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"AND THE LION SHALL LIE DOWN WITH THE LAMB": UNITED STATES-CANADA CULTURAL RELATIONS IN A FREE TRADE ENVIRONMENT

BY JOYCE ZEMANS

At the heart of the discussion of Canada-United States relations in the cultural field is the fundamental difference in the two countries' views concerning the position of culture in a free-trade environment. Canada views culture and the cultural industries as the United States views national security — as a social good essential to its sovereignty and its capacity to preserve national values and its unique identity. In contrast, the United States, as the dominant world force in cultural trade, views the sector primarily on an economic basis and is committed to ending trade restrictions which infringe or are likely to limit its trading capacity. This is not surprising. Entertainment is the second-largest American export and the Americans know that their ability to export their culture is closely tied to their dominance in other domains.

THE CULTURAL INDUSTRIES "EXEMPTION"

In Canada, as in Europe and China, the United States is standing firm in its claim to unrestricted access to foreign markets and the profits associated with that access. The situation is particularly problematic in light of the Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA). Although Canadians have been assured that Article 2005, "the Canadian cultural industries exemption" (negotiated in the FTA and retained in the NAFTA) removed culture from the agreement, Article 2005(2), the "notwithstanding" clause, suggests that the cultural exemption may be less of an achievement than the Canadian government claimed when its negotiators rose from the bargaining table. In *Trade Liberalization and the Political Economy of Culture: An International Perspective on the FTA*, Graham Carr suggests that 2005(2) is particularly troubling since "it has long been a cardinal rule of Canadian diplomacy to avoid any linkage of issues in bilateral

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THE SOFTWOOD LUMBER DISPUTE

BY GERRY SHANNON

Clearly, it is time to seek a permanent solution to the recurring, damaging problem we have with the United States over softwood lumber exports. For well over ten years, we have found ourselves caught in the cross hairs of American lumber protectionists and of their very skilled trade lawyers in Washington — a coalition well able to pull all the political triggers necessary to do us in.

They failed in 1983 because their own quasi-judicial system found Canada innocent of subsidization of our industry — in other words, the

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dealings with the United States on the ground that the advantages in such arrangements would automatically redound to the Americans by virtue of their greater scope for retaliation." By consenting to the retaliation clause, Canada permitted the linking of the treatment of culture to other areas of the Agreement, thus establishing an enormously problematic precedent which goes far beyond the limits of the Agreement.

An American summary of the clause highlights its ambiguity and concludes, on the one hand, that "Canada faces no constraints on its ability to promote the development of Canadian culture through economic measures." It adds, on the other, that "[t]he United States can take measures of equivalent economic effect to respond to actions taken by Canada in the cultural area. The U.S. recognizes the importance to Canada of maintaining its cultural identity. At the same time, however, the U.S. wants to ensure that Canadian cultural policies do not constitute an unnecessary barrier to U.S. trade."

RELEVANT PROVISIONS OF THE FREE TRADE AGREEMENTS

FTA, ARTICLE 2005

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

NAFTA, ANNEX 2106 - CULTURAL INDUSTRIES

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

The fact that subsequent to the signing of the FTA the Conservative government backtracked or stalled on every cultural policy initiative on its agenda which could have been seen to threaten American interests, while at the same time capitulating to the American demand to reduce postal subsidies, strongly suggests that the government was afraid to challenge American interests or to open the Pandora's box of Article 2005. That the Mulroney period saw limited friction in this area had more to do with the Conservatives' acquiescence to the United States in cultural matters than with any real meeting of the minds on this subject. Acknowledging the problem during the 1993 election campaign, the Liberals stated that "[a] Liberal government would put the notwithstanding clause as an issue for discussion during the renegotiation process." At the same time, recognizing culture as a cornerstone of nation-building, they pledged to take action in the cultural domain both nationally and internationally. Their record, however, reveals a less-than-consistent approach, shifting between capitulation on the Ginn and Viacom deals to a stand-firm position on *Sports Illustrated* and split-run editions.

What is at stake in this discussion is Canadian cultural sovereignty and Canada's ability to create, produce, and disseminate its arts and cultural products.

At the time of the magazine industry and Country

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Music Television decisions, Mickey Kantor described Canada's actions as "concrete evidence of an increasing and disturbing trend in Canada toward the implementation of policies which are intended to protect Canadian industry by discriminating again legitimate U.S. broadcasting, publishing and copyright [interests]." Yet, as Donald Macdonald, Chair of the Royal Commission on Canada's Economic Future acknowledged: "[I]f it were left to market forces, there would be almost no room for Canadian production, however attractive those programs would be to Canadians. The harsh economics of the cultural business would dictate buying foreign which is generally to say American production at the very much lower cost." [Canadian Culture/Communications Industries Committee, *Free Trade and Cultural Identity: Will We Have Access to Our Own Markets?*, 1986, at 14.]

NAFTA exposes Canada's cultural industries, indeed its cultural policy as a whole, to the increasingly relentless challenge of American interests.

What is at stake in this discussion is Canadian cultural sovereignty and Canada's ability to create, produce, and disseminate its arts and cultural products. From the beginning, Canadian public policy has focussed on cultural development in Canada in the context of market forces which work against that development, and the recognition that public policy decisions, and not technological innovations alone, must determine the future of Canada's cultural identity. Given the current American climate, particularly in this pre-election period, there is little doubt that we are heading for continued confrontations. NAFTA exposes Canada's cultural industries, indeed its cultural policy as a whole, to the increasingly relentless challenge of American interests.

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THE SOFTWOOD LUMBER DISPUTE *from page 69*

system of stumpage whereby our provincial governments, as owners of the resource, charge forest companies a fee to cut down trees for lumber, was found not to be subsidized. The question of whether it was injurious to American commerce, therefore, did not arise.

They succeeded the second time in the American trade system in 1986 when the Commerce Department reversed itself, finding that domestic subsidies did in fact exist, and the International Trade Commission found them to be injurious. The decision was derided in Canada, and rightly so, as an artificial and contrived one, designed to meet the needs of the American lumber states and companies. A "solution to the lumber problem" was thought to be the price of approval on the part of some key United States senators to grant the American administration the famous Fast Track authority to launch the Canada-U.S. Free Trade negotiations. And we were right.

The objective of the architects of their strategy, the late Commerce Secretary Mac Baldridge, and the former United States Trade Representative Clayton Yeutter, was to get us to agree not to pursue either our GATT case — which was well advanced — or an appeal process, but rather to go for an out-of-court settlement.

And we did, when Canada agreed to impose a 15-percent tax on lumber exports — a move which was highly divisive in Canada. To speak to its merits:

1. It preserved a considerable amount of revenue in Canada (about $600 million a year, which otherwise would have gone to American coffers;
2. It averted an appeal process against the decision in American courts which would have taken about five years to resolve with no assurance of eventual victory;
3. It met the requirements of the two most important provincial softwood suppliers: British Columbia, by the far the largest, and Quebec; and
4. It was degressive and was to be reduced directly in relation to stumpage increases.

In 1992, Canada terminated the settlement on the grounds that stumpage fees had vastly increased in the key exporting provinces and, therefore, there was no basis for an export tax. The United States retaliated by imposing a 6.2-percent countervailing duty, an action which Canada argued before a binational panel was inconsistent with the United States' NAFTA obligations, and won the case. The United States was required to pay back some $800 million in duties which they had amassed. Even with a binding panel decision, this was not easily extracted from them.

[A]fter more than seven years into a free trade deal with the United States, the Americans are not really prepared to accept any serious pain.

Finally, in 1995, the American lumber coalition returned to the charge and once again coerced the Canadian

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