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Discussion

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DISCUSSION AFTER THE SPEECHES OF J. MICHAEL ROBINSON AND JOHN RAGOSTA

COMMENT, MS. DALLMEYER: Michael, before we go to the floor, would you like a chance for a brief rebuttal?

COMMENT, MR. ROBINSON: Yes. I would like to just make a few small comments in response to John's presentation, which I thought was very mild and reasonable, compared to the belligerent and aggressive one I threw at John. I was trying to do an impression of Jack Valenti, I guess. I gather they are finally going to force him to retire. I met some nice young woman last year in Washington, at a North American Committee meeting, who I think is being groomed to be his successor. Or will he just die? I think they should pickle him. On films, Toronto and Vancouver do make a lot of movies, but they operate under the pretense that they are American cities. There is no movie made in Toronto or Vancouver where the setting is Toronto or Vancouver. They pretend to be other places.

There is a wonderful story about an American movie being made in Toronto. They were going to shoot on a Saturday morning in the downtown financial core, because there is nobody around at that time. There is nobody around there anyway, because we all live like moles underground. If you have ever been to Toronto, you will notice we have this underground city. In winter it is too cold to be up above ground, so we stay below ground. In the summer you will find us below ground because it is too hot. On Saturday, there is nobody on the streets. The city in the scene was supposed to be New York City. So, the film crew got out garbage and paper and spread it all around on the streets. Some guy from the sanitation department noticed it, called out a special crew, and they cleaned it all up overnight. So the film crew came out the next morning, and they were hopping mad. They had spent all of this money putting out the garbage, and the Canadians cleaned it up.

Anyway, the film *The Sweet Hereafter*,¹ the director of which won an award, is kind of interesting because it does have a Canadian setting. It was made entirely in Canada. Nobody figured that anybody would want to watch it anywhere else in the world other than in Canada. For some strange reason people did want to watch it, but the makers were smart enough to try to prepare for the foreign market by including little twists. For example, the film involves the crash of a school bus, and a bunch of children die. The film con-

¹ THE SWEET HEREAFTER (The Movie Network, 1997).

centrates on the reaction of the community to this very sad event. There is no violence other than the bus going through the ice. Of course, the speed is a very important thing. So, all of the speed limits are shown in miles per hour, not in kilometers, otherwise you could not sell the film in the United States. The Court procedures were all done in the American style. We know all of you who watch the television show *Law and Order*² would not tolerate some funny Canadian court procedure that was different from what was being done on that show.

Anyway, there were a lot of twists, but the idea of a lot of Canadian films being made in Canada about things Canadian is nonsense. I do agree with the statement that Jack Valenti is not Sheila Copps. Copps is an elected official and was the deputy prime minister of the country. But I am not sure she is more powerful than Jack Valenti. Jack Valenti can get a hell of a lot of checks written if you want to run for office, be it in California or nationally. Otherwise, fortunately, the extent of his rhetoric is less dramatic. His bark is worse than his bite, thank God; or else we would all be dead from Patriot missiles and F-16s. But I think he is a very powerful man.

I know John talked about clear definition. I agree in principle with that, absolutely. But I am not quite sure. I would like to hear his response on what it is that he wants better defined. Is it a better definition of what is culture? If so, let us work on it and add to it Canadian football. Is it defining the acceptable methods of protection of culture, something like what was done in the WTO on subsidies, red light, green light? I am not sure what he wants better defined, and I am sure he will tell me.

Regarding the so-called discrimination issue in the film industry because the director was American, I think John should have explained that, because that has to do with tax benefits for financing Canadian films. They are done on points. In the old days, I used to do some of this film financing, when Canada tried that as a way to stimulate the film industry. All of the, what you would call Scarsdale orthodontists and accountants, we would call them the North Toronto orthodontists and accountants, bought these film partnerships, and they all went bust.

But there was a tremendous industry that built up in Canada on how to make these qualifying Canadian films. There was even a lawyer from Montreal who taught a course at the UCLA film department, to call it what it really was, "How to Fleece Canadian Investors to Make Canadian Films." He smoked the biggest Cuban cigars I ever saw. He had a hard time getting in the United States with the Cuban cigars. That was one of our less successful attempts in stimulating the development of Canadian culture.

² *Law and Order* (NBC television drama, 1990-present).

What we ended up with was that Hollywood moved north and bought some passports, by which I mean Canadian citizens who were actors prepared to act in schlock movies, some of which went directly to late-night TV and nowhere else. They were prepared to act in them because that would get so many points, X many points. I can tell you right here, I told him to his face, Donald Sutherland was one of the worst. His passport was for sale. He made some horrible movies for some outrageous amounts of money. That chap taught a course down at UCLA., too.

