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Introduction by Professor Cook

Our Guest this evening is Professor Charles Bourne who is a professor of law at the University of British Columbia where he teaches international law, and constitutional law. With his background, and his interests he has, he should be speaking to us on this subject which is: The Legal Issues in the Settlement of the Columbia River Dispute. Those of you who are familiar with the history of the Columbia River, the history of the debate about the Columbia I should say, you would know that Professor Bourne has written very widely on the legal issues of the Columbia River. His special interest is in international drainage basins, and this perspective on constitutional law, and international law, he will be speaking tonight. I won't take up any more time: Professor Charles Bourne.

CRT Lecture 12: Charles Bourne

Perhaps I can start for a short while, while I get a microphone. The chairman should have mentioned one thing that I was also throughout. I was a visiting professor at Simon Fraser for one course, a year ago, which was in international law once a week, or twice a week. Now in talking about law, I wish to make that clear because I'm not an expert on the economics, or politics of the Columbia River. I think I can tell when people are trying to speak extravagant nonsense of the Treaty, but I am not competent to prove them wrong always. And so I am trying to defend myself here. There are some legal aspects to the thing. Lawyers, academic lawyers, spend most of their time thinking of academic problems. And, I suppose when one spends time working on the Columbia River, the legal aspects of it while on this treaty, are working on an academic problem. Also, because this sort of negotiation, that led up to the Columbia

River Treaty, law was a very small part of the exercise. And in fact there are some people who take the view that lawyers are nuisances in the exercise, and hinder the work.

I remember this various speech by a very distinguished Indian engineer, who would dedicate a leading role in the second lump of the Indus River. He was there at conference in 1961, shortly after the Treaty, and he said then, and you remember the great controversy in this River where they wanted to save the goats in Pakistan. He said, we made no progress, got nowhere under the rules the way they are. In a sense this, you're dealing with a problem largely one of practical consequence. And the facts of the basin are the crucial thing. Now I'm going to assume that I'm talking to the most learned audience about the Columbia River, that you can't find anywhere after a whole series of distinguished people. I'm not going to talk about geography, and this kind of thing, I assume you know far more about that than I do.

Let me start by setting the background, the legal background within which the Columbia River debate proceeded. What is the relevant international law, down until the time of the Treaty? Well, you always start with treaties, because customary international law yields to treaties. States made law for themselves by treaties, and that is the first law that applies to them. So the Boundary Waters Treaty is the starting point here. The Boundary Waters Treaty of 1909. A treaty between Canada really, it was made by the United Kingdom on behalf of Canada, and United States, creating the International Joint Commission to oversee the Boundary Water problems and to advise, principally to advise the governments on the solution of boundary water problems.

The Commission, as you know, is made up of 6 people, 3 Canadians and 3 Americans and during this crucial period of course, the Canadian chairman, or the chairman for the Canadian section I should say was General McNaughton who played such a significant role in the Treaty negotiations. Now a little background on the treaty negotiations. The Boundary Water Treaty, gave the Commission 2 powers. Only 2 powers really, and they're not particularly relevant to the Columbia River, except I suppose the Kootenay section of it. The first is that, if you're going to flood boundary waters, not flood, obstruct boundary waters, or divert water from boundary waters, then you need the power of the Commission.

Well, that didn't fly on the Columbia River. But by Article 4 of the treaty, if you wish to back water up a river from one state into the next, the Commission has to give its permission. In fact several of the dockets, before the Commission from the 1920's to the 1940's concerned the Kootenay River. Applications to do some works there that would flood the water a bit across the border. And this is the real power here. This is where the Commission has power. The sort of power that is exercised in the case of the Skagit River Valley, for example, that it could not be flooded without the permission of the Commission. And it gave it on certain conditions. Well, that is relevant. More important for our purposes, the treaty in article 9 provides for references to the Commission by the two governments to study problems, and to report to them as to advice. And this power is of considerable consequence in the boundary waters, and is used more and more. The advice people, the fact finding, the study, and the advisory role of the Commission.

Well, in that treaty, there's another article, article 2, which says that each state reserves the right,

the exclusive jurisdiction over the use and diversion of waters flowing across the border. Now this means that they say we can use it and divert it at will. On the face of it, this is what the article seems to mean. It does go on and say however, that if people downstream are injured, then they may be entitled to compensation. And the compensation on certain conditions. And that is, they would be entitled to the same rights that the citizens in the other country would be entitled to if they were injured by that diversion. So, for the purposes of deciding injury, they assume that the injured territory, or people injured outside of your country are to be treated as if they were injured in your country. This is a curious provision. In essence it means the law in face of diversion will govern. It's equality of treatment between your own citizens and the ailing which are injured. That is the only treaty law that was relevant. But there is customary international law. And one might look at that for a moment. Because the treaty only goes so far, and where it stops then customary international law picks up.

Customary law is a vague law. There are very few rules of international law. It's been accustomed that you can't argue about them because there are no courts that turn out decisions, or sufficient decisions that you can see a line of principle being developed. And there's no legislature of course to make law. So the bulk of international law is based on law of evolution and change which you call customary laws. Practiced, state practiced. Which states accept, or feel, there's a sense of obligation there. Well, what was the customary law governing international drainage basins. There were many theories from about 1900 on. The three competing theories.

First of all, the territorial sovereignty theory. This is simply if the water is in your state, you can do what you like with it. It goes under the name of the Harmon-Doctrine, because of the American Attorney General's named Harmon, in a dispute with Mexico said, there is no law that that should prohibit the Americans from diverting all the water from the Rio Grande River. The water is in your country, you can use it. Now this of course was a very popular theory with the upstream state, when you happened to be the upstream state. But quite often you were both upstream and downstream, the Americans forgot that, and they wrote Article 2. And insisted upon it in Article 2 of the Boundary Waters Treaty.

Then there is the theory known as the Riparian Rights theory, which is that the downstream state is entitled to all of the water to come down in its state of nature. The upstream state can't do anything other than use of it for consumptive uses, domestic and so on. But not really irrigation work without anything without soil. No interference with the flow. The state downstream at the end of the line then, gets all of the water, and no interruption. And this is the favourite theory of the downstream state. Well, neither of these theories are altogether satisfactory. There are obvious defects.

So, you then attempt to find some reasonable compromise. It was necessary in the arid regions. These theories are riparian rights theory. One, the downstream must get it, developed in England where they are full of water. And applied to the eastern United States, but when you got to the western United States, their water is scarce, and vital to agriculture, mining, these kinds of things. The idea that the upstream state could simply, or the person upstream could simply take what water he wants, and leave the fellow downstream to starve, just wouldn't work. So they developed a compromise. They said alright,

territorial sovereignty is all right, subject to prior appropriation. The man who gets there first, and utilizes the water he gets the first right to it. And the upstream state then can only interfere with the downstream user, existing use downstream, if, he can only take the surplus water. He can't interfere with existing use. Now this is the doctoring of prior appropriation, they modified the territorial sovereignty theory to protect those who have invested money and appropriated the water, put into some utilization.

But this you see is defective also. Because historically, most developments start downstream, and when the poor upstream state comes along, and wants to use some water, the bulk of it is appropriated downstream. The upstream state when it then can and wishes to develop, must sit on the banks of the river and see it going on downstream to nourish the industries, and agriculture and so on of the downstream state, and can't use the water that comes out of his own hills and fills his rivers, and they don't like this. They say it's not fair. Surely we're entitled to a reasonable share of this water. And that the Riparian States have to have some equitable share. Then this gives rise to the fourth theory. The theory of equitable utilization, or the Doctrine of Equitable Utilization.

This is the theory that has increasingly become accepted by the international community. It started, interestingly enough, in the United States, because in United States, you have the same sort of problem that you have at the international level. You have the states, it's a federal system with territorial states, and territorial jurisdiction, and Colorado wants to use the river. Sounds fair, but can it do that if it's going to affect downstream states? And since there is a court with country jurisdiction within the United States, these disputes can be gone into court, whereas at the international level, they can't. So you'll find in the United States, a series of cases dealing with interstate water problems and from the beginning, the Supreme Court will say, "Now listen we have to be reasonable about dividing up the benefits of the River." And the idea that the downstream states can get all, and the upstream can get none, is ridiculous. On the other hand, the upstream state can do whatever it pleases and cut off the water, and ignore the usage of that water downstream is also equally unfair, and unjust. So they said equitable utilization. There must be a sharing of the benefits. The beneficial uses of the water of the river.

