

## NATIONAL AFFAIRS

## Canada

## Devil's Dilemma – More Loaves and Fewer Fishes –

by Jamie Benidickson\*

### Introduction

Science now advises us in greater detail than previously imaginable to anticipate the potential consequences of ecological disturbances that result from human intervention in environmental systems. Meanwhile, conventional institutions, preoccupied with the historic politics of property and prosperity, accommodate business as usual, often in the form of visions and proposals that have lingered indefinitely on some institutional wish list.

Against this backdrop, Canada and the United States are grappling internationally with the implications of local domestic initiatives, not always uniformly endorsed in their country of origin. Historic irritants over both water quantity issues and water quality issues, and the desire to manage these systematically and with an acceptable degree of mutual satisfaction, encouraged negotiations leading to the *Boundary Waters Treaty* of 1909 and the creation of the International Joint Commission, a valued institution for dispute resolution and avoidance. Over nearly a century the IJC has investigated and advised upon dozens of controversies and concerns along roughly three thousand miles of shared border. Current issues include reconsideration of allocation arrangements for the Milk-St Mary system; perennial apprehension along the Columbia; Great Lakes water levels and continuing quality challenges; and the vast Lake of the Woods system is coming into the spotlight.<sup>1</sup> Devil's Lake in northeastern North Dakota is the geographic centre of the latest episode in an extended period of cross-border controversy, albeit one that has not been added to the IJC's docket.

### The Unbearable Wetness of North Dakota

Devil's Lake is considered to be a terminal body of water – that is, it has no natural outlet. Beginning around 1993, unusually heavy precipitation exacerbated by the cumulative effects of land-use practices such as wetland drainage and extensive land clearing,<sup>2</sup> accelerated inflows and resulted in an increase in the depth of the lake of roughly 25 feet. Flooding extended across approximately 80,000 acres.

Residential and commercial properties within the basin as well as roadways and other components of North Dakota's public infrastructure were damaged or destroyed

where they could not be relocated. Costs associated with the flooding have been estimated at \$400 million.

American officials at the state and national levels explored engineering options to alleviate the situation. Might some form of artificial outlet encourage the removal of water from the basin and facilitate the return of land surrounding Devil's Lake to its former uses? Under instructions from Congress, the US Army Corps of Engineers began in 1997 to consider a range of alternatives, before identifying a preferred emergency outlet from the east side of Devil's Lake in April 2003.

The costs of the federally-recommended project were estimated at \$186.5 million and it was subject to certain conditions, notably compliance with the US *Clean Water Act* and approval of the Secretary of State with regard to the requirements of the *Boundary Waters Treaty*. Article IV of that historic accord records the agreement of the Parties "that the waters ... defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other".

Meanwhile, the North Dakota Water Commission, exercising the mandate conferred by the state legislature in 1999, explored opportunities of its own.

In general terms, using one or other possible outflow locations along the shoreline of Devil's Lake, a connecting channel would permit drainage to North Dakota's Sheyenne River, a tributary of the Red River. The latter constitutes the boundary between North Dakota and Minnesota before flowing northward into the Canadian province of Manitoba en route to Lake Winnipeg. Implementation of any drainage scheme along these lines requires appropriate legal approvals in the USA and entails international considerations.

### Downstream from Everywhere

In view of the transboundary water systems involved in the particular circumstances of the Devil's Lake outlet, inter-jurisdictional issues also arise. Manitoba – a Canadian province that is sometimes described as downstream from everywhere – has had more than its fair share of experience with the neighbour's waste water.<sup>3</sup> As James Bezan, MP, underscored in a statement to fellow Members of the Canadian House of Commons: "We are talking about four provinces and three states in the U.S. that contribute to the nutrients that are going into Lake Winni-

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peg”.<sup>4</sup> It is also noteworthy – as commentators appropriately remind us – that the Devil’s Lake controversy is not unrelated to broader concerns in the region associated with the Garrison Diversion proposal.<sup>5</sup> Such concerns have been “simmering along the Canada-U.S. border for over 40 years”.<sup>6</sup>

Canadian apprehension about adverse environmental consequences has been on record for over a decade, at least since 1996 when Manitoba’s then-Premier, Gary Filmon, called for a comprehensive environmental impact statement to be prepared.<sup>7</sup> The province subsequently detailed its concerns, initially through participation (along with Canadian federal government departments) in the EIS<sup>8</sup> process conducted on the US side in connection with the work of the Army Corps of Engineers.

