

INTERNATIONAL AIR POLLUTION — UNITED STATES AND CANADA — A JOINT APPROACH

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The United States and Canada share a common boundary that extends 5500 miles from the Atlantic to the Pacific and on to the Arctic.¹ Because of the great length of this boundary, many problems common to both countries have arisen. One of these problems is the constant flow of air pollution across the international boundary, specifically in the Detroit-Windsor and Port Huron-Sarnia area.² This area is highly industrialized and the problem of air pollution has become acute in recent years.³

It should be apparent that, because this great industrialization exists in both countries and because air pollution recognizes no manmade boundaries,⁴ a solution to this common problem is the responsibility of both countries. It is necessary, due to the complexity of finding an international solution, to first briefly outline some of the steps taken by the two countries individually to combat air pollution in this area.

UNITED STATES

At the federal level, the United States has legislation, the Clean Air Act of 1963,⁵ with amendments in 1965, 1966, and 1967, which affirms that the responsibility for control of air pollution rests primarily with the state and local governments. This legislation provides, however, for federal intervention through conferences and possible court action in certain circumstances involving international, interstate or unusual intra-state problems.⁶ The 1967 Air Quality Act provides that approved state

¹ M. Welsh & A. Heeney, International Conference on Water for Peace International Joint Commission United States And Canada, May 28-31, 1967 (unpublished paper on file in the University of Arizona College of Law Library).

² ST. CLAIR-DETROIT AIR POLLUTION BOARD OF THE INTERNATIONAL JOINT COMMISSION CANADA AND THE UNITED STATES, FINAL PROJECT OUTLINE FOR STUDY OF TRANSBOUNDARY AIR POLLUTION IN THE INTERNATIONAL AREAS OF PORT HURON-SARNIA AND DETROIT-WINDSOR (1967) [hereinafter cited as FINAL PROJECT OUTLINE].

³ A. Heeney, *Along the Common Frontier the International Joint Commission, BEHIND THE HEADLINES*, July, 1967, at 18 (published by Canadian Institute of International Affairs) [hereinafter cited as *Along the Common Frontier*].

⁴ C. Yaffe, *A Roll Call of the States — Where Do We Stand in State and Interstate Air Pollution Control?* in PROCEEDINGS: THIRD NATIONAL CONFERENCE ON AIR POLLUTION 359, 362 (Public Health Service Pub. No. 1649, 1967).

⁵ 42 U.S.C. § 1857 (1963).

⁶ INTERNATIONAL JOINT COMMISSION UNITED STATES AND CANADA, TERMINATION OF COMMISSION ACTIVITIES ON VESSEL SMOKE SURVEILLANCE IN THE DETROIT RIVER AREA UNDER THE 1949 AIR POLLUTION REFERENCE (1967) [hereinafter cited as TERMINATION OF COMMISSION ACTIVITIES].

standards will be the federal standards for that state, enforceable by the federal government if the states do not take action themselves.⁷

The state of Michigan has enacted legislation, the Air Pollution Act of 1965,⁸ which deals with the prevention and control of air pollution from any source. This legislation is designed to provide additional and cumulative remedies for the prevention and abatement of air pollution, but is not intended to pre-empt the field of air pollution control in that state.⁹ The underlying purpose of this legislation is to encourage voluntary cooperation by all persons in controlling the common problem of air pollution.¹⁰

Of the three counties lying partially or completely within the area in question (Wayne, Macomb and Oakland), the most comprehensive air pollution regulations have been instituted by the Wayne County Board of Health.¹¹ These regulations were issued on the basis of the broad authority given to the county health departments respecting nuisances. The air pollution regulations of Wayne County assign to the County Board of Health the following powers and duties:

The Board of Health shall adopt and amend rules regulating or prohibiting the emission into the open air from any source, whether fixed or movable . . . and the installation, construction or alteration of equipment giving forth such emissions into the open air.¹²

Cities in Michigan have been given no specific authority by state law or constitution to enact air pollution or smoke control legislation. There is, however, no restriction on doing so and such local legislation has been enacted under the general police and nuisance abatement powers embodied in their charters. The city of Detroit has a major air pollution control program.¹³ The program is comprehensive and includes

⁷ See Middleton, *Summary of the 1967 Air Quality Act*, *supra* p. 25.

