SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 36 | Issue 2 Article 15

2012

# Canada-United States Institute and Development of the Common Approach, The

Christopher Sands

David Crane

James Peterson Hon.

# THE CANADA-UNITED STATES INSTITUTE AND DEVELOPMENT OF THE COMMON APPROACH

*Session Chair – Chris Sands*
*Session Chair – David Crane*
*Session Chair – Hon. James Peterson*

## INTRODUCTION

*Chris Sands*
*Hon. James Peterson*

MR. SANDS: My name is Chris Sands.[1] We would like to recognize our terrific Executive Committee Member, Jim Peterson.[2] He will put in a quick word.

HON. JAMES PETERSON: Just ever so briefly, I want to, on behalf of all of you, thank David and Chris for what I think has been an outstanding Annual Conference.

One big mea culpa on my part, I failed yesterday to thank somebody who did an outstanding job working with Cyndee Todgham Cherniak to put on the Niagara Moot–that is Ian Laird.[3] Ian, I am sorry you are not here, but you did an outstanding job for us. You are our secret weapon in the half conference, and that is because we have had such superb presenters. Of the nineteen law schools that participated in the Niagara Moot in Toronto, sixteen schools came from the United States.[4] That was great for our balance of payments.

I would like to also, in thanking everybody else who has made this possible, give a special vote of thanks to Dan. He has worked tirelessly and has

---

[1] *Chris Sands—Biography*, HUDSON INST., http://www.hudson.org/sands (last visited Oct. 30, 2011).

[2] *Hon. James S. Peterson P.C. —Biography*, FASKEN MARTINEAU, http://www.fasken.com/lawyers/detail.aspx?professional=8eab55ff-0dc4-4a3f-aff9-bcbe6ec1e89e (last visited Nov. 13, 2011).

[3] *Ian Laird—Biography*, CROWELL MORING, http://www.crowell.com/Professionals/Ian-Laird (last visited Oct 30. 2011).

[4] CAN.-U.S. L. INST., NIAGARA INTERNATIONAL MOOT COURT 7 (2011), *available at* http://cusli.org/niagara/documents/2010_2011docs/Niagara%20booklet.pdf.

put so much thought, experience, and imagination into making this happen. Dan, you are the one who is really responsible for everything that has happened here. We are so grateful to you, and our thanks.

MR. SANDS: You know that the way these things usually start is with Jim and Jim, and we have had the Jims represented. Now you get Chris and Crane, and I am going to turn to David to talk about some of the big themes and the "take-aways" we have had from today's program and this conference.

## REMARKS OF DAVID CRANE

MR. CRANE: Thank you, Chris. I found this to be a most stimulating Conference, and the reason is that we have had such superb presenters. I can hardly wait for the Canada-United States Law Journal to come out, because I want to go back and reread some of those presentations.

Now, we discussed many, many different things here, but it seems to me there were certain "take-aways" or themes that wrap right through our discussions.

The first was the sheer complexity of the issues we are dealing with. We are not just trying to find a substitute for gasoline or a faster turbine for wind power. Energy is such a powerful force in our economics and our lives more broadly. It is about water and food versus fuels, impacts on exchange rates, inflation and prices, current account balances, national security, foreign trade policy, trade policy, technological change, and our capacity to align a broad portfolio of policies. So it is an enormously complex field, and we have to have the ability to take this holistic approach. We have to see the broad picture, recognizing that an intervention in one area may trigger challenges in another—for example, if we say we want more biofuels, what does that mean for food prices? We have to think in that broader sense.

The second thing that came through to me very strongly was the sheer extent of change that will be needed to transform our energy systems. If we are serious about moving to a different kind of low-carbon economy, we face the scientific and technological challenges, institutional challenges, and the implications of all these things for different industries and regions. There will be winners, but there are also going to be losers.

The dollar bills that are going to be attached to this kind of change are enormous. We got a little bit of that in the last session. If you look at building smart grids, developing these new technologies for automobiles, and all of these many things we have to do, it will require an enormous amount of capital. How we finance these projects will require much more attention. The extent of scientific and engineering advances that are needed to transform our energy systems will require major advances in research and development and engineering in many different fields, along with resources for

demonstration projects, in effect a new industrial revolution. There will be both winners and losers.

