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Recommended Citation
Available at: https://scholarlycommons.law.case.edu/cuslj/vol5/iss/16
The Canadian Legislative Position

by Mr. T. Bradbrooke Smith*

I intend to deal with really just one aspect this afternoon and that is because I had anticipated that most of you would come from the United States. That aspect really is the constitutional position in Canada and indeed the constitutional restraints under which the legislatures in Canada work when they are looking at the problem of acid rain. And I want to do that under four different headings.

First of all, I want to try and summarize the constitutional position as briefly as I can.

Secondly, I will refer, in a general manner to the legislation that is being put in place in accordance with that position.

Thirdly, I propose to advert to the matter of private law remedies and the constitutional limitations that are imposed on them.

Finally, in the context of transboundary pollution, I want to discuss the matter of Canada and international agreements.

Canada's Constitutional position, as you probably know, is by and large formed from a statute of the Parliament of the United Kingdom called the British North America Act, enacted in 1867. Under that Act, legislative power is divided between the Parliament of Canada and the Legislatures of the several Provinces, and this attribution of power is by and large exclusive; that is to say, where this is confided to the Provinces, they alone may exercise it, along with the Parliament of Canada. There are few concurrent powers.

As you can appreciate, one of the difficulties in Canada with legislation and the power to make legislation is characterizing the laws that come, on the one hand, from Parliament and, on the other, from the Legislatures. So, in dealing with acid rain you have to remember that, in 1867, neither the Fathers of Confederation nor the United Kingdom Parliament had contemplated acid rain as a subject of legislative jurisdiction.

Looking at this division, there are primarily two powers that relate to the control of acid rain on the part of the Provincial Legislatures. The Provincial Legislatures are given authority over property and civil rights in the Province and over all matters of a merely local or private nature in the Province. Those are the two facets of Provincial power that relate to the control and legislation on acid rain.

The Provincial Legislatures have a number of other specific powers including the management and sale of public lands, municipal institutions and local works. In addition to these legislative powers, you have to

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keep in mind that the public lands and property within the territories of the Provinces are vested. The administration and control of those lands are vested in the Province and the Crown in Right of the Province: all of the territories generally speaking within Provincial boundaries that are not private lands belong to the Crown in Right of the Province.

The Crown in Right of Canada, on the other hand, has all unalienated lands outside the Provincial territories and in particular the Northwest Territories, the Yukon Territory and all lands reserved for Indians.

The relevant aspects of Federal power under the British North America Act relating to acid rain are navigation and shipping, sea coast and inland fisheries and the criminal law. There are also other areas such as the militia, military and naval service, defense, Indians and lands reserved for Indians and excepted subjects such as inter-provincial works like railways.

Parliament may use its power and legislate in relation to that power, and in so doing may deal with certain aspects of the problem of acid rain. In addition, Parliament has what is called a general power to legislate for the peace, order and good government of Canada. That power, however, generally has been interpreted to be exercisable only in relation to emergencies, although there is one possibly relevant exception, that is the control of atomic energy which has been found to be an exclusive Federal power.

Finally, both the Legislatures and Parliament have a concurrent legislative jurisdiction over agriculture with the Federal power paramount. I might add at this stage, and will deal with this later, that there is no such thing as a treaty power or an external affairs power in the British North America Act insofar as it applies today.

Having presented a cursory review of the situation, I hope it illustrates what I would like to be the main thrust of my speech. If you take away the idea that there isn't any fixed locus of legislative responsibility, the result becomes, first of all, no one overseeing the control of acid rain, and secondly, an inability to look at Parliament and Legislatures and say, "Oh, they can deal with it. They are fully competent." It will require legislation by both orders of government in relation to their particular powers under the Constitution.

So, in Canada, the matter of the control and prevention of acid rain has to be approached on this dual cooperative, coordinated basis. There is simply no single, national approach possible.