Now, textbook writers have supported this line of argument, which was used in United States cases, and international organizations, private international organizations like the Institute of International Law, and the International Law Association. They studied water problems in the 1950's, both of these bodies adopted the move, equitable utilization. The international law association, and the Helsinki move in 1966, put the Doctrine this way, quite simply: Each basic state is entitled within its territory to a reasonable, and equitable share in the beneficial uses of the water of an international drainage basin. You'll know that the share is of the beneficial uses, not the water. You can't say I'm entitled 50% of the water and you're entitled to 50%. It's, you look at it and see what use can be made of the water, and you share the beneficial uses.

Well this rule is pretty vague, what it comes down to is that states must act reasonably in sharing the river. And it says what is reasonable an equitable share within the meaning of article 4, the one I just read, is to be determined in the light of all relevant factors in each particular case. There is no hard and fast rule, you have to look at the basin, see what can be done, how can it be best developed to maximize

return, and then you start talking about equitable sharing. And all sorts of factors that you may think of en route. Existing uses are a most important factor. But out of this theory, a state that sort of monopolized the downstream share of the river might find itself having to yield some of its existing uses. And the upstream state may yield to interfere with, may be even to cause some injury to existing usage because it's entitled to the fair share of the beneficial uses of the river.

So these Doctrine of territorial sovereignty and prior appropriation, all these things are not really satisfactory in practice, and you'll get down then to a question of basin by basin study and negotiation in good faith to try and reach an equitable sharing.

Now of course, these principles I said in the beginning don't need a treaty at all. And in the case of the Columbia River for example, if you start talking about diversion upstream, there is a Treaty probation on that is more stringent and embodies the territorial sovereignty theory. And therefore, the equitable may be modified in particular, the basins depending on the Treaty surrounding those basins. Well that is the background. And you see there wasn't a very precise system of law. But discussions about these principles. Even the customary principles, did create, to considerate whole reasonable climate. You may say, law is useless in this kind of situation. But it's not, because if you appreciate the policy behind the law, and you feel for example, well the law requires me to share the water, it doesn't support the notion that just because the waters here I can do what I want with it. If that idea gets through, then it's bound to be reflected in the sort of settlement that you‘re prepared to accept. The attitude that you‘re going into the negotiations will be coloured by what legal traits are.

Well lets fast-forward now to the Columbia. The first legal step, apart from these Kootenay applications through the 20's and 30's which I mentioned earlier, the first step about the Columbia, international legal step, came with the reference to the International Joint Commission in 1944. At that time, there was no development, as I understand it, on the mainstream of the Columbia River in Canada. The United States of course had developments proceeding at quite a rapid pace, and I believe Grand Coulee was virtually completed if not completed, I'm not sure of the precise fact there. They actually went ahead with Grand Coulee without paying much attention to whether it would back water up into Canada. They made no application originally. I believe that there is a little water backs up there doesn't it, across the border. And this was tightened up afterwards in some fashion, but strictly speaking, the Commission should have began at that point where no water should have been backed up across the border without the Commission giving it's permission. The reference to the Commission was to study the basin and to see what further developments could be made that would be useful, profitable to the 2 countries.

Following its usual practice in this way, the International Joint Commission set up the Engineering Board, the experts, to study the river, get the facts. Now this Board, as you know, took some 15 years before its report, which really wasn't that large… 1959 when the report was made. What happened between 1944 and 1959 while the Engineering Board was hastily gathering facts, and making studies? Well a number of things happened of legal significance anyways. In 1951, you have the Untied States' application to the International Joint Commission for permission to build the Libby Dam. Now

Libby Dam could not be built the way the Americans wanted, without the permission which falls under article 4 of the Boundary Waters Treaty because it would back things up into Canada and I think it would create a lake of some 42 miles up into Canada, and raise the level of the river something like 150 feet at the border. My figures are not inaccurate. And this meant that there was a considerable body there, and Canada simply said, “No you can’t do it without the permission of the Commission”. We have delegated to that body the right to say yes you may flood, whether the rest of us think it’s a silly decision or not, it’s a legal decision. And once the Americans have that decision, then they could flood. No matter how much we may regret it, or dislike it.

Well, before the Commission, and they looked at it, they said well what are you going to pay Canada, if you’re going to flood Canada. And the Americans said, we’ll pay to relocate groups to flood the reservoir. Well, the Canadian’s didn’t think this was a very good deal, and they won’t agree to this at this stage. And the Americans went back to reconsider.

In 1954 they came forward again with a renewed application. By this time they decided they had to give Canada some incentive. And they then offered to make some sort of cash payment, but it wasn’t, it was trifling compared with the appendix that accrued to the United States from being able to have this extra 150 k by storing the water in Canada. It was on this occasion that General McNaughton said words to something like this, “that they want us to give them a gold watch for the price of a piece of tinsel”. In other words, there was no relationship between the benefit you would get from the storage in Canada, and the sort of things you would get in compensation.

The Canadians then, since 1961, raised what’s known as the question of downstream benefits. Said we are entitled to downstream benefits that accrue from the services, acts done inside Canada. The Americans said there’s no such principle… this is absurd. Well, ‘54, in that year, ‘54, you get the interesting proposal from the Kaiser Aluminium and Chemical Corporation that that entered into agreement with the British Columbia government saying we will build a dam with our tools, at Arrow Lakes, at our own expense, and we’ll give you credit for 20% of the downstream benefits. And the British Columbia government thought it was a pretty good deal. Dam plus 20% of the power without spending any money. Around the same time, shortly after that, I believe that the Puget Sound Utilities council suggested that they would build Mica Dam and give it to Canada. In other words, and in return for the downstream benefits, they would pay cash. Now this sort of suggestion outraged General McNaughton. And he complained to the Canadian government.

For the first time he was able to attract the attention of the Canadian Government, that there was something large at issue here. And this led to the intervention by the Parliament of Canada, by passing the International River Improvements Act of 1955, that simply said if your going to do anything on an international river that will change the level of it, or will change the quality of the water or this kind of thing, you had to get a license from the federal government. So here you have the assertion of federal jurisdiction over the international river.

Now, I don’t wish at this moment, although perhaps this is the most convenient time, to get into

an excerption, discussion of the federal provincial jurisdiction there. Some people question the competence of the Parliament of Canada to pass this Act. They say water resources, like other resources, are exclusively a matter of the province. And how they are used is a provincial matter. The federal parties say, no, this is a matter involving international relations. It's an Act done in Canada, having effects outside, and this is a matter within our competence. And just where within their competence is not so easy to pinpoint as a precise head of authority. But I think they would have to justify it under what is known as the Peace Order of the Government Clause. That's strictly being subsidiary power of the Parliament of Canada, that if the Privy Council didn't think very much of, and refused really to let parliament do very much under it, except for the times of great national emergency. Which is the case of war. Or in the case of, back in the 1890's, with the legislation dealing with tenements in Canada, which the Privy Council seemed to think was an occasion for emergency legislation. The, they look out for the natural resources ownership, rest of the province, but ownership is one thing as the courts say, and jurisdiction, legislative authority is another. And certain aspects of natural resources may be dealt with by the Parliament of Canada. I think that this Act is properly passed. It is an international river, and I think the federal parliament does in fact have considerable jurisdiction over international, and inter-provincial river basins.

Well there was gaped, and this meant the end of these proposals like Kaiser's. It was at this time that General McNaughton said that you know, we have a serious problem with the Americans. They won't take us seriously here, that this downstream does consist us. They think they can get Canadian water, regulated, in due time, without paying anything for it at all. So how to make them realize that this water is valuable water. Value able to them as it is to us. So he conceived the idea of diverting the water from the Columbia River into the Thompson, or the Fraser River, and bringing it down to the ocean through the Fraser in Canada… all the way, instead of just going down to the ocean through the United States. Said, they think this water is off to go on down there, they're mistaken, from an engineering point of view, we can build it. In Canada, he had his engineers look at it. The Americans as far as I know, would have never agreed that the Engineering Board should study out-of-basin diversions because it was quite illegal, and beyond the terms of reference of the Commission.

