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Settling Our Canadian-United States Differences: An American Perspective

Richard R. Baxter

IT IS MEET AND RIGHT that we should from time to time consider how Canada and the United States should go about preventing and resolving the disputes that arise out of our being neighbors living in some intimacy with one another. We are not alone in reflecting on these problems today, for the American and Canadian Bar Associations have set up a Joint Working Group on the Settlement of International Disputes, which is still in the early stages of its work. I have profited greatly from the two extremely comprehensive preliminary memoranda that have been prepared for the information of the Joint Working Group by my colleague Professor Louis Sohn. These two memoranda deal with the disputes that have arisen between Canada and the United States, the means available to resolve them, and proposals about how our procedures might be improved.

Differences of views between Canada and the United States, on matters of shared concern, are inevitable. It is similarly unavoidable that some differences should escalate into full-fledged disputes creating a substantial degree of friction between the two countries. We cannot trade with one another, invest in each other's territory, breathe the same air, use the same waters, fish and sail the same areas, act together for the common defense, and share many of the same cultural influences without disagreeing on a great many questions. In the United States, we have no lack of conflicts between states and between regions, as well as between the states and the federal government. Oil and gas producing states and oil and gas consuming states of the United States quarrel about pricing; sunbelt states vie for federal funds with snowbelt states; agricultural states compete with industrial states for federal aid; states quarrel over scarce water resources. If I may venture to comment on the Canadian scene, there are differences between the provinces that are just as acute as those between Canada and the United States, and the problem of autonomy for Quebec is far more vexing than any matter in issue between Canada and the United States today. We probably quarrel more within our boundaries than across them.

As one reviews the instances of differences and conflicts between the two countries, as has been done by Professor Sohn, it is interesting to note that most of them have been resolved by negotiation and adjustment, not by recourse to adjudication or some other formal dispute-settlement mechanism. Starting from the arbitration of the St. Croix River boundary under the Jay Treaty of 1794, a series of arbitrations resolved the boundary disputes that arose between the two rapidly expanding countries. The other instances of arbitration of disputes between the two countries are few in number, and are more often remembered for the contributions that they have made to the development of the law than honored for the relaxation of major tensions

between our two countries: assessment of damages for injury to crops in the Trail Smelter Arbitration; compensation for losses sustained by Canadians and for the wrong done to Canada in the I'm Alone; the disposal of some pecuniary claims arising out of the First World War; various fishing claims and claims for the refund of hay duties under the agreement between the United Kingdom and the United States in the North Atlantic Coast Fisheries Arbitration of 1910; the differences concerning fur seals in the Bering Sea. The record of the past century is one of only sparse resort to binding third-party settlement, with no such activity during recent decades. The other forms of dispute-settlement with third-party participation—mediation, conciliation, commissions of inquiry—have not been employed at all and have been allowed to rest quietly within the pages of learned treatises.

For each dispute submitted to arbitration, there have been scores that have been adjusted through sometimes patient, sometimes acrimonious negotiation between the two governments. The prevailing pattern is one of negotiated settlements. The most important piece of machinery that we have for coordinating the activities of the two countries—the International Joint Commission—has the capacity to act as an arbitral tribunal with respect to matters submitted to it, but there has never been an instance in which the I.J.C. has actually been called upon to perform that task. It has always acted instead as an organ of adjustment—a circumstance that points to a deeply seated prejudice in favor of talking things through as opposed to resorting to litigation.

The dominant theme in Canadian-United States relations should be the avoidance of disputes rather than the settlement of disputes. I say "disputes" advisedly, because one might hope that differences of views and of policy, which are bound to occur, could be reconciled through negotiation before they escalate to full-scale disputes. If we were to employ wisely conceived modes of reconciling differences and of avoiding confrontations, there would be no need to resort to compulsory third-party dispute settlement by way of arbitration or adjudication by the International Court of Justice. Adjudication and arbitration are simply inadequate instruments for the resolution of differences in many spheres of activity.

