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The Comparative Effects of Environmental Legislation in a North American Free Trade Area

*David Hunter*

INTRODUCTION

Canada and the United States share many interests. The two countries also share their respective discharge of toxic and conventional pollutants into the air and water. Notwithstanding significant and creative efforts to manage water quality issues through the International Joint Commission,1 and the less than significant and creative efforts to manage the emission and deposition of sulphur dioxide, and the on-going trade disputes and negotiations between the two countries, the linkages between the two areas of bilateral concern have not been examined in any detail.

While the Report of the Royal Commission on the Economic Union and Development Prospects In Canada (hereinafter the Report) identifies two basic concerns with respect to the environment and economic growth,2 it does not tie these concerns to trade issues. The Report indicates that the costs of environmental protection may inhibit economic development,3 and that domestic regulatory practices are too slow (regulatory lag) and inconsistent.4 The Report, nonetheless, adopts as a matter of policy the view that the management of environmental concerns and economic growth need not be incompatible. It states: "It will be essential in the decades ahead to integrate environmental decisions and economic decisions, for there is, in the Commissioners' view, no ultimate conflict between economic development and the preservation and enhancement of a healthy environment and a sustainable resource base."5

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* Member of the firm of Campbell, Godfrey & Lewtas (Toronto, Ontario).


3 Id. at 508.

4 Id. at 512.

5 Id. at 509.
While in the view of the authors, there may be no ultimate conflict between economic decisions and environmental decisions there is a substantial amount of short-term conflict, not only within Canada and the United States, but also between the two countries. The Report identifies several major environmental issues which will require long-term commitments to resolve. For the purposes of this discussion reference will only be made to two: (1) Acid Rain (2) Management of Toxic and Conventional Pollutant Discharge into the Great Lakes.⁶

What the Report does not identify is the relationship that should exist between trade policy and the responsibility of Canada through the federal and provincial governments to enhance environmental protection with respect to public health concerns (prevention of pollution), and the conservation of a sustainable resource base.

This paper analyzes the interplay of trade and environmental concerns in relation to transboundary pollution concerns with particular reference to the management of conventional and toxic discharge into the Great Lakes, and the emission of sulphur dioxide. We suggest that any free trade agreement must, at least, remain neutral in its effects on Canada’s ability to assert national interests as to transboundary pollution, and should be supportive of binational agreements to enhance environmental protection. Further, if a trade agreement were to promote the harmonization of environmental practices then that agreement should support Canada-U.S. efforts to achieve the highest possible standards.

**FREE TRADE AND ENVIRONMENTAL CONCERNS: IS THE ISSUE COUNTERVAIL?**

Conventional economic wisdom maintains that it is in Canada’s economic interest to obtain a free-trade agreement with the United States. A principal objective in the negotiation of such an agreement is to limit the application of U.S. trade remedy laws to Canadian products.

**WHAT IS COUNTERVAILABLE?**

U.S. trade law includes the following: countervail,⁷ anti-dumping,⁸ Escape Clause,⁹ and s. 301 (Presidential Retaliation)¹⁰ actions. For the purposes of this discussion the existing countervailing duty law and its present application will be reviewed.

If a subsidy applied to a particular product is found to be countervailable then the U.S. imposes a duty on that product. The addi-

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⁶ Id. at 519-525. In addition to the above, the Report identifies the following as major environmental concerns: Water Export and Diversion, the Arctic Environment, Hazardous Waters and Wildlife Protection.


tional cost to that product, or perhaps the threat of additional costs, may limit the access of that product to U.S. markets. Federal and provincial programs that subsidize environmental protection, including pollution abatement and/or natural resource conservation, could be indirectly affected by the extent to which the respective governments would be required to amend or eliminate financial support programs.

A review of determinations by the International Trade Administration of the U.S. Department of Commerce with respect to whether certain benefits constitute subsidies within existing countervailing duty (CVD) law shows that certain Canadian environmental practices may be countervailable under the present U.S. CVD system.

The following actions were reviewed: Certain Softwood Products From Canada,11 Live Swine and Fresh Chilled and Frozen Pork Products from Canada,12 Certain Fresh Atlantic Groundfish from Canada,13 and Certain Softwood Lumber Products from Canada.14

The items referred to are by no means exhaustive; however, they illustrate the principles that underlie determinations on subsidies, and the relationship between these principles and environmental concerns with respect to public health issues and the management of natural resources.

