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2018 SIDNEY PICKER, JR. AWARD REMARKS STATES AND BORDERS

Maureen Irish[†]

CANADA UNITED STATES LAW INSTITUTE 42ND ANNUAL CONFERENCE

APRIL 12, 2018

I am deeply honored to receive this Award, which celebrates the energy, optimism, foresight, and good judgment of Professor Sidney Picker, the founder of the Canada-United States Law Institute, at this 42nd Annual Conference. Conferences over the years have examined many aspects of Canada-U.S. relations, such as energy, trade, environment, investment, dispute settlement, security, human rights, climate change, border management, intellectual property, technology, among others.

Two years ago, at the 40th Annual Conference, Rosemary McCarney, Canadian Ambassador and Permanent Representative to the United Nations, received the Sidney Picker Award. In her remarks, she spoke of borders “thick and thin”¹ and discussed the friendship and cooperation between our two countries as we face worldwide challenges such as arms control, human displacement and threats to global health. I am going to start off by talking about a time when we were not so friendly; a time when we were at war across Lake Erie.

The United States declared war on Canada in June of 1812. In July, an American force initially crossed into British territory at Amherstburg, but the British responded by first taking Fort Mackinac, then retaking Amherstburg and Fort Detroit.² After a naval victory in the fall of 1813, the United States took control of Lake Erie. The British then withdrew from the Western District,³ of which Windsor was the district town. U.S. forces moved through the area and caught up with the British at Moraviantown, between Windsor and London, where the United States won a decisive battle.⁴ From the fall of 1813 and throughout 1814, the British had been driven out of a large part of what is now

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¹ Rosemary A. McCarney, “Canada-United States Law Institute 40th Anniversary Conference, April 2016: Keynote Address” (2016) 40 *Canada-United States Law Journal* 13 at 14.

² DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT*, 81-84 (Univ. of Illinois Press 1995) [hereinafter Hickey].

³ *Id.* at 132-37.

⁴ *Id.* at 137-39.

southwestern Ontario. Finally, in December of 1814, the Treaty of Ghent ended the war and the two sides returned to their original borders.⁵

I became curious about what was going on in southern Ontario during late 1813 and 1814. What was life like under foreign occupation? It was not occupation as we might think of it now. This was not the modern regulatory state with income taxes, public funding of institutions, and public services. The U.S. headquarters remained in Detroit and residents in the southwest area complained of occasional raids on private property by American troops and their supporters.⁶ It was also a time of uncertain sovereignties in any case, since a major treaty between the British and the Chippewa Nation for the land around Lake Huron was not signed until much later, in 1827.⁷ As far as claims by Europeans went, the territory was American rather than British, but not in the way that we experience government now.

In 1812, the entire region was sparsely populated. At the start of the war, there were about eighty thousand people in all of Upper Canada.⁸ The majority of the population were recent immigrants from the United States who came across the border and settled.⁹ They assumed they had the right to mobility among the North American colonies¹⁰ and the British were offering free land grants after U.S. independence.¹¹ With such a small population, it was a strain on resources when several thousand troops arrived to fight the war, expecting to be fed. On the British side, there were many complaints from the local population throughout Upper Canada about farms being raided by hungry soldiers¹² because their rations were not sufficient.¹³ The army had trouble buying food as there just was not enough agricultural production to feed the extra people.¹⁴ British officers had difficulty raising a local militia to fight.¹⁵ On the U.S. side, military commanders had particular trouble persuading the militia to cross the border to fight, as many had the understanding that they would defend their own territory, but were under no obligation to fight in a foreign land.¹⁶

In present times, this picture becomes intriguing in the context of international law. There is sovereignty or at least there are claims, but it is somewhat non-exclusive. The state does not prevent people from crossing borders and it cannot easily use the power of conscription to turn ordinary people into soldiers who can be sent off somewhere to fight a war. The common

⁵ *Id.* at 296 (some disputed islands between Maine and Nova Scotia remained under British control).

⁶ GEORGE SHEPPARD, PLUNDER, PROFIT AND PAROLES: A SOCIAL HISTORY OF THE WAR OF 1812 IN UPPER CANADA, 92, 105-08 (McGill-Queen's Press 1994) [hereafter Sheppard].

⁷ Huron Tract Treaty, U.K.-Chippewas of Kettle and Stony Point, Jul. 10, 1827, <https://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340>.

⁸ Sheppard, *supra* note 6, at 13.

⁹ *Id.* at 14.

¹⁰ *Id.* at 37.

¹¹ *Id.* at 19, 28.

¹² *Id.* at 122-33.

¹³ *Id.* at 108-12.

¹⁴ *Id.* at 112-19.

¹⁵ *Id.* at 75, 79-89.

¹⁶ Hickey, *supra* note 2, at 33, 81, 87, 88, 137, 145, 260.

understanding of the population resists. I cannot push these examples too far. Soon after 1814, in peacetime conditions, the British stopped selling land to settlers from the United States¹⁷ and expanded British settlement. The population in Upper Canada increased significantly and borders became thicker.

In the history of Canada-U.S. relations, we have this early example of the non-territorial state.¹⁸ The 19th century and early 20th century saw the rise of more assertive nation-states¹⁹ that controlled their borders and populations. Since the late 20th century, I would say that we are witnessing the appearance of connected states worldwide. There are more and more multilateral treaties and we are seeing customary international law and general principles of law that increasingly set the framework of rules. People communicate and interact with each other constantly. The private sector is very involved in cross-border activity of every sort. Domestic legal systems have developed private international law so that we can constantly cope with the geographic diversity of facts. We have conflicts of law rules for contracts, torts, property, estates, and family law. It is quite ordinary now that we use choice of law rules and decide that the substantive law of some other jurisdiction applies to a particular question in a dispute before our courts. This is part of the evolution of global society²⁰ and the connected state fits within it. Instead of strict territory and the state as the source of sovereignty, we now see emphasis on human rights, the environment, well-being of the human population, and the discussion of states as fiduciaries.²¹

As Ambassador McCarney noted, the Canada-United States Law Institute has now studied cooperation and friendly relations between our two countries over several decades, listening to various involved voices on a wide range of topics. There are many different ways of looking beyond and through borders. The more we continue to do that, the more likely we are to see the world clearly.

Again, I am honored and very grateful to receive the 2018 Sidney Picker, Jr. Award. Thank you.

¹⁷ Sheppard, *supra* note 6, at 187-91.

¹⁸ H. PATRICK GLENN, *THE COSMOPOLITAN STATE*, 58-60, 83-85, 117-18 (Oxford Univ. Press 2013) (see at 118: “When Columbus and Cartier arrived in North America, in 1492 and 1534 respectively, neither Spain nor France could qualify as a contemporary state. Westphalia was more than a century away and there were no national borders to prevent movement, either within Europe or beyond it.”).

¹⁹ *Id.* at 86-107.

²⁰ PHILIP ALLOTT, *EUTOPIA: NEW PHILOSOPHY AND NEW LAW FOR A TROUBLED WORLD*, 303-05, 312-14 (Edward Elgar Publishing 2016).

²¹ Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens* (2009) 34 *YALE J INT’L L* 331 (2009); see generally EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* (Oxford Univ. Press, 2011).