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# Preconditions to Cooperation in Canada–United States Boundary Waters

## INTRODUCTION

A glance at a map reveals how closely Canada and the United States are joined by fresh water. East of Manitoba and Minnesota, from the Rainy River to the Atlantic Ocean, lakes and rivers mark a 2,000 mile discontinuous water frontier. Along the total 4,800 mile length of the boundary nearly 300 lakes, rivers, and streams flow along or cross the border. Contention over these waters has been a fact of bilateral relations dating from the last century and will certainly remain significant in the future.

Water is a transient resource that has value in itself, such as for domestic use and irrigation, or as a conveyance of domestic and industrial wastes, a source for hydroelectric generation, a channel for navigation, and a habitat for fish and wildlife. Everyone who uses or shares access to the resource has a stake in it. National, state, and provincial governments can assure the rights to its use and protect its quality, though imperfectly, through legal and institutional arrangements. Where the water forms a boundary or flows across the border, no overriding authority oversees the rights and obligations of water users. Arrangements must be worked out between the two sovereign governments acting to protect their national interest as they perceive it. Broadly speaking, we can assume that this interest entails appropriating as much of the value of the resource as possible without jeopardizing relations with the neighbor.

The title of this article suggests there are preconditions to cooperation. There is really only one precondition, the "political will" of the two countries' governments to work together to seek solutions. In some issues the political will to take joint action seems easy to achieve. In others, like acid rain or pollution from toxic chemical disposal sites along the Niagara frontier, the will seems lacking. Political will can be elusive, but it is not entirely mysterious. An overriding concern of nation states is sovereignty and territorial integrity. Cooperation imposes obligations and responsibilities on states that limit their freedom to do as they like, or it imposes costs that they may be reluctant to bear. To overcome this limitation on sovereignty and the political, as well as economic, costs

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entailed, there must be some compensating advantage to the state. The advantage may be economic or political.

The essential, though not necessarily sufficient, precondition of political will is thus some conception of reciprocal benefit. Canada and the United States have similar attitudes about environmental values, resource use, and international responsibilities. Their interests are generally complementary in the pursuit of objectives such as a clean environment, public health, and economic growth. In broad terms, the two governments and the neighboring states and provinces are happy to work together through scientific and technical exchanges, or to develop a policy to promote common objectives. However, boundary water issues are geographically specific and affect, for better or worse, real people who are more concerned about their own well-being, or public welfare as they perceive it, than in harmonious bilateral relations. As both countries are democratic, the political leaders give priority to these people and the interest groups representing them. This article explores some of the underlying features of Canada-United States boundary relations that lead to bilateral differences and affect the will to work cooperatively.

### GEOPOLITICAL CONDITIONS

Central to any transboundary water dispute is the geopolitical configuration of spillovers and interests affected in one way or another by the activity at the root of the problem. The location of the boundary line in relation to the distribution of people, enterprises, and interest groups benefiting from the activity and those damaged by it sets the stage for cooperation or confrontation. In the extreme case controversies arise from projects or activities that have external effects—pollution, changes in water flow or levels, etc.—spilling over or threatening to spill over across the boundary. One country benefits from the project at no environmental cost, while the other suffers. From the proposed expansion of the Garrison Diversion Project in North Dakota, Canada fears transfer of foreign biota and disease through irrigation drainage from the Missouri basin to the Souris and Red Rivers in the Hudson Bay drainage basin.<sup>1</sup> The United States fears that open pit coal developments in the upper Flathead basin in British Columbia may degrade water quality across the border in Montana, where the river has been designated a “wild and scenic river.”<sup>2</sup>

One-way spillover issues are difficult to resolve. Proponents of projects

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1. For a discussion of the Garrison project see J. CARROLL, ENVIRONMENTAL DIPLOMACY: AN EXAMINATION AND A PROSPECTIVE OF CANADIAN-U.S. TRANSBOUNDARY RELATIONS 175-82 (1983).

2. See *id.* at 163-68 for a discussion of the Flathead River and the Cabin Creek Coal projects. The river was declared a wild and scenic river under the Wild and Scenic Rivers Act, 16 U.S.C. 1274, § 3(a)13 (1982).

like the Cabin Creek coal development in the Flathead basin, the Poplar Creek thermal power plant in Saskatchewan, or the Garrison project can weigh the project's environmental damages against its benefits and decide whether, on balance, it seems a good idea. People on the other side of the boundary will only see the damage and no compensating benefit. Protests against such projects can become unrestrained since the political energy is directed across the border and is not challenged by domestic proponents. Protest becomes even more strident when nationalistic sentiment adds to the sense of injury. Despite the heat of the protests, they may have little effect. If the projects satisfy domestic legislative requirements, the governments will find baseless the charges that the projects violate existing international prohibitions against damage or pollution.

Treaties, agreements, other aspects of relations, and the long border mitigate one-way spillover issues. About fifty-five percent of the ninety significant transboundary rivers flow from Canada to the United States.<sup>3</sup> In one case the United States may be upstream, in another downstream. Realization of this reciprocal vulnerability led Secretary of State Elihu Root in the early part of the century to accept a boundary waters treaty with Canada based on the principle of equality.<sup>4</sup> This tack differed from the one taken with Mexico in the same period when the United States advanced the Harmon Doctrine to enshrine its upstream advantage on the Rio Grande and Colorado.<sup>5</sup> In recent one-way spillover issues, the Canadian government accepted in late 1984 the United States proposal for an International Joint Commission (IJC) investigation of the Flathead River coal development in British Columbia. In 1977 the United States responded to Canadian protests that the Garrison project might violate the anti-pollution provisions of the Boundary Water Treaty by agreeing to an IJC investigation of the Garrison diversion.<sup>6</sup>

As in the Garrison case, generally spillovers adversely affect some national groups in the originating country and this permits coalitions of interests to form in opposition. The National Audubon Society has led the domestic American opposition to that project. A coalition of environmental groups formed in Washington state and British Columbia to fight plans of the Seattle electrical utility, Seattle City Light, to raise the Ross Dam in Skagit Valley and expand the reservoir into a valued wilderness valley in Washington and prime recreation land in British Co-

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3. Bruce & Quinn, *What Difference Do Boundaries Make?*, 4 CAN. WATER RES. J. 5 (1979).

