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THE CULTURAL INDUSTRIES EXEMPTION FROM NAFTA - - ITS PARAMETERS

*John A. Ragosta**

I. INTRODUCTION

I have been asked to take a U.S. perspective on the cultural dispute and the parameters of the cultural sections of NAFTA. Of course, it is hard to have a U.S./Canada cultural discussion without having an American present. I have been appointed to that role. It is a role that I will take readily because of the difference in the perception of this issue held by Americans and Canadians. (In fact, I hate that distinction, America versus Canada. I always think of Canadians as Americans as well.) Still, with such diverging perspectives in the United States and Canada on cultural issues, there are, admittedly, some fundamental differences between the two.

Canada is hardly a monolith in terms of its perspective on these issues, but it is difficult for people in the United States to understand even the general issue particularly well. So let us start with the basics. Cultural protectionism is alive and well in Canada. All of the Canadian folks in the audience know exactly what I am talking about. For those of you who are U.S. citizens, you cannot go to Canada and watch HBO on TV. You cannot see MTV. You cannot see Disney. You cannot see ESPN -- Canada's culture, of course, is threatened by ESPN. Borders Books is not allowed in Canada, not because of a lack of Canadian content, but because the checks from the dividends at the end of the month go to U.S. owners. *Sports Illustrated* threatened Canada's culture so much that they decided it had to be thrown out. Movie distribution has to be controlled by Canadians. There is also a threatened film levy which would take taxes on U.S. films rented at video stores, and return them to Canadian artists. All, allegedly, in the name of protecting Canada's fragile culture.

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Remember what happened with Country Music Television? We are talking country music here -- guitars and haystacks. Country Music Television had been operating in Canada for ten years. A Canadian entrepreneur recognized that Canadian law specifies that if a Canadian service is available in the same format, the Canadian Radio-Television and Telecommunications Commission (CRTC), the Canadian counterpart of the FCC, can remove the U.S. channel in favor of the Canadian channel. So, this very enterprising Canadian went to Country Music Television and said, "Look, you are going to give me part of Country Music Television." CMT, being a group of Tennesseans, showed him the door. He continued, "No, you do not understand, you are going to give me part of Country Music Television, or I will take all of it." CMT again proceeded to show him to the door with some select words. In no time at all, the entrepreneur came up with a format for New Country Network which was, quite simply, a clone of Country Music Television. (It is not difficult to make a twenty-four-hour video music station, by the way. The artists give you the videos. You need a mixer and you need a satellite uplink. That is all it takes. It is very simple. It does not take a lot of cash and it certainly does not take a lot of creativity when somebody else has created a successful format for you.) The entrepreneur took this Canadian clone, went to the CRTC, and got Country Music Television thrown out of Canada after ten years of service. The CRTC was quite proud of what it did. In fact, it said that it did not deny that what it had done was discriminatory nor that it had "loaded the dice" in favor of the Canadian producers. So here you have a seemingly harmless system, of cultural protection and it turns out to be a very exclusive, and very protectionist trade measure, in any kind of normal international trade perspective.

Before I am accused again, as I am often, of being a cultural troglodyte, let us stop for a moment and recognize a few things. First of all, there clearly is a difference between the Canadian and U.S. perspectives on protection of national culture. I remember writing a paper for one of my partners on the Free Trade Agreement (FTA), before it was an FTA, back in 1987 which I entitled, *Canadian Paranoia and U.S. Indifference — The Negotiations of the FTA*. He changed the title.

Why are these issues so important in Canada and yet receive so little exposure in the United States? There is a simple reason for that: size. Size is always an issue. People on Prince Edward Island are consistently accusing people in Ontario of ignoring their interests and ignoring what happens in the "smaller" areas of the country. So, similarly, because of the market sizes, there is much less focus on these issues in the United States than there is in Canada. Secondly, there is also a

philosophy in the United States that international trade is somehow solely about wealth maximization. Let me immediately say that I do not share this view. International trade is not, and never has been, simply about wealth maximization. Wealth maximization is, however, the basis behind a U.S. philosophy that does not consider protection of culture part of legitimate international trade rules. My own view is that a country has every right to protect its culture, but such protection comes at a cost.