On a different subject, the tax on sound tapes is not directed against the United States. It is directed against any country which is so backward in the development of its copyright law that it does not recognize artists' rights. The fact that the United States is the only major industrialized country which falls into that category is a problem for the United States; it is not Canada's problem. I do agree with John on the fact that technology is probably going to make this debate moot. But, Canadians are ingenious. We may figure out ways to regulate it.

I was just sitting here thinking about offering a free hockey stick to anyone who would agree to watch the CBC fifty percent of the time – that is the national Canadian broadcast – or buy *MacLean's* magazine at least once a month. That is our national magazine that competes with *Time*. I am sure that the government chaps will come up with better ideas than that.

Regarding Country Music Television, the only thing I would add to that, and it is a bit of a sorry case, is that Country Music Television knew the rules when it came into Canada, and the rules were that they could get bounced out if a Canadian wanted that channel. So, this was not a change of the law or a change of the rules. The rules were right there staring them in the face. They came in and made their money for a period of time. A Canadian competitor came along, and, following the rule, said he wanted the channel. As we all know, there were screams and shouts. Fortunately, Jack Valenti does not represent Country Music Television, so there were no threats of Patriot missiles. But there was the usual U.S./Canada settlement. The parties sat down and made a deal, and nobody had to go to court or go into arbitration or tribunals or anything else.

There was an initial response, which was legal and justified under the Free Trade Agreement. All of the Canadian artists' videos were bounced off American cable to help promote that settlement. So, of course, it was a true analogy about the elephant and the mouse, the Canadian artists were losing access to a market of 275 million, so there was not much choice but to settle.

As for Polygram, I could not agree with John more, that is a mess. I would recommend to you Larry Herman's column on this in *The Financial Post* for Wednesday, January 28, 1998, *Film Distribution Flare-Up Turns*

Friend Into Foes. It is a very good little two-column analysis of the problem. Larry said maybe we should let in the Dutchmen, Polygram, to dilute the power of Jack Valenti and the Six Sisters. I do not know really how that is going to turn out. It is part of the ongoing challenge of coming up with ways to protect the rights of Canada to encourage industries where Canadians talk to Canadians about things Canadian, without getting people so cross in the United States that they will use their legal right to retaliate.

QUESTION, MR. DUDLEY: I would like to apply for my hockey stick. I buy *MacLean's*, I watch the CBC, and I listen to Radio Canada. I guess my serious question is regarding the effect of technology on the question of Canadian culture.

Is there any concern in the United States about the effect of technology on American culture? In the Canadian context, there is a lot of culture; small places, small villages, writers and artists who reflect on the past and bring that into the future in a very simple way. This can be very vulnerable to the technology about which you are talking, by virtue of the fact that we live in Canada, and we get to watch all of the U.S. networks. We see some problem with PBS disappearing or sponsoring pledge drives to get money. Is this significant about our struggles, or is there perhaps a part of American culture which might be vulnerable to this technology as well?

ANSWER, MR. ROBINSON: I think there is a huge concern in the United States about this. Perhaps you do not hear about it. Think of the United States as a cultural juggernaut. You are actually talking about the Wal-Mart problem. Wal-Mart comes in, it homogenizes, and it wipes out the local drugstore, the local pharmacist, and so on.

The same is true on the cultural front. I will mention a couple of examples. Look at subcultures in the United States, because the United States is not a cultural monolith. Cajuns, people in Michigan, people in Maine, they are all losing their subculture with the homogenization of technology. Another example, which is of even more concern, is one that I mentioned last year. I mention it whenever I can because I think it is a truly troubling and frightening reality. There was a study done a number of years ago about an increase in the percentage of revenues that Hollywood makes abroad. What they discovered was that Hollywood encourages violence and sex, because those things translate. A car crash is the same in Japan, France, America, and England. Romance or humor are a little more difficult to translate. So, I think these are enormous problems that we all have to face.

I do not think they are uniquely Canadian problems. But, I think the Wal-Mart problem, for example, was essentially the same as the Borders bookstore problem. Borders Books was not allowed into Canada. The problem may be solved by helping the local bookstore or the local newsstand restrict

the magnitude of operations, enforcing the antitrust laws against preferable pricing arrangements that Borders and Barnes & Noble have been able to achieve. But, I would suggest, those are not uniquely Canadian problems.

QUESTION, MR. TUTTLE: Mr. Ragosta, you talked about the promotion of culture, rather than restricting it, and I wonder what you had in mind, although you may have just answered that question. I was also wondering, will that open up a whole new thicket of free trade issues that are always present when you talk about government subsidy?

