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# Between Scylla and Charybdis: The U.S. Embargo of Cuba and Canadian Foreign Extraterritorial Measures Against It\*

H. SCOTT FAIRLEY\*\*

## I. Introduction

The presence of a communist or latter day socialist dictatorship in Cuba since 1959 has remained a raw nerve in American politics and resulting foreign policy since that time. The U.S. economic embargo of Cuba as well as American legislated and concomitant regulatory attempts to extraterritorially extend the effectiveness of this sustained U.S. foreign policy choice has, in turn, become and remains a source of tension between the United States and its otherwise closest trading partners among whom the American policy choice toward Cuba is not shared. This is particularly true of the United States' still largest trading partner: Canada. A number of years ago, in the pages of this Section's journal, I observed:

Canadian-American policy differences over Cuba remain unresolved. However, the impasse is one our respective governments and international business communities have managed to live with, notwithstanding clearly conflicting laws between our two jurisdictions and equally antithetical positions on their appropriate reach. With profuse apologies to our third North American trading partner, the prevailing Canadian-American status quo on Cuba may be best viewed as a classic Mexican stand-off.<sup>1</sup>

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1. H. Scott Fairley, *Relating to and Doing Business with Cuba: A Canadian Perspective*, 36 INT'L. LAW. 1117, 1118 (2002).

That was seven years ago. Not too much has changed since then, notwithstanding the passing of Fidel Castro from power and the ascension of his brother Raul.<sup>2</sup> Nevertheless, I share the conference planners' view that a legal refresher on the business reality of compliance between warring statutes over doing business with Cuba remains both informative and timely, perhaps no more so than in the hospitably warm, sunny, but sometimes heated venue of this conference.

## II. Canadian Blocking Measures In Context

Back in 1985, the Parliament of Canada enacted the Foreign Extraterritorial Measures Act.<sup>3</sup> At that point in time, Parliament was not focused on U.S. attempts to enjoin Canadian subsidiaries of United States owned or controlled entities from trading with Cuba, but more generally, in response to the long-arm reach of U.S. antitrust laws in relation, *inter alia*, to a typically global investigation of an alleged uranium cartel and various off-shore activities of Canadian banks.<sup>4</sup> In that regard, the new Canadian legislation purported to "protect Canadian citizens and corporations from measures taken by foreign governments or foreign tribunals with *unacceptable* extraterritorial scope."<sup>5</sup> Thus far, however, the legislative and regulatory history of FEMA has only engaged the perceived spoiler of the U.S. embargo of Cuba into Canada.

The framework of FEMA is four-fold:

1. The Attorney General of Canada is given comprehensive powers to prohibit the production of documents and business records where the Attorney General had formed the view that a foreign tribunal was purporting to exercise jurisdiction over Canadian entities in such a way as to infringe Canadian sovereignty;
2. In similar circumstances and with the concurrence of the Secretary of State for External Affairs (now Foreign Affairs and International Trade), the Attorney General can block enforcement of foreign judicial decrees pursuant to designated foreign legislation within Canada;
3. The Attorney General can also invoke "claw-back" provisions allowing Canadian entities to sue in a Canadian court for the recovery of consequential damages and costs suffered as a result of legal proceedings abroad pursuant to designated foreign laws; and
4. Lastly, the Attorney General may also impose notification obligations and non-compliance orders on Canadian businesses in respect of foreign state measures and directives deemed to infringe on Canadian trade policy or Canadian sovereignty.<sup>6</sup>

2. See Paul M. Lalonde & A. Farcas, *Still in the Tunnel: The Ongoing Dilemma of Doing Business with Cuba*, 7 CAN. INT'L LAW. 165 (2009).

3. Foreign Extraterritorial Measures Act, R.S.C., ch. 49 (1985).

4. See H. Scott Fairley & John Currie, *Projecting Beyond the Boundaries: A Canadian Perspective on the Double-Edged Sword of Extraterritorial Acts*, in TRILATERAL PERSPECTIVES IN INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW AND POLICY 119, 121-24 (M. Young & Yuji Iwasawa eds., 1996) [hereinafter *Beyond the Boundaries*].

