

NOTES FOR ADDRESS TO GREATER CLEVELAND INTERNATIONAL
LAWYERS' GROUP
11 November 2008

CANADA-UNITED STATES RELATIONS
when the
DUST SETTLES

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A New Era

The election of Barak Obama as president of the United States is monumental -- for Americans and for the world at large.

The question for Canada, and for those Americans involved with Canada, is to ensure that both the new US administration and the newly-elected Canadian government, continue to build and strengthen the bilateral relationship. But questions remain to be answered.

For Canadians, the President-elect's views on international trade need clearer definition, particularly regarding the *North American Free Trade Agreement*. Equally important will be the attitude of the 111th Congress on matters of trade, business and a range of other issues related to our shared geographic and political space.

Here are a few thoughts on how some of those issues could be approached, all of which are based on the premise that both countries hold an unshakeable faith in the rule of law.

Shared Traditions

While some might argue that under the previous administration, the UK and Australia might have replaced Canada as your closest ally, if Canada is not number one today, that is transitory. Political relationships among countries will ebb and flow. But through it all Canada, even if often critical and not always in agreement with our American cousins, will remain the closest friend of the American people in this troubled world.

The un-intended downplaying of the Canadian connection in the minds of Americans is the product of a largely trouble-free relationship. There is so much that works and that works well between our two countries, that there is usually not much to be concerned about.

One of the reasons why I am sanguine about the prospects for continuing Canada-US cooperation is that, in spite of differences that do occur (such as disagreement over the War in Iraq and National Missile Defense), we speak the same language, we share the same geography, we have the same social concerns for the welfare of our peoples and we share the same unshakable faith in the RULE of LAW.

We Deal Together with Terrorism and the Border

It is impossible to embark on a discussion the rule of law without considering border issues and North American security. These topics are closely intertwined although, on deeper analysis, the border is distinct from the question of perimeter security. The border engages trade, crime and anti-terrorism; the perimeter is essentially a defense-related matter.

In looking at these together, however, several propositions must be considered. First, from an economic perspective, the free movement of goods, services and people is vital to the interests of each of us. This demands skillful management by both governments to ensure the necessary balance between security/law enforcement, on the one hand, and the need to maintain an open, or relatively open, Canada-US border, on the other.

The second proposition is that border and perimeter security issues between Canada and the US are bilateral in nature. They are not issues to be addressed within the NAFTA framework or otherwise on a trilateral basis involving Mexico.

What is suggested is that our mutual border and security concerns are best served by dealing bilaterally on a pragmatic, solution-oriented basis. That means avoiding the quicksand of seeking tri-lateral North American solutions.

Regarding bilateral solutions, it is worth noting that, with the exception of the NAFTA (1994) and the *Acid Rain Treaty* (1991), the recent history of Canada-US relations has been bereft of large, over-arching treaties. Instead, the two governments have pursued resolution of bilateral issues through creative diplomacy and through incremental advances, through a myriad of lower-level agreements, treaties and working arrangements and, often, through non-binding declarations and statements of purpose.

In many cases, this has proven to be beneficial and a hallmark of the solid nature of the bilateral relationship. But in an increasingly complex and dangerous world, questions are raised as to whether these subject-specific agreements, protocols, MOUs, exchanges of notes and the myriad of working-level agreements and discrete and often *ad hoc* approaches, particularly concerning the border and national defense, are good enough.

Even though political factors in the US Congress and elsewhere makes big picture solutions difficult to achieve, the issue for both countries to consider is whether the

pragmatic and incremental approach can be counted on to resolve many of major issues that we face – international terrorism, rogue states, environmental degradation, shared water resources, fighting crime -- in the future.

International Law - The Security and Free Trade Interface

We both share respect for and faith in the rule of law. This includes international law, a collection of principles of international relations of which the US has been the leader.

Customary international law allows States to take necessary measures to protect sovereignty and safeguard their national security. This is a given. The customary law concept is incorporated or codified in a plethora of international treaties and conventions, including, of course, in the *United Nations Charter*.