⁸ MICH. STAT. ANN. § 14.58 (1965).

⁹ MICH. STAT. ANN. § 14.58(5)(m) (1965) (encourages the formulation and execution of plans by cooperative groups or associations of cities, villages and counties or districts, or other governmental units, industries and others who severally or jointly are or may be the sources of air pollution, for the control of pollution); MICH. STAT. ANN. § 14.58(24) (1965) (provides that nothing in the act shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision or anything by virtue of the act be construed as estopping individuals, counties, cities, townships or villages or other governmental units from the exercise of their respective rights to suppress nuisances or to prevent or abate air pollution).

¹⁰ MICH. STAT. ANN. § 14.58(5)(n) (1965) (provides that the state shall cooperate with the appropriate agencies of the United States or any interstate agencies or international agencies with respect to the control of air pollution and air contamination).

¹¹ AIR POLLUTION TECHNICAL INFORMATION CENTER DIVISION OF AIR POLLUTION, REPORT OF THE INTERNATIONAL JOINT COMMISSION UNITED STATES AND CANADA ON THE POLLUTION OF THE ATMOSPHERE IN THE DETROIT RIVER AREA 8 (1960) [hereinafter cited as TECHNICAL INFORMATION CENTER REPORT].

¹² *Id.*

¹³ DETROIT, MICH., ORDINANCE 167-E (1947).

most of the functions found in large air pollution control programs in the United States. The program is administered by the Bureau of Smoke Abatement of the Department of Buildings and Safety Engineering.

CANADA

The federal government in Canada, which derives its authority from the British North America Act, exercises all powers not specifically delegated to the provinces.¹⁴ The control of air pollution has been basically a provincial function except for control of the emissions of air contaminants from vessels plying navigable waters and from equipment used by railways in interprovincial commerce.

In the province of Ontario, there has been air pollution control legislation for almost a decade. The Air Pollution Control Act of 1960,¹⁵ with amendments in 1961-62, 1962-63, and 1966 gave broad powers to municipalities to prohibit or regulate emissions of air pollution from any source. An Air Pollution Control Branch was established in the Ontario Department of Health, which furnished advice in the field of air pollution to assist municipal officials in the preparation of air pollution control laws, in the development of air pollution control programs and in the training of local staffs for these purposes. The province of Ontario, however, has recently enacted new legislation in the Air Pollution Control Act of 1967,¹⁶ which has shifted the major responsibility for the control of air pollution back to the province.¹⁷

In the city of Windsor there is legislation which regulates air pollution activities.¹⁸ This legislation is administered by the Air Pollution Control Department. The Department seeks out violations of the smoke abatement laws and arranges for abatement of unsatisfactory conditions. This is usually accomplished through cooperation with responsible parties, but in some cases legal action has been taken to require compliance with the laws.

¹⁴ TECHNICAL INFORMATION CENTER REPORT, at 11.

¹⁵ REV. STAT. ONT. c. 12 (1960).

¹⁶ REV. STAT. ONT. c. 2 (1967).

¹⁷ REV. STAT. ONT. c. 2 (18) (provides that every air pollution control by-law of a municipality including a metropolitan municipality, passed under the 1960 Act . . . that is in force immediately before the 1967 Act comes into force, shall remain in force until the 1967 Act and the regulations become effective in the municipality and the 1960 Act and amendments thereto . . . shall remain in force in the municipality until the 1967 Act and regulations become effective in the municipality). Under this new legislation, the municipalities will still be able to pass and enforce their own by-laws controlling air pollution until the province authorities designate the areas in Ontario to which the 1967 Act are applicable and until they designate the date on which the Act and regulations thereunder become effective in that area.