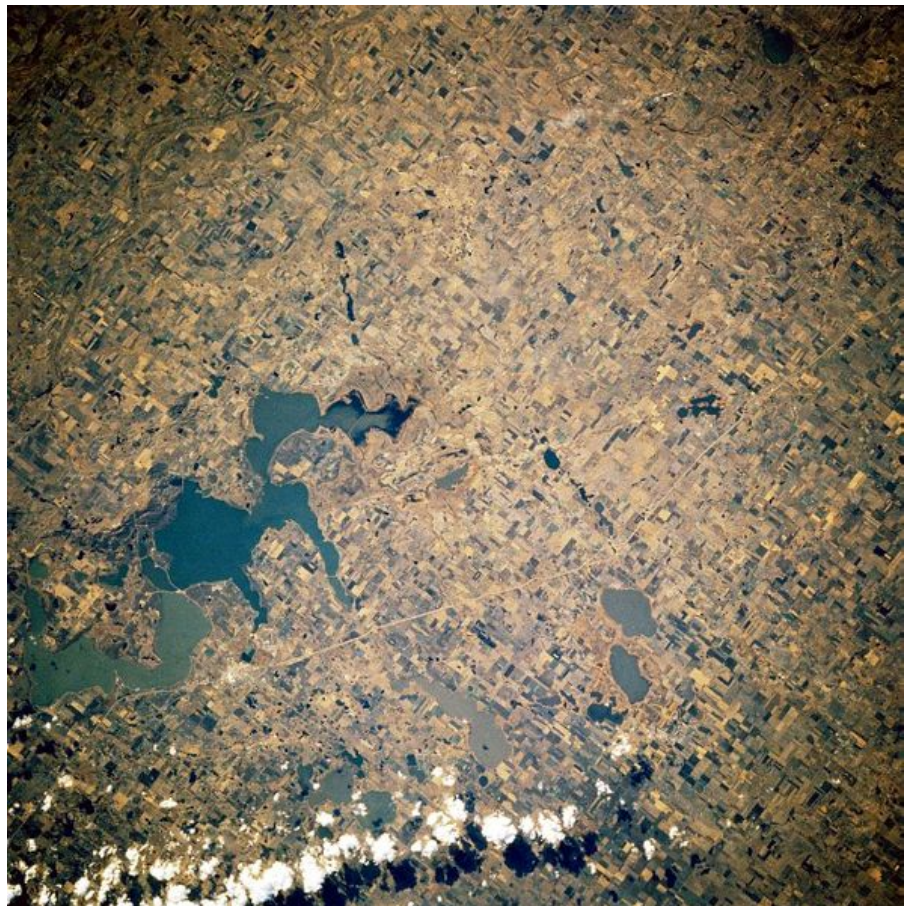
In responding to the final EIS following its completion in April 2003, officials from Manitoba’s Conservation department identified a remaining series of deficiencies with transboundary implications.<sup>9</sup> Firstly, the EIS itself forecast that for a significant period of time the total level of dissolved solids at the boundary would exceed the water quality objective established by the International Joint Commission in order to safeguard downstream health and property. It noted that the “[o]peration of an artificial outlet that causes exceedences of this objective would likely constitute violation of the Boundary Waters Treaty of 1909”. Secondly, while Manitoba approvingly acknowledged the proposed addition of a sand filter in response to US domestic standards concerning invasive species,<sup>10</sup> the province found that existing information on the efficacy of the new feature was inadequate to support an assessment of the filter, particularly against viruses, protozoa and bacteria. In addition, Manitoba queried the scope or comprehensiveness of the EIS in light of its failure to discuss the potential consequences of related developments, in particular a proposed inlet or bulk water transfer to Devil’s Lake from the Missouri River to counteract the possibility of drought at some future date.<sup>11</sup>

