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## EXTRATERRITORIAL SANCTIONS IN THE CANADA/U.S. CONTEXT – A CANADIAN PERSPECTIVE

*Barry R. Campbell\**

It is a great pleasure to be here at this podium. The last time I was in this room was to judge a moot. On that occasion, I was robed as a judge, so I hope I will receive the same deference this morning as I received then!

Art Downey and I were concerned about a Saturday morning panel. How could we make things interesting? We decided on Saturday morning television – cartoons in fact.

CBC-TV – The National, March 11, 1998, 10:19 p.m.:

Peter Mansbridge: Some lawmakers in Washington have taken another swipe at Canada over Cuba. Last week a congressional report accused Canadian companies in Cuba of exploiting slave labour. Today, supporters of the law that aims to punish businesses that invest in Cuba repeated that charge, then went further suggesting racial motivation. One Congressman said Canada is more forceful condemning black dictators in African countries than in the way it deals with Fidel Castro.

Lincoln Diaz-Balart: [T]o the Canadians, for example, who have been outspoken leaders in seeking sanctions against the Nigerian dictatorship, it's as though it is evil for a black man to impose a dictatorship on a black population, but it seems as though by the Canadian policy it's all right for a white man, son of a Spanish immigrant who went to Cuba to fight against the Cuban insurrection. It seems as though it is all right, a white man to enslave mixed people. There is a total double standard.

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\* Barry Campbell served as a Member of the Parliament of Canada from 1993 to 1997. He served two years as Vice Chair of the House of Commons Standing Committee on Finance and two years as Chair of the Greater Toronto Federal Liberal Caucus. From January 1996 to June 1997, he served as Parliamentary Secretary to the Minister of Finance. Mr. Campbell graduated from McGill University, McGill Law School (LL.B. 1975, BCL 1976), and Harvard Law School (LL.M. 1977).

Peter Mansbridge: The Congressman's comments fell on the eye of the second anniversary of the Helms-Burton law.<sup>1</sup>

The rhetoric has become extreme. Canadian companies have been accused of enslaving labourers, fomenting prostitution, and now there is a charge of racism. These are serious allegations. We wondered – who is Congressman Diaz-Balart? Where was he educated? The answer is *right here* at Case Western Reserve Law School! So Canadians have serious problems because we are up against someone educated at Case!

Now that I have your attention, I am delighted to have the opportunity to speak about extraterritoriality.

Extraterritoriality has been good to me. My thesis at Harvard was about the first attempt to blunt (by bilateral agreement) the long arm of United States law. The topic was the Canada-United States Antitrust Notification and Consultation Procedure. I am so old now that I remember when discussions about extraterritoriality concerned antitrust. I have file cabinets full of cases, articles, tomes, and miscellaneous amicus briefs on the topic. As a young lawyer, I helped draft Canada's first blocking statute (at the time of the uranium cartel litigation) and later assisted in the drafting of regulations implementing U.N. sanctions against Iraq in Canada, and I participated in the U.N. claims procedure after the conclusion of the Gulf War as well. So I have been around this issue for a long time and it is comforting, returning to the private sector, to discover it is still with us.

Some may wonder if we have made any progress at all in helping the United States to understand Canada's perspective on extraterritoriality. Let me read you something:

Our independent world needs accepted rules of the game in extraterritoriality. I am hopeful for the future. Lots of good positive work is being done ... we are hopeful the results will represent a significant step away from the unilateralism and towards a regime based upon mutual accommodation. But a good deal more work by international groups of lawyers and policy-makers is very badly needed.<sup>2</sup>

Canada's Ambassador to the United States spoke these words in 1982. Those words could have been written today.

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<sup>1</sup> Interview with Rep. Lincoln Diaz-Balart (D-FL), *The National*, CBC-TV, Mar. 11, 1998.

<sup>2</sup> Ambassador Allan E. Gotlieb, Address at the New York Int'l Assoc. (Nov. 12, 1982).

But in fairness, the discussion has evolved. There has been progress over the last twenty years. First, we used to talk about “territoriality,” “objective territoriality,” “sovereign compulsion,” “effects tests,” and “comity.” Now, in order to discuss extraterritoriality, you do not need any special vocabulary or apparently much education! Second, we have gone from concern about the limits of authority over American-owned foreign subsidiaries and concern about the “effects” of activities of foreign entities on the United States, to sanctions against foreign companies for acts in foreign countries with the most tenuous of links to the United States.