4. See the Secretary of State's appraisal quoted in MEMORANDUM OF THE DEPARTMENT OF STATE, LEGAL ASPECTS OF USE OF INTERNATIONAL RIVERS, S. DOC. NO. 118, 85th Cong., 2d Sess. 7 (1958).

5. See 21 OPINIONS OF ATTORNEYS GENERAL 274, 283 (1895), and 1 MOORE, DIGEST OF INTERNATIONAL LAW 654 (1906).

6. INTERNATIONAL JOINT COMMISSION, TRANSBOUNDARY IMPLICATIONS OF THE GARRISON DIVERSION UNIT (Ottawa & Washington, IJC, 1977).

lumbia.<sup>7</sup> For many issues along the border environmental and other like-minded groups form transnational coalitions.

In recent years the Canadian government has cultivated allies in the United States through the diplomatically unorthodox means of public diplomacy and the lobbying of elected officials. In the Garrison case the government informally supported American interests opposed to the project, such as the National Audubon Society. In addition, officials from both the federal government and Manitoba lobbied in Congress directly. Strong domestic opposition to Garrison no doubt made the State Department more responsive to considering the Canadian argument that the project would violate the anti-pollution provision of the Boundary Waters Treaty and should be the subject of an IJC investigation.

Similarly, the Canadian government has found friends it has wished to encourage in issues like Niagara River toxic dump sites and acid rain. With regard to acid rain, given the initial reluctance of the Reagan administration to discuss the issue, the Canadian government went beyond congressional lobbying to public diplomacy. Through films, information packages, speeches, interviews, and encouragement of journalistic interest in the issue, Environment Canada and the Canadian Embassy in Washington worked to develop and encourage a constituency in the United States willing to pressure their elected representatives to action.

In a variant geopolitical configuration governments may work to optimize benefits from positive spillovers. A regulation dam upstream can have benefits downstream for power production and flood control. By integrating river basin development two countries can enjoy greater economic returns than if each worked independently of the other. The Columbia River dams upstream in Canada and the St. Lawrence Seaway and Power Project were negotiated on that basis. In the last two decades such developments have faded from view for lack of compelling projects and a less sympathetic political atmosphere. Vestiges linger on in some quarters in the appeal of visionary continental scale water transfer schemes, such as the Grand Canal scheme which envisages damming James Bay and pumping water south through the Great Lakes to the United States.<sup>8</sup>

Another kind of geopolitical issue concerns boundary water levels. Where dams and other works control water levels and flows, the IJC, except where special bilateral arrangements have been established such as for Lake of the Woods and Lake Memphremagog, sets a regulation regime that attempts to balance riparian interests. As the waters are shared,

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7. See D. LEMARQUAND, *INTERNATIONAL RIVERS: THE POLITICS OF COOPERATION* 79-93 (1977).

8. See Kierans, *The Grand Recycling and Northern Development (GRAND) Canal*, in *PROCEEDING: ONTARIO WATER RESOURCES CONFERENCE 24* (Sponsored by the Ontario government to examine future demands, availability, and best uses of Ontario's water resources, June 12 to 14, 1984, Toronto; available from the Ontario Ministry of Natural Resources, Toronto).

conflicts may be more between different types of water users than between governments. Regulation of the Great Lakes has long been controversial. The vast amount of natural storage makes lake levels remarkably stable. Nevertheless, levels do fluctuate and, for example, during the extreme high levels experienced in 1985 and 1986 lakeshore interests demanded reductions beyond what existing controls at the outlets of Lake Superior and Lake Ontario can accomplish. There is, however, no consensus on an acceptable levels regime. Hydro, shipping, and lakeshore interests, as well as environmentalists, have different views. Moreover, in IJC regulation studies, the commission found it impractical and uneconomic to develop new regulation works beyond what nature and the existing controls provide.<sup>9</sup>

Some of the most difficult water quality problems along the boundary arise from patterns of industrialization, urbanization, and land use. In the past, rivers like the Saint John suffered from common abuse. Where the river or lake is equally valued by both countries, both have incentives to reverse the process of degradation. This does not necessarily mean the swift introduction of remedial measures. Implementation may be delayed as a result of the involved process of agreement and coordination from among the various levels of government, and from the resistance of those interest groups that benefit from existing practices. The most serious problems affecting the Great Lakes are of this reciprocal nature. Eutrophication, which is degradation of water quality from excessive discharges of nutrients such as phosphorous, toxic pollution, long range transport of air pollution, and consumptive uses of water are the most serious problems facing the two countries. Canada and the United States share the Great Lakes, and each suffers the consequences of pollution. The contribution to Great Lakes problems is not equal and the disproportionate use and abuse of the lakes gives these problems some of the characteristics of one-way spillover issues. Canadian initiatives to deal with the Great Lakes problems run into the indifference of the American political process to Canadian concerns and objections. This is a major feature of bilateral boundary relations.

#### UNITED STATES DOMINANCE

The United States, by the weight of its population, the use it makes of shared water resources, and the thrust of its domestic policy, dominates the boundary water relations. While the United States dominates relations, its political interests are centered elsewhere. Americans outnumber Canadians three to one in boundary basins; overall, they outnumber Ca-

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9. INTERNATIONAL JOINT COMMISSION. FURTHER REGULATION OF THE GREAT LAKES (Ottawa & Washington, IJC, 1976).

nadians ten to one.<sup>10</sup> The relative population sparseness, in American terms, of their boundary region gives Canadians a different perspective from Americans of the same boundary regions and water resources.

