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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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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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government into levying an export tax, this time more convoluted and, in my view, fragile. Fragile because it puts the Canadian federal government into the export allocation game, and because it relies on the ability of the United States government to deliver on a promise that no new cases would be launched against Canadian lumber exports for five years. I, for one, do not know how this or a successor United States government can deliver on such a promise if an American company exercises its rights under United States law and, in good company, files a case against Canada one more time.

[W]e clearly do not have a national consensus or a national policy to deal with our softwood problem vis-à-vis the United States.

ESSENCE OF THE PROBLEM

What are the essential ingredients of the problem?

First, it must be apparent by now that, after more than seven years into a free trade deal with the United States, the Americans are not really prepared to accept any serious pain. The adjustment has been largely on Canada's side. When pain is felt in the United States, as it seems to be when Canadian lumber exports exceed around 30 percent of the American lumber market, they mobilize their vast political, legal, and financial resources and ensure that we are rolled back. The question of alleged and injurious subsidy on our side recurs and, even though they have been unable to establish it before the binational panels, they trumpet it and use our own internal split jurisdictions to ensure that somehow we ease their pain.

Second, there probably is no solution to be found in further bilateral talks. We always get roughed up in dealing alone with the Americans on issues which they deem to be critical to them. They simply have too many guns and they will persevere until they win.

Third, we clearly do not have a national consensus or a national policy to deal with our softwood problem vis-à-vis the United States. The trade and commerce powers of the federal government are there, but they were almost left in shreds during the 1996 skirmish, when at least two of the provinces rushed to Washington to make their own deals. We need to reassert the federal powers and federal leadership, but do so in a way that takes fully into account the needs and views of the provinces and industry as well as the overall Canadian requirements.

Fourth, we did attempt in the Uruguay Round of multilateral trade negotiations to deal with the issue of resource pricing in the context of the multilateral subsidy agreement, but did not succeed. Again, the underlying issue for both the Americans and ourselves was lumber and, unfortunately, we were not able at that time to mobilize sufficient support from other countries to get the Americans to agree on subsidy definitions on resource pricing which would have met our needs on softwood.

OPTIONS

The options then seem to be as follows:

First, continue to proceed on an *ad hoc* basis, knowing that when prices rise, or American suppliers of softwood lumber produce less than expected for environmental or other reasons, we will face new trade harassment. No one can say that, when that occurs, the next Canadian government will do better in presenting its case than its two predecessors.

A second option is to give in — to change our fee-for-tree system to emulate that of the United States — an auction system where the wood goes to the highest bidder. It must be remembered, of course, that stumpage is squarely in provincial jurisdiction, so provinces' acquiescence would be required.

Perhaps there is a way of pricing our timber resources which stops short of an auction, but which would better shield us from the American lumber protectionists.

A third option, which I think should be explored, is to launch two initiatives to resolve the issue. The first would be to discuss the issue at the national level in a federal government-led forum involving the provinces, industry, and labour. Perhaps there is a way of pricing our timber resources which stops short of an auction, but which would better shield us from the American lumber protectionists. One of the immediate issues to focus on would be our log export controls — which was the principal, if not the only, element of subsidy found by Commerce in 1992. It's worth a try.

The second initiative would be to propose to negotiate the broader issue of resource pricing in the next round of multilateral trade negotiations in the World Trade Organization. The agenda for the next round will be discussed at the Singapore December 1996 World Trade Organization Review Conference, where Trade Ministers will meet to discuss mutual priorities. This is an occasion where, if we carefully explored the ground in advance with important allies, we could launch a negotiating initiative designed to do what we were unable to achieve in the Uruguay Round — i.e., find a global solution to the resource-pricing issue which would meet our domestic and bilateral needs.

In this regard, it may be salutary to recall that our major trade policy objective in the Canada-United States Free Trade negotiations ten years ago was to establish definitions and rules that would clarify what was an unfair subsidy and what was a non-actionable one — that is, not subject to countervail. We could not do it because the Americans refused, although we did get Chapter 19 dispute settlement which has proven advantageous to us. On resource pricing, in particular, the United States insisted on including a provision that nothing in the Agreement could be a basis for undoing the Softwood Lumber Memorandum of Understanding.