This diversion talk led to a great deal of legal discussion. In fact this part of the whole exercise gave us lawyers the greatest time. And we used to have quite interesting and lengthy discussion with the Americans of Seattle, the academic staff there, and some of the others too. And those discussions were not altogether fruitless. They did bring home to the Americans the notion that a River is a shared resource, and that its benefits have to be shared and that they couldn't take it for grated. The argument, I've already referred to Article 2 of the Boundary Waters Treaty, and this is undoubtedly is, it was put in there by the Americans for the purpose of leaving the upstream state completely devoid of using its waters.

From their point of view in the Columbia River, it was an unfortunate thing that it was there. But Canada, in my view, and I think some of the Americans too, would have had a perfectly legal right to divert the water. They admitted that, but they said, ahh if you do, you have to pay us all sorts of tremendous money because you'll be depriving our existing generating power. And of course, the proposal was to take out only surplus water, I think it was 15 million acre feet or something which went on down to the sea unused. They could use, the development, they couldn't make use of this water, so the,

as far as power was concerned it would prevent future growth, future use. I doubt it was actually caused so much damage to the existing usage.

The Americans, being realists, never really took this argument too seriously. They said, oh right, they never believed that we would divert the water. All sorts of problems, temperature of the Fraser River, how would it effect the salmon, would it kill them off, would they spawn in this colder water, so there was this aspect, the threat upon the water to the salmon. But equally important, and today of course because of upstanding importance is in order to make use of this, you have to dam the Fraser, and put dams all the way down. Well, the thing about damming the Fraser is, the person has to account for the fish. They never really thought that we would divert, it was just an enormous threat, which they didn't take seriously.

Now of course, the next development in that era in 1957, when Premier Bennett got the idea the north had to be developed, and the Peace River was the key to the whole thing. He adopted the Peace River alternative to the Columbia River. He started studying and talking about that. Now the Americans realized that this just wasn't a manoeuvre to try and make them think that we could get along without the Columbia. There was a reality that we could divert to the Peace River, and it would produce more power than we could use, or be able to use for some time. Then they realized if Canada went ahead they would not be interested in the Columbia River for awhile and while the Americans if they could wait long enough, would get the regulated flow, and Canada in turn would develop the Columbia river and so on. They really felt that they could not wait that long, and they were prepared to pay a price for earlier development of the Columbia.

This, this Peace River alternative, seems to me, was the pressure, the real pressure on the Americans to change their idea about what they were prepared to pay, to persuade Canada to go forth with the development of the Columbia River. This altered their attitude remarkably around this time. And by 1959, the Engineering Board report was about to be produced, and you find that they ask the International Joint Commission to study what principles, and to proposed, to recommend principles for determining and apportioning the benefits from cooperative use development of the Columbia River system. So they're now going to look at the sharing of benefits. How can you maximize these benefits, and what principles should govern if you share you benefits? And the International Joint Commission produced its principles on this question. And there, these principles are a considerable interest to international lawyers because they are really rules that state that this position having to try and work out where equitable sharing should fall.

Two or three of them I should mention. Each country should bear the cost of the facilities in it. So each country builds its own facilities based on principle. Another one is that the work should produce savings to each state compared with any alternative it might have by proceeding on its own. In other words, it should be cooperative development should produce some additional benefit than if they did it on their own. If you can't do that, then it's not really cooperative development is not worthwhile, should not be undertaken. And then they said and the benefits, the power benefits, the flow from cooperative development, that is the downstream power benefits should be divided 50/50. So they are split evenly.

You might say why 50/50? In all logic, if Canada does something, upstream, allows more people downstream to use it, compared to itself, and it causes a benefit, it has cause the benefit 100% of that. Should it not get 100%. Well, perhaps not completely, but in these matters, I don't know where they get the 50/50 figure from, they say alright we do things, they produce benefit, let's share them 50/50, thus shared. So by 1959 then, March, the engineering report is it, the International Joint Commission produces its principles shortly thereafter, and you're all ready then to negotiate the Treaty.

The negotiation of the Treaty, and I may got the details here. The actual people that negotiated for are the Minister of Justice, Davie Fulton, who was a Deputy Minister of the Secretary of External Affairs and the Deputy Minister for Northern Affairs for the federal government. And then Mr. Pagget from the BC Waters Branch. So there was 1 British Columbia person and 3 federal. 2 federal civil servants and 1 minister that actually did the negotiation. But behind them there was a committee, and on that committee I believe there were equal federal and provincial. I haven't checked that, I'm proceeding from memory here, but certainly Bonner, and Williston were on that committee. I can't remember whether Pagget was probably there too. Was Keenleyside not there? And Keenleyside. From the point of view of how Canada makes treaties, the Columbia River negotiation was of some interest, because here they were making a treaty of a British Columbia resource, and British Columbia was right in on the negotiation. The equal representation on the Committee and they had a representative right at the table where the Treaty was being negotiated. So cooperation between federal and provincial authorities in working out this Treaty was as close as could possibly be. And in fact, this pattern was followed true on many occasions.

In the case of the Columbia, in fact it was the provincial presence of the negotiation, was far stronger than the presence of then Ontario had in the negotiation in the recent water quality on the Great Lakes, agreement. I was fortunately enough, when I took a sabbatical to work in External Affairs because I had a little specialty of international water problems, I was given the job of working on this treaty. There was a negotiating team all the rest of it. We always had an Ontario man there, but he was the only on in the negotiating team. So that in the case of the Columbia, BC was there in force. But I have to say of course, that in the case of the Great Lakes water quality agreement that this Ontario representative carried a great weight. If he said Ontario doesn't like that, or we will agree with that, then we took heed of that that.

Well the Treaty was negotiated. And I'll just say 1 or 2 things about it. Some you know obviously already. I will take all look at some legal, some interesting legal questions. The Treaty is for 60 years, it will go on after that until it's terminated by 10 years notice. The storage you know in all three dams some million acre feet and so on, 50% of the downstream power benefits, and a lump sum for flood control benefits, option to build Libby, no sharing of benefits on Libby because they get benefits, and we get benefits. We're downstream for a small portion of the Kootenay. So we take our benefits, and they take theirs.

Diversion. Now I want to say a few things about diversion of water. The Treaty allows diversion for consumptive uses. Now consumptive use is defined by way. It really includes for all uses except using it to produce power. Domestic uses, irrigation, industrial uses, that's a considerable factor here. You can

use a lot of water for industrial purposes like mining. But does not include use for the generation of hydro electric power. Not sure what it doesn't include. So that we can divert without anyone's permission … consumptive uses, but not for non-consumptive uses.

The Treaty prohibits basin diversions for non-consumptive uses during the life of the Treaty. No other basin diversion. Now I'm putting consumptive uses aside, that is permitted, not restriction there. Speaking of the non-consumptive uses, none can be made during the life of the Treaty. Within the basin diversions however, are permitted within certain restrictions. None during the first 20 years. So for 20 years, you can't divert, after 20 years, you can make a small diversion from the Kootenay to the Columbia, what's it, 1.5 million cubic feet a second at Canal flats, with a minimum of 200 cubic feet or the natural flow. After 60 years, then you can take out all water from the Kootenay above a flow of 2500 cubic feet, at the border, or if the natural flow is less than that, then you can't take any, but you have to maintain this flow, after 60 years. After 80 years you can take out all above 1000 cubic feet from the natural flow at the border. Now you can take out then substantial quantities of water.

There is a catch about these diversions from the Kootenay. And that is, they have to be exercised, these rights, the 60, the 80 years right to divert, have to be exercised before 100 years from the Columbia River Treaty. If you exercise this right, before the 100 years, then you continue to divert it in perpetuity. This is made clear in the Protocol. And that is diversions during the life of the Treaty. What happens after the treaty is terminated, assuming it is? This has been given rise to a little controversy. Because Mr. Higgins whom you had speak to you earlier this series, wrote an article in the international journal in which he had been bemoaning the fate of Canada as it signs this Treaty. And he concluded on this point as follows, that if this Treaty is ratified, then Canada will forfeit forever the rights and advantages it has under the Boundary Waters Treaty of 1909. That was to save the right of diversion. Now I can't bother you with the technical argument, but that was his main position.