Secondly, I will address what has been done up to now by the two orders of government. Let me just mention some of the Federal legislation to give you the flavor of what I have been saying about the inability of Parliament, for example, to legislate in this global manner. For instance, as previously mentioned, the Boundary Waters Treaty, under which the IJC was set up, was an early piece of legislation relating to the environment. It was implemented by a prior piece of legislation relating
to the environment, the International Boundary Waters Treaty Act, which dates back to 1913.

Over the past twelve years other environmental legislation has included: the Arctic Waters Pollution Prevention Act, the Canada Water Act, Amendments to the Canada Shipping Act, the Ocean Dumping Control Act, the Clean Air Act of 1971 and later on the Environmental Contaminants Act. There is also the Northern Inland Waters Act that covers an area in which Parliament has a much greater authority because it refers to territory within the administration and control of the Federal Government. I should say here that the above stated Federal legislation is directed towards the fisheries power. The focus is primarily on the criminal law power, by setting standards and compelling obedience through the imposition of criminal sanctions. That may be extreme but we feel forced into that situation by this particular division of powers under the British North America Act.

On the other hand, in a sense, Provincial legislation can be much broader in scope, but it is limited territorially, of course, to the boundaries of the Province.

A good example of Provincial legislation across the lake is the Environmental Contaminants Act of the Province of Ontario. This Act succeeded the Air Pollution Control Act in 1971 and basically is a statute prohibiting the release of contaminants in the environment in concentrations or in excess of those prescribed by regulation. Among the areas affected are air pollution control regulations, which deal with contaminants in the air. I suppose, you could say they impose a nuisance standard in relation to air pollution.

With the above pieces of legislation, there is a continual attempt on the part of Federal and Provincial Governments to coordinate their legislative endeavors, which is one of the distinctive features of our system. It is difficult to balance the two. One of the burdens, as in the United States, of being a Federal State is the need in certain areas to achieve anything necessary to get along, which may be a long difficult, but necessary, process. In terms of the actual regulatory framework, at the Provincial and Federal level, there is a good deal of legislation in place, but new problems and developments in the area of acid rain will have to be addressed on this dual basis.

Let me now move to the third point concerning private law remedies. I mentioned nuisance a moment ago. As most of you know, the concept of nuisance has been around for a long time. At one time, they even had an assize of nuisance and a common or public nuisance used to be invoked where there was harm or injury to persons; the remedy was determined at a suit by the King. The rule seemed to be that it was a nuisance to interfere with the reasonable use of the plaintiff's premises, but he could not complain if he were unduly sensitive. In fact, there are references in the reports to people who were complaining about the manufacture of candles, the tallow, the burning of various things as a form of local air pollu-
tion centuries ago.

Of course, in the early days, the problem of proof was not necessarily too difficult. But, with the advent of acid rain and tall stacks, the problem of proof becomes very difficult, if not impossible as a basis for resolution.

The problem of proof is joined by another problem under our law, the problem of the origin of the pollution. I say the origin of the pollution in the jurisdictional sense because the general rule that we follow is the local action rule; namely, that an action in tort for injury to real property can only be entertained in the jurisdiction where the land is situated. And, if the potential defendant does not have assets there, or if it is going to be difficult to bring him into court, there is a serious problem. The local remedies rule is derived from a case called British South Africa Company The Companhia de Moçambique. That was a British case but there have been a number of Canadian cases which have adopted the same rule and applied it to cases within Canada; of course, we would also extend its application as between jurisdictions in Canada and the United States.

In order to overcome the jurisdictional barrier, I might say that there is currently under study by a Joint Committee of the Uniform Law Conference of Canada and the Conference of Commissioners and Uniform State Laws in the United States a State-Provincial draft model statute to do away, in effect, with what I would call the Moçambique rule. The revision would permit equal access to the courts of the jurisdiction where the pollution originates for the polluted in another jurisdiction. The idea is that the access would be on the same basis as if a person in the polluter’s jurisdiction had, in fact, been polluted. Although that would appear helpful, the revision doesn’t address a somewhat broader problem.