The Canadian submission also provided a more extended and critical commentary on the methodological and procedural deficiencies in the EIS. An underlying assumption – reliance upon a “wet scenario” – to justify preference for the selected alternative came in for sharp criticism. Canadian officials highlighted

the “improbable and scientifically unsupported” character of the “wet scenario”. They were concerned as well over severe shortcomings in the assessment of alternatives to the federally-recommended outlet limitations that could be attributed to the exclusion of several important considerations from the EIS.

As stated most explicitly in the EIS itself, “Without treatment of the discharge water (which was deemed cost prohibitive), it is not possible to design an effective outlet that will assure attainment of all downstream water quality standards”.<sup>12</sup> In this respect, the potential impact of nutrients on Lake Winnipeg, home of one of North America’s largest freshwater fisheries, is a major concern.

Nutrient loadings have been under close scrutiny in Manitoba for some time and a provincial action plan has been instituted in relation to the condition and continuing vulnerability of Lake Winnipeg. According to the International Red River Basin Board, a regional body associated with the IJC, 30% of the nitrogen load and 43% of phosphorus entering Lake Winnipeg can be attributed to inflows from the USA via the Red River.<sup>13</sup> Accordingly,



Devil’s Lake, North Dakota, United States

Courtesy: NASA

the estimate that even with a sand filter installed in connection with an outlet from Devil’s Lake, Lake Winnipeg could anticipate an increase of 32 tons per year in phosphorus loading was disturbing.<sup>14</sup>

## Installing the Tap

Notwithstanding Canadian concerns, a certain amount of domestic criticism within the United States, and the ongoing work of the US Army Corps of Engineers, North Dakota proceeded independently from 1999 to authorise a state outlet project. At \$28 million, the state scheme envisioning a 14 mile conduit from an alternative location was substantially less costly than the Army Corps proposal that had undergone environmental assessment. It would not include a sand filter and could be financed entirely from state funds. Following public hearings in North Dakota, the State Health Department agreed to the issuance of permit to the Water Commission in August 2003, attaching operating conditions including compliance with applicable water standards and formulation of a programme of adaptive management.<sup>15</sup>

## Responding to Friction

The avenues of recourse available to critics of the anticipated discharges from Devil's Lake included further scientific investigation, litigation and diplomacy. Each of these options has been pursued in recent years in attempts to better understand, to forestall, or to ameliorate the potential impacts of releases of water through the Devil's Lake outlet.

## The Scientific Front

Acknowledging Canadian concerns, the US State Department itself called upon the Environmental Protection Agency, the President's Council on Environmental Quality and the U.S. Fish and Wildlife Service to review the EIA that had been prepared in connection with the Army Corps outlet proposal. In an opinion that attracted sharp criticism within the United States, then-Secretary of State Colin Powell eventually expressed the view that the Army Corps project would not violate the *Boundary Waters Treaty* because it was assumed that "no biota of concern exist in [Devil's Lake] that are not already present in downstream systems".<sup>16</sup> For their part, Manitoba researchers continued to review available information while North Dakota officials, in fulfilment of the requirements of the State Health Department operating permit, formulated an adaptive management plan that incorporated ongoing monitoring and reporting obligations.<sup>17</sup> All of this work, generally confirmatory of a continued state of uncertainty regarding the operation and potential consequences of the state's outlet arrangements, left residual conflict and uncertainty to be resolved elsewhere.

## The Litigation Front

The decision of the North Dakota Department of Health to issue a discharge permit in August 2003 to allow the ND Water Commission project to proceed was promptly challenged by a group of affected parties including the government of Manitoba. Several Minnesota agencies participated in the proceedings as *amici curiae*, or friends of the court.