5. Press Release, Government of Canada, Government Introduces Foreign Extraterritorial Measures Bill (May 28, 1984).

6. See Foreign Extraterritorial Measures Act.

As will be seen from the foregoing, the operative provisions of FEMA are not self-enforcing, save the penal consequences of non-compliance that FEMA specifies in anticipation of focused targets. The only targets to date have been the U.S. embargo of Cuba under the Trading with the Enemy Act,<sup>7</sup> Cuban Democracy Act, 1992,<sup>8</sup> and related Cuban Asset Control Regulations (CACRs),<sup>9</sup> in place since 1962; and latterly, the even more notorious Helms-Burton legislation of 1996.<sup>10</sup> In response to those emanations of Congressional zeal, Canada put in place FEMA Orders in 1990,<sup>11</sup> 1992,<sup>12</sup> and 1996.<sup>13</sup> Amendments to the parent statute followed in 1997, essentially to give those Orders sharper compliance-related teeth with penalties of comparable weight to those mandated by Congress in enforcing the embargo.<sup>14</sup>

The FEMA Orders, taken together, seek to both protect Canadian business entities from U.S. legal and regulatory interference with existing and potential Canada-Cuba business, and to punish them for compliance with the U.S. embargo which was viewed, further to FEMA's declared purpose, as having unacceptable extraterritorial scope.

#### A. THE 1990 ORDER

The U.S. embargo was not regarded as overly intrusive in Canada so long as it did not straightjacket Canadian affiliates from direct economic relations with Cuban entities or third parties dealing with them. Up until 1990, the CACRs had always allowed for either a general license (until 1975) or at least specific licenses under which foreign affiliates of United States owned or controlled entities—in CACR terminology, “persons subject to the jurisdiction of the United States”<sup>15</sup> could do business with Cuba without violating the embargo.<sup>16</sup> But in 1990, with the Mack Amendment, Congress purported to eliminate any exceptions to vindicate the rule by imposing a blanket prohibition on foreign affiliates of U.S. entities.<sup>17</sup> In anticipation of this political initiative passing into law, Canada put in place the 1990 Order, which was two pronged: first, it prohibited Canadian affiliates from complying with the U.S. prohibition; second, it compelled the Canadian affiliates to report to the Attorney General any attempts by U.S. parent companies to apply the prohibition to Canadian business conduct.<sup>18</sup> As it turned out, the Mack Amendment died with that session of Congress and the 1990 Order was never tested.<sup>19</sup>

7. Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 (1994 & Supp. III 1998).

8. 22 U.S.C. § 6000 (1992).

9. Cuban Asset Control Regulations, 31 C.F.R. § 515 (2002).

10. Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. §§ 6021-6091 (1996).

11. Foreign Extraterritorial Measures (United States) Order, SOR/1990-751 (Can.).

12. Foreign Extraterritorial Measures (United States) Order, SOR/1992-584 (Can.).

13. Foreign Extraterritorial Measures (United States) Order, SOR/1996-84 (Can.).

14. An Act to Amend the Foreign Extraterritorial Measures Act, 1996, S.C., c. 28 (Can.).

15. 31 C.F.R. 515.329.

16. See John Boscaroli, *The Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL. INT'L BUS. 439, 446-47 (1999) [hereinafter *Pyjamas*].

17. *Id.* at 447.

18. *Id.* at 454-55.