There will also be unintended consequences. Are there very many people in this room who are not wearing a watch? The reason I ask that is the advent of the mobile phone has had a huge impact on the watch industry;[5] similarly, we will get unintended effects on the energy side as well.

The third thing that came through very strongly is that there is no silver bullet. There is no one thing that is going to deliver a low-carbon energy-efficient economy. Therefore, we need policies and approaches that are extraordinarily flexible and allow for a wide range of choices and an array of technologies. We need many different kinds of policy approaches, which allow for this flexibility. So whether we are designing taxes or subsidies or competitions for prizes, government procurement, demonstration projects, there has to be an open-ended approach that does not exclude future possibilities, one that sets aside some funding for what may seem like far-out or controversial possibilities, that we just have not thought of today.

We discussed this this morning with concern, for example, that betting so heavily on lithium-ion plug-in electric vehicles may turn out ten years from now to have been a very expensive mistake. So while policy should support the development of electric vehicles, it should not do so to the exclusion of other possibilities.

I think the fourth take-away is that many key decisions will have to be political decisions—decisions on regulation, product standards, taxes, direct grants, building codes, environmental standards, demonstration projects and procurements, the role of renewables, emissions targets. Yet we have a serious problem today. Our political institutions and politicians do not seem to be able to handle complex challenges in a coherent way. Combined with this incoherence, there is a lack of public understanding.

The current polarized political environment, the pressure to continuously raise political funds, and the short-term political cycle, as well as the powerful role played by vested interests and lobbyists, combined with a lack of public understanding gives added currency to the politics of expediency, opportunism, and confrontation.

Then there is the short-term nature of political decisions. As a Canadian, I am struck by the fact that in the United States after you get elected into the House of Representatives, you have to run again in two years.[6] If you are President, you get your first two years of your term, and once the mid-term Congressionals are over, you are into the start of the presidential re-election

---

[5] *See generally* Leslie Earnest, *Wristwatches Get the Back of the Hand*, L.A. TIMES, Apr. 16, 2006, http://articles.latimes.com/2006/apr/16/business/fi-watch16.

[6] U.S. CONST. art. I, § 2.

cycle.[7] This has a profound effect. Canada is somewhat better off since our Parliaments typically run on a four-year cycle. But that doesn't save us from short-term and opportunistic thinking.

In both countries we need to give much more thought going ahead on how we improve the capacity of our political institutions to deal with long-term change, which usually means difficult change.

The fifth take-away that I took from our conference is that climate change is real and we have to deal with it. While we can debate the details of the consequences or the best mix of policies to curb greenhouse gas emissions, we should no longer have to debate whether human activities are a source of those emissions. The science is clear. So, we should be able to move on, start to address it, and not spend more years debating the changing climate or denying the science.

There will, of course, always be deniers and nay-sayers. We have seen past efforts to deny science—despite the unfolding evidence of the link between smoking and lung cancer, or the damaging effects of automotive emissions on human health before catalytic converted were made mandatory, or health challenges from excessive sugar or salt in processed foods, you could always find another industry report from scientists somewhere in the industry who were paid enough to declare, "Maybe it is not lung cancer; maybe it is the moon that does this kind of thing."[8] But I think, generally speaking, I think it is fair to say that there is an acceptance now of climate change science.

Without policies of both mitigation and adaptation human society faces grave consequences. As with fiscal deficits and growing public debt, this is an intergenerational issue—failure to act today will condemn the next generation to a much more difficult world.

The sixth take-away is that industry needs a clear and consistent direction that sets the framework for change. Private industry will respond to changes in prices, as well as to changes in incentives and regulations. The competitive and innovative nature of industry means enterprises will generate many different technologies, systems, and approaches to deliver a low-carbon economy, but businesses and investors have to know what the framework is that defines the operating environment. If in the public interest we want cars to achieve a certain fuel efficiency standard, there has to be certainty that the targets represent a long-term commitment, not something subject to constant change. Governments cannot decide what types of vehicles will emerge. But governments can set these standards and rules and let the ingenuity and com-

---

[7] YALE HIRSCH AND JEFFREY HIRSCH, *The Stock Trader's Almanac 2004* 127 (2003).