The Flathead case illustrates the point. The British Columbia government sees the upper basin as ripe for coal development. In Montana the United States government classified the river as a "scenic and wild river,"<sup>11</sup> a designation Americans would like Canada to apply to prevent coal developments. A similar problem may eventually arise in the Stikine-Iskut area of the Alaska Panhandle, designated a wilderness area on the American side, and planned as an area of hydroelectric development upstream by British Columbia Hydro. There are a number of existing and planned energy, mining, and logging developments in Canada close to the border, particularly in the West. Many of the projects were shelved during the recession of the early 1980s in Canada, and the complaints heard in the late 1970s from American officials that the United States was downstream in all too many instances have subsided. Nevertheless, the difference remains. Americans tend to prize the boundary wilderness area as the last remaining accessible frontier, while Canadians see the boundary region as a corridor for development. The true wilderness areas worthy of preservation are further north.<sup>12</sup>

Some of the most complex and serious problems occur within the Great Lakes basin. The basin supports a population of about 40 million, of which about 7.5 million live in Ontario. This is approximately a third of the total Canadian population. The American Great Lakes population accounts for one-seventh of the total population in the United States. The basin is the center of heavy industry in North America. It generates about one-third of Canada's national income, and about one-sixth of American national income.<sup>13</sup>

Naturally, the United States, with its larger population and industrial base, has historically made and continues to make greater use of the water resources. It accounts for eighty-seven percent of the approximately 4,900 cfs (140 cms) of water consumed from the lakes (1975 estimate)<sup>14</sup> and discharges eighty percent of conventional pollutants from treatment plants.<sup>15</sup> One can assume a similar proportion for toxics and non-point sources of

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10. Bruce & Quinn, *supra* note 3, at 9.

11. See Wild and Scenic Rivers Act, *supra* note 2.

12. Bruce & Quinn, *supra* note 3, at 9.

13. INTERNATIONAL GREAT LAKES DIVERSION AND CONSUMPTIVE USES STUDY BOARD, REPORT TO THE INTERNATIONAL JOINT COMMISSION 2-30 (1981) (Available from IJC Ottawa and Washington) [hereinafter cited as REPORT TO THE IJC].

14. *Id.* at 6-50. Consumptive uses are also reported in International Joint Commission, GREAT LAKES DIVERSIONS AND CONSUMPTIVE USES 27-30 (Ottawa and Washington, IJC, 1985).

15. Municipal Abatement Task Force of the Water Quality Committee, REPORT TO THE GREAT LAKES WATER QUALITY BOARD 6 (1983) (Available from the IJC, Ottawa and Washington).

population. This presents Canadians with a dilemma. As Munton points out, for the United States it is a *modest advantage* to have Canadian cooperation in clean-up efforts; for Canada it is a necessity to have American cooperation.<sup>16</sup>

Although the American population in the Great Lakes basin is about five times larger than the neighboring Canadian basin population, the American Great Lakes population has less political power in Washington than its Canadian counterpart has in Ottawa. Great Lakes issues do not have the same national political priority that such issues have in Canada. The locus of American political and economic power has been shifting to the South and West, and the Great Lakes region has declined in economic and political power. As a consequence, relevant national programs, such as for waste water treatment and sewage, favor the new power centers more than the older communities with their aging industrial and urban base. Moreover, the interest in the region in Great Lakes issues has been unfocused. The eight Great Lakes states and their congressional representatives have not developed in the past a community of interest centering on Great Lakes issues, though this is changing.

In the last few years the regional voice in environmental and economic development matters is starting to be heard more strongly in Congress and in executive departments. New political organizations, like the Council of Great Lakes Governors and Northeast-Midwest and Senate and congressional coalitions, have been formed with a mandate to consider Great Lakes issues and represent regional interests. In the development of this regional voice the states and Great Lakes political interests are reaching across the lakes and the St. Lawrence to consider with Ontario and Quebec such issues as the diversion of waters from the Great Lakes and acid rain.<sup>17</sup>

The fact remains that Canada is dependent on American domestic politics to solve issues of reciprocal damage. Where American groups allied to Canadian interests lack political force in Washington, as they do for issues like acid rain, the Canadian government can do little. Congressmen, and the President, see few votes in approving measures designed mostly to protect Canadians from the spillover of American practices, especially when those practices are of benefit to their constituents. The American government responds more readily to Canadian diplomatic in-

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16. Munton, *Canadian Laws and Institutions*, in DECISION FOR THE GREAT LAKES 144 (D. Misener & G. Daniel ed. 1982).

17. See Note on the Signing of the Great Lakes Charter by Ten Great Lakes State Governors and Premiers in Feb. 1985. 15 ENV'T REP. 1813 (1985) (Available from Council of Great Lakes Governors, 122 W. Washington Ave., Suite 801A, Madison, Wis. 53703) [hereinafter cited as Note on the Signing of the Great Lakes Charter].



itiatives and arguments if there are balancing domestic interests or the Canadian opponents have little political weight.

A case can be made that for major issues, like Great Lakes cleanup or acid rain, international agreements will only be as progressive as domestic American policy. In other words, the progress in Great Lakes cleanup results from American programs applicable nationwide. From this perspective the 1972 and 1978 Great Lakes Water Quality Agreements offer nothing more than what would have been achieved otherwise by application of the Clean Water Act.<sup>18</sup> This view finds support more among American observers and officials than among Canadian.

Paradoxically, the inwardness of American policy formulation, with its relative insensitivity to Canadian concerns, combined with the dominant position along the boundary, can make for expansionist transboundary policies. This arises from the different approach to environmental issues adopted in the United States.

### MANAGEMENT PHILOSOPHIES

The two countries see water resources and boundary waters differently. Americans tend to look at boundary water resource issues from the point of view of equity and equitable utilization, in which the rights and obligations of the individual water user are recognized. Canadians see boundary water issues in terms of equality, and the rights and responsibilities of the two states. The American approach aims to secure the advantages of the larger population, the Canadian the advantages of geography and the rigid application of the notion of territorial integrity. Canada starts from a position supporting equality. In negotiating the Boundary Waters Treaty of 1909 the Canadian side sought acceptance of the principle of equality. At that time Canadians feared United States power and wanted to deal with the United States on an equal footing in the settlement of boundary water disputes.<sup>19</sup> The Boundary Waters Treaty accepts that principle and guarantees equal and similar rights in the use of boundary waters,<sup>20</sup> for example, in rivers forming the boundary on the basin the flow is divided

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18. Agreement with Canada on Great Lakes Water Quality, April 15, 1972, United States-Canada, 23 U.S.T. 301, T.I.A.S. No. 7512, superseded by Agreement Between the United States and Canada on Great Lakes Water Quality, 1978, in 31 INT'L ENVTL. REP. 601 (published by the Bureau of National Affairs, Inc.).

