



Prime Minister Trudeau and President Trump walk along the colonnade at the White House in Washington. February 13. *Adam Scotti photo*

Negotiating With an Elephant: NAFTA's Not for Sissies

Jeremy Kinsman

While it may seem as though the NAFTA renegotiations are about arcane clauses and sub-sections at their most abstract and the fate of industries and jobs at their least, they are also about personalities. Trade negotiations, like any trans-border diplomatic interactions, involve the personal strengths and weaknesses of their interlocutors. As veteran senior diplomat Jeremy Kinsman writes, there's a texture to these things.

Canadians and Americans negotiate effectively every day. We enjoy an ease of dealing with each other in the private sector as smooth as any relations in the world. Trans-border acquisitions are agreed on complicated bargains for pipelines, banks, property, waste collectors, diamond mines and food suppliers.

Traders settle easily on terms for everything that is sold across the border. Deals proceed on the need to agree first on the facts. The governing principle is win/win. Behaviourally,

the sociology is that of cousins: the easy after-work cocktail banter is in a shared language about a common sports and entertainment universe.

While some historians still make the case we're basically the same people, polling shows that Canadians increasingly see U.S. society, and certainly American politics, trending differently than Canadian in ways that could become almost existential if trajectories hold. But deal-makers keep fractious political debate out of day-to-day business transactions.

It was the sense of common bonds at the people-to-people level that lifted the idea of a free trade agreement among the North American countries beyond the economic sphere. It aimed at a higher and wider spatial ideal, a sense of North American community, as set out by Ronald Reagan in his speech when he announced his candidacy for the presidency. It was about neighbourhood.

"A developing closeness among Canada, Mexico and the United States—a North American accord—would permit achievement of that potential in each country beyond that which I believe any of them—strong as they are—could accomplish in the absence of such cooperation," Reagan said. "In fact, the key to our own future security may lie in both Mexico and Canada becoming much stronger countries than they are today."

But Reagan has a nationalistic successor who campaigned on a vow to "tear up NAFTA," who in a myriad of ways has insulted Mexicans. Donald Trump has also jarred a lot of Canadians with his claims American workers were being victimized by an unfair trade deal. He has top advisers who are extreme nativists and sovereignists, for whom international relations are an exercise in seeking national advantage whenever possible; "America first, always America first," as Trump intoned in his inaugural address.

Yet, despite Trump's recent descrip-

tion to the *Wall Street Journal* of NAFTA as "a horrible deal...one of the truly bad deals," the recently-released U.S. statement of objectives for NAFTA re-negotiation with Canada is not unreasonable. NAFTA does need updating, adjustment and extension into new areas of commerce that were not foreseen in the pre-digital age.

The three countries have appointed experienced, professional, no-drama lead negotiators, in the hope that Trump meant it when he told the *Wall Street Journal* that NAFTA "may be salvageable." But, still, it may be too much to hope that negotiations proceed the way they do in the private sector, in a friendly, fact-based and objective way.

The first reason is that negotiating for your country is different and possibly most different for Americans. Maybe there's something about being a superpower that makes exceptionalist Americans (and Russians, by the way) curiously unable to easily digest that things might be done differently and even effectively in other countries. For example, Canadians have a national goods and services tax (GST); our timber resources are mainly on "Crown" lands; our cultural industries lack the scale to compete with all-out continental market forces. For Americans, differently aligned policies infer an unfair advantage, even if they come to understand why we choose different ways.

As the senior Canadian cultural official, I went to Los Angeles in the 1980s to explain to the president of Disney, Frank Wells, why we needed to separate the Canadian market for film distribution rights from the standing practice of indivisible North American rights that by definition excluded Canadian distributors from earning the revenue that could nourish a Canadian film industry.

Wells received us for a working lunch in the cafeteria (always a sign of a put-down). But then Wells stayed for three hours, concluding with seem-

ing empathy that he "got our reasoning." He'd think the same way if he were us. Yet, that evening he sent a message to the White House that these Canadians were dangerous to their industry's global interests and had to be stopped. The issue of Canadian corrective film distribution legislation almost derailed the FTA talks several times. But in the end, Prime Minister Mulroney obtained an exemption for Canada's cultural industries, after persuading Reagan he couldn't sell the deal to voters without one. This deal-making exemption was granted by a former president of the Screen Actors Guild.

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The U.S. system is certainly unique. The division of powers means that American negotiators aren't free agents. They need to answer to Congress as well as to the president. "We can't bind the Congress," Reagan's Treasury Secretary James A. Baker said in the final days of negotiating the original Canada-U.S. Free Trade Agreement, a caveat that is repeated as doctrine in every negotiating room for every working group all the time. It can mean that any agreement is ad referendum ad infinitum. "We'll have to run it past our lawyers" is one of the most frequently heard and ominous retorts from the U.S. side in negotiations. Even the U.S. Constitution gets invoked when the going gets tough.