In the Softwood determination, investment tax credits for the purchase of new machinery and equipment used in manufacturing and processing activities were held not a countervailable subsidy if available to all companies on equal terms. The investment tax credit, however, was countervailable where credits were provided above a generally available amount, in this case 7%, and where the credit was available only or particularly within a certain region.

In the same determination the Forest Industry Renewable Energy Program, designed to encourage the substitution of biomass energy sources for fossil fuels, was held countervailable when such program dollars were limited to the forestry industry.15

In the Live Swine determination, two findings of a countervailable subsidy are of interest for the purpose of this discussion. Under the Nova Scotia Swine-Herd Health Policy, veterinarians are reimbursed for "house calls". Because this program was limited to a specific enterprise or industry, or group of industries, it was found to be countervailable. Perhaps of greater interest was the finding that low-interest long-term loans, grants and loan guarantees to finance irrigation to farm lands under the Saskatchewan Financial Assistance for Livestock and Irriga-

15 Supra note 11 at 24,161.
tion Program was held to be a subsidy, and countervailable.\(^{16}\)

The *Ground Fish* determination was exhaustive; no fewer than fifty-five federal and provincial programs were examined and found to confer subsidies. Not all subsidies, however, were found countervailable.\(^{17}\)

The reasoning that led to a decision that a subsidy was not countervailable is as instructive as the reasoning where a countervailable subsidy was found. For the purposes of this discussion three examples of a countervailable subsidy will be presented, and one where the subsidy was not countervailable. All of the benefits under federal and provincial programs for the construction, maintenance and operation of fish-chilling, ice-making and the provision of ice were found countervailable because they conferred a benefit to a specific industry.\(^{18}\) The loan guarantees under the Fisheries Improvement Loan Program for the improvement of fisheries projects including the purchase, construction and repair of fishing vessels, equipment and water supply systems were countervailable subsidies. Further, the Newfoundland Program to Enhance Fishing Operations, and specifically the grants to research improvements in the fish quality by establishing universal standards of fresh fish quality, was a countervailable subsidy.\(^{19}\)

The New Brunswick Aquatic Resources Program, which provides assistance to the fishing industry to develop aquaculture projects, to test aquaculture environments, and to test the adaptability of certain species was not found to confer a benefit on investigated exports because the species affected by the program were not the species under consideration in this determination.\(^{20}\) Presumably, if the research grants pertained to species within the determination, and if the research grants obtained were of benefit to a particular industry, then such grants would be countervailable.

The recent Preliminary Affirmative Countervailing Duty determination; *Certain Softwood Lumber Product from Canada*\(^{21}\) is instructive with respect to the extent to which government programs could be held to be countervailable.

In this determination stumpage programs of provincial governments were held to be countervailable for the following reasons: In the previous *Softwood* case,\(^ {22}\) stumpage programs had been held not countervailable, because they were determined not to be limited to a group of enterprises. In this determination, it was found that stumpage programs were

\(^{16}\) *Supra* note 12.

\(^{17}\) *Supra* note 13.

\(^{18}\) *Id.* at 10,044, 10,055 and 10,058.

\(^{19}\) *Id.* at 10,053.

\(^{20}\) *Id.* at 10,051.

\(^{21}\) *Supra* note 14. While this determination is not binding, because it is a Preliminary finding, the reasoning of the International Trade Administration if applied in other areas could be significant in its impact on land use management practices.

\(^{22}\) *Supra* note 11.
countervailable. Because provincial governments in the exercise of their discretion targeted the allocation of stumpage rights to specific enterprises the programs were, therefore, *de facto* industry-specific.

The preliminary determination states: "Thus the provinces exercise considerable discretion in allocating stumpage rights. While the existence of discretion does not per se mean the benefit is specific, when the discretion results in the targeting of a specific group enterprise or industry or group of enterprises, then that program is countervailable." 23

Further, the imputed production costs borne by the government included the value of the standing timber. Specifically, it was determined: "The primary input into the selling of stumpage rights is the tree itself". 24 Thus the U.S. Commerce Department arrogates to itself the authority to determine the value of the Canadian resource at issue in the case.

While the matter is not free from doubt, it would appear that any government program that allocated the use of any natural resource could be found countervailable, and that an imputed cost for that resource would be "ascertained" by the U.S. Commerce Department.

**SUMMARY**

It is evident that federal and provincial financial programs that assist public health, conservation and management of resources and research in relation to these areas can be found to be countervailable subsidies. More particularly, where benefits or grants are not generally available then they may be countervailable even though their purpose may have an environmental and public health concern rather than trade enhancement. To the extent that such programs have been found to be countervailable and to the extent that other programs could be found countervailable under the application of U.S. trade remedy law, then Canadian environmental practices may be affected — the federal and provincial governments could withdraw or reduce their program support in these areas.