¹⁸ Windsor, Ontario, By-Law 2770 (1965). The control of air pollution in Windsor will be administered by city officials until the province assumes responsibility sometime between December, 1968 and April, 1969.

JOINT APPROACH

Although much work has been done at the various levels of government in the two countries, additional international methods have been employed in an attempt to solve air pollution problems. The most significant contributions in this area have been made by the International Joint Commission-United States and Canada.¹⁹

The International Joint Commission was established under the Boundary Waters Treaty of 1909.²⁰ This Treaty was negotiated and signed by the United States and Great Britain on behalf of Canada. The Treaty is unparalleled in both United States and Canadian history and, indeed, in the relationship between any two sovereign nations. The purposes of the Boundary Waters Treaty are set out in its preamble:

[T]o prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise²¹

Although the main purpose of the treaty was to help facilitate solutions to disputes over water rights and boundary questions, it must be noted that the use of the treaty has not been limited to those problems.²²

The treaty negotiators felt that solutions to common problems, where the two countries had incompatible and even divergent interests, could be achieved, not by customary diplomatic arrangements, but "in joint deliberation of a permanent tribunal" composed equally of Americans and Canadians.²³ The members of the International Joint Commission were to act, not as "separate national delegations under instruction from their respective Governments," but rather as a "single body seeking common solutions in the joint interest and in accordance with the rules and principles" set forth in the Treaty.²⁴ It is on this foundation that the commission has conducted its operations throughout the last fifty-nine years. There has been little tendency for the six com-

¹⁹ A. Heeney, *Diplomacy with a Difference, The International Joint Commission*, INCO MAGAZINE, Fall, 1966.

²⁰ 36 Stat. 2448 (1909).

²¹ 36 Stat. 2448 (1909); M. Welsh & A. Heeney, *supra* note 1.

²² M. Welsh & A. Heeney, *supra* note 1.

²³ INTERNATIONAL JOINT COMMISSION UNITED STATES AND CANADA, RULES OF PROCEDURE AND TEXT OF TREATY (1965); M. Welsh & A. Heeney, *supra* note 1 at 2. (There are three commissioners, including a chairman, from each country. The Canadian chairman presides at meetings held in Canada and the United States chairman presides at meetings in the United States. Permanent offices are maintained in Ottawa and Washington but meetings and public hearings are held wherever convenience dictates).

²⁴ M. Welsh & A. Heeney, *supra* note 1 at 3.

missioners to divide along national lines and they have reached unanimous agreement in almost every case decided.²⁵

Under the 1909 treaty the commission's role is partially judicial, passing upon requests for indorsement of works that affect water level and flow in the other country, and partially investigative, recommendatory, and administrative.²⁶ In addition the commission possesses certain arbitral powers but as yet the governments have not called upon it to exercise these powers.²⁷

The International Joint Commission's activities concerning air pollution specifically have involved four areas. The commission's first activity was with regard to the international flow of pollution from a smelter at Trail, British Columbia.²⁸ The flow was adversely affecting agriculture in communities in the State of Washington, just south of the international boundary. Following a lengthy study of the problem by agencies in the United States and Canada for the commission, a separate international arbitral board was established between the two countries.²⁹ The board determined that compensation for damages be paid to the United States and that an air pollution control regime be established for the smelter in Canada.³⁰ Although the commission did not take part in the actual arbitration decision, its investigative and recommendatory methods contributed to a fair and equitable solution to the problem.

The second air pollution problem referred to the commission concerned the flow of smoke across the international boundary from vessels plying the Detroit River.³¹ The commission worked on this problem for a period of over eighteen years making extensive findings and recommendations, which have been implemented by the two countries and local control bodies. The commission's efforts were very successful and the project was finally terminated on January 17, 1968.³²

²⁵ *Id.* at 3.

²⁶ 36 Stat. 2448 (1909); M. Welsh & A. Heeney, *supra* note 1 at 3.