"It ain't over 'till it's over," Yogi Berra said. And ex-ambassador to the U.S. Allan Gotlieb added from

his experience in Washington, "It's never over." In 1984, Canada won a court judgment that our method of pricing timber on Crown lands ("stumpage") was not a trade advantage. That summer, at the Democratic convention, a congressman friend from a timber district warned me not to celebrate; they wouldn't accept the verdict. There have been several such judgments in the years since, from neutral panels set up to adjudicate conflicts under NAFTA, all confirming the initial verdict in Canada's favour. The U.S. authorities still don't accept it and indeed, now want the provision for neutral bi-national dispute settlement panels under article 19 of NAFTA scrapped altogether. However, no Canadian government is going to agree to leave conclusions in the hands of U.S. courts which seldom rule in favour of foreigners. Justin Trudeau has already made it clear that this is a deal-breaker for Canada.

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Negotiating with the U.S. means, as Gotlieb also said, coping with “a country of a thousand players who can deliver a thousand wounds.” It's easy to understand how the U.S. film industry could influence Ronald Reagan. But how come the owner of the critical and over-burdened Ambassador Bridge between Windsor and Detroit could get the U.S. government under Obama to fight the construction of a new parallel bridge to relieve costly border congestion?



President Trump announces executive orders on trade on March 31, with Vice President Mike Pence and Commerce Secretary Wilbur Ross. *White House photo*

Canada will end up paying the entire \$4.8 construction cost of the new Gordie Howe International Bridge, and will even pay \$250 million for the customs plaza on the U.S. (The costs will be recouped from toll revenues and Canada and Michigan will be co-owners of the bridge.)

American presidents have to pick when they will make concessions that might affect domestic players and jurisdictions, even U.S. agencies. Getting Bill Clinton to sign on to a land mine agreement the U.S. Army deplored when he was already at daggers drawn over his ““Don't ask, don't tell” policy authorizing gays to serve, if not openly, in the military was expecting too much.

Strategically, we should avoid pitching ourselves as solid co-citizens of sort-of-the- same-place. The U.S. is a very divided society. I learned that the fact my mother was born in Los Angeles and I went to an American university may stir a bit of empathy in Los Angeles and New York but not with anybody who went to Texas Christian or Alabama; on

the contrary. Moreover, if we try to come across as being just like them, how come we get to claim we can do things differently?

We should never appear too eager for an accord. While we may want to refrain from mirroring the Trump tactic of threatening to tear up the deal, Canadians need patience and disciplined restraint combined with perfect timing on when to say across the table to Americans “No way.” As Donald S. Macdonald put it, “You have to kick them in the shins from time to time if you want to get anywhere.” In 1987, we wrested a five-minutes-to-midnight Free Trade Agreement from the White House only after PMO Chief of Staff Derek Burney and Chief Negotiator Simon Reisman said “We're done. It's over.” It was over the U.S. resistance to bi-national dispute settlement panels. On the phone with U.S. Treasury Secretary Baker on October 3, 1987, the night Reagan's fast track authority to negotiate a deal without Congressional amendments would expire at

midnight, Prime Minister Mulroney told Baker he would be calling the president at Camp David, asking just one question: "How come the United States can make a nuclear arms deal with its worst enemy, the Soviet Union, but can't sign a free trade agreement with your best friends, the Canadians?" Within half an hour, Baker and the U.S. agreed to the dispute settlement mechanism.

Of course, we had in James Baker a reasonable, fair-minded, and very intelligent professional, working for a president who wanted an accord, who saw benefits in the whole North American picture, and who adored Brian Mulroney.

"Justin is doing a spectacular job in Canada. Everybody loves him and they love him for a reason," pronounced Donald Trump recently at the G20 summit in Germany. And in a transcript leaked in August of a phone call with Mexican President Enrique Peña Nieto a week after he took office in January, Trump said Canada was "not the problem," that the Canada-U.S. trade relationship was "balanced and fair," and that "we do not have to worry about Canada, we do not even think of them."

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For negotiators, that’s great to know, provided the president in question doesn’t change his affections as often as the current one changes his bluffs and indeed his mind. Most Canadians deplore Trump’s behaviour and

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We’ll inevitably have to disagree with the U.S. on some international and even bilateral issues: how we communicate that is important, including what we say for political purposes back here. We sure shouldn’t go down there to woo partisan allies against the president, as Stephen Harper did in telling a New York audience that Obama’s choice on Keystone XL was a “no-brainer,” or in thinking it was smart for Canadian Conservative cabinet ministers to traipse to Washington for GOP prayer breakfasts.

That being said, we need to connect to Americans able to see the benefits in a win/win NAFTA deal, from tens of millions of workers, to state governors and legislators, to media and to civil society, to all who have positive feelings for Canada at a time of unprecedented favourable profile in the U.S. for our attractive young prime minister. We shouldn’t vaunt those connections but at the end of the day, they are very pertinent assets in a negotiator’s toolkit.

Of course, in hoping for even-handedness, objectivity about the facts, and a balanced outcome, we know it has to be one that enables the president to declare victory. But we need him also to celebrate it as a win for North America as a whole, one that we and the Mexicans will endorse for our own economies. It would be even better if we could describe our

accord as something exemplary for others in the world. North Americans should re-ignite faith in such transnational agreements at a competitive and even dangerous time when protectionism and populism have made a cyclical resurgence.

It would be an adequate start just to convert this phase of taunting and daunting populist U.S. push-back against North American neighbours into an agreement that works for all North Americans and keeps us all competitive. But it won’t be easy and it’s not for sissies. **P**

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