In the first place, courts are ill-suited to striking bargains or to deciding questions of policy. If we disagree about the quantity and price of Canadian oil and natural gas to be delivered to the United States, a court can hardly be expected to write the contract between the two countries. When the question is one concerning the protection of the environment, the establishment and management of machinery of protection is vastly more effective than litigation over the damages to be paid to an individual who has sustained environmental harm. The establishment of airline routes calls for a bargain. If there is to be joint defense of the two countries, plans must be coordinated in the face of differences in both defense and foreign policy. No court could resolve the question of how responsibility for air defense should be allocated between the United States and Canada.

Adjudication also has the disadvantages of being slow and complex. International litigation may drag on for months and then for years. The delay may be tolerable if what is in issue is the right of the United States, consistently with international law, to regulate activity taking place in Canada and having effects in the United States. During the period of litigation, the application of United States law or regulatory authority may be stayed. But if the question is one of determining whether a fugitive criminal should be returned, environmental harm halted, fisheries regulated in a particular way or a vessel allowed to pass, the time required for litigation may be such that the matter will either become moot or an irreparable harm not compensable in dollars will have been occasioned.

There are also areas of the law where the proper or permissible limits of state action may vary according to the infinite variety of circumstances that can arise. The law should be fine-tuned, and this can be accomplished only if there is a sufficient number of cases to provide a coherent and sophisticated pattern of law. One or two cases will not provide the necessary guidance; there would have to be a substantial volume of litigation. Disputes about the application of United States regulatory legislation to conduct in Canada falls in this category. Of course, each instance in which United States law reaches into Canada could be litigated; but that is hardly a satisfactory state of affairs when what is needed is the establishment of governing principles or rules. If many cases were litigated, the strain on the machinery of adjudication, on the legal resources of the two countries and on the state of their general relations might become intolerable. The establishment of caselaw would provide no shortcut to the avoidance of conflict.

At the other extreme, disputes about such matters as physical boundaries, both territorial and jurisdictional, will, if once resolved, *ceteris paribus* preclude disputes about which state is to regulate what conduct. The line, once laid out, determines what is mine and what is thine. These questions are eminently justiciable, and yet neither the United States nor Canada seems prepared to accept compulsory third-party settlement of disputes about boundary questions. When Canada adopted the Arctic Waters Pollution Prevention Act of 1970, it altered its acceptance of the compulsory jurisdiction of the International Court of Justice by excluding:

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.

With this exclusion went any chance of litigating the lawfulness of the Canadian pollution and fisheries zones, as well as of the economic zone that may be established in the future. I fully understand the reasons that prompted this alteration in the acceptance of the jurisdiction of the Court. Canada saw the law in movement and did not wish a judicial pronouncement that would

freeze the law in its then unsatisfactory state. The position of your country is yet a further instance of the tension between stability and change that may make adjudication desirable in the eyes of one state and completely unsatisfactory in the perspective of the other.

I do not mean to suggest that the United States posture in these matters reflects superior virtue. Quite the contrary. The Connally Reservation, whereby the United States hypocritically accepts the jurisdiction of the International Court of Justice but excludes from that acceptance of jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America," creates what is generally regarded by international lawyers as an illusory obligation. The hands of the United States are tied when it comes to bringing matters to the Court, because it is always possible for the respondent state to reciprocally invoke the United States reservations. Canada would be fully justified in determining that the subject of an application by the United States constitutes a matter which is essentially within the domestic jurisdiction of Canada, as determined by Canada.

We have no less than four continental shelf boundaries in dispute between our two countries. Sovereignty over at least one island, Machias Seal Island, is the subject of controversy, despite the soothing words of Canadian international lawyers that the sovereignty of Canada in this instance is as much subject to question as Canadian sovereignty over the city of Toronto.