19. For a review of correspondence that brings out Canadian fears of dealing with the United States through special commissions on a case by case basis without agreed upon general principles to restrain American power, see Gibbons, *Sir George Gibbons and the Boundary Waters Treaty of 1909*, 34 CAN. HIST. REV. 124 (1953); see also Neary, *Grey, Bryce, and the Settlement of Canadian American Differences*, 49 CAN. HIST. REV. 367 (1968).

20. Treaty Between the United States and Great Britain Relating to Boundary Waters, Jan. 11, 1909, United States-Canada, 36 Stat. 2448, T.S. No 548 [hereinafter cited as Boundary Waters Treaty].

equally for the purposes of power production. The Canadian government has tried to have the principle applied more generally to water quality, arguing that each country should have a right to an equal share of the assimilative capacity of common water bodies like the Great Lakes. On the basis of territorial integrity each side should be able to do as it likes on its side of the boundary, subject only to the provision that it maintain agreed-upon quality standards at the boundary.<sup>21</sup>

The disproportionate use the United States makes of boundary waters would make the Canadian position difficult to implement in practice, even if accepted by the American government. The United States acknowledges the equality principle as set out in the Boundary Waters Treaty for uses such as hydro power, but it does not accept the Canadian argument that Canada should be compensated for greater American withdrawals, or consumption, of water from boundary waters. IJC projections foresee the United States being responsible for eighty-two percent of the water consumption in the Great Lakes.<sup>22</sup> Americans gain an economic benefit from the consumption, but do not share the cost proportionately. While the United States is responsible for eighty-two percent of the decrease in flow, it shares with Canada, in proportion to present flow apportionment provisions, the decline in hydroelectric generation at Niagara and on the St. Lawrence. The greater American consumption represents, in effect, a diversion out of the lakes for which Canada gains no compensation. The American argument is that Canada has similar rights to the use of boundary waters. It may not be exercising those rights to the same degree as the United States, but that can be of no concern to the United States.

The United States follows a different approach than Canada for managing domestic water quality. Under the Clean Air Act, point source standards are imposed on all dischargers regardless of the location or condition of the receiving waters. The approach stresses equity. Waste dischargers in one part of the country face measures similar to those in another. The emphasis is on process in the belief that if the process works properly, environmental objectives will be achieved. The American government wanted Canada, in negotiation of the 1978 Great Lakes Water Quality Agreement, to adopt this approach and the standards under the Clean Water Act.<sup>23</sup> The equity approach applied to boundary water issues favors "equal responsibilities," equal commitments, and uniform regulatory policies, and disregards the quality of the water at the boundary.

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21. See Munton, *Great Lakes Water Quality: A Study in Environmental Politics and Diplomacy*, in *RESOURCES AND THE ENVIRONMENT: POLICY PERSPECTIVE FOR CANADA* 175 (O. Dwivedi ed. 1980), for a discussion of the principles used in negotiating the 1978 Great Lakes Water Quality Agreement.

22. See REPORT TO THE IJC, *supra* note 13.

23. See Munton, *supra* note 21.

In domestic environmental management Canadian governments tend to work from the objectives back to the source of the problem. Standards and guidelines may be adopted, but they do not have the force of law. Discharge licenses are negotiated taking into account the standards and guidelines. The terms and conditions of the license are legally enforceable. As the process is informal, and does not rely on the courts for enforcement in the same way as in the United States, it is not always clear that appropriate measures are being undertaken.

In international negotiations on Great Lakes water quality, American negotiators often are skeptical that Canadian industrial waste dischargers are making the necessary effort to meet agreed-upon objectives. (With regard to municipal sewage treatment Ontario has been many years ahead of neighboring states.) The Americans would prefer their approach, that stresses "equal responsibility" and is open to legal challenge. The approach also ensures that one region does not gain a competitive advantage from lax environmental regulation. Canadians, on the other hand, tend to see the pursuit of American legislative provisions in international negotiations as an extraterritorial extension of U.S. legislation or, as Munton quotes one official, "a fine example of imperialistic thinking."<sup>24</sup>

### FEDERALISM

The Canadian federal structure hinders the ability of the Canadian federal government to respond effectively to some bilateral issues. The American system gives its federal government a leading role in environmental issues, while in Canada the provinces own the natural resources, and are protective of their authority and jurisdiction over water resources.

In the early 1970s the Canadian federal government adopted a fairly aggressive stance to define a national interest in water issues. For water quality, the government elaborated national effluent quality regulations under the Fisheries Act of 1970 for industries, such as pulp and paper, and it began to deal directly with various industrial concerns. The provinces saw this and other legislative initiatives, such as the water quality provisions of the Canada Water Act of 1970, as federal intrusion and usurpation of provincial responsibilities, and an undesirable duplication of effort.<sup>25</sup> As a consequence, the Department of the Environment backed off and concentrated on indirect means to manage water quality, such as research, surveillance, pollution control technology, technology transfer, and advocacy of environmental protection measures.

The lack of direct hands-on authority to tackle water quality problems hinders the government in its bilateral dealings. The Department of the

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24. *Id.*

25. Fisheries Act R.S.C. 1970, F-14, § 32; Canada Water Act 1970, 1st Supp. C5. See also J. Mactavish, *The Federal Role in Water Management* 29 (Research paper No. 15 for the Inquiry on Federal Water Policy; available from the Enquiry Centre, Environment Canada, Ottawa K1A 0H3).