Essentially the applicants for review alleged inconsistencies between the state permitting decision and requirements of the US *Clean Water Act*, notably deficiencies in

addressing phosphorus limits, disregard for the requirement to avoid degradation of navigable waters and failure to impose standards derived from the best available technology to guard against the transfer of biota out of Devil's Lake.

In applying the prescribed standard of review, described by the Supreme Court of North Dakota as "highly deferential", it was determined that the permit decision reached by the Health Department was not "arbitrary, capricious or unreasonable" (the legal standard required in order to overturn an administrative decision). In connection with concern about biota transfer, for example, the Supreme Court discussed studies that had been in evidence and concluded:

*"Although those studies may not be as conclusive as Manitoba or the amici would like, those studies do not show that the state outlet would result in a significant risk of harm in the transfer of alien and invasive species of biota from Devil's Lake to the downstream waters."*<sup>18</sup>

The standard of review and burden of proof thus proved to be formidable obstacles to the challenge against the local permit approval.

A substantially more precautionary approach might be applicable in some other cases. For example, the International Joint Commission, in a completely unrelated matter that arose two decades ago, observed in relation to transboundary pollution in possible contravention of Article IV of the *Boundary Waters Treaty*:

*"when any proposed development project has been shown to create an identifiable risk... existence of that risk should be sufficient to prevent the development from proceeding. This principle should apply, even though the degree of the risk cannot be measured with certainty, unless and until it is agreed that such an impact – or the risk of it occurring – is acceptable to both parties."*<sup>19</sup>

Not surprisingly, considerable attention has also been given to proceedings that might be initiated at the international level in connection with possible violations of the provisions of the *Boundary Waters Treaty* itself.<sup>20</sup> While no government action has been pursued, non-governmental organisations recently sought to employ a complaints procedure involving the Commission on Environmental Cooperation (CEC) established in the context of the North American Agreement on Environmental Cooperation (NAAEC) to accomplish the same end.

In an Article 14 submission to the CEC Secretariat (SEM-06-002) Canadian and US environmental NGOs contended that in failing to prevent the Devil's Lake diversion and cross-border pollution contrary to Article IV of the 1909 *Boundary Waters Treaty* and by failing to refer the cross-border dispute to the IJC, Canada and the USA have failed in their obligation of effective enforcement of environmental laws.

The CEC Secretariat dismissed both versions of the submission. Firstly, even if it were established that "boundary waters and waters flowing across the boundary" be-

tween North Dakota and Manitoba were “polluted... to the injury of health or property” in Canada, the *Boundary Waters Treaty* does not provide for automatic referral to the IJC. Moreover, the CEC Secretariat concluded that Article IV of the *Boundary Waters Treaty* was not a “statute or regulation” of the United States within the meaning of the NAAEC as it had not been implemented by US legislation and was not otherwise self-executing.

As Noah Hall explains, the *Boundary Waters Treaty* provides neither for citizen enforcement nor for mandatory referral to the IJC in connection with conflicts over transboundary water pollution. “Thus, if the federal governments choose to jointly ignore a transboundary pollution problem or resolve it through other means, citizens and other affected parties have no recourse under the treaty or through new mechanisms such as the NAAEC.”<sup>21</sup>

### The Diplomatic Front

Allen Springer, a long-time observer of Canadian-US relations underscores a central preoccupation of boundary watchers who are deeply appreciative of the reciprocal geographic circumstances that facilitated the pioneering framework arrangements of the last century. Given the frequency with which water-related conflicts may arise or recur along a lengthy boundary, “taking too strident or uncompromising a stance on one issue, however strong the feelings of local interests who will likely perceive the problem more narrowly, runs the risk of limiting [the] ability [of federal officials] to pursue a more conciliatory path when positions are reversed.”<sup>22</sup> And this observation about multiple and ongoing cross-border interactions is not unrelated to Springer’s reminder that: “... it is a particular mistake to emphasize legal relationships in the U.S.-Canadian context, where officials on all levels have worked hard to create a diplomatic culture that seeks to avoid disputes and in which a pragmatic, problem-solving approach has generally been able to defuse conflicts before they deteriorate to the point where law must intervene.”<sup>23</sup> And yet in the Devil’s Lake context, diplomatic pragmatism (or pragmatic diplomacy) has not brought resolution.