[8] *See generally* Gardiner Harris, *Cigarette Company Paid for Lung Cancer Study*, N.Y. TIMES, Mar. 26, 2008, http://www.nytimes.com/2008/03/26/health/research/26lung.html?pagewanted=all.

petitiveness of the market pursue the most reliable, effective, and affordable solutions. This is not just about autos. It is about fuels, power stations, grid design, efficient refrigerators and appliances, different types of buildings, all of these kinds of things.

The seventh point that I thought came through, was that people are now prepared to give a carbon tax more serious consideration. I do not think that was true two years ago. As we look through one of the alternatives, we are learning more about the problems with cap and trade, and we are learning that from a whole variety of sources, including industry. A price on carbon is a signal that the market understands and will respond to. And a carbon tax is the most efficient way to put a price on carbon. But what is the price of carbon going to be? How do we do that? How do we create the incentives so people will change their behavior? How do you create the incentives, by creating a potential market for new technologies, if you do not have a price on carbon? To be sure, there is not unanimity on the carbon tax, but I think the weight of opinion is moving in that direction.

While a cap-and-trade system was also discussed, it would appear to be much less efficient because of its bureaucratic nature, its potential for exceptions and rent-seeking, and the difficulties in designing a system that would effectively operate across the economy. A carbon tax was seen as having much greater efficiency and transparency and much less potential for rent-seeking.

The eighth take-away that came up frequently, and was emphasized by Ambassador Jacobson in his remarks, is that North American cooperation makes a huge amount of sense. It is a win-win scenario. Shared standards, goals, and cooperation will allow us to access much wider choices. Also, our shared concern about unemployment and future competitiveness increases the possibility of creating an industrial base in North America that has innovative new products, technologies, software, and so forth.

So there is a great need to discourage Buy America,[9] to discourage the Ontario domestic content approach on renewable energy,[10] and to constrain with these kinds of opportunistic short-term policies where politicians like to think they can win popular support by claiming all the jobs will be created locally. But that is not going to work because it results in an uncompetitive and costly infrastructure and industry base and depends on a high level of subsidization.

---

[9] *See generally The* Buy American *Act and the* Buy America *Provisions*, GOV'T OF CAN., http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/buyamerica.aspx?lang=eng&view=d (last modified Nov. 25, 2011).

[10] *See generally Domestic Content*, ONT. POWER AUTHORITY, http://www.fit.powerauthority.on.ca/Page.asp?PageID=122&ContentID=10598&SiteNodeID=1054 (last visited Jan. 5, 2012).

What we need to pay much more attention to is the potential for smart cross-border electric grids, collaboration on major research and development initiatives, intelligent traffic systems, infrastructure cooperation, and development of next-generation vehicles and other technologies and fuels.

But cooperation is not just a matter between our two federal governments. Cooperation between state and provincial governments can also make a contribution. For example, Québec and Ontario could work together on a variety of issues with the Great Lakes states.

Ninth, there are some things we can do now cooperatively across the border that will help the transition to a low-carbon economy. The expanded use of compressed natural gas or liquid natural gas in heavy-duty trucks and inner-city busses would have a significant impact on greenhouse gas emissions from vehicles. Canadian research shows that heavy-duty diesel trucks emit thirty percent of vehicle greenhouse gas emissions.[11] Developing natural gas fueling stations along the major highways linking Québec and Ontario with the Great Lakes states should be investigated as a cross-border energy/climate change initiative. Cooperation on fuel cells, including a demonstration fuel-cell highway between Michigan and Ontario, is another possibility.

If you could do something about these tractor-trailers that go on major highways, you would make a dent in greenhouse gas emissions. Compressed natural gas or a liquid natural gas is one way to do that. We could build in Québec, Ontario, and the Great Lakes states on the most heavily traveled traffic arteries for tracking fueling stations, which would allow trucks to access natural gas. That is something we could do together, and so that is one just one example of a possibility of a cooperative collaboration for which the technology exists, which would have a real effect.

