communications from other organisations and residents of the Point. However, it is submitted that a wide range of opinions were fully enunciated at the public hearings held by the Commission.

Finally, a wealth of other secondary sources was used in the preparation of this thesis including books, journals and newspaper articles, all of which are noted appropriately.

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18. Charles Dunlop, "The Origin and Development of the International Joint Commission as a Judicial Tribunal" [M.A. Thesis, Queen's University, 1959], pp. 20-1.
19. Boundary Waters Treaty, Preliminary Article.
20. William R. Willoughby, "Expectations and Experience: 1909-1979", in The International Joint Commission Seventy Years On, eds. Robert Spencer, John Kirton and Kim Richard Nossal [Toronto: University of Toronto Press for the Centre for International Studies, 1981], p. 29; International Joint Commission, Annual Report-1978 [Ottawa-Washington, 1978], Appendix.
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24. International Joint Commission, Docket No. 92, "Terms of Reference", April 21, 1971, p. 1.
25. Ibid.
26. Peter S. Smedresman, "The International Joint Commission and the International Boundary and Water Commission: Potential for Environmental Control Along the Boundaries", New York University Journal of Law and Politics 6 [Winter 1973]: 507.
27. International Joint Commission, "Annual Report - 1978", Appendix. Maxwell Cohen, "The Regime of Boundary Waters: The Canadian-U.S. Experience", Recueil des Cours 146 [1975]: 219.
28. Jordon, "Canada-United States Boundary Relations", p. 539.
29. International Joint Commission, Docket No. 92, "Final Report", August 16, 1977, p. 1.

30. International Joint Commission, "Summary of Seminar", p. 6; Willoughby, Joint Institutions, p. 59..
31. James Eayres, quoted in Hugh H. Keenleyside et al. eds., The Growth of Canadian Policies in External Affairs [Durham, N.C.: Duke University Press, 1960], pp. 63-4.
32. Private communication with a former Commissioner of the International Joint Commission. 28 March 1982.
33. John E. Carroll, "Patterns Old and New", in The International Joint Commission Seventy Years On, p. 80.

## II. THE INTERNATIONAL JOINT COMMISSION - A MECHANISM FOR SETTLING DISPUTES AND AVOIDING CONFLICTS

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A close look at the Commission's record of success... reveals that it has been a rather special kind of success. The Commission is...a well-behaved caged and tame animal; it is brought out only on occasion but only when it is safe and there are no children around to be eaten up. <sup>1</sup>

Throughout its long tenure, the International Joint Commission [I.J.C.] has acquired an impressive record of success. It has earned and sustained its reputation as a neutral and impartial body and has thereby gained the confidence of the Canadian and American governments. On this basis, one might imagine the Commission to be capable of playing a greater role in the binational institutional framework. It has already been suggested that the Point Roberts reference may have represented an attempt to project the I.J.C. into this expanded institutional role.

Consequently, the importance of the Point Roberts reference is that it was a case where the Commission was faced with a set of problems outside of its "traditional parameters of concern". It was very much a "test case" irrespective of whether national governments actually perceived it as such. The success of this particular case may have inaugurated a new era in the history of the I.J.C.. But before the Point Roberts case can be examined in its proper context, we must first understand why the reference should

be seen as an anomaly. We may determine what is "irregular" with respect to the normal purview of the I.J.C. by discussing the "regular" business of the Commission. It is precisely the purpose of this chapter to investigate what has been referred to as the "traditional parameters of concern" of the I.J.C.

The preliminary step in explaining these traditional parameters involves a review of the legislative and institutional framework within which the I.J.C. operates. It will be made clear that, in theory, there exist no legal or jurisdictional impediments to the I.J.C. in assuming a broader function in matters affecting Canada-U.S. relations. Both the intent and provisions of the I.J.C.'s enabling statute, the Boundary Waters Treaty,<sup>2</sup> suggest that the I.J.C. is to provide a general mechanism for dispute settlement and conflict avoidance in the bilateral relationship.

However, in practice, it will be found that the Commission has instead, in the course of its work, evolved into a specialised agency. This specialised agency has, in turn, evolved gradually from its role as an adjudicative tribunal [considering applications for the use, obstruction and diversion of boundary waters], into a far more investigative body [with an emphasis on environmental concerns] in recent years. Yet, for the most part, the evolution of the I.J.C.'s work has been circumscribed neatly. The Commission has failed to extend its authority beyond those matters that

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pertain to boundary waters. Similarly, the Commission has failed to transcend the scientific and technical orientation implicit in its work throughout its history. It is these two factors and their necessary implications that give meaning to the notion of the I.J.C.'s "traditional parameters of concern". Consequently, these two factors provide the primary basis for distinguishing between the normal purview of the I.J.C. and the Point Roberts reference.

#### 1. The Origins and Intent of the Boundary Waters Treaty

It is clear that the Boundary Waters Treaty established by the I.J.C. was the product of a mutual realisation reached by Canada and the U.S. It was a shared perception that there existed a manifest need for a formalised and permanent method of resolving "boundary waters" problems. The Boundary Waters Treaty was preceded by almost a hundred and twenty-five years of a series of treaties, beginning in 1783, that established and regulated the uses and navigational rights of boundary waters.<sup>3</sup> Towards the close of the nineteenth century, Canada and the United States confronted a number of difficulties involving their common lakes and rivers. This circumstance prompted a call to find some formalised method to deal with such questions.<sup>4</sup> As early as 1894, T.S. Dennis, a Canadian delegate to the International Congress, urged the U.S. to appoint, in conjunction with Canada, a joint international commission to settle conflicting rights and claims to international streams.<sup>5</sup>

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Although the suggestion was not acted upon immediately, the Rivers and Harbors Act of 1902<sup>6</sup> led to the establishment in 1903 of the I.J.C.'s predecessor, the International Waterways Commission. This new joint agency began operations in 1905 with a composition of three Canadian and three American officials. The mandate of this new commission was "to investigate and report upon the conditions and uses of waters adjacent to the boundary line in the Great Lakes and the International Section of the St. Lawrence Seaway."<sup>7</sup>

By 1906 the International Waterways Commission was facing several persistent controversies. These matters before the commission included: a dispute pending from 1888 concerning the Lake of the Woods; problems regarding the use of water for irrigation purposes from the St. Mary and Milk Rivers; disagreements over use of waters of the St. Mary's River at Sault Ste. Marie;<sup>8</sup> a dispute involving the diversion of the Niagara River; and various problems concerning the proposed diversion of tributary boundary waters in Minnesota.<sup>9</sup> It soon became obvious from the size of this "caseload" that the Commission's "advisory" functions were inadequate to the task of settling the existing and potential conflicts over water resources along the U.S.-Canada border.<sup>10</sup>

Although the Waterways Commission submitted many different reports on various controversies,<sup>11</sup> its most significant contribution was its call for the establishment of a set of principles applicable to all diversions and other uses of boundary and trans-boundary waters.<sup>12</sup> The proposed method for satisfying this need

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was enunciated by two members of the Waterways Commission itself: George Gibbons, Chairman of the Canadian Section, and George Clinton, a member of the U.S. Section. They suggested that a bilateral treaty be drafted to outline the rules and principles that would govern the settlement of contentious boundary water issues. They further envisaged the creation of a permanent commission to be given a wider mandate than that of the Waterways Commission. It would be the function of this newly-charged commission to apply the principles laid down in the bilateral treaty and to settle boundary water disputes accordingly. <sup>13</sup>

More importantly, Gibbons, impressed with the results of the Hague Conferences of 1899 and 1907, believed that such a forum ought to have the capacity to deal with issues other than boundary waters alone. Gibbons declared that the new agency should be empowered to adjudicate matters at issue "along the common frontier" and any other general dispute between Canada and the United States. <sup>14</sup>

Eventually the need for a permanent mechanism for settling boundary water disputes was recognised officially. However, it was not until 1908 that the primary negotiators - Gibbons, Clinton, James Bryce [British Ambassador to the United States], and Eliha Root [U.S. Secretary of State], reached a concensus as to the nature of the powers to be given to the proposed binational agency. <sup>15</sup>

The outcome of the negotiations was the proclamation of the

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Boundary Waters Treaty in 1909. The Treaty produced an innovative and unique mechanism for the resolution of bilateral conflicts. It was evident that the primary purpose of the long-awaited Treaty was the creation of a permanent commission. This commission would be responsible for the application of the principles established in the articles of the Treaty pertaining to the use, diversion and obstruction of boundary and transboundary waters. Moreover, the jurisdiction of the new agency was not confined to boundary water matters. Instead, largely due to Gibbon's role in drafting the Treaty, the commission was granted a more general dispute settlement jurisdiction. The Preamble to the Treaty declares that the purpose of the Commission would be not merely to "...prevent disputes regarding the use of boundary water...", but also,

...to settle all questions which are now pending between the United States and ... Canada involving the rights, obligations or interests of either ... along the common frontier, and to make provisions for the adjustment and settlement of all such questions as hereafter arise...

As a result, there came into existence the capability to resolve binational problems through the deliberations of a permanent tribunal whose mandate supplemented pre-existing channels of diplomacy.<sup>16</sup> The Treaty provided for an agency that enjoyed a broad jurisdictional mandate within an institutional framework that was, as one commentator suggests, "...far more sophisticated than perhaps any comparable piece of bilateral machinery then

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existing in Western society...[including]...even the successful Rhine and Danube commissions which had been functioning since the 1860's." 17

It is Article VII of the Boundary Waters Treaty that establishes the International Joint Commission. It is to be composed of six commissioners, three of whom were to be Americans appointed by U.S. President, and three Canadians appointed upon the recommendation of the Governor-in-Council. The Canadian and American Sections of the Commission are each required to appoint one of their respective members to serve as a co-chairman.

Certainly an important element of the Treaty was the establishment of a set of principles governing the management of boundary and transboundary waters. The Treaty effectively creates a regime for the administration and development of boundary water resources.

It is important to note, however, that the drafters of the Treaty believed that the new bilateral agency would be successful only if it were founded upon the principles of equality and parity between the two separate nations. As Dr. Maxwell Cohen, former Canadian chairman of the I.J.C., explains,

...here was an asymmetrical relationship between a small Canada, still almost semi-colonial, and a great power, which together in 1909 were able to devise a system to create symmetry in the relationship of the two countries...through the theory of equality on the Commission and equality on the boards in the field... 18

It was further understood that the Commission was to be founded

on the notion of its internal unity, of its "singleness" in operation, of its independence from U.S. or Canadian government interference.<sup>19</sup> It is agreed generally that the work of the I.J.C. has been free of nationalistic considerations and has operated objectively to obtain the best solution to matters of common concern to both countries. Further, the Commission "...acts, not as delegates striving for national advantage under instruction from their respective governments, but as members of a single body."<sup>20</sup> This has permitted the development of an "esprit de corps", both among the I.J.C.'s own personnel and among the many public servants, engineers and other experts who serve on its various technical and advisory boards.<sup>21</sup>

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The fundamental concepts implicit in the Boundary Waters Treaty have enabled the I.J.C. to carry out its mandate successfully. The Treaty precepts have proven very wise in allowing the Commission to "depoliticise" many sensitive bilateral issues, a necessary step before serious negotiations can, in most instances, begin.<sup>22</sup>

In sum, there is little doubt that the Boundary Waters Treaty, despite the specificity of its usual title, was not intended to limit its applicability to matters of diversion or obstruction of boundary or transboundary waters. Rather it was envisaged to offer an institutional framework within which bilateral matters of a general nature could be addressed. Let us then investigate

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this multi-purpose role of the I.J.C. in attending to Canada-U.S. concerns. We may best illustrate this general function by reviewing the specific powers and responsibilities that the Treaty bestowed upon the Commission.

## 2. The Powers, Functions and Organisation of the I.J.C.

The role given to the I.J.C. under the Boundary Waters Treaty asserts the functional adaptability of the Commission. The I.J.C. is mandated to act in four basic capacities pursuant to its administrative, quasi-judicial, investigative and arbitral powers.<sup>23</sup>

Under article IV of the Treaty, the Commission is to act as an "administrative body" with respect to the measurement and apportionment of two transboundary rivers, the St. Mary and Milk Rivers. These two rivers had been the source of numerous disputes dating back to the nineteenth century owing to competing boundary irrigation interests. Not only do the rivers flow from Montana into Alberta, but the St. Mary's River actually recrosses back into the United States after flowing some two hundred miles through Canada. Article IV of the Treaty specifically addresses this anfractuous matter by laying down the principles that the I.J.C. is to follow in settling the conflicting water claims. One author even goes so far as to suggest that article IV might well be considered a treaty within a treaty.<sup>24</sup> The primary principle enunciated is that both rivers are to be treated "as one

stream for the purpose of irrigation and power" and are to be apportioned equally between the two countries.<sup>25</sup>

It should be understood that, in the early years of the Commission, there were arguments over the interpretation of certain words and sentences contained in article IV that emerged from an application submitted in 1914.<sup>26</sup> Moreover, Robert Lansing, then U.S. Secretary of State, challenged the I.J.C.'s authority to construe disputed provisions and declared that his government would not be bound by any Commission order pursuant thereto. Nevertheless, the I.J.C. issued an order on 4 October 1921 that did just that without attempting to interpret the controversial provision. While the U.S. government requested in 1927 that the apportionment issue be re-opened, it was not until 1932 that the I.J.C. finally brought the matter to a vote after heated debate. In this instance, contrary to whatever objectivity and "depoliticisation" had prevailed previously, the Commission vote split strictly according to national lines. The two governments, realising that the I.J.C. would be unable to resolve this crisis, promptly established a two-man engineering board, the St. Mary's and Milk Rivers Board, which then became responsible for the effective distribution of the water of the two rivers. All reports of this board and any disagreements that emerged were then to be referred to the I.J.C. Since that time, the administration of these waters has not been at issue.<sup>27</sup>

The International Joint Commission is also vested with those quasi-judicial powers pursuant to articles III, IV, and VIII of the Boundary Waters Treaty. These articles empower the Commission to pass upon all cases involving the use, obstruction or diversion of boundary and transboundary waters when the result is to alter the flow of boundary waters or to "raise" the natural level of transboundary waters. <sup>28</sup>

Article VIII also provides "guiding principles" the Commission is bound to observe when considering applications for approval of projects that come under articles III and IV. First, both countries are deemed to enjoy "equal and similar rights in the use of waters" on their own sides of the boundary. Second, article VIII enunciates an "order of precedence" applying to various uses of the waters that the Commission must observe in the event of a material conflict between competing uses. This ordering of usage priorities ranks domestic and sanitation purposes first, navigation second, and only then allows for power and irrigation uses to take precedence. <sup>29</sup> Finally, the I.J.C. is empowered to make its approvals conditional on either the construction of remedial or protective works, or on "adequate and suitable compensation." These provisions for remedy and redress are intended to protect and indemnify interests on either side of the boundary that are adversely affected by a project given Commission assent. <sup>30</sup>

That indemnification is possible against "injury of any interests" is immensely significant. The last paragraph of article IV, yet to be mentioned, states that boundary and transboundary waters "shall not be polluted on either side to the injury of health or property on the other". By virtue of these relatively straightforward words, the Commission has been able to involve itself in, and contribute significantly to, the whole ambit of environmental law, research and investigation. This important element in the role of the Commission will be discussed in greater detail later. <sup>31</sup>

The Boundary Waters Treaty did not prescribe any rules of procedure for the Commission to follow. Instead, the I.J.C. was left to adopt its own rules provided they were "in accordance with justice and equity".<sup>32</sup> The rules of procedure that the Commission came to adopt have evolved from a formal set of rules to a more flexible and informal procedural code. <sup>33</sup>

Pursuant to article VIII, a majority decision is required before an application or decision can be rendered. If a majority cannot be obtained, a separate report by each Section of the Commission shall be submitted to their respective governments. <sup>34</sup> The two governments are then to try to reach an agreement which in the event is obtained will subsequently be given to the I.J.C. for the execution of the provisions of such an agreement. It might also be noted that once the Commission has rendered a decision,

there can be no appeal on a matter of fact or law.

It is generally agreed that the I.J.C. has handled the applications put before it "with a commendable measure of neutrality and impartiality".<sup>35</sup> One author has been so impressed by the conduct of the Commission that he has felt compelled to state that it deserves the "complimentary appellation of 'North America's International Court of Justice'".<sup>36</sup> Only a few of its decisions have not received unanimous approval<sup>37</sup> indeed, most of its findings have been lauded.

However, it is only fair to observe that there have been exceptions to this record of harmonious and praiseworthy conduct.<sup>38</sup> One such instance involves the application made by the City of Seattle in 1941.<sup>39</sup> The City of Seattle applied to the I.J.C. for permission to increase progressively the height of the Ross Dam on the Skagit River, the effect of which would have been to flood 5,475 acres of land in British Columbia. The Commission approved this application on the condition that the City of Seattle reach a compensation agreement with the government of British Columbia. This agreement was to provide for the indemnification of private interests and the Province of British Columbia against the discomfort and damage caused by the flooding.<sup>40</sup>

Despite repeated attempts,<sup>41</sup> however, the necessary compensation agreement was not signed until 1967. Since that time, there has been continued opposition from political and environmental

lobbyists in both countries which condemned the proposed flooding. The objections of these opposition groups led the governments involved to request, in 1971, the I.J.C. to issue a report under its investigative powers on the environmental impact of the project.<sup>42</sup> In its 1971 report, the Commission raised a number of questions as to the suitability of the project given the prevailing attitudes and needs that had come to light.<sup>43</sup>

Finally, in 1980, the British Columbia government requested formally that the I.J.C. re-open deliberations on the original 1942 Order of Approval.<sup>44</sup> The request for a review of the decision was premised on the argument that the original finding to approve raising the dam was no longer valid since the environmental impact had never been considered. It was argued further that the 1967 compensation agreement failed to provide for "suitable and adequate" compensation against the ecological damage to be caused by the flooding. Today, despite some signs of progress, this dispute remains unresolved.<sup>45</sup>

It is very difficult to criticise the I.J.C. for approving the original 1942 application since at that time the environment issue was of no consequence.<sup>46</sup> However, one might doubt the wisdom of making approval of the application conditional on a compensation agreement.<sup>47</sup> That it required twenty-five years before such an agreement was reached between the City of Seattle and the provincial government is ample testimony to the short-

sightedness of the Commission's decision. It seems plain that the I.J.C. ought to have set a deadline for the conclusion of any such agreement failing which the matter would be returned before the Commission. It might also be suggested that the I.J.C. should have insisted that the compensatory agreement itself be subject to Commission ratification, thereby permitting a review of the suitability of any arrangement.

The Ross Dam case has raised several difficult jurisdictional questions for the I.J.C. For example, does the Commission have the authority to review its own decisions? Did the I.J.C. have authority under the provisions of the Treaty to itself fix compensation when the case first came up in 1942? As a general rule, the Commission had left such a complicated and sensitive task to the Canadian and American governments. But is this of any help or does it merely prolong the settlement of this and other disputes? Whatever conclusion is to be drawn, the Ross Dam case, one of fifty-four cases the I.J.C. has considered under its quasi-judicial powers, is one of the few that has precipitated any serious criticism of Commission operations.

The administrative and quasi-judicial powers of the I.J.C. assign to it a "specific" jurisdiction<sup>48</sup> with respect to boundary and transboundary waters. The Commission is further provided with appropriate guiding principles that are to be applied in the discharge of its responsibilities. But aside from this, the Treaty

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further grants the I.J.C. a "general" jurisdiction, under articles IX and X of the Boundary Waters Treaty, that need not relate to the uses of boundary waters.

Pursuant to article IX, the I.J.C. has jurisdiction to examine and report on "...any questions or matters of differences arising ...involving the rights, obligations, or interest of either... along the common frontier." In other words, as long as the matter pertains to the "common frontier", there are no limitations on the Commission's power to investigate questions of fact or law involved in any dispute or problem.<sup>49</sup> It is important that we make it clear at this point that these reports that may be submitted to the respective governments are not decisions. In this instance, the Commission is charged to apply its investigative machinery to the task of providing governments with I.J.C. reports that may serve as a basis for negotiation of treaties and other bilateral arrangements. Commission reports so requested may further help Canadian and U.S. governments to formulate policy and make decisions. There is considerable scope for the utilisation of I.J.C. submissions given that the investigative machinery is already in place. In the event, however, that the I.J.C. Commissioners cannot agree upon a joint report, it may still prove useful for both majority and minority reports to be submitted to both governments. 50

The I.J.C., while acting under its investigative powers, is generally not given any principles to follow in the

conduct of its studies. However, there are some exceptions to this situation. Often it is the case that national governments will prescribe rules under the Commission's terms of reference. Also, when a reference relates to boundary and transboundary waters, the Commission must be guided by the principles laid down in the Boundary Waters Treaty.

Another limiting factor is the procedure for procuring a Commission study. Here it is clear that the investigative machinery of the I.J.C. can be activated only at the request of the national governments themselves.<sup>51</sup> This is more restrictive than the Commission's quasi-judicial powers where governments or individuals can make applications to the Commission.<sup>52</sup>

Until 1964, it was not certain whether a reference to the I.J.C. could be initiated by only one government. Then the new Rules of Procedure<sup>53</sup> went into effect and clarified matters by stating that a government may indeed act alone in presenting a reference to the Commission.<sup>54</sup> In practice, however, there seems to have emerged a tacit understanding that, unless an extraordinary situation comes to pass, all references are to be joint or complementary.<sup>55</sup>

Once the Commission has received its terms of reference, notice of the forthcoming investigation is published and an advisory board selected. Unlike other bilateral agencies, the I.J.C. has looked traditionally to other agencies, various academic institutions, and to state, provincial and local governments in addition to the national governments for the experts required to help

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it meet its responsibilities.<sup>57</sup> The advisory boards that are thus staffed by experts from other institutions and organisations fulfill a function analogous to that of control boards appointed by the Commission to ensure compliance with its orders of approval.<sup>58</sup>

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Upon appointment, the advisory board is directed to conduct its own thorough investigation of the facts of the case involved and to subsequently file interim and final reports with the Commission. These reports, upon review and publication by the I.J.C., provide a basis for discussion once the Commission itself begins public hearings in each country in the locality of the area involved. Following a review of the proceedings of the hearings and reports, the Commission is then ready to prepare its own report.

In many respects the advisory boards are similar in structure to the Commission itself. Members of the boards are to act not as representatives of their agencies - whether local, state, provincial or federal - but as international civil servants and professional experts in their own specialised fields of endeavour.

Each nation has equal membership on each board and on each of their subordinate task forces or study committees where appropriate.<sup>59</sup>

There are several advantages enjoyed by the I.J.C. in its reliance upon other agencies and outside technical personnel in the conduct of its studies or its supervision of orders of approval. The Commission is thereby enabled to involve itself in an almost unlimited number of broad and technically sophisticated

fields without the necessity and expense of creating a large permanent organisation. One commentator has suggested that "...without the use of the I.J.C.'s unique technical board procedures, neither side would have the confidence in each other's proposals, and the resolutions of the problems might be needlessly hindered by endless debate about facts, effects and opportunities." <sup>60</sup> Furthermore, the arrangement enhances Canada-U.S. cooperation outside the conventional diplomatic arena by giving all concerned levels of government "a greater awareness of what is happening along the boundary and has consequently improved the planning process." <sup>61</sup>

Practical considerations have shown, however, that since the personnel recruited are only part-time, studies have taken longer than necessary. <sup>62</sup> Also, there exists the possibility of a conflict of interest between most board members' responsibilities to the I.J.C. and those to their respective government organisations or agencies. This problem has, fortunately, remained only an idle suspicion and not an active concern. <sup>63</sup>

Observation of I.J.C. operations would suggest that the success of its staffing policies and the excellence of its studies can best be attributed to the highly technical nature of Commission work. The empirical considerations that are involved has tended to promote objectivity and impartiality - qualities that are much demanded and commonly supplied by the I.J.C. and its constituent boards.

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Finally, under article X of the Boundary Waters Treaty, the I.J.C. is empowered to arbitrate "any question or matter of difference" in Canada-U.S. relations arising along the common frontier or not. However, such jurisdiction will rest only with "the advice and consent of the U.S. Senate" and "the consent of the Governor-General-in-Council". Once jurisdiction is established, a majority of the I.J.C. is given the authority to render a binding decision on any matter so referred. If a majority decision cannot be reached, either joint or separate reports shall then be submitted to each government. Following this the matter is referred to an umpire chosen in accordance with article XLV of the Hague Convention of 1907 for the Pacific Settlement of International Disputes. The umpire then renders a final decision.

Perhaps the most interesting aspect of the Commission's arbitral power is that it has never been exercised. There seems to be no clear consensus why this has been so. It has been suggested that the requirement of Senate approval,<sup>64</sup> especially "in light of the political history of the exercise of the 'advise and consent' powers of the Senate", is too much of a precedent-setting situation for the Commission to be vested with jurisdiction.<sup>65</sup> No doubt the binding nature of the arbitral power, implying the requisite surrender of sovereignty, also constitutes a hindrance. Others have suggested that Canadian-American relations have been so cordial during the formative years of the I.J.C. that no need has arisen for an appeal to the arbitral provisions of the Treaty.<sup>66</sup>

However, this latter view seems difficult to accept as several important disputes including the "I'm Alone", Trail Smelter<sup>67</sup> and Gut Dam<sup>68</sup> cases were submitted to ad hoc arbitral tribunals or negotiated through established diplomatic channels. A wiser view is that the national governments have been reluctant to delegate to the Commission those sorts of disputes that might divide the I.J.C. along national lines and thereby impair its effectiveness in other areas.<sup>69</sup>

It is also true that there have been moments in the history of the Commission, for example the period from 1942 to 1962, when there have been two or less commissioners with legal training.<sup>70</sup> The argument follows that a government might not under such circumstances have confidence in the ability of the Commission to adjudicate certain matters. This is one reason given by the U.S. in accounting for its refusal to refer the Trail Smelter case for arbitration.<sup>71</sup>

Finally, national governments may simply prefer to rely on the investigative powers of the Commission and the resulting reports that are submitted for governmental consideration rather than use the arbitral functions of the I.J.C. itself. By referring an issue to the I.J.C. for examination and report, the governments not only retain their decision-making authority, but further initiate an impartial and skilled fact-finding inquiry. This investigative process may disclose the extent to which a consensus

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may be reached and ultimately help to depoliticise the issues under review.

### 3. The I.J.C. in Practice

From the discussion found in the last subsection, it would appear evident that, in theory, the I.J.C. is vested with broad jurisdiction in the realm of Canada-U.S. relations. Nonetheless, there are certain identifiable characteristics and operating patterns that are common to the usual work of the Commission, save for some exceptions. The vast majority of cases brought before the Commission has been confined to matters concerning boundary water resources. But this circumstance points to the common feature running through the work of the I.J.C. - the technical orientation of the casework. The Commission has been required consistently to undertake scientific, economic and engineering studies of varying depth and detail. These investigations have been necessary irrespective of whether the Commission has been required to apply the principles of the Boundary Waters Treaty in its deliberations over applications [under its quasi-judicial powers] or to make recommendations [under its investigative authority]. The I.J.C. has also been required to deliberate at a higher level of abstraction in being asked to make policy recommendations [e.g. when studying the competing uses of river and lake basins]. It is these two characteristics - the similarity of subject-matter and the common technical problems associated

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with these cases - that allow us to draw a preliminary distinction between the Point Roberts reference and other work of the Commission. It is necessary, however, to develop a better understanding of the subject and nature of the Commission's traditional concerns before the differences between such work and the Point Roberts case can be explored in the next subsection.

The early years of the I.J.C.'s work were concerned primarily with those applications submitted by private and public bodies that related to various water-use potentials. The proposals for single-use developments on boundary and transboundary waters have covered a wide range of issues. Some of the proposals concern the application for permission to construct a dam, placing log booms in a river, or dredging a navigation channel to gigantic hydro-electric developments. Over seventy-five per cent of the cases prior to 1944 were pursuant to the Commission's quasi-judicial powers for approval of certain projects under article VIII of the Boundary Waters Treaty.<sup>72</sup> As F.J.E. Jordon notes, in such cases "the Commission's concern is not determining the 'best' use for which particular water should be put or with considering the overall development of water resources...". Rather, the Commission is only to direct its attention to the proposed water use in accordance with the rules and principles laid down in the Boundary Waters Treaty.<sup>73</sup>

Many of the applications submitted to the Commission grew out of the gradual development of hydro-electric power. This develop-

ment witnessed the need for the construction of flood-control dams and possible alternative water uses such as irrigation and domestic needs.<sup>74</sup> Almost forty cases have been brought before the I.J.C. directly or indirectly concerning these various water management issues. This pattern persisted even though power generation was assigned a low priority in the "order of precedence" of uses enunciated under article VIII. The primary role of the Commission in the consideration of applications is twofold: to ensure that the projects do not unduly interfere with the higher priority uses; and that the affected riparian interests are protected.

Although such applications may be considered to be single-purpose projects, the range and magnitude of projects involving hydro-electric power generation have been immense. These projects may be separated conceptually into those regarding the approval of a dam for a small mill and alternatively those "mega-" projects such as the development of the St. Lawrence River. In regard to this latter project, the national governments requested the I.J.C. in 1920 to undertake a major study and thereupon recommend the best plan for the development of the St. Lawrence river for power and navigation uses.<sup>75</sup> In 1922, the Commission recommended the full development of the waterway as well as plans for the joint and integrated navigation and power projects.<sup>76</sup> It was not until 1952, however, that the national governments filed joint applications to the Commission for the massive St.

Lawrence power and seaway projects.<sup>77</sup> The Commission approved this joint application subject to the following conditions: adequate indemnification and protection of injury arising from the construction and operation of the works; and the safeguarding of interests of future developers for water power downstream and the riparian interests upstream that would be affected by changes in water levels. Further, the work was to be constructed and supervised under the auspices of the International St. Lawrence River Board of Control to ensure compliance with the order of approval.