ANSWER, MR. RAGOSTA: I think there are ways to promote culture that are not necessarily dependent upon subsidies, although subsidies are the most obvious way to do it. Subsidies raise a group of problems. In fact, I have read several articles about subsidies suggested by the WTO in the *Sports Illustrated* case.³ It is suggested that the subsidies decision was a silly decision. What the WTO said, in essence, was that Canadian posts cannot provide a postal subsidy to Canadian magazines by keeping their postal rates lower. If Heritage Canada wants to write checks to the Canadian magazines to make up for the postage difference, they are permitted to do that. I have seen several academic papers that say that is silly. That is because they are academics, and they do not really live in the real world. It is not silly. In fact, the designers of the GATT knew exactly what they were doing because it is a lot harder to write a check for a government. Passing regulations is easy. Writing a check that somebody can trace is more difficult. So, I am not opposed to subsidies in this area, setting aside whatever subsidies disciplines you have, which primarily do not apply, unless you are exporting into somebody's market and injuring their industry, it is not really a big issue here. But, subsidies do have to be direct subsidies, and that forces the very clear, direct question of, are we willing to pay for this cultural protection?

QUESTION, MR. HERMAN: I think that there is suprisingly more common ground between John and Michael than I would have thought possible at the outset. I think they presented the issues very well. I think that John Ragosta is right in this regard; cultural issues should not be addressed in terms of goods crossing the border. I think the panel sitting in Geneva for the periodicals case saw that there was something not right there. I think that was the right conclusion, if you applied the GATT rules to the measure to provide a good.

I do not think that the cultural issue should be addressed in terms of individual goods crossing the border. I think, and I would like to know what the panel thinks of this, including the issue of what information technology is abroad, that it should be addressed as a comprehensive issue.

³ *Canada-Certain Measures Concerning Periodicals*, WT/DS31/R, (Mar. 14, 1997).

I mentioned earlier on that there is a so-called cultural exemption in Article 20 of the GATT. That is just a flippant way of asking why should this not be an agenda item that has a more comprehensive review among governments, rather than dealing with it piecemeal as an issue affecting goods crossing the border.

ANSWER, MR. ROBINSON: John, does that plug into your desire for a better definition of culture? I am not trying to pass the buck to you. But, it sounds like this can be done best in the MAI, if we can get that cranked back up, because there is clearly a groundswell of pressure for cultural exemption. I think it comes from not only Canada, but also from France, the E.U., and from various other places where English is spoken, because that is the big fear. I tend to think, and I would appreciate the comments of my American colleagues on this, that the USTR can be persuaded to accept a cultural exemption for the MAI if it were decently defined.

ANSWER, MR. RAGOSTA: I think it is going to be very difficult to get the U.S. government to agree to these kind of things because we are very competitive in the area, and we can make a lot of money. It is a huge industry. It is the second most important export in the United States.

Now, with that reality, the general impression of trade policy in Washington, for better or for worse, does tend to be about wealth maximization. It tends to be about dollars. Therefore, to achieve this, I think definition is part of the problem, and I think it is very difficult. One of the things that worries me about definitions is that you get into governments defining culture, and I think that is a very dangerous business. The definition paradigm that I have been able to come up with is the difference between distribution and content. I do not know whether that potentially poses a way to craft a cultural exemption that would be viewed as narrow enough so as to not undermine other agreements.

The second thing is the price. While this is something that Canada and France want very much, the United States has no interest in it. Therefore, the United States is going to ask for some things they want that might not otherwise fit so neatly into an agreement, such as environmental restrictions or other restrictions. Because, as I did say, when you tend to move away from the paradigm, the way we have created our trade rules, when you move away from the paragon of national treatment and wealth maximization and free trade, there is a cost, so there would be a trade-off in it.

Is it possible? I do not think it is impossible. The MAI discussions were vacuous in this regard, so I have not seen any serious movement in that direction.

COMMENT, MR. ROBINSON: The problem I see, John, although I like the idea initially, is trying to work on the difference between distribution and

content, while leaving distribution alone. Is it the distribution profits that make the money that goes into the content for the next film, book, or whatever? This is, of course, the crux of the problem that Ms. Copps is trying to address in Canada. The government discussion paper on this published by Canada not long ago says that if we cannot somehow skim off enough of those profits that are now going back to the United States from the distribution of various films, there is never going to be enough money to make Canadian films.⁴ That is unless, as you say, we just write the checks. So, it is an ongoing problem. I am not sure that distribution versus content distinctions would really work.

QUESTION, MR. ROSENTHAL: A few questions and a comment. First of all, Jack Valenti is involved in the distribution of all American films in many parts of world. Is there nothing that this subtle man has done that would not be subject to a valid antitrust attack under laws and jurisdictions like Canada? That is question number one.