Diesel is not bad, but this is better. Diesel has, as one of the slide shows this morning presented, diesel has a SOx and NOx emission switch,[12] which natural gas does not.[13]

Finally, my tenth take-away. Government has a major role to play in funding both precompetitive research and development and funding demonstration projects for next-generation technologies. Because of spillover re-

---

[11] CAN. GAS ASS'N, NATURAL GAS: OUR PLACE IN CANADA'S SUSTAINABLE ENERGY FUTURE 14 (2011), *available at* http://www.cga.ca/pdfs/CGA%20Gas%20in%20the%20Future%20-%20Final%20Feb%207,%202011.pdf.

[12] Kim Hill, Presentation: Energy Security and Climate Change: A Canada-U.S. Common Approach—A View from the Auto Sector, Can.-U.S. L. Inst., at 7 (Apr. 16, 2011), http://cusli.org/conferences/annual/annual_2011/documents/Presentation_KHill.pdf.

[13] Pamela L. Spath & Margaret K. Mann, *Life Cycle Assessment of a Natural Gas Combined-Cycle Power Generation System*, NREL 3 (Sept. 2000), *available at* http://www.nrel.gov/docs/fy00osti/27715.pdf.

sults from research and development, which means competitors will also benefit, businesses will typically under-invest in longer-term, higher-risk research and development. The identification of where government should best play the role should come from a shared understanding from government's own research capabilities, from industry, and from the engineering and scientific communities. Government can use its procurement capability to serve as a first customer for emerging technologies. And government in our two countries can identify Low-Carbon Grand Challenges that reward innovators who come up with solutions to low-carbon economy needs—such as storage systems for electricity generated by solar, wind, and other forms of renewable energy, carbon capture and storage, and hydrogen fuel cell systems. For example, we are building significant renewable power capacity in both our countries. But we do not always need it. How can we develop systems that store electricity? It is a huge challenge.

Those were ten things that I got out of this. Everybody will have their own ten-point list, but those are my ten, and I hope they are helpful.

Finally, the fun for me, this project was the opportunity to work with Chris and Dan and to enjoy all our exchanges as we tried to shape this Conference; dealing with changes, directions, cancellations, and all these other things. So it has been a lot of fun as well.

## CLOSING REMARKS

*Chris Sands*

MR. SANDS: It does feel like it has been part of a conversation we have been having for the last year, and it is an exciting sort of grand finale for us. I do not have a lot to add to what David said. You summed it up brilliantly, I think, but let us come back to the theme of the Conference: energy, security, climate change, and a common approach. It seems to me, one of the things you get out of this Conference, and you have captured it, is that we have a common problem of energy security and our energy security is getting worse.

Part of the reason is policy, which is accepting signals all over. Are we going to use oil? Are we going to use feed-in tariffs and renewables? We have a lot of mixed signals out there, and the question of how are we going to meet our energy needs, given that they are growing, is up in the air in both countries.

Secondly, there is a lot of desire to deal with climate change through a variety of approaches, and we are not sure whether we are going to price carbon and so on and so forth. So then it seems to me that we do have a common approach, but it is pretty chaotic. And not to be pessimistic, but optimistic, how do we get around these mixed signals? It will be people like you. The

legal system provides the way for those people who are more concerned about the policy direction to advocate. So, we have a rich area here.

The Canada-United States Law Institute is going to be at the center of it. You all are going to be at the center of it, getting from where we are, which is a lot of confusion in policy chaos, to where we want to go, which is for more efficient energy and improved climate environment. It is all going to depend on you. I hope that these last couple of days were stimulating, provocative, and, hopefully in the future, enriching. Not just for our current members but for the students who are here, who will hopefully be on the gravy train to pay back all their student loans for quite a long time.

For you, we have gone from Jim and Jim to Chris and Crane, and now if we can, we will turn to Dan and done.

PROFESSOR UJCZO: Ladies and gentlemen, these proceedings are adjourned. Thank you.