However, the massive St. Lawrence River project should not be allowed to overshadow the multitude of more routine applications for development of hydro-electric power. For example, the development of the Columbia-Kootenay River system has been the subject of numerous applications to the Commission since 1929. At that time, the West Kootenay Power and Light Company of British Columbia submitted an application for approval of a power dam on the Kootenay River in B.C.. The effect of the proposal would have been to raise the river level in both B.C. and the State of Idaho. After initial opposition from upstream interests due to the adverse effects of the elevated water levels, an order of approval was issued in 1938. This order was conditional on the payment of compensation to the State of Idaho for any remedial measures required to protect upstream farmlands. The Internation-

al Kootenay Lake Board of Control was also established by the I.J.C.. Since that time, six supplemental applications have been forwarded to the Commission in regard to the Columbia-Kootenay River system.<sup>78</sup>

There have also been other types of application submitted to the Commission concerning competing uses of boundary waters. The protection of navigational rights was at issue in applications made in 1912 and 1916. Here the concern was with the location of log booms along the Rainy River.<sup>79</sup> In 1913, the Commission considered a proposal for the diversion of boundary waters of Shoal Lake to Winnipeg for domestic uses.<sup>80</sup>

Only one application has come before the Commission with a direct bearing on fisheries. In 1923, the State of Maine sought Commission approval of an order requiring two dam operations to reconstruct and maintain fish ladders on the dams so as not to impede the upstream passage of migrating fish.<sup>81</sup> However, since there is no mention of the protection of fisheries in article VIII of the Boundary Waters Treaty, the Commission was confined to consider whether the proposed "fish ladder" project would raise the levels of boundary waters. Having found that this was not the case, the I.J.C. approved the State of Maine proposal over the objections of the dam operations that the costs of this project were prohibitive.

Following World War II, the general nature of the casework undertaken by the I.J.C. has been of a rather different orientation.

From 1944 to the present, over sixty percent [60%] of the cases submitted to the Commission have come under the mandate of its investigative powers.<sup>82</sup> These references have generally required the Commission to conduct extensive technical, scientific, or economic feasibility studies with respect to proposed uses or diversions of boundary waters.

For example, the I.J.C. was given two references pertaining to the Champlain waterway. The intent of the two references was to have the Commission investigate the advantages of a deep navigational channel connecting the St. Lawrence River to New York City via Richelieu River, Lake Champlain and the Hudson River.<sup>83</sup> The latter of the two references resulted in a 1962 report issued by the International Champlain Waterway Board. This report stated that an improved commercial waterway would not be of sufficient advantage to warrant the requisite development project.<sup>84</sup>

In the region of the Prairies, there have been four references with respect to water apportionment requiring the Commission to settle conflicting interests over the diversion of scarce water supplies for irrigation purposes.<sup>85</sup> Further, there have been some twenty cases involving conservation measures for international waters. In an attempt to preserve and enhance the scenic beauty of Niagara Falls, international boards have considered three references requiring the preparation of various technical

and engineering studies to evaluate alternative strategies.<sup>86</sup>

Perhaps the most discernable aspect of the Commission's own work since World War II has been the need for the I.J.C. to consider the multiple uses of boundary water resources. The Commission has been compelled often "...to attempt to devise a plan of development or control which provides for the optimum beneficial uses of water resources of the basin from an international point of view."<sup>87</sup> As such, the Boundary Waters Treaty fails to enunciate any precise principles that might be of assistance to the Commission in this task. It has been left for the disposition of the Commission itself to establish those principles guiding co-operative development of water resources. In effect, the I.J.C. evolved into an international water resources planning agency. This circumstance requires that the Commission become more active in formulating policy on broad and complex cases than is otherwise necessary in its handling of single-use projects.<sup>88</sup>

The Columbia River basin reference of 1944 illustrates the magnitude of the I.J.C.'s role in multi-purpose resource development. In this case, the Commission was asked to determine the desirability and practicality of further development of the water resources common to the Columbia-Kootenay water system. This reference was intended to have the Commission consider a variety of bilateral concerns, including: [a] domestic water supply and sanitation; [b] navigation; [c] efficient develop-

ment of water; [d] control of floods; [e] needs of irrigation; [f] reclamation of wet lands; [g] conservation of fish and wildlife; and [h] other beneficial public purposes.<sup>90</sup>

The International Columbia River Engineering Board, under the direction of the I.J.C., subsequently conducted extensive engineering, technical and economic studies. These studies served to identify the affected interests, the costs of the projects proposed, and the indemnification and the apportionment of costs between the two governments.<sup>91</sup> A massive report incorporating all this information was not submitted until 1959 whereupon the governments decided to enter into direct negotiations on a treaty aimed at securing co-operative development of the basin. This Treaty was concluded in 1961 and provided several important principles applying to downstream benefits.<sup>92</sup> In essence, the Treaty provided for benefits to the United States of increased water storage and flood control in return for American compensation to Canada of one-half the downstream power. The provisions incorporated into this Treaty were in strict accordance with the principles established by the I.J.C..

The St. Lawrence Seaway and power projects together with the Columbia River basin developments provide ample evidence of the critical role played by the Commission in the broader base planning of boundary waters. Both projects owe their completion to the preparatory work undertaken by the I.J.C.. More recently,

the Commission was again involved in a major river development project in the case of the Pembina River basin reference [1962] in southern Manitoba and North Dakota. However, the governments have yet to act upon the recommendations of the I.J.C.,<sup>93</sup> leaving the work of this reference in a vacuum.

With the completion of several enormous projects, the era of the great boundary/transboundary hydro-electric developments may have come to a close [save for a few exceptions].<sup>94</sup> With this passing of a developmental phase, there has been a similar evolution in the work of the I.J.C. over the past twenty years. This metamorphosis has proceeded gradually alongside an increasing emphasis on environmental concerns. Two interdependent goals can be found to have emerged from the course of the I.J.C.'s evolution: first, the Commission has sought to achieve improved water level regulation and greater flood control in two sensitive areas - the Great Lakes and the Richelieu and Champlain valleys; and second: the need for the study and surveillance of water and air quality together with pollution control at various points along the common frontier.<sup>95</sup>

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It should be noted that although some of the references still to be discussed are subsequent to the Point Roberts case, they nevertheless reflect a trend whose origins antedate the appearance of the Point Roberts reference.

Owing to the appearance of extremely low water levels in the Great Lakes, the two governments requested jointly in 1964 that the I.J.C. ascertain the causes of the water level fluctuations in the Great Lakes basin.<sup>96</sup> They also asked the Commission to make recommendations that would help achieve a more beneficial range of water levels for such boundary uses as power and domestic supply, navigation, sanitation, fish, wildlife and related concerns.

It was not until 1976, however, that the board established by the Commission pursuant to the reference actually submitted its report.<sup>97</sup> This comprehensive study reflected the gravity of the problem in that it was necessary to provide extensive regulatory plans as well as voluminous scientific, social, and economic research. But with the persistence of water level fluctuations, the governments once again in 1977 asked the I.J.C. to consider additional means of improving the management of water levels and flows in the Great Lakes.<sup>98</sup> The Commission was requested specifically to determine the potential of limited regulation of Lake Erie and the resulting impact on the Great Lakes as a whole and on the St. Lawrence River basin. Also, the Commission was required to examine the effects of existing and proposed diversions and further to assess the impact of foreseeable patterns of consumptive uses on water levels and flows.

There is little debate that the bulk of present Commission work is devoted to the investigation and study of transboundary

pollution. When the Boundary Waters Treaty was negotiated, however, water quality or air pollution was certainly not the primary concern of the framers.<sup>99</sup> Thus the only reference the Treaty makes to pollution is found, somewhat out of place, in article IV,<sup>100</sup> and reads as follows: "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."<sup>101</sup>

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It is ironic that one of the first references submitted to the I.J.C. under article IX required the Commission to investigate and report on boundary water conditions both in the Great Lakes basin and elsewhere along the international boundary.<sup>102</sup> In 1918, the Commission issued a report calling for urgent action. This report recommended that the two national governments confer jurisdiction upon the Commission to regulate and prohibit trans-boundary pollution.<sup>103</sup> A draft convention was thereupon submitted which was to have provided the I.J.C. with important regulatory and investigative powers. It was further stipulated that findings of fact made by the Commission would become "final and conclusive", thereby obligating the governments, if found in violation of article IV, to act so as to remedy the offending conditions. As matters turned out, this draft document was soon thereafter rejected,<sup>104</sup> preventing any statutory extension of Commission powers.

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Apart from the above Great Lakes reference, the pollution issue did not appear on the agenda of Commission work prior to the World War II era. The only exception to this involved an air

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pollution problem that the Commission considered in the Trail Smelter arbitration. 105

In the years following WWII, the Commission was given a multitude of references associated with pollution problems. The first of these cases appeared in 1946 with the so-called Connecting Channels reference.<sup>106</sup> Under the terms of this reference, the I.J.C. was empowered to investigate and report on pollution problems concerning the St. Clair River, Lake St. Clair, the Detroit River, the St. Mary's River, and also [added later in 1948] the Niagara River.

In 1950, the Commission submitted its report to the governments.<sup>107</sup> This report recommended "urgent action" due to the seriousness of the pollution from the discharge of domestic sewage and industrial wastes. The Commission also issued two other recommendations of significance. First, the governments were urged to adopt "Objectives for Boundary Water Quality Control". These objectives were to serve as minimum criteria for maintaining boundary waters in such a condition as to comply with the obligations specified in the Boundary Waters Treaty. Second, to ensure that these objectives would be met, the Commission further recommended the establishment of control boards to maintain continuous supervision of boundary waters pollution and to make periodic reports to the Commission on the state of such pollution. 108

In this instance, the I.J.C. report was in fact adopted by the national governments in 1951. Subsequently, two advisory boards were established, one for the Superior - Huron - Erie connecting channel section, and the other for the Erie - Ontario connecting channel section.<sup>109</sup>

Although, by the mid-1960's, the mechanisms for providing solutions to water quality problems had gradually come into place, it had become clear that water quality standards were meaningless without government enforcement. This conclusion was supported by the reports submitted by the International Advisory Boards that had been created following the 1950 Commission recommendations.<sup>110</sup> Although these reports maintained that some progress had been made in controlling pollution in the Connecting Channels, the boards had nevertheless found that the Water Quality Objectives of the Commission were not being satisfied.

It should also be noted that in the time between the Connecting Channels reference and the mid-1960's, several other references pertaining to water quality had been submitted to the Commission. The boundary or transboundary waters included in these references were the St. Croix River, the Red River, the Rainy River and Lake of the Woods, in addition to Lakes Erie, Ontario, and the international section of the St. Lawrence River [Lower Great Lakes Pollution reference].<sup>111</sup>

Under the terms of the St. Croix River, Red River, Rainy River and Lake of the Woods references, the I.J.C. set up various advisory boards whose studies were incorporated into the final Commission reports later submitted to the national governments.<sup>112</sup> All of these final reports, including significant provisions for water quality standards as well as a supervisory mandate for the Commission to monitor these and other standards, were subsequently adopted. This constituted an important achievement of the Commission in the developing fight to control pollution of waterways.

With respect to the Lower Great Lakes Pollution reference, the I.J.C. established two technical advisory boards - the International Lake Erie Water Pollution Board and the International Lake Ontario - St. Lawrence Water Pollution Board. The I.J.C. and its subordinate agencies thereupon proceeded to conduct one of the most intensive and comprehensive investigations of water pollution anywhere to date.<sup>113</sup> Also involved in these studies were twelve agencies of the national governments, the four states and the Province of Ontario. These investigations required the services of several hundred scientific, engineering and technical experts to carry out the work of the Commission. Eventually, the advisory boards would submit ten semi-annual reports, two interim reports, and then a massive final report to the I.J.C. in 1969.<sup>114</sup> In turn, the Commission itself made three interim reports to the national governments, followed by the submission of the final I.J.C report in 1971.<sup>115</sup>

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This report provided extensive discussion on all aspects of the Lower Great Lakes pollution problems. It also proposed a series of general water quality objectives while making twenty-two specific recommendations for actions required of both governments. 116

It should be noted that the list of recommendations did not merely request the usual technical-scientific evaluations and necessary remedial measures be taken, but took a step further in asking that the U.S. and Canadian governments,

...specifically confer upon [the] Commission the authority, responsibility and means for co-ordination, surveillance, monitoring, implementation,...reporting recommendations to governments...and the Commission be authorized to establish...international board or boards to assist it in carrying out these duties...117

On the basis of these water pollution references and through negotiations between all concerned levels of government, the Great Lakes Water Quality Agreement was signed in April of 1972. 118

In articles II and III of the Agreement, several general and specific water quality objectives are outlined respectively, establishing "minimum desired levels of water quality". Article IV sets out measures and programmes designed to achieve these standards and further sets deadlines for the implementation of these programmes. But, more importantly, article VI describes the responsibilities of the Commission in the process of implementing the Agreement. These responsibilities include: surveil-

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lance of water quality; monitoring the state of compliance with Canadian-American agreements as well as making recommendations of corrective measures; tendering advice to international governments; assisting in co-ordination of joint activities envisaged by the Agreement; and water quality research and submissions of annual reports. These responsibilities are, of course, very familiar to the Commission. It should be remembered that they are very similar to the duties conferred upon the Commission following adoption of the reports on the Connecting Channels, St. Croix, Rainy and Red Rivers.

However, article VI of the 1972 Agreement conferred additional powers upon the I.J.C.. For example, the Commission could now use its own initiative to prepare special reports on any problem of water quality throughout the Great Lakes System. Further, it was specified that the Commission could, at its discretion, publish any document or report that it had prepared in the discharge of its function under the Agreement. The I.J.C. could also now conduct independent verification of any data submitted to it by the various governments.

Although the Agreement fails to establish any new international legislative or enforcement machinery, it did, however, enhance the powers of the I.J.C. to a significant extent and in a number of important respects. First, the Great Lakes Water Quality Agreement widens the jurisdictional mandate of the Com-

mission with respect to pollution concerns. It has already been noted that the only reference to pollution in the Boundary Waters Treaty appears in article IV which prohibits pollution without defining the term "pollution". Certainly the 1972 Agreement does not implant any new principle of international law on the liability of a state vis-a-vis its fellow [co - water basin] states in the event of injury caused by water pollution. However, the Agreement supplements in implicit fashion the still-operative article IV of the Boundary Waters Treaty by defining "pollution" through the enunciation of water quality objectives. Polluted water may be so described when it fails to pass the given standards of water quality. Once pollution has been thus defined, the concept becomes not merely a guide for governmental conduct, but further permits the identification of non-compliance. This identification process in turn allows governments to invoke the provisions of article IV on a more legitimate basis. Consequently, the 1972 Agreement, despite the lack of direct legislative effect of its own creation, nevertheless does exert an indirect legislative force by virtue of reviving article IV of the 1909 Treaty. Hence the suggestion of one commentator that the 1972 Agreement "breathes life into Article IV".<sup>119</sup>

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Second, the 1972 Agreement solidifies inter-governmental mechanisms for dispute resolution existing outside the political forum. The Commission is entrusted with the responsibility for

co-ordination of all water quality programmes and investigations for some seven state, provincial and federal jurisdictions. It was also accorded the right to prepare and publish reports on its own initiative, as well as to conduct independent reviews of government-submitted data. These manifold responsibilities provide for greater opportunity to improve binational communication and conciliation processes. The net effect of this is to confirm the role of the I.J.C. as the primary intergovernmental agency handling the aforementioned matters. Once this role is fully recognised, the implicit potential for the Commission to exert its authority in provoking government action becomes all the more obvious.

Since the 1972 Water Quality Agreement, there has been continual emphasis on the environmental work of the Commission. This environmental focus of the I.J.C. has been further enhanced by the recent Great Lakes Water Quality Agreement of 1978.<sup>120</sup> This particular agreement is essentially a more comprehensive and forceful version of the 1972 accord. The 1978 Agreement reaffirms the joint commitment of Canada and the United States to the preservation of the Great Lakes, a commitment implicit in the 1972 Agreement. Perhaps the most notable feature of the 1978 accord is that it takes a different philosophical stance in the presentation of an "ecosystem" approach.<sup>121</sup> This approach recognises that the causes and effects of pollution are not restricted to the actual boundary waters. This is clearly a more sophisticated

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account of the pollution issue than the "man-in-a-system" concept inherent in the 1972 Agreement. The ecosystem interpretation gives the 1978 accord a far more expansive outlook that can better capture the complex nature of the problem. The new agreement accepts that transboundary pollution of the Great Lakes basin is the end result of land-based human activities in the area surrounding the Great Lakes. Consequently, the 1978 Agreement encompasses an area that is more than twice the size of the boundary waters themselves. It further recognises the hazards of airborne pollutants.<sup>122</sup>

In sum, there has been a gradual evolution in the concerns and activities of the I.J.C. from the time of its inception to the present. Over the last seventy years, the Commission has evolved in response to the changing economic and social needs of the two countries.<sup>123</sup> In the early years of the Commission, the emphasis was on its quasi-judicial function that consigned the I.J.C. to adjudicating mostly single-use applications with respect to the use, diversion and obstruction of boundary waters. In general terms, the course of this early Commission work followed the gradual growth in the binational use of boundary waters for hydro-electric, irrigation, and navigational purposes. Following the Second World War, the Commission dealt with an increasing number of references that involved a broader definition of the notion of boundary water "uses". But it was more significant that these references required the Commission to undertake far more complex studies of situations involving competing uses of such waters.

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The change in emphasis, from applications pertaining to the quasi-judicial powers to those references applying to the investigative powers, in the work of the Commission held implications that went beyond mere procedural differences. Whereas the former applications demanded that the Commission devise as well as apply certain vital principles to particular situations, the multi-purpose projects submitted under the references required the I.J.C. to supplement these principles concerning competing uses of boundary waters.

However, as the era of great transboundary and boundary hydro-electric power projects drew to a close, the Commission again witnessed a gradual change in the emphasis of its work. This evolution came in response to new sets of binational needs and imperatives. Although the Commission's concern with environmental issues had some roots in its formative years, these environmental concerns were established and solidified under the Great Lakes Water Quality Agreements of 1972 and 1978. These two agreements represented a natural evolution in the work of the Commission, for it had already gained enormous expertise in boundary water matters as well as the respect and confidence of the national governments. It should also be mentioned that the changing nature of Commission casework had in no way diminished its authority and influence with respect to non-environmental concerns. This point is particularly evident in Commission involvement in the important area of Great Lakes water level regulation.

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[4] The Anomaly of the Point Roberts Reference

The question still remains as to the extent to which the Point Roberts reference deviates from the usual ambit of Commission work. When the Point Roberts reference was announced in 1971, it was readily apparent that the Commission was facing a novel challenge. At issue was the fate of a small U.S. community. Although it rests below the 49th parallel, Point Roberts is cut off from the rest of the United States by a quirk of geography and the location of the British Columbia/Canada international border. The I.J.C. was thus requested to study the problems of the community that issued from the fact that the only connection by land existing between Point Roberts and the nearest U.S. territory was through Canada. The Point Roberts community was continually beset with difficulties relating to customs laws, the supply of almost all essential services, law enforcement and other matters - all the product of its contradictory geographic and political elements. The Point Roberts reference would come to be recognised as a potential source of new responsibility for the investigative apparatus of the I.J.C.. However, commentators have failed repeatedly to explain the basis for supporting the view that the reference constitutes an extension of, or deviation from, the traditional responsibilities of the Commission.<sup>124</sup>

It thus becomes necessary to explain those characteristics which distinguish the Point Roberts reference from the mainstream of cases that have come before the Commission. Since empirical study is the surest means of sustaining either pro or contra arguments with respect to extension of Commission powers, it is vital that scrutiny be paid to the case that perhaps best exemplifies how the I.J.C. operated in a non-traditional role.

The failure of most authorities to account for the differences that separate Point Roberts from other cases may be a function of the vague and implicit conception of the operating parameters of the Commission. It is commonly stated that the I.J.C.'s "traditional parameters of concern" simply refer to those subject-matters that have been historically associated with the Commission - i.e. those matters pertaining to the use and management of boundary water resources.

This conception of the "traditional parameters" of Commission work is not at all difficult to appreciate. After all, more than ninety percent [90%] of the applications and references put before the I.J.C. to date have been confined to matters relating to the use, diversion, or obstruction of boundary and transboundary waters. However, the notion that the traditional parameters of Commission concern refer solely to boundary waters issues must be considered as an incomplete criterion upon which to distinguish the Point Roberts reference. Apart from Point Roberts, there are

at least seven other cases scattered throughout Commission history which deviate from the subject-matter of boundary waters. Illustration II more specifically categorises the various matters that have come before the Commission. It may be appropriate, at this stage, to review these other exceptions briefly.

The most common subject-area of Commission casework that does not pertain to boundary waters is that of air pollution. Beginning with the Trail Smelter case of 1928,<sup>125</sup> there have been four such cases to date. This case was followed by references in 1949 and 1966 that involved air pollution in the Windsor-Detroit and Detroit-St. Clair River areas respectively.<sup>126</sup> Finally, the most recent air pollution reference was brought to the I.J.C. in 1975.<sup>127</sup>

Further, there have also been two references dealing with tidal power production.<sup>128</sup> In 1948, the governments of Canada and the United States requested the Commission to review the existing plans for tidal power development projects in Passamaquoddy and Cobscook Bays. The I.J.C. was asked to determine the cost of an extensive investigation into the practicality of such a plan.<sup>129</sup> In 1950, the Commission reported that the estimated cost of the investigation would be \$3,900,000.. Another reference was later submitted by the national governments in 1956. This time the Commission was asked to determine the cost and economic feasibility of developing tidal power at Passamaquoddy Bay. The I.J.C. was also requested to determine the effects of such development on

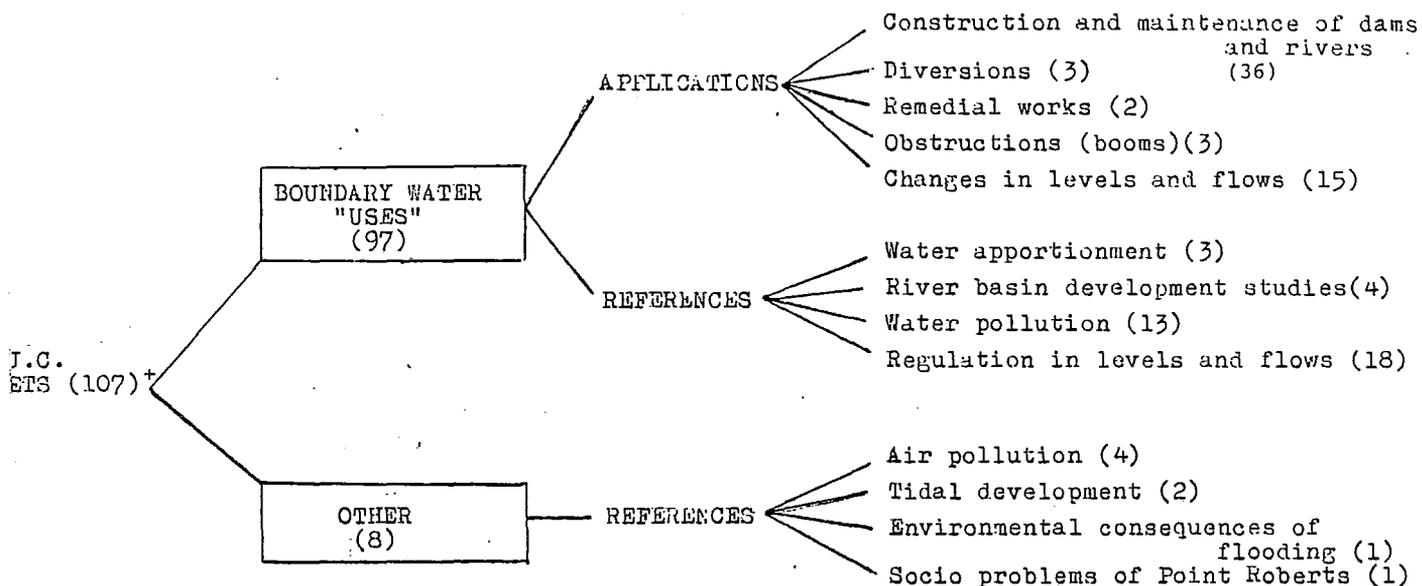


ILLUSTRATION I: SUBJECT-MATTERS BEFORE THE I.J.C. \*\*

The actual number of cases do not add up to 107 since there were two docket numbers assigned in error, docket nos. 30 and 56.

Categorization partially derived from Maxwell Cohen, "The Regime of Boundary Waters —the Canadian-U.S. Experience", Recueil des Cours 146 (1975): pp. 274-5 and I.J.C., Annual Report-1977 (Ottawa, 1978). There has been no further applications or references submitted between 1978 and 1981.

the local and national economies and further to examine the possible effects of the proposed structures on the fisheries of the region.<sup>130</sup> Following the investigations conducted by the engineering and fisheries boards set up by the Commission, the I.J.C. issued its 1961 report stating that the development was not economically feasible when compared to alternative sources of power. The Commission also concluded that the project would have no long-run benefits for the economies concerned. The governments accepted the Commission's recommendations and decided not to proceed with the project unless other, cheaper, sources of power had first been utilised and exhausted.<sup>131</sup>

Finally, the I.J.C. considered one other non-boundary water issue. In 1971, the Commission was asked to investigate the environmental consequences of flooding the Skagit River as a consequence of raising the level of the Ross Dam.<sup>132</sup> As mentioned earlier,<sup>133</sup> the problem centered around a 1942 I.J.C. order of approval to raise the level of the Ross Dam on the Skagit River that was conditional upon the City of Seattle and B.C. government reaching an indemnification agreement. When the agreement was finally concluded in 1967, a strong lobby emerged in opposition to the flooding. Opponents of the project objected to the negative impact the flooding would have on the ecology of the region. Since this aspect to the application had not been considered when the 1942 order of approval was granted, a reference was submitted

to the I.J.C. in 1971, asking the Commission to study and report on the environmental consequences of the project. The Commission eventually found that there would indeed be adverse environmental and ecological effects resulting from the flooding.

It should therefore be clear that the air pollution, tidal power, and Ross Dam cases do not pertain directly to boundary water resource concerns. In this sense, these references are similar to the Point Roberts case. However, few observers have ever objected that these cases, with the exception of Point Roberts, fell outside the Commission's usual ambit of involvement. It is not at all obvious as to why this has been true, although there are some possible explanations for this apparent inconsistency of argument.

It may be suggested that the air pollution cases have always been treated with a "special status".<sup>134</sup> The designation of this status began after the first air quality reference had been heard, i.e. the Trail Smelter case. In 1928, the I.J.C. was asked to determine the extent of the damages caused by a Canadian-owned smelter in Trail, B.C., to the property interests in the State of Washington as a result of the atmospheric transport of the smelter's fumes. Although the Commission reported its findings in 1931, the final settlement of claims against the B.C. company concerned was not reached until 1935. At this time, Canada and the United States signed a convention which

established an ad hoc tribunal to deal with all future claims in respect to this matter.<sup>135</sup> However, the convention did accept the I.J.C.'s recommendation of indemnity in the amount of \$350,000 for damages incurred prior to 1931. But much more importantly, the recommendations of the I.J.C. and the findings of the tribunal gave rise to the establishment of a radical principle of transboundary air pollution - the "polluter pays" principle. This general rule declares that it is the responsibility of the polluter to compensate those parties on the other side of the border for damages and injuries caused by the offending side.<sup>136</sup>

With the clear enunciation of this significant principle, it has been argued that it is only natural for the federal governments to refer subsequent transboundary air pollution problems to the I.J.C..<sup>137</sup> Furthermore, with the gradual shift in the emphasis of Commission work towards environmental concerns, specific air quality disputes would seem then to fit conveniently inside the context of the Commission's traditional parameters of concern. Consequently, although the four air pollution cases do not relate to the subject-area of boundary water resources, their "special status" as environmental concerns serves to disqualify them from being considered as exceptions to the I.J.C.'s so-called "traditional concerns."

Similarly, explanations may be offered in opposition to the view that the tidal power and Ross Dam cases should be under-

stood as "exceptional" references. The tidal power development cases, it may be argued, dealt indirectly with the subject-matter of boundary waters. Although these two references were not located precisely within the territorial definition of "boundary waters", they certainly raised the very same issues considered by the Commission [issues with which it had become very familiar] when it had dealt with power development projects in boundary waters. In the case of the Ross Dam, two arguments may be advanced to show that it, too, was not an exceptional reference. First, the Commission was the authority that had issued the original order that precipitated the later dispute. Hence, it would have been highly irregular and perhaps dangerous for another agency to have been summoned and effectively adjudge the past performance of the I.J.C.. Second, the submission of this reference to the Commission may be seen as requiring only a slight extension of its previous work with environmental matters. In effect, this latter explanation contends that the Ross Dam reference was an appropriate matter for Commission review since it makes little practical difference whether the ecological damage arises from pollution or flooding.

In sum, it may be argued, however dubiously, that the traditional parameters of Commission concern are simply those subject-matters which happen to fall before the I.J.C. These cases may involve either the simple diversion of a river or a complex hydro-electric development - the crucial element is that the reference pertains

directly or indirectly to boundary water resources. If this position is adopted, then Point Roberts represents a clear exception to the traditional concerns of the Commission. The Point Roberts reference thus becomes worthy of study for the purpose of exploring the operations of the I.J.C. in a non-traditional role.

The suggestion that the Point Roberts reference, or any other case, can be considered to stand "outside" the usual parameters of Commission concern simply because the case does not pertain to boundary water resources, is a highly problematical assertion. It fails to provide a complete methodology for understanding the circumstances whereby a case falls properly within the ambit of I.J.C. responsibilities. There must surely be another connotation to the notion of "traditional parameters" to explain the restricted scope of bilateral affairs that have been referred to the Commission. For this limitation has been imposed despite the broad jurisdictional mandate of the I.J.C.