Environment's Ontario regional office expressed the frustration of the government in negotiating the Great Lakes issues:

Lacking a federal framework of legally enforceable standards comparable to that which exists in the United States, the federal government and departments dealing with water issues cannot directly implement programs to meet signed treaty and agreement objectives and obligations undertaken with the United States regarding Great Lakes water quality . . . there exists no current mechanism where DOE can coordinate federal and provincial water management activities of the region.<sup>26</sup>

The government must negotiate with the United States to secure transboundary agreement and, equally difficult, must negotiate a corresponding federal-provincial agreement. Indeed, examination of federal-provincial agreements could provide an interesting casebook of examples relevant to the study of international boundary water relations.

The constrained power of the federal government best equips it to adopt critical rather than positive positions with regard to transboundary problems. It can freely criticize actions and activities that threaten Canadian interests. But it is less well equipped to initiate positive bilateral policies requiring domestic legislation or programs in both countries, unless it has the full cooperation of the relevant provinces. Similarly it has difficulties responding to initiatives from the American government. The position of the federal government is particularly awkward when the provincial government is the source of a problem. A provincial government may not recognize that its actions undermine a position the government is trying to establish overall or with regard to issues in another part of the boundary.

The division of powers within the U.S. government can lead to similar frustrations. The difficulty of gaining Senate approval for a treaty tends to exclude treaties as an option. Thus the Great Lakes Water Quality Agreements are in law little more than expressions of good intentions; they have no force. There is in fact a very skimpy formal treaty structure for boundary relations. The Boundary Waters Treaty of 1909 provides the framework; three other treaties are in force concerning water use: The Lake of the Woods Treaty of 1925,<sup>27</sup> the Niagara River Treaty of 1950,<sup>28</sup> and the Columbia River Treaty of 1961.<sup>29</sup>

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26. Environment Canada (Ontario Region). Submission to the Inquiry on Federal Water Policy 10 (1984—Submission No. 47, Oct. 30, 1984) (Available from Environment Canada Library, Ottawa K1A 0H3).

27. Convention to Regulate the Level of the Lake of the Woods, Feb. 24, 1925, United States-Canada, 44 Stat. 2108, T.S. No. 721.

28. Treaty relating to Uses of Waters of the Niagara River, Feb. 27, 1950, United States-Canada, 1 U.S.T. 694, T.I.A.S. No. 2130.

29. Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638.

## INSTITUTIONAL ARRANGEMENTS

Overlying the structural features of Canada-United States relations are the institutional arrangements between the two countries through which their governments handle boundary water issues. These include treaties, agreements, institutions, and arrangements for interchanges among officials and politicians. These latter arrangements are characterized by their informality. The community of officials and politicians involved in bilateral matters is not large. They meet and renew contacts at scientific conferences, IJC board meetings, or during bilateral discussions. In times of rather sour relations, such as those which have characterized the Trudeau-Reagan years of this decade, officials may engage in more amicable relations than do their governments. Exchanges among low level officials provide valuable supplements to information exchanged through normal channels. Such informal intelligence gathering helps to provide an early warning of impending issues, and permits actions before issues become too politicized.

The division of powers of the American government allows openings for unorthodox diplomacy, such as the lobbying of elected officials and public diplomacy. If the executive has little inclination to follow up on issues like acid rain that the Canadian government considers vital, Canadian officials may be able to cultivate some support from sympathetic interests on Capitol Hill and lobby groups. The executive-legislative divisions in the Canadian system and Canadian sensibilities to political interference from below the border rather restrict corresponding American initiatives in Canada. On the other hand, the United States government does not need to go to any trouble for its views to be heard in Canada.<sup>30</sup> A great many Canadians watch American television and read American magazines. And the Canadian media is quick to report American positions that have a bearing on Canada.

*The Boundary Waters Treaty*

Of note in recent years has been the growth of provincial-state arrangements. Most visible perhaps are meetings of the Great Lakes governors and premiers. In February 1985 they concluded a Charter for the Great Lakes aimed at controlling diversions out of the Great Lakes.<sup>31</sup> Other provincial-state meetings have been arranged to deal with the issue of acid rain, such as one held in Quebec City in April 1985 bringing together fifteen states and several provinces.

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30. See Note on the Signing of the Great Lakes Charter, *supra* note 17.

31. The Canadian Embassy in Washington has a special environmental affairs section that maintains a network of contacts in Congress and among lobby groups. The U.S. Embassy in Ottawa has no similar group.

The most prominent institutional features of U.S.-Canadian relations are the Boundary Waters Treaty of 1909 and the International Joint Commission.<sup>32</sup> The treaty provides a framework for guiding boundary water policy. It was one of the first treaties Canada negotiated. It reflects the federal government's concerns and uncertainties in its relations with the United States, the boundary water issues of the time, and the American government's preoccupation with territorial sovereignty. The treaty does not address some of today's concerns, but the two governments evince little interest in changing it. It has proven adaptable to changing conditions along the boundary. Its strength is in the basic principles that guide the two national governments in boundary water issues and the institution it created, the International Joint Commission.

The principles of note in the treaty are first, each country has exclusive jurisdiction over the use or diversion of transboundary rivers or rivers flowing into boundary waters; if such use or diversion causes injury downstream, the courts of the upstream country are open to inhabitants from the downstream country.<sup>33</sup> Second, both countries have equal and similar rights in the use of boundary waters. More broadly, the treaty establishes the principle of equality in the work of the IJC and its deliberations in approving works on boundary water courses or downstream on transboundary rivers that affect boundary water levels.<sup>34</sup> Third, boundary and transboundary waters shall not be polluted on either side to the injury of health or property in the other country.<sup>35</sup>

For Canadian negotiators the most troubling part of the treaty was article II, the provision enshrining "territorial sovereignty." In practice, neither government has attempted to exercise this right. Ironically, debate on the issue was most heated in the 1950s during the Columbia River negotiations when Canada, as upstream riparian on the Kootenay and Columbia Rivers, contemplated unilateral diversion. Today, as Bourne says, the right "is still alive to some extent in Canada, surviving but largely ignored when the time for making decisions is at hand."<sup>36</sup>

The treaty achieved one of the main Canadian objectives. It put Canada on an equal footing with the United States. Article VIII makes the point that each side has "equal and similar rights" in the use of boundary waters. The negotiators established the principle of equality, but the history of boundary relations shows that it is difficult to effect in practice, particularly with regard to domestic and sanitary use in the Great Lakes or, in other words, water consumption and pollution.