In fact, I think he misread the Treaty. Because article 19 of the Treaty, if I can find it said this is article 19, paragraph 2. "Either Canada, or the United States of America may terminate the Treaty. Other than article 13", now this is the one that means that there's diversions, "other than article 13, (except paragraph thereof)." So paragraph 1 of article 13 is excepted from the previsions of this Treaty which said that it terminated the Treaty other than article 13, 17 and this article that any time after the Treaty has been enforced for 60 years that they except paragraph 1 from those articles that continue in force. And if you look at paragraph 1 of article 13, it expressly deals with diversion in general. Not just diversion from the Kootenay, so out of basin diversions are part of the Treaty that can be terminated. The prohibition that prohibits diversions, other then for consumptive use can be terminated when the Treaty terminates. And then if Canada has the right to divert out of the basin, before the Treaty, it may do it after the Treaty. And in fact, paragraph, article 2 of the 1909, which is the one that Canada relied on before the Treaty to divert, that is expressly revived, and continues in force, even if the Boundary Waters Treaty is terminated, which of course it can be done, under 1 years notice. So that this conclusion, that the Treaty prevents, or in that Canada has given up its right to divert water from the Columbia forever, is inaccurate, is wrong.

As far as the Kootenay's concerned, we have quite substantial rights there, but there is this limit

to it, and that it they will have to be exercised within 100 years. Because under this Treaty, Article 13 is one that does not terminate with the termination of the Treaty. In other words continuing obligation of Canada. If the Boundary Waters Treaty is enforced, it is revived on the termination of the Columbia River Treaty, and so far it applies to the Columbia River. If it's been terminated, as I say article 2 continues, and may be itself be then terminated by the notice of 1 year, which is the provision of the Boundary Waters Treaty. So on that point I think Canada has protected it's self, as well as you can reasonably expect considering that Libby Dam is going to be built.

There's only one other feature of the Treaty I will mention, that's of interest to lawyers. Article 17 provides for the compulsory settlement of misuse concerning the treaty and its application by arbitration, and compulsionary jurisdiction which is always something that one should make peace about in a Treaty because one can't take the other state to court in international law. It depends upon the voluntary submission. Well in this Treaty, the United States, and Canada agree to submit to adjudication. If any side of the party wants to raise a point about the Treaty, they have a legal right that this may be somehow infringed.

Well that's the Treaty and the surprising thing of course was, as you know, that in spite of British Columbia's close association of the negotiation of this Treaty, and their agreement to it and everything else, that immediately arose when they signed, Premier Bennett found it was unsatisfactory. So he rejected the Treaty, which had been negotiated with 2 of his Cabinet, and with their agreement presumably. And then, he followed this up by expropriating the BC Power Company and the BC Electric Company. The reason for this I thought at the time, and I think it's probably still not too inaccurate was in the first place, the Columbia River Treaty provided for the return of the downstream benefits for Canada. The fact that power was coming back. And if you built the Peace River, and the Columbia River, all that power, then you might have a surplus of power on your hands. And he had to market the Peace River power to make it economic. So he had to take over the Peace River, he had to frustrate the returned power under the Treaty to Canada. And incidentally if he could sell the downstream power benefits he would get some cash to help finance the dam construction on the Columbia while he was raising his money to build the Peace River Dam. So the Treaty was rejected, and further negotiations were necessary.

This was done after the Liberals came in, in '63, and in 1964 you get the Protocol which modified in small ways the Treaty. Clarified a few points, things that were concerning some people about the interpretation of the Treaty. They were spelled out to reassure them that it didn't mean what they thought perhaps it could mean. The main thing was, that as a part of the Protocol, an Exchange of Notes that were signed at the same time, that the downstream power benefits were sold for 30 years, for some 254.4 million dollars, payable at the time of ratification which took place on 1st October 1964.

I just wish to mention now the BC-Ottawa agreements which were made in July '63 and January of '64 immediately before the signing of the Protocol. In this agreement, or these two agreements, it was made clear that all benefits from this Treaty belonged to British Columbia. Ottawa didn't attempt to share this natural resource. And of course, it was also made clear that all burdens, many obligations arising out of the Treaty would fall on British Columbia. So it's a British Columbia affair. And Ottawa simply did

it's best to get the best arrangement for British Columbia.

Article 5 of the '63 agreement provides that if British Columbia requests any change in the Treaty, and Canada agrees to it, then Canada will do its utmost to persuade the Americans to make the change. This is the prevision for renegotiation which is referred to from time to time. There are a few points where Canada will have to endeavour to obtain the agreement with the United States if requested by British Columbia any variation on the operation of a dam constructed under Article 12 of the Treaty. Any modification of the area in the land in Canada required for the purposes of the dam, any diversion of water not provided for by the Treaty, that it be requested, British Columbia request this then Canada will do it's best to get it adjusted. But on the general proposition, any proposal relating to the Treaty which Canada and British Columbia agree is in the public interest, so there you need the concurrence of Canada. So if you're embarking on any wide scale or fundamental change in the terms of the Columbia Treaty, it can only be done if Canada consents, that is Canada is not in the obligation to do it. If it wishes to or if it likes, it can do it. So that when you talk about the renegotiation of the Columbia Treaty, you're doing something that is not going to be very easy… and quite understandably.

If I sell my house to you I'll be getting the last share, not yet realizing that the house will be going to jump 25 or 30% in Vancouver and sold it today it's worth quite a bit more than I sold it to you, I realize that if only I'd known that inflation was right around the corner in such a way. Now I can't say now, listen give me something over this, I didn't get a very good deal. You'll want to jump me. But it's worse than that in the case of Canada, because the Americans want some things too. They'll like to renegotiate a number of things like the automotive pact. And I'm sure that if we went to them and said now listen, lets renegotiate the Columbia River, you're going to find, well that's not bad. At the same time if you go back ABC and D so that it's not going to be particularly easy renegotiation.

Let me sum up here. The rules of law of the breaking out of the Columbia settlement has some, made some contribution, but I couldn't say that it played a very large role. That would be an exaggeration. The roles of the International Joint Commission on the other hand, were of tremendous importance. Not legislative, or adjudicative but providing the role of finding the facts. Seeing what was possible, being able to show what benefit state A would get, what benefit state B would get. These things are crucial in settling international river disputes. It wasn't until the World Bank sent the engineers in and the experts to look at the Indus River and come up with the fact of what can be done to maximize the waters, to satisfy the claims of the two sides. They put the steam out of that dispute. The steam that they were perhaps fights about because they didn't understand how they could meet demands and yet not out-ruling the other. With studying you can see what's possible. And the role of independent Commission is of crucial importance in creating drainage basin development.

The International Joint Commission here obviously served another function. It provided a forum where the great battles could take place without involving the two governments. And this is a vital role again for an independent sort of agency… a governmental joint agency. You could remove this dispute down there … keep the tempers flaming there. Let General McNaughton rave at the Americans and they rave at him, and so on. And there were some very tense wars in the Commission, and some harsh words

spoken. Whereas the Prime Minister and so on would keep calm and cool and say what are our people doing down there. And in the course of time, that the fact available of political pressures and so on, then the reasonable scheme can be drawn out. And the States made compromises without all the passion so that the Columbia River exercise demonstrates to be the vital role of independent Commissions in the management of drainage basins.

The Treaty, looking at the Treaty the finished product, I think they contributed to the development of international water resources law. It illustrated the advantages of basin-wide planning and coordinated operation of developments it. Perhaps, it's an illustration also of the application on the principle of equitable utilization. Where you take all the facts into consideration, and see what should be a reasonable sharing of benefits. And with intent to do that, some people may think they weren't terribly successful, but it was that. It established I think, and this is one of the great contributions Canada's made to this kind of law through the permission of General McNaughton's insistence, it established, firmly the principle of downstream benefits, or the sharing of downstream benefits. And in the Treaty, as first written, that compensation should be paid, not just in cash, but in power … sharing of the actual benefits of it. Now the state who has the power can sell it if they wish, but that is the principle of the Treaty was Canada was entitled to share, a 50% share of those downstream benefits returned to Canada in the shape of power.