II. THE CULTURAL PROVISIONS OF THE NAFTA

What do the cultural provisions in the NAFTA really do? Let me suggest that, to understand the actual language of the NAFTA, you ought to think about three things: definition, balance, and discrimination.

In terms of definition, what does it mean to talk about cultural industries? The NAFTA includes a definition that talks about publication, distribution, or sale of books, magazines, periodicals, or newspapers; production, distribution, sale, or exhibition of film or video recording, or audio or video music recordings; publication, distribution, or sale of music, radio communications, television, cable broadcasting, radio undertakings, and all satellite programming and broadcast network services. This is a definition which is, ironically, overly broad and under-inclusive at the same time. Is this definition really what culture is about?

I happened to read in the *Washington Post* this morning about the continuing disputes in Western Canada among the Native Americans, and particularly in the Hadai nation. A Minister of the Council of Hadai Nations, discussing the problems they are facing in British Columbia, said, "There is a perception of the general irrelevance of aboriginal culture. It's a pretty sad state of affairs. We haven't gone anywhere, we still exist, and we still want to find a relationship with Canada that's balanced." This is hardly the time or the place to address aboriginal issues in Canada. They are immense; they are very complex; they are difficult.

Does this suggest, however, that Native American issues are defined as cultural issues as well? It sounds valid, but what does it mean? Does it imply that Native Americans can discriminate against Canadian products or services? Similarly, in the United States, is it part of culture to have large cars and light beer? Perhaps not. Is it part of U.S. culture to have steel? Where I grew up it was. Is it part of culture to have farms and wheat? Certainly the "cultural" aspects of maintaining farms and wheat served as major motivating factors in the establishment of the

European CAP program, and they have a lengthy and a very reputable lifespan from Jeffersonian ideas of the agrarian ideal. But are these legitimate cultural issues which can justify trade discrimination?

Ron Atkey, in his article discussing culture, defined culture in the Canadian sense; as how Canadians are different from Americans. He ultimately defined Canadian culture by using the term American. He said Canadians were more polite and less aggressive. (Well, today's panel might suggest that is true.) He went on to describe Canadian culture as accommodating bilingualism, embracing multiculturalism, finding strength in diversity, resourceful, traditional, and committed to peace, order, and good government. I am offended. Canadians, but not Americans, are multicultural? Only Canadians embrace multiculturalism and find strength in diversity? I might as well stand up here and tell you that to define U.S. culture is to define what Canadian culture is not -- it is energetic, creative, and capable. That would be atrocious. It would be inaccurate. I suggest to you that when governments start defining culture and then use culture as a means of economic protectionism, it is a very funny business -- a very ill-defined business. In general, as you can see, there is grave danger in defining culture in government documents.

The second issue to consider, and this is one quite in dispute, is balance. It is one thing to say that culture is a legitimate goal; it is another to say it must be balanced and it must be paid for. In the FTA, Canada could protect, essentially, whatever it wanted, culture-wise. Frankly, the terms were drafted in such a way that Canada not only could protect culture, but it could define it too. Yet this freedom to protect and define was restricted by the stipulation that Canada was going to pay for any protective measures it sought, potentially through U.S. retaliation. As a result, Canada could not take overly aggressive action to throw out U.S. interests, recognizing that it might be subject to retaliation. Unfortunately, even though NAFTA incorporates the FTA provisions on culture, this simple recognition of balance somehow got confused in the NAFTA. What remains is a major dispute that has not fully erupted yet between the breadth of that trade-off -- that you can do what you want, but you have to pay for it -- in the FTA and the NAFTA. (This was an issue in the CMT dispute but it never reached dispute settlement.)

What Canadian government officials read the NAFTA to mean is that only issues covered in the FTA are covered in the NAFTA with respect to cultural provisions. What the United States reads it to mean is that culture, as in the FTA, can be protected but it will have to be paid for -- the FTA provisions applying to all "culture" were simply trans-

ferred.