19. See *id.* at 445-48; *Beyond the Boundaries*, *supra* note 4, at 124-127.

## B. THE 1992 ORDER

A new Congress completed what it had begun under the Mack Amendment by enacting the Cuban Democracy Act in 1992,<sup>20</sup> sterilizing foreign affiliates of U.S. entities from doing business with Cuba and, in Canada, the 1992 Order was a prompt reaction to what was generally regarded in Canada as U.S. extraterritorial action clearly contrary to international law. From the compliance standpoint, the thorniest element for Canadian business, apart from dealing with imperious commands from south of the border as a company matter, was again the prescribed duty to report, which obliged the Canadian company and any of its officers who receive such communications regarding extraterritorial measures of the United States in relation to Cuba from a person in a position to direct or influence the policies of the Canadian entity to report such communications to the Attorney General.<sup>21</sup> Any such report would also have to be made in appreciation of the corollary prohibition on compliance and the penalties for offending the prohibition already in place in the parent statute.<sup>22</sup>

## C. THE 1996 ORDER

The clash of Canadian and other foreign policies of engagement with Cuba and the intransigent U.S. policy of isolation did not resolve and, four years down the road, the 1996 Order sought to reaffirm and improve the effectiveness of the 1992 Order. The Attorney General's Regulatory Impact Statement characterized the amendments of January 1996 as intended "to [increase the 1992 Order's] scope to make it more responsive to infringements of Canadian sovereignty and to make it more effective in the light of experiences gained since it was first made."<sup>23</sup> The 1996 Order broadened the definition of extraterritorial measures of the United States to include not only the CACRs, but also to any laws, guidelines, enactments, and communications similar thereto intended to impede trade and commerce between Canada and Cuba.<sup>24</sup> It also provocatively extended notification requirements from the company to directors and officers, and further cast compliance obligations even more widely to company managers and other employees in a position of authority, exposing these individuals to criminal prosecution and penalties.<sup>25</sup> Whether intended or not, the generality of the foregoing made compliance and concomitant comfort for private business actors in Canada that much more problematic.

D. THE 1997 AMENDMENTS TO *FEMA*

The United States threw perhaps its most provocative extraterritorial gauntlet of all with the unprecedented and totally unanticipated enactment of the Helms-Burton Act in March of 1996.<sup>26</sup> This legislation provoked an outpouring of indignation from Canada

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20. 22 U.S.C. § 6000.

21. SOR/1992-584 § 3.

22. R.S.C., ch. 49 § 7.

23. SOR/1992-584 (Regulatory Impact Statement).

24. SOR/1996-84 § 2(b).

25. *Id.* § 5.

26. For a comprehensive Canadian critique, see H. Scott Fairley, *Exceeding the Limits of Territorial Bounds: The Helms-Burton Act*, 34 CAN. YRBK INT'L L. 161 (1997); and from the United States, Robert L. Muse, *The*

and its other major trading partners by moving beyond the parameters of embargo, to attaching both civil rights of recovery to the concept of “trafficking in confiscated property” in Title III of the legislation and to designating those who do so as undesirables precluded from entering the United States under Title IV.<sup>27</sup> The Canadian response at this juncture, left the 1996 Order intact, but amended FEMA with Bill C-54, introduced in September of 1996 and proclaimed in force on New Year’s Day, 1997.<sup>28</sup> The amendments, on the one hand, increased the pain for non-compliance by raising penalties substantially from previous levels, both by way of indictment and on summary conviction to maximums of a \$1.5 million fine for corporations and five years in prison for an individual.<sup>29</sup> At the same time, however, Canadian companies also got the benefit of broadened claw-back remedies from Canadian courts that were blocked from enforcement of civil damages awards from U.S. courts based on the embargo.<sup>30</sup>

The foregoing legislated and regulatory status quo has remained essentially in place for over a decade.

### III. Practice And Experience Between Scylla And Charybdis

Cross-border experience of Canadian and American private actors placed between two clearly conflicting political wills is probably best explained by posing the question: “Who do you fear most?”

My own experience as a legal adviser to companies from time to time on reporting and compliance issues in Canada and, in one instance, as an expert witness for a U.S. criminal defense team in a U.S. federal prosecution for “trading with the enemy”<sup>31</sup> suggests the appropriateness of a particular metaphor very familiar to Canadians in the context of relations with our good neighbor to the south—that of the “elephant and the mouse.” There are seldom any miscues as to which role falls to which country, but in fairness to both sides, the record is somewhat mixed, while at the same time giving credence to the chilling effect of U.S. foreign policy toward Cuba on its economic relations with other nations.