²⁷ *Along the Common Frontier*, at 16.

²⁸ The Trail Smelter Case (United States v. Canada), INT'L ARB. AWARDS (1941).

²⁹ S. DEAN, REPORT SUBMITTED TO THE TRAIL SMELTER ARBITRAL TRIBUNAL (1944).

³⁰ The Trail Smelter Case (United States v. Canada), INT'L ARB. AWARDS (1941). See Read, *The Trail Smelter Dispute*, THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 215, 226 (1963).

³¹ TERMINATION OF COMMISSION ACTIVITIES. On January 12, 1949, the governments of Canada and the United States referred to the International Joint Commission for investigation and report, the problem of air pollution in the vicinity of the cities of Detroit, Michigan and Windsor, Ontario. The commission was specifically to recommend preventive and remedial measures with regard to the emission of smoke by vessels plying the Detroit River. On July 27, 1960, the commission transmitted its report under the reference, recommending among other things:

1) Adoption of objectives for smoke emissions from vessels plying the Detroit River, and

2) Development of administrative and legal procedures for dealing with non-compliance by vessels with the applicable air pollution regulations.

³² *Id.* Through similar letters from the Department of State of the United States and the Department of External Affairs of Canada dated January 30 and February

The commission presently has two international air pollution activities. One is concerned with the international transport of pollution across the St. Clair and Detroit Rivers from land based sources in both countries.³³ The other is concerned with surveillance of international transport of pollution across the entire United States-Canadian border.³⁴ To deal with these two activities, the Commission has created two boards known respectively as the International St. Clair-Detroit Air Pollution Board and the International Air Pollution Advisory Board. The St. Clair-Detroit Board has currently mounted a field study of the problem.³⁵

The examples listed above concerning problems not related specifically to water resources illustrates the inherent flexibility provided by the Boundary Waters Treaty, "which enables the governments to refer for investigation any question arising between them" along the border.³⁶ It is obvious, however, that in matters of such complexity as the latest two references, it will be some time before the Commission can submit its report to the governments and the governments can act on the Commission's findings.³⁷

It is against this complex background that understandable impatience exists with regard to the present air pollution situation in the Detroit-Windsor area. Because of the absence of any mandatory character in the commission's conclusions under the present references, its recommendations will become effective only when adopted and carried

7, 1961, respectively, the commission was advised that, although the two governments were then not as yet in a position to comment on the commission's report as a whole, they authorized the commission to continue surveillance of air pollution from vessels in the Detroit River area. Accordingly the commission maintained a program of observation and control of vessel smoke on the Detroit River on a voluntary basis in cooperation with the governmental and shipping interests concerned. The commission at its October 1966 meeting agreed to terminate its vessel smoke surveillance program and to report to the two Governments the completion of its work under the 1949 Reference.

³³ M. Welsh & A. Heeney, *supra* note 1. On September 23, 1966, the governments of the United States and Canada requested the International Joint Commission to ascertain whether the air in the vicinity of Port Huron-Sarnia and Detroit-Windsor is being polluted on either side of the international boundary to an extent that is detrimental to the public health, safety or general welfare of citizens or property on the other side of the boundary. If the question is answered in the affirmative, the Commission is to indicate the sources and extent of the air pollution, and to recommend to the two governments the most practical preventive or remedial measures.

³⁴ Letter from Arthur C. Stern to George Rempe, March 4, 1968, on file in the University of Arizona College of Law Library.

³⁵ *Id.*

³⁶ M. Welsh & A. Heeney, *supra* note 1 at 6.

³⁷ FINAL PROJECT OUTLINE. The following general schedule of operations has been followed to date and will continue insofar as possible:

July 1, 1967

— Start of field preliminary surveys.

September-November, 1967

— Initiation of measurements.

December, 1968

— Completion of field investigation.

January-March, 1969

— Preparation of draft report.

