State and Provincial Regulations with Cross-Border Impact

Katharine McGuire

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

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/cuslj/vol27/iss/41

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.
Thank you very much.

I want to talk not so much about the results of this dispute; I would like to talk about the way in which the State of Minnesota, and I think states generally, treat trade policy issues.

Mr. Southwick made a couple of references to the unique role of Governor Ventura. I have to tell you. We did a lot of research. First we watched his sci-fi flick. Governor Ventura got the girl in the end, but that was not particularly helpful. Then we watched a tribute video that the Wrestling Federation made and we learned his aphorism: Win when you can, lose when you must, and always cheat. Suddenly Minnesota's strategy was clear to us.

The question posed for this panel is: Does the North American Free Trade Agreement (NAFTA) dispute settlement work at the sub-national level? I would have to say in the case of the Ontario/Minnesota fish dispute, the answer is no. Why do I say that? I say that because this case represents a failure on the part of the state to distinguish between a trade problem and a political problem and to use economic development tools to resolve that political problem. As a result, the state did not get the result it desired. Minnesota seems to be happy for now, but this has been a problem that has existed for a long time. In my view, the state did not get the result it desired and certainly the province did not get the resource management cooperation it required.

Let me try to quickly draw you a picture of the situation in which we found ourselves. There are two large lakes with the Ontario/Minnesota border running through them: Rainy Lake, and the larger Lake of the Woods. For simplicity I am going to talk simply in terms of Lake of the Woods. The country is beautiful.

In terms of sports fishing, the overwhelming number of anglers on the lake come from the U.S. Many are day trippers, some camp on the Ontario side or stay in Ontario lodges, others stay in Minnesota lodges, clustered on
the edge of the border so that customers can fish in Ontario waters among our many islands.

If you look at a map of Lake of the Woods it looks, on the Ontario side, like many lakes because there are so many islands and peninsulas dividing it up. The U.S. side is really a huge bay. It is good for large tour boats, but it is not sheltered. So, for that reason, it is not as attractive for individual anglers.

The fish populations are distinct on the Ontario and Minnesota sides of the lake, and resource management objectives are very different. Minnesota, at the time of the dispute, was willing to consider stocking. Ontario wants to ensure natural regeneration. After all, the attractiveness of the Ontario side is its wildness. We are not going to manage it like an artificial fishpond.

At the time of the dispute a resident could take fourteen Walleye on the U.S. side and four on the Canadian side. Abuse has been a problem. U.S. Fish and Wildlife, together with Minnesota and Ontario, conducted a two-year sting operation, between 1989 and 1991 and the results were stunning: an illegal fish harvest equal to the total annual legal take. Federal and state charges were laid, property was seized, fines and lifetime bans on guiding imposed. After that sting operation, and in light of declining stocks on the Ontario side, Ontario and Minnesota spent a year, from 1992 to 1993, coming up with ways to manage pressures from competing interests in border waters.

While sport fishing is the overwhelming use on the U.S. side, on the Ontario side there was a small and declining commercial fishery, a significant aboriginal fishery, as well as sports fishing.

When you have strikingly different fishing regulations on an international border, you need coordinated enforcement. The fish, after all, are not marked with little flags to tell you which side of the lake they were caught on.

The central recommendation of the Ontario/Minnesota Task Force was to limit pressure from U.S. anglers in Ontario waters to eight thousand pounds and to provide

Ontario with a reciprocal eight thousand pounds from Minnesota waters. In other words, Ontario would allow a greater pressure from U.S. anglers than it otherwise would in its waters, in return for equivalent relief in Minnesota waters. Unfortunately, the Governor of Minnesota vetoed the task force recommendations, throwing the ball back to Ontario.

The problem then was this: A million-acre lake; two species in decline; a majority of U.S. anglers and a border you cannot cross to enforce your regulations. What to do?

Ontario decided to institute catch and release for anglers beyond its control, and to allow the taking of fish only where enforcement was possible-
Ontario. This was known as the overnight-stay requirement. This was part of a three-prong approach to conservation: a reduction in U.S. angler take, lower limits for residents and an acceleration of the trend among tourist operators to offer catch and release packages.

