

Review of the Renegotiated NAFTA: Benefits and Drawbacks to Canada

By [Prof. John Ryan](#)

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There is something strange about this. Other than [Maude Barlow](#) and of [Sujata Dey](#) of the Council of Canadians, it appears that no other journalists or columnists from the mainstream media have mentioned two significant features in NAFTA 2.0 that are of considerable benefit to Canada. These two factors may compensate for the flaws and drawbacks of the renegotiated deal. Yet nowhere is this mentioned in the mainstream media.

The [text](#) of NAFTA 2.0, now to be known as USMCA (United States-Mexico-Canada Agreement), leaves out in their entirety Chapters 6 and 11 of NAFTA 1.0. Both of these chapters do not appear in the new agreement. By not being in the new agreement the provisions of these chapters are simply no longer applicable. This is a fact of major consequence, yet this has received no media coverage whatsoever.

Chapter 6 in the original NAFTA deals with energy and has the infamous energy proportionality rule (NAFTA 605 a), which gives the USA the right to import the same proportion of any type of energy that it has imported over the previous three years, even if Canada itself needs this energy product. Article 605 (b) prevents Canada from imposing a higher price for exports than its domestic price.

NAFTA's Chapter 11 contains a dispute settlement provision that allows American and Mexican corporations to sue Canada for any law or regulation which they think causes them "loss or damage" and which they feel breaches the spirit of NAFTA.

To fully appreciate the significance of the omission of these two chapters in the new agreement, it is important to review the nature of their provisions.



In a recent publication **Gordon Laxer** [pointed out](#) that in NAFTA's Chapter 6 the proportionality rule is unique in the world's treaties. No other trade agreements worldwide have NAFTA-like proportionality clauses. Obviously no other country would subject itself to this type of sovereignty limitation. Actually, the energy proportionality provision came into effect in the 1989 Canada-U.S. Free Trade Agreement; in 1994, NAFTA built upon and superseded the FTA, but its energy proportionality rule remained. As Laxer points out,

"Putting this policy, or any policy, into an international trade agreement is like constitutionalizing it. It's hard for the next government to undo it no matter how much it and the voters may wish to do so."

Knowledgeable Canadians sometimes wonder why it is that Canada currently exports three-

quarters of its oil production to the USA but then proceeds to import 40 percent of its oil largely for Quebec and the Atlantic provinces. Canada is compelled to do this because of the “proportionality clause” in the NAFTA document. The proportionality clause stipulates that Canada must continue to export the same proportion of total “supply” that it has over the previous three years. Supply includes domestic output as well as Canada’s imports, and this applies to all forms of energy – oil, natural gas and electricity. If Canada should reduce the amount of energy it exports to the USA, it must also reduce the supply of that energy domestically to the same extent. It should be noted that although Mexico is a member of NAFTA, it refused to agree to the proportionality clause.

With this NAFTA provision it was not possible for Canada to ever cut off exports to the USA for purposes of conservation or in order to supply eastern Canada with our own oil and to stop foreign imports. According to Laxer, at present Canada is committed to export 74 percent of its daily oil production, 52 percent of its natural gas, and 11 percent of its electricity. With NAFTA in force, Canada could never reduce these amounts of exports to the US, and furthermore, our exports would keep increasing. And as Laxer said, “That’s true even if it leaves eastern Canadians freezing in the dark.”

To compound the problem, Canada has allowed most of its oil and gas industries to be foreign owned. No other country in the world has signed away to another country first access to its energy resources.

So to suddenly have NAFTA’s energy chapter, including its horrendous proportionality rule, eliminated in the new trade agreement is of monumental importance.

As for NAFTA’s Chapter 11, which allows US and Mexican corporations to sue Canada for any law or regulation that they considered would cause them “loss or damage” or restrict their profits, this was almost as bad as the energy proportionality rule. These disputes were not heard by Canadian judges in Canadian courts, but by special tribunals operating behind closed doors, using not Canadian law, but NAFTA rules. There was no right of appeal. Since 1994, Canada had been sued 42 times by US corporations under NAFTA. These tribunals reversed several of Canada’s laws, [forced Canada to pay](#) \$314 million, \$219 million in NAFTA fines plus \$95 million in unrecoverable legal fees, and Canada was faced with additional claims of \$6 billion more. In the meantime, the USA had not lost a single case. Almost two-thirds of the claims against Canada have targeted our environmental regulations or resource management policies.