April-May, 1969

— Completion and review of joint technical report.

June-September, 1969

— Editing and printing of joint technical report.

out by other bodies in the two countries.³⁸ It has been suggested by some that it would be simpler, if there were but one duly constituted authority to deal with international air pollution questions in their totality.³⁹ Such proposals do much credit to the enthusiasm and social awareness of their proponents but possibly do not take into account present realities and possibilities in the international and even national spheres. The whole rationale of the Boundary Waters Treaty is contrary to the "concept of an international body with administrative, let alone enforcement authority and functions."⁴⁰ According to the late chairman of the Canadian section, General A. G. McNaughton, "the very reason the International Joint Commission was not given policing powers was to prevent its becoming a super-power with authority beyond that of the national governments." Under its present structure, the commission is devoted to the thesis that "equitable solutions to common problems can be worked out by close cooperation between jurisdictions — local, national and international — under agreed principles and upon a foundation of mutual confidence."⁴¹

It is not suggested, however, that there is not room in both countries and in the Commission to improve the already effective framework for dealing with the urgent problems of air pollution generally and international pollution specifically. But if the International Joint Commission or any other single body is to regulate and control air pollution along the border, there will have to be a neoteric and fundamentally different treaty agreed upon by the two countries.⁴²

Such a treaty would have to establish a commission with authority to manage all aspects of the international air pollution problem or at least those of the Detroit area. There would have to be a clear definition of the powers of this body and there must be no question about its ability to take the necessary action to stop international air pollution.

³⁸ *Along the Common Frontier*, at 16.

³⁹ A. Heeney, *supra* note 19 at 6.

⁴⁰ *Id.* at 7.

⁴¹ *Along the Common Frontier*, at 17; Prime Minister Lester B. Pearson and President John F. Kennedy, *Joint Communique*, Hyannisport, Mass., May 10, 1963 ("While it is essential that there should be respect for the common border which symbolizes the independence and national identity of two countries, it is also important that this border should not be a barrier to cooperation which could benefit both of them. Wise cooperation across the border can enhance rather than diminish the sovereignty of each country by making it stronger and more prosperous than before").

⁴² *Along the Common Frontier*, at 16. On the limits of what can be done by treaty in the United States see *Geofray v. Riggs*, 133 U.S. 258, 266 (1960). But also consider the possibility that a treaty, exceeding the federal government's constitutional powers, might be valid at international law if it didn't appear void on its face. See Feidler & Dwan, *The Extent of the Treaty-Making Power*, 28 GEO. L.J. 184 (1939), and Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242 (1923). In making a new treaty, thought must also be given to possible Canadian constitutional limitations on delegating enforcement powers in the field of air pollution control to any authority other than the provinces. See generally Sabourin, *La participation des provinces canadiennes aux organisations internationales*, THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 75-99 (1965).

The commission established would need powers comparable to a domestic administrative or regulatory body, including the power to license and enforce.⁴³

The initial determination of the existence of an international problem would have to be within the jurisdiction of the international group. It would have the responsibility of studying the problem, determining the air standards, making recommendations for needed corrective action and finally seeing that this action is taken.

Once initial determination of a problem is made and technical investigative studies completed (this procedure could be modeled after the present International Joint Commission), the commission would set air pollution standards. This issue is particularly critical, since the effectiveness of the international body to alleviate boundary air pollution problems will be directly related to the standards adopted.⁴⁴ These standards obviously must be adequate to solve various pollution problems, but they must also have a degree of flexibility to be able to adjust to changing conditions in an area. It is, however, essential that the same standards be uniformly applied to both countries within the same airshed; differences in the emission standards allowed industries in the two countries, where all industries contribute to the same condition, would be discriminatory and unfair to those subjected to the higher standards.⁴⁵

Equally important to the question of proper standards is the determination of commission enforcement powers and the conditions under which they may be used.⁴⁶ In this area of enforcement, commission recommendations might first be made to appropriate local, province and state authorities. Under this coordinated approach, valuable cooperation might be achieved by according local agencies the first opportunity to take needed control and enforcement action. The commission would take remedial measures only when the lower agencies failed to do so within a reasonable time.