There are similarities in the work of the Commission in terms of both the nature of the subject-matter and the specific tasks demanded by the work. The nature of the work that has characteristically been assigned to the Commission has required that a specific approach be taken - that which is of a technical orientation. Whether the Commission has been required to consider an application or investigate a reference, it has generally, to varying

degrees, been compelled to base its findings or recommendations upon scientific, economic, engineering or otherwise "technical" data. Indeed, the organisational structure of the I.J.C. has been moulded into an elaborate fact-finding mechanism. Through the use of its control and advisory boards, its procedures of inquiry, and its jurisdictional mandate, the Commission is capable of drawing on expert and professional advice and analysis from almost any field of endeavour. Although no attempt has been made to draw the limits encompassed by the term "technical", it is submitted that the Commission has enjoyed the advantage of conducting studies that are empirically-grounded, whether these studies are of a scientific, socio-economic, or engineering nature. Hence, a fundamental element of Commission success is the fact-finding process that unifies and compels the technical staff to determine the critical aspects of a given situation. It is this technical quality to Commission work that allows for a de-politicisation of issues.<sup>138</sup> Although the governments may not agree with recommendations or findings of the I.J.C., these same governments have rarely, if ever, challenged the validity or integrity of the various underlying studies upon which Commission reports are founded.

As a consequence, it would seem that the governments have been reluctant to delegate to the Commission those tasks that do not permit the application of pre-established basic principles,

e.g. those enunciated in the Boundary Water Treaty. Nor have the governments been inclined to submit those references that require the Commission to "step out" of its technical "shoes". Of course, this selectivity on the part of the governments is out of the hands of the Commission. In those cases that have been referred to it, the I.J.C. has displayed considerable innovation and resourcefulness in conducting its studies and preparing its recommendations. Indeed, the I.J.C. has advanced the cause of resource planning, co-ordination and policy-making in the course of its work.

This second interpretation of the Commission's "traditional parameters of concern" would seem to have general application even to those cases that do not fit into the former "subject-matter" connotation. It is submitted that the sole exception is that of the Point Roberts reference.

The Point Roberts case displays an inherent lack of the technical characteristics referred to above; however, there are some minor technical aspects to the problems associated with the case. But the thrust of the reference, regardless of how it was phrased, involved the call to resolve a regional political impasse that had been fueled by historical animosity, nationalistic feelings, and prior governmental inaction. It was the task of the I.J.C. to resolve this complicated dispute, or at least remedy the hardships and other difficulties that the dispute imposed upon

community residents. The palpable absence of any serious technical considerations was recognised, at least in part, by the Commission itself, which characterised the reference as that dealing with the "socio problems of the residents".<sup>139</sup>

Complicating the task of the Commission, beyond the absence of any technical elements for it to consider, was the widespread perception that the national and local governments concerned were fully cognizant of the problems of Point Roberts but were unwilling to reach a compromise solution. All the concerned governments knew that no "miracle solution" existed. If an effective solution were to be devised, it would not be the product of a rational process of technical inquiry. A solution could be approached only by the delicate weighing of all interests in as impartial and equitable fashion as possible. This would provide the basis for deciding upon the most appeasing scheme capable of implementation, with the residents of Point Roberts caught in the middle. In other words, the task at hand was political in nature. No matter which course of action the I.J.C. recommended, it can be safely assumed that any such proposal would leave some of the parties dissatisfied.

If the Commission's "traditional parameters of concern" are composed of at least two of the aforementioned elements, i.e. the subject-matter of the issue and the technical requirements of the task, then this will help clarify C.B. Bourne's statement that the I.J.C. has always enjoyed a "special kind of success."<sup>140</sup>

The national governments may have contributed to this record of accomplishment by confining its references to the I.J.C. to only those issues to which pre-established principles may be applied or which relate to boundary waters and dictate the need for a sophisticated and integrated fact-finding procedure.<sup>141</sup> The relevance of the Point Roberts reference as a focal point for study issues from the fact that it challenges this very proposition.

#### [5] Summary

Thus far an attempt has been made to illuminate three points. First, from the origins and legislative mandate of the Commission, there is no doubt that the I.J.C. was intended to serve as a mechanism for dispute settlement and conflict avoidance with respect to matters dealing with the use, diversion and obstruction of boundary and transboundary waters. It is equally true that the Commission was also equipped with the potential to evolve into a more general vehicle for the resolution of binational differences through either its investigative or its arbitral powers.

Second, it would seem that, for the most part, the work of the Commission has been confined to boundary water issues although it has gradually expanded its influence in this specific context. Its emphasis on environmental concerns and water levels demonstrates both the relevance and adaptability of the Commission

to present and future bilateral issues.

Third, an effort has been made to situate the Point Roberts reference from the perspective of the Commission's traditional parameters of concern. There would appear to be two integral components to this range of involvement. The first deals with the nature of the subject-matter and the second with the nature of the tasks implied. If this proposition is tenable, then the Point Roberts reference is perhaps the only example where the Commission has had the opportunity to examine a problem "outside" its traditional ambit of responsibility. The success or failure of the Commission in dealing with this "exterior" reference may then have some important implications for the advisability or desirability of future Commission ventures into such non-traditional fields.

It is therefore necessary to explore in greater detail the work of the Commission in the Point Roberts case. It is proposed first to explore the origins of the difficulties facing Point Roberts residents. An examination will then be conducted into how the matter came to be put before the Commission, followed by a study of how the I.J.C. processed the reference.

NOTES - CHAPTER II

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1. Charles B. Bourne, "Entente Cordiale? Part II - Bilateral Commissions and International Legal Methods of Adjustment", Proceeding of the American Society of International Law [1974]: 245.
2. U.S., Statutes at Large, Vol. 36, p. 2448; Treaty Series No. 548, "Treaty Between the United States and Great Britain Relating to Boundary Waters Between United States and Canada", 11 January 1909.
3. A concise history of the legal regime relating to international rivers prior to the twentieth century is found in L.M. Bloomfield and Gerald F. Fitzgerald, Boundary Waters Problems of Canada and the United States [Toronto: Carswell, 1958], pp. 2-10; and in Peter S. Smedresman, "The International Joint Commission and the International Boundary and Water Commission: Potential for Environmental Control Along the Boundaries", New York University Journal of Law and Politics, 6 [Winter 1973]: 500-2.
4. Some of the boundary water problems that existed at the turn of the century included: the growing need to develop hydro-electric power, the need for better irrigation in the West, and disputes concerning the uses of the Niagara River. Maxwell Cohen, "The Regime of Boundary Waters: The Canadian-U.S. Experience", Recueil des Cours 146 [1975]: 249; N.F. Dreisziger, "Dreams and Disappointments", in The International Joint Commission Seventy Years On, eds. Robert Spencer, John Kirton and Kim Richard Nossal [Toronto: University of Toronto Press for the Centre for International Studies, 1981], p. 8.
5. William L. Griffon, "A History of the Canada-United States Boundary Waters Treaty of 1909", University of Detroit Law Journal 37 [1959]: 77. A detailed account of the origins of the Boundary Waters Treaty is found in Chirakaikaran Joseph Chacko, The International Joint Commission Between the United States of America and the Dominion of Canada, [New York: Columbia University Press, 1932; reprint edition, AMS Press, 1968], pp. 45-70.
6. 27 Stat. 826; 32 Stat. 372 [1902].
7. Ibid.

8. Bloomfield and Fitzgerald, Boundary Waters Problems, p. 10.
9. Griffon, "A History of the Canada-United States Boundary Waters Treaty", p. 78.
10. Cohen, "The Regime of Boundary Waters", p. 249; A.D.P. Heeney, "Along the Common Frontier: The International Joint Commission", Behind the Headlines 26:5 [July 1967]: 5.
11. See generally: International Waterways Commission, Compiled Reports of the International Waterways Commission, 1905-13.
12. Griffon, "A History of the Canada-United States Boundary Waters Treaty", p. 78.
13. Chacko, The International Joint Commission, pp. 74-78.
14. Heeney, "Along the Common Frontier", p. 5; Alan D. Gibbons, "Sir George Gibbons and the Boundary Waters Treaty of 1909", Canadian Historical Review 34 [1953]: 131.
15. It seems that the U.S. negotiators would have preferred to refer boundary waters disputes to ad hoc boards and commissions to facilitate settlement rather than create any sort of permanent commission. Gibbons, "Gibbons and the Boundary Waters Treaty", pp. 124-6. However, a permanent commission was agreed upon to ensure a degree of continuity and consistency in the application of principles, familiarity with the subject-matter, and the development of procedural techniques. Charles E. Ross, "Entente Cordial? Part II: Bilateral Commissions and International Legal Methods of Adjustment", Proceedings of the American Society of International Law [1974]: 230-1; 238.
16. Heeney, "Along the Common Frontier", p. 4.
17. Maxwell Cohen, "The Commission from the Inside", in The International Joint Commission Seventy Years On, p. 108.
18. Testimony before the Senate Standing Committee on Foreign Affairs, 18 February 1975, quoted in Canada, Parliament, Senate, Standing Committee on Foreign Affairs, Canada-United States Relations, Vol. 1: The Institutional Framework for the Relationship [Ottawa: Queen's Printer, 1975] p. 41.

19. William R. Willoughby, The Joint Organizations of Canada and the United States [Toronto: University of Toronto Press, 1979], pp. 55-6; Cohen, "The Regime of Boundary Waters", p. 257.
20. A.D.P. Heeney, quoted in Charles E. Ross, "National Sovereignty in International Environmental Decisions", in Protecting the Environment: Issues and Perspectives, ed. O.P. Dwivedi [Toronto: Copp Clark, 1974], p. 270.
21. Willoughby, Joint Organizations, p. 55.
22. Standing Committee on Foreign Affairs, Canada-United States Relations, p. 42.
23. The I.J.C. was also handed further duties concerning the Lake of the Woods, the Rainy River, and the Niagara River under the following respective treaties: "Treaty and Protocol Between Canada and the United States to Regulate the Level of the Lake of the Woods", League of Nations Treaty Series, No. 1060, 24 February 1925; "Convention Providing for Emergency Regulation of the Level of Rainy Lake and Certain Other Boundary Waters", Canada Treaty Series, No. 9 [1940], 15 September 1938; "Treaty Between Canada and the United States of America Concerning the Diversion of the Niagara River", Canada Treaty Series, No. 3 [1950], 27 February 1950.
24. Bloomfield and Fitzgerald, Boundary Waters Problems, p. 15.
25. Boundary Waters Treaty, art. VI, para. 1.
26. I.J.C., Docket No. 9, St. Mary and Milk Rivers [1914].
27. William R. Willoughby, "Expectations and Experience", in The International Joint Commission Sevent Years On, pp. 28-9.
28. The Preliminary Article of the Boundary Waters Treaty distinguishes between "boundary waters" and "transboundary waters". Boundary waters are the "waters from main shore to main shore of the lakes and rivers and connecting waterways, or portions thereof, along the international boundary passes, including all bays, arms and inlets thereof...". Transboundary waters are those "tributary waters which in their natural channels would flow in such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary." The governing sections for transboundary waters are

articles II and IV while the pertinent section for boundary waters is article III.

29. Boundary Waters Treaty, art. VIII, para. 3. It should be noted that paragraphs 4 and 5 state that these provisions are not applicable to any use of boundary waters existing prior to the enactment of the Treaty. Further, the I.J.C. may suspend the requirements of equal division at its discretion if it is not advantageous for various reasons.
30. *Ibid.*, art. VIII, paras. 6 & 7.
31. Below, pp. 53-64.
32. Boundary Waters Treaty, art. XII.
33. International Joint Commission, Rules of Procedure and Text of Treaty [Ottawa, Canada - Washington, D.C. 1965]. Further discussion of the procedural aspects of the I.J.C. may be found in [Peter Pantaleo], "Note - A Primer on the Boundary Waters Treaty and the International Joint Commission", North Dakota Law Review 51 [1974-75]: 501-3; G.G. Waite, "The I.J.C.: Its Practice and its Impact on Land Use." Buffalo Law Review 13 [1963]: 100-10.
34. Boundary Waters Treaty, art. VIII, para. 8.
35. Willoughby, Joint Organizations, pp. 33 and 35.
36. *Ibid.*
37. For example, I.J.C. Docket No. 1, Rainy River Improvement Company [1912]; Docket No. 6, Michigan Northern Power Co. [1913]; Docket No. 8, Algoma Steel Corp. [1913]; Docket No. 15, St. Lawrence River Power Co. [1918]; Docket No. 57, Waterton-Belly Rivers [1948]; Docket No. 59, West Kootenay Power Company Ltd. [1948].
38. For example, I.J.C. Docket No. 38 in 1937 concerning the Richilieu River remedial works and Docket Nos. 65 and 69 in the years 1951 and 1952 concerning the Libby Dam and Reservoir were among a few of the controversial applications put before the I.J.C..
39. I.J.C. Docket No. 46 [1941].
40. Bloomfield and Fitzgerald, Boundary Waters Problems, pp. 159-60. The I.J.C. approved the application under authority of article IV. However, it will be remembered that, by way

of article VIII, it is possible for the I.J.C. to approve the application conditional upon "suitable and adequate" compensation for the protection and indemnification of all interests on the other side of the boundary and which interests may be injured thereby.

41. For example, the basis of an agreement had been reached in 1952. However, the B.C. Social Credit government refused to formalise it. The B.C. government instead sought an agreement based on principles of return of downstream power benefits in relation to the amount of water stored in Canada. In essence, B.C. was unwilling to set an unfavourable precedent for itself since this concept was an important bargaining point in the forthcoming Columbia River negotiations. See David G LeMarquand, International Rivers; The Politics of Co-operation [Vancouver: University of British Columbia Press, 1977], pp. 81-2.
42. I.J.C., Docket No. 91 [1971].
43. I.J.C., "Environmental and Ecological Consequences in Canada of Raising Ross Lake in the Skagit Valley to an Elevation of 1725 feet" [Ottawa, 1971].
44. "Rescind Ross Dam Ruling, Victoria Asks IJC Officials", Globe and Mail, 17 September 1980.
45. "Anti-flooding Talks on Skagit Valley Hit Snag, B.C. Says", Globe and Mail, 11 December 1982.
46. Willoughby, Joint Organizations, p. 33.
47. The 1942 Order of Approval represented the first time the Commission postponed the effect of an order until an agreement had been reached between the parties. Bloomfield and Fitzgerald, Boundary Waters Problems, p. 160. Usually, the I.J.C. refers the task of fixing compensation to the national governments since it is uncertain if it has the authority to do so under the Boundary Waters Treaty provisions. That the Commission did not refer the matter to the national governments in this case has been an argument put forth by the B.C. government supporting their point that the 1942 Order of Approval is invalid. "Skagit River Controversy", Globe and Mail, 7 May 1974.

48. C.J.Chacko refers to the Commission's judicial powers under articles III, IV and VIII as a "compulsory" jurisdiction and its arbitral powers under article X as a "voluntary" jurisdiction.
49. Willoughby, Joint Organizations, p. 37.
50. In the event that the Commission is divided evenly, separate reports are submitted to their respective governments.
51. Boundary Waters Treaty, art. IX, para. 1.
52. It is not clear whether individuals in their own capacity can make direct applications to the I.J.C.. It seems that when an individual wishes to make an application, it must be submitted to the Commission through the appropriate government. F.J.E. Jordon, "The International Joint Commission and Canada-United States Boundary Relations", in Canadian Perspectives on International Law and Organization, eds. R. St. J. MacDonald, Gerald L. Morris and Douglas M. Johnston [Toronto: University of Toronto Press, 1974], p. 256. The I.J.C. seems to accept this view in its Docket No. 31, Madawaska Co. application [1932], cited in Bloomfield and Fitzgerald, Boundary Waters Problems, pp. 192-3. However, some observers have criticised this procedure, as for example, Pantaleo, "A Primer on the Boundary Waters Treaty", p. 499, and Willoughby, Joint Organizations, p. 30.
53. I.J.C., Rules of Procedure and Text of Treaty [Ottawa: Canada - Washington, D.C., 1965].
54. Ibid., Rule 12.
55. There are a number of cases scattered throughout the Commission's history where one or the other country was reluctant to refer the matter to the I.J.C.. For example, in 1939, the U.S. was reluctant to refer the Souris River water apportionment case, Docket No. 41, to the I.J.C.. Whereas, in 1956, Canada was equally hesitant to refer the Passamaquoddy tidal power development case, Docket No. 72.
56. For example, the International Pacific Halibut Commission and the International Pacific Salmon Fisheries Commission both have their own staffs of experts.
57. One notable departure from this practice is found in the "Agreement Between the United States of America and Canada on Great Lakes Water Quality", Canada Treaty Series, No. 12 [1972], 15 April 1972, where it states that there is to be "representation" in some instances.

58. In 1981, the I.J.C. had fourteen control boards, ten investigative boards, and four pollution surveillance boards.
59. Further details on the working of the board system is found in O.P. Dwivedi, "The International Joint Commission: Its Role in the United States-Canada Boundary Pollution Control", The International Review of Administrative Science 40 [1974]: 375; J.L. MacCullum, "The International Joint Commission", Canadian Geographic Journal [March 1966]: 80.
60. David G. LeMarquand and Anthony Scott, "Canada's Environmental Relations", in Resources and the Environment: Perspective for Canada [Toronto: McLelland and Stewart, 1980], p. 87.
61. International Joint Commission, "Summary of the Seminar on the I.J.C.: Its Achievements, Needs and Potential", Montreal, 1974, p. 24, [Mimeographed].
62. Ibid.; Willoughby, Joint Organizations, p. 54.
63. Willoughby, Joint Organizations, p. 23.
64. A two-thirds majority of the U.S. Senate is required.
65. Cohen, "The Regime of Boundary Waters", pp. 258-9.
66. Willoughby, Joint Organizations, p. 36; International Joint Commission, "Papers Relating to the Work of the International Joint Commission", Ottawa, 1929, p. 99.
67. Trail Smelter Arbitration [U.S. v. Canada], 3 United Nations Reports International Arbitration Awards 1905 [1941]; American Journal of International Law 35 [1941]: 684.
68. The "Gut Dam" issue is discussed in detail in R.B. Lillich, "The Gut Dam Claims Agreement with Canada", American Journal of International Law 59 [1966]: 892-9.
69. Smedresman, "The International Joint Commission and the International Boundary and Water Commission", p. 513.
70. Willoughby, Joint Organizations, p. 36; Don C. Piper, "The Role of International Machinery in Canadian-American Relations", South Atlantic Quarterly 62 [Autumn 1963]: 555.

71. Willoughby, Joint Organizations, p. 36.
72. Willoughby, "Expectations and Experience", p. 29; International Joint Commission Annual Report - 1978, [Ottawa, Canada - Washington, D.C., 1978], Appendix.
73. Jordon, "Canada-United States Boundary Relations", p. 528.
74. Cohen, "The Regime of Boundary Waters", p. 275.
75. I.J.C., Docket No. 17 [1920]; Bloomfield and Fitzgerald, Boundary Waters Problems, pp. 107-10.
76. Ibid.
77. I.J.C., Docket No. 68 [1952].
78. I.J.C., Dockets Nos. 42 [1940]; 43 [1941]; 47 [1942]; 59 [1948]; 84 [1966]; and 93 [1971].
79. I.J.C., Docket Nos. 2 and 12.
80. I.J.C., Docket No. 7.
81. I.J.C., Docket No. 18.
82. Willoughby, "Expectations and Experience", p. 29.
83. I.J.C., Docket No. 37 [1936].
84. I.J.C., Docket No. 77 [1962].
85. I.J.C., Docket Nos. 41, Souris River [1939]; 53, Sage River [1946]; 57, Waterton and Belfy Rivers [1948]; 58, Souris and Red Rivers [1948].
86. I.J.C., Docket Nos. 64 [1950]; 74 [1961]; 86 [1967].
87. Jordon, "Canada-United States Boundary Relations", p. 535.
88. Ibid.
89. I.J.C., Docket No. 51 [1944].
90. Ibid., Terms of Reference, dated 9 March 1944; Bloomfield and Fitzgerald, Boundary Waters Problems, pp. 164-70.

91. Bloomfield and Fitzgerald, Boundary Waters Problems, pp. 164-70.
92. A further discussion of the Columbia River Treaty and its implications can be found in B. Bourne, "The Columbia River Controversy", Canadian Bar Review 39 [1959]; 444; Maxwell Cohen, "Some Legal and Policy Aspects of the Columbia River Dispute", Canadian Bar Review 36 [1958]: 25-28; John V. Krutilla, The Columbia River Treaty: The Economy of an International River Basin Development [Baltimore: The Johns Hopkins Press, 1967].
93. I.J.C., Docket No. 76; I.J.C., "Report on the Co-operative Development of the Pembina River Basin", [Ottawa, Canada - Washington, D.C., 1967].
94. Cohen, "Regime of Boundary Waters", p. 276. There are still a number of areas where there will be large hydroelectric developments as for example in the Alaska-Yukon Area.
95. *Ibid.*, pp. 277-79.
96. I.J.C., Docket No. 82.
97. I.J.C., "Report to the Governments on Further Regulation of the Great Lakes", Ottawa-Washington, 1976.
98. I.J.C., Docket No. 103 [1977]; Docket No. 106 [1977].
99. F.J.E. Jordon, "Great Lakes Pollution: A Framework for Action", Ottawa Law Review 5 [1971]: 67.
100. C.B. Bourne, "Canada and the Law of International Drainage Basins", in Canadian Perspectives on International Law and Organization, eds. R. St. J. MacDonald, Gerald L. Morris and Douglas M. Johnston [Toronto: University of Toronto Press, 1974], p. 486.
101. Boundary Waters Treaty, art. IV, para. 2.
102. I.J.C. Docket No. 4, Pollution of Boundary Waters Reference [1912].
103. International Joint Commission, "Final Report on Boundary Waters", Ottawa-Washington, 1918, pp. 48-51. A summary of this report is found in R.B. Bilder, "Controlling Great Lakes Pollution: A Study in United States-Canada Environmental Co-operation", Michigan Law Review 70 [1972]: 481-91; Jordon, "Great Lakes Pollution", pp. 68-9.

104. A further discussion of this matter is found in Carl A. Esterhay, "Note - Restoring the Water Quality of the Great Lakes: The Joint Commission of Canada and the United States", Canada-United States Law Journal 4 [1981]: 216-17.
105. I.J.C., Docket No. 25 [1928].
106. I.J.C.; Docket No. 54.
107. I.J.C., "Report on the Pollution of Boundary Waters", 2 Vols., Ottawa-Washington, 1950.
108. Ibid., pp. 5-10.
109. It is of interest to note that these boards are still active.
110. International Joint Commission Advisory Board Report, "Summary on Pollution on the Niagara River", Ottawa-Washington, 1967; International Joint Commission Advisory Board Report, "Summary Report on the Pollution of the St. Mary's River, St. Clair River and Detroit River", 3 Vols., Ottawa-Washington, 1968.
111. I.J.C., Docket Nos. 71 [1955]; 81 [1964]; 73 [1959]; 83 [1964].
112. I.J.C., "Report on the St. Croix River Basin", Ottawa-Washington, 1959; I.J.C., "Report on Pollution of Rainy River and Lake of the Woods", Ottawa-Washington, 1965; I.J.C., "Report on the Pollution of the Red River", Ottawa-Washington, 1966.
113. Bilder, "Controlling Great Lakes Pollution", p. 493.
114. International Lake Erie Water Pollution Board and the Lake Ontario-St. Lawrence Water Pollution Board, "Report to the I.J.C. on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River", 3 Vols., Ottawa-Washington, 1969.
115. International Joint Commission, "Report on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River", Ottawa-Washington, 1970.
116. A summary of this I.J.C. report is found in Bilder, "Controlling Great Lakes Pollution", pp. 498-501; Jordon, "Great Lakes Pollution", pp. 74-83.

117. I.J.C., "Pollution of Lake Erie, Lake Ontario and the St. Lawrence River", p. 156.
118. "Agreement Between the United States of America and Canada on Great Lakes Water Quality", Canada Treaty Series, No. 12 [1972], 15 April 1972. A discussion of the negotiations leading to the signing of the Agreement is found in Don Munton, "Dependence and Interdependence in Transboundary Environmental Relations", International Journal 34 [Winter 1980-81]: 148-61.
119. Bourne, "Law of International Drainage Basins", p. 488.
120. "Agreement on Great Lakes Water Quality", T.I.A.S. No. 9257, 22 November 1978.
121. Ibid., Preamble; Esterhay, "Restoring Water Quality of the Great Lakes", pp. 226-27.
122. Water Quality Agreement, 1978, art. IV [1].
123. Maxwell Cohen, "Canada and the United States: Dispute Settlement and the International Joint Commission - Can This Experience Be Applied to Law of the Sea Issues?", Case Western Reserve Journal of International Law 8 [Winter 1975-76]: 77.
124. Although most agree that Point Roberts is an exceptional case, many nevertheless fail to explain why this is so. For example, Don Munton, "Paradoxes and Prospects", in The International Joint Commission Seventy Years On, eds. Robert Spencer, John Kirton and Kim Richard Nossal [Toronto: University of Toronto Press for the Centre for International Studies, 1981], pp. 79-80; I.J.C., "Summary of the Seminar on the I.J.C.", p. 6; Jordon, "Canada-United States Boundary Relations", p. 539; Willoughby, Joint Organizations, pp. 18 and 59; Smedresman, "The International Joint Commission and the International Boundary and Water Commission", p. 507.
125. I.J.C., Docket No. 25.
126. I.J.C., Docket Nos. 61 and 85.
127. I.J.C., Docket No. 99.

128. I.J.C., Docket Nos. 60 and 72.
129. Bloomfield and Fitzgerald, Boundary Waters Problems, p. 182.
130. Ibid., pp. 204-5.
131. Jordon, "Canada-United States Boundary Relations", p. 530.
132. I.J.C., Docket No. 91 [1971].
133. Above, pp. 36ff.
134. Although no author uses this term, a few have at least recognised that there is a prima facie distinction between air quality cases and other matters before the I.J.C.. Jordon, "Canada-United States Boundary Relations", p. 529; Cohen, "Regime of Boundary Waters", pp. 274-75.
135. "Convention for the Settlement of Certain Complaints Arising from the Operation of the Smelter at Trail, British Columbia", 49 Stat. 3245 [1936], U.S. Treaty Series, No. 893 [1936], 15 April 1935 [effective 3 August 1935]. A more detailed discussion of the case is found in Bloomfield and Fitzgerald, "Boundary Waters Problems", pp. 137-38; D.H. Dinwoode, "The Politics of International Pollution Control: The Trail Smelter Case", International Journal 27 [Spring 1972]: 219-35.
136. The principle enunciated in the Trail Smelter case finds substance in Principles 31 and 32 of the "Declaration of Principles" by the United Nations Conference on the Human Environment, International Legal Materials 11 [1972]: 1416; and the United Nations Economic Commission for Europe's "Convention on Long-Range Transboundary Air Pollution", International Legal Materials 18 [1979]: 1442.
137. Dwivedi, "The International Joint Commission", p. 371. It cannot be said at present that all transboundary air pollution matters are referred to the I.J.C.. It seems unclear whether the most controversial transboundary air pollution problem, that of acid rain and deposition, will be referred to the Commission for investigation. Munton, "Dependence and Interdependence", pp. 161-79.
138. Standing Committee on Foreign Affairs, Canada-United States Relations, p. 42.

139. International Joint Commission, Annual Report - 1974, Ottawa, 1975, p. 28.
140. "Entente Cordial? Part II: Bilateral Commissions and International Legal Methods of Adjustment", Proceedings of the American Society of International Law [1974]: 2245.
141. K.J. Holsti and Thomas A. Levy, "Bilateral Institutions and Transgovernmental Relations Between Canada and the United States", in Canada and the United States: Transnational Transgovernmental Relations, eds. Annette Baker Fox, Alfred O. Hero, Jr, and Joseph S. Nye, Jr. [New York: Columbia University Press, 1976], pp. 288-99.

### III. THE EVOLUTION OF THE REFERENCE

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The square peg of Point Roberts fails to fit any of the conventional round holes. 1

In the previous chapter, an attempt was made to provide insight into the "traditional parameters of concern" of the I.J.C. It was further submitted that the Point Roberts reference failed to fall within those parameters. At this point, a more detailed examination of the Point Roberts case is required in order to grasp the precise nature of the reference. An exploration of the difficulties facing the Point Roberts community will serve to establish the background of the dispute and the context into which the Commission was thrown when it arrived at the Point in 1971.

The purpose of this chapter is therefore to amplify the comprehension of this complex drama and to show how the tiny community became an embarrassment to both Canadian and American authorities. To this end, it will be first necessary to understand the geographico-historical circumstances surrounding Point Roberts. Second, it is imperative that an inquiry be made into the residents' perceptions of the dispute that brought the community to international attention and ultimately that of the I.J.C. itself. It shall be seen that the Point Roberts affair involved more than

those daily inconveniences that were to receive the greatest publicity at the time of the reference. The problem was far more fundamental in nature. It concerned the quest for survival by a once self-sustaining town that displayed firm notions of community spirit and the proud tradition of an American heritage. The threat posed by its northern neighbour at the close of the 1960's endangered the continuance of this community - not so much by outright cession, but by virtue of a process of gradual assimilation.

In essence, Point Roberts desired the opportunity to determine its own destiny. Yet it lacked the political clout and the financial resources necessary to realise this perceived right.

The Point Roberts imbroglio had been evolving over the course of several decades. By the time the I.J.C. was summoned to investigate the problems facing the community, the residents had already established an integrated community defence network refined through years of experience in lobbying their cause at all levels of government. This explains in part why any extra-local body attempting to shape the destiny of the community would have faced the same determined and resilient opposition as that which met the I.J.C.. The success of the Commission may well have been dependent upon its ability to appreciate the essence of the problem in the same way that the situation was perceived by the residents of Point Roberts.