As matters now stand, and to bring the discussion closer to home, it would appear that the following could be considered countervailable subsidies under U.S. practice: the provision of loans or lines of credit at below market rates, the financing of industrial research or developments (if the financing subsidizes the production of an item), or an investment tax credit to a specific industry or in a particular region with respect to pollution abatement control. Even if a particular benefit purported to be generally available, it could nevertheless be countervailable if in fact the benefits were sector-specific or if in fact the benefits were made available according to the discretion of the administering agency of the federal or

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23 Id. at 37,456.

24 Id. at 37,457.
provincial government.\textsuperscript{25}

**Future Considerations: Binational Management of Environmental Concerns and the Free Trade Negotiations**

As indicated, the continued application of U.S. trade remedy law, as reflected in the *Softwood\textsuperscript{26}* case, could affect Canadian environmental practices particularly with respect to the management of natural resources.

While the status quo remains unacceptable, it is less than clear what future developments will hold. On one hand, increased protection in the United States could result in a Gibbons type approach,\textsuperscript{27} allowing a duty to be put on a producer's product if an up-stream subsidy were found. On the other hand, agreement could be reached to reduce or eliminate tariff and non-tariff barriers, or agreement may be reached on acceptable definitions for countervailable practices. With respect to the latter, Canada should insist on a clear separation of environmental practices from trade enhancement practices, and the assurance that environmental practices are not subject to trade remedy law.

While environmental management concerns of a national or binational nature have received little attention, two extremely contentious areas have received some comment. First, Mr. Reisman, the Canadian negotiator in the free trade negotiations (in his private capacity), had proposed that Canadian water be exported to the United States. Such a proposal stands in sharp contrast to extensive efforts by the Great Lakes States and the Provinces of Ontario and Quebec to seek measures to protect the ecosystem of the Lakes and to limit diversion.\textsuperscript{28} Second, the issue of acid rain has indirectly received some comment in the free trade negotiations. The testimony before the United States Trade Representative Trade Policy Staff Committee raises the question as to whether differences in environmental legislation and/or enforcement between

\textsuperscript{25} If the United States adopts further protectionist measures, for example, legislation comparable to the Gibbons bill, that would have, *inter alia*, expanded the definition of a subsidy to include a foreign government's sale of a natural resource to a domestic industry at a price below market value, then a significant number of Canadian products would be subject to countervailing duties. Canada must also be concerned that the U.S. does not seek to amend the definition of a subsidy to include government support for a specific industry or industries, regardless of its general availability. If the U.S. does follow this path then virtually all government support programs would be actionable.

\textsuperscript{26} *Supra* note 14.

\textsuperscript{27} *Supra* note 25.

\textsuperscript{28} CANADIAN BUSINESS REVIEW, CONFERENCE BOARD OF CANADA, (Fall, 1985). Specifically Mr. Reisman advanced the proposition to desalinate James Bay and to move fresh water to the Great Lakes. See THE FINAL REPORT AND RECOMMENDATIONS: GREAT LAKES GOVERNORS TASK FORCE ON WATER DIVERSION AND GREAT LAKE INSTITUTIONS, COUNCIL OF GREAT LAKES GOVERNORS, Madison, Wisconsin, (January 1985). See Particularly the Great Lakes Charter at Appendix III.
Canada and the U.S. constitute a trade barrier.\textsuperscript{29}

In hearings before United States Trade Representative Trade Policy Staff, representatives of U.S. electrical utilities and coal companies stated that, in part, the increase in the levels of Canadian electric power imports into the United States were a result of "the extreme imbalance of environmental regulations within the countries."\textsuperscript{30} Specifically, testimony given indicated that U.S. electric utilities, coal extracters, and related industries have shouldered heavy costs to meet environmental regulations\textsuperscript{31} while the Canadian power producers enjoy a comparatively minimal environmental compliance burden, placing U.S. producers at a great competitive disadvantage.\textsuperscript{32}

The objective of the representation was two-fold: first, that federal and provincial subsidies which unfairly affect the pricing of Canadian electrical power should be identified and eliminated, and second that incentives be found to ensure that Canada enact "more adequate environmental legislation."\textsuperscript{33}