To have this perverse provision suddenly removed from the new trade agreement is cause for celebration by Canadians.

Although it’s in order to celebrate the successful renegotiation of this matter, the reality is that this deal must be approved by the legislatures of all three countries before it comes into force. Until then, NAFTA will stay in effect. Because of the nature of American politics, the ratification of the USMCA is not a certainty.

With respect to other beneficial parts of the deal, Maude Barlow and Sujata Dey point out that in addition to the elimination of these two harmful provisions, Canada has been able to retain the cultural exemption clause from NAFTA 1.0. This means that Canada can keep cultural protection policies that shield culture from the marketplace and the U.S. mega cultural industries. However, the flaws of the original agreement are still there and prevent Canada from enacting future policies that would protect culture in the digital world.

The removal of both the energy proportionality rule and chapter 11 in the renegotiation of NAFTA did not come about in some happenstance manner. It occurred because of concerted public pressure and this is proof that public input works. The Canadian government was made aware that these two NAFTA issues were of concern to millions of Canadians, and hence the government could not afford to alienate such a large portion of the public.

This awareness occurred largely as a result of a campaign by several groups and a number of individual researchers. The campaigns by the Council of Canadians and the Canadian Centre for Policy Alternatives were crucial in this matter. They kept these two critical NAFTA issues at the forefront throughout the renegotiations. The Council of Canadians maintained a national public education and engagement campaign that reached more than 1 million people. This included their hard-hitting [TV ad that ran on CBC's The National](#), a series of [informational videos](#) breaking down key problem areas, and their NAFTA Toolkit that helped ordinary people take the NAFTA fight directly to their own MPs. In addition they mobilized more than 35,000 people to make individual submissions to the federal government's public consultations on what they wanted to see in any new NAFTA deal, especially the elimination of both Chapter 11 and energy proportionality. They also organized numerous public forums and rallies in communities across Canada to help people better understand what's at stake and how to get involved.

The Council of Canadians produced hard-hitting research and timely reports on [why energy proportionality should be out of NAFTA](#), and what was needed to make [NAFTA a good deal for people and the planet](#). As well there were a number of individual researchers, especially Gordon Laxer, who presented well-researched material to alert the public to the problems that had been created by NAFTA.

With regard to other features in the new agreement, almost everything else is downhill for Canada. What has correctly made the news is that some Canadian farmers will take a hit. NAFTA 2.0 opens Canada's market to more U.S. dairy products, including products that contain bovine growth hormone (BGH), a genetically modified hormone that is injected in cows to make them produce more milk. BGH has been banned in Canada due to its link to serious health concerns. However, more than 90 percent of our dairy market is still protected for Canadian producers.

Patents on pharmaceuticals, such as biologic drugs, have been extended from 8 years to 10 years - the US had insisted on 12 years, so this was a compromise. This means that it will take longer for generic drugs to get to the market. And of course this will make drug prices even higher, and it could have an impact on Canada's attempt to implement a national pharmacare plan.

Although the agreement makes some reference to environmental protection, marine pollution, endangered animals, and measures to protect the ozone layer, because of US insistence there is no reference to global warming or climate change. Also, as in the original, it could still leave our water vulnerable to corporate interests that want to buy and sell it. It also does not include provisions on gender equality or Indigenous rights, although these are mentioned in the agreement.

The chapters on labour and the environment both suffer from weak enforcement. However, with reference to Mexico, there are provisions to reinforce collective bargaining and increase auto wages. Hence this is an improvement over the original NAFTA. In the case of

the auto industry at least 40 per cent of the car will have to be made by workers earning at least \$16 (U.S.) per hour, much higher than the average Mexican autoworker makes. As such this is of particular importance to Mexican workers. There is no such wage provision in NAFTA.

It should also be noted with respect to Mexico that in the new agreement, Article 8.1, entitled, *Recognition of the Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons* states as follows:

The Mexican State has the direct, inalienable and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory, including the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto, in strata or deposits, regardless of their physical conditions pursuant to Mexico's Constitution.