[1] The Notion of Point Roberts as a Community

Point Roberts occupies a land mass of merely 4.9 square miles. The particular natural and international borders of the town are geographically defined in such a unique way as to contribute to a strong sense of community identification and recognition. The area of land comprising Point Roberts is situated at the southern extremity of the peninsula which projects south from the Province of British Columbia. Hence, to the north, the forty-ninth parallel delineates the boundary with Canada. To the west, the natural boundary of the coastline separates the community from the Gulf of Georgia.

The significance of this rather square-shaped parcel of land is heightened not so much by its strict geographical peculiarity, but by its specific territorial affiliation. Although it is not connected physically to any point within the United States, Point Roberts is American territory located south of the forty-ninth parallel. The only land-based connection between Point Roberts and other U.S. territory is through Canada. In fact, the nearest American connection to Point Roberts is Blaine, Washington, a distance of some twenty-five miles via Canadian roadways. This territorial isolation has led one author to suggest that Point Roberts bears similar characteristics to that of an "enclave".<sup>2</sup> This term is used to describe the situation where the territory of one country is surrounded completely by

foreign territory.<sup>3</sup> Although it is true that Point Roberts shares only its northern border with a foreign country and is otherwise surrounded by water, the "enclave" characterisation does reflect the common perceptions of residents whose usual means of transportation is by road.

Whereas the geographical isolation tends to reinforce the communal notion, the territorial isolation promotes the understanding that Point Roberts is an American community. Clearly, when the peninsula was ceded to the United States under the Treaty of Oregon in 1846, the possibility that this delimitation would eventually give birth to an American peninsular "enclave" was not at all obvious. The Treaty of 1846 served to settle a long and protracted dispute between the U.S. and Great Britain over the Oregon territory. It defined the line of demarcation to run along the forty-ninth parallel "to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean".<sup>4</sup> The scarcity of population in the region and the dominance of the Hudson's Bay Company prevented any immediate concern over the implications of the demarcation. In 1854, upon the incorporation of the County of Whatcom, the most northwestern county in the then newly-formed legislature of what is now the State of Washington, the central concern of the day had nothing to do with the Point Roberts area.

At that time, the main issue involved the interpretation of the 1846 Treaty as to which of the two channels, the Canal de Haro or the Rosario Strait, was to be understood as separating "the continent with Vancouver's Island". The settlement of this question would determine the sovereignty of the San Juan and Gulf Islands which were attracting attention in the 1850's as desirable sites for settlement.<sup>5</sup> It was not until 1872 that the final determination of the border "line" was made, giving us the present Canada-U.S. boundaries, pursuant to an arbitration provision under the 1871 Treaty of Washington.

At least one historian suggests that an important conclusion may be drawn from the absence of any dispute over the Point Roberts peninsula during that period. It should be recalled that when, in 1856, a boundary commission was delegated the task of locating, surveying and marking the boundary line described in the 1846 Treaty of Oregon, it was at this moment that questions concerning the territorial status of Point Roberts were first raised. However, with the difficulties then being encountered in establishing the course of the boundary line through the San Juan and Gulf Islands, it was decided to set aside the Point Roberts matter until later.<sup>6</sup> It seems clear that neither side desired a boundary dispute over the Point Roberts peninsula. While other boundary issues were being disputed vehemently, "it must have been well understood that Point Roberts was the

property of the United States of America".<sup>7</sup> Hence this view contests the more commonly accepted historical interpretation, such as that found in the introduction to a 1966 Whatcom County Regional Planning Council publication which explained that Point Roberts "was an accident of geography and [the] arbitrary establishment of the 49th parallel as the U.S. - Canadian political boundary...".<sup>8</sup> Regardless of which historical explanation of the nature of the origins of the boundary dispute is to be accepted, there is no doubt that Point Roberts was considered to be U.S. territory.

Point Roberts has always been a small community. Nevertheless, since the turn of the century, a hearty nucleus of permanent residents has continuously dwelt there. Of those individuals who registered to vote in the years from 1932-34, over sixteen percent [16%] of the population had lived at the Point for more than twenty-five years. Similarly, of the registered voters appearing on the 1969 voter's list, over thirty percent [30%] had also appeared on the 1932-34 voter's list.<sup>9</sup> These figures give impressive testimony to the continuity of population at Point Roberts and provides an indication of many residents' dedication to the life of their community.

The notion of Point Roberts as a community is a vital concept that provides a basis for appreciating the nature of the overall problem. The geographic isolation, the indisputable ter-

ritorial affiliation with the U.S., the continuity of the resident population - all these factors combine to reinforce the shared concept of community in the town of Point Roberts.

[2] The Basis of the Dilemma

The plight of the residents of Point Roberts can be traced back to the economic transformations that had been wrought in the decades prior to the I.J.C. reference. Several historical studies on the development of the community have documented the difficult growth and maturation of Point Roberts.<sup>10</sup> These works have stressed the residents' strong identification with the common history they have endured and their affiliation with American history and tradition. At the beginning of the century, Point Roberts was a small but thriving U.S. community with half of its nearly two hundred residents claiming Icelandic ancestry. Given Point Roberts' close proximity to west coast waters, it was only natural that its main industries were commercial fishing, packing plants, and other associated fishing services. Indeed, Point Roberts' fishermen were pioneers in the development and use of the "fishtrap".<sup>11</sup> By 1905, there were already more than forty such fishtraps in operation off the coastal waters of Point Roberts. The town also boasted a growing farm industry producing many specialised crops and seeds as well as dairy products, eggs

and fruit. In essence, the agricultural and fishing economies were interdependent as the fishermen boosted their income through farming while farmers were apt to supplement their revenues by fishing.

It is interesting to observe that the Fraser River gold rush of the 1850's first sparked the development of a small settlement on the Point Roberts peninsula. However, the failure of the gold rush brought the town to a hasty end. In 1856, Point Roberts was declared a military reserve, a measure that was in part dictated by the continuing controversy over ownership of the San Juan Islands.

Although neither military personnel nor equipment ever arrived on the peninsula, the declaration of the military reserve certainly did arrest the social and economic growth of the area. During that period, the only residents at the Point were squatters.<sup>12</sup> Then, in 1890, the U.S. Department of the Interior began to open the Point Roberts peninsula to settlers. This move was taken under the authority of an 1884 Congressional law entitled, "[An] Act to Provide for the Disposal of Abandoned and Useless Military Reservations".<sup>13</sup> For the first time, squatters would now enjoy legal claim and security for their lands. In 1908, the entire area of Point Roberts was opened for settlement, adding new impetus for both industrial and agricultural expansion. Then, in 1911, the Point Roberts Township was declared to exist and

its leadership focused attention on road construction and the assessment of local industry.

The community probably reached its zenith in 1913 with the existence of the fishtrap industry, two canneries, several stores, a school and a church.<sup>14</sup> As early as 1917, however, a series of unfortunate events had cast doubt on the economic viability of the town. For the once-plentiful and seemingly unlimited supply of salmon had gradually been shrinking. It is generally believed there were three causes for this distressing phenomenon. First, Canadian authorities had begun rock-blasting up along the Fraser River during the construction of their railway tunnels. The force of the explosions involved produced the Hell's Gate rock slide of 1913. The ecological repercussions of this rock slide were severe - the slide effectively eliminated the spawning runs of the salmon further down the Fraser River. This disaster, together with the dams being constructed along the Adams River, created havoc for the spawning salmon population<sup>15</sup> and thus reduced the salmon catch for fishermen.

Second, the unregulated and unsupervised fishing practices carried out by American and Canadian fishermen in the Puget Sound area further contributed to the exploitation and gradual depletion of the salmon colony.

Finally, an influx of "alien" fisherman had contributed to the overfishing of the area. It was reported in 1917 that, of

the \$12 million worth of fish taken from the region, at least \$8 million or two-thirds of the total amount had been caught by fishermen other than Americans or Canadians. The majority of these alien fishermen were sent from the southeastern European countries.<sup>16</sup>

By 1929, two the major canneries in Point Roberts had either relocated or closed as a direct or indirect result of the depleted fishing catches. But the most devastating blow to the local economy was to be administered in 1934. It was in this year that the Washington State Fisheries Board introduced legislation that effectively declared illegal such fishing devices as the fishtrap. This decision, labelled "Initiative Seventy-Seven", had a far more serious impact on the community than even the demise of the canneries.<sup>17</sup> For without the fishtraps, the core of the Point Roberts community was lost.

The official explanation for the legislation introduced by the State of Washington was the declining annual yield of salmon. However, Canadians had complained bitterly throughout the prior decade about the indiscriminate fishing practices and techniques employed by Americans. These complaints revolved around the use of such devices as the fishtrap. That these devices had long been outlawed in Canada may suggest that "Initiative Seventy-Seven" was enacted by the State Legislature for reasons of fair play and political appeasement as much as for the ostensible ecological necessity.

The outlawing of fishtraps triggered the demise of the fishing economy and this in turn unleashed a chain reaction of events. Since the fishing industry provided the main source of employment, most residents were compelled to either change jobs or move away. A minority continued to fish with alternative fishing techniques, however, the population experienced a sharp decline as is indicated by a fifty percent [50%] drop in school enrolment between 1932 and 1934.<sup>18</sup> The agricultural community similarly tended towards collapse. Small-scale farm operations undertaken by Point Roberts farmers, no longer supplemented by fishing income, found it more difficult to compete with the larger acreage and superior equipment of farmers in nearby localities. That Point Roberts' soil was generally of poor quality only accelerated the demise of farming. In the midst of the depression years, the prohibitive costs of transporting goods out and supplies into the community, some twenty-five miles through Canada, eliminated the markets for its specialised crops. It was not long before the U.S. federal government discontinued mail delivery by boat, thereby removing an economical means of transporting goods in and out of the town. Finally, it should be remembered that the agrarian sector of the Point had always been a supportive industry. Faced with the loss of the important supplementary revenues that the now-suffering fishing industry had once provided, the small-scale farmer could not survive. To make

matters even worse, the responsibility for road construction and maintenance was taken out of the hands of the township and placed under county control. This deprived Point Roberts residents of yet another source of employment.<sup>19</sup>

It was clear that Point Roberts had entered a new era of its existence. The old era had lasted from the late 1800's to the late 1920's. This chapter in its history had symbolised the orientation of the community towards the east, west, and south, as Point Roberts looked beyond its natural coastal boundaries towards the United States. But with the erosion of the fishing and agrarian sectors of the economy, Point Roberts evolved gradually to take a northward perspective out of the necessity of increased trade and contact with Canada. It had not been until the end of World War I that an easily accessible road into Canada existed. Prior to that time, boats provided almost the exclusive means of travel to and from the Point. But with the virtual abandonment of all the commercial port facilities, the boat was no longer a reliable or convenient means of outside access. It was only natural then that the primary access to Point Roberts from the U.S. would shift to the road running through Canadian territory.

The old era represented a self-sustaining and prosperous community rich in pride and tradition. The nature of the new era was uncertain. It was apparent that the future of Point Roberts

was jeopardised with the collapse of its economic base. The town had experienced first-hand and in great measure the fragility of its livelihood and its vulnerability to extra-local actions and decisions. The once-thriving community could no longer continue to survive in its relative obscurity.

### [3] The Northern Invasion

It had become plain that Point Roberts no longer enjoyed the economic base to sustain the community. It was not just a matter of becoming progressively poorer that imperiled the town, but the self-sustaining character of the Point was also fading gradually. The residents felt threatened not just by economic hardships, but further by the potential dissolution of their proud community. In the 1940's, while the surrounding communities enjoyed prosperity through commercialisation and urbanisation, Point Roberts was in the midst of a continuing decline in its economic health. During the forties, the effects of the crippled economy were becoming more obvious. Moreover, the effects of material deterioration were exaggerated by the geographic peculiarity of the Point.

One striking example of the problems of this isolation was the absence of any medical facilities in the community. U.S. doctors were reluctant to travel to the Point owing to the complexities of customs regulations when crossing the border. Mean-

while, Canadian physicians were only permitted to respond to emergency cases as State of Washington medical regulations barred Canadian doctors from establishing full-time practices in Point Roberts.<sup>20</sup>

Further, skilled American tradesmen and even general labourers would be careful to avoid Point Roberts. In order to reach the Point, they would have to obtain a customs escort to be able to bring their tools and other equipment through Canada. Otherwise, they would have to incur the extra costs of shipping by a bonded truck. Special arrangements needed to be made with respect to customs inspection and clearance in the transportation of all goods and materials crossing the border. Canadian customs' "in transit" regulations required that all goods be sealed while being transported from American territory through Canada at Point Roberts. Hence, these special arrangements had to be made at both border crossings.<sup>21</sup>

Point Roberts was also described as a "lawless" community since it had little police protection. Whatcom County had provided only one police official to patrol the entire Boundary Bay area. This did little to satisfy residents' demands for some greater measure of police presence.

The collapse of the main industries of Point Roberts had served to sever the mechanisms that supported commercial life

and exchange with areas to the south of the Point. The effect of these restrictions was to make Point Roberts a prisoner of customs and immigration regulations.

As early as 1950, an editorial in a Whatcom County newspaper reported that the Canadian press had twice in the previous seven years suggested that Point Roberts be ceded to Canada. It was further reported that the citizenry of Point Roberts - ninety-eight per cent [98%] American - would tolerate no such surrender of their national identity and affiliation.<sup>22</sup>

In 1951, the newly-formed Point Roberts Chamber of Commerce requested that a group of experts from the University of Washington consider the growing difficulties encountered by the community. One of the primary recommendations issued by this study group called for "the appointment of a special international commission to make a thorough study of all of the possible solutions to this problem".<sup>23</sup> In the same year, a Washington State Congressman recommended to the International Boundary Commission that a special sub-committee be appointed to investigate the problems of the Point Roberts peninsula.<sup>24</sup> In 1952, the Whatcom County Board of Commissioners were given to describing Point Roberts as an "orphan problem child" in their brief to a Joint Fact-Finding Committee of the Washington State Legislature.<sup>25</sup> The County complained that the costs of maintaining and building

roads in Point Roberts were prohibitive, as a consequence of the distance involved in the regular transport of equipment, materials and labour to the peninsula.

A distress signal was therefore sounded in the early 1950's. This signal warned of the emergence of a new era in the history of the community. Already the Point was becoming an increasingly popular Canadian tourist resort and it was the tourist trade that provide the community with its chief source of revenue. This new industry infused new economic life into a dying town and reversed a long period of decline. The Point benefited from all the requisite elements of a vacation retreat. The moderate climate was such that Point Roberts received only one-half of the seasonal rainfall that fell on the Vancouver area. Point Roberts had extensive beaches and these served as a magnet for the crowds that would flock to region. It must be understood that Point Roberts was located in the heart of the most densely populated and highly industrialised sectors in western Canada. Not only had the northern invasion begun, but the economic frailty of the community prevented it from mobilising any immediate resistance to this development.

While it had taken the collapse of the fishing and agrarian sectors of the local economy to herald a new era in the history of Point Roberts, it took a combination of other factors to bring this era to full maturity. In 1956, the government of Bri-

tish Columbia announced the construction of a \$30 million, four lane, air-conditioned tunnel under the south arm of the Fraser River at Deas Island. Upon completion of the tunnel in 1959, the Point Roberts peninsula was now within easy and convenient access to the Vancouver and outlying regions. Point Roberts's newly-acquired accessibility was confirmed by statistics compiled by the U.S. Bureau of Customs statistics. In 1950, 50,959 passenger vehicles had entered the Point. This figure skyrocketed to some 170,505 vehicles in 1960. By 1965, over 220,000 vehicles found their way into Point Roberts on an annual basis. <sup>26</sup>

Of greater importance to the survival of the community as a social entity were the increasing numbers of Canadians taking residence, rather than merely visiting, in Point Roberts. In 1953, by means of a reciprocal agreement, the State of Washington enacted legislation whereby Canadians were permitted to own property in the State of Washington.<sup>27</sup> Throughout the late 'fifties and well into the 'sixties, Canadians found Point Roberts an attractive real estate market. In comparison with Canada, both property taxes and annual assessments were far lower at the Point. As one Point Roberts historian noted, "...retired farmers became real estate salesmen and Canadians snapped up lots". <sup>28</sup> It was not long before more than half of the residents of Point Roberts were Canadian.

The new era had begun, and with it came a new economy. This material transformation would be founded upon the notion of Point Roberts as a retirement and recreation community. But for the residents of Point Roberts, the issue was more serious than a question of identity. The new era would alter in a fundamental way the residential composition of the community. Of the 326 permanent residents in 1969, 151 were Canadians, 132 were Americans, and 19 enjoyed dual residency.<sup>29</sup> The remaining populace was neither Canadian nor American. It is interesting to observe that most of the American residents were employed within the confines of the community. Conversely, the vast majority of Canadian residents were employed outside the Point and almost entirely in British Columbia.<sup>30</sup>

It is also worthy to note that it was very difficult to determine the precise number of "permanent" Canadian residents at the Point. It is illegal, for technical reasons, to reside at the Point without a special visa. Many "permanent" Canadian residents, for whatever reasons, choose to live at the Point without a visa.<sup>31</sup>

In the meantime, Point Roberts had developed into an extremely attractive vacation area for Canadians. By the close of the 1960's, there were approximately 3500 summer residents at the peninsula. Indeed, eighty-five percent [85%] of the 1,600 owners of real property inside Point Roberts were citizens of

Canada. 32

But apart from permanent and summer residents, Point Roberts was being overwhelmed by tourists, visitors and vacationers from its northern neighbour. In the summer months, the population of Point Roberts would increase tenfold. Further, on holiday weekends, the number of tourists spending time in Point Roberts would run into the tens of thousands. A tourist city was effectively created under those circumstances.

Scenic beauty, however, was not the only feature of Point Roberts that induced visitors to pass through the community. Complimenting the aesthetic appeal of the peninsula, Point Roberts' taverns were thriving under the lure of a burgeoning Canadian clientele. Since the Point fell under the law of the State of Washington, taverns could remain open longer in the evenings than could similar establishments in Vancouver. Another comparative advantage of Point Roberts was that British Columbia prohibited the sale of beer on Sundays without the accompanying purchase of a meal. This measure of "prohibition" did not exist in Point Roberts under State law. Aside from the tavern trade, the Point Roberts movie theatre did roaring business. Unlike the more prudish movie houses in Canada, "triple X-rated" adult films and magazines were not forbidden in Point Roberts. Although the phrase "everything is permitted" was not necessarily the motto of Point Roberts and its residents, the town nevertheless became one of the favourite Canadian entertainment centres. Others viewed

the Point as a nearby "Tijuana".<sup>33</sup>

The drastic population fluctuations placed terrible demands and strains on the supply of essential services. Almost overnight Point Roberts would transform into a very complex community.<sup>34</sup> For example, electricity would be supplied to the town by British Columbia Hydro. However, since the Canadian authorising statute prevented the direct export of such services, it was done through a franchise on behalf of the United States Puget Sound Power and Light Company.<sup>35</sup> As a result, if a repairman was required, a Canadian serviceman could not be summoned. Instead, a technician would have to be sent from Whatcom County in the U.S. There was another reason preventing Canadian repairment from servicing the Point. American labour laws barred Canadians from working at the Point without special permits. Hence, irrespective of the actual repair needs involved, the most difficult problem arose in finding the necessary assistance in the event no American could be found in the Point to perform the task.<sup>36</sup>

Since telephone service was provided by the B.C. Telephone System, residents of Point Roberts were not listed in the Whatcom County telephone directory. Instead, they were listed in the B.C. directory. Further, although Point Roberts is part of Whatcom County, telephone calls placed between Point Roberts and other areas inside the country were considered long-distance. It is amusing to note that in B.C. it was toll-free to call any point in the lower Canadian mainland from Point Roberts, in a

range from White Rock to Vancouver.

If a person was arrested at the Point, the accused had to be transported by the costly means of air or sea to a holding cell in the U.S.. Extradition proceedings made it too complicated a procedure to transport the person back to the U.S. through Canada. Further, there were no major food outlets in Point Roberts at the time. The nearest source of food and other necessities was to be found in Delta, B.C.

By the close of the 1960's, the tourist era had forged a new identity for the community. Yet the intangible notions that gave substance to the ideal of the community remained unaltered and undiminished. The dilemma of Point Roberts that its residents had perceived twenty years earlier had only intensified. It was not strictly the day-to-day consequences of its dependency on Canada that provoked the most anxiety. It was the fact of the northern dependency itself that disturbed residents, for it posed a serious threat to community autonomy as well as its continuing status as an American town.

The problem of Point Roberts was very much a two-edged sword. On the one hand, dependence on Canada had provided a desperately-needed economic base to a once-dying community. On the other hand, the depth of this dependency implied a loss of control over the shape of the Point's future. The geographic

fate of the community was irrevocable. This "manifest destiny" of the Point prevented any convenient solutions to the emerging consequences of massive residential expansion and the frenetic pace of a recreation and entertainment economy.

If the storm warnings of northern dependency had first been noticed some twenty years prior to the arrival of the I.J.C. in 1971, some attention should be given to account for this delay in finding some solutions to the problems of the area. In the early 'fifties, the question was raised as to which government or level of authority would assume some responsibility for the survival of Point Roberts. This same fundamental question was essentially that put before the International Joint Commission when it was handed the reference in 1971.

#### [4] Mobilisation for a U.S. Solution

It has already been mentioned that several local and extra-local groups had begun, in the early 1950's, to demand recognition of the plight of Point Roberts. By the end of that decade, additional groups and authorities had mobilised in an attempt to find solutions to the boundary-related problems and in general to help revive a sagging economy. In November of 1958, for example, the Point Roberts Harbour Committee was formed. It was the purpose of this body to lobby for an adequate harbour for

Point Roberts and to "generally educate county, state and federal authorities of the economic plight of the Point and its growing dependence on Canada".<sup>37</sup>

The Committee's quest for an adequate harbour was predicated on the assumption that the formation of a stable economic base was the only means of ensuring that Point Roberts would survive and prosper. With the full support of the Point Roberts Township Supervisor,<sup>38</sup> the Harbour Committee called upon the U.S. Army Corps of Engineers to conduct an economic survey of the proposed harbour project. This survey was also to provide a feasibility study with respect to the commercial potential deriving from the creation of a suitable harbour. However, the harbour project failed to materialise despite the positive recommendation of the Corps of Engineers that such a development would be justified at the cost of \$3 million. It was the lack of such necessary funds that doomed the project. Before the U.S. would provide federal assistance, it was necessary for the Point Roberts officials to obtain matching funds. Unfortunately, the legal sponsor of the project, the Port of Bellingham, withdrew its sponsorship on the grounds that it did not have the financial resources to fund its share [\$1.2 million] of the harbour development.<sup>39</sup>

The Whatcom County Board of Commissioners refused to assume the sponsorship of the project for the same reason - lack

of the necessary funds. But the County also argued that, in any event, the Point of Bellingham would have sole jurisdiction over the harbour project.<sup>40</sup> At the State level, government officials rejected point-blank all proposals for State sponsorship. Point Roberts was simply not an urgent theme of State economic reflection.

Other avenues of development were also explored by local officials. It was believed that if Point Roberts were declared eligible for State assistance under the Area Redevelopment Act, the State government would be much more amenable to provide funding for existing and pending projects. However, in reply to the official application, Point Roberts' authorities were required to propose economically-feasible projects that would create specific long-range job opportunities. Moreover, Point Roberts was obliged to demonstrate that the sought-after designation of redevelopment eligibility would benefit not just the local community but the general economy of that part of the state.<sup>41</sup>

But by 1962, Point Roberts was no closer to qualifying under the Area Redevelopment programme, or for that matter for any other government-assistance, than it had ever been. In the absence of any feasible development project, such as the harbour plan, the community could not give any reasonable guarantees of long-range employment benefits. In addition, there was almost

no chance that Point Roberts would be able to produce the local contribution of funds necessary to qualify the town for outside assistance under the strict criteria of the Area Redevelopment Act. Further, it was a policy of the Area Redevelopment Administration that no area less than a county [in extent] could be designated for assistance under the authorising Act.<sup>42</sup> It was thus becoming evident that neither the County of Whatcom nor the State of Washington authorities were willing to produce the financial resources required to revitalise Point Roberts.

It was only to be expected that the lack of co-operation from the Port of Bellingham in initiating the harbour project, coupled with the denial of funding from county and state officials, gave rise to much indignation on the part of Point Roberts officials. Although the Point had been making substantial contributions to the Port of Bellingham's annual revenues through tax assessments<sup>43</sup> [and it continued to do so], the Port was not willing to commit the necessary funds. In 1961, the Whatcom County Assessors cancelled the agricultural status of the Point Roberts farmlands and this increased tax assessments on Point Roberts property by a substantial amount.<sup>44</sup> While the County applauded the efforts of Point Roberts to rebuild the town's economy, it steadfastly refused to provide any direct aid. Indeed, the County stood to reap significant tax advantages as more and more of Point Roberts' lands were subdivided and sold to aliens.

While recognising the unique situation of Point Roberts, the State of Washington took the view that the problems of the area did not fall within the purview of any existing legislation or programmes. If solutions were to be found, they would have to be provided by some other level of government - most likely that of the federal government.

The township's appeal to federal authorities brought yet another sympathetic although unproductive response.<sup>45</sup> In 1962, the Washington State Grange submitted a resolution to the U.S. House of Representatives requesting that "...all possible Federal assistance...be extended to Point Roberts to aid in solving [its] problems, both through the enactment of appropriate legislation by Congress and through the more effective administration of existing laws by the President...".<sup>46</sup>

The only concrete reaction to these demands was an allotment of funds to conduct an economic survey. The resulting study, entitled "An Economic Outlook of Point Roberts and Effects of a Proposed Harbour",<sup>47</sup> required more than three years to be completed. When the report was published finally in 1965, it was evident that it was founded upon the assumption that the proposed harbour project was assured of construction. Since this was not consistent with the real circumstances of the harbour proposal, the report proved to be of limited relevance and use. Nevertheless, the report helped to identify border problems as

the chief reason for the lack of development in the local economy of Point Roberts. In particular, the report found that various border restrictions regarding employment opportunities, commodity transportation, and year-round Canadian residency as the primary sources of economic instability. It was also perceived that the uncertain future of the Point discouraged private investment and long-range planning.

During the 1960's, county, state and federal authorities continued to debate the matter of which branch or level of government held ultimate responsibility for solving difficulties present at the Point. As one Congressman stated, "...if the problems faced by the people of Point Roberts are to be solved, some level of government is going to have to develop a specific proposal and it will have to be backed up with special legislation". The real question of course remained as to which level of government would actually take the initiative and, just as importantly, what would be the nature of this "special legislation". 48

A growing sense of alienation from all levels of government had come to reinforce the residents' insular perceptions. Frustration grew within the community as negative or dilatory government responses had not contributed to the solution of the very substantial problems besetting the Point. In 1963, for example, the Point Roberts school closed in the face of declining

enrolment as only ten students remained in grades nine to twelve. The closing of the school marked the end of a seventy year-old community institution as well as the disappearance of an important town symbol. All the Point Roberts students would now be required to make a daily fifty mile round-trip to Blaine, Washington.<sup>49</sup>

The Canadian position toward Point Roberts had remained clear and for the most part unequivocal: Point Roberts was American territory. The adjacent Canadian municipality, Delta, as well as the Provincial Government, argued that it was not Canadian responsibility to supply services such as electricity and water. Most of the relevant legislation or government policy expressly prevented the export of such services. It was undoubtedly an important factor in the stance of the Canadian governments that were reluctant to provide such services and utilities as long as Canadian residents at the Point were paying American property taxes. The argument followed that only U.S. citizens are allowed to vote on money by-laws. As a result, the minority of two hundred U.S. property-owners could dictate the taxes to be levied on the two thousand-plus majority of Canadian property-owners. Similarly, the American residents could dictate the amount of money to be spent by the community.<sup>50</sup>

At least one American newspaper implied that the reluctance of Canadian authorities to make certain concessions was an

example of overt Canadian nationalism.<sup>51</sup> In response to such criticism, both provincial and municipal politicians rationalised their views by declaring that any such concessions might set a dangerous precedent for the export of their natural resources. Regardless of the particular arguments offered, neither the Municipality of Delta nor the Province of British Columbia would give any assurances of assistance without a reciprocal commitment by Point Roberts to limit the growth of its population. It was feared that, once Canadian supplies and services began flowing south to the Point, there would be an incessant and increasing demand for additional supplies.

Trapped in the middle of this stalemate, of course, were the residents of Point Roberts. On one side, each of the U.S. county, state and federal authorities confessed their respective inability to resolve the plight given the absence of the appropriate legislative and policy provisions. None of the various levels of government were willing to take the first step towards addressing the unique problems of the Point. On the other side, the intransigent positions taken by Canadian authorities barred any co-operative remedies to the situation. Meanwhile, the putative object of this debate, the Point Roberts Township, lacked the funds and resources to deal with the evolving problems. Towards the close of the 'sixties, the common perception of community residents was that further attempts to persuade the U.S. authorities to adopt a

a unilateral solution would be futile.