At its meeting of 8 April 2002, the executive committee of the IJC contemplated a possible reference on Devil’s Lake and initiated consideration of appropriate approaches. Yet in response to an official invitation from the United States to join it in a reference on the proposed Devil’s Lake outlet, Canada initially declined to do so. The Government of Canada took the view that in the absence of a finalised and recommended project a reference would be premature. Without a specific proposal on the table, Canada took the view that “there is simply no basis for serious comparison of alternatives to address the reported problems of flooding and their respective degree of compliance with the BWT provisions.” Canada, in addition, anticipated a requirement for a broader reference to address other related diversion and transfer proposals.<sup>24</sup>

Within two years, it was Canada’s turn to call for a reference, but by this point construction by North Dakota was underway. With shovels in the ground, there was very little inclination to accept delay. In 2005, Canada’s new ambassador to the United States, Frank McKenna, pub-

licly championed a joint reference to the IJC for what he called a “time-limited, independent, scientific review”.<sup>25</sup> The window of opportunity, however, had closed.

Although Devil’s Lake had avoided review under the auspices of the IJC, international discussions continued. In August 2005, a layered system of environmental safeguards nested alongside cooperative monitoring arrangements for the Red River Basin was presented as the outcome of extensive cross-border inter-jurisdictional consultation.<sup>26</sup> In a joint declaration following a period of collaborative scientific research, Canada and the USA reported “a higher level of confidence that the outlet can be operated in a manner that will not impose an unreasonable risk to the other parts of the basin”. The announcement set out a series of mitigation measures and joint monitoring:

- North Dakota will put in place a rock and gravel intermediate filter before opening the outlet, to prevent the release of macroscopic aquatic nuisance species from Devil’s Lake;
- The United States and Canada will cooperate in the design and construction of a more advanced filtration and/or disinfection system for the Devil’s Lake outlet, taking into account the results of ongoing monitoring and risk assessment;
- The participants will work with the International Red River Board, of the International Joint Commission, to develop and implement a shared risk management strategy for the greater Red River Basin, involving an early detection and monitoring system for water quality and aquatic nuisance species throughout the Basin;
- The participants will take immediate measures to prevent the spread of any aquatic nuisance species that pose significant risk to the Basin, should any be identified;
- The Province of Manitoba will complete tasks associated with mitigating the impacts of the Pembina Border Dike no later than August 31, 2005; and
- To address concerns raised by Canada, Manitoba and Minnesota with respect to an inlet being built from the Missouri River to Devil’s Lake to help stabilise lake levels, North Dakota affirms it does not have such a current intention, plan or prospective proposal to construct such an inlet; and the US federal government affirms that it is prohibited by federal law from expending funds towards the construction of such an inlet.

The limitations of the August 2005 announcement were immediately apparent.<sup>27</sup> It was, in the first instance, documentation in the form of a news release rather than a legally-binding instrument. It failed to resolve the profoundly contentious matter of an appropriate filtering procedure – quite apart from financial responsibility for the anticipated upgrade. And the status of a future Missouri River inlet, whether intended, planned or proposed, was murky at best.

### An Open and Shut Case, Opened Again, Shut Again and ....

Pumps began operations and the Devil’s Lake outlet opened within days of the 5 August 2005 joint statement,



but after barely ten days of operation, the outlet was closed when sulphate levels in the Sheyenne River reached 390mg per litre, well in excess of the allowable level of 300mg per litre under the North Dakota Health Department permit for the project. While a source of concern on the US side and certainly subject to monitoring at the border, the higher sulphate levels in the Sheyenne were not expected to affect conditions on the Canadian side because of the diluting effect of the much larger Red River flow.

