CANADA AND THE UNITED STATES : A LEGAL FRAMEWORK FOR THE FUTURE*

Maxwell Cohen, Q.C.**

The Continental reality that links Canada and the United States, their many-sided involvements with each other, requires a fresh perspective on the framework for their future relations. While that framework is essentially a political question, its jural consequences will be significant both in themselves and as a model for bi-national cooperation over a wide range of transcontinental questions.

If men are egocentric and nations ethnocentric, continents are geocentric and tend to be preoccupied with their own universe. In an older day this was called "isolationism" but since communications and international violence, affluence and technology, color and numbers have made us smaller, sensitive, more crowded and more intertwined than ever before, it is not really possible to be "isolationist" although it is quite possible to remain preoccupied with a land of one's own. And the North American horizon is sufficiently broad, and so central to the world balance of military and economic power, that it is a regional universe easily commanding an introverted interest that global realities cannot entirely distract. Even if the continent north of the Rio Grande were not divided between two sovereign states with a common Britannic history there still would be regional problems of complexity and grandeur to solve. We have these tensions between regions within our own respective federations — south and north in U.S. of yesterday; Quebec and English-speaking Canada in the Canadian history of today. American "separatists" lost a civil war — ours, it is hoped have no such plans; but if some do engage in civil strife, they may discover that it is among the most tragic of all the struggles, for fratricide yields in the end to numbers as do most confrontations. Whatever one may say, therefore, the relations of our two countries, and the political and legal framework for a common future, must be seen through the prismatic perspectives or distortions of triple lenses: the broadest vision — the world scene itself; the second tier of sight — the continental framework and reality; the third aspect — contemporary specialized challenges in the respective federations, Civil Rights for the United States, Quebec and Ottawa for Canada.

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** Professor of Law, Director of The Institute of Air and Space Law, McGill University.

To some extent it may be said that this is the first time in a generation or more, perhaps, since the great depression of the Nineteen-Thirties that we have as our primary preoccupation a desperate sense on the home front. Yet in a curious way that sense — civil rights in the United States, Quebec's future in Canada — have global links that weave them with anxieties on other continents. For it is patent that American civil rights interlaces with the problem of white and non-white peoples everywhere and indeed, the interaction is profound enough to make it likely that strong movements toward racial self-respect elsewhere add to the drives here and conversely success here only generates more social energies elsewhere reaching for the plane of equality.

The parallel in Canada is equally striking. A new Quebec, suddenly touched by a renaissance of its own, has thrown off in less than a half a dozen years, the burdens of a self-inflicted social structure that retarded its politics, its culture, its economic confidence, its essential self-esteem. Confederation in Canada has always had the hard history of reconciling French and English-speaking, "conqueror" and "conquered", Catholic and Protestant, conservative nostalgia and modern realities. The Quebec renaissance has come perhaps less from below than from above. A new elite, dissatisfied with themselves, with the English-speaking economic ascendency in Quebec and elsewhere, with the powerful and penetrating role of the English-language and the negligible command Quebec has over Canadian culture outside of Quebec and, above all, with the sense of having been left behind in the 20th Century's rush towards self-fulfillment — this new elite demanded a new deal for itself and in so demanding it had to reconsider what that new deal would mean in Quebec's relations with English-speaking Canada. Federalism in Canada is, therefore, on trial and among the energizing sources for Quebec's new confidence are the visions of other peoples in Asia and Africa less accomplished, less affluent, less linked with the main stream of western culture, and yet able to assert their claims to self-determination, to independence. A few years ago it would have been unimaginable to expect a French-speaking Canadian to say: if Ghana and Ceylon and the Congo, why not us; if they can go it alone and present an image of a viable society, or at least attempt to achieve one certainly we can do so, a powerful people whose writ runs from the St. Lawrence to the Arctic circle. And so the "unquiet revolution" in Quebec takes its cue from an unquiet world and in that relationship Quebec and the new emerging nations are to each other both mirror and catalyst.

