

# Trick - or - Treaty?

by Michael Bergman

The chair on which George Washington sat as he presided over the American Constitutional Convention of 1787 was decorated by a radiating half-sun. Benjamin Franklin is said to have remarked that he could not decide whether the ornament represented a rising or setting sun. On the signing of the American constitution, Franklin declared that the chair's design was clearly a rising star.

The cover of the Canadian government's publication of the Canada/United States Free Trade Treaty bears a radiating half-sun against the background of a maple leaf. Proponents and opponents of the Treaty will find dawn or dusk in this image. I fear that history will prove neither correct. The illustration is nothing more than the static picture of an orb that never rises to its complete potential but never sinks in total failure. Frustration will be its ultimate legacy.

The Free Trade Treaty is nothing but a bunch of half-measures cobbled together in haste by men who have fixed on a narrow objective without seeing the broader field. The free-traders sought to open the American market to Canada yet, in the process, have affirmed the very anti-dumping and countervailing laws which are so inimical. They wanted a say in the application and interpretation of those laws against Canada – the bilateral dispute resolution mechanisms – yet they settled to throw aside the fair and impartial courts of law, even if American, for some panel contraption that is supposed to be better able to understand American law than American judges. They sought the benefits of America without its burdens. They gave the Americans the burden of Canada and its benefits. They said they would protect cultural sovereignty and, well, at least they tried.

## Cultural sovereignty

Properly, the phrase "cultural sovereignty" appears nowhere in the Treaty. The phrase has an amoeba-like elasticity about it which defies definition and therefore can mean more than one

thing, depending on the orientation of the reader. Sovereignty may be an incidence of being sovereign but in the real world it is much easier to be sovereign than to have sovereignty; every state's right to control its own destiny being dependent on every other state's willingness to let it do so.

At any rate, cultural sovereignty is a nonsense term since culture lives and dies in a sociological and anthropological environment and, while a government may influence it and control its expression, it cannot claim to be culture. A nation does not possess a culture as one possesses property, a nation *is* its culture. Much like the soul defies description, culture is incapable of a legal definition. What does admit legal definition is the power of a government to control the expression of culture.

If the Free Trade treaty would state this plainly then Canadians, whatever their views on the overall concept of free trade, should be satisfied with its cultural provisions. Saying and meaning though are not one of the attributes of the language of the Treaty. This is not surprising since ambiguity allows several interpretations and either party to draw from it those more favourable to themselves.

## Cultural industries

The principal provision of the Treaty dealing with cultural industry is Section 2005. It is useful to quote this Section:

*"1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.*

*2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1."*

The very first sentence of this Section raises a number of important questions. What are cultural industries? Well, Section 2012 offers a definition, as follows:

*"For purposes of this Chapter: cultural industry means an enterprise engaged in any of the following activities:*

*a) the publication, distribution, or*

*sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.*

*b) the production, distribution, sale of exhibition of film or video recordings,*

*c) the production, distribution, sale or exhibition of audio or video music recordings,*

*d) the publication, distribution, or sale of music in print or machine readable form, or*

*e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services;"*

The first sentence of this Section 2012 also raises a question. What is an enterprise? Well, Section 201 defines enterprise as follows:

*"Enterprise means any juridical entity involving a financial commitment for the purpose of commercial gain."*

The definition of enterprise also raises a question. What is a juridical entity? Well, a juridical entity is a legal pseudonym for a fictitious or moral being otherwise known as a corporation.

These definitions within definitions and the definition of cultural industry are quite important. I submit that the proper interpretation of the term cultural industry as used and defined in the Treaty refers to a commercial corporation engaged in the activities enumerated in Section 2012 but does not include a human being engaged in those activities. If human beings were to be included in this definition then the definition of cultural industry at Section 2012 would not use the word enterprise which is narrowly defined. In fact, Section 2012 could have used the word person in addition to the word enterprise. The word person is defined at Section 201 as a natural person. Therefore the provisions of the Treaty dealing with temporary entry for business purposes, investment, services, taxation and subsidies may still apply to individuals, Canadian or American, involved in cultural industries. More of this later but first the reader must consider another element of Section 2005.

Section 2005, in excluding cultural industries from the Treaty and the appli-

cation of the Treaty (with the exception of the four areas mentioned in the Section's first paragraph), nowhere says that government has the right to legislate or regulate cultural industries. Rather I submit the correct interpretation of the language used is that corporations involved in cultural industries are excluded from the benefits of the Free Trade Treaty. I say benefits because the intent and language of the Treaty generally is that American and Canadian businesses are, by the Treaty, being offered further opportunities and a reduction of discriminatory practices. Only governments suffer liabilities or limitations under the Treaty since they are foregoing their right to otherwise legislate discriminatory provisions against corporations or nationals of the other party. The ultimate irony then is that, in attempting to protect cultural industries, the Canadian government has excluded these industries from the protection of the Treaty without expressly reserving to itself the power to enact measures inconsistent with the Treaty.