Leaving enforcement in the hands of local agencies conceivably could result in lack of uniformity, even if the standards to be applied were uniform. Differences in control approaches by the different local agencies, varying requirements for speed of compliance and inconsistent policies regarding allowance of variances could possibly retard any attempts for equal treatment of industries in different areas. One solution to this possibility would be to have the international body replace

⁴³ A. Heeney, *supra* note 19 at 6.

⁴⁴ J. Bregman, *The Case for an Interstate Air Pollution Control Program*, in *PROCEEDINGS: THIRD NATIONAL CONFERENCE ON AIR POLLUTION* 368, 370 (Public Health Service Pub. No. 1649, 1967).

⁴⁵ The principle of uniform standards is recognized in the 1967 Air Quality Act. Under the act, control program jurisdiction is established on the basis of airsheds as well as traditional governmental units.

⁴⁶ J. Bregman, *supra* note 44 at 369.

all other control agencies within its jurisdiction. This way the international body could act directly without first attempting to get local action.⁴⁷ This approach to the problem, however, has its obvious disadvantages. It would require abandonment of authority by local, province and state officials. This abandonment would certainly raise strong objections from lower agencies who are reluctant to give up their responsibilities without being given the opportunity to show that they can do the job.⁴⁸ Opponents to this approach feel that effective air pollution control, especially in a large industrial area, can and should be accomplished through local authorities. The possibility of inconsistent controls could be substantially eliminated by informal but well organized coordination among the various air pollution control agencies involved.⁴⁹

Another critical area in the establishment of such a commission, whether it acts directly or after the local authorities fail to do so, is the membership of the commission. The system used by the International Joint Commission would certainly provide rules and guidelines for the selection and duties of a new commission.⁵⁰ The representatives from each country would have to come onto the commission with the philosophy that they are concerned with the elimination of international problems, regardless of the nation from which they originate. A constructive spirit is essential and the persons appointed to the commission would have to have this attitude impressed upon them in order for the commission to operate fairly and effectively.⁵¹

Finally, whether the present system of the International Joint Commission is continued or whether a new system is devised by treaty, the attitude of the two countries is of the utmost importance. There must continue to be a desire by both countries to prevent international air pollution. The seriousness of the problem in the Detroit-Windsor and other areas makes it clear that there must be a special effort made to deal with the flow of international air pollution in the most effective way possible. As to the International Joint Commission it is believed

⁴⁷ *Id.* at 369.

⁴⁸ *Id.* at 369. Effective control of air pollution is the ultimate goal and past experience has shown that frequently local bodies are "somehow able to move effectively" when they cite the threat of action by a higher and less understanding commission, if they do not do the job themselves.

⁴⁹ *Id.* at 369.

⁵⁰ INTERNATIONAL JOINT COMMISSION UNITED STATES AND CANADA, RULES OF PROCEDURE AND TEXT OF TREATY (1965).

⁵¹ J. Bregman, *supra* note 44 at 369.

that, if the two governments have the will and provide the means to employ it to full capacity, "the Commission will be able in the future, even more substantially than in the past, to contribute to the solution of these problems."⁵² And as to any new system, it will be successful only if both countries enter into complete agreement in an unselfish, constructive spirit.⁵³

⁵² A. Heeney, *supra* note 19 at 7; M. Welsh & A. Heeney, *supra* note 1 (Generally the International Joint Commission's work and that of its international boards, has not been widely known except to Canadians and Americans immediately concerned with particular issues and to international lawyers. But, year after year for over a half a century, it has contributed substantially to the continuance of the friendly relations that exist between the United States and Canada by preventing disputes and settling differences along the common frontier and by facilitating the development and use of the water and air resources that they share).

⁵³ J. Bregman, *supra* note 44 at 370.