

1991

Volume 17 Issue 2

Canada-United States Law Journal

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

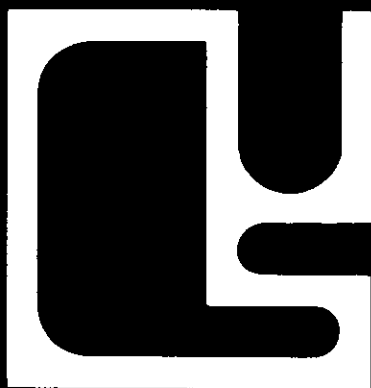
 Part of the [Transnational Law Commons](#)

Recommended Citation

Canada-United States Law Journal, *Volume 17 Issue 2*, 17 Can.-U.S. L.J. Iss. 2 (1991)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss2/45>

This Front Matter is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.



Canada- United States Law Journal

Volume 17

Number 2

1991

CONFERENCE PROCEEDINGS

THE LAW AND ECONOMICS OF DISPUTE RESOLUTION IN THE CANADA/U.S. CONTEXT

Conducted Under the Auspices
of

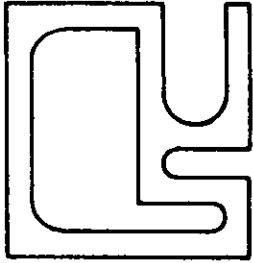
THE CANADA-UNITED STATES LAW INSTITUTE

and

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Cleveland, Ohio
April 12-14, 1991

Conference Chairman
Henry T. King, Jr.



Canada-
United States
Law Journal

Volume Seventeen, Number Two
1991

Case Western Reserve University
School of Law

Cite as:
CAN.-U.S. L. J.

The *Canada-United States Law Journal* is published by the Case Western Reserve Journal of International Law on behalf of the Canada-United States Law Institute. The *Journal* is currently an annual publication and subscription rates are \$10.00 per volume (domestic and foreign). Subscriptions are payable in advance. Back volumes may be purchased by contacting William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14290. The *Journal* welcomes submission of comments and correspondence from readers and authors. Address all correspondence to the Canada-United States Law Journal, 11075 East Blvd., Cleveland, Ohio 44106, U.S.A. Telephone: (216) 368-3291.

The *Journal* also welcomes submission of articles on topics in international and comparative law. Manuscripts should be submitted in duplicate, typed triple-spaced, and should conform to the *United States Government Printing Office Style Manual*. Footnotes should be double-spaced and should conform to *A Uniform System of Citation* (15th ed.). Unpublished manuscripts will not be returned to the author unless requested.

The *Journal's* policy requires that unless a claim for nonreceipt of a journal is received within 3 months after the mailing date, the *Journal* cannot be held responsible for supplying that issue without charge.

The opinions expressed herein are those of the respective authors and not of the *Canada-United States Law Journal*.

The *Journal* is printed by Joe Christensen, Inc., 1540 Adams, Lincoln, Nebraska 68521.

Notice: Subscriptions are renewed automatically unless timely notice of cancellation is received.

CANADA-UNITED STATES LAW INSTITUTE

Canadian Director

Wesley B. Rayner
Faculty of Law
University of Western Ontario
London, Ontario N6A 3K7
Canada

United States Director

Henry T. King, Jr.
School of Law
Case Western Reserve University
11075 East Boulevard
Cleveland, Ohio 44106

ADVISORY BOARD

Chairman

Sidney Picker, Jr.

Board Members

Clive V. Allen
Katherine Braid
David Brink
Robert D. Brown
William J. Davis
William W. Falsgraf
Paul Fraser
W. C. Graham
A. Mosby Harvey, Jr.
R. M. Ivey
Henry T. King, Jr.
Monroe Leigh
Rosemary McCarney

Myres S. McDougal
J. H. Moore
John R. Mullen
Jack Roberts
Victor Siber
T. Bradbrooke Smith
Louis B. Sohn
Timothy F. Stock
D. Carlton Williams
Alfred K. White
Glenn W. White
Sanford Yasowitz

On behalf of the Canada-United States Law Institute, the *Journal* gratefully acknowledges founding grants from the governments of Canada and the United States as well as the following foundations: The William H. Donner Foundation (U.S.); The Richard Ivey Foundation (Canada); The Cleveland Foundation (U.S.); The Ontario Bar Foundation (Canada); and The George Gund Foundation (U.S.).