[5] Mobilisation for an International Solution

The realisation that an international solution would be necessary evolved out of the seeming absence of any serious alternatives. However, this was not a novel perception of the situation. Since the early 'fifties, intermittent discussion had been given to the idea of convening an international inquiry into the dilemma of Point Roberts. In 1950, it was reported the State Department in Washington, D.C., had given this suggestion the "cold war treatment". Meanwhile, the Canadian Department for External Affairs would have been willing to entertain some sort of investigation by a joint committee of the two governments.<sup>52</sup> Similarly, in 1951, a group from the University of Washington had concluded that an international commission was required to resolve the complex problems of Point Roberts. Later, in 1961, the Point Roberts Township Supervisor requested formally that the dilemma facing the community be placed on the agenda for the next meeting of the U.S.-Canada Committee, a body comprising both M.P.'s and Congressmen.<sup>53</sup>

Throughout the 1960's, the call for international co-operation was promoted by Point Roberts. Indeed, the notion of binational support produced a myriad of possibilities for the development of the community. One particular suggestion had been

put forth by the Point Roberts Harbour Committee. The Committee proposed that a national or international park be created in the area in the manner of the American Samoan Islands in the Pacific. In its submissions to the Department of the Interior of the State of Washington, the Harbour Committee conceded that its proposal might require a change in the "political status" of Point Roberts. However, if such a change were demanded, it would be made temporary "until such time as Point Roberts has achieved economic independence and stability".<sup>54</sup> These efforts of the Committee did succeed in acquiring support from some officials, including a local Congressman.<sup>55</sup> The Secretary of the U.S. Department of the Interior nevertheless reported, in 1966, that his office was "unable to recommend the establishment of a national or international park in the area".<sup>56</sup> This refusal to proceed with the Committee proposal was reinforced by the response of the Interagency Committee for Outdoor Recreation in Olympia, Washington, which advised that the proposal was beyond the scope of the department.<sup>57</sup>

In 1964, another suggestion was advanced first in a local magazine article, calling for Point Roberts to be designated a "freeport" similar to those existing in other border cities around the world, e.g. Monaco.<sup>58</sup> It was claimed that Point Roberts could offer natural scenic beauty, an enormous potential for recreation and entertainment, and further act as a natural "magnet" attracting

vacationers and tourists from the dense Vancouver area. This initiative would have attracted an influx of private capital and have enabled authorities to plan the orderly development of the community. This proposal was lent support by a study on the economic problems of Point Roberts conducted by H.W. [Fred] Zittier in 1969.<sup>59</sup> This report concluded that by designating the area a "Duty-free International Port", it would become feasible to create a base industry that would foster the growth of an economic infrastructure in Point Roberts. The presence of a stable economic base and its multiplicative properties would have produced enormous employment opportunities and a solid tax base for the survival and expansion of the town.

A variation on the "freeport" scheme was suggested in a 1969 news item.<sup>60</sup> This latest remedy proposed the development of Point Roberts into an internationalised site for a new Pacific North International Trade Fair. This would effectively replace the old Washington State International Trade Fair which had previously failed to "meet the region's needs for a great business and industrial showplace for foreign buyers or sellers."<sup>61</sup>

The proposed development of Point Roberts into a "freeport" or an international trade site or some variant on this theme made sense for several reasons. First, Point Roberts is a short travelling distance to Vancouver, one of the most industrialised cities in western Canada and which also boasts the

second largest port in Canada. Second, while the Point Roberts peninsula evolved into a residential and recreational community, considerable commercial and residential development had been undertaken in the immediate area north of the international boundary. Toward the end of the 1960's, the region known as Tsawwassen was transforming into an exclusive residential suburb of Vancouver. Third, and perhaps most significantly, the Pacific side of the Canadian community was in the planning stages of the development of Canada's largest superport, the Robert Banks Superport. It seemed only natural that the American community of Point Roberts would become an integral part of the Robert Banks Project. This idea was supported by Decker in his 1965 report, "Economic Outlook for Point Roberts and Effects of a Proposed Harbour".

The end of the 'sixties also witnessed several interesting changes evolving within the community infrastructure itself. New organisations with broader bases of support took shape and gathered a variety of allegiances. In 1968, the Point Roberts Community Association was organised to consider community needs, investigate the possibilities of community development, and strive towards an international approach to solving the difficulties of Point Roberts.<sup>62</sup> The membership of this organisation was not restricted to the local citizenry - its officials included both Canadians and Americans residing at the Point. Further, governmental "districts" were established to act as important

liaisons for communication and co-ordination among community, governmental and private agencies. The water, fire, and parks districts developed quickly in areas where community autonomy had been weakened and where federal, state and county levels of government had failed to address pressing needs of the community. <sup>63</sup>

The community structure at the Point had established a viable defence system for the protection of local interests. This unified movement was also dedicated to the task of illuminating the plight of Point Roberts for all extra-community authorities to see. In 1969, a Memorial was sent to the U.S. federal government in Washington, D.C., endorsed by almost every section of the community. This petition called upon the U.S. federal government "to take whatever action necessary in order to hold a joint conference with the appropriate representatives of Canada in order to discuss the problems of Point Roberts". <sup>64</sup> It was proposed to establish a commission of representatives of U.S. federal, state and county governments, their counterparts from Canada, and the residents of the community.

However, at the end of 1969, the last surviving official community institution was closed. Whatcom County decided to dissolve the Point Roberts Township and transfer its functions to the county. Hence, the close of the Township Council represented the demise of another community symbol that had stood as an

identifiable and collective voice in the regional political structure.

No single event brought the Point Roberts dilemma, as perceived by both the community and the governmental authorities, to a visible climax. However, a new threat, yet to be mentioned, had been gaining more and more recognition. Since Point Roberts has no rivers or lakes to provide a fresh water supply, it must instead rely upon a single source of potable water - ground wells. There were a total of seven such wells serving the entire Point Roberts peninsula. Two of those wells ran dry while the others had begun yielding increasingly less water.<sup>65</sup> With the massive influx of thousands of summer residents and tourists, the demand for an adequate supply of drinking water could not be satisfied.

This problem of water resources was undoubtedly the most controversial issue in the entire community.<sup>66</sup> The adjacent municipality of Delta, B.C., and the B.C. provincial government both refused to export drinking water for the same reason they refused to export other natural resources - it went against existing law or governmental policy to export resources to a foreign territory in this particular context. In addition, as mentioned earlier, it was believed that any such exports would establish a dangerous precedent for the export of other natural resources. The water resource problem eventually became so severe that Whatcom County found it necessary to place a moratorium on the construction of new buildings at the Point. It became necessary

to have water supplies trucked in from Blaine, Washington at exorbitant costs. A related concern was that in the absence of adequate water supplies, there was little hope in having a badly-needed sewage system built.

Following twenty years of community calls for attention, an increasing nucleus of support had been amassed. This support included the local Congressman, members of the Washington State Legislature, and M.L.A.'s from the Province of British Columbia and who together sought to find some mechanism for the resolution of the eternal plight of Point Roberts.<sup>67</sup> Finally, in April of 1971, the federal governments of Canada and the United States agreed. "whether out of sincerity, curiosity or desparation",<sup>68</sup> to ask the International Joint Commission to investigate and report on the problems besetting the residents of Point Roberts.<sup>69</sup>

#### [6] Summary

For a community of its negligible size, Point Roberts has a long and curious history. The unique nature of its problems and the dilemma as it was perceived by its residents were attributable to the community's peculiar geographic, socio-economic and political characteristics. The plight of Point Roberts encompassed much more than the mobilisation of a community

in pursuit of those daily conveniences that are taken for granted in almost every other town: adequate water supplies, sewage systems, health and medical services, and electricity. These various problems, amongst others, were not the source of the basic dilemma as has been too often assumed. At best, these irritants were merely the focal point of the residents' long and sometimes bitter struggle to retain their identity, to retain what they perceived to be their right to live in a prosperous, but more importantly, American community.

The tortuous history of the community made its residents acutely aware of their vulnerability to the outside world. Point Roberts had struggled to forge a series of local alliances that united the town into a formidable vanguard of community interests. A community defence system had been devised to counter any extra-local action that threatened Point Roberts and the interests of its residents.

Thus the arrival of the I.J.C. heralded the beginning of a new era in the history of Point Roberts. The residents of this community were fully determined that this era not be the last.

## NOTES - CHAPTER III

1. Arthur Finch, Secretary, Point Roberts Harbour Committee, "Point Roberts, Washington: A Look at the Past with a View to the Future", Point Roberts, November, 1971, p. 17.
2. Richard E. Clark, "Social Change in an American Eclave Community", Bellingham, Washington, 1969. On File at the Library of Western Washington University, pp. 3-4.
3. Clark, in his work "Social Change", on pp. 3-4, accepts a more particular geographical definition of Point Roberts in his use of the term "pene-exclave". A "pene-exclave" is the situation where the territory of one country can only be approached conveniently by transversing the territory of another country. This notion is discussed in G.W.S. Robinson, "Exclaves", Annals of the Association of American Geographers 49 [September 1949]: 283.
4. Lester Burrell Shippee, Canadian-American Relations: 1849-1874 [New York: Russell and Russell, 1939], p. 241. Also see generally: S.F. Boggs, International-Boundaries: A Study of Boundary Functions and Problems [New York: AMS Press, 1966], pp. 33-9.
5. Percy E. Corbett, The Settlement of and an-American Disputes: A Critical Study of Methods and Results [New Haven: Yale University Press, 1937], p. 17.
6. Richard E. Clark, Point Roberts, U.S.A.: The History of a Canadian Enclave [Bellingham, Washington: Textype Publishing, 1980], p. 2.
7. Clark, "Social Change", p. 2.
8. Whatcom County Planning Council, "The 1966 Overall Economic Development Program", Bellingham, Washington, April, 1966, p. 2.
9. Clark, "Social Change", p. 71.
10. Richard E. Clark, "An American Exclave Community and the 'Great Change'", [M.A. Thesis, Western Washington University, 1970], pp. 7-15; Clark, "Social Change"; Clark, History of a Canadian Enclave; Bruce Ramsay, Ghost Towns of British Columbia [Vancouver: Mitchell Press, 1975]; Lottie Roeder Roth, History of Whatcom County [Seattle, Washington: Pioneer Publishing, 1926]; John T. Walbran, British Columbia

Coast Names [Vancouver: Library's, 1971].

11. A fishtrap is an arrangement of piles, wire webbing, nets and ropes. First a row of piles from ten to fifteen feet are driven, starting from shore and diagonally from the incoming tide water, and on these piles and held down with rocks, wire netting is fastened. This forms the "lead" which is 2500 feet long. At the outer end of this lead is the "pot" in the deep water. Flanking the mouth of the "pot" are short rows of piles strung with netting in such a way that when the schools of fish strike the "lead" and follow it to deep water they are then turned toward the mouth of the "pot" by the flanges. The mouth itself is a hole suspended on piles like a huge bag so arranged that fish once trapped there are likely to remain there until the trap is full. See also Clark, "Social Changes", p. 45.
12. Ibid., p. 16; Roth, History of Whatcom County, p. 801.
13. United States, Supplement to the Revised Statutes, 1874-1891, pp. 453-55; Clark, History of a Canadian Enclave, p. 45.
14. Clark, "'Great Change'", p. 12.
15. Clark, "Social Change", pp. 63-5.
16. Ibid.
17. Ibid., pp. 54-61; James A. Crutchfield and Guilio Pontecorvo, The Pacific Salmon Fisheries: A Study of Irrational Conservation [Baltimore: Johns Hopkins Press, 1969], p. 37.
18. Clark, "'Great Change'", p. 15.
19. Ibid., pp. 13-14.
20. "Is U.S. to Lose Point Roberts?", Bellingham Herald, 3 December 1950, p. 9.
21. This problem is explored in more detail by the International Point Roberts Board in its "Report to the International Joint Commission on Solutions to the Problems Facing the Residents of Point Roberts", October, 1973, pp. 18-21. For further discussion, see Chapter IV, 4 [iv], below.
22. "Is U.S. to Lose Point Roberts?", Bellingham Herald, 3 December 1950, p. 9.

23. Raymond B. Allen, President of the University of Washington, to Secretary, Point Roberts Chamber of Commerce, 3 January 1951. Files compiled by Arthur Finch attached to his work, "A Look at the Past", hereinafter referred to as "Finch Files".
24. Congressman Henry M. Jackson to Vlinski, Chairman of the International Boundary Commission, 3 June 1951. "Finch Files".
25. Whatcom County Board of Commissioners to the Joint Fact Finding Committee of the Washington State Legislature", 7 July 1952. "Finch Files".
26. "Border Crossing Sets Record Here: 630,000 Persons Crossed Border Here Last Year", Bellingham Herald, 11 January 1962.
27. Washington, Revised Code of Washington, 1969: 64.16.150; Clark, History of a Canadian Enclave, p. 100.
28. Clark, History of a Canadian Enclave, p. 100.
29. Clark, "Social Change", p. 95.
30. Ibid., 95-8.
31. Ibid., "Point Roberts Tired of 'Tijuana' Image", by John O'Ryan, Ocean Star, November, 1982, p. 3.
32. "What Point Roberts Scheme 'Really' Means", by Moira Farrow, Vancouver Sun, 26 January 1974, p. 6.
33. "Point Roberts Tired of 'Tijuana' Image", by John O'Ryan, Ocean Star, November, 1982, p. 3.
34. Clark, History of a Canadian Enclave, pp. 105-6.
35. Ibid. For further discussion, see Chapter IV, 4 [iv], below.
36. Ibid.
37. Finch, "A Look at the Past", pp. 10 and 41-44.
38. The Point Roberts Harbour Committee was representative of almost all local organisations including the local Grange, the Businessman's Association, Commercial Fish Packers, and Commercial Fisheries Association.

39. T.J. Glenn, Manager, Port of Bellingham, to Point Roberts Township Supervisor, 14 October 1965. "Finch Files".
40. Whatcom County Board of Commissioners to Point Roberts Harbour Committee, 2 December 1965. "Finch Files".
41. Finch, "A Look at the Past", pp. 18-23.
42. George W. Greene, Acting Chief, Northwest Division, Area Development Administration, U.S. Department of Commerce, n.d.. "Finch Files".
43. An editorial in the Bellingham Herald, dated 13 April 1952, revealed that the fishing catch in the Point Roberts area yielded some \$3 million in U.S. markets. However, little monies from assessment taxes found its way back to the Point Roberts community.
44. Finch, "A Look at the Past", pp. 41-44.
45. For example, there was an unsuccessful attempt to have Point Roberts designated under the Depressed Area Bill, *ibid.*, pp. 23-4.
46. Agricultural Section Resolution No. 38, 11 June 1962, submitted by Congressman Jack Westland in the U.S. House of Representatives, 87th Congress, 2nd Session, 14 August 1962.
47. John Kenneth Decker, "A Study Prepared for the Whatcom County Planning Commission", Bellingham, Washington, 1965.
48. Finch, "A Look at the Past", p. 27.
49. Clark, History of a Canadian Enclave, pp. 98-9.
50. "Hearings on Point Roberts Set by Border Commission", Vancouver Sun, 28 MAY 1971.
51. "Canada's Nationalism Hits an Isolated U.S. Town", by William Borders, New York Times, 5 October 1973, p. 8; At least one Canadian newspaper did not hide its attitude towards the issue, in its editorial, "Water is not for Sale", Globe and Mail, 16 August 1973.

52. "Is the U.S. to Lose Point Roberts?", Bellingham Herald, 3 December 1950, p. 4.
53. Senator Warren G. Magnusson, to V.C. Wampler, Point Roberts Township Clerk, 1 December 1961. "Finch Files".
54. Finch, "A Look at the Past", p. 34.
55. Congressman Lloyd Meeds to Arthur Finch, Point Roberts Harbour Committee, 17 May 1966. "Finch Files".
56. Congressman Lloyd Meeds, to the Secretary of the U.S. Department of the Interior, 16 March 1966.
57. Finch, "A Look at the Past", p. 53.
58. "Point Roberts Could be State's Top Attraction: Freeport or Another Monaco Suggested for Orphaned Area", by James T. Hughes, Argus, 23 October 1964.
59. H.W. Zittier, "Point Roberts Economic Potential", n.d., 1969.
60. "Point Roberts as Trade Site", by Dan Coughlin, Seattle Post-Intelligencer, 23 March 1969.
61. Ibid.
62. Clark, History of a Canadian Enclave, p. 104.
63. Ibid.
64. Clark, "Social Change", p. 113.
65. "Hearings on Point Roberts Set by Border Commission", Vancouver Sun, 28 May 1971.
66. For further discussion, see below pp.
67. For example, Congressman Lloyd Meeds had actively supported the idea that the Point Roberts issue should be put before the I.J.C. since the mid-'sixties, see: Peter C. Dobell, "The Influence of the Congress on Canadian-American Relations", in Canada and the United States: Transgovernmental and Transnational Relations, eds. Annette Baker Fox,

Alfred O. Hero Jr., and Joseph S. Nye, Jr. [New York: Columbia University Press, 1976], pp. 323-4. At the end of the 1960's, an unofficial committee was formed by some members of the B.C. and Washington legislatures whose constituencies were in the vicinity of Point Roberts. The purpose of the committee was to lobby to have the Point Roberts dilemma put on the agenda of the I.J.C.. The Committee did have some support from the B.C. provincial government cabinet. Private communication with a Member of Parliament for a B.C. constituency, 20 April 1982.

68. This phrase was used by Don Munton during his discussion of the Point Roberts reference in "Paradoxes and Prospects", in The International Joint Commission Seventy Years On, eds. Robert Spencer, John Kirton, and Kim Richard Nossal [Toronto: University of Toronto Press for the centre for International Studies, 1981], p. 79.
69. One explanation as to why the I.J.C. was asked to investigate the Point Roberts reference was given in a 1971 newspaper article. Apparently, Canadian officials at the federal level were reluctant to refer the Point Roberts case to the I.J.C.. At the same time, U.S. federal authorities were opposed to the idea of having the I.J.C. review its 1942 Order of Approval for the raising of the Ross Dam which would flood the Skagit Valley. A compromise was reached by sending both matters to the I.J.C. in the same month. See: "'No Man's Land' Probe Continues", Edmonton Journal, 24 April 1971.

#### IV. THE CONDUCT OF THE REFERENCE

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If the community is traumatized, it immediately galvanizes into a powerful, united, reactionary force...<sup>1</sup>

When the I.J.C. arrived in Point Roberts, it was obvious that it would have to contend with a wide array of interests.

In 1971, there were approximately 350 permanent residents living on the peninsula, less than half of whom were U.S. citizens. There were about 3500 seasonal residents, the vast majority of which were Canadian. In addition to these permanent and semi-permanent community-dwellers, the Point attracted thousands of tourists and vacationers on the summer weekends and who came, for the most part, from the Vancouver area. In addition to the concerns of the residents, there were no less than six varying jurisdictions of government directly involved with the problems facing the Point Roberts peninsula. As the Commission investigation progressed, the circle of interests that would be affected by the presence of the I.J.C. would widen dramatically.

As a consequence, it is not possible to account for each concern that would in some way bear connection to the investigation conducted by the Commission. Similarly, it would be useless to review every conceivable remedy, solution or idea proposed to alleviate the persistent and distressing problems of the town.

Instead, it will be the goal of this chapter to elucidate the general framework within which the I.J.C. undertook its inquiry. Further, the results of the Commission's studies and the community reaction to these findings will be given serious study.

It shall become apparent that by the time the Commission terminated its work, the investigation had raised further questions, polarised various local and regional factions, and ultimately left the problems of the community and its residents unresolved. The unsuccessful bid of the Commission to alleviate the plight of Point Roberts residents must be analysed from a variety of perspectives.

The community of Point Roberts was extremely protective of its local interests. To gain the respect and confidence of this tightly-knit community, the Commission would need to pay close attention to local fears and anxieties while making certain that the residents understood the nature and purpose of the Commission's investigation into their affairs.

Meanwhile, each governmental level in Canada and the United States had a stake in the future of Point Roberts. It was the responsibility of the Commission to recommend which problems required urgent attention and which particular authorities would be obliged to deal with specific sets of needs.

The overall task confronting the I.J.C. would be considered difficult by any standard. However, the Commission made

its task all the more difficult by devising an unworkable operational framework within which to conduct the inquiry. It was the nature of the approach taken by the Commission that may have undermined its objectives from the very beginning. Rather than break down the dilemma of Point Roberts into its component problems, the Commission sought to transcend the stalemate through the discovery of a "general" solution. This general solution consisted of the proposal to create a vast international conservation area. Immediately upon the release of this proposal, however, the overwhelming majority of the residents affected by the recommendations rejected it in the strongest terms. It is now plain that the Commission proposal was dismissed for reasons that bore no relation to the actual merits of the conservation idea.

[1] The Community's Perception of the I.J.C.

It is difficult to evaluate the reaction of residents to the announcement on 21 April 1971 that the governments of Canada and the United States had jointly referred the dilemma of Point Roberts to the I.J.C. for study and proposed solution. It can only be assumed that the formal recognition, on an international scale, of the dilemma of Point Roberts produced a cer-

tain measure of gratitude and relief. But the I.J.C. was very much an unknown quantity. To the community of Point Roberts, it was a matter of speculation whether the Commission was a specialised mechanism designed to encourage and initiate inter-governmental action or just another large bureaucracy motivated by political expediency. Point Roberts, it should be remembered, had already witnessed a multitude of studies and public pronouncements restating the plight of its residents and which had produced little if any substantial change. The community's struggle for survival over the previous twenty years had made it realise that the solution to its problems did not lie with a simple inquiry. The lengthy struggles of the community had also alerted it to yet another potential danger. The only thing worse than an inadequate solution would be the implementation of an unacceptable one. At stake was more than the day-to-day consequences of living in an American enclave. In the view of the residents, the dilemma was essentially one of territorial and communal survival. The economic collapse of the Point and the heavy influx of tourists and seasonal residents from the north had laid the foundations for the perception of the threat to community survival. If the dominant concern was survival, then any solution would be obliged to not merely maintain the existing rights and interests of the community as a whole, but would further need to ensure the prosperity and longevity of the residents' homesteads. The residents

had made it clear on several occasions that the only feasible solution to their dilemma would involve a general economic rehabilitation of their community. This notion of economic revival would further demand the sort of regulation and monitoring that would permit the community to control its own destiny. It would seem to be the view of the residents that such a solution would, by its very nature, lead to the resolution of its much-publicised and problematic daily living conditions.

But regardless of the reasons, the arrival of the I.J.C. at Point Roberts was to be met with guarded optimism and general apprehension.

## [2] The Terms of Reference

On 21 April 1971, the national governments of Canada and the United States submitted to the I.J.C. the Terms of Reference for the Point Roberts case. The Terms of Reference specified that pursuant to Article IX of the Boundary Waters Treaty, the Commission was to study and recommend solutions to problems created or magnified by the location of the international boundary at Point Roberts.<sup>2</sup>

The Terms of Reference noted specific problems at the Point which were to be investigated. These problems were described as follows:

- [i] The application of the customs laws and regulations of the United States and Ca-

nada with respect to the transportation of goods, particularly perishable foodstuffs and tools and equipment used in connection with the trade or business of the person transporting the same into and out of Point Roberts.

- [ii] The regulations governing employment in Canada of residents of Point Roberts and in Point Roberts of Canadian residents in and around Point Roberts.
- [iii] Problems of health and medical service including the following:
  - [a] Limitations in governmental health insurance programs which operate to deny compensation to residents of Point Roberts.
  - [b] Restrictions on the practice of medicine in the State of Washington which forbid Canadian physicians from practicing in Point Roberts.
- [iv] The existing arrangements for supply of electric power and telephone service to Point Roberts by Canadian utilities subject to U.S. laws and regulations.
- [v] Present and potential problems related to law enforcement in Point Roberts including transportation of accused persons from Point Roberts to detention facilities in the United States by way of Canada.
- [vi] Any other problems found to exist on account of the unique situation of Point Roberts. 3

It was the purpose of the Commission to recommend various solutions to this litany of distress "and any other ways of improving the situation".

Although the Terms of Reference gave a concise declaration of certain difficulties present at the Point, it should be

repeated that these problems had existed for decades. Complaints had been voiced concerning these same matters since the early 1950's. However, the precise tone of the Terms of Reference suggests that the sources of the dilemma issued from the immediate concerns of application of customs and employment laws, the lack of health and medical facilities, the supply of essential services and the inherent difficulties of law enforcement. It was clear that the residents of Point Roberts understood all these matters as symptomatic of a more fundamental problem.

In addition, nowhere in the Terms of Reference was there mentioned the supply of potable water, although this would later become one of the most critical questions facing the community. The water supply matter was a precondition to the related concern for the construction of an adequate sewage system. During the period immediately prior to the reference, questions had arisen as to whether the water resource problem was being overstated.<sup>4</sup> Nevertheless, it was generally perceived to be the most serious problem facing residents and became therefore the most vocalised issue.<sup>5</sup> The water resource problem was not brought to the attention of the Commission until the Commissioners themselves conducted public hearings in the vicinity in December of 1971.<sup>6</sup> Although the Terms of Reference were sufficiently broad to permit consideration of additional difficulties "found to exist on account of the unique situation", this important omis-

sion from the Terms of Reference suggests that the national governments did not have a complete grasp of the difficulties present at the Point.

[3] The International Point Roberts Board

Regardless of its deficiencies, the Terms of Reference did effectively reflect the immediacy of certain problems in Point Roberts. It was then the task of the I.J.C. to construct an operational and investigative framework within which the appropriate remedies could be found. It was at this preliminary stage that the Commission would come to erect obstacles in the path of its own investigation. These obstacles may well have undermined to a significant extent the overall success of its mission.

Although the Terms of Reference were submitted to the I.J.C. in April of 1971, it was until 30 November 1971 that the Commission announced the appointment of its advisory board - The International Point Roberts Board [I.P.R.B.]. This advisory board was instructed to conduct, through the appropriate agencies and departments of Canada and the U.S., the necessary studies and inquiries. Its general purpose was to advise the Commission on all matters contained in the Terms of Reference. On the basis of the I.R.P.B.'s investigation, the Commission would issue recommendations to the national governments.

As with most of the I.J.C.'s advisory boards, I.P.R.B. was composed of an equal number of members from Canada and the United States. A co-chairman was appointed from each section. The majority of the members of the I.P.R.B. had established careers in the administrative field representing both the private and public sectors. The Chairman of the Canadian Section, Dr. Geoffrey C. Andrew, was the Former Executive Director of the Association of Universities and Colleges. Other members of the Canadian section were Lloyd Brooks, the Deputy Minister of the B.C. Department of Parks and Recreation, and William T. Lane, a solicitor for the Municipality of Richmond, B.C.. Mr. Lane was also a Commissioner for the B.C. Land Commission. It is interesting to observe that there was no appointee from the federal government of Canada.

The members of the American Section had similarly held a variety of administrative posts. The Chairman, James W. Scott, was retired from the foreign service and acted as a consultant to the U.S. State Department. James M. Dolliver was the administrative Assistant to Governor David Evans of the State of Washington. Other members of the American Section included Dr. Manfred Vernon, a professor of political science at Western Washington College, and Frank Baker, an alternate to James Dolliver. Mr. Baker was the Executive Director of the Washington State Hospital Commission.

It should also be noted that there was no appointee from the county level on the American Section of the I.P.R.B.. This might have proven to be a short-sighted decision by the I.J.C.. For irrespective of the nature of the solution to be recommended, Whatcom County would undoubtedly play an essential role in the implementation and administration of any proposal submitted to the national governments.

Perhaps another unfortunate decision made by the I.J.C. was the failure to appoint anyone from within the community of Point Roberts. There is little question that a suitable candidate could have been found to provide an impartial assessment of the situation. Such input could have given the I.P.R.B. critical insight into the specific character and needs of Point Roberts. The inclusion of a community resident might further have helped the member of the Board develop a more informed understanding of Point Roberts beyond that otherwise obtainable from public hearings and related inquiries. The inclusion of a Point Roberts resident would further have provided the Board with a valuable liaison with the community.

The residency of certain Board members is also a matter of some interest. Most notably, James Dolliver, the Chairman of the American Section, resided on the opposite coast of the United States, in Alexandria, Virginia. The remaining Board members lived within a radius encompassing Olympia, Washington, and

Vancouver, B.C..

While the competence, credentials and sincerity of the members of the I.P.R.B. cannot be assailed, the Commission's decision to select the Board members itself may have been a tactical mistake. If the residents were at all suspicious of the I.J.C.'s initial presence at Point Roberts., then the I.J.C.-approved composition of the Board may have reinforced local anxieties. The Commission's selection of Board members may well have contributed to an aura of alienation that would alert the sensitive defence mechanisms of the Community. The absence of any Point Roberts resident on the Board may also have antagonised the community.

Also present were various circumstances that may have affected the outcome of the investigation in a more fundamental way. Foremost amongst these was the absence of any funds allocated by the national governments to the I.J.C.<sup>7</sup> for the investigation at Point Roberts. The lack of allocated funds is not an atypical circumstance of a Commission inquiry. Traditionally, the I.J.C. relies heavily on the expertise, facilities, and other resources and personnel from the various levels of governmental agencies. For instance, as stated in the Directive given to the Board by the I.J.C., "it is expected...that each member of the Board will bring with him the experience, information and, to some extent, the facilities in his department or agency so that the best use can be made of available resources and unnecessary

duplication avoided." 8

However, the Point Roberts investigation differed in many respects from the usual types of studies conducted by the Commission. In a fundamental way, the problems at Point Roberts were connected intimately to the community - its history, its residents, and its local and regional socio-economic and political environment. As shall be discussed later in this chapter, it was vital for the I.P.R.B. to appreciate the sensitive and particular needs of the area. Similarly, it would be imperative for the community and its outlying regions to become thoroughly familiar with the activities of the Board. Surely the achievement of this double-sided familiarisation process would have been much advanced by the allocation of an operating budget so as to permit a public liaison process. In the case of Point Roberts, the traditional reliance of the Commission on intergovernmental agencies was hopelessly inadequate. After all the many years of waiting, it is somewhat tragic that this particular opportunity to resolve the problems of Point Roberts should have run afoul of procedural rigidities.

For a period of two and a half years following the I.J.C.'s public hearings [held in Vancouver and Point Roberts in December of 1971], the I.P.R.B. was assigned to conduct its investigations.

