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The Free Trade Agreement: It Muddles the Law

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There's a saying:
If you study the practices of a race
in the remote past, you'll understand
its actions in a complicated age.

I. INTRODUCTION

This article grapples with the Free Trade Agreement: a compact creating a common market in goods and services between Canada and the United States. It examines the source of North American law, feudal England. It charts the development of that law in the United States and Canada. It explores the legal muddle, i.e., the likely misconceptions in contracts (bankruptcy and torts) attributable to the Agreement. It summarizes these provisions of the Free Trade Agreement and predicts what will happen to goods' and services' markets in North America.

II. BACKGROUND

A. *Feudal England*

Hobbes said, people were equal in their capacity to inflict misery upon one another.[1] If they'd surrender some sovereignty to the state, they could rescue time to spend on self-improvement.[2] This notion was knitted to a primitive forest economy—a way of life dependent upon hunting and foraging.[3] When the king's deer were slaughtered wholesale and yeomen took trees that belonged to royalty, foraging was out of hand. Parliament promulgated death penalty statutes to punish people for their acts.[4]

As time passed, these statutes, the so-called Black Acts,[5] gave way to civil methods for resolving disputes. Competing usages of forest re-

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1. T. HOBBES, LEVIATHAN 183-85 (C.B. MacPherson 8th ed. 1978)(1691). The account of man's nature and the need for government appear in Chapters 13 and 17 of his book.

2. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 42 (1979). Hobbes states the only way for men to get out of the state of war is to "conferre their power and strength upon one man, or upon an assembly of men, that may reduce all their wills, by plurality of voices, unto one will." T. HOBBES, *supra* note 1, at 227. This uniting for a common purpose, the mutual protection and advancement of men's interests in a profitable setting, is given a name: "the multitude so united in one person . . . a commonwealth [and] in Latine Civitas." *Id.*

3. E.P. Thompson, Professor of History, Warwick University, presented lectures on customs and common rights at Queen's University, Kingston, Ontario, Canada, on February 3, 10, 1988.

4. *Id.*

5. *Id.*; *see* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 206, 270, 272 (1975).

sources were resolved in favor of suzerainty, grandeur, profit, and utility.[6] Some disputes were resolved by a contestant's purchase of a rival's use or practice.[7] Property was seen as a practice or usage of forest resources granted to an individual by a benevolent conqueror in the past,[8] an object fashioned with a man's hands, a grant of land for services,[9] a practice or usage a rival was willing to purchase,[10] or anything bearing demand value.[11]

Promises created contracts, when they were made by royalty.[12] Reliance and seals affixed to writings emerged as justifications for transforming mere promises into legal obligations.[13] Specific performance was an injured party's remedy.[14] The dominant philosophy was "all nature is man's servant."[15]

In this primitive world, hunger stalked bounty; population tread upon production; capitalism overtook subsistence economics. Adam Smith became the sage for the age. To fight privation, he said, purge the markets of religious dogma.[16] Let goods flow like water.[17] The price, with aid of demand, will find its level.[18] Bounty comes from production.[19]

Smith predicted people will be thrown together by plays of the market, which is a good thing.[20] Circumstances will drive buyers toward sellers boasting a competitive advantage. When a vendor's wares have been consumed, needy consumers will buy from the vendor boasting the "next best" competitive advantage. When a seller with the least competi-

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6. Thompson, *supra* note 3 (Feb. 3, 1988).

7. *Id.*

8. *Id.* (Feb. 10, 1988).

9. Copyholders were serfs who behaved as if they owned property outright. They were born of a "grant of land for services." Their rights in land were conditional. Their claims had to be proven by a written account registered in the manoral court's books. Retention of land depended upon the grantee rendering homage or quick rent to the granting lord. Conversation with E.P. Thompson, Professor of History, Warwick University, at Queen's University, Kingston, Ontario, Canada (Mar. 21, 1988).

10. Thompson, *supra* note 3 (Feb. 10, 1988).

11. *Id.* (Feb. 3, 1988). Professor Thompson said rival uses of forest resources (something a competitor coveted or found a nuisance) were resolved by contract.

12. *See* J. COMMONS, ECONOMIC FOUNDATIONS OF CAPITALISM 216-17 (1959).

13. In an 18th century case, Lord Mansfield said the following: The intentions of the parties are the basis for contractual liability; consideration is "evidence" of that intention; other forms of evidence [such as seals] may be equally satisfactory. ATIYAH, *supra* note 2, at 216. "Detrimental Reliance" was a justification for converting a promise into an obligation. *Id.* at 185; *see* FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 224-25 (London 1949); *see also* STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 6 (Austl. Nat'l Univ. Press 1975).

14. Berryman, *The Specific Performance Damages Continuum: A Historical Perspective*, 17 OTTAWA L. REV. 295, 296-97 (1985).

15. Thompson, *supra* note 3 (Feb. 10, 1988).

16. *Id.*; *see* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 345 (U. of Chic. 24th ed. 1982).

17. *Id.* This is Smith's prescription for dealing with monopolies and mercantilism, an arrangement and practice he regarded as harmful to the state. *Id.* at 33, 287.

18. *Id.* at 24.

19. *Id.* at 34.

20. *Id.*

tive advantage is the only person with whom one can do business, let the buyer beware. When all the vendors behave like the one with the least competitive advantage, let the vendors beware. There shall be no hoarding, Smith said, or monopoly and contracts in restraint of trade.[21]

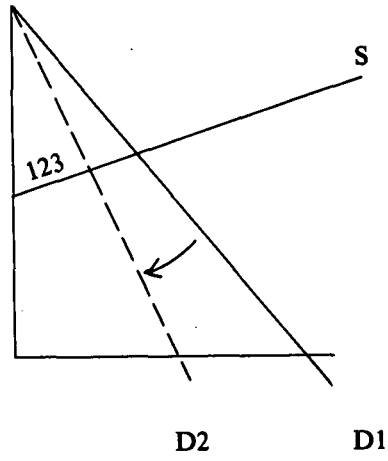

Illustration I

The demand curve moves from right to left. The shift in demand is caused by (1) use value (satisfaction) of the goods, (2) substitute goods, (3) the rate at which manufacturers (vendors) replenish the supply, and (4) inventions rendering supplies obsolete. The numbers refer to sellers with whom buyers do business.

B. *Colonial North America*

These ideas about property, contracts, and markets were exported to North America. People conducted experiments based upon the teachings of Hobbes and Smith. Property and contracts were hewned out of the wilderness.[22] Practices, delineated in royal charters, were treated as property. Competing uses of forest resources among Europeans and Indians were resolved on the basis of treaties, profit and utility, grandeur, and contracts.

Americans, as distinguished from Canadians, improved upon Smith's suggestions. Every settler had to participate in some capitalist activity for his own good.[23] The spoils went to the victor. The van-

21. *Id.* at 55.

22. Thompson, *supra* note 3 (Feb. 10, 1988). Thompson summarized the enclosure movement, the process by which rights and property were created. Competing usages of forest resources created demand values for each one. People, he said, were willing to buy a rival's use to eliminate competition. We went from a common use of the wilderness to enclosure. Grandeur, profit, and utility were used by authorities to resolve disputes. Originating in England, this process reproduced itself in India and North America.