These concepts of sovereignty and national security find reflection in both the *World Trade Organization Agreement* and the NAFTA. While there must be a legitimate case for a State taking these kinds of overriding measures, both the *General Agreement on Tariffs and Trade* (“GATT”), which is part of the WTO Agreement, as well as the NAFTA, permit countries to derogate from their binding trade obligations where national security is concerned. Both provide that nothing in the agreements shall be construed

“to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations”¹.

In almost 50 years since its inception in 1947, this provision has never been the subject of a legal challenge in either the GATT or, since 1994, in the WTO. Nor has there been any

¹ GATT Article XXI (Security Exceptions). NAFTA Article 2102 contains virtually identical wording.

challenge or dispute over the identically-worded exception under the NAFTA. The absence of any legal disputes reflects the view that treaty obligations under the GATT/WTO/NAFTA concerning trade in goods, services and investments are always subject to measures of national security.

Under the WTO Agreement and the NAFTA, security does indeed trump trade.

There is another important aspect in this regard. Since national security overrides *NAFTA* obligations, nothing inhibits either Canada or the US from agreeing on border and perimeter security matters on a purely bilateral basis.

Notwithstanding the trilateral nature of the NAFTA and the good-faith declarations in the trilateral *Security and Prosperity Partnership* ("SPP"), Canada is under no legal obligation to deal with Mexico on security-defense type agreements with the United States, notwithstanding that these might affect trade in goods or services or other things covered in the NAFTA.

In short, nothing in the NAFTA mandates trilateralism -- even where trade is involved -- or precludes separate bilateral agreements settling Canada-US border issues.

Canada's Response to 9/11 and Border Security

In the aftermath of 9/11, Canada and the U.S. concluded the *Smart Border Declaration* of 12 December 2001. The Declaration is not a treaty. It is a political statement of purpose that incorporates a set of four good-faith objectives or "pillars", covering: (1) the flow of people; (2) the flow of goods; (3) improving border infrastructure, and; (4) cooperation in information sharing and enforcement. To implement these objectives, a broad 30-point Action Plan was agreed to, again, as a non-binding set of intentions.

While the contents of the SBD and Action Plan contain important statements of common endeavour and joint resolve, the document is not legally binding. Its value depends on good-faith implementation by the respective regulatory, enforcement and border agencies in a spirit of bilateral cooperation.

In fact, notwithstanding the good intentions reflected in the SBD, crossings at critical Canada-US border points in Ontario, Quebec and B.C. have been slowing down due to increasingly complex and time-consuming (largely U.S.) border clearance measures, to the commercial detriment of stakeholders on both sides. Voices have been raised by business groups and other interested parties about the negative impact that this myriad of new measures are having on Canada-US trade, including the automotive sector (and unions) and the manufacturers' associations and Chambers of Commerce of both countries

The challenges at the border, post-9/11, was the subject of the recent conference of the Canada-US Law Institute in April 2007, whose conference title was "The World's Longest undefended Border – Gateway or Checkpoint?". There were numerous presentations at the Conference pointing out the continuing problems in maintaining an open border between the two countries.

Differing Perceptions and the National Psyche

One problem in this respect is that Canada and the U.S. have different perceptions when trade versus security is concerned. Canada was not attacked on 11 September 2001. The US was. That makes for a profound difference in attitude and in national psyche.

Because of these different perceptions and concerns, the future holds for a radically different framework for the conduct of Canada's trade --and security -- relations with the

United States. This will not change over time. It will become even more, not less, of a concern by Americans in the years ahead.

This will require skillful stewardship and political leadership to ensure that the Canada-US border, on which so much of our mutual well-being depends, is not rendered less certain and less secure by moves to create – not a fortress North America – but a “fortress America”.

The SBD and Action Plan contain elements to ensure against this. However, its implementation depends on full cooperation of respective enforcement and inspection agencies.

There is growing evidence that the US government and its enforcement agencies may be stiffening their application of a range of regulations affecting Canadian trade and that border delays are increasing significantly, resulting in negative economic consequences on both sides of the border.