During this time, the Board initiated several feasibility studies, solicited numerous letters of opinion, and contacted officials from various levels of government in the U.S. and Canada. For example, in the initial stages of the inquiry, the I.P.R.B. requested the U.S. National Park Service to prepare a study on the feasibility of establishing a national park at the Point. The Board further initiated a joint study by the National Parks Services of Canada and the U.S. to develop conceptual studies showing how Point Roberts could be made the focal parks system. This system was envisaged to run astride the border and offer environmental, recreational and long-term developmental advantages.<sup>9</sup>

Other studies summoned by the I.P.R.B. included the work of the British Columbia Hydro and Power Authority in exploring the difficulties of supplying electricity to the Point. The U.S. Department of Labour was also called upon to examine possible solutions to the problems associated with the employment of Canadians in and around Point Roberts. With further respect to the problems enunciated in its mandate, the I.P.R.B. was in consultation with the following agencies: the U.S. Departments of Health, Education and Welfare; Justice; State; National Revenue; and Canadian Departments of National Health and Welfare; Manpower and Immigration, amongst others. In addition, various state and provincial agencies were asked to give their counsel.

Except by way of some general remarks, the results of these studies and consultations may best be assessed upon the actual examination of the I.P.R.B.'s reports. However, one of the more interesting aspects of the Board demanding our attention involved the "low-key" profile kept throughout its investigative tenure. This approach to the investigation was reflected in several ways. First, the Board failed to establish an administrative office or headquarters at the Point nor did it otherwise attempt to make its presence felt in Point Roberts. Second, the Board issued few, if any, public statements on the progress of its investigations [this is not necessarily unorthodox in matters of a judicial or investigative nature]. To be certain, unless one already knew of the I.P.R.B.'s investigation, it is probably safe to assume that it would have been difficult to surmise that the I.J.C. had authorised any study of the Point Roberts reference.<sup>10</sup>

The I.P.R.B. may have preferred to proceed in cognito so as to facilitate a more efficient and objective inquiry. It may, on the other hand, simply been a lack of funds that prevented the Board from making its presence more apparent. But, for whatever reason, its low visibility proved disadvantageous in the long run. Too many questions were left unanswered and too many suspicions went unallayed. The community was kept very much in the dark with respect to the operation of the I.J.C./I.P.R.B.

and the course of the investigation into the plight of Point Roberts. After all, it was the survival of a community and its residents' way of life that was the ultimate object of the investigation. Yet the community had no idea whether the I.J.C. was acting as friend or foe.

Interrelated with the issue of profile was the matter of accessibility. It has been estimated that throughout the course of its operation, the I.P.R.B. met no more than eight to ten times.<sup>11</sup> This circumstance may not have denied community access to certain individual Board members, but it definitely restricted communication with the Board as a whole. Undoubtedly, the varied locations of the permanent residences of individual Board members limited the ability of the I.P.R.B. to get together and deliberate matters collectively.

Conversely, it may be argued that the available lines of communication between the residents of Point Roberts and the I.P.R.B. were in fact sufficient considering the graduality of the fact-finding and information-gathering process. This may, however, illustrate a crucial distinguishing factor between the Point Roberts study and those more commonly conducted by the I.J.C.. It may be assumed that the greater the technical orientation of the study required [involving the compilation and analysis of scientific, engineering and other data], the greater the probability that the study will be conducted in isolation.

Each expert assigned to the study would be given a clear role and responsibility in his particular realm of expertise. However, with respect to the Point Roberts investigation, the success of the I.P.R.B.'s work would only be marginally dependent on the technical studies undertaken. To a much greater extent, the implementation of the I.J.C.'s final recommendations would rest heavily on the extent of the inter-governmental cooperation and community support solicited by the I.P.R.B. That the advisory board chose to operate with a minimum of community contact may have undermined its investigation whatever the substance of its technical findings. Point Roberts was not a simple case involving a dam, or a bridge, or some controversial use of boundary waters. The case required a far greater degree of subjective consideration than the otherwise technical studies of previous Commission work had demanded. The advisory board assigned to investigate the Point Roberts reference should have seen the wisdom of approaching this case in a new light. Since the difficulties obtaining at the Point had been simmering for many years, the nature of the task facing the Board would have required this body to have evolved into something more than a mere investigator of fact. To address the problems of the Point properly, the Board would have to assume a much broader role. It would have to understand the opposing interests and factions in the effort to reach a consensus. In adopting this mediating function,

the Board would have made it imperative that every avenue of communication remain open. Under this approach, it would have been essential that the Board remain as accessible as possible in fulfilling a liaison function between the community and the various levels of the local and regional government structures. This sort of liaison and continuous community-government-I.P.R.B. contact would have been a more promising procedural framework within which the Board might have conducted its inquiry.

[4] The I.P.R.B's 1973 Report

It was not until October of 1973, two and a half years after the announcement of the reference, that the I.P.R.B. submitted its findings and recommendations to the I.J.C.. These recommendations were contained in a brief entitled, "Report to the International Joint Commission on Solutions to the Problems Facing the Residents of Point Roberts".<sup>12</sup>

In this report, the Board outlined the results of its investigations with respect to specific problems at the Point. It then discussed four general solutions to the Point Roberts dilemma: [a] the possibility of territorial adjustments; [b] the potential of regulated private development; [c] the creation of a U.S. National or State Park; and [d] the development of an International Conservation Area. The Board recommended in the

strongest possible terms that the Commission adopt the latter proposal calling for the creation of an International Conservation Area. For the purposes of review and analysis, the findings of the Board and its proposed solutions shall be examined in turn.

[a] Findings on the Specific Problems

In its report, the I.P.R.B. considered specific problems at the Point as were mentioned in the Terms of Reference as well as other difficulties uncovered during the course of its investigation.

With respect to several problems at the Point, the Board made no specific recommendations for solution. It simply identified the concern and described the nature of the matter without any further comment. For example, the Board gave no particular response to the serious problems associated with the application of customs laws and the potential hazards of law enforcement at the Point.<sup>13</sup>

In other areas, the Board failed to find that any problems existed at all. For example, with respect to employment and immigration difficulties, the Board stated that there were no real legal or other impediments for permanent U.S. citizens residing at the Point to seek full-time employment in Canada.<sup>14</sup> Similarly, the Board failed to see any problems concerning health and medical services. Canadian summer residents of the Point,

so long as they reside ordinarily in the Province of British Columbia, are not denied coverage under the B.C. Medical Services Plan. In the case of U.S. residents, it was the opinion of the Board that a 1972 amendment to the United States "Social Security Act" had done much to ease the problem. This amendment provides that an individual is entitled to U.S. hospital insurance benefits when admitted to a Canadian hospital if "...the hospital was closer to, or substantially more accessible from, the residence of such individual than the nearest hospital in the United States...".<sup>15</sup> Further, a 1973 Washington State legislative amendment<sup>16</sup> permitted licenced Canadian physicians to respond to emergency and house calls although they were still not permitted to open offices in Point Roberts. Of course, none of these measures did anything to resolve the problem that still faced Canadian citizens residing permanently at the Point. Since they cannot fulfill the provincial residency requirements, they lose the benefits of the B.C. health insurance programme. Similarly, problems remained for those American residents who fail to qualify for U.S. health insurance benefits.

The Board also examined a number of solutions to the problem of supplying electric power to Point. It was concluded that no solution was possible without the complete cooperation of B.C. Hydro and possibly amendments to its authorising legislation. It found that B.C. Hydro was reluctant to endorse any

proposal that permitted it to export utilities to Point Roberts, for this would have entailed B.C. Hydro coming under the jurisdiction of the U.S. Federal Power Commission and other state regulatory agencies.<sup>17</sup>

The Board further identified some problems at the Point that were not specified in the Terms of Reference. The most serious of these was the lack of water resources for both domestic uses as well as for the construction of an adequate sewage system. One solution investigated by the Board to solve this supply problem would involve the construction of a pipeline from the Point to another part of the U.S. across Boundary Bay. However, the U.S. Department of Agriculture reported to the Board in June of 1972 that the department had denied an application for financial assistance for this venture.<sup>18</sup> Without State assistance, the pipeline project was well beyond the financial reach of Whatcom County. Consequently, it was the Board's understanding that without the appropriate legislative amendments permitting B.C to export water to the U.S. and full support from all levels of government in Canada, there could be no solution to this problem. Canadian authorities would not agree to exporting water or permitting the usage of sanitary sewage systems serving the Greater Vancouver District so long as Canadian residents continued to pay U.S. property taxes in the Point. In the midst of this stalemate, the Board recommended that the Point Roberts

Water Board and municipal authorities from Delta, B.C. be asked to initiate a joint feasibility study on the problem.<sup>19</sup>

Other problems identified by the Board dealt with visa restrictions and pension rights for Canadian residents at Point Roberts.<sup>20</sup> The Board issued no recommendations with respect to these matters.

In sum, the I.P.R.B failed to issue substantive recommendations for the solution of any of the specific problems at the Point. The Board believed that a piecemeal approach was an inappropriate response to the problems of the residents. The dilemma was said to require a much more ambitious solution.

[b] The Possibility of Territorial Adjustments

It was the understanding of the Board that the Terms of Reference assigned to it by the I.J.C. did not restrict its mandate in the search for solutions. Consequently, the I.P.R.B. gave consideration first to the most expedient remedy - the possibility of leasing, selling, or otherwise effecting the transfer of Point Roberts into Canadian territory. However, the American section of the Board made it plain early into the reference that "it could not accept such a solution and [that] other solutions should be pursued".<sup>21</sup> It was thought that any transfer of land from one nation to another would be "politically unacceptable". Any sort of territorial adjustments would simply not be supported

by state and local authorities.<sup>22</sup> It would seem clear that the entire Board shared this perception. It can be assumed, therefore, that the question of ceding the Point to Canada was not considered seriously as a possible solution.<sup>23</sup>

[c] The Potential of Regulate Private Investment

Another solution examined by the Board would be to encourage private development at the Point to enable it to prosper as a recreational and residential enclave. It should be noted that the idea of regulated private development was not studied in the abstract. A Washington State-based firm, Pacific and Western Equities Limited,<sup>24</sup> had made a preliminary proposal to develop the Point into a "recreational-retirement community". The proposed \$200 million development project envisaged a self-sufficient community composed of both American and Canadian citizens. The firm's plan for the Point included a marina, two golf courses, and a resort hotel. The supply of all essential services, such as electricity, water, and sewage disposal systems, would be provided by the firm. This proposal also considered the construction of internal roads and conservation areas, in addition to carefully planned neighbourhoods.

It would appear that Pacific and Western Equities was quite serious in its proposal. Of the just over 3,000 acres comprising Point Roberts, it had interest in or owned outright more

than 1700 acres by 1973. It also had options to purchase several hundred additional acres. To make the project economically feasible, the community would have to sustain a population of between fifteen to twenty thousand people.<sup>25</sup> This would be five times the summer resident population at the Point. It was argued that, with a large and stable population core, the major projects required to provide adequate essential services could then be financed properly. These projects would in turn generate a stable economic base for the existing residents. It was further asserted that the material infrastructure thus established would justify the major capital expenditures required for such badly-needed developments as the construction of a water pipeline from U.S. sources to the peninsula across Boundary Bay.

The report of the Board revealed the numerous advantages to be yielded by private development. First, it would enable the residents of Point Roberts to determine the nature of the solutions to their problems. If private development were able to provide the required financial resources, such solutions could be obtained without the restrictive dependency on public taxes. Further, even if public financial assistance were in fact necessary, the private expansion proposal would still provide a larger tax base for both Whatcom County and the State of Washington.<sup>26</sup>

The I.P.R.B. believed that the proposal might be feasible

if the newly developed community was closely regulated and properly zoned by state and county authorities. It was felt that if private development proceeded without such regulation, the existing community problems would only be magnified with an increase in the present population.

In the end, the Board decided not to recommend any sort of private development scheme as a solution to the plight of Point Roberts. It was the Board's view that although many essential services might be provided without international co-operation, "the Canadian authorities, regional, provincial and federal, would deplore the additional burden on Canadian public facilities, roads and services." 27

The primary objections raised by the I.P.R.B. concerned the proposed tax base of the community under a private development scheme. More than one-half of the property at the Point would be Canadian-owned. Consequently, Canadians would be paying American property taxes without the right to vote. Without the right to vote, Canadian property owners would then have no say in the rate of annual assessments or its allocation.

Further, the Board assumed that Canadian governmental authorities would oppose any large-scale development of the Point Roberts peninsula. It was felt that whatever the success of private development projects, Canada would still be asked to co-op-

erate in the direct or indirect supply of services. Private development was seen as little if any benefit to Canadian governments as it would attract even more Canadians to visit or holiday at the Point - spending money in the U.S. that might otherwise go to Canadian merchants and businesses. On top of all this, Canadians living at the Point were already paying American property taxes. Unless the taxing authority and the provider of direct or indirect services were the same entity, the Board contended that a private development solution would not be desirable.

It is conceivable that the I.P.R.B. simply did not regard private development as an appropriate solution to the dilemma at the Point. It is more likely, however, that the Board did not trust the developers and their assurances that most essential services could be provided without heavy reliance on Canadian facilities. The Board believed that the notion of private development presented attractive possibilities, but that this potential for community expansion could not be realised in a practical solution to the problems of the area.<sup>28</sup>

[d] Creation of a U.S. National or State Park

The idea of establishing a U.S. National Park in and around the Point Roberts area was given study early on in the investigation and soon thereafter rejected. The U.S. National

Parks Service had advised the Board that the Point Roberts peninsula did not meet the strict criteria for a national park. Under these circumstances, the Board did not consider this solution any further. <sup>29</sup>

With respect to the notion of a state park, it was felt that this plan might provide for the ordinary necessities of community life. In particular, a state park might provide an adequate water system and the required level of police and fire protection. But the implementation of a state park was predicated on the provision of financial resources from the State of Washington. These funds would not be provided, given the existing demographic composition of the Point. In effect, the State of Washington would be asked to provide for heavy financing of a venture that would benefit a small number of American residents in comparison to the potentially large number of Canadian tourists and summer residents. Just as in the case of the Canadian governments' objections to the supply of services for the benefit of an American commercial venture, Point Roberts was again betrayed by the politics of its geography, only this time it was the State of Washington that objected. It should also be mentioned that the Board believed that new transportation links would have to be provided for American access to the state park. Unless these links, e.g. a ferry service, could be established, it was thought that the proposal would not be politically or economically feasible. <sup>30</sup>

[e] The Development of An International Conservation Area

The overall thrust of the 1973 I.P.R.B. Report to the I.J.C. was directed towards the development of an International Conservation Area. In the view of the Board, this proposal provided a genuinely international solution as well as long-term stability for the Point Roberts community.

The basis for this recommendation was contained in the joint feasibility study conducted by the U.S. National Parks Service and the Canadian National and Historic Parks Branch.<sup>31</sup> This study reviewed the potential in developing a bi-national park area. It was completed and submitted to the Board in March of 1973, whereupon the I.P.R.B. unanimously endorsed "Concept B" after evaluating the various proposals suggested in the study.

Concept B envisaged the creation of an international park system which would stretch from Gabriola Island to Whidbey Island in the San Juan - Gulf Islands Archipelago. Going from west to east, the proposed conservation area would stretch from Vancouver Island to the mainland coast of the State of Washington. In total, the area comprises approximately three thousand [3000] square miles over one-half of which is water. The area would encompass several already-existing communities, ninety existing public parks and fifteen wildlife refuges. Concept B further envisaged the creation of various recreational facilities

including marinas, bathing beaches, and underwater areas not then in place. 32

The international park and conservation system would be administered by a "bi-national forum" composed of three representatives each from Canada and the United States. This forum would be given a dual responsibility: [1] to develop and make policy and legislative recommendations to all levels of both governments that would pertain to the entire area under Concept B with respect to water quality maintenance, wildlife preservation, land use development, transportation networks, etc.; and [2] to administer a bi-national "headquarters" for the park system. The headquarters area would consist of the Point Roberts peninsula and a contiguous area in Canada of approximately the same land area. 33

Inside the headquarters region, the bi-national forum would have sufficient authority to acquire necessary lands while regulating the development of services and facilities required for the operation of the park headquarters area. As a consequence of this, the bi-national forum would be responsible for water supplies, sewage systems, fire and police protection, transportation networks and recreational facilities within the headquarters area.

The report of the I.P.R.B. gives little discussion to the means for financing the international conservation area. It would

seem clear, however, that the implementation of this proposal would have required substantial sums for the establishment, administration and operation of the park. Certain properties would have to be acquired within the general park system and within the headquarters area "deemed necessary in the operation of the international park system".<sup>34</sup> The only mention of how the required funds for this project would be obtained came in the context of the description of the legal instrument necessary for the U.S. and Canadian governments to establish the park. The instrument would be modelled after that which established the Roosevelt Campobello International Park.<sup>35</sup> It must be assumed from the report that the financing arrangements for the international park and conservation area would be similar to those arrangements provided in the instrument creating the Roosevelt Campobello International Park. According to that instrument, article 11 specifies that the "Governments of Canada and the United States shall share equally the costs of developing the Roosevelt Campobello International Park and the annual costs of operating and maintaining the Park". The extent to which provincial and state, county and municipal authorities were to be involved in financing arrangements was not made clear.

Perhaps the lack of specificity concerning funding for this project stems from a basic assumption enunciated by the Board. Since Concept B was to to be established and administered

by both the U.S. and Canadian governments, the I.P.R.B. assumed that all levels of government on both sides of the border would cooperate in the realisation of the project. This was certainly a dubious assumption, for even if financial arrangements could be agreed upon, this would not ensure that the park system would pacify local animosities. It was equally possible that the project would only serve to intensify disputes between the authorities and parties involved.

The I.P.R.B. report did not provide any detailed discussion of how Concept B would solve the specific local problems that initiated the reference. The Board merely suggested that in the headquarters area:

...it should be possible to alleviate Point Roberts water shortages and to provide an adequate waste disposal system within a reasonable period of time...even if this...would require amendment to existing British Columbia legislation regarding the export of water. 36

This matter-of-fact treatment of an urgent problem did not respond to the needs of the community. Certainly the Board failed to explain why the water shortage and sewage facility problems could be resolved without the creation of an international park. Specific and immediate concerns such as the application of customs laws, the need for electricity and added police protection were ignored in the report as it dealt with the creation

of the park. Many authorities came to complain<sup>37</sup> that the I.P.R.B. had proposed the mammoth park development without solving the immediate problems which gave rise to the reference in the first place. In creating a three thousand [3,000] square mile park, the very real and particular difficulties faced by residents in the five square mile area known as Point Roberts were simply lost in the preparation of this grand scheme. The park proposal conveniently assumes the eventual establishment of this conservation area would tend to solve the water, sewage and other concerns of Point Roberts as a by-product of the project. For the residents, and for many other commentators, this took too much for granted.

There was also an ironic element to the Board's proposal. Although Point Roberts was to retain its identity as a community, it was to be subject to the administrative structure of the "headquarters area". While the Point would, technically, remain part of the United States, the community would come under the jurisdiction of a bi-national forum composed of three Canadian and three American officials. Not only would this forum add to the existing mass of overlapping bureaucratic and administrative machinery, but it would send Point Roberts into a form of political limbo. It may be argued that while no formal transfer of territory was specified, there were to be substantial property "sales" as well as jurisdictional surrender to the "headquarters area" that included

Point Roberts.

There was a good deal of criticism addressed to the matter of the jurisdictional surrender of Point Roberts. In response to the clamour, the Whatcom County Commissioners issued a statement of opposition to the Board's park proposal. The county commissioners protested that U.S. citizens living in the Island, San Juan, Skagit and Whatcom [encompassing Point Roberts] counties would be governed by a non-elected six-man body composed of equal numbers of Canadian and American officials. The county commissioners further argued that, "...[to] give this six-man body the control over zoning and all other matters in such a large area is...government without representation and a basic violation of citizens' rights."<sup>38</sup> At the same time, a spokesperson from a group called the U.S. Citizens of Point Roberts declared that U.S. citizens felt that the international park proposal was tantamount to making the area part of Canada.<sup>39</sup> From this point onwards, the Board was forced to explain at most every opportunity that the opponents of the park scheme had misconstrued the proposal. The I.P.R.B. argued that the effect of the park would be to allow the current residents to live within this recreational setting possessed of all the public services they did not then enjoy. Whatever the validity of the Board's explanation, it became clear at the public hearings held two weeks later that area officials and residents still believed that the park scheme

was a form of covert cession.<sup>40</sup>

As far as the advantages of the park are concerned, it seems clear that there would be considerable ecological, environmental and recreational benefits. It would also remove some of the force of Canadian governments' objections concerning Canadian residents' paying U.S. property taxes at the Point, since Canadians would have indirect representation through the three Canadian members of the binational forum administering the park region encompassing Point Roberts.

Aside from the intrinsic merits of the park proposal, a major part of the struggle to win public approval of the plan would be for the Board to convey accurately the essential elements of this "solution" to community problems. The Board needed to inform residents of the parameters of Concept B, the parties to be affected, and the manner and means of implementing and sustaining the project. An urgent public relations campaign was necessary to dispel misconceptions and give an honest account of the proposal and its implications. However, the failure of the Board to mount such a campaign was brought to full light throughout the course of public hearings held in December of 1973.

Finally, one further observation concerning the I.P.R.B. report should be made. It is apparent from the text of the report that, in the opinion of the Board, the only feasible solution to the problems of Point Roberts was the creation of the interna-

tional park as envisaged. In the course of its work, the Board progressed from the study of specific problems mentioned in the Terms of Reference to the elaboration of a "master plan" for the solution of these concerns. The underlying causes of this evolutionary process remain unclear. It may have been that the Board had reached an impasse in a point-by-point analysis of the problems of the community. Or the Board may have come to believe that individual solutions were not economically or otherwise feasible, and so it came to accept the virtues of a more "global" approach to the situation, one that might offer long-term stability to the region.

Another explanation may be that the Board became preoccupied with the notion of an international park. The interim reports<sup>41</sup> submitted by the I.P.R.B. to the Commission in 1972 and 1973 suggest that the park scheme was at the forefront of the Board's consideration from the onset of the reference. It should be pointed out that, in the time just prior to the reference, the two national governments and their assorted agencies discussed at length a similar proposal for the establishment of an international park.<sup>42</sup> Further, at the time the reference was initiated, a federal-provincial task force was investigating the possibility of creating a network of Marine National Parks in the whole of the Georgia Strait area.<sup>43</sup> Coincidentally, just a few days before the U.S. and Canada announced the Point Roberts reference, Barry

Mather, a Member of Parliament for Surrey-White Rock, raised a question in the House of Commons whether "it would be Canada's intention to propose the creation of an international park at Point Roberts." 44

It is not certain whether the pre-existing idea of an international park, or that particular scheme upon which the Board focussed, overshadowed the Board's search for other alternative general or specific solutions to the problems of Point Roberts. However, the introductory section of the 1973 I.P.R.B. report to the Commission does indicate that the early pre-occupation with the park concept may have blurred the Board's vision of the initial purpose of the investigation. For the report stated:

...[t]he major objective of this international concept would be to preserve the existing attractive characteristics of the island archipelago region astride the border including the preservation of marine and land-based wildlife, archaeological and historic resources, and the maintenance of water quality standards. 45

Although this may otherwise be a worthy objective, it marked an obvious departure from the Board's mandate as described in its Terms of Reference as laid out by the I.J.C.. The major objective of any proposal put forward by the Board should have been the provision of specific solutions to the problems of Point Roberts, whether in the nature of an overall "master plan" or in the form of discrete remedies that are not necessarily inter-related or inter-dependent. All other motives behind the Board proposal should be understood as subsidiary considerations to

the primary purpose of the reference.

Whatever the actual motives behind the Board's recommendation of the park solution, it is clear that the I.J.C. was well informed of the progress of the I.P.R.B.'s inquiry. Hence, if the Board lost sight of its primary objective, then the I.J.C. must be blamed in part for failing to exercise its powers of discretion and control during the course of the Board's investigation.

#### [5] The Reaction of the Community

Just over a month after the release of the I.P.R.B.'s report, the I.J.C. held public hearings in Point Roberts and in Vancouver in 1973 to discuss the results of the Board's investigation. In total, the public hearings involved almost two hundred oral and written submissions which combined to make up over one thousand [1000] pages of transcripts. It was not long into the hearings before it became obvious that the majority of the submissions, representing both Canadian and American residents, organizations, and other interests, stood opposed to the proposal for the creation of an international park.

It also became obvious that, aside from the intrinsic merits of the plan, the I.P.R.B. had failed completely in the effort [or lack of it] to communicate the substance of its reports

to the public. The proposal to make Point Roberts a part of an international conservation area was to be termed "...perhaps the most misunderstood issue of the decade".<sup>46</sup> As one observer revealed:

...[C]opies of its report and many details had to be written away for or examined at a library. Therefore, many people got their information from skimpy newspaper stories. It was inevitable that by the time the public hearings began on December 3, minds had been made up before the facts were made clear.<sup>47</sup>

No explanations have been given to account for the Board's failure to publicise the results of its work so that residents could be informed properly of the findings of the investigation. The lack of liaison and information campaigns may reflect an inherent limitation of the I.J.C.'s fact-finding process with respect to non-technical issues. A lack of funds for such liaison work or simply a failure of perception and foresight may also explain the Board's communicative shortcomings. In any event, it is not surprising then that at the hearings, James Dolliver, a member of the American section of the Board, was quoted as saying that only two out of one hundred and twenty-five [125] witnesses demonstrated any real understanding of the international park concept.<sup>48</sup>

In the same way that the Board felt that most submissions reflected a general misconception of its report, various witnesses

complained that the Board's own report was too vague and lacked specificity with respect to many essential aspects of the proposal.<sup>49</sup> Many special interest groups opposed the plan essentially because the 1973 I.P.R.B. report failed to specify how their interests would be affected. For example, the Puget Sound Gillesters Association, which represented some one thousand and two hundred [1,200] fisherman, refused to endorse any proposal unless the jurisdictional aspects as regards fisheries were laid out<sup>50</sup> first. At that time, both the Pacific Salmon Fisheries Commission and the Washington State Department of Fisheries had concurrent jurisdiction. The Commercial Salmon Fisheries Association and the Puget Sound Salmon Canneries Inc. voiced similar opinions.<sup>51</sup>

Bob Jacobson, the President of Community Development Services, Inc., of Seattle, Washington, revealed that his firm had acted as a consultant to a study conducted by Whatcom County entitled Point Roberts Comprehensive Plan and Development Program.<sup>52</sup> The results of this study did not necessarily invalidate the I.P.R.B.'s proposal. However, he stated that more information would be needed by the Board to determine the degree to which the two reports were incompatible. Others objected to the I.P.R.B. report and its lack of specificity in regard to: the absence of a definition for the term "headquarters area"; the

impact of the plan on local initiative, business and industry; and the failure to outline any procedures to provide equitable compensation for existing property owners at Point Roberts whose land might be needed for the purposes of the international park.<sup>53</sup> The Point Roberts Planning Committee, an organisation formed in August of 1972 and which represented some five hundred [500] Point Roberts and vicinity property owners, argued that the report simply failed to give sufficient detail as to the effects of the plan on the community. Hence, in their view, a proper assessment of the scheme would be premature.<sup>54</sup>

Throughout the hearings, there echoed yet another preliminary criticism of a more serious nature. Many elected officials, governmental agencies, community organisations, and other groups complained that they were not consulted by the I.P.R.B. for their views and suggestions. For instance, a representative of the San Juan County Planning Department stated that his department was not contacted by the Board at any stage of the investigation.<sup>55</sup> John Linde substantiated this comment and added that neither his organisation, the Landowners and Taxpayers Association of San Juan County, nor the County Commissioners for San Juan County, were consulted.<sup>56</sup> Similarly, representatives from the Lummi Tribe and Reservation as well as from the Lummi Planning Commission opposed the proposal bitterly. They revealed

that there had been absolutely no communication between their officials and the Board.<sup>57</sup> They stated that they would not endorse any plan until they had "...been made a meaningful part of the planning process."<sup>58</sup> A representative from the U.S. Navy commented that his agency had not been consulted even though its present flight patterns might well have been a source of considerable noise pollution to the area covered under Concept B.<sup>59</sup> It is also interesting to observe that, in a submission by the County Commissioners for Skagit County, it was declared that they would not endorse any plan without some assurance of local input and public participation in the planning process.