23. *See* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE

quished got nothing.[24] The government turned its back on the loser until he pled destitution. Egalitarianism, leveling the competition playing field, was fastened to some capitalist undertakings to ease the burden the loser had to bear.[25] Liberalism was rivetted to capitalism later on in the nation's history to purge people of ill-gotten gain.[26]

The Canadian experiment, "Capitalism with a heart," insisted upon every settlers' participation in some competitive scheme.[27] The winner was given the spoils. The loser, though, got something. For policy reasons (such as the need to appease a population tempted to move to warmer climes), the government rewarded losers for the good fight.[28]

Building on this past, twentieth century Canada seems to be a developing nation.[29] The central government is weak.[30] The population is too small to dominate the continent.[31] Canada's industrial service center is overshadowed by its trade with America in strategic metals and natural resources.[32] The provinces feud with one another.[33] There are few things, other than east-west trade, that hold the provinces together.[34]

America, on the other hand, behaves like a post-industrial state. It has miniaturized its traditional industries—automobiles and steel.[35] It is

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HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 256, 266 (1985)[hereinafter HABITS OF THE HEART].

24. *Id.* at 32-33.

25. *Id.* at 255.

26. *See* FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 5 (1983); HABITS OF THE HEART, *supra* note 23, at 148-49.

27. Richard Simeon, Director, School of Public Administration, and Professor of Political Science, Queen's University, Kingston, Ontario, Canada, presented a lecture on the Free Trade Agreement (Harmonizing the Laws) at Queen's University, Kingston, Ontario, Canada (Feb. 2, 1988); Conservation with Michael Cormier, Director, Legal Aid, Faculty of Law, Queen's University, Kingston, Ontario, Canada (Jan. 20, 1988).

28. Cormier, *supra* note 27.

29. Conversation with H.R.S. Ryan, Professor (Emeritus) of Legal History, Faculty of Law, Queen's University, Kingston, Ontario, Canada (Apr. 20, 1988).

30. A sanguine account of the central government's powers appears in an article published in the Queen's Quarterly. Whyte, *Submission to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord*, 94 QUEEN'S QUARTERLY 793 (1987). The Meech Lake Accord reconstituting the Canadian Confederation of Governments is a monument to nursery politics. It seeks reconciliation with Quebec at the expense of nation building. *Id.* at 793, 795-96. It panders to the two language policies (unilingualism versus bilingualism) which compete for domination in Canada. It regionalizes the appointment process for the upper house of Parliament (Senate) and the Supreme Court of Canada. *Id.* at 794, 803-04. Richard Simeon, Director, School of Public Administration, and Professor of Political Science, Queen's University, in his *Meech Lake and Free Trade: Role and Function of Contemporary Government* made a similar comment in the Dean's conference on the "Meech Lake Accord," Dean's Conference on Law and Policy, Queen's University, Kingston, Ontario, Canada (Feb. 19, 1988).

31. Ryan, *supra* note 29. Conversation with T.P. Chen, Professor of International and Chinese Law, Faculty of Law, Queen's University, Kingston, Ontario, Canada (Apr. 13, 1988).

32. Conversation with David Haglund, Director, Institute for International Studies, Queen's University, Kingston, Ontario, Canada (Mar. 29, 1988). *See* Valorzi, *U.S. will buy more Canadian electricity, study says*, Whig Standard, Apr. 19, 1988, at 15, col. 3.

33. Faculty lecture presented by the Honorable Allan Blakeney, Provincial Premier of Saskatchewan (retired), to the Faculty of Law, Queen's University, Kingston, Ontario, Canada (Feb. 1, 1988).

34. *Id.*

35. M. HARRINGTON, NEW AMERICAN POVERTY 11 (1984); *see* Seaberry, *First the Good*

obsessed with foreign trade.[36] It is committed to wooing foreigners interested in investing in America. Investments, after all, increase the supply of capital and lower interest rates. It makes money available to businesses committed to rebuilding plants and recapturing markets.

If climate and geography shape a group's coping mechanism, Americans appear to be an inventive lot. In commercial matters, they are tied to legal revisionism—using any tool that hastens the process of creating obligations out of promises.[37] When there's a crisis, they're interested in the legal analysis that resolves most, if not all, of it. It's an up-scale version of the way the English manufactured the common law—for every case there's an opposite. Circumstance determines the outcome.[38]

Canadians, in comparison, seem to be cautious folks. They treasure public order as much as personal freedom.[39] In commercial matters, they are wedded to objectivism—subduing personal freedom by way of offer and acceptance.[40] They are wedded to old-world structures and traditions. They strive for social coherency in the midst of change.[41] They are faithful to old ideas.[42] They retain a surprising amount of faith in politics, an arena where people deal with situations that cannot be finessed with legalisms.[43]

D. *Legal Cultures*

Canadian law is cradled in an evolving culture as opposed to one born of revolution. The people are obsessed with social coherency.[44] Lawyers are committed to putting all events into the right box.[45] If an event is an anomaly, something that does not reverberate in a legal structure, it is a matter for politics.[46] Parliaments react to crises as they unfold. After a crisis has been averted, the remainder is governed by the common law, an uncharted oral tradition providing ways for people to bind themselves to one another.[47]

News: The Worst May be Over for U.S. Manufacturers, Wash. Post Nat'l (Weekly Ed.), Feb. 10, 1986, at 19, col. 3.

36. *See, e.g.*, *"Walkom," Asian Friends recoil from "ugly American policies,"* The Globe and Mail, Mar. 26, 1988, at D-3, col. 6.

37. *See* POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 163 (6th ed. 1963).

38. *See* ATIYAH, THE HAMLYN LECTURES: PRAGMATISM AND THEORY IN ENGLISH LAW 1-53 (1987). Conversation with Donald Galloway, Professor of Law (Torts), Queen's University, Kingston, Ontario, Canada (Mar. 22, 1988).

39. On March 8, 1988, Ernest J. Weinrib, Professor of Law, University of Toronto, delivered the Catriona Gibson Lecture at Queen's Law School, Kingston, Ontario, Canada. The title of the lecture was *Theology of the Law*. Following the lecture, I met with Professors Weinrib and Weisberg at which time we discussed the lecture and other Canadian issues.

40. *Id.*; *see* POUND, *supra* note 37, at 150.

41. POUND, *supra* note 37, at 150.

42. *Id.*

43. *Id.*

44. Weinrib, *supra* note 39.

45. *Id.*

46. *Id.*

47. *Id.*

Canadians have a constitutive view of the law;[48] law is a judgment about the past.[49] It's composed of abstractions (like $K = \frac{O + A}{C}$ or $K = M \times M$), strung together in patterns.[50] It contains performative terms.[51] It's something the judiciary understands.[52] It deals with human interactions.[53]

Suppose there were a problem with advertising. This would be the Canadian response. Advertising deals with human interactions such as expressed and implied warranties. It's camped on the fringe of contract law, because it deals with writings and utterances. If the utterance contains a claim that is false, that's fraud. If an advertisement is harmful, but it doesn't reverberate in law as it's presently constituted, that's a matter for politics. Parliament has to enact a statute to deal with this situation.

Americans would react differently to the advertisement. As instrumentalists, they would latch onto the legal analysis that resolved the problem. Law, for them, is a legislative or judicial edict which ensures that all resources (time, money, and materials) are put to their most valuable use. If an advertisement urged people to engage in wasteful spending, an activity in conflict with a policy promoted by law, it would be subject to law. If the advertisement contained a false claim, that would be fraud. If the advertisement was deceptive, that would be actionable at law.