Number two, I am outraged about the blunted employment opportunities for your daughter because I like ballet, and I want to see meritorious dancers dancing in the United States. Would it not be helpful to work on that issue, rather than to worry about some of the other issues that are working here, because that is profoundly disturbing under principles relative to greater free movement of employment in North America.

Third, part of what is missing in this discussion, which I found fascinating, is an historical perspective. Canada's problem and France's problem has been analyzed poetically by people like the author of *Tristes Tropiques*.⁵ The history of humankind is the history of the emergence and destruction of cultures. Much that is valuable is lost, but the one thing that is so important to our democratic system in both the United States and Canada is the free movement of ideas, and not trying to tax or burden the dissemination of ideas. It strikes me as profoundly un-democratic to try to regulate this area.

Because so much of the political philosophy of John Stuart Mill is embedded in our two political systems, and that is why I care deeply about your daughter's difficulty in finding jobs in the United States, we believe that our democracies will prosper if our people have access to other ideas. We do not try to set up boundaries and definitions of what forms of expression are permissible enough.

ANSWER, MR. ROBINSON: Let me take this one first, John, because Doug mentioned my daughter. One law firm in New York and two in Wash-

⁴ *A Review of Canadian Feature Film Policy* (discussion paper, Canadian Heritage, Feb. 1998).

⁵ CLAUDE LÉVI-STRAUSS, *TRISTES TROPIQUES* (John Russell trans., Atheneum Books 1963).

ington benefited significantly from my attempting to solve this problem in a personal context. I hired them, but they could do nothing because the INS has been lobbied by the U.S. Dancers Union, and the door is closed. I was told of one chap whose daughter had been offered a contract at the Los Angeles Ballet, which I think has subsequently folded. He was a cabinet minister of Canada. He hired a lobbyist on the Hill, and I am told that he got a green card for his daughter. That was back in the days when, if she had a contract in her hand and a green card, they could not block her entry. It cost him one hundred and fifty grand, real money, not Canadian.

So, it is a real problem. On the second point, I agree with you completely. There are a lot of people in Canada who are very worried that cultural protectionism is, in fact, trying to put up a border to ideas and thought, and we have to be really, really careful about not doing that.

I tend to say, look, we have to write the checks. Canadians have to belly up if we want a Canadian culture. If we want Stratford, if we want the CBC, and if we want the National Ballet Company, we have to write the checks and leave the borders open, but we have to make sure that quality continues to be there for that particular thing we want.

I do not know what you do about *MacLean's*. I guess you could keep subsidizing it. I read *MacLean's*. The news is about a week stale, but there are Canadian items there that I cannot get anywhere else.

COMMENT, MR. ROSENTHAL: I am indebted to you, Michael, for revealing to me, in the context of your invitation to Charlene Barshefsky, that Shakespeare was Canadian and a part of Canadian culture. I had not realized that.

COMMENT, MR. ROBINSON: It is the Shakespeare Festival, which I guess is now the largest festival of its kind. It is even bigger than the annual Stratford Shakespearean Festival in England. If you have not been there, I recommend it to you. About forty-five percent of the people who attend are from the United States.

COMMENT, MR. ROSENTHAL: Well, I did not think that Shakespeare was Canadian.

COMMENT, MR. RAGOSTA: First of all, with respect to Jack Valenti, as you no doubt know, United International Pictures (UIP), which distributes films in Europe, is only third largest among the big film distributors, and UIP is being challenged by the Europeans. They lost their exemption, so there are things that can be done. And beyond that, I would be ill-advised to comment about Jack Valenti's efforts worldwide.

On the issue of Michael's daughter, I think it goes to another point. It does go to the content point. It goes to the danger of regulating content in the points you raised. It also goes, fundamentally, and perhaps some our Cana-

dian friends will start to see the cost of some of the things that I have suggested earlier, to the point that trade is not just about wealth maximization and what we find so offensive.

I have no idea what the regulations are. I find the whole problem absurd. I can only think of the person who sued the State Department for applying discriminatory means on the issuing of visas from Argentina and won. I cannot believe the INS could withstand a challenge to restrict somebody based on their being Canadian. I do not doubt that the labor unions might have tied up access to dancers, which has nothing to do with Canada. I mean, do not take any offense personally, it is just the unions. But, there is something else that strikes us about that, and that is the personal injustice of it all.

And that goes to one of my points, that trade is not, and it never has been, solely about wealth maximization. Sometimes, our trade rules deal with justice to the individual, and that is why, when you tell me the United States has access to eighty percent of Canadian shelf space on magazines and ninety-five percent of films, that does not really answer the question of whether or not individual performers, individual printers, individual producers, or individual actors are being denied in an unjust manner. Access was the issue in Country Music Television. I think the law was there all along, but there was a tone of extraordinary injustice in the whole thing. Sometimes, the trade rules are about that as well.