One of the most vehement complaints in this regard was voiced by Mr. C. Johnson, the Chairman of the Board of County Commissioners.<sup>60</sup> Johnson thought it was a travesty that he was not consulted given that he was an elected official whose constituency included the community of Point Roberts. Finally, even though the Whatcom County Planning Commission had been in contact with the I.P.R.B., it complained that the Board had ignored its submissions.<sup>61</sup>

Beyond these criticisms of the Board's lack of consultation in the preparation of its report, and the lack of specificity of the report itself, there were serious objections to both the substance and effect of the proposal. There was one objection, in particular, that was raised consistently throughout the course

of the hearings. The target of this complaint was the responsibility of the binational forum, under Concept B, for the administration of the headquarters areas which included the community of Point Roberts. The forum was intended to have the authority to make recommendations to the national governments as well as to, where warranted, the state, provincial and local authorities in both countries. These recommendations would concern the entire park area and, as a result, local authorities within the boundaries of the park, especially those within the headquarters region, would be subject to the jurisdiction of the binational forum. As one resident put it, the forum would be "abridging the local consent of the government."<sup>62</sup> In other words, the argument objected that the binational forum would be responsible to the national governments and not to the residents in the affected areas. A former Whatcom County Commissioner asserted that this would be not merely a violation of citizens' rights, but would also be unconstitutional.<sup>63</sup> This objection was reiterated in the hearings before the I.J.C. by members of the Point Roberts Voters' Association. They pointed out that the officials of the binational forum would be appointed and not elected representatives.<sup>64</sup> Further, it was argued that the type of administrative arrangements foreseen by Concept B would complicate the political lines of authority while, more importantly, increasing the size of the bureaucracy unnecessarily.<sup>65</sup>

In the I.P.R.B. report, the Board assumed that the "... gradual reduction of the resident population of Point Roberts, envisaged under either an international or state park arrangement would, in and of itself, reduce..." the specific problems mentioned in the Terms of Reference.<sup>66</sup> It was submitted that the creation of a binational forum, with this assumption in mind, would strip the community of both local autonomy and the right to "self-determination".<sup>67</sup> The Board report expected the community to wither away in the wake of the international park, and this would in course resolve the problems at the Point. This expectation showed how far the Board strayed from its original purpose to remedy the plight of Point Roberts. It was as if the I.P.R.B., believing that the community was dying anyway, had decided to focus on the grand scheme of the international park and conveniently assume that nature would take its course and Point Roberts would no longer be a problem for the authorities. Perhaps this explains the failure to recommend specific solutions to the particular problems of the residents. The residents of the Point certainly felt that the Board was acting contrary to community interests. One resident, representing the Senior Citizens of Point Roberts, protested that the park plan outlined in Concept B would transform the Point into a "reservation".<sup>68</sup>

In essence, it was argued that the Board proposal would deprive

Point Roberts of its sense of independence and dissolve the "notion of community."<sup>69</sup>

Other residents were criticised Concept B as being simply "too grandiose" while doing little to address the immediate concerns of water shortages and the construction of a proper sewage system.<sup>70</sup> Some residents of the Point and its vicinity argued that the proposal would only create additional difficulties. For example, the report did not explain the impact of the plan on access routes to and from the Point, on traffic congestion, and on provincial and municipal arterial street systems.<sup>71</sup> Many residents also expressed the view that the plan would have a negative effect on land values.<sup>72</sup>

Mayor D.J. Morrison of the Corporation of Delta, B.C., would only endorse the Board's proposal upon fulfillment of two conditions. First, that all or most of the underdeveloped land in Point Roberts must be acquired for parks purposes; and second, that all further development of land for residential and general urban use be limited to or near the present population level. He stated that his office would not support any international arrangement that served to legitimise the use of Canadian services to facilitate the urban development of Point Roberts. In his view, the proposed international park would only compound the problems already associated with the area.<sup>73</sup>

It is difficult to discern, however, on the basis of

residents' submissions at the hearings, the appropriate solution to the problems of their community. Some felt that if the I.J.C. could rectify the water resource problem, then Point Roberts would be thus enabled to determine its own course.<sup>74</sup> A large contingent were much in favour of some sort of regulated private development. As a result of an effective public relations campaign mounted by the company,<sup>75</sup> many were impressed with the scheme proposed by Pacific and Western Equities Limited. It was believed that private development would enable the community to retain its autonomy through the creation of an expanded and more stable tax base. Private initiative would also be very likely to exploit the recreational features of the Point.<sup>76</sup>

Nevertheless, some people questioned both the logistics and the feasibility of private development.<sup>77</sup> It was suggested that the international conservation area would at least offer protection for the natural environs surrounding the community and monitor any development on the Point. On the other hand, the private development scheme that had been suggested would create a housing suburb with a population density equal to that of East Chicago. One commentator was puzzled by community support for a development project that, it was suggested, would turn the beaches of Point Roberts into a replica of Coney Island.<sup>78</sup>

Finally, it should be made clear that were several officials, groups and individuals which supported the establishment of the park. For the most part, Concept B received the approbation of environmental lobbyists and the like from both sides of the border.<sup>79</sup> These organizations ranged from the B.C. Wildlife Federation, representing over thirteen thousand [13,000] British Columbians, to the Sierra Club of Puget Sound. The then Premier of B.C., Dave Barrett, and the then Governor of the State of Washington, David Evans, also showed support for the proposal. In addition, Jack Davis, who at the time was the Federal Minister for the Environment in Canada, similarly voiced his praise for the international park concept.

#### [6] The Termination of the Reference

Following the close of the public hearings, it was obvious to the I.J.C. Commissioners that their advisory board's report and proposal had not been received well and further attracted heavy opposition. The Commission was to attribute this lack of support to the conceptual nature and the general public misconception of the I.P.R.B. report.<sup>80</sup> As a result, the Commission requested the Board to make itself available for consultation between it [the I.P.R.B.] and officials from jurisdictions within the Gulf - San Juan Island - Point Roberts area. The I.J.C.

wished the Board to further explain the latter's recommendations and in greater detail to area officials. The Board was also asked to establish a task force composed of appropriate authorities from state, provincial and local jurisdictions. The task force was instructed to scrutinise the implications of the Board's recommendations and the impact of the park concept on the areas affected. It was then the function of the task force to determine whether there was a sufficient degree of mutual co-operation and agreement to make the international park and conservation area a feasible project.

Finally, in June of 1974, the Board itself was directed to prepare a supplemental report focusing on the specific problems affecting Point Roberts within the more limited geographic area of the Point and its immediate environs.<sup>81</sup> The I.P.R.B., in the course of preparing this new study, was to make various assumptions about future population levels and examine the implications of such levels. The assumptions concerned the following: existing population levels; the maximum population for which water might be provided from Canada; and the population level which would be attendant to large-scale private development of Point Roberts.<sup>82</sup>

Following these directives, there were a series of information meetings held between the Board and local officials. However, the Board was unable to establish a task force to study

the impact and implications of its recommendations, as the co-operation needed to create such a body could not be obtained.<sup>83</sup>

On 15 September 1974, the I.P.R.B. submitted its second report to the Commission, entitled, Supplemental Report of the International Point Roberts Board to the International Joint Commission.<sup>84</sup>

However, the thrust of the Board's Supplemental Report differed little from its previous report. In the introduction to the Supplemental Report, it was stated that "...the problems initially identified by the two governments were minor when compared to a number of other more fundamental problems facing the existing population."<sup>85</sup> The fundamental problem was said to be the geographical isolation of Point Roberts from the rest of the U.S.. Close proximity to the Vancouver area made the Point a Canadian recreational and dormitory suburb without the natural resources to support the existing permanent and summer residents or any future development of the community. Further, it was the finding of the Board that "the Canadian governments involved will agree to supply these resources only if they have a voice in the question of land use patterns and population densities on Point Roberts".<sup>86</sup>

With few exceptions,<sup>87</sup> the Board's Supplemental Report reiterated the findings and recommendations contained in the previous 1973 report. The Supplementary Report concluded with the

observation that at either the existing or at higher population levels, international co-operation would be essential at all governmental levels. Any unilateral solution introduced by the United States would be extremely expensive while likely failing to resolve all the difficulties of the community. In the words of the Board,

...it is necessary that the United States citizens on the Point and local and state legislators should come to recognize that the local and provincial governments in Canada are entitled to have a view of the population density of Point Roberts, if Canada is to be expected to provide road access to the Point and other services. 88

The Board finally concluded that it could no longer fulfill its duties until various local and regional authorities agreed that bilateral co-operation was required. Given this understanding of the situation, together with the negative public reaction to the park proposal as witnessed in the hearings, the Board admitted that it would be futile for the Commission itself to propose to the national governments that "Concept B" be accepted as a solution to the problems of Point Roberts.<sup>89</sup>

By early October of 1974, the I.J.C. had announced that it would not be recommending that Point Roberts be incorporated into an international park scheme. The decision against recommending the proposal to the federal governments came as no surprise. By this time, not only had the residents of Point Roberts

raised strong objections to the proposal, but official opposition continued to be stiff. For instance, a Senate Joint Memorial was submitted by the Washington State Legislature on 11 February 1974. It requested the discontinuance of the I.J.C.'s study until a Select Committee, appointed by the State Senate to make recommendations regarding Point Roberts, had completed its report. When the Commission revealed that it would not recommend the park proposal, the Chairman of the Select Committee stated that the committee would have asked the I.J.C. to scrap the scheme anyway the following January.<sup>90</sup> It was further reported that the Select Committee had reached the conclusion that the problems of the Point should be solved by local action with the co-operation of the B.C. Provincial and Washington State governments.<sup>91</sup>

It is interesting to note that while the Washington Select Committee was investigating the situation, the B.C. government was conducting its own studies concerning the land adjacent to the Point Roberts peninsula. It was reported that British Columbia was in the process of establishing an Islands Trust in the Gulf Islands region in order to regulate and coordinate the development of those lands.<sup>92</sup>

For a period of over two years following the 1974 I.P.R.B. Supplemental Report, there was little if any progress with respect to the Point Roberts reference. As a result, on

16 August 1977, the International Joint Commission officially terminated its work under the reference. In its final report to the Canadian and American governments, the Commission stated that "until such time as the local jurisdictions have reached some sort of accommodation concerning the Point Roberts question, there is little the Commission can do in this matter." <sup>93</sup>

[7] Summary

The I.J.C.'s involvement with the Point Roberts reference lasted approximately six years. Yet, within three years of its arrival at the Point, it was plain that the ability of the Commission to achieve any solutions to the dilemma was in grave doubt. Part of blame for the failure of the Commission to resolve the problems of Point Roberts must be attributed to the inherent complexities of these concerns. The specific problems in obtaining essential services were complicated by the geographic peculiarities of the Point. These logistical/political problems were further compounded by the deep rifts between local jurisdictions and factions within the vicinity of the Point.

Another aspect to the inability of the Commission to fulfill its objectives in the reference lies in the nature of the approach taken by the I.J.C. and the advisory board it appointed. It is questionable whether the I.J.C. ever cleared

its perspective of its traditional environmental orientation as the Commission proceeded with Point Roberts as if it were a typical case. But the narrow technical focus of the advisory board, its seeming obsession with the concept of an international park, and its failure to establish the liaison and consultative mechanisms necessary to keep the residents informed of its work all served to undermine its purpose. In losing sight of the need to find specific solutions to the various problems present at the Point, the advisory board seized upon the notion of a "grand solution" as the most expedient means of resolving the dilemma. It was perhaps thought that a master strategy would be able to escape the local political antagonisms and the nationalistic overtures of various interest groups. But by failing to recommend specific solutions to several urgent community problems, the concept of a grand solution had little appeal for the residents especially in the corrupted account of the park concept that was filtered down to the public.

Although the proposal of a grand solution was intended to capture the imagination of the many diverse interests affected by the plan, instead it united most factions in opposition to the international park scheme. But, in this ironic fashion, the proposal may have yielded a positive result. The proposal demonstrated to all concerned parties the sort of arrangement that might come to be imposed upon the area unless some local accom-

modation could be reached. The existence and recent prosperity of Point Roberts today may provide testimony to the view that the work of the I.J.C. in Point Roberts was not completely in vain.

## NOTES - CHAPTER V

1. Richard E. Clark, Point Roberts U.S.A.: The History of a Canadian Enclave [Bellingham, Washington: Textype Publishing, 1980], p. 104.
2. International Joint Commission, Docket No. 92, "Terms of Reference", 21 April 1971.
3. Ibid.
4. Private communication with a Point Roberts resident, 9 April 1982.
5. "200 People Attend Commission Hearing in Tavern," Globe and Mail, 20 December 1979, p. 29.
6. Private communication with a former member of the International Point Roberts Board, 9 February 1982.
7. Ibid.
8. I.J.C., Docket No. 92, "Directive to the International Point Roberts Board," 15 November 1971.
9. International Point Roberts Board, "Report to the International Joint Commission on Solutions to the Problems Facing the Residents of Point Roberts," 23 October 1973, p. 37.
10. Private communication with a former member of the International Point Roberts Board, 13 July 1982.
11. It was reported that in September of 1973 when the I.P.R.B. was drafting its report, it was only its sixth meeting. "Canada, U.S. Pondering Roberts," Daily Colonist, 6 September 1973. It seems that throughout its tenure, the I.P.R.B. met no more than times. Private communication with a former member of the International Point Roberts Board, 13 July 1982.
12. International Point Roberts Board, "Report to the International Joint Commission on Solutions to the Problems Facing the Residents of Point Roberts," 23 October 1973.
13. Ibid., pp. 18-19; 25-7.

14. Ibid., p. 20.
15. The Public Health and Welfare Act, 42 U.S.C., sec. 139, as amended by P.L. 92-603, Title II, sec. 211, para. 1395.
16. Canadian Physicians - Point Roberts Practice Permitted, H.R. 933, 1st extraordinary sess., chap. 110 [1973].
17. I.P.R.B., "Report to the International Joint Commission," pp. 24-5.
18. Ibid., pp. 27-31.
19. Ibid., p. 29.
20. Ibid., pp. 31-32.
21. Ibid., pp. 1 and 13.
22. Ibid., p. 10.  
It was clear that cession of territory was not permissible. A consideration of the Board was a Memorial to Congress passed by the Washington State Legislature in 1969 to establish a commission to hold a joint conference to discuss possible solutions for Point Roberts. However, transfer of territorial or historical rights were specifically excluded from possible solutions to be considered.
23. "Committee Works Out Plan to Deal with Point Roberts," Vancouver Sun, 6 September 1973; "Report Completed on Point Roberts," Daily Colonist, 8 September 1973.
24. Pacific and Western Equities, Ltd., was a Washington-incorporated firm. However, most of its executives were Canadian, including its President, Mr. Bruce Wallace.
25. I.P.R.B., "Report to the International Joint Commission," p. 9.
26. Ibid., pp. 2-3 and 40.
27. Ibid., p. 2.
28. Private Communication with a former member of the International Point Roberts Board, 13 July 1982.

29. I.P.R.B., "Report to the International Joint Commission," pp. 37-8.
30. Ibid., p. 39.
31. U.S. National Parks Service and Canadian National and Historic Parks Branch, "Joint Study. An Inventory of International Parks Possibilities: Point Roberts, Boundary Bay, San Juan and Gulf Islands Archipelago," March, 1973.
32. I.P.R.B., "Report to the International Joint Commission," pp. 3-7; 43-50.
33. Ibid., pp. 45-6. It was the intent of the Board to establish the "binational forum" with a structure similar to that of the I.J.C.
34. Ibid., p. 48.
35. "Agreement Between the Government of Canada and Government of the United States of America Relating to the Establishment of the Roosevelt Campobello International Park," T.I.A.S. 5631 [1964].
36. I.P.R.B., "Report to the International Joint Commission," p. 52.
37. For a detailed discussion, see subsection 5, below.
38. "U.S. Officials, Point Roberts' Residents Take Firm Stand Against I.J.C. Park Plan," Vancouver Sun, 5 November 1973.
39. Ibid.
40. A detailed discussion is provided in subsection 5, below.
41. Private communication with a former member of the International Point Roberts Board, 9 February 1982.
42. For example, it was reported that Tom Goode, M.P. for Burnaby-Richmond, stated that the Terms of Reference were broad enough for the I.J.C. to recommend transforming Point Roberts into an international park much like Campobello International Park. "No Man's Land Probe Continues," by Peter Calamai, Edmonton Journal, 24 April 1971.

43. Canada, Parliament, House of Commons, Debates, Question No. 1,026, 7 March 1973, p. 1978.  
It was also revealed by the Minister of the Environment, Jack Davis, that both his department and the Department of Indian Affairs had obtained cabinet approval in 1971 to appoint a federal task force to investigate the concept of a park area encompassing the Strait of Georgia. International Joint Commission, "Proceedings of the Public Hearings Conducted by the International Joint Commission at Vancouver, B.C. and Point Roberts, Washington." December, 1973. [Hereinafter referred to as "Public Hearings."] By 1973, it was reported that James Lorimer, Municipal Affairs Minister for B.C., accepted in principle a report by a legislative committee which recommended a trust form of government for the Gulf Islands. Apparently, the study was prompted by the growing concern over the land boom on the islands and from people who live on the mainland and Vancouver Island that the land would lose its rural character. "Public Protection to Save Gulf Islands for the Future," Globe and Mail, 3 November 1973.
44. Canada, Parliament, House of Commons, Debates, 23 April 1973, p. 5178.
45. I.P.R.B., "Report to the International Joint Commission," p. 5.
46. "What the Point Roberts Scheme 'Really' Means," by Moira Farrow, Vancouver Sun, 26 January 1974..
47. Ibid.
48. Ibid.
49. Submissions of Jack Rand, "Public Hearings," p. 29.
50. Submissions of the Puget Sound Gilnetters Association, presented by Ben Hinkle, "Public Hearings," pp. 80-1.
51. Submissions of the Commercial Salmon Fisheries Association, presented by Joe G. Hanson and the Puget Sound Salmon Canneries, "Public Hearings," pp. 82 and 92.
52. Community Development Services, Inc., "Point Roberts Comprehensive Plan and Development Program," Seattle, September, 1973. See submissions of Bob Jacobson, "Public Hearings," p. 123.

53. Submissions of Robert Sopow, Sopow Construction, "Public Hearings," p. 171; Hank Peltier, *ibid.*, p. 179; Gordon Marriott of the Maple Beach Property Owners Association of Vancouver, *ibid.*, p. 286; and Glen Johnson of the Point Roberts Voters Association, *ibid.*, p. 287.
54. Submissions by the Point Roberts' Planning Committee, presented by C.M. Hockridge, "Public Hearings," pp. 200-2. The Point Roberts' Planning Committee consisted of both U.S. and Canadian citizens and was designed to coordinate development at the Point.
55. Submissions of Richard M. Grout, "Public Hearings," p. 77.
56. "Public Hearings," pp. 250-2.
57. Submissions of Boyd Hayden, "Public Hearings," pp. 264-5.
58. *Ibid.*
59. Submissions of Commander Roger Leonhardi, "Public Hearings," p. 73.
60. "Public Hearings," p. 194. All members of the Whatcom County Commission opposed the park proposal. See submissions of Terry Unger, *ibid.*, pp. 21-8; and Larry McIntyre, *ibid.*, pp. 68-72. William Converse, a former commissioner also opposed the plan, *ibid.*, pp. 35-7.
61. Submissions of James Chin, "Public Hearings," pp. 114 and 124.
62. Submissions of Terry Unger, "Public Hearings," p. 22.
63. *Ibid.*
64. Submissions of Glen Johnson, "Public Hearings," pp. 287-8.
65. Submissions of William Converse, "Public Hearings," p. 37, Glen Johnson, *ibid.*, p. 241, and B. Gottz, *ibid.*, p. 29.
66. I.P.R.B., "Report to the International Joint Commission," p. 10.

67. Submissions of Mrs. R. Thordarson representing North-West Grange 921 of Point Roberts, "Public Hearings," pp. 163-6. Also see submissions of Albert Vertel, *ibid.*, pp. 166-9, William Wainwright, *ibid.*, pp. 196-7, and D. Read representing Canadian Property Owners Association of Point Roberts, *ibid.*, p. 241.
68. Submissions of Mrs. R. Thordarson, "Public Hearings," pp. 160-3.
69. Submissions of Richard E. Clark, "Public Hearings," pp. 223-31.
70. Submissions of Bob Jacobson, "Public Hearings," pp. 122-3; Hank Peltier, *ibid.*, pp. 180-1; James Chin, *ibid.*, pp. 113-4; Pat O'Neil, *ibid.*, pp. 208-10; and Terry Unger, *ibid.*, pp. 21-4.
71. Submissions of Robert Finch, "Public Hearings," pp. 43-4; and William Dennis, *ibid.*, p. 93.
72. Submissions of L. Thorstenson, "Public Hearing," p. 159; Clifford C. Jorgenson, *ibid.*, p. 271; and Harold M. Burgess, *ibid.*, p. 351.
73. Submissions of Mayor D.J. Morrison, "Public Hearings," pp. 362-5.
74. For example, one resident asked why money allocated for the park was simply not given to the local government in order that the needed facilities may be built. Submissions of George Elsner, "Public Hearings," p. 185.
75. The tactics of the developer were criticised. For instance, it was alleged that many supporters of the park plan had land under option to the developer and that the developer's public relations officer filed "regular" news items with a Toronto newspaper. "What Point Roberts Scheme 'Really' Means," by Moria Farrow, Vancouver Sun, 26 January 1974, p. 6.
76. For example, see submissions of Harry B. Sames, "Public Hearings," pp. 275-85; James M. Medica, *ibid.*, pp. 387-8; and Max White, *ibid.*, pp. 182-3. It should also be noted that two presentations were made on behalf of Pacific and Western Equities. See submissions of H. Bruce Wallace, *ibid.*, pp. 92ff and 294 ff.

77. For example, the submissions of Peter Chataway, "Public Hearings," p. 245; and Mayor Morrison, *ibid.*, pp. 362-5.
78. "What Point Roberts Scheme 'Really' Means," by Moria Farrow, Vancouver Sun, 26 January 1974, p. 6.
79. For example, see submissions of Peter Stratton and Dr. F. Turnbull, representatives from Save Our Parkland Association, "Public Hearings," pp. 314-5; 432-44; Eric Dingerstein, representative of the North Cascades Chapter of the National Audubon Society, *ibid.*, pp. 84-90; Walter H. Rasmussen, representing the Citizens Association of Delta, *ibid.*, pp. 546-7; and the brief of the Northwest National Seashore Alliance, *ibid.*, pp. 60-6; Sierra Club of B.C., *ibid.*, pp. 463-5.
80. International Joint Commission, "Annual Report - 1974," Ottawa-Washington, May, 1975, p. 20; and I.J.C. Docket No. 92, "Interim Report," 1 November 1974.
81. International Point Roberts Board, "Supplemental Report of the International Point Roberts Board to the International Joint Commission, United States and Canada, 15 September 1975, p. 6.
82. *Ibid.*, pp. 6-7.
83. I.J.C. Docket No. 92, "Interim Report," pp. 1-2.
84. I.P.R.B., "Supplemental Report," 15 September 1974.
85. *Ibid.*, p. 2.
86. *Ibid.*
87. *Ibid.*, pp. 10-14.  
For example, it was suggested that Point Roberts should be designated as a "free zone" by the U.S. government so as to ease many of the problems concerning customs, transportation of goods, movement of tradesmen, and importation of perishable food stuffs.
88. *Ibid.*, p. 31.
89. *Ibid.*, p. 33.

90. "International Body Shelves Point Roberts Park Plan,"  
Vancouver Sun, 7 October 1974.
91. Ibid.
92. "Public Protection to Save Gulf Islands for Future,"  
Globe and Mail, 3 November 1973.
93. I.J.C. Docket No. 92, "Final Report," 16 August 1977.

## V. SUMMARY AND CONCLUSIONS

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When the International Joint Commission terminated its work in 1977, the Point Roberts reference was brought to an anti-climactic conclusion. The community was left with essentially the same problems it faced when the Commission first became involved with the case. For the most part, these difficulties still persist today. In 1982, the Point Roberts customs post was heralded as the second busiest U.S. point of entry west of Detroit. On average, some 1700 vehicles entered from Canada each day.<sup>1</sup> In August of that year alone, 100,055 vehicles entered Point Roberts and carried some 230,000<sup>2</sup> people into the community. This heavy traffic only aggravates the serious concerns of the Point with respect to shortages of water resources and sources of electricity.

While residents may retain only faint recollections of the I.J.C.'s involvement with their community, it is clear that the Point Roberts reference has made an indelible impression on the Commission. Point Roberts was more than a mere anomaly in the case history of the Commission; rather, the reference represents one of the few "black marks" on the otherwise impeccable record of the I.J.C.. This was one of the few references where the Commission was unable to submit any recommendations to the

national governments other than that its future involvement would serve no productive purpose. The results of the reference have prompted a re-evaluation of those arguments asserting the relevance of the I.J.C. to common U.S.-Canada concerns beyond those of boundary waters. The issue of whether the purview of the Commission should be extended remains to be resolved.

Consequently, it may now be appropriate to recapitulate the episode of Point Roberts and suggest how the reference ought to be interpreted with respect to the I.J.C.'s future role in the bilateral relationship.

#### [1] The Plight of Point Roberts

The Point Roberts case was a perplexing affair for the Commission. At the centre of the issue lies the geographical and political peculiarities of the Point. Point Roberts, a very small community by any standards, comprises only 4.9 square miles of land that is home to well under a thousand permanent residents. Although it is U.S. territory, it is physically separated from the nearest American landmass. The most convenient means of access to the Point is by road through Canada.

But aside from these underlying problems, further examination reveals additional causes of concern. Point Roberts, once a proud and prosperous community, had been victimised by government regulation and the realities of commerce. As the

salmon population was depleted and annual yields dwindled, and with the closing or relocation of its canneries and the outlawing of its unique "fishtrap", the economic base of Point Roberts collapsed in the 'thirties. The supportive farming industries were similarly dissipated as the specialised crops and limited acreage could not overcome prohibitive transportation costs or keep pace with advancing agricultural methods.

In the 'forties and 'fifties, the economic decline of the Point continued. The severity of economic hardship was such as to create controversy over which level of government should take ultimate responsibility for the survival of Point Roberts. The State of Washington, Whatcom County, and eventually the U.S. federal authorities each looked to the other to take the initiative to foster the "orphan child" of Point Roberts. In the interim, the community was undergoing a metamorphosis. The peninsula was becoming recognised in the late 'fifties and the 'sixties as an attractive vacation and recreation retreat by its northern neighbour - Canada. In place of the ghosts of fishing and farming industries, now came an industry based on tourism and seasonal residences.

The early stages of this metamorphosis produced a serious warning of northern dependency. It was at this stage the ensuing dilemma took shape. The influx of Canadians provided the poten-

tial for the economic rehabilitation of the hitherto moribund community. But this potential for creating a material infrastructure could not be realised fully or properly without the attendant procurement of the essential services required to maintain the quality of life. The threshold level to community recovery would otherwise soon be reached. In the 'sixties, potable water shortages, inadequate sewage facilities, lack of police supervision and law enforcement, and the mounting need for additional electricity were all issues that had slowly gained public recognition in both Canada and the U.S..

But these growing areas of concern only focused attention on matters that hid a far more urgent theme of community reflection. The nationalistic overtones that had echoed in the early days now began to reverberate loudly. Certainly Point Roberts wished to remain a viable community - but it was more important that it remain an American community. But even these bursts of nationalistic fervor were overlain with the curious circumstance that, at any given time of the year, there were more Canadian residents than Americans at the Point. Almost every facet of community existence was in some way connected to Canada. This strict dependency informed the community that its destiny was subject to foreign determination.

Meanwhile, the Province of British Columbia reiterated its position that it would not set a precedent by exporting its

natural resources to a foreign country, i.e. to Point Roberts.

By the close of the 1960's, the stage had been set. For the residents of Point Roberts, it seemed plain that, unless immediate action were taken, the future of their community was in peril.

When the Point Roberts case was referred to the I.J.C., it was understood that there would be no clear and easy solution to the dilemma. The Commission would be asked to submit recommendations that provided for economically feasible and politically viable remedies. Any attempts at resolving the ills of the community would have to respect these dual considerations.

This may have explained the view of the advisory board appointed by the I.J.C., the I.P.R.B., which believed the ultimate solution laid beyond the immediate confines of Point Roberts. The Board looked outside the territorial limits of the Point in exploring the possibilities for a regional solution. The creation of an international conservation area was an idea raised early in the course of its inquiry and remained at the forefront of consideration for the remainder of the reference.

The notion of establishing an international park cannot be said to be devoid of logical merit. The park concept could be seen as a means of circumventing the legal complexities issuing from the geographic peculiarity of the Point. Nationalistic

animosities might therefore be pacified in the course of this joint venture where common purpose and a framework for cooperative action would prevail. An international conservation area would at least have the assumed support of environmental groups on both sides of the border.

But this international park could not be planned in isolation from other concerns. It would have to on the order of a large-scale project to warrant the attention and justify the expenditure of significant government funds. Further, the project would have to conform to federal, provincial and state land use and planning priorities for the development and conservation of adjacent lands. The I.P.R.B. felt only one proposal could satisfy these multiple demands - "Concept B".

However, it was at this point in the argument that the logic of creating a 3000 square-mile international park to remedy the plight of 4.9 square mile community went astray. The putative purpose for proposing the creation of such a park was to overcome the nationalistic rivalries implicit in the dilemma. The ultimate effect of the proposal was not the burial of sources of antagonism but rather their exacerbation.

If Concept B failed on the strict merits of its argument, then it do so by ignoring the specific problems which were meant to be remedied.

The national governments, in the Terms of Reference

submitted to the I.J.C., listed a series of difficulties present at Point Roberts.<sup>3</sup> Other problems were revealed in the course of public hearings conducted by the Commission in 1971.<sup>4</sup> In a narrow sense, the mandate of the Commission was to elaborate appropriate remedies to these specific concerns. But it is interesting to observe that several of the concerns assigned to the Commission were found lacking in substance. The Advisory Board, in its report to the I.J.C., could not identify any legal or other difficulties involving permanent American residents at the Point seeking full-time employment in Canada. Similarly, recent U.S. federal and state legislative amendments regarding the work of Canadian physicians in Point Roberts had done much to mitigate problems in obtaining health and medical services in the area.<sup>5</sup> The existing telephone service arrangements were also found not to be a point of contention. With respect to customs laws and regulations, the I.P.R.B., in its 1974 Supplemental Report, supported the idea of establishing a "free zone" at the Point. This measure was considered a feasible solution to the needless yet frequent inconveniences<sup>6</sup> associated with travel and transport in and out of Point Roberts that issued from its curious politico-geographic situation.

It is highly ironic that the remaining problems - the most serious being those of securing adequate drinking water and electricity as well as the transport of accused persons - were

only generally discussed in the description of Concept B. There was no specific mention of means to eliminate these difficulties through the creation of an international park. Perhaps it had been assumed that this major project would provide the financial resources and the necessary impetus for the elimination of supply shortages and inadequate police services. Nevertheless, the lack of specificity in the remedy of such concerns testified to the poor judgement and inattentiveness of the Commission and its advisory board.

There is little doubt that the issue of water supplies, for both domestic use and as a prerequisite for the construction of a proper sewage system, was the most publicised issue during and subsequent to the I.P.R.B. inquiry. This problem affected every resident of the community in the daily conduct of their lives. It was plain, then, that the community would not consider the international park proposal seriously without detailed exploration and specification of remedies to the water shortages. Yet the Board offered nothing more than vague assurances that the creation of the park would in course resolve matters.