To illustrate the American and Canadian perspective, let's refer to a more traditional case like *Raffles v. Wichelhaus*[54] in which the parties entered into a contract for the sale of 125 bales of cotton. The cotton's origin was Bombay, India. Its destination was Liverpool, England. The parties agreed the goods were to be transported on a ship named Peerless, departing Bombay for Liverpool. The seller presented the goods to the buyer for acceptance. The buyer rejected them, claiming the Peerless he "meant and intended" was a ship that sailed from Bombay in October and not the one that sailed in December.[55]

Americans would treat the parties' conduct and writing as evidence of an agreement. The buyer and seller had prepared a writing, specifying what was to be sold and how it was to be transported. The writing was signed by the parties. Furthermore, the seller had completed his performance.

From an American perspective, the question would be whether the buyer's performance warranted punishment under the law. If under the

48. *Id.* The word refers to a practice enjoying a wide consensus. *See* Whyte, *Federal Power Over the Economy: Finding New Jurisdictional Room*, 13 CAN. BUS. L.J. 257, 271 (1987-1988).

49. Weinrib, *supra* note 39.

50. *Id.*; *see* Griffin, *Hill's Account: Law School, Legal Education and the Black Law Student*, 12 T. MARSHALL L.J. 507 (1987).

51. Samek, *On Contracting*, 4 DALHOUSIE L.J. 62, 66-69 (1977).

52. Weinrib, *supra* note 39.

53. *Id.*

54. 2 H.& C. 906, 159 Eng. Rep. 375 (1864).

55. G. GILMORE, THE DEATH OF CONTRACT 36 (1974).

circumstances the agreement represented the best allocation of the parties' resources, and the buyer had imposed additional costs upon the seller, the buyer would have to pay damages. According to contract law, damages would equal "derivative reliance costs" (if any) plus lost profits.[56]

By comparison, Canadians would express less concern about the resource allocation question, while acknowledging (one would suppose) some concern about damages. Rather, they would ask how this transaction registers under the law of contracts. Because there is no statute on the subject, common law controls the case. Agreements between parties are valid, provided the minds of the parties have met ($K = M \times M$). If there is evidence the parties agreed upon the subject matter, price, time, and place for performance, they would say there was a meeting of the minds. But because the agreement is indefinite as to the time for performance, they'd reluctantly conclude it must be declared invalid.

When these ways of dealing with legal problems are mixed together, as they undoubtedly are under the Free Trade Agreement, there's a muddling of the law. Bewildered businessmen, not knowing the opponents' frame of mind, are left wondering about what is legal and how a crisis ought to be averted.

E. *Social History*

The anxiety attributed to businessmen is provoked by Canadian-American relations and the businessmen's desire to make money in both countries.[57] To date, America and Canada share the longest common border in the world. They admit to a common language and a colonial history with England.[58] From these commonalities, the world's largest trade relationship has emerged.

In 1985, the trade in goods between Canada and America totaled $125 billion (U.S.).[59] That's thirty-seven billion dollars more than the trade between Japan and the United States, and seventeen billion dollars more than American trade with the ten nations of the European Economic Community.[60] The Institute for International Economics published a book featuring an account of this trading relationship.

> In . . . 1984-85, Canada bought 22 percent of U.S. exports, or more than twice as many as second place Japan . . . . If Canada was considered two separate countries (the first being Ontario, and the second, the other nine provinces) Ontario would be the leading buyer of U.S. exports, with the remaining nine provinces ranking third place ahead

56. Swinton, *Foreseeability: Where Should the Award of Contract Damages Cease?*, in REITER AND SWAN'S STUDIES IN CONTRACT LAW 62-91 (1980).

57. 1988 Briefing Paper, *U.S.-Canada Free Trade Agreement*, at 3-3, -4 (assembled by Leitzell, Kendall & Winfrey, Law Firm of Bogle & Gates, Washington, D.C.).

58. *Id.* at 3-3.

59. *Id.*

60. *Id.*

of Mexico and Britain.[61]

If the trading relationship were examined from a Canadian perspective, it would overwhelm the analyst. Eighty percent of Canadian merchandise is exported to the United States.[62] This figure looms large when linked with the fact that exported goods constitute one-fourth of Canada's gross national product.[63]

Too many Americans, I suspect, might be stunned by the magnitude of this trade. The significance of the Canadian-American embrace, however, is not overlooked by Canadians.[64] Canadians feel the influence and closeness of the United States every day. This perceived closeness is a source of irritation for many Canadians and the principle reason for the controversy precipitated by the Free Trade Agreement.[65]

The controversy over the Free Trade Agreement comes down to this. On the North American continent there are competing images of the good life.[66] There's the American way, "unrestrained capitalism."[67] There's the Canadian way, commitment to a system that places "a sense of community ahead of profit."[68] The Free Trade Agreement, the worst fear of some, amounts to a triumph of one image over another.[69] It exposes a country of twenty-six million to the fancy of 241 million Americans.

In the history of our two nations, political leaders have labored with arrangements to normalize trade. The first trade agreement, implemented in 1854, played a role in moving Canada from a colony to an independent state.[70] It covered natural products and mutual fishing rights.[71] After the Civil War, America abrogated the treaty.

The second treaty, submitted for ratification in 1911, covered trade in natural resources.[72] Its submission to the Canadian Parliament met widespread opposition, fueled by a fear that Canada would become a dependent of the United States.[73] This fear spread like a wild fire, fueling a backlash against the dominant (liberal) party. In time, the backlash swept them from office.

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61. P. Wonnacott, The United States and Canada: The Quest for Free Trade, an Examination of Selected Issues 2 (Washington, D.C., Institute for International Economics, Mar. 1987).
62. 1988 Briefing Paper, *supra* note 57, at 3-3.
63. *Id.*
64. *Id.*
65. *Id.* at 3-4.
66. *See* Burns, *Canada's General Election, in Effect, A Plebiscite on Trade Pact with U.S.*, N.Y. Times, Oct. 3, 1988, at 8, col. 3.
67. *Id.* at col. 4.
68. *Id.*
69. *Id.*
70. 1988 Briefing Paper, *supra* note 57, at 3-4.
71. *Id.*; *see Fisheries, Commerce, and Navigation in North America*, in 12 C. BEVANS, COMPILATION OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 116-20 (1974).
72. *Id.*
73. *Id.*

The third treaty and, until now, the final attempt to normalize trade between the countries was withdrawn in 1948 by Canada. The Premier, at that time, feared political reprisal in his government from anti-American elements.[74]

III. FREE TRADE AGREEMENT

A. *Synopsis*

The Free Trade Agreement eliminates gimmicks like quotas, tariffs, and license fees invented by governments to protect domestic industries. Under the Free Trade Agreement, Canada promises to end the practice of paying its farmers subsidies to sell its surplus products to Americans at prices "below market values;"[75] to eliminate train subsidies to companies transporting farm products to United States' markets;[76] to eliminate tariffs on fresh fruit and vegetables coming from the United States;[77] and to remove barriers that impede the flow of energy to America.[78]

America, in turn, promises to eliminate quotas on Canadian beef and veal;[79] to eliminate import license fees for Canadian wheat, oats, and barley;[80] to end the embargo on Alaskan crude oil going into Canada;[81] and to allow goods, services, and investment to flow freely across the border (modifying laws that impede vendor personnel from following their goods and investments).[82]

B. *Consequences*

The Free Trade Agreement creates a common market. It stimulates competition. It drives inefficient businesses from the market place. It encourages people to think about business ventures in terms of comparative advantage (specialization), competitive advantage, and profits.

