THE COLUMBIA RIVER TREATY — A COMMENT

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The Treaty between Canada and the United States, Relating To The Co-operative Development of the Water Resources of the Columbia River Basin was signed in January 1961, and, as the attached *précis* summarizing the Treaty indicates, it has not yet been ratified or implemented by the Parliament of Canada.

There is a considerable body of public knowledge with respect to the unexpectedly difficult relations between the Federal Government and the Province of British Columbia over the matter of giving effect to the Treaty. This dispute has not only delayed implementation of the agreement but it has obscured the really considerable achievement the Treaty represents in the evolution of the international law and administration concerned with the management of an international river basin.

It will be remembered that from 1944 onward the further development of the Columbia River in the matter of power and flood control, had been a subject of study by the International Joint Commission as well as a matter of some diplomatic negotiations between Canada and the United States. Not until 1958-59 were the parties able to reconcile strongly divergent views with respect to the rights and duties of co-riparians sharing this common transnational river. The principle at issue had been the extent to which storage of water by the upstream state, whereby the river flow was better controlled in order to obtain a higher output from existing sources of power generation in the downstream state, should lead to a sharing of these new downstream power benefits between the two states concerned. Initially the United States' position, in the International Joint Commission and, possibly, diplomatically, had been to reject the "downstream benefits" theory advocated by Canada, particularly in the vigorous stand taken personally by General A. G. L. MacNaughton, the Chairman of the Canadian Section of the International Joint Commission. Canada also asserted a general right to divert the Columbia into the Fraser — a right strongly rejected by the United States. The pressing need for power in the Pacific Northwest, certain changes in the personnel of the American Section of the International Joint Commission and the possibility that a mounting interest in the development of power on the Peace River might interfere with the future growth of the Columbia, all contributed to an agreement on principle by late 1959 and to the completion of the Treaty signed in January 1961.

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In essence, as the following *précis* shows, Canada receives fifty per cent of the power additionally generated downstream because of the new storage facilities upstream now to be built at three strategic points on the Upper Columbia River and its tributaries, at Mica Creek, the Arrow Lakes and Duncan Lake. Canada would receive these downstream benefits over a period of years and they would eventually terminate after the passage of time — about 35 years. Canada also receives payments for flood control and, of course, has the right to all the power to be generated on-site at the storage dams referred to. The United States receives the benefit of this storage and flood control program, the effect of which is to regulate the flow of the Columbia so as to prevent the wastage of water resulting from the spring overflow and the diminution of power output in the dry seasons of the year. This evening out of the flow and the harnessing of the spring floodwaters are to be executed within a common engineering program for the control of the river through an agency not fully defined in the Treaty and which will require further negotiations and arrangements.

The United States also receives the right to build a dam on the U.S.-Canadian border, at Libby, Montana, a subject of considerable debate in the I.J.C. over a period of years because of the doubt in the Canadian Section of the I.J.C. as to the general value of such a development in relation to cost. Other considerations, however, of regional U.S. development, and politically, led to considerable U.S. pressure for the inclusion of this project within the Treaty.

With respect to the Treaty itself, and the various calculations set out in the Annexes for the harnessing of the Upper Columbia for better regulation of the flow, there seems to be some question as to whether the technical arrangements represent a program for the optimum utilization of the river's power potential. Apparently General MacNaughton and Canadian experts would have wished for somewhat different engineering plans but this was the best agreement that could have been reached under all of the circumstances and the vital significance of the downstream benefits provisions of the Treaty perhaps tended to compensate for any shortcomings of the engineering provisions.