Four years ago, the United States proposed that two of these questions—one relating to sovereignty over Machias Seal Island and North Rock, and the other relating to the legal significance of the A-B Line connecting Cape Muzon, Alaska, and the entrance to Portland Channel separating Alaska from British Columbia—be submitted to a special chamber of the International Court of Justice or, failing that, to an ad hoc tribunal composed of five judges selected by the parties, as was done in the Beagle Channel case. My understanding is that this proposal was not received well by the Canadian Government. This summer the two countries did appoint two high-level negotiators, Ambassador Cadieux and Ambassador Cutler, to resolve the question of the maritime boundaries and related fishery and hydrocarbon issues; they are to provide the "substance of an ad referendum comprehensive settlement" by the first of December. These disputes have been dragging on for some time. Sovereignty over Machias Seal Island has, for example, been the subject of exchanges between Canada and the United States since the 1930's—and one may hope that there may at last be a resolution of these vexing disputes before the year is out.

What a wonderful opportunity was thus lost four years ago for the peaceful adjustment of our boundaries and territorial disputes through judicial settlement. Nevertheless, there are certain advantages in negotiation. When a court is called upon to establish boundaries between the continental shelves or fisheries zones of two states, it is, in effect, establishing an equitable apportionment of the areas in controversy. It is not applying a rule of law to the facts of the case, as courts normally do. The tribunal does not discover where

the boundary is; it creates a boundary. As the International Court of Justice pointed out in the North Sea Continental Shelf cases and the Court of Arbitration in the continental shelf boundary case between France and Great Britain, the principles to be applied are those of equity. Therefore, the adjudicator has a wide range of discretion, and each case is treated as a separate one. New rules of law may be slow to emerge from the process. The fact that the adjudicator is not bound by firm rules of law, and simply does equity, may make the judicial process a somewhat uncertain one in the perception of some states. The fact remains that clearly justiciable issues have not been adjudicated.

The Trail Smelter Arbitration, that landmark case of international environmental law, shows on closer examination what an unsatisfactory instrument adjudication may be for the resolution of environmental questions. The case found its way into international arbitration because of the unsatisfactory operation of the legal remedies otherwise available in the United States and Canada. Canada had, in effect, already admitted liability for the harm that had been caused in the State of Washington, and the basic task of the tribunal was to determine the quantum of damages. The tribunal was able to perform a useful function in establishing the compensation to be paid for harm done in the past, but damages would not resolve what should be done for the future. The tribunal was thus asked to determine "what measures or régime" should be adopted or maintained by the Trail Smelter. It thereby became an environmental manager and to that end employed a technical staff and framed a plan for the future. These are not true judicial functions. What was clearly needed in the case was management and not mere adjudication.

Those disputes which are clearly justiciable and those which cannot be satisfactorily dealt with through adjudication form the two extremes. It may be that differences arising out of the enforcement of antitrust laws by the United States could be submitted to courts, but as I have indicated, it would take a substantial amount of litigation to provide a body of detailed and nuanced substantive law. And is litigation really the way to coordinate antitrust policy, to secure information in the face of legislation prohibiting foreign access to business records, to assure that the United States does not offend Canadian sensibilities by making Canadian officials unindicted co-conspirators? I suspect that what is more urgently needed are some revisions in United States policy and a set of agreed upon guidelines in antitrust matters which would not impose any undue constraints on my country.

The real task at hand is the prevention of disputes, rather than their resolution after they have arisen. A gram of prevention is worth a kilo of cure. To this end, as I have indicated, a set of principles on antitrust policy would probably be more helpful in the long run than a corpus of litigated cases across the boundary.

Agencies of coordination of policy between the two governments have done much more to maintain the calm and orderly relations between our countries than the litigation that has taken place in the past. The greatest

success of them all has been the International Joint Commission Canada-United States in dealing with boundary water and environmental matters. The Commission has dealt with over one hundred applications and references, but it is significant that it has never been called upon to exercise the judicial powers conferred upon it under Article X of the Boundary Waters Treaty of 1909. The entire thrust of its activity has been to provide plans for concerted activity rather than to adjudicate particular disputes.