There is in this global perspective one profoundly restraining element for those who would upset the Canadian balance, and correspondingly also for those who would press on, without counting the cost,

to effect the most rapid social changes in the United States; and these restraining cords are the greater threats that still lie outside our common security. The "thaw" has not yet melted the glacier that divides East and West. Disarmament, so resistant to agreement points every day to the abyss where thermo-nuclear weapons lie in wait to be sprung by malice or miscalculation. While this horror is poised above mankind, aimed in the name of ideology or vital interest, unresolved by sustained efforts to disarm, most of mankind should regard their homegrown crises with less than a sense of catastrophe. For true catastrophe is the mortal cloud above and beyond our borders should we fail to control this miraculous and fatal union of atom and rocket that has now transformed our politics and our violence beyond recall.

Yet even if we admit that the higher urgencies and fears are the military-political accumulations of the past generation we cannot avoid coming to grips with the demands of a home-front more turbulent for Canada than it has been for almost two generations. And this brings one to the second tier from which to view our problems — the regional. It is this regional tier that in fact determines the course of this continent and to which I shall now address myself in an attempt to project a framework for a common continental future.

That future somehow is taken for granted for the most part, at the same time as it is occasionally the subject of irritation and a pessimistic estimate. It is no easy matter to share a great continent between the world's most powerful state and one of the world's more sensitive neighbours, not at all "powerful", but quite conscious of itself and the need for an independent image. It might have been easier if all Canada spoke French and the great wave of American language and culture and techniques did not daily wash over that porous frontier and threaten to erode by its force whatever cultural citadel we are able painfully to create. Instead, Canada is for the moment a predominantly English speaking country essentially shaped by United States technology, literature, mass media, humour, values and prosperity. It is a charming speculation to consider what would have happened if we could have had the benefits of the neighbourhood without the mixed pains and pleasures of a cultural-economic onslaught. The question of a "Canadian image", so much a part today of our domestic dialogue, might have been more truly answered with a wholly French-speaking Canada or with a truly bilingual Canada than with one so easily penetrated by the persistent forces of communication.

Thus a primary continental problem for Canadians is how to have the best that naturally flows from our geographic relationship —

culturally, economically and administratively — concurrently with the fostering of a Canada that is different from the United States, preserving that difference for all of the irrational reasons that men will insist on in rationalizing their preferences and the accidents of history. This is an old problem; it really begins with the abrupt departure of the thirteen colonies from the imperial family. Stubborn Englishmen in North America were insisting on political equality with stubborn Englishmen in London and from that early bourgeois confrontation there emerged the mythology and the reality that has blossomed into what America is today — the leaders of the free world (and sadly not a member of the Commonwealth !).

The British remnant in North America, therefore, became a kind of permanently defensive entity. Having just conquered the French in 1763 it was necessary to make a viable, permanent peace with them in order to secure the fragile frontier that soon was to mark off the powerful infant state to the south from the monarchial-colonial north. If ever boundaries were artificial those that drew lines between British North America and the new federation of thirteen were surely among the least defensible, militarily, economically, culturally. From those days in the Seventeen-Seventies and Eighties to the present time it has been one long continuing story of varieties of accommodation between those who remained with the Crown and those who fashioned a new kingdom of their own but now to be called a Republic.

Elsewhere I have suggested that it is possible to discern five distinct periods in the relations of old British North America, the Canada of yesterday and today with the United States from romantic independence to world supremacy: [1]

> "The first period I have called the "Period of Adjustment", from the Treaty of Paris of 1783 which concluded the American War of Independence, down to the settlement of the Alabama Claims in the 1870's. The preoccupation here must be seen as part of the adjustment of the new United States to the remnant of old British North America, now the Canada of pre-Confederation and early Confederation. This adjustment was psychological, military, territorial, and economic, and the treaties in that period deal with the great boundary questions, pre-Revolutionary debts, fisheries, criminals, and trade, including the great experiment of reciprocity in 1854. In essence this was the time when British North America and the United States were feeling their way towards answering the question as to "who gets what" on this continent and how to determine the minimal conditions for the living together of a burgeoning sovereign and a dawdling colony.