**Case Western Reserve
Journal of International Law**

1991-92 Editorial Board

Editor-in-Chief

Forrest A. Norman III

Managing Editor

Andrew L. Zumbar

Canada-United States

Law Journal Editor

Mary P. Torok

Executive Editors

Sean J. Fahey

Scott C. Peters

Executive Notes Editor

Susan J. Steinle

Solicitations & Topics

Development Editor

Elizabeth W. Zimmerman

Business Editor

David Benson

Notes Editors

Swithin Munyantwali

Gregory M. Scanlon

Articles Editors

Joseph J. Cusimano

David E. Dow

Christopher D. Dwyer

Andrew F. Moore

Michael Albright

Vincent Brotski

Mathew Crowley

Karen Evans

Ann Gardner

Wayne Hettenbach

Thomas Horwitz

Associates

Junwei Hou

Richard Krumbein

Karen Lindquist

Michael Majeski

Jeanne Marshall

Peter Mason

Parrish McCormack

Sarah Moore

Holly Osterland

Cindy Rayak

Sean Reidy

Stephanie Robinson

Clara Zone

Faculty Advisor

Sidney Picker, Jr.

Advisory Board

Robert A. Friedlander

Christopher C. Joyner

Henry T. King, Jr.

Francis A. Boyle

Barry M. Fisher

Secretary

Debra Hairston

been Vice Chairman and Chairman of the Administrative Law Section of the Canadian Bar Association. In 1989 he was a panelist appointed to the roster of Canadians established under Chapter 19 of the Canada-U.S. Free Trade Agreement. He has authored several publications in the labor arbitration field and has spoken widely on labor law and other topics.

James H. Carter is a partner in the New York law firm of Sullivan & Cromwell. He is Vice Chairman of the Section of International Law and Practice of the American Bar Association and was formerly Chairman of the Section's International Arbitration Committee. He was formerly Chairman of the New York State Bar Association Committee on International Law and is the current Chairman of the Committee on International Law of the Association of the Bar of the City of New York. He has acted as counsel in arbitrated or litigated matters involving proceedings in many areas of the world.

Jean-Gabriel Castel is currently Distinguished Research Professor at the Osgoode Hall Law School, York University in Toronto. He has been for many years Professor of International Business Transactions, International Licensing, and Canada-U.S. Trade Relations at Osgoode Hall. He is regarded as one of Canada's leading academics in the international conflict of laws, business and trade law fields. He was chosen for the roster of panelists for bi-national settlement of disputes under Chapter 19 of the Canada-U.S. Free Trade Agreement. He has written extensively in the international law field.

Eugene K. Connors is a partner in the Pittsburgh office of Reed, Smith, Shaw & McClay. His practice includes representing management in employment-related matters with emphasis on improving employment relationships, avoiding and minimizing employment difficulties, and maximizing employment opportunities in purchasing, moving and selling businesses. Mr. Connors is an adjunct professor with St. Francis College of Loretto Pennsylvania where he currently teaches courses in current employment problems, fair employment-practices, collective bargaining and labor arbitration. His experiences include having persuaded the Supreme Court of the United States to overturn a 9-0 appellate decision in *Novotny v. Great American Savings & Loan Ass'n*.

George W. Coombe, Jr. is currently a partner in Graham & James San Francisco. Until October, 1990 he was Executive Vice President and General Counsel of the Bank of America. He has served as Chairman of the Southwestern Legal Foundation and of the Section on Corporation, Banking and Business of the American Bar Association. He is a Director of the American Arbitration Association.

Robert Coulson is President of American Arbitration Association.

He has written and spoken extensively on the settlement of disputes. He is a member of the International Council for Commercial Arbitration and is an honorary fellow of the Arbitrators Institute of Canada. He is author of *HOW TO STAY OUT OF COURT, BUSINESS ARBITRATION AND BUSINESS MEDIATION*.

Larry W. Evans is Director of the Corporate Patent & License Department of BP America Inc. and Vice President of BP Chemicals Inc. He is responsible for all intellectual property law matters of BP in America, including patents, trademarks, copyrights and trade secrets, and licenses, agreements and disputes relating to intellectual property. His experience includes the negotiation of well over 100 licenses throughout the world. He is a former President of the Licensing Executives Society and is a past Chairman of the Intellectual Property Committee of the Chemical Manufacturers Association.

