SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 12 | Issue | Article 10

January 1987

Discussion after the Speeches of Joel Davidow and Lawson Hunter

Discussion

Follow this and additional works at: https://scholarlycommons.law.case.edu/cuslj

Part of the Transnational Law Commons

Recommended Citation

Discussion, *Discussion after the Speeches of Joel Davidow and Lawson Hunter*, 12 Can.-U.S. L.J. 75 (1987)
Available at: https://scholarlycommons.law.case.edu/cuslj/vol12/iss/10

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Discussion After The Speeches of Joel Davidow and Lawson Hunter

QUESTION, Professor King: There's a political world around us. It is conceivable, because we have elections, that there may be a change, at least in the United States, in 1988. I don't think that this is carved in stone. I wanted to ask Joel Davidow what he foresees as the possible changes in the event that there is a transfer of power from the Republicans to the Democrats?

We see people like Senator Metzenbaum, a Democrat from Ohio, introducing legislation on antitrust. We have many people who are vigilant in this area. I don't think that this is cast in concrete. What does this mean in terms of the future?

ANSWER, Mr. Davidow: There was a conference held at Airlie House early in 1987 which was roughly called an Antitrust Policy for a Democratic Administration. The fact that it required a whole conference and a lot of papers indicated that the issue was not simple. The critique of some of the past rules was sufficiently strong that some of them—such as, alleging conspiracies between a parent and a subsidiary, or of allowing firms that only have three percent of the market to be charged with attempt to monopolize—will probably never come back. The critique is so devastating that it doesn't matter what administration comes in. The old policies won't come back.

On the other hand, there is a hostility to antitrust enforcement, which is part of a hostility to government in the Reagan Administration, and I think it will change. The Reagan budget calls for a cut of 100 enforcement positions in the antitrust division of the Securities and Exchange Commission (S.E.C.). It is clear to me that the Democratic Congress will reject that cut and that a Democratic president would not be interested in cutting the size of antitrust.

President Reagan had proposed, or was willing to study, legislation that would do away with mandatory treble damages and replace them with discretionary damages or even no damages in certain cases. I think, except possibly in the area of foreign trade, that the Democratic Congress is not about to do away with treble damages, so there is no substantial difference there. Interestingly, because of some concern about takeover abuses, I think there may be some minor strengthening in the antitrust laws in regard to longer waiting periods under Scott or Rodino and a greater control on the use of special partnerships to buy up other companies, with the partnership avoiding the corporate regulation.

That, of course, could probably be done by the Federal Trade Commission on its own.

On merger control, I could foresee some minor differences. Merger control started as being involved largely with mergers that were threatening to become monopolies. At the high point of merger control in the U.S. Supreme Court, the government was able to break up a supermarket merger that involved perhaps eight percent of the market. The typical figure now is probably closer to 20% of the market. I would not expect to see that figure go back down very far, though there is perhaps a greater sensitivity on the part of democrats to giant size; that is, if you have two multibillion dollar oil companies with 14% of the market between them, would you sue them? I think maybe a Democratic president might and a Republican might not, although it is hard to say, because it depends on whether you look at the size or at the market share. So I would expect differences in resources and in spirit, but only minor differences in doctrine.

QUESTION, Mr. Herman: I have a question for either of the two speakers. In the context of the trade negotiations, there has been, as I understand it, consideration given to replacing anti-dumping measures with some alternative kind of procedure. Conceptually you could deal with anti-dumping in the Canada/U.S. context through competition law. Given what Lawson Hunter has said about some of the similarities on the substantive side—and I think the logic of his presentation is that you can harmonize the systems—the result could be to use antitrust and competition law as a means of dealing with the dumping problem.

Going back to the Canadian objectives in the free trade talks, one of the most important Canadian objectives is to try to reduce or eliminate the harassment effect of anti-dumping laws against Canadian exports. If you have some kind of North American competition law system, explicit in which is reciprocal access to the courts or the procedures of both countries to deal with anti-dumping problems through competition law, one immediately has to ask whether we have accomplished the Canadian objective; the objective of eliminating or reducing the harassment effect of aggressive U.S. entrepreneurs who like to litigate, or tend to like to litigate, as a corporate objective in dealing with competition.