In a distinctive twist on the principles of adaptive management, the State Water Commission applied in May 2006 to the North Dakota Department of Health for modifications to the original permit. Following notice and a public hearing, the Health Department recommended and the district court approved the proposed changes: the maximum allowable sulphate level was raised from 300mg per litre to 450mg per litre.<sup>28</sup>

North Dakota's decision to re-open the Devil's Lake outlet on June 11, 2007, when sulphate levels in the Sheyenne River met revised standards provoked a further round of critical response. To the head of Friends of the Earth Canada, by operating the outlet, North Dakota had "committed a hostile act against Canadians". Manitoba's Minister of Water Stewardship announced an appeal of North Dakota's 2006 decision to weaken the sulphate standards applicable to the Devil's Lake discharge.<sup>29</sup>

At the national level, Canada's House of Commons held an emergency debate. This culminated in a motion: *That this House calls on the Canadian government to continue to employ every means possible to have the flow of water from Devil's Lake into the Canadian water system stopped immediately and to coordinate with the relevant authorities in North Dakota and the United States to ensure the principles of the August 2005 joint statement to halt the diversion of water from Devil's Lake until adequate environmental and health protection measures, including the construction of an advanced filter, are respected.*<sup>30</sup>

Parliamentary intent is never easily determined, but the legislative debate overall suggests a reasonable level of satisfaction with previous efforts at the national level coupled with profound disappointment in apparently unilateral action by North Dakota following the state's earlier decision to lower the domestic water quality standard for the specific purpose of accommodating the Devil's Lake outlet.

While the vulnerability of Lake Winnipeg to increased nutrient flows and invasive species remained the immediate source of alarm, the institutional damage was equally a cause of great concern. Thus, Stephen Fletcher, MP, expressed disappointment that:

*"In addition to exposing Canadian waters to an unknown and unwarranted degree of risk, North Dakota is jeopardizing very important binational scientific work on invasive species in the Red River basin being conducted under the International Joint Commission."*

Shortly after the 2007 re-opening, when fish turned up on the wrong side of the outlet's intake filter, North Da-

kota was forced to close the outlet (June 27). An inspection revealed a crack that might have permitted fathead and stickleback minnows to pass through. The facility was re-opened on July 11 and has continued to operate intermittently.

By September 2007, according to reports from the US Geological Survey, Devil's Lake and nearby Stump Lake came together for the first time in two centuries at an elevation of 1,447.15 feet above sea level. Should lake levels rise a further 12 feet, these waters will be united with the Sheyenne and Red Rivers and Lake Winnipeg on the basis of natural drainage.

## Interpretation and Assessment

One early commentator aptly characterised the Devil's Lake controversy as involving "a wide range of environmental, economic, social and engineering issues overlaid on layers of political, diplomatic and legal processes".<sup>31</sup> The episode has also been described as an example of increasing unilateralism on the part of the United States.<sup>32</sup> Elaborating this characterisation, Owen Saunders and Michael Wenig remark (with reference to persistent challenges along the Columbia) on the possibility of either Canada or the United States taking unilateral action where bilateralism threatens to involve delay or an unpalatable outcome. The two countries, they conclude, "have yet to fully demonstrate that they are willing to trust international institutions or processes with responsibility for transboundary watershed management".<sup>33</sup>

As Manitoba MP, Stephen Fletcher, among others has lamented, the Devil's Lake experience portends the unravelling of long-standing institutional accommodation: "If North Dakota transfers even a small amount of water into the Sheyenne River, its ability to violate the Boundary Waters Treaty without consequence would show that neither Ottawa nor Washington is firmly committed to that legal regime. Individual states and provinces would become more willing to challenge federal control over transboundary waters".<sup>34</sup> Devil's Lake is thus simultaneously an incident and a disheartening symptom of potentially a broader setback to a distinguished tradition of cross-border respect and accommodation.