L. Yves Fortier C.C. Q.C. is Canada's Ambassador and Permanent Representative to the United Nations. In 1989-1990, he was Canada's Representative to the Security Council of the U.N. He is also a senior partner (on leave) in the Montreal law firm of Ogilvy Renault. He is a former President of the Canadian Bar Association. Ambassador Fortier is a trial lawyer who has pleaded cases before all court jurisdictions in Canada. In 1984 he represented Canada before the International Court of Justice in the Hague in the Canada-U.S. Gulf of Maine case. From 1984 to 1989, he was a member of the Permanent Court of Arbitration at the Hague. In 1991 he represented Canada before an International Arbitration Panel in New York in the Canada-France Maritime Boundary Dispute.

Jonathan T. Fried is a career Foreign Service Officer of Canada's Department of External Affairs, currently the Principal Legal Counsel to the Office of North American Free Trade Negotiations. Mr. Fried has served as Counsellor for Congressional and Legal Affairs at the Canadian Embassy in Washington, D.C. Before coming to Washington, he served as Assistant General Counsel of the Canadian Trade Negotiations Office and as a member of Canada's negotiating team on the Canada-U.S. Free Trade Agreement. Mr. Fried was formerly Visiting Professor at the University of Toronto Faculty of Law and has been an adjunct faculty member at Georgetown Law Center, the University of Ottawa Faculty of Law and the Norman Patterson School of International Affairs at Carleton University. He has written and spoken extensively in both Canada and the United States on legal-economic topics.

John O. Haley is Professor of Law and of East Asian Studies at the University of Washington where he has taught Japanese law since 1974. He lived in Japan for five years as a teacher and lawyer. During that

period he was with the law firm of Blakemore & Mitsuki and was a Senior Fulbright Research Scholar at Kyoto University. In 1984 he was a Visiting Professor of Law at Kobe University. He has authored numerous articles on Japanese law and for over a decade was Editor in Chief of *Law in Japan: An Annual*.

Alan B. Morrison is Director of Public Citizen Litigation Group. He has been a Visiting Professor at Harvard Law School and an Adjunct Professor at New York University Law School. He has served as an Assistant U.S. Attorney for the Southern District of New York. In 1980-81 he served as a member of the President's Commission on a National Agenda for the 80's and from 1985-87 he was a member of the American Bar Association Action Commission to Improve the Tort Liability System.

Michael B. Phillips is Assistant Deputy Minister, United States Relations Branch of the Department of External Affairs and International Trade of Canada. Prior to his present post he was Director General, Foreign Policy and General Communications Bureau, Department of External Affairs. He also served with the Department of External Affairs in London, Nairobi, Dublin and Addis Ababa.

Bruno A. Ristau is a partner in the Washington, D.C. office of Ristau and Abell where his practice consists of transactional litigation at the trial and appellate level and of international arbitration. He was formerly the Director of the Office of Foreign Litigation in the U.S. Department of Justice and in that position he supervised all suits by or against the U.S. in foreign courts. While in government service he also served as the U.S. Delegate to the Hague Conference on Private International Law. He is an Adjunct Professor of Law at American University and the author of a two-volume treatise entitled, "International Judicial Assistance (Civil and Commercial)."

Andrew J. Roman is a partner in the Toronto law firm of Miller Thomson. He taught at Carleton University in Ottawa in 1973 to 1974 while serving as General Counsel to the Consumers Association of Canada (CAC) where he founded the CAC's Regulated Industries Programme. In 1976 he became the founding General Counsel of the Public Interest Advocacy Centre. He has appeared before a broad range of administrative tribunals and at all levels of courts, including numerous appeals in the Federal Court and the Supreme Court of Canada. He has written widely on a broad range of economic and regulatory matters.

Hans Smit is Stanley H. Fuld Professor of Law and Director, Parker School of Foreign and Comparative Law at Columbia University. He is a very prominent international arbitrator and is the author of sev-

eral books on international law and business. He is the co-author of the *World Arbitration Reporter* and is the Editor in Chief of the American Journal of International Arbitration. He has been Director of the Leyden-Amsterdam-Columbia Summer Program in American Law since 1963 and Director of the Project on European Legal Institutions since 1968.

Richard J. Smith is Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State. He assumed his present position in August 1985. In 1990, he served as special negotiator with rank of Ambassador for acid rain talks with Canada. He previously served as Country Director for Canada in the U.S. State Department and as Deputy Chief of Mission at the United States Embassy in Ottawa.