So what does NAFTA really mean? The FTA did not cover intellectual property and it did not cover all services. The question is, then, if Canada discriminates against a U.S. service or intellectual property owner on cultural grounds, is there a right of retaliation? The U.S. interpretation is yes; the Canadian interpretation is no. That is an extremely important issue. Is there balance? Is there a natural constraint on abuse of the cultural provision by permitting retaliation?

The system to date actually has worked quite well to avoid disputes on this issue and on culture in general, because there has been a quiet status quo or a sort of "No Man's Land." Both governments have disagreed about exactly how the cultural terms should be interpreted, but both governments have been loathe to really force the issue. In fact, when the Country Music Television dispute came along, I understand that the Canadian government officials were apoplectic. The idea of having to go before an FTA panel and defend why New Country Network really was essential to protect Canadian culture as opposed to Country Music Television, did not really amuse them a great deal. The fact of the matter is that Country Music Television was showing many, many Canadian artists (perhaps more in Europe on Europe Country Music Television than in North America) and, setting aside "legalistic" arguments, the idea of arguing that this new network was central to the protection of Canadian culture was not something they looked forward to. The idea of saying this was central to the protection of Canadian culture was not something they looked forward to.

Returning to the idea of the "No Man's Land," there have been two major disputes between the U.S. and Canada relating to cultural provisions, Country Music Television and *Sports Illustrated*. It is only when this quiet status quo was broken that they erupted -- it was only when Country Music Television was unceremoniously thrown out of Canada in 1994 and only when *Sports Illustrated* received the same treatment two years later did these issues come to a head. Even though both CMT and *Sports Illustrated* faced serious discrimination in Canada, it was not until they were thrown out -- the status quo was broken -- that a dispute erupted.

So you have this truce and this balance, and it has worked fairly well. Accepting the Canadian interpretation of the NAFTA, however, would eliminate that balance in the agreement which could be the cause behind not only additional disputes, but, if Canada loses, behind new situations where actions have to be paid for.

How would they be paid for? This actually is a major legal issue, one which Ron Atkey raises in his article, concerning whether the Unit-

ed States can retaliate on other sectors. I will touch on it only briefly.

During the long days of the Country Music Television dispute, determining what we could retaliate on always provided a little levity. Maple syrup quickly became a favorite because it would be targeted at Quebec, annoying Ottawa to no end. There was not a lot of maple syrup coming in from other areas; it was a luxury item so we did not really have to worry about consumer backlash, and New England would have loved us. It seemed the perfect scenario. But there were serious questions about whether or not the United States could have retaliated on maple syrup because of WTO obligations. Of course, there were other areas in which the United States could have retaliated. For example, one government official kept insisting that we ought to prevent the Blue Jays from entering the United States. I really preferred, at that time, to avoid a dispute with every fan of major league baseball in the country, but it is an example of a retaliation not covered by the WTO.

Again, the second point, there was a balance in the FTA -- protection with a cost. The question remains as to whether that balance exists under the NAFTA.

The third aspect to consider is discrimination. Discrimination is fundamental to international trade law. If you go back, what are the two core principles you are taught about international trade law? National treatment and Most Favored Nation (MFN). MFN, in particular, treatment lies at the core, at the very heart, of international trade law. The lack of MFN has been considered one of the causes of friction among trading blocs which contributed to World War II. MFN -- non-discrimination among one's trading partners -- is at the core of our trading regime. Yet look at how it has been treated in the cultural dispute.

In the NAFTA, the cultural provision directly violates any concepts of MFN because it is not a provision for the NAFTA, it is a provision for the United States and Canada. NAFTA expressly states that the language regarding cultural provisions related only to Canada and the United States. In other words, Canada was not concerned about protecting its culture, it was concerned about protecting its culture from the United States. Now, you may say that is an obvious observation, and there was no particular reason for Canada to be worried about a Mexican invasion. But think about it from an international perspective.