The representatives of the U.S. industries were of the view that Canadian standards were non-existent,\textsuperscript{34} and that Canadian environmental assessment procedures were less onerous than U.S. regulatory approval requirements for construction and operation of electrical utilities.\textsuperscript{35}

While the comments of the U.S. industry representatives may be less than objective, they do raise the interesting notion that differences in environmental legislation and the non-enforcement (or indeed differences in enforcement) of such legislation are a barrier to trade. It is not within the scope of this paper to discuss this issue. However, this testimony does raise jurisdictional issues; for example, what are the respective responsibilities of the federal and provincial governments, and whether the legislative frameworks between Canada and the United States are that different. (The following section of the paper briefly discusses federal and provincial (Ontario) jurisdictional issues and legislation. It is not intended in that discussion to compare Canadian and U.S. legislation but rather to give a general overview of Canadian legislation.)

**Federal and Provincial Environmental Legislation: The Jurisdictional Framework**

Any discussion of environmental protection in Canada cannot be written without reference to constitutional issues for two basic reasons.

\textsuperscript{29} Trade Policy Staff Committee Public Hearings Possible negotiation of a Canada-U.S. Free Trade Area: Hearings Before The United States Trade Representative Trade Policy Staff Meeting, 99th Cong., 2d Sess. (September 9, 1986).

\textsuperscript{30} Id. at 20.

\textsuperscript{31} Id. at 21.

\textsuperscript{32} Id. at 24.

\textsuperscript{33} Id. at 20.

\textsuperscript{34} Id. at 27.

\textsuperscript{35} Id. at 23, 24.
First, if Canada is to come to any trade agreement, then provincial consent in many areas is mandatory. The federal government can make treaties but cannot implement them in relation to matters of provincial jurisdiction. As will be discussed, environmental management is one such area.

Second, there are significant differences between the federal and provincial authority as to environmental protection. In this discussion reference will be made to key jurisdictional issues in relation to water and air management, with reference to federal and provincial (Ontario) legislation and practice.

**CONSTITUTIONAL ISSUES**

Jurisdiction or plenary power over the Great Lakes is divided between the Federal government and Province of Ontario. The provincial law-making power, in part, derives from the "property and civil rights" clause of the constitution. The provincial authority to legislate land-use activity significantly affects the direct and indirect management of water.

The federal government, pursuant to s. 91, has the following relevant areas of jurisdiction: fisheries, navigation, relations with foreign countries, federal lands, works "for the advantage of Canada," and possibly the "peace, order and good government" clause. The legal controversy over the management of fisheries provides a good example of the constitutional and legislative difficulties associated with water management.

The federal government has legislative control over fisheries in that the Fisheries Act provides the legislative base to protect and manage fish, and also permits the protection and management of fish habitat.

The federal and provincial governments have overlapping jurisdiction over fish because fish are defined by common law as property — a provincial responsibility. Furthermore, the beds of lakes and rivers are provincial property. Accordingly, by statute (the Fisheries Act), the federal government can legislate for the protection of a fishery. However, federal legislation that sought to improve the quality of drinking water, might ultra vires. With respect to the quality of water, the federal and provincial governments have concurrent legislative authority.

There is some possibility that the pollution of an interprovincial river, and possibly an international river/lake, would trigger the residual clause of the Constitution and allow for the regulation of that river or lake if there were extra-provincial concern.

In a recent decision of the Supreme Court of Canada (the *Interprovincial Co-operatives* case), some Judges in *dicta*, indicated that the

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federal government would have legislative jurisdiction where there was pollution of an interprovincial river, while other Judges stated that jurisdiction lay in the province where the pollution originated.

**FEDERAL AND PROVINCIAL LEGISLATION: POINT SOURCE CONTROL**

**FEDERAL LEGISLATION**

*Fisheries Act*

The Fisheries Act is the most significant federal statute for controlling water pollution. Section 33(2) establishes that "no person shall deposit a deleterious substance of any type in waters frequented by fish..." "Deleterious substance" is defined by Section 33(11) as a substance which, if added to water, would degrade the quality of the water so that the water would be deleterious to fish of fish habitat.

**Provincial Legislation**

The Ontario Water Resources Act\(^39\) gives the Minister of the Environment management powers over all *surface* and *ground* waters. Section 16(1) established that every municipality or person who discharges or causes or permits the discharge of any material into water that may impair the quality of water is guilty of an offense. There is no offense if the discharge has been approved by the Province under a Certificate of Approval. There is no general permit or approval scheme for the regulation of contaminant discharges to water. At this time in Ontario there is no permit system as it is understood in the United States. However, every facility that will discharge into a water course requires a Certificate of Approval.