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32. See Boundary Waters Treaty, *supra* note 20.

33. *Id.* at art. II.

34. *Id.* at arts. III & IV.

35. *Id.* at art. IV.

36. C. Bourne, International Law of Shared Fresh Waters 18 (unpublished manuscript).

The anti-pollution provision of Article IV suffers from the same difficulty. The treaty is designed to deal with discrete issues in which the IJC can issue an Order of Approval or one country can invoke principles to prohibit an act or potential act in the other country that will have transboundary effects. The problem with issues like consumption and pollution is that they arise from numerous acts, none of which may have any significant transboundary impact, particularly in large water bodies like the Great Lakes, though over time the total effects are large.

More positively, the principles offer shared values from which to approach the problems. Both sides agree that they should not pollute to the detriment of the other. To some extent that focuses the issue on questions of fact and permits a more functional, less political examination of the issue. The IJC is often asked to establish the facts, that is, whether the problem exists and how serious it might be. However, as the long history of IJC studies of Great Lakes pollution indicates, determining that a problem exists is not enough. Apart from the principles, the most lasting and still vibrant legacy of the Boundary Waters Treaty is the IJC.

#### *The International Joint Commission*

It is tempting to focus on the IJC because of its visibility, its reputation as perhaps the most active and successful international boundary water institution, and a natural inclination among analysts to have institutions correspond to the subject of investigation. The IJC has an important role in boundary water relations, but its role is limited. Many issues never reach the IJC or reach it only at the point in the history of the issue when the governments feel the commission can contribute. For example, the commission has not been involved in the acid rain dispute, and has had only a secondary role in the pressing current issue of toxic chemical discharges from waste dumps along the Niagara Frontier.

The six commissioners are appointed and serve at the pleasure of the governments. They practice a "collegial" approach in the sense that they come to collective decisions as individuals and not under instruction or as representatives of their governments. Among international river commissions such an approach is unique to the IJC. The commission seldom fails to reach a decision because of splits along national lines. Nevertheless, the commissioners will bring national points of view to bear with varying degrees of force. These perceptions of national interest have to be reconciled to arrive at a collective decision. Long delays in drafting reports to the two governments reflect in part the problems of reconciling perceptions of national interest with the collegial approach. Overall, the character of the commission—for better or worse—reflects the personalities and capabilities of its commissioners, and the care of the respective governments in selecting qualified and capable appointees. Many ap-

pointees are known more for their political connections than for their interest in or proven ability to deal with the types of issues facing the commission.

The main functions of the commission are to consider and approve works, both in boundary waters and downstream on transboundary streams, that affect the water level at the boundary and to conduct investigations, or references, at the request of the two governments. The 1972 and 1978 Great Lakes Water Quality Agreements greatly expanded responsibilities of the commission. In fact, the commission has become so heavily involved in Great Lakes issues that there is a danger of it becoming thought of as a Great Lakes, rather than a boundary-wide, institution.<sup>37</sup>

In line with popular and government concerns and current boundary water issues, the commission has developed a decided environmental orientation that contrasts with the largely engineering and legal outlook of the early years. Some commissioners and environmental groups would like the commission to evolve further into a role as the guardian of the transboundary environment.

The priorities in the 1909 Boundary Waters Treaty do not include some of the important ones of today. Fisheries, recreation, and in fact the present concern for environmental quality were omitted. The prohibition against transboundary pollution was in advance of its time, but it gives the IJC no power and is inadequate to stop incremental pollution of boundary waters. Despite the recognized limitations of the treaty, it is regarded as "untouchable" for it is thought that it would be virtually impossible to negotiate as good a treaty today.<sup>38</sup> The treaty has proven to be a "living instrument," though somewhat arthritic in parts, capable of adapting to changing conditions.

There has been some interest in reforming the IJC, interest shown more by activist former commissioners like Maxwell Cohen, the interested public, and academics than by the governments. There is a strong feeling that the commission could build upon its strengths to become a more

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37. The 1978 Great Lakes Water Quality Agreement gives the IJC during the life of the agreement the duty to evaluate government programs for research and pollution control for which commitments were made under the agreement. The agreement (art VIII) also created three institutions to assist the commission: the Great Lakes Water Quality Board, to act as principal advisor to the commission; the Great Lakes Science Advisory Board to provide advice on research to the commission and to the Water Quality Board; and the Great Lakes Regional Office in Windsor to provide administrative support and technical assistance to the two boards, and to provide a public information service for the programs, including public hearings, undertaken by the IJC and by the boards. For a discussion of the responsibilities under the agreement and how they differ from regular IJC functions, see THE ROYAL SOCIETY OF CANADA AND NATIONAL RESEARCH COUNCIL OF THE UNITED STATES, *THE GREAT LAKES WATER QUALITY AGREEMENT: AN EVOLVING INSTRUMENT FOR ECOSYSTEM MANAGEMENT* 78-95 (1985) [hereinafter cited as STUDY].

38. Letter from M. Cohen, former chairman of the Canadian section of the IJC, to the author (1977).



effective instrument for boundary environmental protection and management. The strength of the commission lies in a number of areas.