Imagine if in the 1970s the United States had passed a safeguard measure on consumer electronics, but applied it only to Japan because it simply was not concerned about consumer electronic imports from Canada, Mexico, or Guatemala. Such action would have been appalling. The United States would have been vilified as a violator of MFN. Yet in the NAFTA, it is clear that cultural issues are solely directed towards the

United States, and MFN is not questioned.

This was corrected, interestingly enough, in the Canadian-Chile Agreement which too, has a cultural provision. The provision applies between Canada and Chile, and it applies not because Canada is concerned about a Chilean cultural invasion, but because, I think, Canada has realized the need for a cultural provision which is non-discriminatory. And because there is a fundamental concept of non-discrimination in international law, in the FTA, in the Canadian-Chilean agreement, but not in the NAFTA, if, in fact, cultural protectionism proliferates on the discriminatory basis of the NAFTA, it will bite Canada.

III. THE PARAMETERS

Look again at these three issues under the NAFTA: definition, balance, and non-discrimination. Now, try to match them up with what has actually happened. Let me suggest three areas we might consider very quickly: the rhetoric, the domestic impact in Canada, and the question of Canadian broader economic interest.

The rhetoric has always been outrageous. Minister Copps is always good for this. My current favorites are, "the U.S cultural monolith" and, in particular, "the Hollywood juggernaut is trying to take over the world."¹ That may be true, but then again, the Japanese juggernaut took over the consumer electronics world. Just as Japan is competitive in consumer electronics, the United States happens to be very competitive in entertainment products. And, secondly, as much as Hollywood may want to take over the world -- and I should add, I represented Disney in the WTO in some of the discussions -- they are not going to do it.

The reality is that culture is alive and well in Canada. Both Ministers Copps and Eggleton have agreed on this point. Let us compare the rhetoric. At one point, we hear about the United States as a juggernaut and a monolith, and the next we hear Minister Copps referring to "flag-waving Canadian boosterism" and Minister Eggleton lauding the strength of the Canadian cultural industry. Minister Eggleton recently explained in a speech that, "[b]etween 1990 and 1995, foreign demand for Canadian cultural goods and services abroad rose by 83 percent, accounting for \$3 billion in export sales. The cultural sector gets nearly 10 percent of its revenues from exports, and foreign sales are associated with more than 50,000 jobs in the cultural field."² With musicians such as Alanis

¹ *Canadian Officials Claim Unanimity on Preserving Cultural Protections*, Bureau of Nat'l Aff., Feb. 11, 1997.

² Notes for an Address by the Honorable Art Eggleton, Minister for International Trade, on

Morissette, Celine Dion, and Shania Twain and authors including Margaret Atwood and Michael Ondaatje, Canada is, indeed, a primary cultural product producer.

The second parameter, what is the domestic impact in Canada? Well, what exactly are we protecting?

You have Canadian ownership of Hollywood assets. Are they Canadian or are they U.S. assets? Most importantly, look at the effect on content and on the domestic market. Christopher Maule, a professor at Carleton, made some very interesting observations in this regard that were quoted by Minister Eggleton after the *Sports Illustrated* dispute. I will quote from it at length because it was quite an interesting statement. Christopher Maule says:

Newspapers and books have no content controls, neither do magazines, unless they are considered split-runs. Theatres can show what they want except in Quebec, where French language dubbing rules apply. Broadcasters and cablecasters are subject to Canadian content rules, but video stores, book stores and music stores can carry what they like. Thus, a New Zealand-made film about Pierre Trudeau would not be considered Canadian content, [although] a Canadian-made film about Nelson Mandela would.³

Minister Eggleton continued, "I have a hard time understanding clearly which cultural imperatives are being advanced by which instruments on such an uneven field."⁴ Have the mechanisms in fact been directed at Canadian culture, or have they been directed at Canadian shareholders' audio-visual enterprises?

Going back to the CMT dispute on this issue, the fact of the matter was that Country Music Television offered to be bound by any Canadian content requirement that the CRTC wanted to impose. It became quickly evident, however, that was not the issue. The issue was where the dividend check ended up. The dividend check going to a Canadian address or a U.S. address was all that was at stake.