Another explanation for this insensitivity and short-sightedness might be that the Board believed that its attention should be directed towards providing a comprehensive rather than point-by-point solution to the Point Roberts dilemma. It may have felt that to address each problem on its own merits would have

altered the complexion of the reference. But the necessity for such a mid-course correction was apparently recognised by the I.J.C. which requested the I.P.R.B. to prepare a second report based on a more issue-oriented rather than "global" approach. Although the release of this second report in 1974 was received better than the first,<sup>7</sup> it was still too little, too late.

Perhaps the failure to address the water shortage issue was a function of the perceived lack of any feasible solution. It may have been the opinion of the Board that the water problem would not be viewed by the appropriate funding authorities to be sufficiently severe as to justify the expenditures required to alleviate the shortages. Perhaps it was believed that only a comprehensive solution [e.g. the park concept] would gather the necessary support and funding to provide for remedies to a myriad of concerns amongst which would be included the water problem. In any event, the problem at the Point still persists a good ten years after the reference. It is encouraging to report, however, that the community has come closer to a solution in the past few years. Plans are now being completed for the construction of a three million gallon water tank in Blaine, Washington. Following from this increased water-holding capacity of the area, negotiations are set to discuss the possibility of a water supply "trade-off". It is conceived that Blaine could sell some of its water to the B.C. Municipality of Surrey. In turn, the water

system of Greater Vancouver would supply water down to Point Roberts via the Municipality of Delta, B.C. <sup>8</sup>

Even if we were to assume that the implementation of Concept B would solve the many problems of the Point, it is unlikely the idea would ever have won the approval of community residents. To the residents of Point Roberts, the central difficulty of the international park proposal was that it would alter the political status of the Point in an unacceptable manner. While the plan called for the territory to remain American, the area would be governed by a binational forum. This part of the park concept was interpreted by residents as akin to surrender of the Point's sovereignty. The residents argued that Point Roberts was U.S. territory and thus they felt entitled to all the rights and privileges thereby guaranteed. The single most important of these rights was the freedom to determine the destiny of their own community free from the interference of a foreign country.

It seems evident that the residents were far more interested in private development proposals. It was believed that this was the surest means of securing the necessary public services while at the same time retaining the existing political structures. Had the I.J.C. recommended a solution incorporating private development of the Point, the residents would not have been much averse to such plans provided no change of political

status was required and the main problems of the community were to be clearly addressed. A private commercial solution to the dilemma would have allowed the community to retain control over the pace and character of development. In return for permission to develop the area, private business interests would have guaranteed the supply of essential services. Although in somewhat less dramatic fashion than the schemes put forth at the time of the investigation, the private development approach has been the operative theme of community evolution during the last ten years.<sup>9</sup> Plans are presently being readied for the construction of a massive 800-unit condominium at the Point. This complex may well herald a magnificent new era of expansion that promises to realise the economic potential of Point Roberts at long last.

It is difficult to determine the likely community response had the I.P.R.B simply proposed creation of a U.S. national or state park. More than likely, the success of such a recommendation would have depended upon the size of the park, the administrative arrangements, and the delegation of responsibilities in the financing, developing, and planning as envisaged in the proposal.

A full explanation for the failure of Concept B to gain approval may not be revealed by a detailed appraisal of the merits of the notion itself. For example, there remains the puzzle over why the very idea of an international park was rejected so emphati-

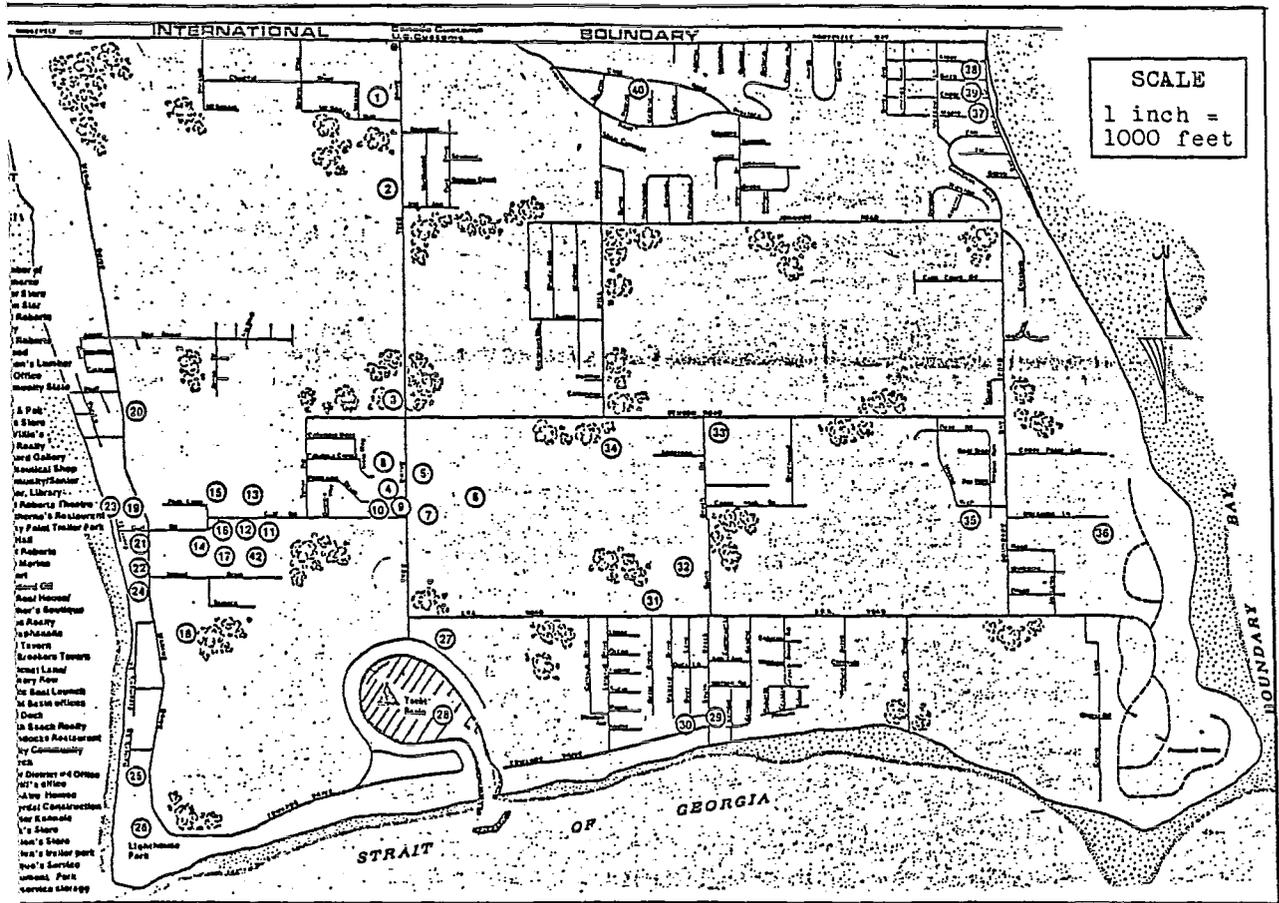
cally. There is also uncertainty over the precise sources of the huge rift that divided the I.J.C. from the people it was supposedly trying to help. The Commission was sincere in its belief that the proposed park was the best feasible long-term solution to the dilemma of the Point. However, the residents directly or indirectly affected by the prospective conservation area were hostile to this suggestion without ever having tried to understand it. Further, there was relatively little input from any community source for an alternative solution or a modified version of Concept B. It would seem then that the dismal reception accorded Concept B must be attributed not just to the intrinsic deficiencies of the plan, but also to the failure of the Commission and its advisory board to demonstrate the benefits of the proposal to those most affected by it. This failure may be traced to variety of factors.

First, the I.P.R.B. failed to foresee the possibility of a negative community perception of its role in settling the problems of Point Roberts. It must be recalled that the Board had interpreted its mandate as that requiring a broad and unrestricted quest for solutions. Given this sweeping function, the community of Point Roberts may have viewed the Board as more than a passive investigator of fact. Certainly by the time the park proposal had been put forth, the Board may have been suspected of acting in the manner of a policy planning agency, a community developer, or

an arbitrator. This perception may have left the Point Roberts community in a state of extreme anxiety over the true role of the I.P.R.B.. In short, the Board may have been seen as usurping the responsibilities of local, county, state or even federal authorities in determining the future of the community.

Second, the failure of Concept B should in part be attributed to the lack of any effective public relations or awareness campaign mounted by the I.J.C. or its advisory board. The criticisms of the Board with respect to its lack of accessibility, public consultation, and public participation in the investigative process would seem to confirm this view.<sup>10</sup> It is evident that the community simply did not trust or otherwise have any confidence in the role, responsibilities, and work of the advisory board. Of course, the I.P.R.B. had never tried seriously to instill community trust. The Board quite simply ignored the need for an ongoing process of community liaison and consultation. Perhaps the difficulty of obtaining copies of the Board's recommendations gave symbolic testimony to its palpable lack of public disclosure. It is of no surprise to learn that community representations at the 1973 public hearings were filled with uncertainty and suspicion.

Finally, Concept B failed not only for the substance of its proposal, but for those substantive concerns it neglected to mention. How would the park be financed? what effect would this



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+ Ocean Star, 1 March 1983, p.12.

development have on local property values and business concerns? how would the land be expropriated? what sorts of access routes into and out of the Point would be required? what levels of government would be responsible for which duties and functions? - these were only a few of the many questions raised as regards the lack of specificity in the I.P.R.B. reports. A general lack of trust in the Board, coupled with the lack of specificity in its reports, served to undermine the legitimacy of the Board and to vitiate the proposals of the I.J.C. itself.

[2] The Lessons of the Point Roberts Reference

The increasingly complex and varied nature of the Canada-U.S. relationship has prompted debate over which dispute settlement and conflict avoidance mechanisms ought to be developed to accommodate new sorts of bilateral concerns. It has often been argued that the I.J.C., the oldest and most successful of bilateral institutions, should be adapted to play a more active role in the mediation of the relationship. It is widely held that the Commission could extend its purview to fill any institutional gaps that may exist within the bilateral framework.<sup>11</sup> As a consequence, numerous proposals have been advanced to reform the I.J.C. and thereby enable it to address contemporary challenges more adequately.

Proposals for the reform of the I.J.C. have varied greatly in scope and function. At one extreme, the increasing insufficiency of traditional means for resolving modern environmental problems has provoked the call for drastic "structural transformation"<sup>12</sup> of the I.J.C.. This step would allow the Commission to amplify its present involvement in the field and further to take a more comprehensive and co-ordinated approach. Perhaps A.D.P. Heeney best described this position when he stated:

Another suggestion which has gained more recent currency would be to convert the present Commission into, or replace it by, a supra-national institution and endow it with authority to manage all aspects of boundary waters...Such a body would apparently have powers comparable to a domestic administrative or regulatory body including a power to licence and presumably to enforce. 13

Proponents of this scheme have suggested that the Commission be given the power to "...take action in order to control the mounting pervasive forms of transboundary pollution...".<sup>14</sup> This goal may be achieved either by granting the necessary enforcement powers or by extending the Commission's quasi-judicial power under article III of the Boundary Waters Treaty and thereby creating a form of supra-national environmental court. <sup>15</sup>

Other observers, not wishing to grant enforcement powers, have advocated providing the Commission with a broad supervisory,

co-ordinating and investigatory mandate.<sup>16</sup> This may include investing the Commission with "authority on its own initiative to make preliminary examinations or assessments of potential pollution problems along the boundary, to point out potential sources of trouble and dispute and to suggest to the two governments that a reference should be made."<sup>17</sup> Variations of these proposals have also been suggested. For example, the I.J.C. could be empowered to initiate its own references that involve transboundary environmental problems. In addition, the Commission might be assigned the responsibility for overall surveillance and remedy coordination in all pollution matters. But irrespective of the precise articulation of the variations, the general thrust is to transform the I.J.C. into a binational environmental "watchdog".<sup>18</sup>

At the opposite end of the spectrum, proposals have been to similarly extend the jurisdiction of the I.J.C.. However, rather than transforming the Commission into a specialised environmental agency, they advocate widening the purview of the I.J.C. to mediate Canada-U.S. concerns of a general nature. The Commission, in the spirit of these suggestions, would not be confined to either boundary or environmental issues. It should be appreciated that the Boundary Waters Treaty could not be duplicated or re-negotiated today.<sup>19</sup> Further, there is very little hope for the establishment of more than a few new bilateral agencies.<sup>20</sup>

These circumstances suggest that the I.J.C. might be a convenient means of addressing new and additional concerns in the vacuum that exists today for the presence of such a mediatory institution.

A vast array of topics have been envisaged as falling under the purview of an enhanced version of the I.J.C.. Such suggestions go beyond strict environmental matters and include: coastal and marine problems [including oil spills, traffic management, marine water quality, fisheries, Outer-Continental Shelf hydro-carbons, Arctic resource development, and energy resources]; other natural resource areas from forestry to parks and wildlife; and even the broader issues of civil aviation, specific trade and general balance of trade affairs, weather modification and cross-border T.V. broadcasting.<sup>21</sup>

It is in the light of these projected extensions of I.J.C. responsibility that the Point Roberts reference acquires greater significance. At the beginning of the 1970's, the Point Roberts case was seen as a harbinger of a trend towards enlarging the scope of the Commission's responsibility for dispute settlement. The reference presented the possibility that "...the I.J.C. will also be increasingly engaged in boundary questions having sociological, cultural and political aspects." <sup>22</sup>

Essentially, the Point Roberts reference tests the adaptability of the I.J.C. to a new area of concern in the Canada-U.S. relationship. It has already been argued that the Point Roberts case was a matter that lay outside the Commission's traditional parameters of responsibility. It was a case that did not pertain to the subject-matter broadly characterised as "boundary water uses" and which were normally the focus of the Commission. But it was the very nature of the dilemma itself that situated the Point Roberts reference outside these traditional Commission parameters. For the case required the I.J.C. to transcend the technical orientation and fact-finding investigative procedures which constituted the standard methods of Commission operation. It was this sort of "quantum" methodological leap that the I.J.C. and its advisory board failed to make in the approach to the reference.

The results of the Point Roberts experiment are neither conclusive nor surprising. At best, the case serves as a stern warning to the national governments concerning the real and potential hazards in employing the I.J.C. as a general mechanism for bilateral dispute settlement and conflict avoidance. But it would be premature to bar the Commission from any future involvement in matters beyond its traditional scope of inquiry.

It is commonly believed that the I.J.C. failed at Point Roberts owing to the mere fact that the issues involved in the

dispute did not pertain to the boundary water concerns that had consistently informed the previous casework of the Commission. This proposition, however, would appear to be wrong-headed and misguided. For the failure of the Commission at Point Roberts must be attributed much more to the inapplicability of its fact-finding procedural model than to the inherent features of the case itself. It was really a failure of perception, approach and sensitivity that left the formidable technical apparatus of the Commission operating in a vacuum.

The Commission's fact-finding model is designed for the purpose of conducting an impartial investigation of fact which invariably requires a considerable degree of technical expertise. The operating model can aptly be described as "...the use of peer technicians, under some institutional umbrella, equal in number and skill, and who are appointed by and responsible to that unitary umbrella agency."<sup>23</sup> One of the important advantages of this model, in certain cases, is that it diminishes the use of overt bargaining methods so as to make difficult to distinguish winners from losers and thus identify those parties whose interests have been left out.<sup>24</sup> Indeed, it has been declared that the I.J.C. may reflect "...the most advanced effort to approach the concept and practice of fact-finding, recommendations, quasi-management and judgement-making in very significant areas of mutual national interest."<sup>25</sup>

But in order to determine the applicability of the Commission's model, it is imperative that we review the nature of the Point Roberts dispute. The neatly articulated problems enunciated in the Terms of Reference lend the impression that the dilemma of the residents revolved around several discrete difficulties. On the level of appearances, then, the community seemed to suffer from a lack of certain basic societal amenities, e.g. lack of drinking water, electricity, poor sewage facilities, etc. The task before the I.J.C. was one of limited proportions - or so it seemed. But when the I.J.C. actually began its inquiry, the guise was lifted and the essence of the dilemma revealed.

Although there was a need for an impartial investigation of fact at the Point, the animating theme of the reference should have seen the Commission thrust itself above and beyond any technical considerations involved. The nature of the case required the I.J.C. to reconcile the rights and priorities between the various diverse and polarised interests. There was little chance, however, that the Commission would be capable of arriving at a mutually-agreeable factual base whatever technical expertise it brought to bear on the case. All parties to the dispute already understood the nature and number of the vexing problems that faced Point Roberts. Thus deprived of the efficacy of its orthodox model for establishing an empirical base for its recommendations, the Commission was confronted with the difficult task

of recommending solutions based on its general perception and interpretation of the dilemma at the Point. Stripped of its traditional technical basis for resolving disputes, the I.J.C. was asked to play a role more closely akin to that of a political body rather than that of an administrative agency. At the time of the reference, the Commission was neither prepared nor equipped to meet the challenges of the case.

In reality, the results of the Commission's investigation would act only as a recommendation for the national governments to consider. Nevertheless, the residents of Point Roberts and other interested parties believed this was more a matter of form than substance. There was little doubt that the national government would give due consideration to the submissions of a prestigious body such as the I.J.C.

The inapplicability of the Commission's investigative model to the Point Roberts reference yields several important implications. Foremost, it refutes the popular perception that the record of success previously established by the I.J.C. was achieved because "...each government has refrained from submitting disputes other than those over water."<sup>26</sup> It would seem that there is more to the Commission's formula for success than simple familiarity with the subject-area would suggest.

The Point Roberts experience also implies that the na-

tional governments ought to be very selective in the nature of the disputes they choose to submit to the Commission. As Professor Munton notes most appropriately:

The fact-finding approach to settlement makes the assumption that the technical and political issues in a given dispute are identical, or at least the former largely accounts for the latter...Often the lack of technical facts is not the difficulty at all. Indeed, political disputes frequently arise precisely because 'the facts' become well known. 27

Therefore, one may submit that the I.J.C. may have little difficulty in resolving disputes where there is a need to establish a mutually-accepted factual base. This empirical groundwork may then serve as a foundation upon which productive bilateral negotiations may proceed. In this context, the Commission should certainly be employed to deliberate a wide range of binational concerns. Indeed, there exists a multitude of issues arising from the Canada-U.S. relationship which require a thorough and impartial investigation of fact. In these situations, the capacity for the Commission to adapt to non-traditional concerns will be very much a function of the willingness of the governments to employ the I.J.C. in such matters. Even if the Commission is not employed in this capacity, the I.J.C. may, however, serve as a viable model for other bilateral agencies. An illustrative case in point was the common fact-finding technique applied in resolving

the balance of trade statistics dispute in 1971.<sup>28</sup> Further, a 1975 Senate report suggested that the I.J.C. may be usefully employed in resolving various questions in the fields of energy and agriculture where factual data is often in dispute.<sup>29</sup>

However, the situation may be very different where, irrespective of factual questions, the content of a dispute retains its political dimension. In these matters, the Commission would be entering into a role reserved traditionally for governments.<sup>30</sup>

To insert the Commission into disputes which are fundamentally political in nature presents several obvious dangers. It should be remembered that a critical element in previous Commission success has been the impartiality of its deliberations. This impartiality has enabled the I.J.C. to gain the confidence and respect of both Canada and the United States as an effective bilateral institution. However, once the Commission is referred to concerns requiring political rather than practical solution, then the I.J.C. itself may become politicised.<sup>31</sup> This would appear to be extraneous to the logic of the I.J.C. model and in contradiction to the fundamental principles of the Commission. The "politicisation" of the I.J.C. would further threaten to undermine the Commission's credibility and thus its effectiveness in the conduct of existing work.<sup>32</sup> The practical result of this would be the benign neglect of the I.J.C. and the increasing

tendency of Canada and the U.S. to employ other means of international dispute adjudication.<sup>33</sup>

An ever wider issue is raised in assessing the effects of the I.J.C.'s assumption of a more political role. Professor Carroll points out that "...the I.J.C. lacks a constituency in the legislative branches or political parties of either government or among the general public on which the responsibility for support would rest."<sup>34</sup> Hence, the proposed evolution of the Commission's political role may be understood as a threat to the principles of responsible democratic government.<sup>35</sup>

The Point Roberts case may offer a practical illustration of this problem. Apart from the 1971 public hearings held by the I.J.C. at the start of the reference, the community and probably the county had little awareness of the progress of the I.R.P.B.'s investigation. In the eyes of community residents, the fate of Point Roberts was too important an issue to delegate to an international agency that had no legitimate political authority. The resolution of the problems of Point Roberts, implying some determination of the community's destiny, was simply not a matter where the cold hard facts of the case would dictate appropriate remedies. Further, the absence of any appointee to the Board from Point Roberts or Whatcom County, insufficient consultation with various levels of government, and the absence of any local working or liaison committees did little to sustain the

legitimacy or reliability of the I.P.R.B.

Remedying the problem of public participation and consultation, on a general structural level, may not be an easy matter. The extent of public involvement in the investigative process must be determined in light of the requirements for the effective operation of the advisory board system. As it was stated in a 1974 I.J.C. publication,

There is a need to resolve the apparent dilemma between the need to maintain a distance from the public while the investigations are in progress and the need to inform the public regarding what the Commission is doing. 36

Whilst the Commission moves further away from the investigation of strict technical concerns, or where technical and political matters are fused, structural and operational considerations emerge. If the I.J.C. does wish to proceed in this direction, a distinction may have to be drawn between technical and non-technical advisory boards as regards their composition and conduct. Additional challenges will also be confronted by the members of these boards, for it will become increasingly difficult to act in both capacities - i.e. as both a member [expected to make decisions of a political nature] and an employee of an agency, government or non-governmental body.

Finally, the Point Roberts reference also poses some general questions as to whether the Commission should be at all

eager to assume new responsibilities and expand into new areas of concern. One of the hallmarks of the I.J.C. has been its resistance to the trend towards creation of a large, permanent bureaucratic structure. Any expansion of its responsibilities may necessitate a philosophical decision of whether to increase its institutional apparatus or remain a relatively small and neutral body.<sup>37</sup> The Commission itself has already acknowledged that a move into a new array of concerns could only be accomplished with additional staffing and other resources.<sup>38</sup>

### [3] Point Roberts in Retrospect

As with any case study, the results of a close examination of the Point Roberts reference must be interpreted with care. There will always be disagreement whether the reference was a legitimate case to test new terrain for the I.J.C.. Some may contend that Point Roberts was simply an anomalous case which saw the Commission address itself to an inherently insoluble dilemma.

Clearly, there were many intractable elements to the Point Roberts affair. It may be argued that, at the time of the reference, there was no common ground on which to erect a consensus. Perhaps the Commission did the best any conciliatory agency could have hoped to accomplish - i.e. to provide an opportunity to articulate and illuminate the primary impediments to any "ultimate" solution. If we assume that the I.J.C. was in fact

given an impossible set of problems to resolve, then the record of the Commission at Point Roberts must be considered a limited success.

Nevertheless, the question still remains as to whether the Commission could have established some common ground in its work at the Point. For example, a problem-by-problem approach would certainly have been a more appropriate strategy in the search for solutions. But the important part of this approach is that it might have gained more community support than the grand international park scheme proposed by the I.P.R.B.. Of course, it is impossible to determine how the conservation park idea itself might have been received had there existed greater consultative and liaison mechanisms. One may also ask why no alternative versions of "Concept B" were submitted for consideration. Faced with a series of alternative proposals, those affected by the international park scheme might have been less inclined to treat Concept B as an ultimatum. There would have been far more opportunities for compromise had alternatives been put forward in earnest.

Of course, the chances of satisfying all interests and solving all the problems of the Point Roberts community were very small. But if we believe that there was an opportunity for the Commission to try and establish a working consensus, then the experience of the I.J.C. at the Point must be regarded as a very

serious failure and disappointment.

It may be unfair to assess the performance of the Commission based only on the results of the reference. The difference between the success and the failure of the I.J.C. may only have been one of degree. But the weight of evidence would suggest that the Commission failed to adapt to the unique requirements of the Point Roberts reference. It failed to establish the necessary consultative structures to gain public trust. It failed to recommend specific solutions to several urgent community problems. Lastly, it failed in a general way to respond to the needs of the community whose dilemma the Commission was assigned to help resolve. The inadequacy of Commission work in the Point Roberts case may yet prevent it from enjoying further opportunities to extend its field of concern.

But irrespective of any particular evaluation of I.J.C. performance at the Point, the exceptional character of the reference provides a means of reflecting on several important issues.

Foremost, the case provokes discussion of the role and function of the I.J.C. in the framework of the Canada-U.S. relationship. The history of the Commission's casework is an outstanding example of the institutional resolution of bilateral differences. Yet the Point Roberts reference suggests that there may be limits to the scope of the institutional process as a means of dispute settlement. Bilateral agencies such as the I.J.C.

cannot supplant traditional diplomatic or otherwise political solutions to certain sorts of problems. Bilateral agencies can at best enhance the diplomatic process by providing a common empirical basis for negotiation. These agencies may also apply or establish sets of mutually-acceptable principles that will guide bilateral relations. Perhaps the Point Roberts case may best be understood as an example of the difficulties that inhere when an institutional mediatory process is applied to a task inconsistent with its organisational framework.

The Point Roberts case has also served to enrich the debate over the future role of the I.J.C.. An examination of the reference should alert the national governments to possible dangers in expanding the purview of the Commission to those matters which are not readily amenable to its investigatory orientation as presently constituted. It is difficult to ask a bilateral agency to make "quantum leaps" of the sort discussed earlier.

The evolution of the Commission has been gradual in response to changing bilateral needs and concerns. No doubt the Commission will continue to adapt to bilateral demands and thereby resolve new problems as they arise. The Point Roberts case does not nullify the potential for the I.J.C. to broaden its sphere of influence. The case does, however, suggest that the expansion of the Commission's responsibilities should be planned

carefully so as not to jeopardise the work and progress of the I.J.C. in other fields of endeavour.

Finally, it must be recalled that the Point Roberts reference was a new experience for the Commission. It may be unfair to assess the capacity of the I.J.C. to enlarge its purview on the basis of this single and very difficult case. The Commission ought to be given other opportunities to display its formidable technical resources. These opportunities will allow the I.J.C. to develop the appropriate liaison structures and become more sensitive to community concerns where certain cases demand. Of course, an expansion of Commission responsibilities may well entail an expansion of the bureaucratic-institutional apparatus required to meet new challenges. But, in any event, when the governments come to consider the insertion of the I.J.C. into more extensive bilateral concerns, the lessons of Point Roberts will receive intensive study.

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## NOTES - CHAPTER V

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1. "Point Roberts Customs Second Busiest Port to Detroit", by Carolyn Price, Ocean Star, June 1982, pp. 8-9.
  2. Ocean Star, September, 1982, p. 10.
  3. See: Chapter IV, subsection 2, above.
  4. Ibid.
  5. See: Chapter IV, subsection 4 [a], above.
  6. See: Chapter IV, subsection 6, above.
  7. Private communication with a former I.J.C. Commissioner, 26 March 1982.
  8. "Water Trade Talks Resume in January" by Sonja Nelson, Ocean Star, January, 1982; "There is Water" by Carolyn Price, Ocean Star, December, 1982.
  9. Since the late 1970's, a 900-slip yacht basin has been built in addition to a supermarket, a local bank, and a number of other commercial establishments. Also plans are in the works for a \$50 million luxury resort and condominium complex. See: Ocean Star, January, 1982, p. 4.
  10. See: Chapter V, subsections 3 and 5.
  11. For example, in 1965, a study commissioned by the national governments to study the bilateral relations suggested that, considering the past success of the I.J.C., there ought to be consideration of "some extension of the Commission's functions". L.T. Merchant and A.D.P. Heeney, Canada and the United States: Principles for Partnership [Washington-Ottawa, 28 June 1965].
  12. For an excellent review and evaluation of contemporary proposals to reform the I.J.C., see Don Munton, "Prospects and Paradoxes" in The International Joint Commission Seventy Years On, ed. by Robert Spencer, John Kirton and Kim Richard Nossal [Toronto: Centre for International Studies, University of Toronto, 1981], pp. 60-105.

13. "Along the Common Frontier: The International Joint Commission" Behind the Headlines 26:5 [July 1967], p. 16.
14. J.K. Barnett, "United States and Canadian Approaches to Air Pollution Control and the Implications for the Control of Transboundary Pollution" Cornell International Law Journal 7 [May 1964] 148, pp. 168-70.
15. D.C. Arbitlit, "The Plight of American Citizens injured by Transboundary River Pollution" Ecology Law Quarterly 8 [1979], pp. 353-4. It has also been suggested that a draft convention from a 1912-18 I.J.C. pollution reference be adopted and which would oblige the governments to take legal action against anyone found polluting boundary waters. See: Peter S. Smedresman, "The International Joint Commission and the International Boundary and Water Commission: Potential for Environmental Control Along the Boundaries" New York University Journal of International Law and Politics 6 [Winter 1973], pp. 524-5.
16. F.J.E. Jordon, "Recent Developments in International Environmental Pollution Control" McGill Law Journal 15:2 [1969], pp. 300-1.
17. Standing Senate Committee on Foreign Affairs, Canada-U.S. Relations - Volume 1 - The Institutional Framework for the Relationship [Ottawa: Queen's Printer, 1975], p. 42; I.J.C., "Summary of the Seminar on the I.J.C. - Its Achievements, Needs and Potential", Montreal, 1974. [Mimeographed], pp. 15; 17-18.
18. Ibid.; Munton, "Prospects and Paradoxes", pp. 62-4.
19. Richard B. Bilder, "Controlling Great Lakes Pollution: A Study in U.S.-Canada Environmental CO-operation" Michigan Law Review 70 [January 1972].
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