First, the commission performs valuable administrative and quasi-judicial tasks in handling a wide range of minor and major boundary level issues. Of less importance now than formerly the commission's work is, nonetheless, important in relieving the governments of issues not well suited to normal bilateral negotiations. Second, this work and other tasks performed in references and by its boards have given the commission experience and legitimacy in dealing with boundary issues, and a reputation of impartiality. Third, the IJC is an arbitrator of fact. In contentious boundary references where neither side has full confidence in the other's facts the commission has the reputation, through its board investigations, of being able to determine and win acceptance of the facts of the issue—the critical first step in successful negotiation of technical issues. Fourth, it is a mediator of policy. The commission in its reference investigations has an international perspective, which considers boundary issues from each country's position and from its own concern for solutions to problems without regard for the boundary. Fifth, under the umbrella of IJC boards most of the top water managers in both countries come together regularly. This has created an informal network of contact among government officials and experts that facilitates understanding of each government's positions, notice of impending actions that may have transboundary effects, and importantly in reference boards, lays the groundwork for subsequent international agreements following completion of the inquiry.

A wide range of reforms has been suggested. Some reforms seek to improve the performance of the commission through better staffing; greater formalization of the qualifications, terms, and duties of the commissioners; or more secure and satisfactory funding arrangements from the governments. Other types of reforms concentrate on increasing public participation and public information programs. The IJC's relations with legislators and government departments are the subject of other suggested reforms. The IJC is seen as an institution that should have a mandate to protect and manage the boundary environment. Many reforms suggest expanding the commission's jurisdiction and authority in order that it might more effectively carry out this role, for example, through power to conduct its own investigations, establish standards, coordinate and participate in government environmental and other water oriented studies and programs, and license waste dischargers. The more ambitious of these reforms anticipate the commission having limited supranational authority.<sup>39</sup>

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39. For a critical discussion of IJC "reform mongering," see Munton, *Paradoxes and Prospects*, in *THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 60* (R. Spencer, J. Kirton, & K. Nossal ed., 1981).

Many of these reforms reflect weaknesses experienced in the commission's operations. Others reflect the limitations of the commission's mandate and weaknesses, or perceived weaknesses, of the governments in responding to problems along the boundary. Reform of the IJC raises the question of what role should the commission have and, given the political pressures that exist in bilateral relations, what role will the governments allow it to have?

Both governments have managed to keep their enthusiasm for reform in check. In fact, they have rebuffed requests of the commission for a modest expansion in its authority. In the early 1970s the work of the IJC grew greatly in a series of reference investigations and its duties increased, particularly under the Great Lakes Water Quality Agreements. In this atmosphere it seemed that the commission might increase its jurisdiction significantly, and some commissioners actively advocated a more expansive role for the commission. In the mid-1970s the commission wished the governments to submit to it plans and information on actions that might affect boundary water levels (in this case American plans for the St. Mary's ice boom). In another instance the IJC asked whether the commission might be used in some way to ensure "notice and consultation" provisions between the governments. The governments were united in their opposition to the commission's requests.<sup>40</sup>

It was in this period also that the Regional Office of the IJC in Windsor, established under the 1972 Great Lakes Water Quality Agreement, came under attack. The office was growing rapidly and had the potential to undermine the IJC boards as the principle source of information and interpretation to the commission. In the 1978 Agreement the role of the Regional Office was severely limited to serve as a secretariat to the boards and to carry out public information programs of the commission for the Great Lakes.

Munton recorded officials in the late 1970s as characterizing the relationship between the governments and the commission as one of "fundamental distrust." The commission, or some members, were thought to be "empire building."<sup>41</sup> As the commission's work expanded into ever more complex and politically sensitive areas there was a questioning of the legitimacy of the commission in complex environmental issues. "While the IJC in boundary waters questions narrowly defined is accepted as legitimate, its involvement in continental ecosystem questions broadly defined is not."<sup>42</sup> Pursuing water quality through the ecosystem approach will lead through many sensitive byways of domestic politics where the

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40. *See id.* at 77-81.

41. *Id.* at 83.

42. *Id.* at 34.

commission may not be welcomed or for which, as a non-representative appointed body, it is not equipped.

Not only did the commission have its "wings clipped severely" for trying to do too much in the 1970s,<sup>43</sup> but the governments have in recent years been neglecting it. For six months in 1981 there was only one commissioner, and it was not until the end of 1982 that the commission was again at full strength. For a number of months in 1985 there was only one Canadian commissioner. The governments have also been under-utilizing the commission. Between 1977 and 1985 the governments did not give the commission any new references.

The lack of references may in part reflect government and official attitudes and a lapse in the traditional Canadian government's commitment to maintaining a strong and effective commission. It also reflects changes in bilateral boundary relations. Many of the issues that may have been appropriate for IJC references have faded from view. Energy developments—oil refineries, thermal power plants, coal and mineral exploitation—that were of concern to one or other government, have been set aside with the recession and increased energy conservation. Moreover, relations between Canada and the United States have been "hard nosed" and less sympathetic to third party problem solving approaches.

While the suspicion of the late 1970s may have lessened today, it is clear that the governments have a conservative view of the commission's role. In the words of one American official, the IJC is a fine institution, but its usefulness should not be exaggerated. The governments see it as a tool useful in some circumstances, but not in others. They want to employ it as they see fit, that is, when its use will be most appropriate with regard to domestic issues and bilateral relations. They do not want the commission to have authority that might allow it to interfere with their sovereign rights to solve boundary problems to their best advantage.

### CONCLUSIONS

The preconditions for cooperation are quite simple: the "political will" to cooperate, encouraged by some sense of reciprocal interest. One might add to this effective treaties, agreements, precedents, practices, and institutions that provide clear guidelines as to each country's responsibilities and obligations; free communication among officials; and common problem solving mechanisms. While Canada and the United States enjoy more of these features than most countries, for many issues the preconditions are not in strong enough evidence to assure proper care for common water resources.

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43. *Id.* at 80.

Competition over the use of these waters has been a feature of relations since the beginning of the century. Water shortages in the West, toxic chemical pollution, acid rain, hydroelectric development, water withdrawals, and a host of other current and emerging issues will continue to keep boundary waters on the bilateral agenda. It is time to think more creatively to nourish the conditions that assist in boundary waters management.

