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## Getting to Yes in United States-Canadian Water Disputes

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## “Getting to Yes” in United States— Canadian Water Disputes

The United States and Canada face the prospect of increasingly tough bargaining over water resources issues in the next few years. Although they are collectively proud of a long record of harmony and cooperation in such matters, they are both aware that there are several storm clouds on the horizon. Without some major changes in attitude, accompanied by modifications in institutions, it will become more and more difficult to “get to yes.”<sup>1</sup> Both countries have much to gain from cooperation and a great deal to lose from intransigence. The success of the Columbia River Treaty is an illustration of the former. The inability to reach a mutually satisfactory agreement over acid precipitation is an example of the latter.

### SHARED RESOURCES AND DIFFERING VIEWPOINTS

Canada and the United States have much in common, particularly with respect to water resources. Both are endowed with huge rivers and numerous large lakes, some the size of individual countries elsewhere. Both have developed these resources for a wide variety of purposes, particularly irrigation, navigation, and the generation of hydroelectric power. Some of the water resources are shared, and in certain places form the boundary between the two countries. In contrast to the situation with international rivers in most parts of the world,<sup>2</sup> Canada and the United States have cooperated in the management and development of an important part of these shared resources. The construction of the St. Lawrence Seaway, the regulation of the Great Lakes, and the harnessing of the Columbia River are illustrations.

There are now signs, however, that United States—Canadian water relationships are becoming less harmonious than they once were. While there continues to be a good deal of cooperation in data collection and in the operation of a number of river and lake control facilities, the quest for agreement on certain key issues has become increasingly protracted and difficult. It took two decades to arrive at the Columbia River Treaty.

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1. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983)

2. D. LEMARQUAND, *INTERNATIONAL RIVERS: THE POLITICS OF CO-OPERATION* (1977).

Discussions relating to the Skagit River lasted more than twenty years before Seattle City Light and the government of British Columbia signed a final arrangement concerning the Ross Dam. The problem of acid precipitation has been on the political agendas of both countries for a decade but a solution satisfactory to each of them still seems far away. Meanwhile, other issues concerning shared water resources are beginning to demand attention. One of these concerns the possibilities for large-scale water transfer from Canada to the United States.<sup>3</sup> Although there is broad agreement among water resources experts that such transfers are likely to be economically inferior to other alternatives,<sup>4</sup> proposals continue to be made and Canada's chief negotiator on free trade with the United States, Simon Reisman, stated recently that water export could well be one of the items covered in a future agreement between the two countries.<sup>5</sup> The Canadian government is currently funding investigations of one proposal, the Grand Canal project, which would transfer water from James Bay to the Great Lakes.<sup>6</sup> It is certain, however, that opinions will be severely divided within both countries as to whether large-scale water transfers are desirable, even if they can be shown to be feasible.

#### THE INCREASING PROBLEM OF "GETTING TO YES"

There are several possible reasons why Canada and the United States are finding it increasingly difficult to reach agreements on major water issues. One relates to the growing scale and complexity of water projects. More and more they involve schemes which cover vast areas of territory and/or require the investment of hundreds of millions, or perhaps billions, of dollars. Often their development would require agreement not only between the two countries but several states and provinces as well. A second factor stems from the fear of the smaller partner, Canada, that the larger, richer, more economically developed partner, the United States, will try to drive a bargain that would yield at best only small, short-term gains for Canada and might lead to serious economic and possibly political disbenefits in the future. Conversely, some observers in the United States are concerned that arrangements with foreign powers, including Canada, are a possible threat to the security of the United States. It is preferable,

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3. Sewell, *Inter-Basin Water Diversions: Canadian Experiences and Perspectives*, in *LARGE SCALE WATER TRANSFERS: EMERGING ENVIRONMENTAL AND SOCIAL EXPERIENCES* 7-36 (G.N. Golubev & A.K. Biswas eds. 1985).

4. C.W. HOWE & K.W. EASTER, *INTER-BASIN TRANSFERS OF WATER* (1971); *FEDERAL RESERVE BANK OF KANSAS CITY, WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES* (1980); *WISCONSIN WATER MANAGEMENT COUNCIL, THE INTERBASIN TRANSFER OF WATER: THE GREAT LAKES CONNECTION* (1982).

5. *Quit or Shut Up: MPs to Reisman*. Vancouver Sun, Jan. 23, 1986, at B6.

6. *Public Funding of Grand Canal Sparks Feud*. Ottawa Citizen, Jan. 7, 1986, at A3.

some of them argue, to transfer oil or natural gas by tanker from the Alaskan North rather than by a pipeline through Canada. Similarly, they suggest, transfer of water from Canada to the United States would involve the risk that supplies might be cut off at some time in the future. Nationalism has long been an important matter in the United States. It is now becoming an issue in Canada, too.

Looking back over the past century, the United States and Canada appear to have been very successful in dealing with matters of mutual concern in water management. Notably, they have established an institution which facilitates a joint review of issues that cannot be settled informally or independently. The International Joint Commission, set up under the Boundary Waters Treaty of 1909, has a proud record of achievement in this respect. While its mandate and its structure have remained the same, its *modus operandi* has been changed in several ways over the years, enabling it to adopt an increasingly broad perspective. Beyond the arbitration of disputes, the two countries have established mechanisms to collect data, facilitate the exchange of information, undertake planning, and, in some cases, develop the resources of a given river or lake on a cooperative basis. Successful as such efforts have been, questions have been raised as to whether they are adequate to handle the problems that are now emerging and that will certainly appear in the future.