[1] Cohen, "Canadian United States Treaty Relations, Trends and Future Problems", in Deener, *Canada - United States Treaty Relations* (1963) 185.

The second period may be described as the "Period of Continental Stabilization", from the 1870's down to the negotiations over the Boundary Waters Treaty of 1909. Here the major questions of boundaries were concluded through settling the Alaska and Passamaquoddy Bay boundaries, the widening of common control over the movement of criminals, and the first modest ventures into some fisheries control over and above the rights acquired under the 1818 Treaty.

The third period may be called the "Period of Common Resource Conservation and Early Joint Management", and this is the period from the Boundary Waters Treaty of 1909 to the outbreak of the Second World War. It coincides with the emerging independence of Canada as an international person and as the leader of the movement from Empire to Commonwealth. It marks the breakthrough of American power from continental to global responsibilities which was to be firmly crystallized by the Second World War. It is a period during which the network of treaty relations, covering boundary waters, fisheries, taxation, extradition, and early questions of common defense, all pointed to such a formal intertwining of dealings with each other as to now suggest a cautious acceptance by both countries of those continental realities that would push them further along the road toward the common management of their common continental concerns.

The fourth period is the "Period of Wartime Continental Cooperation" from 1939 to 1946. Here the subject matter takes on a greater variety, the spirit of the relations is more intimate and the involvement more complete. Defense, trade, the common management of industrial resources for the purposes of war-making — are all indicative of the new dimension of mutual reliance and interdependence. Radio and broadcasting, air transport, already observed in prewar agreements, become almost annual additions to the list of note exchanges. But clearly what had happened was the extension of the notion that many of the problems of Canadian-American wartime responsibility were but further projections of the idea of joint management of a common continent, an idea already maturing in fact, if not in philosophy, in the relations of the neighbours.

Finally, the fifth period may be called the "Period of a Maturing Continental Partnership" — irascible but inevitable. The reaction of the postwar years expressing itself conflictingly in Canadian resentment and Canadian reliance is clearly evident in the broadening scope of joint action and joint responsibility side by side with dramatic moments of explosive irritation. Again the main treaty concerns are trade, defense, certain special problems of the opening Arctic in consequence of defense, the intensity of double taxation burdens requiring special treaty treatment, and the further development of measures to deal with fisheries, trade, boundary waters, and other resources".

But having an analytical perspective on these five periods is by no means enough to satisfy the sense of administrative order that now is demanded in the managing and sharing of the common continent. A design for this ongoing program of continental cohabitation and common control appears to be emerging.[2]

[2] See Communiqué issued after the meeting between President Johnson and The Honourable L. B. Pearson, Joint Committee Jan. 21-22, 50 Dept. State Bull. 199-200 (Feb. 19, 1964).

The fundamental principle to guide the relations of our two peoples is already fashioned by the common continental story of the past generations. That principle, however, may have had less recognition in a specific way than it deserves and it may be stated in the following plain terms: Canada and the United States in sharing a common continent and essentially a common culture, on the English-speaking side at least, must undertake, in the use of the resources and the skills of their continent, programs of economic and social development that embrace wherever possible the essential interests of **both peoples.** Now, of course, this is often easier said than done. It may be more difficult to apply this general socio-economic standard of policy-making for both states to economic questions than, for example, to the more irrational defence situations. I use "irrational" advisedly because in defence policy, considering the essential bi-polarity of nuclear capability, the Canadian role in the defence of North America is essentially spatial and symbolic, "Spatial" in the sense of having both U.S.S.R. and the United States as our neighbours with our northern tundra and skies a theoretical buffer, and symbolic in the sense that we are devoted and willing partners in the common defence of the continent but really can have no pretensions to being an authentic military power as such.