It imposes the American mechanism for dealing with hunger and privations upon all of North America. It rolls back government interference with competition, facilitating private arrangements like spot marketing and subsidized price wars between businesses, which circumvent competition. By encouraging north-south trade as opposed to trade with the provinces, it destabilizes Canada. It muddles the law, destroying and reshaping the legal cultures of the two countries.

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74. *Id.*
75. Free Trade Agreement Between Canada and the United States of America [hereinafter FTA] art. 701 (explanatory note), in THE CANADA-U.S. FREE TRADE AGREEMENT, INTERNATIONAL TRADE COMMUNICATIONS GROUP, DEPARTMENT OF EXTERNAL AFFAIRS (CANADA) art. 701 (explanatory note), at 75 (1988).
76. *Id.*
77. *Id.*, art. 702 (explanatory note), at 75.
78. *Id.*, art. 905 (explanatory note), at 142-43.
79. *Id.*, art. 704 (explanatory note), at 76.
80. *Id.*, art. 705 (explanatory note), at 76.
81. *Id.*, art. 902.5 (explanatory note), at 141.
82. *Id.*, art. 102 (explanatory notes), at 7, 215.

C. *Economic Wonderland*

In the new market created by the Free Trade Agreement, the demand curve will swing to the left and to the right. Movement will be dictated by an object's residual "use value" (as determined by the public's willingness to spend money on it) and by patented inventions that make existing objects obsolete. Vendors (assumed in Illustration II) will form a line on the supply curve in accordance with their greatest or least competitive advantages. Buyers will engage sellers on the basis of advertising, supply, quality of what's being sold, and use value of the seller's wares and price.

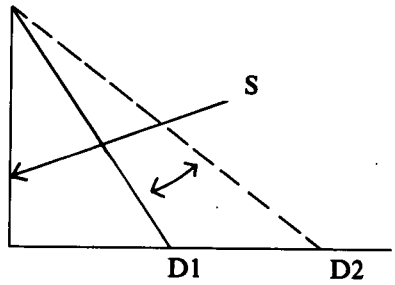

Illustration II

The competitive advantages, such as cost of plant, equipment, raw materials, and talent, will determine the business victims of wild swings in the demand curve. Vendors will pad their advantages to avoid expulsion from the market by moving to favorable tax havens.[83] Some will yield to advertising to smother a competitor's claim that one country has better products than the other.[84] If a market is saturated with goods, the least competitive firm will use advertising to woo a competitor's customer to itself.[85]

From a technical point of view, when the cost of production exceeds gross receipts, vendors will buy competitors and slow their plant production to stimulate demand. Some will buy businesses engaged in profitable but unrelated activity.[86] Others, while managing new acquisitions, will buy advertising to woo its competitor's customers to itself.[87] A few will use spot markets to inflate a product's price. Others, if they can get away

83. *See* Bale, *The Treasury's Proposals for Tax Reform: A Canadian Perspective*, 48 LAW & CONTEMP. PROBS. 151, 161 (Autumn 1985).

84. *See* J. BACKMAN, ADVERTISING AND COMPETITION 4, 82 (1967).

85. *Id.* at 14-16, 54-56. When you're confronted with generic products, brand (differentiation) dominance can be eroded by subtle things like time and special displays in a store, the consumer's desire for change, a friend's recommendation, or the discovery that a preferred brand is out of stock. If a company owns several brands, shifts in brands mean brand loyalty is very weak. *Id.* at 56. Such a situation invites advertising. It provides marginal companies with an opportunity to gather customers.

86. *Id.* at 49, 50.

87. *Id.* at 50.

with it, will start a subsidized price war to get rid of competition. All will cite competition and portray these practices as the only way to serve a "residual demand" for something as reasons for excluding the government from squabbles between competitors.

D. *Spot Marketing*

Spot marketing, a clever contrivance, is a way to alter a price to maximize profits. The price of a product is the sum of the cost of production, rent, and profits.[88] Cost encompasses long-range fixed costs (taxes, equipment, and maintenance of plant) and average variable costs (transportation, labor, energy, and materials).

Assume, for the moment, a buyer pays a price that includes a cost for transportation from a distant plant. If the seller ships the goods to the buyer from a nearby plant, the transportation cost looms as an unearned profit (a sign that a firm has circumvented competition).[89]

If Americans market their goods in Canada under such a pricing scheme, Canadians will have to deal with the practice under its competition statutes (if there is one on the subject),[90] or the Free Trade Agreement provision on disputes which may not be applicable, or some other arrangement which consumes time and money.[91]

E. *Price Wars*

Price wars are subtle ways to trim competition in targeted markets.

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88. *See* G. GILDER, WEALTH AND POVERTY 23, 32 (1981); Griffin, *Wealth and Poverty* (Book Review), 57 NOTRE DAME LAW. 741 (1982).

89. Base point pricing is a species of "delivery pricing." Under this scheme, the seller uses one or more of its plants as a reference point for the calculation of freight charges. Base point pricing can lead to "phantom freight" (a way to note anticompetitive activity). Corn Prods. Refining Co. v. F.T.C., 324 U.S. 726, 728-31, 738-39 (1945).

In a Canadian context, base pointing refers to a transportation cost that reflects the price from the closest place of production to customer, which may mean a rival's plant if it's the closest facility. If rivals use F.O.B. destination contracts, one of them might exact an attractive freight charge (from a nearby rival's plant) to attract new customers. *Market Law and the Competition Act—Practical Problems Confronting Corporate Council*, in 1987 ANNUAL INSTITUTE ON CONTINUING LEGAL EDUCATION, CAN. (ONTARIO) B. ASS'N 46. In all likelihood, the rival will retaliate. Each will subsidize their deliveries out of profits made from nearby customers (other resources) to keep or recover customers. When the price war proves to be too exhausting, the parties might drift to an agreement to standardize the prices.

When the market's price is competitive, competition regarding freight charges can produce conspiracies to stabilize prices, which are condemned by §§ 52 and 53 of the Canadian Competition Act. Davidson, *Delivery Prices Under the New Competition Act*, 7 CAN. COMPETITION POLICY REC. 59 (1986). The parties might agree to prices for different delivery zones which may not reflect the cost of freight from plant to customer. *Id.* 59-60.

90. There are no cases on this in Canada. Conversation with Tom Asplund, Professor of Law (Competition Law), Queen's University, Kingston, Ontario, Canada (May 6, 1988).

91. The dispute provisions cover conflicting interpretations of the Free Trade Agreement, countervailing duties, and antidumping issues. Free Trade Agreement, chs. 18, 19 (explanatory note), at 258-60, 267-70. Zuijdwijk, *Dispute Settlement Mechanism Under the Free Trade Agreement*, 40 ME. L. REV. 325 (1988). In 1984, America and Canada made an agreement covering antitrust issues. Canada/U.S. Memorandum of Understanding as to Notification, Consultation, and Cooperation with respect to the application of National Antitrust Laws (Mar. 1984), *reprinted in* 23 INT'L. L. MATS. 275 (1984).