Certain Minnesota lodges were unhappy with the overnight stays, especially as its application was expanded to cover new portions of border waters. These lodges have been basing their livelihood on a resource that is not theirs. They have been unprepared to adapt to new business practices such as promoting catch and release as an activity or to press the state government to adopt the task force recommendations. They have also been slow to adapt their marketing to showcase the variety of fishing experience in the region. The Ontario catch and release regulations for U.S. anglers did not apply to all species, only Walleye and Sauger, which, admittedly, are two very popular species. However, there are eight other popular species in these waters, including Bass and, if you have ever watched the fishing channel, you will know that, in America, bass fishing is a multi-million dollar industry. Finally, these lodge operators were short sighted. There had been a collapse in the fishery in the 1970s. If there were another collapse in the fisheries, that would have a more devastating effect than catch and release regulations. So, in short, the Minnesota government was faced with a classic economic development problem: How to bring these lodge operators into the twenty-first century.

What did the state government do? They handed the problem to the federal government, supporting an allegation that what was at issue was a trade problem, not an economic development problem and a conservation problem. Their friendly federal government did the usual trade song and dance. United States Trade Representative (U.S.T.R.) ignored the facts, made no attempt to demonstrate there was a cross-border trade in services and blindly proceeded to adopt absurd positions.

The federal government was demanding not only the removal of Ontario's conservation measure but also a huge allocation of fish from the Ontario side of the lake. The heart of the matter remained: Minnesota lodges wanted unrestricted access to something that was not theirs.

Ontario had a problem. The Minnesota Department of Natural Resources was not really in the game. There was no chance for another attempt to forge cooperation, the kind of cooperation that is required to have two very different systems work across an international border.

The process we found ourselves in was a complete waste of time, from a resource-management perspective, and it was unsettling to residents in the area.
The overnight stay had worked. The stocks were improving and the public did not want to lose the momentum of the conservation effort.

We could have, with the stroke of a pen, resolved the trade issue by reducing the limit for all U.S. anglers, regardless of where they stayed, to zero across the board. However, I suspect that Minnesota anglers, especially the ones who do not stay at lodges, would not have been pleased with this approach. But it would have been, literally, what Minnesota was asking for: equal treatment regardless of where you stay.

But the problem with fishing regulations is this: you have to depend on voluntary compliance, particularly on a million-acre lake, and one with a history of poaching. So any alternative regulation had to be realistic in terms of human nature.

In the end we decided to impose uniform lower limits for non-residents. However, but this broader coverage meant lower limits, and the continuing prospect of zero limits should stocks decline.

How did we reach this conclusion? There are five stages in a trade dispute: Anger, denial, depression, bargaining and acceptance. Once you get your clients passed anger, they tend to stay in denial for a long, long time. Why is this? I think there is a general tendency amongst government policy makers to avoid conflict. Options are worked and reworked to achieve consensus. So, when faced with conflict, the first instinct of a policy maker is to flee.

In this particular case, we were dealing with the added reaction against the unmitigated gall of Minnesota to criticize a measure that had been implemented because the state itself had refused to face up to its responsibilities. If Minnesota wanted to base the health of its lodging operators on a foreign resource, then it had better be prepared to pay part of the cost of maintaining that resource.

On the face of it, the trade challenge was absurd; fishing licenses are a privilege, not a right. U.S. lodges offering services to U.S. citizens in the U.S. are not engaged in cross-border trade in services. It did not matter whether or not the trade challenge was ridiculous; the point was- it was going to take time and resources to settle the dispute.

Looking at the demands on our resource management staff, we had to ask the question: do we want to spend the time proving ourselves right or do we want to get on with the job of conservation? We chose the latter.

What was the trade challenge based on? It was not about the right of U.S. anglers to fish in Ontario waters. It is a generally accepted principle of international law that nations have absolute sovereignty over their natural resources, and the U.S. has recognized this principle in international treaties and in its own bilateral agreements. Yet, as I mentioned, U.S.T.R. insinuated
into the consultations demands for the allocation by Ontario of Ontario fish from Ontario waters to U.S. interests. This demand was in sharp contrast to long-standing, U.S. international policy.