An effective formulation of the specific challenge posed by Devil's Lake is provided by Allen L. Springer. The project, he observes, simultaneously raises "substantive questions about the level of protection Canadian interests deserve and the procedures, ranging from environmental assessment to consultation and negotiation, that should be followed".<sup>35</sup> Noah Hall's observations, urging greater harmonisation of international and domestic law, are directly responsive on both fronts:

*"Substantively, federal and state/provincial governments should incorporate compliance with international transboundary pollution agreements into the permitting standards for relevant domestic laws. Procedurally, federal and state/provincial governments should remove discriminatory procedural barriers to give foreign plaintiffs equal access to domestic courts for resolving transboundary pollution disputes."*<sup>36</sup> ➔

Cheryl Rosenberg had previously recommended the need to “incorporate into all environmental assessment processes involving transboundary effects, not only consideration of transboundary effects, but a formal method for allowing all the interested governments to participate in the assessment”.<sup>37</sup> Her proposal for a joint approach, formally entailing inter-governmental participation and modelled on some existing arrangements, is supported as follows:

*“The proposed joint process, unlike a referral to the IJC, provides for an active, shared role for the foreign jurisdiction in environmental impact assessment without taking the process outside the environmental assessment scheme of the country in which the project is proposed. Neither jurisdiction would run the risk of obtaining from an international tribunal a decision with which it may not agree. In addition, the environmental impact assessment itself, and the decision based on it, would remain subject to judicial review in the courts of the country which had conducted the assessment. ... In addition, if either side were to be displeased with the results, the opportunity to refer the issue to the IJC or consider other legal options would remain open.”*<sup>38</sup>

These thoughtful reflections, advanced in a period of greater apparent flexibility, presume the persistence of goodwill and open-mindedness. But certain options became more difficult to pursue when digging gets underway, and it is now clear that an IJC reference is not quite as readily available as a bottle of aspirin.

The IJC itself has drawn attention to watershed-based arrangements as a possible mechanism to enhance longer-term management of transboundary waterways, perhaps even to avoid situations where a reference might otherwise be contemplated. In some respects then, we might welcome calls for a greater integration of domestic and international legal frameworks, albeit on the assumption that environmentally-progressive elements would be encouraged. Awareness of watershed issues and implications would be central to such new arrangements. Some, for example, already point to recognition of ecosystem protection, sustainability, the importance of scientific information in international environmental law as valuable guides to the future. In particular, principles such as the basin-wide approach, concern for cumulative effects, adaptive management, and public accountability through a judicial review process as incorporated in the *Great Lakes-St Lawrence River Basin Water Resources Agreement*<sup>39</sup> would represent a commendable advance over the performances we have seen around Devil’s Lake.<sup>40</sup>

## Notes

1 For an overview of the recent work of the International Joint Commission, see the report on 2006 Activities at <http://www.ijc.org/php/publications/pdf/ID1596.pdf>.

2 Beginning in 1996, North Dakota initiated remedial programmes intended to encourage water storage activity around Devil’s Lake. For details, see North Dakota State Water Commission, “Wetland restoration information for the Devil’s Lake basin”. Memorandum, 14 August 2003.

3 Interprovincial Co-operatives v. The Queen [1976] 1 S.C.R. 477.

4 Canada, House of Commons, Debates, 14 June 2007.

5 Generally described at <http://www.garrisondiv.org/>.

6 Allen L. Springer, 2007, “From Trail Smelter to Devil’s Lake: The Need for Effective Federal Involvement in Canadian-American Environmental Disputes,” *American Review of Canadian Studies* 37: 77.

7 Sheryl A. Rosenberg, 2000, “A Canadian Perspective on the Devil’s Lake Outlet: Towards an Environmental Assessment Model for the Management of Transboundary Disputes”, *North Dakota Law Review* 76: 817 at 836.

8 The “environmental impact statement” or “EIS” is the formal name of the EIA process under the USA’s federal government and of many state EIA processes, including North Dakota.

9 Dwight Williamson, Manager, Water Quality Management Division, Manitoba Conservation, to US Army Corps of Engineers, Re “Devil’s Lake Final Integrated Planning Report and Environmental Impact Statement”, 19 June 2003.