T. Bradbrooke Smith is currently associated with the firm of Stikeman Elliott in the Ottawa office. Prior to his present association he had a distinguished career with the Department of Justice of Canada where his last post was that of Chief General Counsel. His duties at the Department of Justice involved broad responsibilities in the litigation area. Mr. Smith is Co-Chairman of the Joint American Bar Association/Canadian Bar Association Working Group on Dispute Settlement. He is also a former Chairman of the International Law Section of the Canadian Bar Association. He was counsel for Canada in the Gut Dam and La Bretagne international arbitrations.

Justice John Sopinka was appointed to the Supreme Court of Canada in May 1988. Prior to being appointed to the Supreme Court, he had been a partner in the law firm of Faskin and Calvin and in the firm of Stikeman Elliott. Justice Sopinka has also acted in a number of important Canadian Commissions of Inquiry. He is a frequent lecturer before academic and legal fora and is also the author of publications dealing with *The Law of Evidence in Civil Cases* and *The Trial of an Action*.

Bruce A. Thomas is partner and Chairman of the Insurance Section of the Toronto law firm of Cassels Brock & Blackwell. He is Chairman of the International Bar Association's Committee on Negligence and Compensation and was in 1985-86, Chairman of the Canadian Bar Association's Tort Reform Committee. He is a frequent speaker and writer on insurance related matters.

Malcolm E. Wheeler is Special Counsel in the Denver law firm Parcel, Mauro, Hultin and Spaanstra. A graduate of M.I.T. and Stanford Law School, he has been a Professor of Law at Kansas School of Law and the University of Iowa College of Law. In 1982 he was the Chief Counsel to the U.S. Senate Committee on Undercover Activities which

conducted the Abscam investigation. He has published widely in the product liability field and contributed to the Frumer and Friedman product liability treatise. He is a member of the Board of Editors of the Journal of Product Liability and the Federal Litigation Reporter.

Clifford L. Whitehill is Senior Vice President General Counsel & Secretary of General Mills, Inc. He joined General Mills in 1962 and was appointed General Counsel in 1975. His board memberships include National Association of Manufacturers and the American Arbitration Association. He is Chairman of the Lawyers Steering Committee of the Corporate Governance Task Force of the Business Round Table.

**Speakers and Participants at the Canada-U.S. Law Institute
Conference on the Law and Economics of Dispute Resolution in
the Canada-U.S. Context**

Gerald Aksen	Reid & Priest	New York, NY
Janet Albers	Business Laws, Inc.	Chesterland, OH
Clive V. Allen	Northern Telecom Ltd.	Mississauga, Ont
M. Jean Anderson	Weil Gotshal & Manges	Washington, DC
Milos Barutski	Bureau of Competition Policy	Hull, Ont.
Shelly Battram	Osler Hoskin & Harcourt	Toronto, Ont.
Grace Bogaert	Ministry of Industry, Trade & Technology	Toronto, Ont.
Katharine F. Braid	Canadian Pacific Legal Services	Toronto, Ont.
Ronald A. Brand	University of Pittsburgh Law School	Pittsburgh, PA
Kenneth R. Bruce	Buchanan Ingersoll	Pittsburgh, PA
Sil A. Cappon	A.W. Fenton Co., Inc.	Novelty, OH
James H. Carter	Sullivan & Cromwell	New York, NY
Jean-Gabriel Castel	Osgoode Hall Law School	North York, Ont.
Laura Carlson Chen	Business Laws, Inc.	Chesterland, OH
Stanton G. Cort	Weatherhead School of Management	Cleveland, OH
Eugene K. Connors	Reed Smith Shaw & McClay	Pittsburgh, PA
George W. Coombe, Jr.	Graham & James	San Francisco, CA
Robert Coulson	American Arbitration Association	New York, NY
James Crowe	Canadian Consulate	Cleveland, OH
Dorinda Dallmeyer	University of Georgia	Athens, GA
Brendan Delay	Donahue & Scanlon	Cleveland, OH
George J. Dunn	BP America, Inc.	Cleveland, OH
Richard Edwards	University of Toledo	Toledo, OH
Larry W. Evans	BP America, Inc.	Cleveland, OH
William Falsgraf	Baker & Hostetler	Cleveland, OH
Ivan R. Feltham	University of Ottawa	Ottawa, Ont.
Barry M. Fisher	Thompson Hine & Flory	Toronto, Ont.
Robert C. Fisher	Weil Gotshall & Manges	Washington, D.C.
Yves Fortier	Canadian Ambassador to U.N.	New York, NY
Thomas-Louis Fortin	Dept. of External Affairs	Ottawa, Ont.
Jonathan T. Fried	Canadian Embassy	Washington, D.C.
Adele Gandal	Canada/U.S. Law Institute	Cleveland, OH
Peter Gerhart	CWRU School of Law	Cleveland, OH
Paul Gerhart	Weather School of Mgmt.	Cleveland, OH
Marcus Gleisser	The Plain Dealer	Cleveland, OH
David Goffin	Canadian Chemical Producers Assn.	Ottawa, Ont.
John O. Haley	University of Washington Law School	Seattle, WA
Margot Halpenny	Noranda Minerals, Inc.	Toronto, Ont.
James Holbein	Department of Commerce	Washington, DC
Roger Hsu	Lubrizol Corporation	Cleveland, OH
Patricia Hujarski	AMSCO	Pittsburgh, OH
Eric Jensen	CWRU Law School	Cleveland, OH
Terrence Joyce	Department of Justice	Ottawa, Ont.
Mark J. Kasoff	Bowling Green University	Bowling Green, OH