#### REVIEW AND PROSPECT

It was such questions that led to the preparation of this special issue on United States-Canadian water problems. Its purpose is to present a "state of the art" review of United States-Canadian water relationships, aiming to identify key issues, assess experience to date, and suggest lines of action that might be pursued to overcome deficiencies in the present ways of doing things. Two kinds of contributions were invited. One was to focus upon the general matter of negotiation on water issues. Carroll addresses the issue of water resources management as a concern of environmental diplomacy, noting the broadening scope of the latter and the various ways in which the two countries have tried to cope with this. Interestingly, he argues along lines very similar to those suggested by Fisher and Ury<sup>7</sup> for "getting to yes." Essentially, he suggests that a soft approach to bargaining should be adopted in which the goal for each party is agreement rather than victory, where participants are seen as friends rather than adversaries, where offers rather than threats are the key strategies, and where flexibility is the major guideline.

LeMarquand follows this analysis with a discussion of the preconditions

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7. R. FISHER & W. URY. *supra* note 1.

for cooperation in Canada-United States boundary waters management. He argues persuasively that although many of the cultural and the political differences between the two countries tend to split them apart, there is considerable scope for problem solving and the management of boundary waters. This scope is enlarged if better use is made of existing institutions, such as the International Joint Commission, and if new initiatives are adopted, such as joint studies by academies of science in Canada and the United States, or reviews funded by independent foundations in the two countries.

Several other papers were invited, focusing upon experience with respect to particular problems. Swainson addresses the matter of the Columbia River Treaty, signed by the two countries in 1964 and due for reexamination in less than a decade from now. Reviewing the changing circumstances, including the decreasing demand for electric power in British Columbia and the Pacific Northwest, the increasing concern about environmental impacts, and other matters, Swainson concludes that it is unlikely that a renegotiation of the Columbia River Treaty will take place. At the same time, he suggests, some modification of existing arrangements with respect to the sale of downstream benefits and operating arrangements will probably occur.

Kirn and Marts address the matter of Seattle City Light's proposal to raise the height of the Ross Dam on the Skagit River in the State of Washington, provided for in the 1942 Order of the International Joint Commission and a 1967 agreement with British Columbia. They show how parties in the two countries became increasingly embroiled in a controversy involving shifts in social values on the one hand and legal and financial obligations on the other. When the original agreement was concluded in the mid-1940s, there was little concern perceived or voiced for the environment. By the mid-1960s, when raising the height of the dam was proposed and was permissible, the environmental movement was well underway. The dilemma was to find a way in which an alternative source of power could be found. The paper shows how initiatives taken by the IJC, as well as skillful negotiations, resulted in a solution acceptable to parties in both Canada and the United States.

The third case study focuses upon the Great Lakes which have been the center of international attention by the United States and Canada for over a century. The initial emphasis was on navigation, switching later to hydroelectric power, and then to water quality. The latter now dominates the scene. Dworsky traces the evolution of this concern and the various arrangements that have been made, particularly under the auspices of the International Joint Commission. The main thrust of the IJC's attention has tended to be centered on physical dimensions, and on aspects

relating directly to specific water bodies. Recently, however, the Commission has broadened its viewpoint to embrace economic, social, and institutional elements and is now wondering about such matters as possible impacts of climatic change, world food supply and demand, and structural shifts in the economies of the United States and Canada. More importantly, one of its most recent reports raises the question of whether the water institutions now in place are adequate to deal with the emerging water issues, both within the individual countries and with respect to waters they jointly own. Dworsky notes the moves that have been made in response to the IJC's reports.

A fourth case study addresses the matter of acid precipitation which has become an increasingly pervasive issue in the two countries. Scott points out that although there has been concern about the matter for two decades, and despite attempts to resolve it through conventional and other channels, a solution remains elusive. He suggests some alternative avenues that might be used towards this end.

The final paper, by Sadler, offers an overview of Canada-U.S. boundary water issues. He notes first the broad context of the associated geopolitics and then moves on to a discussion of the manner in which the two countries have tried to deal with water disputes over the past eighty years or so. This has included the use of normal diplomatic channels; formal machinery for dispute settlement, such as treaties and accords; and, more recently, interest group linkages sometimes described as para-environmental diplomacy. In addressing the question of where do we go from here, Sadler suggests that the basic thrust should be to move from the present *ad hoc* approach to one in which an umbrella set of principles is developed, linking concerns about both water development and environmental management. He identifies several ways in which this line of thinking could be translated into the institutions for bargaining.

The purpose of a symposium issue is to bring together a set of papers focusing upon a common theme, identifying the major issues, and offering suggestions for solutions. In this case, the *Journal* deals with a key concern facing the United States and Canada, the adequacy of existing institutions to deal with international water disputes. It is hoped that these articles will stimulate discussion not only of this matter but also of the more general issue of the need to develop more responsive legislation, policies, and administrative structures and procedures in the resource management field.