What, then, are some of the instruments that govern the Canada-U.S. relationship and how can they be harnessed, improved upon or replaced, to provide Canadians with market security of access while at the same time assuring Americans that their security interests are enhanced, not diminished, by their trading relationship with Canada?

Trilateralism versus U.S. Canada Bilateral Issues

The NAFTA is a trilateral agreement that includes Mexico. As noted above, trade and security between the U.S. and Mexico, however, are qualitatively different from Canada-U.S. concerns. American problems over its border with Mexico are chronic and deep-seated and involve things such as illegal immigration, drug trafficking, wide-spread criminal activity and other matters. Some of these pre-date 9/11. Whatever their genesis,

these have nothing to do with Canada. The challenges faced on the northern and southern American borders are qualitatively different, involving different circumstance and demanding different solutions.

It follows that if US concerns with its southern border are pursued as part of a drawn-out trilateral exercise and within a Canada-US-Mexico framework, this will impede the effective and timely resolution of separate bilateral Canada-US issues.

What about the *Security and Prosperity Partnership*, the broad declaration concluded among the three North American heads of government in 2005? That particular initiative, which is also a political statement and not a legally binding agreement, has spawned a large, sprawling bureaucratic machine that is moving at a snail's pace.

The recent meeting among the three North American government leaders in New Orleans, ostensibly to move SPP forward, resulted in further political declarations but, in terms of Canada-U.S. border security, little of direct moment. The President-elect and the Canadian Prime Minister should therefore view the SPP initiative with a healthy dose of skepticism.

A recent study by the Brookings Institution comes to a similar view. It supports the need for bilateral, as opposed to trilateral, solutions, stating,

“To realize the latent economic opportunities of the [Great Lakes] region, both countries require more than the well-intentioned, slow-walk of the existing Security and Prosperity Partnership dialogues of the past three years. The next U.S. president must join with his Canadian counterpart to push through real and perceived barriers to bi-lateral policy innovation, and put the major elements in place that can fuel bi-national prosperity and transform the Great Lakes regional economy. Working together, the countries can pioneer effective and efficient

ways to enhance economic exchange while both ensuring mutual security and respecting the unique culture of each partner.”²

The likelihood of anything concrete coming out of the SPP agenda is all the more unlikely given that, while the SPP bureaucracy grinds along, events at the political level - the U.S. election and the fact that there will be a new administration sworn into office in early 2009 – are leaving it behind.

Pragmatism and Constructive “Incrementalism”

One of the distinguishing features of the Canada-U.S. relationship is the degree to which it functions below the level of large-scale treaties, through a host of working level agreements and formal and informal understandings, arrangements, procedures, mechanisms and the like at both the federal, sub-federal and, in some cases, at the municipal level.

It is surprising how well both countries have cooperated for over one hundred and fifty years in spite the dearth of what I describe as over-arching treaties or formal legal institutions to either oversee or manage aspects of the relationship.

This fact is illustrated by the most useful two-volume report by the Canada School of Public Service in 2004, listing all of the treaties, agreements, memoranda of understanding and channels of formal and informal cooperation and collaboration by Canadian and US agencies across-the-board³. As will be discussed below, one of the

² *The Vital Connection: Reclaiming Great Lakes Economic Leadership in the bi-National US-Canadian Region*, Austin, J., Dezenski, E. and Affolter-Caine, B., Brookings Institution, March 2008, p. 19.

³ *Advancing Canadian Interests in the United States: A Practical Guide for Canadian Public Officials*, plus a companion volume, *Building Cross-Border Links: A Compendium of Canada-US Government Collaboration*, published by the Canada School of Public Service in 2004. These reports are an invaluable tool for examining the legal and institutional linkages between Canada and the U.S. It is available at the School through publications@cspc-efpc.gc.ca

hallmarks of the Canada-US relationship is the harmony that functions in the absence of formal structures and institutions.