As far as diversions are concerned, the Treaty actually strengthened the right of Canada to make diversions, within the basin. A matter the Americans were disputing. I don't think it's, I don't think they were right, but it's arguable that they could not divert the Kootenay tributary, into the Columbia River, and deprive the downstream states of that water. Well, I don't think there's much doubt about it, but the American s thought they had an arguable case, in the Treaty, we are guaranteed the right to divert substantial quantities. Someone said impossible, frankly that's inaccurate, that ultimate diversion is possible after 80 years that you can in fact take 9/10 of the water out of the Kootenay. I'm relying on a figure I read, I don't know if this is so or not, but very substantial diversions. And this is guaranteed in perpetuity if you exercise before 100 years. This is diversion within the basin. The Treaty does not really speak, it does not guarantee your right within the Treaty to divert water out of the basin, but if we had that right, we can exercise it when the Treaty is over. And then of course, the Treaty is another illustration of the desirability of dividing for equitable utilization, as a means of settling international disputes. From the lawyers point of you then, the Treaty was a satisfactory solution to a difficult international problem. So if you have any questions, I will speak a little bit about the federal jurisdictional laws.

Audience: In our previous speaker, professor Marts from Washington University said that there was really no need of a Treaty. Is there any other better alternative than a Treaty?

Mr. Bourne: Well, I don't want to strike the word of, at least to develop downstream, and without having some firm commitments from upstream. But I don't quite understand. You don't need a Treaty at all for anything; you don't need contracts if people are prepared to rely on others doing what you want them to do when you want them to do it. It seems you're getting into a complicated thing like this with the mean for regulated flows and this kind of thing. How can you get along without the agreement of some sort?

And that's all a Treaty is, an agreement. I'm surprised that one would try and do it without.

Audience: Well he made it quite clear that it sounded so simple. And I was wondering, as a lawyer, what other alternative can you think of better than a treaty? I realize it's very complicated.

Mr. Bourne: No other alternative except to just do what you, develop what you want, and hope the other man won't ruin it. And then what the alternative is, if he did something which you said is contrary to the general principle in international law, you couldn't get any remedy unless you went into court, and you can't force him into court so.

Audience: [inaudible]

Mr. Bourne: Well, the right of the Americans to raise Ross Dam rests on a Treaty… rests on the Boundary Waters Treaty. The contract is simply one of the conditions of the license given by the International Joint Commission. It's between British Columbia, and the city of Seattle. So it's an agreement between two entities that are in off states.

Audience: What is the interpretation of basin vs. could you divert from the Columbia into say, the Okanagan. That went up to the sea in the same riverbed, but not across the border.

Mr. Bourne: A basin, as I understand it, it's a drainage basin. All the waters that flow into the mainstream of the river, tributaries are in the basin. So that would be an inter-basin, intra-basin within the basin diversion.

Audience (Tim Newton?): So if it could be done, our benefits to be derived from this would still be allowed under the Treaty?

Mr. Bourne: Not to the Okanagan. The Treaty only speaks of diversion from the Kootenay, not diversion from the Columbia. In fact the prohibition in the Treaty, in Article 13 I think would clearly prevent it.

Audience (TN?): It's just part of the basin. Isn't Article 13 preventing…

Mr. Bourne: Well I suppose, when I said out of the basin, perhaps I had not taken wide enough view of the basin. I was thinking the Columbia mainstream and the Kootenay. So there's no diversion out of the Columbia river, that's a more accurate way of putting it

Audience: It's strange that in the diversion of water in the Columbia, they allow industrial consumptive use. Because they don't allow this in the Great Lakes I know. In the case of Chicago when they were having litigation between Canada and the United States on that, and they only allow diversion for consumptive use which is depletion. Anything that goes into the corporation of a product or domestic consumption. Because most industrial water use can be reused many times, and it is one of the largest users of water. And how do they define industrial water use in their case as a consumptive use?

Mr. Bourne: Well they just do. Words have the meaning you wish to give them.

Audience: I can see irrigation as a consumptive use, but industrial at the amount that goes into the incorporation of the product for industrial is very, very little.

Mr. Bourne: In Chicago they were using it to what, flush the sewage down the canal, and this is probably not an industrial use, would it be?

Audience: Many plants along the sanitary canal in the summer time, you can even boil an egg there.

Mr. Bourne: Is that why they are making the diversion?

Audience: Well the diversion is to, dilution water.

Mr. Bourne: To dilute the…

Audience: To dilute the water into downstream.

Mr. Bourne: I don't get your argument by what you industrial uses.

Audience: Well industrial water use is simply water use by manufacturing plants because it could be used for manufacturing.

Mr. Bourne: If they use it to flush out the sewers it's not an industrial use.

Audience: Well the plants use it you see, along the canal, there are many plants.

Mr. Bourne: Well it depends on what purpose you use it for.

Audience: They use it for cooling, for…

Mr. Bourne: If that is the reason for the diversion, then yes.

Audience: Here, you know, didn't they get a more explicit definition of industrial because anyone who's worked in this industrial water problem knows only 5%, less than 5% of it is consumptive use.

Mr. Bourne: I think I should say that there's no treaty of course that allows the Americans to divert from the Great Lakes for industrial purposes. In the Columbia River, it's expressly authorized.

Audience: You have an advantage, but what I'm saying is there this inconsistency of international law.

Mr. Bourne: Chicago, they lowered the level of Lake Eerie, and Canada has a very great concern of this. This was a matter of some importance to Canada.

Audience: The variation of the lake there is also questionable because of course it didn't affect it that much depending on the run of the snow melt, and the amount of ships coming in.

Mr. Bourne: This dispute was at the time and cycle, when the level of Lake Eerie was already quite low,

and to divert more water would have lowered the level of Lake Eerie, and caused considerable damage to Canadian residents. The level of the Great Lakes seems to go in cycles… 11 year cycle or something like that. But I think this was one of the main problems at the time. But it then does of course affect the amount of power able to generate at Niagara Falls. If you divert water into Chicago into …

Audience: You see Commonwealth Edison has 9 generating plants. Commonwealth Edison in Chicago along the canal and they use a lot of water for cooling. That's why they can't let them use it because the water for cooling you know, accounts for more than any other uses.

Mr. Bourne: Canada's position is that they haven't got this right to take this water out from the Great Lakes.

Audience: That was the main complaint, and this is the fear that it will continue to go down. But Canada did not win the case though.

Mr. Bourne: As I understand the thing to be, the people of Chicago wanted to divert water and use it all the time. And the courts, Canada's protest the American government. Canada had never been directly involved in the litigation. And the courts held the diversion. They made them reduce it at one point, but in law, anyhow, it's supposed to be 3000 cubic feet a second or something of that sort. It's maintained at that low level so that, while there's still diversion, Canada in fact succeeded in its protest in keeping the American authorities keeping that down to a very minimal level

Dr. Shrum: Why would the Columbia River Treaty view, rather than an agreement or order under the IJC.? Why a treaty rather than using the IJC?

Mr. Bourne: The IJC has jurisdiction to make orders, only if, in the case of a river going across the boundary, only where the river is being backed up, so that under the Boundary Waters Treaty the only part of the Columbia River Treaty, where the IJC could have spoken about, and made a binding order was on the building to Libby Dam which would have backed the water up into Canada. And they could provide the conditions under which that dam would be operated if it doesn't provide compensation. But the rest of the Columbia River, Mica Dam, all that is just not within the jurisdiction of the Commission. So all they were asked to do was to study it, and to recommend. That's where there job finished. You have to amended the Boundary Waters Treaty to give them the power to prescribe it's conditions. So if you, you have to have another treaty to give them the power to legislate to regulate the Columbia. The governments didn't wish to do that.

Dr. Shrum: When did this theory of equitable utilization come into use? You say it was the idea of the US supreme court?