The trick is to get consumers in one market to subsidize a firm's decision to sell goods in another market at sums below market prices. Illustration III represents a targeted market. LAVC represents "long-range average variable costs." LATC represents "long-range average total costs." LAFC represents "long-range average fixed costs." The peaks and troughs in the market price occur on an axis where the LAVC and LATC curves intersect with the margical cost curve (MC).

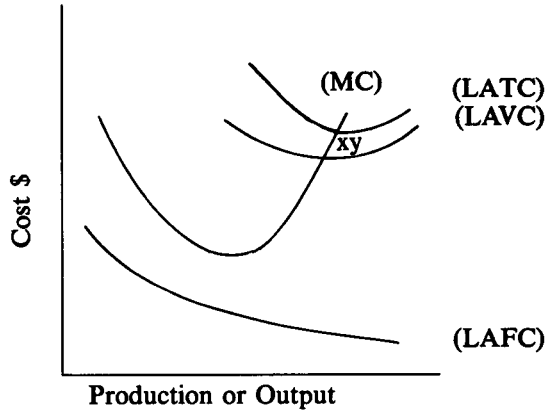

Illustration III

This is a picture presentation of the Areeda-Turner Test. It's the setting in which analysts plot price wars. D. Gifford & L. Raskin, Federal Anti-Trust Law: Cases and Materials 404-05 (1983).

When firm X drops its price between the points where the curves intersect ($6.75), the presumption is that X has started a price war. People will say X has acted competitively to lure Y's customers to itself. When Y, thereafter, drops its price to $4.50, the presumption is that Y has acted competitively to recover customers it has lost to X.

When X and Y drop their prices below the lowest point where the MC and LAVC curves intersect, it is presumed the parties have acted suspiciously. Some will assert the parties have succumbed to the temptation to establish a monopoly at the expense of competition and will allege the parties are waging a competitive war against the market's rules. X and Y have to find an explanation the judiciary will accept (e.g., this war is the only way to salvage a market where there's a residual demand for what a single manufacturer can produce).

F. *Cautionary Note*

Canadian economic arrangements invite parliamentary intervention to serve and protect the public.[92] The subject matter, whether provincial

92. In trade and commerce, federal (provincial) powers are both split and indeterminate. On

regulation of potash or a violation of the Federal Competition Act, determines who will intervene.[93] When a province adopts a regulation pertaining to a provincial resource pulling the demand curve to a near inelastic state, Parliament (Ottawa) can enjoin the administration of that regulation, provided the resource is sold interprovincially (Illustration IV) or in international trade.[94] In Canada, some level of government is authorized to deal with business (provincial) practices threatening the public.[95] If a business is the offender, government has the option to warn it. If the government is in a contentious mood, it can nudge the entity off the supply curve.[96]

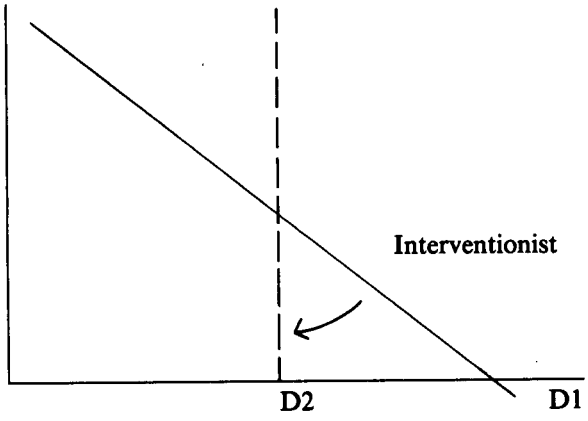

Illustration IV

The solid line is a normal demand curve. The dotted line is an inelastic demand curve. The arrow symbolizes the pull of the normal demand curve to the left.

The Free Trade Agreement will destroy this scheme to make room for a free-standing, free enterprise, government noninterventionist ar-

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one level, the trade and commerce provision, § 91(2) of the British North America Act, permits Parliament to regulate businesses engaged in interprovincial commerce. John Deere Plow Co. v. Wharton, [1914] A.C. 330, 340, 18 D.L.R. 353, 360 (P.C.); A.-G. Ont. v. A.-G. Can. (Canada Standard Trade Mark Case), [1937] A.C. 405, 417, [1937] 1 D.L.R. 702, 704; *see* Whyte, *supra* note 48, at 272-87.

93. *See* Central Can. Potash Co. v. Government of Sask. (1978), 88 D.L.R. (3d) 609, (1979) 1 S.C.R. 42; Regina v. Wetmore & A.-G. Ont. (1983), 2 D.L.R. (4th) 577 (1983) 2 S.C.R. 284; *see also* Finkelstein, *Constitutional Law—Section 91(2) of the Constitution Act, 1867—Competition Legislation*, 62 CAN. B. REV. 182 (1982). Labatt Breweries of Can. v. A.-G. Canada (1979), 110 D.L.R. (3d) 594, [1980] 1 S.C.R. 914, put an interesting slant on Parliamentary Power. Provincial power amounts to what Parliament (Ottawa) can't regulate. A.-G. Can. v. A.-G. Ont., [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.).

94. Whyte, *supra* note 48, at 286 (citing Canadian Indus. Gas & Oil (CIGOL) v. Government of Sask. (1977), 80 D.L.R. (3d) 449 (1978) 2 S.C.R. 545; Central Can. Potash Co. v. Government of Sask. (1978), 88 D.L.R. (3d) 609 (1979) 1 S.C.R. 42). Whyte, *supra* note 48, at 290-291, paints a picture of parliamentary power as regards international trade.

95. *See* Whyte, *supra* note 48, at 272-87.

96. *See* ECONOMIC COUNCIL OF CANADA, INTERIM REPORT ON COMPETITION POLICY, ch. 2, at 37 (July 1969)[hereinafter ECONOMIC INTERIM REPORT].

rangement (Illustration II). There's no law for it in Canada except those acts perceived by Parliament to be necessary to implement the Free Trade Agreement. Relying upon constitutive theory or some pull of the demand curve, Parliament can fashion acts to regulate goods sold internationally.[97]

There is another dimension to this competition business that Canadians may have overlooked. It's the acquisition and use of intellectual property (new technologies, organizational schemes, and synthetic materials and goods). Any decision to employ something new on the supply curve will render existing goods obsolete, depress the profits of rivals, or drive a poorly organized vendor from the market.[98] How a lucky vendor uses something new is a matter of some importance. Canada has statutes on the subject,[99] but they're shorn of case law development.

Assume, for the moment, A and B are widget vendors commanding business vistas (on a supply curve) that are the envy of competitors. A is a patent owner who occupies fifty percent of the market. B is a patent infringer, occupying thirty percent of the market. What remains, roughly twenty percent, is divided about equally between fifteen price-cutting competitors. While sitting around the corporate conference table, discussing possible formulae for the settlement of an impending infringement suit, A says to B:[100]

> You're a responsible company . . . (pause) . . . not one of those price cutters. Those guys . . . their discount schemes and price cutting maneuvers . . . (pause) . . . . Nothing but antics . . . . Keeps the market unsettled.
>
> I've been thinking about this . . . I mean . . . the price cutters and the infringement business. I'm going to license my potential cost-cutting widget maker (the latest rage) to all applicants for twenty years. How about that as a settlement of our differences? Twenty percent royalties on the first million, ten percent royalties on the second, one percent thereafter on annual sales . . . (pause). I assume you can sell twenty million units? That amounts to . . . you'll have to pay an average royalty of about 2.4% . . . something like $480,000. That's a fair settlement of our differences (smile). The machine will cut your product cost by a third. What do you say . . . (smile).