It is also public knowledge that the Treaty negotiations were carried on with the full knowledge of the Government of British Columbia and indeed, representatives of that government sat in as observers on the Canadian negotiating team and their views were taken into account fully by the Government of Canada. It was with very great surprise, therefore, that within a few days after the signing of the Treaty the Premier of the Province of British Columbia, Mr. W. A. C. Bennett should have declared that he could not agree to all of the terms of the Treaty. More particularly he was in dispute with the Federal Government not merely over some of the engineering arrangements to which his observers apparently had acquiesced shortly before the Treaty was signed, but there were now two new developments: first, the Province insisted that the Federal Government's financial offer to assist with the building of the storage

dams was unacceptable in amount and in principle; and second, it was claimed that the Province should have a right to sell its fifty per cent share of the new power from which the generating plants downstream now benefitted. It was argued that by selling that power in the United States, where it was located, there would be no loss in or costs of transmission through returning it to Canada, while the revenues could be employed to finance not only all of the storage dams on the Upper Columbia but also the equally necessary development of power on the Peace River.

The Federal Government was unprepared for this neglect by the British Columbia Government to communicate its view before the Treaty was signed — although there is some evidence that a hint of a last minute change of heart may have come to the attention of the Federal Government hours or a few days before the signing ceremonies in Washington.

The merits of the B.C. position have been challenged by the Federal Government in addition, of course, to more angry statements alleging bad faith. For fifty years it has been Federal policy not to permit the export of electric power on the ground that such power, usually cheaper in Canada, is required for the development of Canadian industry and that once sold it is very difficult to recapture it because the American users develop a vested need which would be very difficult later to disregard.

Throughout most of 1961 the debate between the Federal and Provincial governments continued acrimoniously with both technical arguments and political overtones rendering the issues increasingly misunderstood. But essentially the problem has become one of finding a means of reconciling the Federal view that power should not be exported and the Provincial view that in this case the power "benefits" are not being exported but are being left where they are and that their sale can help finance the building of larger power sources on-site at the Upper Columbia storage dams and on the Peace River. Indeed, the British Columbia Government has argued that when in 1965 or 1966 the downstream benefits become available a block of power, about 800,000 kw, would be available to the Vancouver Lower Mainland area and there would be no immediate market for it. Therefore, the sale of that block for cash in the United States, at the rate of 5 mills would help finance dam and power construction on the Upper Columbia and the Peace River and represent a real gain to the whole program.

There is no doubt that the recent expropriation of the British Columbia Electric Company Limited was intended to bring under provincial public control all of the main power-generating and distributing facilities in the Province both for purposes of a unified power program policy to prevent the taxation at regular rates of a British Columbia public utility by the federal government—a source of dispute for some time between the two governments, as well as to prevent the Federal Government from exercising its power to declare the Columbia River program or the company, under Section 92 (10) of

the British North America Act, to be a work "for the general advantage of Canada". While there was not much danger that such a drastic step would have been taken by the Federal Government in its dispute with the Province, this quick Provincial move to convert a very large privately owned power system into a crown corporation was thought to assure the facilities of immunity from any possible Federal action under Section 92 (10), and to settle the taxation grievance referred to.

As the debate now stands the Federal Government must determine whether the sale of these downstream benefits is equivalent to the export of power in the strict sense and even if such equivalence is regarded as present in this situation, then the Government must consider whether the severe policy of forbidding exports of power — except under wartime or special regional conditions — is as defensible under present conditions in the development of energy sources and their transportation as it may have been a generation or two ago. It is very likely that some formula will be arrived at which serves the practical needs of the situation and saves face for the parties. The Province has asked for the right to sell these benefits for a twenty year period at least; the Federal Government has implied that a shorter time may be considered and very likely a period of perhaps ten to fifteen years may be agreed upon and incorporated into a protocol to be attached to the Treaty which would set out in detail not merely the right but the method and timing for the recapture of such power. It may very well be one of the ironies of this complex dispute that not only will it prove that Federal-Provincial relations often are more difficult to manage than international disputes between Canada and the United States, but more important, that alternative sources of power both in Canada and the United States may relieve the pressure to develop the Columbia that gave rise to this important and successful bi-national approach to the development of a common river basin.