I want to ask the question as to whether the kind of system that seems to be in vestige would solve the problem that Canadians are concerned about or would exacerbate that very problem?

ANSWER, Mr. Lawson Hunter: Well, I think there are two sides of the question, at least from my point of view. First is the question of substantive law; I think that you would have to harmonize the two price discrimination laws. The price discrimination laws in the competition context, imperfect though they are now, are better than the anti-dumping laws. They make more economic sense. But they are not identical and I would be inclined to make changes. However, I don't want to underesti-

mate the difficulty of doing that, because small businessmen generally view the price discrimination laws as their salvation.

Second, I would drop the cost justification rule in the U.S. law and rely only on a quantity test as the Canadian law does. I would add a meeting competition test to the Canadian law and I would add a requirement to the Canadian law that there be some impact on the competition. I think you could make changes that would make the laws similar.

Now, a cynic might say the impact of those changes would be to make the price discrimination laws less enforceable than they already are; but I guess if I sit back and say "what would be a sensible price discrimination law," those would be the things that I would examine.

If these changes were made, how would Canadian businessmen be able to use those laws? Will they be subject to litigation, which is more likely in the United States, in an attempt to enforce those laws, more so than they could do in a reciprocal way in Canada? I think the answer to that is yes, and that's why you have to temper any new laws with some adjustments to the institutional regime that in the United States encourages private litigation. Without that, I think there is certainly a prospect that U.S. businessmen would just switch from the anti-dumping laws to the price discrimination laws as a means to protect their position in the U.S. market.

Now, one of the reasons that I quoted those figures on the private cases and the trend in the use of the courts in the United States to enforce price discrimination laws is to show that they have been on the decline. They are less significant than they used to be; but nevertheless they are still significant figures.

On the Canadian side, if I were a Canadian businessman, I would say I want a little easier route to use the price discrimination laws in Canada. I don't know how you go about doing that. If you could arrive at some joint instititutional system that deals with costs and discovery, etc., you would have the same regime and the Canadian businessman would have equal access. I think you can harmonize the laws, but I think you have got to do something to make the playing field more level on the private enforcement side.

COMMENT, Mr, Davidow: I think it is surprising that in his answer, Lawson Hunter left out one of his favorite topics, which is jurisdiction. The advantage of the dumping law is that you can use it against a foreigner who has never entered your country. You might not get a hold of the foreigner, but the dumping laws are in rem statutes. If you are an American and you find that some Canadian is selling products below cost, and he's not in the United States to sue, just sue the goods.

By means of the dumping laws, you get two advantages. One, the government does the litigating for you, so you don't have to pay the legal fees after you have filed your petition. Two, you don't ever have to get a hold of the defendant. You just have to put a tariff on the goods. If you

did what is done in the Common Market and treated transborder sales as domestic sales not subject to the trade laws, you would create a different world; a world in which people in Canada or in the United States could sell into the other country at allegedly predatory or below costs prices and there would be no clear remedy.

I think the Americans would have some remedies in the Wilson Tariff Act or Section 337, if those were stated in fact, because both are, in a way, in rem statutes; although they have a much higher standard of injury. I'm not sure that Canada has a similar statute that could be used, in essense, against the goods, as opposed to against the named defendant. I think that, at the moment, there isn't a lot of groundwork laid for a substitute for the anti-dumping laws either way. You would either have to lay a groundwork for a substitute system of enforcement or make a major intellectual case that the issue was unimportant, that predatory pricing is too rare to care about. The alternative is to try to negotiate some really substantial changes, substantive tests in the anti-dumping laws.

COMMENT, Mr. Yosowitz: I think that you can work to eliminate price discrimination laws, which a lot of people in the United States think are silly, and you said you would harmonize them in such a way that would make them effective. I think also, though, that there is hardly any realistic possibility of changing the procedural laws or the U.S. antitrust laws in the context of a trade law negotiation. If you lower the tariffs and allow the Canadian businessmen to come in, they have to compete on the same basis as the U.S. businessmen. I don't think that you can have a special law that would affect only Canadians. I'm not sure if that's what you had in mind, but I don't think that you could effect that.

There are currently many types of U.S. attempts to lower treble damages from Division B class actions. All of this, in the context of the whole law, is being worked on right now. I don't think that you can have any particular separate actions that way.