It is interesting to compare this with the situation in the European Union, an entity with a population and a level of economic activity and production that compares with that of the North America in terms of order of magnitude. In contrast to the Canada-US experience, EU institutions permeate the European economic and social system with an over-arching institutional set-up and architecture that is complex in the extreme and with powers that are pervasive in their authority to legislate and regulate.

The EU, of course, is a full-fledged customs and economic union with a single internal market, as opposed to the Canada-US situation, which is a classical form of free trade agreement. It thus makes it difficult to take the comparison too far. However, it is instructive to compare approaches under the two systems.

This is not to suggest that treaties should be signed and formal bilateral mechanisms and edifices built simply to have some kind of purposeless architecture. The question, in an increasingly complex and dangerous world, is whether this creative Canada-US pragmatism and incrementalism, which has served us well, is good enough for the future.

Can these two countries continue to conduct their vast economic and other relations -- particularly on the security and defense front -- in the absence of some form of institutional mechanisms? In spite of the myriad of formal and informal agreements and *ad hoc* arrangements between Canada and the U.S. based on creative pragmatism, is the situation in terms of governing the trade and security interface fully satisfactory?

Legal and Institutional Mechanisms

As noted, there are hundreds of bilateral treaties governing a host of day-to-day matters, as well as exchanges of notes, agreements, arrangements, MOUs, executive-type agreements, inter-agency working procedures, between the two federal governments and between and among the various states and provinces, covering virtually everything from security, defense, common border patrols, highways, cooperation on criminal matters, and on and on.

In terms of large matters, however, there is really only a small number of what I describe as over-arching or “foundation” treaties between Canada and the United States at the national level.

As stated in the Canada School of Public Service report just referred to,

“Despite the myriad points of contact . . . and the approximately 343 treaties in force, the Canada-US relationship is a largely non-institutionalized one at the supranational level, particularly relative to the European Union.”⁴

The major Canada-U.S. agreement, of course, is the NAFTA which, although formally trilateral, is built on the 1987 bilateral Canada-US *Free Trade Agreement*. In terms of national economic self-interest, the NAFTA is far and away Canada’s most important legal agreement with the Americans.

As important as NAFTA is for both countries, and as vast as the volume of trade that it covers, it has no permanent institutional structure to administer its various components or standing dispute settlement body to resolve differences on an ongoing basis.

⁴ *Advancing Canadian Interests in the United States: A Practical Guide for Canadian Public Officials*, *supra*, p. 18.

Moreover, while in theory the NAFTA created a trilateral Trade Commission with supervisory powers, that Commission is in reality nothing more than a fiction, with trade ministers meeting from time to time to issue *pro forma* statements. There is nothing in terms of a permanent institution to ensure the Treaty's proper operation on an ongoing basis. The question is whether this is good enough in today's ever complex environment, where trade and security are so closely inter-mixed.

Some of the shortcomings of the NAFTA were revealed in the ongoing *Softwood Lumber* dispute, 2001-2007), a battle that gained relatively little attention in the American media, but which was front-page news for years in Canada.

Managing the Canada-US Geographic Space

In areas of environmental and resource management, it is similarly surprising how few treaties are in existence. One that stands out is the 1909 *Boundary Waters Treaty* which created the International Joint Commission and which will soon be celebrating its 100th anniversary. The IJC operates largely out of the public eye. It performs valuable service in administering day-to-day management of cross-border water levels and, in some cases, of boundary water diversions.

Notwithstanding its yeoman's work, the *Boundary Waters Treaty* is 100 years old and the Commission mandate and structure has not changed since the treaty first entered into force. In an era where continental water issues such as diversions, fresh-water availability of supply, use of common watersheds, challenges of climate change and a host of other matters, questions arise as to whether the 1909 treaty and the Commission process and institutional structure needs updating adjusting.

Another Canada-US treaty governing management of common geographic space is the *St. Lawrence Seaway Agreement* of 1954 and the large projects of Seaway infrastructure within the treaty framework. That Agreement, like the *Boundary Waters Treaty*, exemplifies some of the best aspects of Canada-U.S. relations in terms of joint management and administration of a common resource.