Industrial discharges that do not go directly to a water course, but go through a municipal sewer system and through a municipal sewage treatment plant to a water course, are not regulated under the Ontario Water Resources Act but under sewage use by-laws in the Municipal Act. The Environmental Protection Act\(^40\) establishes that it is an offense to discharge contaminants into the environment.

Air emissions are also controlled by this Act. The Air Pollution Control regulations set out in a schedule the maximum concentration of pollutants and related substances as a point of impingement test. Under the Ontario Water Resources Act and the Environmental Protection Act, if the Ministry of the Environment discovers unacceptable discharges to water or air from waste disposal sites, orders can be issued to reduce those discharges.

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\(^{40}\) The Environmental Protection Act, Ont. Rev. Stat. ch. 140 (1980).
FEDERAL AND PROVINCIAL LEGISLATION — NON-POINT SOURCE CONTROL FEDERAL LEGISLATION

Federal involvement in the control of non-point source pollution is quite limited. This situation exists because of jurisdictional reasons (land-use planning is a provincial responsibility) and because non-point source pollution can arise from many different activities such as urban area storm run-off, agricultural practices, liquid and solid waste disposal, shoreline refilling, extractive operations, forestry and erosion.

There is no federal law with respect to the control of solid waste disposal except for federal lands, or for lands that form part of radioactive waste management activities. The Fisheries Act establishes that the federal government can protect fish habitat and waters frequented by the fish from toxic leachates from landfill sites. In addition, under the Environmental Contaminants Act, restrictions may be placed on the handling and disposal of selected substances — but there may be limited legal effect as the Provinces are still able to control the use of such substances.

Provincial Legislation

The effective control of non-point source pollution falls to provincial practices. Storm water run-off is regulated by the Ontario Water Resources Act and the Municipal Act. The Pesticides Act establishes licensing provisions for business applicators. Liquid and solid waste disposal areas are regulated by permit under the Environmental Protection Act. Municipalities may control water disposal activities through their by-law powers. Private sewage disposal is regulated under the Environmental Protection Act.

Municipalities, pursuant to the Planning Act, may affect non-point source activities through planning practices. Regional governments may acquire and use land within their region for waste management. Their practices will impact on non-point source pollution.

In regard to point source control of discharge, initiatives by the province with respect to the control of discharge into surface waters suggest an adoption of U.S. practices. Specifically, Best Available Tech-
nology effluent limits regulations and water quality standards will be implemented.

**THE ABATEMENT OF TRANSBOUNDARY POLLUTION AND THE FREE TRADE NEGOTIATIONS**

This discussion has identified areas of interplay between the present application of U.S. trade remedy law and federal/provincial environmental interests. While the issue remains speculative, the clear possibility exists that federal and provincial support for pollution abatement and resource management could be subject to U.S. trade remedy law, notwithstanding the fact that federal and provincial responses, particularly with respect for the Great Lakes, in part reflect common environmental objectives of Canada and the United States. Such objectives are reflected in bilateral accords between provincial and state governments and between the two federal governments

Agreements of a similar nature, it is hoped, can be reached with respect to air emission standards. While these agreements and the infrastructures that support these objectives stand apart from discussions of trade policy matters, it is possible that such attempts at cooperative management would be impaired if the status quo remains as to trade remedies and subsidies. The abatement of pollution requires government regulation; it requires public funds, whether federal, provincial or municipal.

It would be counterproductive if financial assistance to industry to meet pollution control requirements became subject to trade remedy law. The development of any trade agreement and the establishment of procedures to facilitate binational trade activity should not stand alone from the present agreements and institutions that are concerned with environmental protection. Any trade agreements should not impair nor take priority over other international agreements. It would be intolerable if present trade remedy practices by either country undermined Canada-U.S. efforts through the Great Lakes Water Quality Agreement or other agreements to seek appropriate measures to virtually eliminate the discharge of toxic pollutants, and to limit water diversion. To do so would not only place at risk a shared resource but would also damage efforts to incorporate environmental concerns into economic decisions. Further, the same principles should apply to binational efforts to control the discharge of acid rain. In effect, national and binational environmental concerns should not be lost or put under the table in the free trade negotiations. That means that such concerns should be addressed directly. Specifically, government assistance by any level of government in either country that is directed towards pollution abatement, and particu-

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46 Supra note 1.
47 Supra note 44.
larly where such abatement focus a common objective of our respective governments, must be excluded as a countervailable subsidy.