QUESTION, Mr. David Hunter: My question touches upon a point Mr. Herman raised and to which Lawson Hunter responded. There have been several comments made by U.S. negotiators or officials that U.S. trade remedy law is not negotiable and I'm not sure if by that they mean on the substantive side or the procedural side. Presuming the trade remedy law to be nonnegotiable, what is left for negotiation?

ANSWER, Mr. Davidow: Reduction of tariffs.

QUESTION, Mr. David Hunter: And that's it?

ANSWER, Mr. Lawson Hunter: I think Mr. Davidow is right—reduction of tariffs and that's about it. My sense of the Canadian government's position is that reduction of tariffs is not enough and there has to be some accommodation to the protection side. Now, whether meaningful changes can be achieved is a good question. How important is it?

The man who commented just before seemed to say that—maybe he was only talking about antitrust—he wasn't worried about being harassed. My impression of some Canadian businesses is that they feel they would be harassed by the contingency protection system, if not the antitrust laws.

If that's not true, then we should not be worrying about it. But if there is the potential that either the contingency protection system or, if it doesn't apply to U.S./Canadian trade, the antitrust laws can be used to prevent the operation and freer operation of markets in the entry of each other's businesses to the other domestic economy, and then it just isn't going to work.

QUESTION, Mr. David Hunter: Just one follow up; is there a way to divide procedure from substance? I'm talking now in terms of CVD, where you attempted to define what acceptable subsidies are, while leaving the procedural mechanism in place.

ANSWER, Mr. Lawson Hunter: Well, on countervailing, there will be a later panel that is going to talk about that. It strikes me that there is no equivalent in the domestic competition law on subsidy because it is a governmental action. I think the substantive law there is more important than the dumping side where, in my view, you have to worry about the substantive law and the procedural law.

QUESTION, Mr. Magnus: I would just like to follow up on your response to Mr. Herman. Did I understand you to suggest that the price discrimination provisions are, you feel, more effective than the anti-dumping provisions? Is that because you see a lack of harmonization between the anti-dumping provisions in Canada and the United States?

QUESTION, Mr. Lawson Hunter: Did you say more effective?

ANSWER, Mr. Magnus: That's what I thought I understood you to say.

ANSWER, Mr. Lawson Hunter: I guess I would say they reflect better policy. They reflect the rationale of public policy in an economic sense. It makes more sense to me—even in their current state, which most people don't think is perfect—than do the anti-dumping laws. I think the anti-dumping laws are clearly and exclusively, as far as I can see, aimed at preventing competition based on international price discrimination and they don't make much economic sense.

COMMENT, Mr. Magnus: I can understand that from a policy standpoint. In terms of harmonization, though, if we were going price discrimination versus anti-dumping, I would suggest there is more harmony between the anti-dumping processes of the two countries than in price discrimination.

COMMENT, Mr. Lawson Hunter: You are right about that. The two anti-dumping laws are very clear.

QUESTION, Mr. Rosenthal: I found Mr. Davidow's criticism surprising; surprising that it would be difficult to get jurisdiction in the U.S.

law if you brought a price discrimination action against what would have been dumping before dumping was abolished in U.S./Canada trade.

The Supreme Court just recently came down with a decision in the Asaki case where the Court said if you sell goods intending that they be resold in the United States knowing that they will be resold in the United States, there is personal jurisdiction in the United States. I can see that Canadian law has to be modified to assert jurisdiction in the other way, but I don't see any need for a change in the U.S. law to assert personal jurisdiction over a price discriminator in the Northwest Territory for selling his goods in the United States.

ANSWER, Mr. Davidow: There was a remark by one of the presidents where he said, "Mr. Marshall has made his decision, now let him enforce it." You can have personal jurisdiction over a foreign seller in the limited sense that the court says that you can serve an empty chair and seat an empty chair, but that's also an empty purse.

COMMENT, Mr. Rosenthal: That's not true if you can get a default judgment that can block the goods from coming into the United States.

COMMENT, Mr. Davidow: Well, again, if you are looking for money for past damage because you are out of business and the foreigner is not present, you would have the possibility of seeking enforcement of the judgment in Canada. My understanding, however, is that the treatment of antitrust judgments is that the Hague Convention on the reciprocal enforcement of judgments is generally not accepted in antitrust cases. Of course, Canada has gone out of its way to suggest that it reserves the right not to give full faith and credit to antitrust judgments.