Other examples include and the 1961 *Columbia River Treaty*, the 1972 *Great Lakes Water Quality Agreement* and the ground-breaking 1991 *Acid Rain Treaty*. These agreements represent signal achievements in bilateral cooperation.

What stands out in this review is that these treaties, as important as they are, are relatively dated. Apart from the *Canada U.S. Free Trade Agreement*, itself dating from 1987, and the 1991 *Acid Rain Treaty*, there have been no other major State-to-State agreements between Canada and the U.S. on shared economic space, on boundary waters, on trade or on other issues for over forty years or thereabouts. Several of the agreements just listed are more than 50 years old. The *Boundary Waters Treaty* and its instrumentalities are soon to be 100 years old.

In a sense, this is testimony to the foresight of the two governments in creating agreements with enviable longevity. It also reflects the workmanlike nature of the relationship and the extent of shared values, allowing both peoples to work things out without complex and over-arching legal documents and the weight of institutions.

On the other hand, the absence of a robust agenda of institution-building and treaty-updating is surprising in light of the fact that common space management issues, water, air quality, boundaries have been multiplying and are increasingly challenging to find common solutions. It will, however, take considerable astuteness of leadership to get some of these big-picture matters on the radar screen.

Safeguarding Defence and Security

On defense matters, the most significant Canada-US treaty is the *North American Aerospace and Defense ("NORAD") Agreement* of 1958. The NORAD Agreement is important in the context of the present discussion because it is, in fact, the only legal document in place between Canada and the US that recognizes the concept of an exclusive Canada-U.S. -defense perimeter. Mexico is, of course, not part of NORAD.

Bilateral defense cooperation is further enshrined in the *Permanent Joint Board of Defense*, created in 1940. Whether the PJBD structure and mandate today is fully adequate is a question to be asked. It is worth noting that the PJBD has not been changed since its creation in 1940. The Canadian Forces web-site entry on the PJBD has not been up-dated for almost seven years. This is surprising, given the depth of the bilateral relationship in matters of defense, and the fact that defense cooperation is becoming increasingly critical.

In addition to NORAD and the PJBD, important Canada-US arrangements are contained in the *Defense Production Sharing Arrangement* (1956) and by the *Defense Production Sharing Agreement* (1963), both important documents that give Canadian companies rights to participate in the US defense procurement market. It should be noted in passing that the advantages to Canadian companies of these arrangements are under threat by the application of restrictions contained in the US *International Traffic in Arms Regulations* or ITARS.

Another illustration is the application of export controls affecting sensitive military and strategic goods. There is close cooperation between Canada and the US on these matters, within both the multilateral Wassenaar Group and the Nuclear Suppliers Group. Yet much of the bilateral arrangements for cooperating on export controls are based on a

series of informal arrangements, called the "Hyde Park" arrangements that were concluded in the 1940s.

This is not to say that matters are static. Indeed, they are not. Following 9/11, a number of steps were quickly taken to enhance North American -- that is, Canada-US -- defense and security. A Joint Planning Group was created in NORAD for coordinating military responses by the two countries to future terrorist threats and other matters. In many respects, the system of cooperation works -- in spite of Canada's refusal to participate in the Missile Defense Initiative as part of its NORAD engagement.

On the anti-terrorism and security front, the Smart Border Declaration and Smart Border Action Plan, referred to above, set out a range of intended actions that each country agreed to pursue -- as best-efforts undertakings -- to deal with post 9/11 security at border crossings. The Declaration and Action Plan have resulted in actions implemented within a joint framework under the joint Free and Secure Trade (FAST) program.

However, as previously stressed, the SBD and the Action Plan are statements of purpose with political weight but no legal underpinning.

There are a host of other defense and security arrangements of various kinds between Canada and the U.S. to manage border issues within and outside the SBD and Action Plan. What is notable about these is that they function well as pragmatic arrangements and mechanisms, addressing immediate needs of our two countries.