There is no room here to air the details of particular cases, but I will touch on some of them. One celebrated instance was the Wal-Mart affair with Cuban-made pajamas.<sup>32</sup> This much publicized clash of wills occurred relatively early on in the wake of Helms-Burton and barely a month after consequent amendments to FEMA when the story attracted media attention in February of 1997, doubtless explaining much of the incident’s

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*Nationality of Claims Principle of Public International Law and the Helms-Burton Act*, 20 HASTINGS INT’L & COMP. L. REV. 777 (1996); but see, e.g., Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT’L L. 434 (1996).

27. See Fairley, *supra* note 26, at 164-72. To date, President Clinton and his successors, George W. Bush and Barack Obama, have repeatedly suspended civil rights of action under Title III by written notice to Congress, renewable every six months, as provided by the Act. See 22 U.S.C. § 6085(b)-(c) (1996). Under Title IV, the only Canadian company whose executives have been designated as “traffickers” is Sherritt International Inc. in respect of its nickel mining operations at Moa Bay and other investments in Cuba, notably oil and gas.

28. An Act to Amend the Foreign Extraterritorial Measures Act, 1996 S.C., c. 28.

29. *Id.* § 5.

30. *Id.* § 9.

31. See *United States v. Brodie*, 174 F. Supp. 2d 294 (E.D. Pa. 2001).

32. See *Pyjamas*, *supra* note 16, at 462-464.

notoriety.<sup>33</sup> The offending sleepwear had found its way onto the shelves of Wal-Mart stores across Canada through independent buying on behalf of the Canadian chain.<sup>34</sup> When this fact came to light, Wal-Mart U.S. instructed its Canadian affiliate to withdraw the product from Wal-Mart shelves, and Wal-Mart Canada dutifully did so in all of its stores; upon notice of this action, the Canadian Department of Foreign Affairs and International Trade and the Department of Justice descended on the Canadian affiliate and the pajamas went back on Wal-Mart Canada shelves.<sup>35</sup> Wal-Mart protested that its Canadian affiliate had acted in defiance of its clear instructions to remove the product, while, in Washington, the U.S. Office of Foreign Assets Control (OFAC) administering the CACRs, indicated it would review Wal-Mart's action and enforce the U.S. embargo against Cuba.<sup>36</sup> Thereafter, the story disappeared from public view; Wal-Mart U.S. ultimately paid OFAC a fine of \$50,000 by way of settlement, with no finding of liability.<sup>37</sup>

The Wal-Mart saga brought into public view both a process and an exchange of mutually inconsistent positions, which, in my experience, has happened much more frequently—and less confrontationally—out of the public eye. A Canadian affiliate of a U.S. entity receives a directive from head office affirming overall corporate policy not to do business with Cuba. There may not be particular business at stake, but more often than not, there is; otherwise, nothing would prompt head office to send such a missive, especially because inter-corporate sensitivities around the embargo have been of such long standing. In any event, the Canadian affiliate has to inform the Attorney General, and of course, tell head office it is doing so. And in the case of a particular transaction awaiting execution—a third party request to supply for example, that the Canadian entity knows is destined for Cuba—say further that Canadian law specifically precludes them from complying with the head office directive. Head office, in turn, advises OFAC of the impasse prescribing the necessary conduct of its Canadian subsidiary. This is the so-called “foreign sovereign compulsion defence,” and allows the corporate family on both sides of the border to say to their respective governments that each has done all they can do under the law applicable to them. This scenario assumes, however, that each government accepts the message. In many cases, papering this Mexican standoff appropriately appears to have worked. Nevertheless, such an occurrence also tends to bring on the chilling effect mentioned above, where corporate actors, where possible, make choices about future business and markets to avoid further risk of liability.