The dispute was supposed to be about an alleged violation of the services obligations of the NAFTA. Even if a measure is not itself directed at the cross-border provision of services, the measure can still arguably violate the NAFTA, if it has the effect of limiting the cross-border provision of services. However, there first has to be a cross-border provision of services. U.S. lodges providing services to U.S. customers in the U.S. are not, by any stretch of the imagination, a cross-border service.

The U.S. could have argued that by limiting nonresident anglers to catch and release, in contrast to the treatment of anglers staying in Ontario, Ontario was discriminating against U.S. service providers. But anglers are not service providers. Even if you could find a relevant U.S. service provider, it is by no means clear that the Ontario catch and release regulations harmed him. Remember, U.S.-resident anglers could already catch fourteen Walleye in U.S. waters, more than three times the catch allowed to a U.S. angler staying in Ontario. That hardly places the U.S. service provider at a disadvantage in terms of competing for customers. Further, the catch and release regulations applied to only two of ten species. Therefore, it is unclear how the ability of U.S. lodges to attract customers was in any way adversely affected by the catch and release regulations. Their own business acumen is perhaps another story.

Was the process successful from a trade-policy perspective? Did it rival, in terms of interest, the discussion of “like products” in the World Trade Organization (WTO) asbestos case? Was it innovative in argument in the same way as Mexico’s appeal of the Metalclad arbitration?¹

In a word, no. As I said previously, there was no effort on the part of U.S.T.R. to demonstrate that this was a trade in services issue.

However, I will say this: The dispute did serve to sensitize our Ministry of Natural Resources to the services obligations of both the NAFTA and the WTO, and to strengthen their resolve to lobby for improvements in the way

¹ Metalclad Corp. v. The United Mexican States, No. L002904 S.C.B.C. (2001) (In 1997 the U.S. company, Metalclad Corporation, sued the Mexican Government for more than one hundred thirty million U.S. dollars because it could not start operating a hazardous waste confinement in the municipality of Guadalcazar, San Louis Potosi. The arbitration decision was issued on August 30, 2000 and the international tribunal determined that Mexico had violated articles 1110 and 1105 of NAFTA. Mexico challenged the arbitration decision. On May 2, 2001 Justice David Tysoe of the British Columbia Supreme Court set aside the arbitration panel’s decision in substantial part. The Court agreed with Mexico that the international tribunal had acted in excess of its jurisdiction in stating the Municipality of Guadalcazar and other Mexican authorities had violated the Agreement).
in which trade obligations intersect with environmental or resource-management objectives.

Was the process successful from the government perspective? From Ontario's perspective, no. The reason for that was, in our view, Minnesota ducked the issue. What they should have done was work with Ontario to address the conservation issue, which, in the long term, is the key to resolving their economic development problem. From the state's perspective, if the objective was short term, to end a client's complaint, then I think you can say the answer is, yes, it was successful. But, fundamentally, the client did not get what it wanted and the political problem is likely to come back.

It is no surprise to this audience to see a trade dispute used as an attempt to satisfy a political problem. I suppose it is ever thus. And even so-called winning a dispute does not always produce the desired results. One only had to think of the Canada and Brazil aircraft disputes which may be on a path to breaking all records for number of compliance panels.

The point I really want to make in this presentation is this: state governments need to start paying more attention to trade-policy issues.

We have heard throughout this conference of the amount of effort state governments put into trade as an economic development issue, as a trade promotion issue. But in terms of trade policy, there is a shortfall. As we have seen on numerous occasions, our counterparts in state governments are not currently equipped to deal with trade policy issues. This dispute underlined this one more time.

It is not anti-federal rhetoric to say that simply leaving it to the federal government is not in a state's best interest. It is simply not realistic to expect that the federal government is going to be sensitive to all state practices and priorities.

Finally, as I think this case illustrates, it is foolish for U.S. states to assume that they can resolve political and economic development issues by shunting them off to the federal government to be treated as a trade issue. The federal interest is to make the trade dispute go away, not to resolve the underlying problem. I think we are all aware that dispute settlement offers a limited avenue for actually resolving problems. Our advice would be that U.S. states would be wise to consider how often a so-called win will come back to haunt you.

Thanks very much.