That is fine as far as it goes. But surely it behooves political leaders on both sides of the border to at least be thinking about improving, reinforcing and solidifying some of these many arrangements, procedures and understandings within a larger framework.

A Dose of Political Reality

The comments in this paper are not forgetful of the reality of politics in the United States and the fact that the U.S. political system is very wary of treaty engagements. This is reflected in the deep-seated reluctance of the Congress, which shares powers with the Executive on international issues, to approve legal agreements that are seen, rightly or wrongly, as inhibiting American freedom of manoeuvre internationally.

This was highlighted in bright relief in modern times when it became clear that the U.S. Senate would not approve a negotiated Canada-US treaty on joint East Coast fisheries management in the late 1970s, resulting in the referral of the offshore boundary dispute to the International Court of Justice.

A further contemporary illustration of Congressional reluctance to approve international treaties is the failure of the Bush administration to secure Senate approval of trade agreements concluded in 2007 with South Korea, Peru and Colombia. The latter is an interesting case, given that the Uribe government in Colombia is decidedly pro-American, surrounded by Venezuela and Bolivia (as well as Ecuador and Argentina), neither of whom is a particularly close friend of the United States.

It is also worth recalling that Senate approval of fast track authority for President Reagan to negotiate the Free Trade Agreement with Canada was only achieved by a small margin in 1985.

That being said, and notwithstanding the difficulty of getting the American government to focus on the big-picture, it is important for political leadership in both countries to find the means to effectively address challenges in a dynamic, competitive and dangerous world. This means relentlessly pursuing those interests at all occasions, reinforcing the special nature of the Canada-U.S. relationship whenever possible, pushing for the

updating and concluding of new treaties and agreements where shared national interest is involved.

As the Brookings report says, Canada must push the new U.S. president, indeed all presidents and all times, to see the larger picture and the overriding importance of a healthy and open bilateral relationship to both countries. This applies on the security and defense front equally to the environment and to trade and commerce.

It is not a matter of seeking treaties for their sake alone. Rather, it is a plea for recognizing that some issues of border security and defense call for strengthened arrangements and for a framework to ensure that bilateral issues don't get bogged down in inter-agency bickering or stonewalling without some efficient means of moving matters to a higher plane.

It is worth signaling that very recently Prime Minister Harper made an important step in this direction, proposing on 6 November 2008 that Canada and the US enter into negotiations on a new bilateral agreement dealing with carbon-emissions and climate change, to address these issues bilaterally through common standards and joint mechanisms and recognition of carbon-trading credits.⁵

Pragmatism and Incrementalism Reigns

This overview shows that Canada and the US have frequently agreed on measures to apply legal rules and to settle disputes by the rule of law in cases of national importance, such as the NAFTA, NORAD, the 1909 Boundary Waters Treaty and others. Yet it is surprising that there are relatively few such treaties and most are decades old.

⁵ "Ottawa swoops in with climate-change offer", Globe and Mail (Toronto), 6 November 2008.

On the other hand, Canada and the US appear quite adept at concluding a myriad of agreements, understandings and *ad hoc* and pragmatic working arrangements at the sub-treaty level, in the form of bilateral MOUs, protocols and political declarations.

The conclusion from this review is that cooperation through constructive pragmatism and creative incrementalism – based on the rule of law - has been the hallmark of Canada-US relations for many decades.

The question that the new political leadership in both countries must ask, in this complex and dangerous world where the environment, international peace and national security is under assault on many fronts, is whether this is good enough.

In 1964, President Johnson and Prime Minister Pearson appointed two high-level diplomats and recognized experts to study the relationship and recommend the best approach continued cooperation. That resulted in the Merchant-Heeney report on Canada-US relations.

My suggestion is that, in the aftermath of the recent US election, with a new chapter opening, the President-elect and the Prime Minister do that again – appoint top level statesmen or stateswomen to meet together, by-passing huge forums and public, circus-like gatherings, to come up with new ideas for furthering our common future together in the North American space.

Mutual respect for the rule of law has taken our two countries along an historic path. The challenge in the years ahead is to find common solutions to continue along that path.

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