Notwithstanding its opposition to the embargo, the Canadian Government does accord respect to U.S. policy in relation to U.S. goods by controlling the use of Canadian trade channels as mere conduits for the trans-shipment of U.S. origin goods to prohibited destinations. Under Canada's Export Control List,<sup>38</sup> Cuba is one of these where a permit is required, the issuance of which practical experience suggests is contingent on some evidence of permission from U.S. authorities or that the shipment of the goods in question is

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33. See *id.* at 453, 462-63.

34. *Id.* at 462.

35. *Id.*

36. *Id.* at 463.

37. See Lalonde & Farcas, *supra* note 2, at 170, 176 n.54.

38. Export Control List SOR/1989-202, Item 5400 (Can.).

for humanitarian purposes.<sup>39</sup> The situation is different, however, where goods that may have originated in the United States are further transformed in Canada or elsewhere, to the extent that, under Canadian law, they are no longer regarded as U.S. origin goods for purposes of re-export.<sup>40</sup> Obtaining such a permit, where possible, obviously provides greater comfort than careful papering by lawyers and faith in the otherwise purely discretionary tolerance of both U.S. and Canadian government officials.

Sometimes, however, nothing works. The most notorious case of Canadian-U.S. policy differences over Cuba wreaking havoc on corporate actors and individuals remains that of the Bro-Tech Corporation and its principal officers and directors, including one Canadian citizen, James Sabzali, prosecuted by the U.S. Justice Department for trading with the enemy, in violation of the CACRs.<sup>41</sup> Ultimately, no one went to prison,<sup>42</sup> but that result was a real possibility, the details of which are well described elsewhere.<sup>43</sup> Briefly, the U.S. parent company came under fire for its business—the manufacture in the United States and sale into Cuba of ion exchange resins for use in water purification facilities—conducted through its foreign subsidiaries.<sup>44</sup> The other individually named defendants were U.S. citizens residing in the United States.<sup>45</sup> The unfortunate Canadian, Sabzali, engaged in the impugned conduct set out in seventy-seven counts of the indictment in three distinct capacities: transactions completed when he was manager of Bro-Tech's Canadian subsidiary, Purolite Canada, while living in southern Ontario between 1992 and 1995 (fifty-seven counts); further transactions after he had been promoted to the position of North American Marketing Director of Bro-Tech in 1995, but was still a Canadian resident (eight counts); and the remainder (thirteen counts) in respect of transactions after he had become a U.S. resident, having transferred to Bro-Tech's head office in Bala Cynwyd, a suburb of Philadelphia.<sup>46</sup> Promotion proved to be a decidedly mixed blessing for Mr. Sabzali, who was convicted on the twenty-one counts falling within the latter two categories.<sup>47</sup> Of those, for present purposes, the most controversial were those convictions sustained while Mr. Sabzali remained a resident of Canada.<sup>48</sup> In this regard, both the Bro-Tech and Sabzali defense teams invoked the compulsion defense based on foreign law, which the U.S. Federal Court for the Eastern District of Pennsylvania rejected in a preliminary motion to strike the indictment.<sup>49</sup>

39. General Export Permit No. 12—United States Origin Goods SOR/1997-107 (Can.); see John Boscaroli, *Exposure of Canadians Under the U.S. Trade Embargo of Cuba: The Case of James E. Sabzali*, 37 CAN. BUS. L.J. 419, 433-34 (2002) (viz. Canadian Law and U.S. Origin Product). The author is also indebted to Mr. Boscaroli for details of his practical experience on the ECL Export Permit issue.

40. ECL Item 5400 provides for export control over all U.S.-originated goods, "other than goods or technology that have been further processed or manufactured outside the United States so as to result in a substantial change in value, form or use of the goods or technology or in the production of new goods or technology." SOR/1989-202.

41. See *United States v. Brodie*, 268 F. Supp. 2d 420 (E.D. Pa. 2003).

42. *Id.* (overturning previous jury verdict on procedural grounds).

43. See *Lalonde & Farcas*, *supra* note 2, at 171-73.

44. *Id.* at 171-72.

45. *Brodie*, 174 F. Supp. 2d at 305.