Mr. Bourne: When did it come to being…

Dr. Shrum: Is this the first case it's been applied to

Mr. Bourne: It was first used in the United States about 1907 I believe in the case between Kansas and Colorado. And then it's been used several times since then.

Dr. Shrum: And as an international application this is the first one where this thing has been applied

Mr. Bourne: I think you can find some other treaties. It's the, it really is the moving spirit behind many treaties, so this is not the first application of that Doctrine. It's the first, almost the first, of downstream benefits with the return of power. I think you can find one or two treaties in Africa and some other state which, provided for return of power, downstream. But this was only done in treaties. No one argued that this was a general principal, a general obligation to do it. Whereas in the case of Canada, we said that it's part of the general principals of international law that if the upstream state confers a benefit by allowing it's territory to store water, that they have the legal right to share those benefits in deciding the rights of the basin. So the principle really, the international level didn't obtain any sort of prominence until the 1950's.

Dr. Shrum: There was one point I didn't understand exactly, and that was when you were talking about the decision of the International Joint Commission. Now on the principal there were 3 principles.

Mr. Bourne: I mentioned 3, I mentioned only 3, the ones I thought were special.

Dr. Shrum: Well it was the 2nd one that, Canada would have to be able to do the works better, than if they did it on their own. It seems to me that Canada would be able to develop the Columbia on its own better than if they did in the terms of the Treaty. Because Mica Dam for example, they can only release water in accordance with the requirements of the American system of power dams on the Columbia, so that that second as you enunciated it doesn't seem to be correct. Maybe I misunderstood.

Mr. Bourne: Well, I made 3 points the 3rd one was ½ of downstream benefits, the 2nd one was that they would develop the civil rights better jointly, under the terms of the joint agreement then they could on their own. I just, if I could read the principle itself, it may be clearer because there are many of these principles.

Dr. Shrum: But you outlined 3.

Mr. Bourne: The proposition that I made I think was the work should produce savings, that each state compared with the going alone alternative. In other words, there has to be some extra benefit from the cooperation.

Dr. Shrum: And I think as far as developing the Columbia for example, Canada or British Columbia would be able to built the same dams on their own, they wouldn't have been restricted by the release of water, which they are restricted at present times. So they could have done it better on their own, than under this arrangement. There were no savings, it was a disadvantage to British Columbia…

Mr. Bourne: I take it your discounting the money that we got?

Dr. Shrum: Nope, I'm just thinking about building them. The second point if you read it again, their savings, I don't think there are any, unless you, I don't see where any savings come in for British Columbia. I'm not arguing against the Treaty or the dam, I still agree it's a good idea, but on this particular second point, I don't agree with it.

Mr. Bourne: Well, I'm not sure whether I follow the 2 points your making because if it were a good idea, then Canada must have got something out of it or they wouldn't have gotten it if they hadn't had the Treaty. If not say that it wasn't a good idea.

Dr. Shrum: The way you enunciated your point, there has to be savings in each country, on your number 2 point, and that wasn't true.

Mr. Bourne: I'd be glad to get some help here. On the facts you may be right, but if you're right then you have to conclude that the Treaty was a bad thing because we got no benefit out of it.

Dr. Shrum: Oh no. no I don't go along with that at all. No this point really said that each country would make savings, maybe overall savings, but I thought this applied to the building of the structures.

Mr. Bourne: It's saying that it must be the just position of these two statements that's proceeding. I think I'm talking about overall savings, although perhaps I should put that first. When you look at the arrangement, there must be something there for both sides. This means the overall benefit. My other principle is both sides then are responsible for building their own works in their own country.

Dr. Shrum: Well I thought our benefits would come from the 3rd, your 3rd point. That we'd get half the benefits, and these benefits would make the Treaty valuable. And I thought your second point had to do with the start of the civil works. Then I misinterpreted your second point.

Mr. Bourne: I can't put my finger on this, there are power principles, and there are other principles, and it's, I just dragged these three out, but I think it's under power principles.

Dr. Shrum: Well he's looking at that Mr. chairman, I came up here especially last night to point out that your speaker last week,

Mr. Bourne: Which one?

Dr. Shrum: Mr. Marts, Professor Marts, I think he made a mistake when he said that unfortunately British Columbia was saddled with a higher price for the Peace power. He said they could have cheaper power if they had just gone ahead with the Columbia. That is absolute nonsense. Because you can phone up Hydro, get the value of the Peace Power, which is around 4.3 mills delivered in Vancouver, the Columbia Power, when it will be delivered in Vancouver will be a bout 9 mills. Now I'm not saying that's the way you should be comparing these because the Columbia Power is coming in in 76, 77 and you will expect things in 76 and 77 to be more expensive than what came in 69, 70. But in any case, it seems to me he was suggesting we shouldn't have built the Peace you see, should have gone ahead with

the Columbia. If that had been so, then it would have been necessary to not only to bring the power all the way from the Bonneville Dam to British Columbia, but to bring it from British Columbia to Prince George, and to Vanderhoof, and all these mines and pulp mills up there. And since it costs 100 million to bring the Peace down here, I would say off the top of my head, and it's been taken off so many times, that it would cost 100 million to get that power up there you see, as well. So this is just a load of nonsense to say that British Columbia would have enjoyed cheaper power. Because a great deal of the Peace power is used at these pulp mills in Prince George and Quesnel, 2 in Prince George, 3 in Prince George, Quesnel, the mines all the way along on highway 16th and so forth. And to supply those from the power at Bonneville Dam would have been a very expensive proposition. And it would have not have been a good idea for British Columbia.

Audience: Why don't your write a reply to him?

Dr. Shrum: Beg your pardon.

Audience: Why don't you reply back?

Dr. Shrum: Beg your pardon.

Audience: Write a reply.

Professor Cook: Yes that's what I was just about to say. I'm sure he would be delighted.

Audience: He would be grateful to you.

Mr. Bourne: As long as you understand it. I don't care if he understands it or not. Tell him the next time he comes. I think it'd be clear if I read you power principle number 6. The power benefits determined to result in the downstream country from regulation of flow by storage in the upstream country should be shared on the basis such that the benefit power, that each country will be substantially equal. That's your 50/50 talk there, provided that such sharing would result in an advantage to each country, as compared with alternatives available to that country.

Dr. Shrum: I think that's about right.

Mr. Bourne: I think that's all right. And then it says, each country should assume responsibility for providing their part of the facilities needed for cooperative development within its own territory.

Dr. Shrum: I think in summarizing it, you sort of left the impression on me that, the civil works would have been less expensive under this arrangement, than if British Columbia. Alone, it would have cost more money, but it would have been easier actually once it was built to have control over the regulation of the water in our own hands without having to accommodate American demands for the release of water from Mica.

Mr. Bourne: What it seems to be saying is that 50/50 split is alright if both sides have advantage. But if a

50/50 split would mean one without and advantage, then that 50/50 split might be varied so that you might have to give 70 to one country instead of 50, and 30 to the other. Each of these basins have to be worked out by themselves. You can't generalize from one basin to the next.

Audience: In your experience with other international river basin development what is your assessment of this Treaty as a document? Do you think this was a good Treaty from a legal point of view?

Mr. Bourne: From a legal point of view, I think it's quite satisfactory. It hasn't given any trouble. No disputes, or misinterpretations of the Treaty. Have you heard of any Dr. Shrum?

Dr. Shrum: I don't think there's been any trouble at all. The Americans have been most cooperative by my understanding of it. In interpreting, and working out the agreements for the release of water. And the Treaty makes provision that if Canada can show United States, show the American authorities that some other release would be beneficial to Canada and would be equally useful to them, we can have our way. And they have gone along with this in every case where this has been presented as far as I know. I take it there has been no argument… all this fighting has taken place before at the political level.

Mr. Bourne: Most of these treaties do not seem to give rise to great disputes. I haven't heard of any trouble at all from the Indus River Treaty for example, which is a quite complicated one. And I meet the Indian's from time to time. And in the meetings, they say there's no trouble

Audience: What impact then does this experience in international cooperative development have to other countries in river basin development? Do you know of any other countries that try to study this and try to learn something from this Columbia River experience to apply it to another country in international joint ventures?