In the Uruguay Round,

however, we did achieve a number of our key objectives on subsidies — rules satisfactory to Canada on subsidy definitions, which protected from attack subsidies in support of reducing regional disparity, in support of research and development, and in support of efforts to make industries environmentally sound. We won these gains because our interests and those of key allies, such as the European Union, converged.

Resolving these issues takes time. While we could not deal with resource pricing in our bilateral negotiations or in the Uruguay Round, we may well be able to do it next time if we can get our act together domestically and if we can conceive a workable strategy to develop a coalition of like-minded countries, as we did on the questions of regional disparity, research and development, and the environment.

No doubt, work is under way on such a strategy somewhere in the federal government.

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CULTURE AND LUMBER: FREE TRADE THE AMERICAN WAY

BY MAUDE BARLOW

The central argument put forward by the Mulroney Tories, when they entered negotiations for the Canada-United States Free Trade Agreement (FTA), was the need to come up with a common and binding set of rules to settle trade disputes between Canada and the United States. These would allow Canadian exporters to escape the arbitrary use of American trade-remedy laws governing anti-dumping and countervailing cases, and end years of trade skirmishes that had limited the access of Canadian goods to the American market.

It was agreed that, within seven years, a clear subsidies code would be completed, a promise Prime Minister Jean Chrétien repeated when he signed the North American Free Trade Agreement (NAFTA) in 1993. In fact, he said that Canada's continued support for free trade was conditional on developing these rules within the two years remaining of the original understanding.

HOLLOW PROMISES

The seven years have now come and gone and there is no sight of the promised rules, nor any prospect for them. It has become clear that, just as many of us feared, there never was any real intention of completing a binding code. All we have, and are ever likely to have, are dispute resolution panels that judge whether American laws have been correctly applied; the United States is free to change its laws when a panel does not rule in its favour.

In fact, International Trade Minister Art Eggleton recently admitted as much, saying that the current saw-off is the best we can hope for. Unfortunately for Canada, we continue to be on the losing end of most disputes which, if anything, have intensified since we first entered a free trade arrangement with the United States. Two cases in particular demonstrate the hollow nature of the promise to establish a more equitable system.

The stakes in the softwood lumber dispute are very high for Canada for it is our third-largest export, worth about $8 billion a year.

Our government recently agreed to significantly reduce exports or place an export tax on softwood lumber shipments to the United States, in spite of winning several consecutive trade panels. We gave in because each time it lost a dispute with Canada, the United States simply changed its law to favour its own industry, as it is allowed to do under the terms of the NAFTA.

The stakes in the softwood lumber dispute are very high for Canada for it is our third-largest export, worth about $8 billion a year. In fact, one of the reasons that the Canadian government wanted free trade in the first place was that it wished to avoid a repeat of the 1986 export tax Washington forced it to place on all softwood lumber exports to the United States. However, the deal has not been worth the paper it is written on to Canadian lumber producers.

In 1991, American trade authorities imposed a tariff on Canadian exports; Canada appealed before a binational trade panel and won, and the tariffs were removed. But the industry fought on, forcing the United States government to change the rules and making it more difficult for binational panels to overturn American tariff decisions. Canada entered negotiations knowing it now had less chance of winning another panel under the new rules. British Columbia decided to impose a provincial export quota instead of increasing stumpage fees and Ottawa made the export tax national.

The "deal" has not satisfied the American lumber industry. A former Canadian Ambassador to the World Trade Organization says that the deal will never last the five years of its term. Under the NAFTA rules, the industry can, and likely will, launch another challenge in the American courts.

CULTURAL EXEMPTION "VICTORY"

Another area of ostensible argument was culture. The Mulroney government claimed it had scored a great victory when it gained an "exemption" for Canadian culture in the FTA, and the Chrétien government pointed to the same "win" when it signed the NAFTA. But claims of victory on this front are hollow.

The terms on culture set out in the FTA were adopted by the NAFTA Annex 2106. While one article (FTA 2005.1) exempts the cultural industry from the agreement with the exception of tariff elimination, divesture of an indirect

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