B ponders the offer then accepts it. A and B are happy with the

97. The question presented is whether Parliament's legislative output will be enough. Whyte alludes to Constitutive Theory (as an interim answer) in his *Federal Powers Over the Economy* work. Whyte, *supra* note 48, at 271.

98. If an invention improves cross elasticity of demand (price-wise, making an alternative good attractive), some vendor is bound to be hurt. *See* ECONOMIC INTERIM REPORT, *supra* note 96, ch. 2, at 32.

99. Feltham, *The Interface Between Intellectual Property Law and Competition Law in Canada*, 12 CAN.-U.S. L.J. 149 (1987).

100. This is an embellished version of a problem prepared by Tom Arnold and others for a conference entitled "Competition and Dispute Resolution in the North American Context." Arnold, Lundell, Schoeder & Cook, *The Interface Between Intellectual Property Law and Competition Law in the North American Context*, 12 CAN.-U.S. L.J. 121, 125-26 (1987).

arrangement. The price cutters are distraught. The cutters can neither pay the twenty percent royalty rate (it will drive them out of business) nor afford a lawsuit challenging the contract between A and B.

From a Canadian perspective, there are two issues to consider: contracts and threats to competition. To begin the analysis, there is a contract within a contract. There's a licensing agreement and a contract sporting a promise to forebear a legal claim for a promise to rent patented machinery. The validity of these agreements will be determined by provincial law.[101] The promises amount to consideration. They carry demand value. They would certainly pass any benefit or detriment test. Renting equipment for money shouldn't raise any legal eyebrows. The tougher issue questions the impact the licensing agreement will have upon competition in the widget market.

Is it the agreement or the performance contemplated under the agreement that is threatening? Should we analyze performance under the Canadian Patent Act? Who will litigate the matter? Do we have some cases on this? Should we use the Canadian Competition Act? What is the remedy? If the patent infringer is an American doing business in Canada, should the remedy be shaped by the Free Trade Agreement?

IV. MUDDLED LAW

Binational panel inspections of a nation's decisions in the name of trade harmonization will have the unintended effect of muddling each country's laws.[102] Trade issues will have a saluatory effect upon judicial decision making. A few cases will illustrate what might happen.

A. *Henningsen v. Bloomfield Motors*[103]

Henningsen bought an automobile for his spouse. The dealer was Bloomfield Motors. The parties conducted a discussion about the car Henningsen ultimately purchased. Henningsen was presented with a standard form contract, which he signed. A clause in the form abolished the implied warranty of merchantability. Another clause granted him an expressed warranty—a guarantee that the manufacturer would care for any defect presented to it within 4000 miles or ninety days after the car had been delivered to the buyer.

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101. *Id.* at 122 n.7.

102. Joint Lectures on Remedies and Administrative Practices under the Free Trade Agreement, presented by Professors Noel Lyon (Faculty of Law, Queen's University) and David Haglund (Director, Queen's Institute for International Studies) at Queen's University, Kingston, Ontario, Canada (Mar. 29, 1988). *But see* Cluchey, *Despute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335 (1988); Trakman, *Privatizing Dispute Resolution Under the Free Trade Agreement: Truth or Fancy?*, 40 ME. L. REV. 349 (1988).

103. 32 N.J. 358, 161 A. 2d. 69 (1960).

All the manufacturers, including the one who made Henningsen's car, used the same form. All the forms contained the same clauses. Bloomfield presented the clauses to Henningsen without pointing them out, spending time to explain them, or seeking Henningsen's acknowledgment that he understood what had been explained to him.

First of all, assume the car was made in Detroit and a Canadian purchased the car in Ontario, Canada, and drove it to the United States. Assume further, the car broke down in Kansas, inflicting injury upon Henningsen's wife, and the buyer's wife sued the manufacturer in Michigan.

If all the manufacturers using this form account for most of the vehicle registrations in Canada, what, if anything, would the Michigan court say about the clause abolishing the implied warranty of merchantability or about the clause limiting the vendor's duties? How would a Canadian organize this case? What advice would American counsel give him? How would the judiciary resolve the complaint against the Michigan manufacturer?

Canadians would examine the facts to determine whether the action sounds in tort or contract. They would say contract should provide the victim with a remedy. If she can't get a remedy from that realm, tort should provide her with something to exact retribution from the defendant.[104] Technically speaking, "proximity of a good to an injury" would create a presumption of negligence.[105] Negligence (breach of a duty to use the safest design and manufacturing techniques) is another way of describing substandard conduct, encompassing what retailers, wholesalers, and manufacturers do with consumer products.

There's a nexus between the good (automobile) and Henningsen's injury, creating a presumption of negligence. The manufacturer has to demonstrate that he used the safest manufacturing and design techniques. To avoid liability, he has to prove "intervening cause" or the plaintiff's contributory negligence.

Taking the location of Henningsen's injury into account (Kansas),

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104. *See* Blom, *Evolving Relationship Between Contract and Tort*, 10 CAN. BUS. L.J. 258 (1985). Under the law of obligations, reliance would separate contracts from torts (privity would loom in both categories). If the defendant (Bloomfield) had created an expectation upon which the plaintiff relied to her detriment, she would get a remedy in torts. Injury would trigger a run of the statute of limitations. The measure of damages would encompass costs (sums spent to repair the injury) and reliance (sums spent as a result of an expectation engendered by the defendant).

On the other hand, if a promise was purchased with "consideration," plaintiff (not in this case) would be provisioned with a contracts remedy. Damages would amount to "loss of expectation" and consequentials. *See* Reiter, *Contracts, Torts, Relations and Reliance*, in STUDIES IN CONTRACT LAW 236-311 (1980).

105. This notion appears in an unpublished manuscript by Professor Donald Galloway (Faculty of Law, Queen's University) entitled *Reconceiving the Law of Negligence*, at 11, 15, 16, 19. The phrase in the text emerged from a conversation with the author on March 22, 1988. Professor Ernest Weinrib used similar language to express this sentiment, *see supra* note 39, and alluded to this in his faculty seminar on March 8, 1988.

the manufacturer has to contend with something called strict liability.[106] When or if the defendant puts defective goods into the stream of commerce, he's liable to the consumer for damages.

In comparison, the Americans would reject contract law as a remedy, because the goods were purchased in Canada.[107] They wouldn't show much enthusiasm for negligence, because it operates where there's a clear cut relationship between plaintiff and defendant.[108] Regarding strict liability, they'd urge caution, because the goods weren't distributed in American commerce. They'd cast around for American and Canadian policies the law tries to promote. If the defendant's conduct was in conflict with one of these policies (putting safe goods on the market), the law promoting that policy would become the basis for a lawsuit.

The American would say a tort is a negative act, a deliberate decision to do nothing in an area where a person is obliged to act. Plaintiffs should be granted a remedy when:

(a) they can't be appeased in contract;
(b) the tort remedy is the only way to get defective goods off the market;
(c) the tort remedy has the effect of harmonizing the product standards (under the Free Trade Agreement) between Canada and the United States;
(d) defendants can bear the loss better than plaintiffs; or
(e) the contract (limiting the defendant's liability in tort) omits one remedy.