What about the third parameter, the economic significance for Canada in an open and viable market for culture? Repeating the statistics that Jennifer Fong raised, because they are worth repeating, Statistics Canada reports that exports of cultural goods and services increased eighty-three percent between 1990 and 1995 and now have reached three billion dollars. Eighty-four percent of it goes to the United States.

Minister Eggleton, when he read his infamous speech, said that

the Occasion of a Panel Discussion, *Can Canada Maintain Its Cultural Identity in the Face of Globalization?*, at 1 (Jan. 27, 1997).

³ *Id.* at 4.

⁴ *Id.*

Canadians sell more television programs abroad than any other country next to the United States. Similarly, Canadian songwriters and composers earn more royalties for the use of their music abroad than they do in Canada. Again, the discrimination principle surfaces. Is Canada really a country that wants discriminatory protection of culture? I would think that Canada would want just the opposite. The facts certainly seem to suggest that this would be true.

In addition, it is widely believed that you cannot protect culture without projecting culture. Former Canadian Foreign Affairs Minister Ouellette agreed, "A country that isolates itself and fails to project its identity in values beyond its borders is doomed to anonymity and loss of influence Internationalization is essential to success and competitiveness."⁵ Does this matter to Canadian artists? Is that not what it is really about, Canadian artists, the Canadian mind, the Canadian novel, the Canadian music?

Let me give you an example. When Country Music Television was thrown out of Canada, it promptly withdrew Canadian musicians from CMT programming. It explained that if Canada did not want to give it an audience, then it should not be worried about the interests of the Canadian audience. They would only play Canadian artists who had a U.S. contract. It hurt Canadian musicians. How much did it hurt? I will tell you - this is an apocryphal story, but it is too good to pass up. As you may know, music video channels get music videos for free. The artists provide them for free because it is viewed as a commercial. Several years ago, I am told, the artists became a little bit arrogant, approached some of the music video channels, and demanded that they start paying for the music videos. The channels responded, "do not be ridiculous, we are giving you free air time," at which point the musicians demanded proof that it was valuable for an artist to be on mass media in the United States. Country Music Television took that challenge. It told the artists to give it three unknown artists and three tapes -- they had to be okay, they could not be really bad. CMT would pick one and play it all the time to see whether it would sell. The song was, *Achey Breaky Heart* by Billy Ray Cyrus, and it was made wildly popular by exposure in the mass media. The importance of access to the European and the U.S. markets for Canadian artists was undeniable.

Now put the three issues: definition, balance, and discrimination and the three parameters: rhetoric, the impact in Canada, and the real eco-

⁵ Notes for an Address by the Honorable Andre Ouellette, Minister of Foreign Affairs, on the Tabling in the House of Commons of the Government's Foreign Policy Statement, at 3 (Feb. 7, 1995).

conomic impact abroad back together. Try to take those parameters and apply them to some of the disputes, and I think that the Canadian cultural policies come out on the short end. As we have seen, *Sports Illustrated* is an excellent example.

Borders Books is a second strong example. Borders Books was not allowed entry into Canada just as Chapters Book Store (a Canadian store) was permitted to engage in one of the largest mergers in Canada. Chapters Book Store, which is the result of the merger of, I believe, the two largest book distribution companies in Canada, had said they needed to merge to compete with U.S. superstores. They merged as soon as these U.S. superstores, such as Borders, tried to enter Canada and the newly formed Chapters used cultural protection to have them kicked out. Again, was this about protecting Canadian culture or protecting the shareholders of Chapters Book Stores?

First, a dispute between Minister Eggleton and Minister Copps, which they claim is not a dispute, has renewed a discussion of cultural policy in Canada, which I think is a very, very healthy thing. It is perhaps this discussion which will lead to more non-discretionary applications of cultural protection, such as that found within the Canadian-Chile Agreement. Changes in Canadian cultural policy may well be the catalyst for more productive discussions on how to protect culture without going to extremes. This would benefit all Americans, on both sides of the border.