Since 1959, an Antitrust Notification and Consultation Procedure, expanded and formalized in 1969, has stimulated the exchange of information, notification and consultation on antitrust matters. While Canadian officials may feel that the Procedure has not met their expectations with respect to deterring the United States from giving extraterritorial effect to its law, it has helped to avoid confrontations and lower temperatures. It has not prevented the United States from causing an uproar in Canada about the naming of currently serving and former Canadian officials as unindicted coconspirators in the recent potash case. But the remedy for such provocative action on the part of the United States does not lie in a lawsuit; it lies in the revision of United States policy.

There has been a wide range of other specialized agencies of consultation and coordination such as the Joint Balance of Payments Committee, consultative machinery to deal with wheat problems, and agencies of joint defense planning. Unfortunately, these agencies have sometimes been established after controversies have arisen. They could have performed a more effective role if they had been constituted before problems got out of hand. The lesson to be learned is that procedures of notification and coordination and joint agencies should be established in order to prevent differences and disputes from arising. They can still perform a useful function, but one more difficult to discharge, if they are formed in response to disputes that have already flared up. It would be a sound principle that such procedures be established with respect to any sphere of action or program in one country which will have ramifications in the other. The United States Government should routinely ask itself two questions: 1) Will our activity in this sphere affect Canada? and 2) Is there an existing procedure by which we can work with the Canadian Government, or should we set one up for this purpose?

These functional links are more likely to be effective than comprehensive solutions embracing wide ranges of activity. We must not forget that the telephone call between Ottawa and Washington can be a highly effective method of dispute-avoidance. Such procedures need offer no threat to Canadian independence. The very existence of a procedure for exchange of information or for coordination may be a reflection of the fact that the law or policy of the two countries is proceeding on different courses.

What then of formal dispute-settlement through binding third-party adjudication? The existing pattern of agreements is obsolescent and should probably be dismantled. It is unlikely that we will ever have resort to the pattern of good offices, mediation, commission of inquiry, and arbitration contemplated by the Hague Convention of 1899 on the Pacific Settlement of

International Disputes. The Treaty for the Advancement of Peace, concluded with Great Britain in 1914 and amended by arrangement with Canada in 1940, provides for the establishment of commissions of inquiry, and we have agreed "not to declare war or begin hostilities during such investigation and before the report is submitted." This procedure is not suited to today's needs. And Article X of the Boundary Waters Treaty of 1909, concerning the arbitral functions of the International Joint Commission, has not been used in nearly sixty years and is virtually a dead letter.

Given the choice between a new treaty for the adjudication of all disputes which may arise between the two countries, and one that is directed to specified types of disputes, the more general obligation is probably to be preferred. If only certain types of cases are to be submitted to adjudication, disputes about the competence of the tribunal are bound to arise, and it becomes correspondingly easier to avoid submission of matters to judicial settlement. It is unlikely, in any event, that many cases will ever be sent to a tribunal. The very threat to take a matter to an international court often has a sobering effect in international relations. A negotiated settlement may suddenly seem far less troublesome.

But what sort of tribunal? Our relation as neighbors and the similarity of our legal systems suggest that the International Court is not the best possible forum. I need not elaborate on why localization of the proceedings is helpful. While a chamber of the Court could be employed, there is no positive assurance that the wishes of the parties to the dispute, regarding the composition of the panel, will be respected.

This leaves arbitration of disputes between Canada and the United States. International lawyers on both sides of the border should accordingly lend their support to a general treaty of arbitration between our two countries. This proposal is not a novel one, and it is hardly radical. It is conceivable that some business would come to the arbitral tribunal, but its more important function would be to goad us into settling out of court. This is exactly what we have managed to do in recent years—and with a substantial degree of success.