10 Executive Order 13112 (64 Fed. Reg. 6183, February 3, 1999) sets out the basis for this requirement.

11 Williamson, *supra* n. 9.

12 Final Integrated Planning Report and Environmental Impact Statement.

13 Nicole Shalla, 2006, “People to Save the Sheyenne River, Inc. v. North Dakota Department of Health: Setting a Permit Precedent, While Allowing Pollution to Transcend International Borders”, *Great Plains Natural Resources Journal* 10: 73 at 80.

14 Canada 19 June 2003 letter re EIS. In a colourful attempt to demonise the devil, one commentator refers to Devil’s Lake as “a shallow, stagnant pothole” whose water is a “noxious brew of salt, arsenic, boron, mercury, nitrogen, phosphorus and sulphate”. Michael Byers, “The Devil’s Lake Diversion”, *Globe and Mail*, 31 January 2005.

15 For discussion of the approval process and a summary of applicable permit conditions, see *People to Save the Sheyenne River v. N.D. Department of Health*, 2005 ND 104.

16 Springer, *supra* n. 6, at 89.

17 Dwight Williamson *et al.*, “A Limited Survey of Biota in Devil’s and Stump Lakes, North Dakota” (Manitoba Water Stewardship Report No. 2005-03, November, 2005); North Dakota State Water Commission, “Adaptive Management Plan for NDPDES # ND-0026247” as approved by the North Dakota Department of Health, 3 August 2005.

18 *People to Save the Sheyenne River v. North Dakota Department of Health*, at para. 37.

19 International Joint Commission, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, (December 1988) 9.

20 Bart Kempf, 2007, “Draining Devil’s Lake: The International Lawmaking Problems Created by the Devil’s Lake Outlet”, *Georgetown International Environmental Law Review* 19: 239 at 252–8; Rosenberg, *supra* n. 7, at 840–8; Noah D. Hall, 2007, “Transboundary Pollution: Harmonizing International and Domestic Law”, *University of Michigan Journal of Law Reform* 40: 681 at 693–5, 705–7.

21 Hall, *supra* n. 20, at 723.

22 Springer, *supra* n. 6, at 81.

23 Springer, *supra* n. 6, at 83.

24 Ambassador Michael Kergin to Ambassador Marc Grossman, 21 May 2002.

25 “Hell from High Water”, *New York Times*, 12 May 2005.

26 Joint Press Statement on Devil’s Lake Flooding and Ecological Protection by the United States and Canada, North Dakota, Minnesota and Manitoba, 5 August 2005.

27 John Ibbitson, “Canada Must Swallow its Devil’s Lake Mistakes”, *Globe and Mail*, 11 August, 2005; Manitoba Wildlands, “Summary and Critique – Devil’s Lake ‘Agreement’”, 10 August 2005 at [http://manitobawildlands.org/pdfs/MW\\_critiqueDevils\\_aug05.pdf](http://manitobawildlands.org/pdfs/MW_critiqueDevils_aug05.pdf).

28 At the same time, the annual operating period for the outlet was extended.

29 The appeal is pending. For a case summary, see <http://www.ndcourts.com/court/briefs/20070118.sum.htm>.

30 Canada, House of Commons, Debates, 14 June 2007.

31 Rosenberg, *supra* n. 7, at 820.

32 Karen Bakker, 2006, *Eau Canada: The Future of Canada’s Water* (Canada: UBC Press), at 10.

33 O. Saunders and M. Wenig, “Canadian Water Management and the Challenges of Jurisdictional Fragmentation”, in Bakker, *supra* n. 32, 119 at 136.

34 Michael Byers, *The Devil’s Lake Diversion*, *Globe and Mail*, 31 January 2005.

35 Springer, *supra* n. 6, at 87.

36 Hall, *supra* n. 20, at 685.

37 Rosenberg, *supra* n. 7, at 852.

38 Rosenberg, *supra* n. 7, at 858.

39 *Great Lakes-St Lawrence River Basin Water Resources Agreement*, 13 December 2005.

40 Bart Kempf, *supra* n. 20, at 269–273.