Hence it is that the irrational component in defence policy is likely to provide us with a nagging sense of unresolved problems, ameliorated perhaps by the general reduction in world tensions which may allow Canadians to move ever farther away from sharing even modestly in the use of nuclear weapons systems. For that really is the essence of the question for Canada and many states — namely, the curious phenomenon that conventional weapons are respectable and nuclear warheads, even for "obsolete" Bomarcs, are not.

Putting aside, therefore, the delicate but declining significance of defence policy as an irritant in U.S.-Canadian relations and for which no statement of general principles can do much, let us turn toward spelling out this broad socio-economic concept of common planning of the remainder of our vital concerns.

It is possible to suggest that the main practical consequence of any principle of continental resource and economic policy-making for the benefit of our two countries must lead in the end to a declining economic frontier and to administrative devices that facilitate this decline, that manage the various fields of economic activity to our common benefit. Indeed, by such common administration there is effected a transmutation of political disputes over economic matters into continuous administration, thus converting potential dispute into the neutrality of ongoing administration.

There are several areas where this kind of approach already is well established — boundary and trans-boundary rivers, Great Lakes fisheries, high seas salmon, halibut and pelagic fishing. Even in defence, the Permanent Joint Board and now NORAD, aside from the nuclear weapons issue, have tended increasingly to become images of administration rather than patterns of political concern. The question is how much farther do we have to go? The answer to this may be seen in part if we briefly set out the areas of immediate continental need and then forecast the other challenges soon to appear on our common horizon.

For the immediate future it is clear that we need common machinery for the integration of resource utilization where, in particular, the United States may increasingly become dependent upon certain primary mineral, forest and specialized agricultural products of Canada.[3] Then, too, the moment is ripe to convert the lessons of the Columbia River Treaty into concepts of continental energy development.[4] We already are great exporters of petroleum and natural gas to the U.S.[5] We are now about to sell our downstream benefits under the Columbia Treaty and we may soon be selling power from Hamilton Falls in Labrador through some of the longest transmission lines in the world via Quebec to the markets of New York City. This pattern of hydro, petroleum and natural gas energy resource development and export deserves more than the *ad hoc* commercial sale approach if it is not to give rise to unfulfilled expectations, interrupted programs of development and political "red-herrings" that serve a momentary regional interest.

In this area, therefore, we need a joint intergovernmental committee on energy policy that would evolve concepts of development, of import and export, uniting gas and petroleum pipe lines into common supply systems and linking electric grid patterns into unities such as those which already exist in part in British Columbia, in Ontario and in New Brunswick across the border.

The forest products of Canada have not been free from their own uncertain relations with United States markets and political chal-

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[3] See for example Fritz, *The Future of Industrial Raw Materials in North America*, Canadian-American Committee (1960).

[4] For a full statement of the significance of the Treaty see *The Columbia River Treaty and Protocol-A Presentation*, published by the Department of External Affairs and the Department of Northern Affaire and National Aesources (April 1964).

[5] Davis, *Natural Gas and Canada - United States Relations*. Canadian-American Committee (1959); also wanted: *A Working Environment More Conducive to Canadian Trade in Natural Gas*, a statement by the Canadian-American Committee (1959).

lenges. It may be lumber from British Columbia one day, or the rising cost of newsprint the next — even through a number of the newsprint manufacturers are, in fact, wholly or in part owned by American parent companies. The attempt to stamp soft woods (and therefore B.C. lumber) with a symbol of the place of origin, eventually vetoed by the American President, indicates that this is not likely to be the last time such a policy will be demanded by those regionally involved. The not infrequent investigation of newsprint prices by congressional committees and the challenge to alleged Canadian monopolistic practices again indicates the scope of annoyance inherent in the relationship. Clearly what is required here is a permanent administrative instrument to de-politicize our forest product relationships through almost a common market approach with a joint bureaucracy to implement the high policies adopted.