COMMENT, Mr. Rosenthal: Under its blocking law, the federal government reserves the right to frustrate the penal portion of the enforcement of the damage award, but I don't know of any Canadian law or policy which frustrates the enforcement of antitrust judgments across the board. Whether there is such a policy or not, I don't see that removing the dumping laws, while preserving the remedy which the 1921 Act dumping law provides— i.e., being able to prevent the goods from coming into the United States except at an acceptable nonprice discriminatory price— puts you any further back than you would be if you still had the dumping laws in place.

QUESTION, Mr. Bilder: I guess we all know that the antitrust laws in the past have been, particularly with the United States, a matter of territorial enforcement and controversy. I was wondering if either of the speakers could comment on the degree to which territorial enforcement has been used for harassment in the past. Aside from the questions of sensitivity and sovereignty, has the use of the antitrust laws by the U.S. government in private concerns really had a substantial impact on Canadian businesses? Has it been a major factor, in practical terms, in the past? Has it been used for harassment or is it mainly the other sort of issues—sovereignty, etc.—that have been involved in the conflict?

ANSWER, Mr. Davidow: First of all, I'm bewildered by the idea that U.S./Canadian trade is now the largest body of trade in the world. Seventy percent of the trade already occurs in a free trade zone. Will putting the other 30% in free trade zone change the competitive or antitrust implication at all? It doesn't change the nature or form of the trade or the basic legislative framework.

One can always make the opposite point that in a negotiation, there is an opportunity to harmonize or an opportunity to improve the kind of free trade that has been achieved. That is quite a different question than to say there is a great danger if you take away the other 30% of the tariffs, that it is going to create a different trading system. It isn't; it is the same trading system. Just a few more industries have lower tariffs than they had before.

About the word "harassment," I had thought the major issue was harassment through the use of U.S. trade laws. In fact, the Japanese have felt that there have been instances where, in a single product like television sets, they have been sued privately, then by the government, then under the dumping rules, and then under section 301. Every time the U.S. plaintiff has lost the case, he has picked another U.S. statute and sued again and ran up enormous legal bills for the Japanese. There have been some speeches, going back to one by Mr. Rosenthal, which suggest that a U.S. commitment to free trade should be a commitment against allowing or facilitating that kind of harassment.

A recent example is that the Federal Trade Commission, under the prodding of Commissioner Calvani, has opened an investigation of a cement dumping prosecution. I think it involved cement from Canada to the United States. The argument was that the anti-dumping claim was frivolous and that there should be a conspiracy prosecution of the Americans who filed a baseless action in order to harass their foreign competitors. The harassment, I think, comes out more in the trade laws and, in this case, antitrust laws become a weapon the other way.

QUESTION, Mr. Miller: I'm from the Department of Finance in Ottawa, and my question may reflect my nonlegal background. We have been making a distinction here between price discrimination and predation within the Competition Act; that is fairly easily distinguishable among the various provisions. On the U.S. side, I'm not so clear that the distinction can be quite so clearly made. In the case of the Sherman Act, I think section 2-A deals with pricing behavior and attempts to monopolize or obtain monopoly power. Is it also the case under the Robinson-Patman Act that if you were looking at the primary line competitive injury, that you would be talking about predation in that case as well?

ANSWER, Mr. Davidow: I'm not sure the word "predation" does a great deal for me, but I think the difference is whether you look at injury in a quantitative substantiation, or whether you look at threat to the market or threat of monopoly. Clearly the difference between the dumping law and the antitrust law, almost from the beginning, has been that the

dumping law's definition of injury has included something about more than minimal damages. For example, if you have three percent of the market, then you dump and get four, you can lose a dumping case if that one percent of the market is viewed as quantitatively substantial. On the other hand if somebody charged you, under an antitrust law, with having three percent of the market and then achieving four, you probably would win. Clearly the dumping law is not concerned with the ultimate problem of whether the consumer will face a monopoly. It is concerned with the immediate welfare of the domestic producer who had to compete with your price discrimination. In that sense, the dumping law is just infinitely stricter in its terms.

COMMENT, Professor King: I want to thank you both for an extremely far-reaching session.