Traditionally bilateral issues are treated separately with no linkage, except the precedents applied from previous similar issues. Such an approach may be too restrictive. The basis for successful settlement of issues is a reciprocal interest, and for many types of issues one side loses to the benefit of the other. More imaginative thought might be given to packaging issues to create possible outcomes in which both sides benefit. Canadians have concerns about the St. Marys and Niagara Rivers over the loss of what they feel is their entitlement to flow for use in hydroelectric generation. Such an issue might be tied to other apportionment and flow issues of concern to the United States, such as American interest in increasing hydroelectric production from flows as yet uncommitted to power production. This approach is no panacea. The scope to create such negotiating packages is limited. Nevertheless, there may be some advantage to returning to some of the perspectives on river basin development that led to the Columbia River and St. Lawrence Seaway developments. Such a view takes a broad look at inter-jurisdictional waters to identify uses, developments, and arrangements where both sides would be better off from working together than by working alone.

The IJC has pinpointed a major strategic problem in dealing with water quality in the Great Lakes. The governments have recognized the concept of the ecosystem and the ecosystem approach to dealing with toxics and other Great Lakes problems. However, the governments as yet do not have an effective binational ecosystem strategy. The problem is how to conceive and implement such a strategy in an international and otherwise complex inter-jurisdictional setting. It requires a commitment to integrate policy and direction. But what form should that integration take?

There is a persistent theme for reform suggesting that new institutional entities be created. The thrust of suggested institutional reform is to consolidate technical and management skills in an organization with the authority and jurisdiction to effectively tackle the transboundary problems. This might be in the form of basin authorities, for example, a Great Lakes authority, or an increase in the authority of the IJC. However, such reform may not be practical or, on reflection, desirable.

As this article emphasizes, the jurisdictional pressures at work in boundary relations do not easily admit such functional reform. We must live with the expectation that governments will not cede authority or jurisdiction

to binational organizations except in very limited circumstances. The manner in which the governments have treated the IJC is an indication of the fact that governments keep a tight rein on international organizations. Authority is given up only where the governments have few vital interests at stake or when they can keep indirect control.

Functional organizations work best when they have been drained of political content. That is, they work best when they deal with issues in which major bilateral contentious political policies and orientations have been resolved. In Canada-U.S. relations we have reached that state for some issues but not others. The issuance of orders of approval on water levels and flows by the IJC is a good example of an issue area that the governments can leave to an independent functional entity with little concern. However, an issue area such as management of Great Lakes water quality is still full of vigorous political life. There is agreement in principle on equality, but how it is defined for each issue differs. No international management authority could succeed until the major political questions and principles for each issue have been resolved and the client governments have anticipated the political ramifications of the organization's mandate.

There is room, however, to strengthen the IJC and the useful investigative and fact finding role it has proven it can play in bilateral issues. The governments in recent years have shown a shyness in using fully the capabilities of the commission and its staff. The commission was given no new investigative assignments from 1977 to 1985. In approaching issues like Niagara River toxic pollution and acid rain—issues riddled with the type of technical uncertainty the IJC addresses well—the governments have turned away from the reference approach. If the governments have lacked confidence in the ability of the commission to handle new challenging assignments, it is in their hands to help the commission regain the confidence of government. In addition to providing sufficient financial and personnel resources, the governments must pay particular attention to appointing commissioners of appropriate experience and political sensitivity. Loss of confidence by the governments results from appointment of commissioners more in tune with political and bureaucratic patronage than with the requirements of the job.

For many boundary water issues there is a natural transnational community of interests. Transnational association of like-minded interests can work together to give a different perspective that might show the way to new approaches for dealing with some boundary issues, and encourage political acceptance of new policies. The present discussions and agreements among Ontario, Quebec, and the Great Lakes states offer political approaches for building a regional consensus on Great Lakes issues that

can have an impact on national approaches. Joint study programs between Canadian and American universities can be fertile areas for new ideas. Environmental and other interest groups will contribute their special views on issues of concern to them. One might note the study undertaken by the Royal Society of Canada and the National Academy of Sciences, funded by the Canadian and American Donner Foundations, to review the progress under the 1978 Great Lakes Water Quality Agreement.<sup>44</sup> To break out of the mold set by traditional government approaches to boundary water issues, these transnational initiatives should be encouraged.

Much can be done by political leaders personally at the bilateral level. Political leaders can take bolder steps than lower level officials. Their interest and commitment can energize the relevant government departments and the process of bilateral exchange. Interest and commitment do not always solve the problems. For example, if Congress opposes an initiative, presidential support may not be enough. At the least, heads of state and ministerial level meetings put bilateral environmental issues on the agenda at high levels; talks serve as educational functions. Positions have to be elaborated and defended. While the Canadian government may not be happy with the American government's policies regarding acid rain, the fact that the Prime Minister raised the issue with the President forced the President to acknowledge the Canadian concerns, to agree to a study by special envoys, and at least to give some consideration to the modest recommendations of the envoys.

Following a low ebb in Canada-United States relations, the apparent good relations between President Reagan and Prime Minister Mulroney raise hope that common environmental problems will receive a better hearing in Washington. The question is what commitment will the political leadership give to boundary water issues in bilateral discussions?

In environmental issues there is generally a large element of scientific and technical uncertainty. For example, in the toxic pollution issue there is a widening gap between our ability to detect toxic substances and our ability to interpret and give meaning to the findings. Many of the issues concerning acid rain remain uncertain. When a government is on the defensive, as the American government is on acid rain or Niagara toxics, it will use that uncertainty to delay serious consideration of means to resolve the issue by insisting on further research. Adopting such a position is not necessarily obstructionist. The environmental damage from continuing with present actions or policies is often uncertain, while the costs of remedial action are certain to be high. Governments have a responsibility to ensure that the abatement actions are worth the price.

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44. See STUDY, *supra* note 37.

In the face of some of the transboundary problems between Canada and the United States there is a premium on good scientific information. The generation of such information must be maintained and expanded to identify emerging problems, to strip away uncertainty fogging appreciation of the environmental ramifications and political responsibilities, and to point out feasible, cost effective remedial measures.