The premise that underlies Helms-Burton opens a virtual Pandora’s Box. My former parliamentary colleague, John Godfrey, has introduced a piece of legislation that parallels Helms-Burton and seeks compensation for the confiscation of pre-Revolutionary property! Soon, I suppose, we will see claims against Italy arising out of Rome’s sacking of Carthage!

Today, in fact, we are discussing old problems in new ways. The rules-based system we have set in place in recent years forces countries like the United States to justify unilateral acts in the context of multilateral agreements, and raises the spectre of using new dispute resolution mechanisms to address old concerns.

Canada and the United States, so often on the same wavelength on so many issues, are miles apart on extraterritoriality, unilateral sanctions, and Helms-Burton in particular. Why is this? There are several reasons: First – for Canada, extraterritoriality is not a theoretical issue – it is real. Canada is a major trading nation, with very high levels of American direct investment – so actions affecting trade and international commerce have a significant impact on Canada and on Canadian companies. Second – Canada and the United States have normal disagreements over foreign policy and appropriate foreign policy tools – and both nations are inconsistent here. For instance, both speak about a link between human rights and trade – unless to do otherwise suits particular interests at a given time. Third – while we agree that effective enforcement sometimes requires extraterritorial reach, Canada often sees the United States as attempting to drag Canada into its domestic politics – its obsessions. Fourth – Canada’s colonial past, its particular evolution, its small size, and dependence on trade makes Canada somewhat reticent about how it tries to accomplish its goals.

Canadians are weary and tired of this fight with the United States. We hoped that bilateral agreements, understandings, or convergence would end it. We hoped that multilateral pressure, agreements, and procedures would cause the United States to change its ways. We hoped the E.U. challenge under the WTO would teach the Americans a lesson. We even hoped that the proposed Multilateral Agreement on Investment would result in agreed upon

rules governing investment and the end to Helms-Burton-type actions. Canada filed countless amicus briefs opposing extraterritorial reach and unilateralism. But perhaps we never heard the United States when it said it would never agree to surrender its right to act unilaterally.

Helms-Burton is particularly irksome for Canadians. We just do not understand it! Perhaps you will permit this foreigner, a keen observer of the United States, some observations on Helms-Burton.

Helms-Burton must be seen in a larger context. Since World War I, the United States has imposed sanctions 115 times – more than half of these cases have arisen since 1993. This is curious since this has been a time when American power is virtually unchallenged. Is it a new insecurity since 1993 or is it that you can get away with more of this now?

Sanctions are, some say, driven by local politics and ethnic constituencies. But with regard to Cuba, something else may be going on. One hundred years ago, the United States was just as obsessed with Cuba and there were no Cuban-American Congressmen educated at Case Western Reserve! One hundred years ago, the press was full of calls for intervention in Cuba. One hundred years ago *tonight*, a joint resolution of House and Senate stated that: “people of Cuba are and of right ought to be free!”

Incidentally, a newspaper article on March 13, 1898 suggested the answer for Cuba lay in an arrangement with the United States similar to that which Canada enjoyed with Great Britain! One hundred years ago, the United States’ Cuban policy was about regional power, spheres of influence, hegemony – good and legitimate 19<sup>th</sup> century foreign policy motivations. The same may underlie the current Cuban policy.

In conclusion, I observe with sadness that today in the United States there is no credible leadership to counter what some have called a new isolationism. The United States appears prepared to cut itself off from an ever-lengthening list of countries. There is also no credible voice to promote the open trading system that has so benefited the United States since the end of World War II. Business will not lead because it might look insensitive to certain constituencies, and this President will not or can not lead.

Answers are elusive. But watch out, the Pope is now engaged in the Cuban issue and this has resulted in a welcome tempering of American sanctions against Cuba. We should remember the fall of the Soviet Union; the Pope played a role in that. So I may have to put my faith in him to lead us out of this problem.

We in Canada remain, years into this discussion with you, somewhat bemused, somewhat irritated, somewhat perplexed, and awfully weary. But it keeps us busy speaking at conferences such as this one, and I am happy for the opportunity. I do wonder, however, if in the year 2098, we will be here

again. Professor King would be here as he has always been, chairing this forum, where we may still be discussing what Senator Helms has been up to. I trust Professor King will stick around as long as Senator Helms does. We may still be here one hundred years hence, because I am not sure we really understand each other yet.