Henry T. King, Jr.	Canada/U.S. Law Institute	Cleveland, OH
Richard N. Kirby	Greater Cleveland Growth Association	Cleveland, OH
Sven A. Langmack	Niagara Custombilt Mfg. Company	Cleveland, OH
Wilbur Leatherberry	CWRU School of Law	Cleveland, OH
Lawrence Lederman	Canadian Consulate	Cleveland, OH
Jeffrey Lloyd	University of Toronto	Toronto, Ont.
Keith Martin	Canadian Chamber of Commerce	Ottawa, Ont.
James Merriman	CWRU School of Law	Cleveland, OH
Jack R. Miller	Interlex Group of Canada, Inc.	Montreal, Que.
Alan B. Morrison	Public Citizen Litigation Group	Washington, DC
Patrick Murphy	Imperial Oil Limited	Toronto, Ont.
Forrest Norman	CWRU School of Law	Cleveland, OH
Godfrey Orleans	Ridout & Maybee	Toronto, Ont.
Michael Phillips	Dept. Of External Affairs	Ottawa, Ont.
Sidney Picker, Jr.	CWRU School of Law	Cleveland, OH
Henry Precht	Cleveland Council on World Affairs	Cleveland, OH
Helen B. Probst	CWRU School of Law	Cleveland, OH
Wes B. Rayner	University of Western Ontario	London, Ont.
Daniel A. Reifsnnyder	Department of State	Washington, DC
Bruno A. Ristau	Kaplan, Russin & Vecchi	Washington, DC
J. Michael Robinson	Fasken & Calvin	Toronto, Ont.
Derek Rogers	Blake Cassels & Graydon	Toronto, Ont.
Andrew J. Roman	Miller Thompson Sedgewick Lewis & Heley	Toronto, Ont.
James K. Roosa	American Greetings Corp.	Cleveland, OH
Peter C. Rousos	Bridgestone/Firestone, Inc.	Akron, OH
John Ryans	Kent State University	Kent, OH
Morris G. Shanker	CWRU School of Law	Cleveland, OH
Victor Siber	IBM Corporation	Purchase, NY
Hans Smit	Columbia University	New York, NY
Richard J. Smith	Department of State	Washington, DC
T. Bradbrooke Smith	Stikeman Elliott	Ottawa, Ont.
John Sopinka	Supreme Court of Canada	Ottawa, Ont.
Randolph J. Stayin	Barnes & Thornburg	Washington, DC
David Steuwe	Dalhousie University	Halifax, Nova Scotia
Timothy Stock	Ford Motor Company Attorney	Dearborn, MI
Edwin R. Teple	Attorney	Waite Hill, OH
Bruce A. Thomas	Cassels Brock & Blackwell	Toronto, Ont.
Kenneth Thornicroft	Memorial University	St. John, Newf.
Mary Torok	CWRU School of Law	Cleveland, OH
Robert Venier	Department of External Affairs	Ottawa, Ont.
Gerard Vezina	Quebec Government Office	Chicago, IL
Derril T. Warren	Vancouver Centre for Commercial Disputes	Vancouver, BC
Malcolm E. Wheeler	Parcel, Mauro, Hultin & Spaanstra	Denver, CO
Alfred White	Proctor & Gamble	Cincinnati, OH
Clifford Whitehill	General Mills, Inc.	Minneapolis, MN
Alice L. Withaar	CWRU School of Law	Cleveland, OH
Ody Wittman	Canadian Consulate	Cleveland, OH
Sanford Yosowitz	Alcan Aluminum Corp.	Cleveland, OH
Toby Zettler	U.S. Dept. of Commerce	Cleveland, OH