In this case, the injured plaintiff is a Canadian. The good is American. The plaintiff seeks a remedy for damages caused by an American good in Kansas. Plaintiff can't recover in contract, because privity of contract is a defense.[109] A decision in tort might have the effect of harmonizing the product standard laws of the two countries, assuring everyone that American manufacturers will put safe goods on the market.

Assuming the plaintiff can prove the car was defective at the time of the injury, she's entitled to a remedy. The theory would be strict liability. The defendant would have to show the car wasn't "unreasonably dangerous."

The American court would pounce upon the clauses disclaiming the implied warranty of merchantability and limiting the vendor's liability.

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106. *See, e.g.*, O'Gilvie v. International Playtex, Inc. 821 F.2d 1438 (10th Cir. 1987); Lester v. Magic Chef Inc., 230 Kan. 643; 641 P.2d 353 (1982)(Prager, J., dissenting).

107. Because the contract was made in Canada, privity of contract would be a defense. *See* Vandepitte v. Preferred Accident Ins. Corp., [1932] S.C.R. 22, *affirmed*, [1933] A.C. 70.

108. Weinrib, *supra* note 39.

109. Greenwood Shopping Plaza Ltd. v. Beattie (1980), 111 D.L.R. (3d) 257 (1980) 2 S.C.R. 228; Vandepitte v. Preferred Accident Ins. Corp., [1932] S.C.R. 22, *affirmed*, [1933] A.C. 70; *see* Tweedle v. Atkinson (1861), 1 B & S 393, 121 E.R. 762 (Q.B.); Dunlop Pneumatic Tire Co. v. Selfridge & Co., [1915] A.C. 847 (H.L.).

The conduct of the parties, it would say, establishes a contract. The seller secured a concession from Henningsen—a promise to do nothing about suing the manufacturer (dealer) for breach of warranty. The problem with the concession, however, is the dearth of evidence to prove Henningsen was aware of the concessions he had made. The seller, Bloomfield, didn't spend time explaining the concessions to Henningsen. There's no evidence Henningsen acknowledged he understood the explanation the seller had given him. Hence, under these circumstances, the minds of the parties hadn't met.[110] Under the meeting of the minds theory, the clause abolishing warranty would be invalid.[111]

Contracts, or so it seems, are a result of the bartering system, people trading valuable things. What you get, in terms of goods, is dictated by the merchants the market foists upon you. If the public consumes supplies provided by a manufacturer (dealer) boasting a competitive advantage, needy consumers go to persons boasting the "next best" competitive advantage. When all that's left is the least competitive manufacturer, the buyer should beware. If all the manufacturers behave like the least competitive manufacturer, let the vendors beware. If objectionable clauses are imposed upon consumers by all manufacturers, they should be declared void in America and Canada. In the market created by the Free Trade Agreement, buyers should have the option (freedom) to buy goods without objectionable clauses in contracts.

The Free Trade Agreement, the American court would say, is the law of the land. This court is bound to make decisions that complement the agreement concluded with Canada. There's the strict liability standard (Kansas) and a tort duty (imposed upon manufacturers doing business in Canada) to warn the people about dangers posed by a consumer's use of specially designed vehicles. If the manufacturer did nothing to disclose known dangers at the time of purchase, he's negligent. If the manufacturer's negligence caused or contributed to Mrs. Henningsen's injuries, she's entitled to a remedy.

It does matter which law is applied in this case, Canadian or American. Whatever law we choose, it will have the effect of harmonizing the law between the two countries regarding the safety of goods sold in North America.[112]

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110. *See* G. GILMORE, *supra* note 55, at 211-45. "K = M × M" is the algebraic way to express the meeting of the minds theory.

111. *See* Tilden Rent-A-Car v. Clendenning, (1978) 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.); *see also* Henningsen v. Bloomfield Motors, 3 N.J. 358, 161 A.2d 69 (1960)(the court comes as close as it could to this position).

112. The New Jersey Supreme Court awarded the buyer damages for breach of warranty because the car was unsuitable for ordinary use. Damages were awarded to the buyer's spouse. *Id.* at 416-17, 161 A.2d at 100-01. Beyond contract damages, the buyer received damages for loss of consortium with his wife. *Id.* at 417, 161 A.2d at 101-02.

If this case had been decided in Canada, the court might have followed Davidson v. Three Spruce Realty Ltd. (1977) 6 W.W.R. 460, 79 D.L.R. (3d) 481 (B.C.C.A.). In Ontario, the court

B. *In re Timbers*[113]

Debtor obtained funds from an investment bank. The bank obtained concessions from the debtor, namely a promise to repay the loan with interest, an assignment of rents, and a surrender of unencumbered collateral (to be encumbered, foreclosed upon, and sold in the event of the debtor's breach). The debtor was unable to make his payments and the bank foreclosed upon its lien. The debtor, thereafter, filed a petition in bankruptcy to prevent the bank from exacting revenge against the property.

The bank argued it had purchased the right to foreclose upon and sell the property in the bargaining process and the Bankruptcy Act arrested his freedom (the right to reduce property to cash and invest the same profitably). Assuming the claimant bank is Canadian, how would its lawyers approach the case? What advice would an American colleague give them? When the case got to court, what would the bankruptcy court say on the subject?

Canadian lawyers would unpackage the law of contracts—the common law ceremonies, notions like consideration and promise. They'd note that the facts resonated under the Free Trade Agreement (financial services) and under the law governing the debtor-creditor relationship. The Free Trade Agreement, they'd say, formalizes a Canadian bank's right to sell financial services to American businesses.[114] The Agreement, they'd go on to say, covers the structure of Canadian banks operating in America and their activities (securities and retail banking

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would have used the reasonable expectations of the buyer to define the seller's duties. *See* Reiter & Swan, *Contracts and the Protection of Reasonable Expectations*, in STUDIES IN CONTRACT LAW § 1, at 8 (Rieter & Swan eds. (1980)). If the seller had used a form contract, the buyer's expectations would have been defined by the items the seller had reduced to fine print. If the fine print items were concealed from the buyer (never mentioned to him), the seller couldn't use them as a defense in a contract action. Tilden Rent-A-Car Co. v. Clendenning, (1978) 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.); *see also* Delaney v. Cascade River Holidays Ltd., (1983) 44 B.C.L.R. 24, 24 C.C.L.T. 6 (C.A.).

In contracts, Canadians are obsessed with establishing a "level playing" field before the parties make mutual promises. If the parties had come to the deal with unequal bargaining power, an objectionable clause like a limitation of liability clause would have been invalid. The judge would review the testimony of the defendant before coming to this decision. He'd ask the following questions.

Judge: Did you (defendant) urge the plaintiff to sign standard form contract?
Defendant: Yes.
Judge: Did you say nothing about reading it?
Defendant: Yes.
Judge: Did you provide the plaintiff with soothing assurances during bargaining?

If each answer was yes, the objectionable clause would be invalid. Davidson v. Three Spruce Realty Ltd., (1977) 6 W.W.R. 460, 79 D.L.R. (3d) 481 (B.C.C.A.).

The FTA would not force a court to do anything like this. A decision which did not take the Treaty into account, however, would undermine what the politicians have tried to promote between the countries (livelier business competition between rivals and higher quality goods and services for Americans and Canadians).

113. 793 F.2d 1380 (5th Cir. 1986).

114. FTA, *supra* note 75, art. 1702 (explanatory note), at 249, 251.

operations).[115] Although the agreement says nothing specific about each country's laws regarding secured transactions and mortgages, it is assumed Canadian plaintiffs are entitled to equal treatment under American laws.