46. See *id.* at 297.

47. *Id.*

48. *Id.*

49. *Id.* at 296.



District Judge McLaughlin began by according significant deference to the fact that the U.S. Justice Department had preferred the indictment at all, notwithstanding foreign sovereign compulsion going the other way. This was the first case in which the compulsion defense had been invoked in U.S. courts in the criminal context.<sup>50</sup> Thus:

To the extent that the doctrine is based on foreign relations considerations, the fact that a criminal suit has been brought demonstrates the executive branch's determination that the injury to the United States from the alleged conduct outweighs the potential injury to foreign relationships. The Court agrees that if the rationale for the doctrine is deference to the acts of a foreign sovereign, there is no place for the doctrine in a criminal case.<sup>51</sup>

In this regard, the Court also made reference to diplomatic exchanges on point, the identity of an unindicted co-conspirator who the record identified as Mr. Sabzali's successor at Purolite Canada, and the fact that the Government of Canada had "never raised any objection to the prosecution of any other defendant."<sup>52</sup>

The very existence of FEMA and the FEMA Orders on which I provided affidavit evidence and testified as a defense expert, similarly failed to persuade, as did that of my counterpart, Professor Christopher Greenwood, for the U.K. equivalent.<sup>53</sup> First, the Court viewed the blocking statutes as not compelling trade with Cuba, raising the difficulty of proving the negative: "they prohibit certain persons from not trading with Cuba only if the decision not to trade with Cuba is because of the CACRs or instructions based on the CACRs."<sup>54</sup> And then, there was no record of actual prosecution under either the Canadian or U.K. blocking statutes and the Court emphasized the difficulty of such a task: "[t]hose governments would have to show that a company or individual did not do business with Cuba because of a desire to comply with the CACRs. It would be very difficult to get evidence of a company's intent in not doing something."<sup>55</sup> In contrast thereto, Judge McLaughlin did not address the presence or absence of a robust record of prosecution under the embargo aimed at foreign business conduct, subject to such blocking statutes.

In the end, it is perhaps fair to say that Bro-Tech remained, at bottom, a case concerned principally with the conduct of an American company, violating the laws of the United States within U.S. territory. To the extent that the case went beyond those parameters, however, the foreign sovereign compulsion defense did not resonate for purposes of a domestic criminal prosecution in the United States. Greater scope may remain in the civil context.

#### IV. Concluding Thoughts

The reality of blocking statutes is that they are designed to be difficult. One might go further and say that, in the result, such laws almost by definition tend not to be clear or

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50. *Id.* at 300.

51. *Id.*

52. *Id.* at n. 6.

53. Both affidavits are discussed by McLaughlin J., *id.* at 298-99.

54. *Id.* at 301.

55. *Id.*

precise. The Canadian example generally, and in relation to Cuba as discussed above, offers no exception to what I suggest might be a general rule. In sum, FEMA emerged as a visceral political act to the perceived extraterritorial excesses of the United States among which its embargo of Cuba has been clearly the most offensive to Canada's views of its own sovereign jurisdiction.

When business actors are caught between the laws and policies of confrontation between governments, government actors on either side are virtually compelled not to offer easy or even intelligible answers, at least not in any public way that could undermine the essential politics of the situation. At the same time, notwithstanding both the sustained intensity of the U.S. embargo against Cuba, and the sustained objections of the United States' otherwise closest allies to the embargo's extraterritorial reach, the notorious cases have been relatively few and far between. Part of that may be ascribed to private sector prudence and market choice measured against the risks of legal, extending to criminal liability. One must also acknowledge, however, that the record of enforcement—and the absence of a large record at that—suggest much public prosecutorial restraint also at work in deference to the impossibility of individual circumstances and in appreciation of intractable laws designed to be difficult. To conclude, the goal of seeking rational solutions in the public domain of enacted laws entrenching irreconcilable politics—as they have been for quite some time as between Canada and the United States with regard to Cuba—may be a misconceived quest. It calls to mind Don Quixote's "Impossible Dream." We are exceedingly unlikely to get there.