Mr. Bourne: They know about it. The experts and they study it. I would have to say that the Boundary Waters Treaty of 1909 is far more influential because it was a pioneering sort of treaty. Canada and the United States got together and they set up this agency to study the problems with someone they can refer to, and that example of the joint Commission to gather facts, and to advise governments is one that is seen as, perhaps, the most significant step two states who have a sort of drainage basin problem can take. And the advice they give you is, alright you think there's a problem here, simply get the facts. And then you get the fact, and let them study how the thing can be developed. You can get a sensible solution. And have your treaty, and carry forward from there. So that example and the success of the Commission, the International Joint Commission was tremendously successful. And the Columbia River was the first time they really seemed to fall apart, unable to do very much. For a period there in the 50's it looked as though it would be understated to say that the Commission would be useless, but in course of time, they got together and they got the engineering board report in, and they were able to agree upon power principles and so on. And they did in fact play a very important role in settling the dispute. It's this example, the technique of settling the dispute that's influential in the evolution of this branch of law.

Dr. Shrum: It seems to me that you didn't give… I always thought that General McNaughton had a great deal to do personally, was driving home this idea in getting accepted the downstream benefits should be

50/50, at least 50/50. It seems to me you sort of indicated the Engineering Board agreed upon this. You may be right, I'm not so certain maybe I was just giving General McNaughton too much credit for it. I felt that he was mainly responsible for that aspect.

Mr. Bourne: I will give General McNaughton tremendous credit for protecting Canada's interests here. I think he was the one responsible for stopping the Kaiser deal for example. He was the one who eventually awoke the general government to see that there was really something quite large here. And if he hadn't been there, this might have gone, like Skagit and some of these others where there was no fuss about it. And hearing somewhere saying this seems reasonable. But he was the one with his engineering ability, and his personality and so on, who felt that there were enormous benefits from this development, and that Canada was entitled to a fair share of them. And he fought, and absolutely refused in the Commission. So you can't underestimate his influence. Now on the 50/50 thing, I think that what really brought the Americans around was the fact that they wanted the stuff very badly. And they knew the benefits, the advantage it was, and they were prepared to pay the price that was eventually agreed on. Whether it was enough or not, is a very technical question about which there are differences of opinion. So that in fact the Peace River plan that had been more influential than anything that McNaughton said, but he did pull the words up.

Dr. Shrum: I heard him speak to the society, a many years ago on debate. An American got him there. And he swore.

Mr. Bourne: General McNaughton, right down until the time of the Treaty was signed really, was a tremendous force. Just at the time when the Treaty was signing, and the IJC was reading through, he had nothing to do … I don't think it's not that a license has ever been given, I'm not sure if anyone's applied for one. I don't think British Columbia applied for this one in this case. I think they took it as unconstitutional. But you know, Dr. Shrum would know more about this than I do, under federal law, the Navigable Waters Protection Act, you can't build a dam on a river that's navigable, without a federal license. And one might wonder how it was that the Peace River Dam was built, without a federal license. Well they never did ask for a license, but the federal government really didn't have the gumption to say to these boys, you can't carry on without a license. I have been told, Dr. Shrum, you need to comment, but I'm told that Evan Thompson in Vancouver gave an opinion that, to BC Hydro that they didn't need to apply because the river wasn't navigable at the point where they were going to build the dam. This may be a fact, but it wouldn't be an opinion that would stand up too well in court.

Dr. Shrum: This is the advice we got, he said that you can go ahead and build the dam because he was on a retainer from Hydro. We could get advice from him without paying for it. We paid him 15,000 a year, and I could go over there whenever I liked but he said, you know, you go ahead and build the dam if you want to, and say that your understanding is that the river's not navigable, and therefore doesn't apply. But he says don't advertise this. We don't mention it to anybody, because if you do he said, it just takes a week or so for parliament to pass an Act to say that so far as this thing's concerned, the Peace River is navigable. He said they can pass an Act in Parliament for the interpretation of this particular clause, the Peace River is navigable, and you have to have your license. So we didn't say anything about it, and the

federal authorities didn't pay any attention and we built without the license.

Mr. Bourne: It was bad legal advice, but it was obviously worth the price.

Dr. Shrum: I think it's the best kind of advice if it gets results.

Audience: I wonder if you can say its silent corporative federalism.

Dr. Shrum: I beg your pardon?

Audience: I wonder if you can say it was silent corporative federalism?

Mr. Bourne: You won't get away with it today, because there would be argument groups around. No I think the federal government wished to lock arms with Bennett.

Dr. Shrum: I don't think anybody was particularly interested. The only people who are interested, were the people who had an avocation on the McKenzie River… and that Northern Aggregation Company. And they were concerned by putting a dam on the Peace, they wouldn't get the flood waters in the McKenzie to get the barges down, the water wouldn't be high enough. Well what happened was after the dam was built, by regulating the water, they got a much longer season, and they were able to transport more goods down the McKenzie than they were before the dam was built. So there was never any objection from the navigation people on the McKenzie. Then this question of the Athabasca, Lake Athabasca, and the levels in Lake Athabasca arose, but nobody raised that. No biologist, geologist, environmentalist, geographer, whatever it is, raised that issue until 1967. I guess it was when we had 2 low water years in succession on the Peace. And then the issue was raised on Lake Athabasca. But that was the first time anybody thought of any problem down there. Now doesn't mean to say that people should have stopped to talk about it, but nobody raised that issue. And this is the case where we can stop, because I never had any idea that there was any problem down there, didn't know anything about the problem. But the problem on the navigation had been written, and we were advised that if there was any problem, that we'd be liable, and would be expected to pay damages for any interference on the McKenzie. And I was somewhat concerned about this, and what would happen. But it didn't. In fact it was able to improve navigation on the McKenzie

Mr. Bourne: The first law in Canada on inter-provincial rivers is really quite unsatisfactory. As the things you just been saying were made clear because what protection is there for the downstream province against dams upstream for example?

Dr. Shrum: Well frankly.

Mr. Bourne: What mechanism is there for studying it? What mechanise is there for sharing benefits and losses, and costs and benefits?

Dr. Shrum: You see, Alberta already has benefits from the Peace from the controlling the water into the Peace. Just like the United States gets benefits when they build a dam. They don't need the dams up there

now, but they will need them as the country develops. I think one of the reasons why we didn't negotiate with Alberta to see if they would pay us something, or we could get some downstream benefit from them. There were probably 2 reasons, 1 was that they wouldn't be very receptive to the idea, and secondly we had this problem of this navigation on the McKenzie. And we thought well, we better not start any negotiation. And I suppose also the question of the license on the Peace. Now the only problem about the license on the Peace would be holding up the work for 2 to 4 months until they studied it and so on. I don't think they would have turned it down.

Mr. Bourne: It was a handle to have to force their way on the Columbia?

Dr. Shrum: Oh yes. Yes. Yes.

Mr. Bourne: They could have barged in and simply said, "Well, we've weighed navigation advantage here, and the alternatives here should be explored first".

Dr. Shrum: I think Mr. Bennett would have been frustrated. He would have moved ahead on the Peace and said, to hell with them. I rather think that would have been his attitude. It didn't rise until after we got started, and then to say you've got to hold this up until you've got a license, I rather think go on with it.

Mr. Bourne: How much money has Bourassa spent on the great Burks up in Northern Quebec there, what do you call it, the James Bay project? A couple hundred million or something? He's stopped his work cold the other day with Supreme Court ruling. But the main problem is still being discussed with the courts… the courts are saying no.

Dr. Shrum: That involves Indians, and Indians have more consideration.

Professor Cook: The Peace involved Indians too.

Dr. Shrum: No, there were only, as far as the Indians were concerned the Peace, we had no problems. We were able to settle them, and give them their lines.

Professor Cook: They were down in the Athabasca.

Dr. Shrum: Oh well that was another matter. That came up after the dam was built you see, the dam had been built before there had been any problem on there. They embarrassed it in the early stages, and then it became a problem. But the only Indians in the Peace River reservoir were no problem because the government had lots of land up there, and the Indian's were very wise. They were more interested in getting quite a bit more land. They were wiser than the white man. If they had taken the money in '66, I mean '61, or '62, it would have been worse than today. But not only did they get the same amount of land, they got more land. Because the government had lots more, and were able to treat them generously. There was no problem. The Indians are involved, I don't know they're trappers and so forth.