I should mention another limitation. Hopefully you won’t find this totally negative, but I think it’s important to put it in context. The other limitation in Canada comes from an unsatisfactory decision by the Supreme Court of Canada in a case called Interprovincial Cooperatives and Dryden Chemicals v. The Queen in Right of the Province of Manitoba. Decided about five years ago, that case involved the same principle as my submission for air pollution. Interprovincial dealt with damage from mercury pollution originating in pulp and paper plants, one in Ontario and one in Saskatchewan, which affected a fishery in the large lakes in Manitoba where there used to be a very large fishery. The mercury was coming into these lakes from these pulp and paper operations outside Manitoba.

The Province of Manitoba passed a statute which provided certain assistance to the fishermen whose fishery had been destroyed. In addition, it authorized the recovery of damages by the Province and imposed a strict statutory liability on any person who discharged a contaminant into waters in the Province, or into any waters whereby the contaminant was carried into the Provincial waters. That statute I understand in the United States is referred to as a long-arm statute. In other words, they
were trying to reach out and get at the offenders in Ontario and Saskatchewan.

There were seven judges who sat on that case instead of the usual nine. Three found that the Province could not legislate with respect to liability for injury and said that only the Federal Parliament could so do. One judge found that the Province couldn't regulate rights outside its territory, and three others said the legislation was valid. So we have a three, three and one situation out of a court of nine. I would venture to suggest that from this decision we cannot arrive at a determinative rule on the issue.

A final limitation, is the matter of international agreements. I will deal with this briefly. Basically, in Canada, there is a divided treaty implementation power. That means that the Federal Executive can enter into treaty obligations, but only those obligations to the extent that they entail a change in the law. This is different from the procedure used in the United States to the extent that the statutes involve a change in domestic law, and therefore have to be implemented by Parliament and the Legislatures according to this division of powers. So one can well imagine a treaty dealing with acid rain may well involve both Provincial and Federal heads of power. As such, it probably won't be a clearcut procedure. It may involve legislation by Parliament, by ten Provinces and two territories. That's possible, depending on the commitments that are made and the extent and nature of the legislation that's required.

So that difficulty, that hurdle, has to be constantly kept in mind when one is talking about treaties because the treaty isn't necessarily the end of the road. If the end of the road is implementation of the treaty there is a great deal to be done in Canada.

I was going to say a word about the Trail Smelter Arbitration that's been adverted to. I don't think I need to do that at this stage. Instead, I will conclude by reminding you that first of all, in Canadian law neither the Parliament nor the Legislatures can unilaterally deal with the problem of acid rain.

Secondly, in terms of treaty obligations the same condition prevails.

And, thirdly, while there are statutes, legislation and regulations in place at both levels of Government, the scope is limited. When and if there is to be a comprehensive approach to developing legislation, both levels of Government are going to be required to take action.

Let me conclude by saying — I stand here not as a representative of the Government of Canada. If I have any bias today it's because I participated with other members of the Canadian Bar Association and other members of the American Bar Association in the preparation of a report on the settlement of international disputes between Canada and the United States. Those of us who participated and, indeed, the members of both Bar Associations who endorsed the report's recommendation, feel that suggestions were made which are of some merit. With respect to acid rain these recommendations could be of some assistance in dealing with
some of the problems associated with the threat. Of course, this report
deals with the equal access problem and it is as a result of this that the
Uniform Law Conferences have set up a joint working group.
An additional point deals with arbitration between the two countries.
I would only say on that note that if there were an arbitration mechanism
for treaty disputes, and an acid rain treaty recommendation in place such
as the two bar associations have made, then that treaty would ultimately
become automatically arbitrable. The great advantage of that result for
both countries and their respective citizens is that the individual
problems of the States and of the Provinces of litigants might then be
taken out of the diplomatic negotiation process and dealt with on their
own merits.