

TRADING ON THIN ICE

With concerns about rising protectionism, the potential reopening of NAFTA, a thickening of the Canada-US border, the World Trade Organization on life support, a global financial crisis and tightening credit markets, international trade lawyers are on high alert

By Sandra Rubin

Forget Mary. There's something about Obama. President Barack Obama, the three words that instill hope in billions of people around the world, elicits a markedly different reaction from many Canadian international trade lawyers. Call it professional apprehension.

Canada depends on access to the American market and the new administration is making some business interests twitchy. Trade is suddenly on people's minds.

"You've got Obama coming in and a left-leaning Democratic administration that's been making protectionist noises," says John Boscariol, head of the international trade and investment law group at McCarthy Tétrault LLP. "They're talking about subsidizing all kinds of industries. Obama's talked about reopening the North American Free Trade Agreement. The EU has been making a lot of noise about government subsidies of the Big Three automakers. These are all juicy trade issues."

You might even say these are juicy times. Juicy as in bloody. Because as the world settles in to watch Obama's first one hundred days, the outlook for international trade is bleaker than it has been in years.

Many Canadians are convinced he was playing to Ohio voters with his campaign pledge to reopen NAFTA to strengthen labour and environmental provisions. That could be true (one

of his aides suggested as much in a leaked memo) but the subsequent meltdown of the financial system may force him to play an entirely different hand.

For many in America's blue-collar heartland, NAFTA has become a symbol of job destruction, of cheap wages luring longtime "made-in-the-USA" manufacturers to set up operations in the developing world. When they think of NAFTA they don't think of Canada, they think of Mexico. Polls show they don't like it and they don't trust it.

With jobs continuing to evaporate, the pushback is unmistakable. Milos Barutciski, an international trade lawyer at Bennett Jones LLP, and other senior Canadian trade lawyers say the forces of protectionism are on the rise in a way unseen since the 1930s.

Cyndee Todgham Cherniak, an international trade lawyer at Lang Michener LLP, says the Canada-US border has actually been steadily thickening since 9/11, with former president George W. Bush trying to build a wall of security around the country. She likens it to that old Pink Floyd song, "Another Brick in the Wall." Will Obama dismantle the "bricks" put up by his predecessor? She is dubious. "In fact, I expect he's going to add to what was started under President Bush.

"You don't want bad food getting in, or tainted toys, or other harmful consumer goods. So it's more bricks in the wall around

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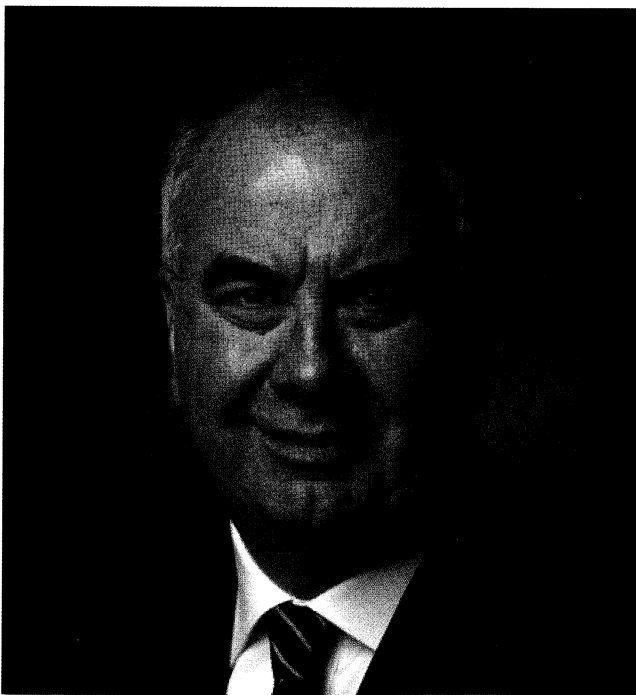
the United States. Then Obama also made all kinds of promises that he's going to add bricks for environmental protection, for IP protection, for labour protection.

"The most important thing is that where George Bush was about 'I don't want bad people to get in,' Obama is all about 'I don't want American jobs to leave and I'm going to be the protector of the American worker,'" she says. "I think he's going to add additional bricks on the inside of the wall and make it more difficult for US jobs to get out. I expect there will be measures to make American goods more competitive domestically — or foreign goods less competitive.

"I think we're heading into a very unique and difficult period, a time when it's going to be tough to get access to some of the things we're used to getting access to."

Tempers are already fraying as delays at the American border and a slew of new requirements are sending up the cost of doing business. Long-standing tensions in areas such as softwood lumber and cattle farming are threatening to boil over again into full-blown standoffs, in slightly different guises.

Meanwhile, halfway across the globe, the World Trade Organization is on life support, with the Doha round of talks, which began in 2001, stalled for the last five years. A planned meeting of trade ministers of member countries had to be cancelled because they couldn't even agree on an agenda. Global treaties are no longer possible. Instead, countries like Canada are forming individual patchworks of bilateral alliances.



Keith Mitchell; Farris, Vaughan, Wills & Murphy LLP

In November, President Bush invited the heads of the G20 countries to a summit in Washington to tackle the impasse. They emerged stressing their determination to break the logjam and commitment not to introduce new tariffs in the meantime.

American farmers immediately cried foul, saying the US was being asked to give up too much. Russian Prime Minister Vladimir Putin suddenly announced new tariffs on foreign vehicles, insisting it did not conflict with the G20 commitment to hold off on tariffs. The spirit of co-operation lasted about as long as an old tooth in a glass of Coke.

In short, it's an interesting time to be a trade lawyer. Of course, as everyone knows, that's the essence of an old Chinese curse. But it may also be the essence of a very profitable year.

It's fascinating — ask pretty much any Canadian trade lawyer what's on his or her mind these days and check your watch. Odds are it won't be five seconds before the word NAFTA comes up. Keith Mitchell, QC, an international trade partner at Farris, Vaughan, Wills & Murphy LLP in Vancouver, says the next six months to a year is going to be all about Obama.

"The Obama Effect — whether he makes good on his commitment that NAFTA should be reopened — is definitely *the* hot-button issue for Canada right now," says Mitchell, who's fought his share of NAFTA disputes. "We can expect protectionist forces among Obama's domestic political allies, forces arrayed against NAFTA, to bring out the big guns."

He's not alone in bracing for a barrage. Many Canadian business and financial players have been uneasy since Obama's campaign pledge to use the "hammer" of activating the six-month notice of intent to opt out of NAFTA as leverage "to ensure that we actually get labour and environmental standards that are enforced."

If the free trade agreement were to be reopened, there are troubling questions about whether it can be closed again. It could turn out to be a Pandora's box.

"NAFTA's been pretty good for Canada and once you reopen an agreement it can become a free-for-all," says Boscariol. "You don't know what's going to come out of the woodwork. That's the problem. Rarely can you confine it to just one issue. Things can be so partisan in the United States, no one knows where this could lead."

In Canada's oil patch, Obama's campaign vows to break America's addiction to "dirty, dwindling and dangerously expensive" oil brought concerns to a whole new level. It didn't help having his senior energy advisor tell reporters greenhouse gas emissions from the oil sands are "unacceptably high" and