Second, new cases, such as *Sports Illustrated*, may in fact be the beginning of an era of disputes. It was announced yesterday that Polygram is considering bringing a case against Canada before the WTO for not being permitted to invest in distribution in Canada. I think what *Sports Illustrated* is really going to stand for in the long-run is the ability to win cultural disputes in the WTO, as long as even a tenuous tie to an actual product exists. If it is purely a service in dispute, then the WTO would probably not be an option, but if you get a product -- and a movie is a product -- there is something tangible that crosses the border. Regardless of whether what the people pay for is a service, if there is a product attached it falls under the jurisdiction of the WTO. I think you will see more cases like the one with Polygram.

The third issue relates to new agreements, such as the Multicultural Agreement on Investment (MAI) in the Organization for Economic Cooperation and Development (OECD). In the MAI negotiations, Canada and France are insisting on wide latitude to block investments based on cultural and linguistic concerns. The United States has responded that there will be no MAI if this is the case. This is yet to be resolved. As I mentioned earlier, regarding FTAA expansion into Latin America, I

think Canada, especially in the Canadian-Chile Agreement, has taken a very important step toward maintaining the legitimacy of its cultural protection by ensuring any provisions concerning cultural protection are non-discriminatory. Even if, in fact, ninety-eight percent of the impact rides against the United States, it is an extremely significant step. I assume Canada will continue that trend in future negotiations of the FTAA.

The fourth area concerns new technology. There is a claim, which I do not really believe, that technology will wipe out Canadian and French cultural protectionism. I think that, as a result of new technology, you will see decreased ability to protect culture and greater questioning of that ability. We have started to witness this already in the telecommunications accord that was signed in Geneva several months ago. For instance, there is a major dispute between France and the United States on the breadth of broadcasting limitations and Canada has protected its telecom services by limiting indirect foreign investment to 46.7%. Such restrictions will raise some very interesting questions regarding competition over time. If you restrict access to new technology, are you really shooting yourself in the foot? I do not believe, however, that technology will ever eliminate the issue. Regulators are too creative.

I cannot pass up the opportunity to mention FCC Chairman Reed Hundt here because he has been a stalwart in all the discussions on culture, speaking as a U.S. citizen on the Canadian perspective. He says, with respect to Canada's telecom provisions, "I'm sorry, but I just have a hard time being sympathetic with the idea that Bell Canada is part of the definition of national character. It makes phone calls."⁶ Reed Hundt has gone so far as to point out the view of many that the provisions in the U.S. telecommunications law, which had permitted a tit-for-tat system of basic reciprocity and created equivalent commercial opportunity, have been basically outlawed by the new Telecom accord. He said that the FCC will do exactly the same thing using the public interest test. There clearly will be issues relating to new technology, and I think the United States, through the FCC, has indicated it is going to take a strong stand.

⁶ *FCC Chairman Urges Canada to 'Do Better' In Allowing Foreigners to Own Telecom Firms*, BUREAU NAT'L AFF., INT'L TRADE REP., Feb. 26, 1997, at 339.

IV. CONCLUSION

Where does all of this lead us? If Canada wants to protect its culture, I concede its right to do so. In fact, I think it is quintessentially important for people to recognize that international trade is not simply about dollars or pounds or yen. Yet, if Canada wants to protect its culture, it has to be concerned about the definitions, the balance, and the non-discrimination. It has to be concerned with rhetoric matching the domestic impact as well as the consequences abroad. Where it may end up, as Canada tries to rethink this process internally, is a smaller but stronger cultural protection -- tighter but stronger.

I am reminded of one of my financial advisors who is fond of saying "cats make money; dogs make money; pigs do not make money." What he means is that when you try to take too much, you end up hurting yourself. *Sports Illustrated* is an excellent example of that because there was a truce on split-run magazines. Had Canada grandfathered *Sports Illustrated*, the issue probably would never have reached the WTO, because *Time* and other U.S. magazines had long since given up entry into Canada. By attempting to apply the cultural protection extremely broadly, it precipitated a crisis. I am not sure that that was in Canada's interest. Time will tell.