## Retaliation

This interpretation is reinforced by the second paragraph of Section 2005 which essentially provides that where one country effects measures for cultural industries inconsistent with the Treaty, the other country may retaliate with equivalent commercial measures. Commercial measures taken with respect to activities covered by the Treaty are subject to a consultation and arbitration process.

There are also, in many cases, provisions recognizing the legality of existing discriminatory practices. The second paragraph of Section 2005 recognizes and institutionalizes naked retaliatory action with respect to cultural industries. As such it prescribes a *modus vivendi* which might not have existed if the Treaty was never concluded. Furthermore, this retaliatory action is not exclusive to measures against an offending party's cultural industries. They may be taken against any industry of the offending party and, consequently, measures by Canada for its cultural industries inconsistent with the Treaty can invite retaliatory measures by the United States against the Canadian steel, automotive or any number of other industries. The incentive to refrain from enacting measures inconsistent with the Treaty for



cultural industries could therefore be quite substantial.

Just what measures justify retaliatory action and the magnitude of such retaliation is unregulated. By virtue of Section 2011, the consultation and arbitration procedure laid out in Section 18 is denied to the cultural industries. Section 18 sets out a process of mutual consultation about measures taken by either party which one party feels contravenes or is inconsistent with the Treaty. A Canada/United States Trade Commission is set up, each to be headed by a cabinet-ranking official. This commission is to consider the effect of any measures which one party complains has been taken by the other inconsistent with the Treaty. If the commission cannot, through consultation, resolve the dispute, the commission could refer the matter to arbitration. If the matter is not referred to arbitration then it is referred to a special panel of experts who will offer their recommendations. The parties to the Treaty undertake to normally implement these recommendations although implementation does not necessarily have to be the case.

### Government measures

This Trade Commission, which is probably by far more important than the bi-national dispute resolution mechanism much ballyhooed by the Canadian government, may ultimately prove to be a pivotal point of the whole Treaty. The bi-national dispute resolution mechanism is designed to deal with issues of contravailing and dumping, issues which should have very little if any effect on cultural industries. On the other hand, in the Canadian context, governmental measures taken on behalf of cultural industries can be of significant importance. As such, the fact that a party cannot have recourse to the consultation and arbitration process, (insofar as cultural industries are concerned) means that there can be no sanction for unjustified retaliatory action by the United States in consequence of Canadian measures in favour of cultural industries.

All of this is not to say that individuals involved in cultural industries are unaffected by the Treaty. If I am correct in thinking the exclusion for cultural industries affects only corporations, then persons involved in cultural industries will be dramatically affected by the Treaty.

The Treaty provides for the entry into each country of the other's nationals for business or professional purposes without the need for labour certification or other tests involving the availability of local people to do the same work. There therefore should exist a relatively open-door policy for American motion picture personnel to enter Canada to work on motion picture projects in this country. Of course the same is true for Canadians entering the United States. Even if the language of the definition of cultural

industries were sufficiently broad to cover individuals, the scope of that definition would still be too narrow to prevent the entrance of secondary motion picture services such as casting facilities, equipment and supply companies, catering services, etc.

The Treaty provides that no new taxation or subsidy measure will be enacted by a government which is discriminatory against the other party's nationals. The Canadian government has used the taxation system to provide incentive for individuals to invest in cultural industries in Canada. It would appear that, under the Treaty, provisions governing taxation and subsidies that manipulate the tax system so that Canadian taxpayers could obtain fiscal relief for investing in Canadian cultural companies will have to be broadened to permit American investors in Canada to attain the same tax relief for such investments. Similarly, the scope of investments will have to be expanded to both Canadian and American companies operating in cultural industries in Canada.

The Treaty clearly prevents direct or indirect discriminatory expropriation of another party's nationals' investments. The definition of cultural industries says nothing about financing or the dealing in cultural property other than in the ordinary course of business. As expropriation, whether direct or indirect, is an extraordinary item, I submit that expropriation-like measures enacted by Canadians against American companies in Canada, even in the cultural industries, are prohibited. As such the recent leaked draft bill designed to reduce American distributors' market share in Canada by governing the importation of foreign films, is probably in violation of the Treaty.

### Conclusion

The Treaty has provisions designed to eliminate performance requirements which have the effect of demanding a certain level of local content, personnel, research, etc. Canadian measures for cultural industries in the past have often contained such performance requirements, whether it be the use of a certain number of Canadians, the spending of a certain amount of money in Canada or contracting with Canadian suppliers, distributors or other entities. Canadian tax shelter requirements for feature films stipulate that a certain percentage of the money raised from such investment must be spent on Canadian personnel and supplies. It is not possible to say that in every case such expenditures have a cultural benefit. The money given to caterers providing services on a Canadian feature film surely has little to do with culture. The long and short of it is that the only way to protect cultural industries is by their complete inclusion or exclusion in or from the Treaty. The current language of the Treaty does neither and consequently leaves Canadian cultural industries exposed.



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