If there was an agreement permitting the Canadian bank to subject the "demand value" of certain property to a claim, and the agreement was reduced to writing, signed, and registered with the state, the debtor would be obliged to surrender the property to the bank. The bank would be obliged to get as much money out of the property as it could to retire the debt.[116] From a Canadian perspective, the Bankruptcy Act shouldn't be used by the debtor to stop the bank (a secured creditor) from selling the property.[117]

After listening to the arguments proposed by the Canadians, American counsel, in turn, would cast around for laws or policies dealing with the bank's desperate situation. Some American lawyers, he'd say to Canadian counsel, would utter little about the claim, contending that they couldn't do much without an examination of the writing between the parties; or that the claims weren't governed by the traditional laws of contracts. A few would assert the bank's claim was suspicious, having inadequately described the right frustrated by the Bankruptcy Act. Others would contend that the right to gouge one's claim out of encumbered collateral was purchased under the mortgage;[118] and that the bankruptcy statute wrongfully took that right (property) from the bank.[119]

The bankruptcy court would pounce upon the last notion, citing sections of the American Bankruptcy Act that protect a secured creditor's rights. It would then drift to the Free Trade Agreement, citing language that orders Americans to accord equal treatment to Canadians doing business in the United States. The court would acknowledge that a Canadian creditor bank could sell this property under the Canadian Bankruptcy Act.[120] While a trustee could do little to frustrate the wishes of a secured creditor (where a claim was greater than the property's demand value), American law stops secured creditors from taking such action.[121]

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115. *Id.*

116. *See* GERTNER, SPRINGMAN, MCGUINNESS, MORRISON, STEWART & LASKIN, DEBTOR AND CREDITOR: CASES AND COMMENTARY 848-49 (3d ed. 1987); Robertson, *The Problem of Price Adequacy in Foreclosure Sales*, 66 CAN. B. REV. 671 (1987).

117. *Re* Brodie (1984), 51 C.B.R. (N.S.) 81 (Ont. S.C.); *Re* Hallmac Ltd. (1973), 1 O.R. (2d) 143, 19 C.B.R. (N.S.) 80, 39 D.L.R. (3d) 511 (H.C.).

118. Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d. 1436 (4th Cir. 1985); *In re* American Mariner Ind., Inc., 734 F. 2d. 426 (9th Cir. 1984); *see In re* Timbers, 793 F.2d at 1380, 1397 (5th Cir. 1986).

119. *Timbers*, 793 F.2d at 1383. *Timbers* supplies an account of the cases on this issue. *Id.* at 1380, Syl. ¶ 2, 1382 n.1, 1405.

120. *E.g.*, *Re* Dunham (1981), 40 C.B.R. (N.S.) 25; *Re* Brodie (1984), 51 C.B.R. (N.S.) 81 (Ont. S.C.).

121. The Bankruptcy Reform Act, 11 U.S.C.A. 362(a)(3) (West Supp. 1989); 11 U.S.C. § 362(a), (4), (5) (1983).

The American Bankruptcy Act recognizes a creditor's property interest in encumbered collateral; it doesn't take it from him. Rather, it postpones the day when a creditor can gouge his claim out of encumbered property. Sections 361 and 362(d)(1) of the Bankruptcy Reform Act, for example, provide secured creditors with an interim remedy when the demand value of encumbered collateral depreciates or is threatened with injury.[122] It provides a final remedy (cash and promissory notes) after a plan to reorganize a business has been confirmed by a bankruptcy court.[123]

When and if the bank produces a recorded mortgage, it will be given the demand value of encumbered property in bankruptcy. If the creditor's claim is a request for extra compensation (for the lost opportunity to make money), extra compensation won't be allowed under the Act.[124]

V. SUMMARY

The Free Trade Agreement formalizes an unwritten understanding that Canada and America are economically related. It erects a new market, the North American Common Market. It puts pressure on each country's courts to ponder the other country's laws while crafting opinions. It hastens the day, finally, when lawmakers will harmonize the laws.

In this new market, contracts will be seen as a cloak shrouding layers of perception. Lawyers will have to unpackage that law to find something, like offer and acceptance or notions about consideration and reliance, to make sense of transborder encounters between businessmen. Enforceable bargains will emerge from the conversations between the

122. *Timbers*, 793 F.2d at 1399; *see* Bankruptcy Reform Act, 11 U.S.C.A. 362(d)(1) (West Supp. 1989).

123. *Timbers*, 793 F.2d at 1385.

124. *Id. Timbers* was decided by the Fifth Circuit Court of Appeals. It concluded the option to use encumbered collateral profitably, i.e., to liquidate an asset and reinvest the proceeds, wasn't a compensable loss of property meriting adequate protection. *Id.* at 1416; *cf. In re* Ahlers, 794 F.2d 388 (8th Cir. 1986). The Supreme Court seized an opportunity to review the Fifth Circuit Court of Appeal's decision. United Sav. Ass'n v. Timbers of Inwood Forest Ass'n, Ltd., 108 S. Ct. 626 (1988). In an opinion written by Justice Scalia, the Supreme Court affirmed the court of appeals. *Id.* at 630-31.

If this case had surfaced in Canada, the Bankruptcy Act would guide the trustee's actions. Generally speaking, secured creditors are provisioned with a right to gouge payment (satisfy a debt) out of property owned by the debtor. If a creditor has done what's required of him to obtain a secured claim, the trustee must relinquish control over the property when the secured creditor requests it. *Re* Brodie, (1984), 51 C.B.R. (N.S.) 81 (Ont. S.C.). The trustee can resist a request for control, provided he files a timely pleading in a provincial court and proves the debtor has equity in the property sought by the secured creditor. *Id.*

The FTA wouldn't mandate an American bankruptcy court or, indeed, a provincial (Canadian) superior court to do anything. Yet, ignoring the trade pact would undermine a goal the politicians have tried to promote between the countries, that of livelier transborder financial services. *See* Wilson, *Canada-U.S. Free Trade Agreement*, in Issues Brief, Congressional Research Service, at CRS-8 (Aug. 19, 1988)(Order Code IBB87173); Congressional Research Service, *Summary of the U.S.-Canada Free Trade Agreement*, at 33-34 (Feb. 1988)(IP-3956-BU). A decision that was unmindful of the pact would make it difficult for Canadian creditors (financial institutions) to calculate the risks of doing business in America.

parties and from their correspondence and written agreements. The duty to maintain a stable business relationship, such as good faith or a duty to perform promised acts, will be built upon the parties' speech, conduct, and correspondence. Breach of these duties will give rise to damages based upon the sum a plaintiff was provoked to spend.

The flurry of activity, prompted by the Free Trade Agreement, will produce a continental law—a way to bridge different cultures without bruising their domestic laws and practices. All this will dawn upon us in the area of financial services and in long-term installment and requirement contract cases.

If law is a way to allay fears, this law, both bargain and obligation law, will inculcate a desire in people "inter se" to cooperate. Yet this law, I fear, will disarm critical thinking. It will lull people into the habit of devaluing each other's belief system, which determines, more often than not, how laws are applied to people. It will mask the decision to replace Canadian governmental regulation of business with the American market mechanism. It will create a legal choir who will whine about or undo (privatize) the mission of crown corporations. It will erode each nation's folkways, fuzzing the differences between Canada and America.