What shall we say of U.S. investment in Canada so necessary to us and yet so symbolic of both dissension and controversy? What of the attempt to apply the U.S. antitrust laws, or export control regulations, to American subsidiaries in Canada and to others closely linked with them? What shall we do about labour relations for example, on the Great Lakes where systematic boycotts by American unions were deliberately designed to challenge Canadian legislative and trade union policy? How shall we approach the need for easier trading relationships between our two countries in at least two areas where Canadian development must look to an improved U.S. market — secondary industries and varieties of agricultural products? Will such a program virtually mean going for beyond GATT and evolving common market techniques on a variety of fronts with special awareness for the vulnerability of certain Canadian sectors to superior technology, a vulnerability which can be overcome, of course, given time, a sizable receptive U.S. market and a superior technology of our own?[6] How shall we manage the continuing balance of payments problems besetting both countries, the U.S., with the world, facing a chronic drain of gold, and Canada, facing a chronic challenge to its ability to achieve equilibrium with United States in imports and exports and depending, therefore, so heavily on U.S. capital imports to make up the difference? Finally, we will know in a few weeks what we are to do about our new High Seas Fisheries zone — the 12-mile line within which exclusive Canadian fisheries jurisdiction will be exercised off

[6] The recent discussion concerning the encouragement to Canadian manufacturers to fabricate automobile parts in Canada shows how strong is the opposition of United States opinion to the development of an automobile parts manufacturing program in Canada; see Communiqué following Canadian - United States Ministerial discussions in Ottawa, Thursday, April 30, 1964. Joint U.S. - Canada Committee on Trade and Economic Affairs, April 29-30, 1964.

its coasts subject to American agreement on whatever "historic rights" are to persist.[7] Does this policy lend itself also to common programs of conservation and extraction without infringing upon regional political irrationalities?

Each one of these questions would be much better tolerated and would offer opportunities for more creative ongoing thought and development if we had not merely principles but machinery that would anticipate the difficulties, improve the intertwining opportunities for policy-making and convert the reality of our geographic continentalism into political-administrative terms.[8]

There are those who will fear that such a degree of administration will mean that the larger dog will wag the smaller tail. But this is not the story so far, in boundary rivers, or in fisheries, or viewed realistically even in defence matters — although here unfortunate U.S. pressures were brought to bear early in 1963 on Canadian policy-making. Canada will have an "image" of its own whether we consciously and progressively seek continental solutions or whether we haltingly proceed from hindsight to crisis and from annoyance to neurosis. There is no evidence that even the intimacy of the European Common Market is about to reduce the determination of the Dutch, the grandeur of the French, the variety of the Italian, or the psychic energies of the Germans. No perceptive continentalist will ignore the uniqueness of the French-English Canadian history and dialogue which by its very ongoing tensions compels Canadians to have an image even if they do not will it — an image that is the product of a search for viable nationhood, an image that is our own, not given to us by anyone, nor can it be taken away by increasing involvement with our continental natural neighbour.

If Holmes once said that general principles do not decide specific cases, at the very least he might have conceded they tend to point the nose in the direction where the wind of principle invites. For principle is at least an atmosphere, at least a harbinger of things to come when detail replaces broad aspirations, when machinery becomes surrogate for generalities. We are at that moment in the history of Canadian-American relations where old perorations about the unguarded frontier are as empty as the prairies on a holiday but not as beautiful. What is remarkable is that such clichés should abound when there is so much experience already to replace them with the stuff of an established pattern for a suggested interlaced future for the com-

[7] See Bill introduced in the Senate of Canada, B. 11 S, 2nd Session, 26th Parliament, 13 Eliz. II 1964 — An act Respecting the Territorial Sea and Fishing Zones of Canada, read a first time April 30, 1964.

[8] Cohen, *supra* note 1.

mon good. The next generation of our relations therefore must spell out not anew, but on a higher level of reality and refinement, what history for both of us already has taught: namely, that the sum of our continent may be greater than its parts though the parts must and will survive as separate peoples with a distinctive history each of its own. Yet that history, like the ambient geography links indissolubly, each people with the other, and we will only be the richer if we make of our oncoming historical processes a deliberately planned program for the common management of a superb continent that the accident of place and time has granted us the chance to develop and to enjoy for both peoples.