Audience: There was a case where the federal government had powers, it had authority to exercise its influence on the development but chose not to do so. One of the arguments was at the heart of the

Columbia, that the federal government has powers to dedicate. It has all the constitutional power it needs but chooses not to do so. In that its been doing a very bad job in protecting international interest. There is anything in that proposition that you want to respond to?

Dr. Shrum: I think the federal government has far in the way of power than one can normally is inclined to think. In the Canada Water Act, which they passed in 1970, they actually assert the right to go into an international river basin and to establish management agencies and design projects and build them. So in 1970, they did put into the legislation of Canada this right. It is contemplated however, that it will only be exercised after an attempt to be made to try and reach agreement with the provinces on the works that are necessary to be done. But if they made those attempts, and they can't get agreement, they can go ahead under this legislation. And in an international basin on the Columbia for example. And this is power. Now they justified this as being under the Peace, or the government power. This is international, just the same way they justified the International Improvements Act. They can say you can't do something in the Columbia River if it's going to affect the flow across the border. Well they can go in and say, we want to see how this river's developed. They haven't used this power yet, and they have more powers to come into provincial waters if the pollution level will effect waters which flow across borders and so on. And they can set up agencies, and regulate the whole river from the point of view of poor water quality. So the Water Canada, Canada Water Act does assert. It's over international rivers, and what they call federal loyalty. I'm not sure, I don't think in the case of inter provincial rivers that, from the point of view of pollution yes, it can in provincial rivers. But probably not just for hydro electric development in inter-provincial rivers. They tried, the federal government, maybe the word tried isn't the right word, they were quite interested in helping to finance the Columbia. This is particularly before Mr. Bennett brings his downstream… sale of downstream benefit. The federal government keeps suggesting that you don't have to sell the downstream benefits, we're prepared to help you finance your share of the Columbia, whatever is needed. Also they offered at one time to help finance the power line to the Peace. But Mr. Bennett wouldn't have anything to do with any of these offers because he felt that that was a preload to try and get some kind of control over operation.

Mr. Bourne: The federal government I found in Ottawa just purely scared the provinces in 1971, '72. And in these times, you couldn't get them to do anything.

Audience: Were they scared in 64? In 1963 and '64?

Mr. Bourne: I wasn't there then. I was there in '71 and '72. But it's surprising at the present time up till 1972, the resources of the provinces and the government didn't want to get mixed up in any fight. Today it is different. One looks and sees what they're prepared to do with the oil in Alberta for example, and there's a definite move to treat provinces natural resources as national resources and a national share. This seems to be the thought Alberta's oil helps to equalize the oil across the country. This only means that the people in the Maritimes have something to spend to the proceed so Alberta's oil.

Dr. Shrum: You should have said Maritimes and Quebec. That would be a better explanation of why they're interested. Because Quebec is simply the Maritimes on this problem. Same position. Because they

get their oil from off shore.

Mr. Bourne: If you're in the west, you're in the west, you certainly don't have to worry about financing the East's resources.

Dr. Shrum: You're not really talking about the constitutional power at all are you? You're talking about the politics of constitutional interpretation.

Mr. Bourne: They have never exercised these powers of control except they threatened to. They put the legislation on the post in 1955 it was the first step. And then in 1970, the Canada Water Act, they went much further in asserting jurisdiction. But so far they lack the will to introduce it, to rely on it. And if they can achieve their objective by cooperation, and this is true with the Water Act, that they must first try to get whatever that ought to be done, done with the cooperation with the Province. But if they won't cooperate, and there is a national interest here in the quality of the water, certainly any water has any repercussions outside of the province, they say this is a matter of federal concern, we can come in. but they haven't gone in yet. And you have, it's quite unsatisfactory trying to have a legal regime for a international, or inter-provincial river basin that is divided into 2 parts, and 2 systems involved applying to it. So at the international level there is a, not very strong, but there are clearly principles of the sharing of the waters in international drainage basin. In the provinces, at least inside Canada, people pretend there isn't. Well I take the view that there is in fact, in Canada, as well as in the United States, a sort of common law. International, inter-provincial water resources that there are certain basic principals that our Supreme Court should apply… in the same way that the American Supreme Court applies. There is a disconcert in Alberta about the Peace River. The Supreme Court in the United States would say well this is governed by the principles of equitable utilization. The pressure comes in Canada you have people assuming that BC Hydro is in the courts with Alberta for the damage down the stream. But under our system, people say, I have to apply the law in Alberta, well what about British Columbia? Is it sensible to make the responsibility of the BC Hydro and British Columbia be subservient to all of Alberta. What if they happen to pass? The case is in the courts in Manitoba. Quite an interesting case because upstream in Saskatchewan, you have a plant, even though Manitoba says that they dump mercury into the river and it goes on downstream and injury persons or fish or something downstream. Well, Manitoba passes a law saying that no one can dump these substances in the river. If you have more then this percent and so on. And then it sues the Saskatchewan company for violating Manitoba law. Now what the company does upstream in Saskatchewan is lawful in the law of Saskatchewan, but Manitoba chooses to prescribe the standards unilaterally, that a Saskatchewan company must leave. Now you see here, as long as Manitoba has so and so standards that Saskatchewan has or people that ought to have then probably no great problem arises. But the day Manitoba jacks up it's standards and says we have to have clean water coming from Saskatchewan. And Saskatchewan says listen, this is not true, your not joint reasonably here, we have to have factories too, and factories have to have water, and they're bound to put something in the water. You have to accept some pollution. Well now you have a inter-provincial dispute. And what courts is going to settle that. The law of Manitoba or the law of Saskatchewan. It just doesn't make sense. There's got to be a super provincial law here, and it's federal and they can do it if they want.

Dr. Shrum: I'm trying to think if this is necessary here. I think in the case of the town of Peace River, they claimed that their water intake system for their domestic water had been damaged by the building of the dam. So they took Hydro to court in Alberta and the Supreme Court, and Hydro paid to have the case heard in British Columbia. Didn't want it in Alberta. But the Supreme Court, or the Alberta….

Audience: This is a question of jurisdiction. But the case hasn't been heard on the principle has it?

Dr. Shrum: I don't think so no, but it has to be heard in Alberta I believe.

Mr. Bourne: You see, if BC Hydro does something, hurts somebody in Alberta, can that individual compensate us when we are hurt. Can BC Hydro say, well you may be hurt, but what about the people I benefited? Am I entitled to claim benefits from them? And the answer of course is you ought to be able to. But it's an inter-provincial thing. Alberta has gotten benefits. It is the law that should compensate its people out of the benefits it gets. And to try and solve what is basically an inter-provincial problem of how you share the water resources of this common basin is, this is an inter-provincial problem. And the attempt to solve that by civil litigation of particular private individuals if they suffered some damage, without looking at the whole picture to see if there's some total balancing the damage against the benefits and so on, is all bound concern themselves. And the Supreme Courts simply said that, it can't work that way. It's an interstate problem and we have to settle it by setting a super state law.

Audience: Carrying the international analogy further. What would happen if BC Hydro refused to appear in court in Alberta?

Mr. Bourne: If they refused to appear in court. I don't think they'd have a choice. Of course they have jurisdiction and it would go on and give a judgement. And, you say, how do they collect? I don't know whether BC Hydro has any assets in Albert but if they do, they'd certainly lose them. And there is also this embarrassing thing of enforcing foreign judgments there. So they might be brought to British Columbia court. Now on the strength of the judges there, they'd get injunction and so on. This is terribly complicated for the person who's trying to get compensation for injuries. He may have a legitimate claim. But who does he get it from? His own government of Alberta, or British Columbia government, or BC Hydro, and how does he get it in court? Does he go to this court in British Columbia, because there are technical laws that say, if you're suing in one country where you're complaining about damages to land in another country? This is a basic principle they used to have. Maybe this needs to be changed… but there are all these sorts of difficulties and uncertainties.

Professor Cook: Do we have one more question? Thank you very much.