So according to this provision, Mexico will continue to have control over its hydrocarbons. But what about Canada? Probably the reason why Canada is not included is because the horses are already out of the barn. The USA already owns or has part ownership of all kinds of oil and gas fields in Canada, especially in the tar sands area. So how could such a provision be made applicable to Canada?

Because of the technical/legalese language involved it is difficult to determine the full ramifications of a number of chapters in the text. However, in at least two chapters there are provisions that would appear to interfere with Canada's economic independence. These are chapters 22 and 33.

Chapter 22 deals with "state-owned enterprises" which in Canada are called Crown corporations, owned by federal or provincial governments. It appears that by the terms of this deal such government owned entities would be restricted to non-competition with private sector companies. Crown corporations had been very important in the past in Canada but not many now remain. It seems that this new provision is intended to restrain Canada from creating new Crown corporations. At present a number of provinces have publicly owned hydro corporations, but this new provision does not seem to affect them. Nevertheless, how could Canadian negotiators have ever agreed with the provisions of this chapter?

Chapter 33, entitled "Macroeconomic Policies and Exchange Rate Matters," would appear to interfere with Canada's right to determine the value of its currency and its Bank of Canada policies. With this agreement in effect it appears that we may now have to consult with the USA to determine the value of our dollar. If true, this would be outrageous!

Inserted near the end of NAFTA 2.0 is a provision that is an outright affront to Canada's independence. It has received considerable comment in the media. This provision restricts Canada's ability to strike free trade agreements with China and other "non-market" countries. It states that a USMCA party would have to inform the others before it began negotiations and it would have to allow them to review the final text before signing. It then states "entry by any party into a free trade agreement with a non-market country shall allow the other parties to terminate this agreement on six-month notice."

How Canada agreed to such an obvious American diktat is almost unbelievable. This was certainly meant to control Canada's trade relationship with China. Actually however this can

be used to Canada's advantage. This would be a good way for Canada to get out of the new USMCA. If we could strike a truly good deal with China – let the Americans kick us out! The case can be made that in almost all respects, Canada would have been better off not being in NAFTA or now being in the USMCA.

It should be recalled that before Canada signed the FTA and NAFTA, it traded with the US and the rest of the world under the General Agreement on Tariffs and Trade (GATT), now the World Trade Organization (WTO). If the new USMCA were terminated, Canada would automatically return to trading with the US under the WTO, under whose terms we did far better than under the FTA and NAFTA.

To put this in further context, it's worthy to quote from [David Orchard](#) on this matter:

In fact, Canada does not need NAFTA or the FTA, and never did. It could profitably withdraw from both with a simple six months notice. Canada, along with the USA and Mexico, is a member of the world's largest free trade agreement and has been for many decades, something those begging for NAFTA blithely ignore or downplay. Formerly called the GATT, the World Trade Organization (WTO) is a multilateral organization with 164 member states in which Canada has more allies and much more clout than trying to negotiate one-on-one bilateral trade agreements with the United States. This forum and its rules have served Canada well over the years. Canada's access to the US market and record of solving disputes has been far better under the WTO than under the FTA or NAFTA, and Canada was able to protect its institutions and pass its own sovereign laws in a way it has not been able to under our two so-called free trade agreements.

To add to this, a number of years back, [Lloyd Axworthy](#), former president of the University of Winnipeg and former Liberal minister of foreign affairs had put forward a powerful critique of NAFTA that deserves citation:

Let's begin by seriously considering an end to NAFTA and reliance instead upon the World Trade Organization to regulate the terms and provisions of free trade. Not only would this offer us the protection of a trade body that has some teeth in its regulations ones not rooted in US domestic procedures and laws—it would also free us to engage in a much more innovative and active global strategy. The emergence of new economic powers like China, India, Brazil and South Africa provides markets hungry for the resources and know-how that Canada possesses. Our NAFTA connection impedes our ability to take advantage of this potential... . It's time for new policies and tough action to shift our trade and security strategies away from a preoccupation with continental matters to a more global footing.

If Axworthy, a previous Liberal cabinet minister, can advocate Canada's withdrawal from NAFTA, why can't the media or our political parties see the logic of this? Because of NAFTA, Canada did not have the right or the independence to determine many of its policies, especially on matters of energy.

Such a conclusion however seems to be beyond the mental capacities of not only the "learned media" but also of all three of our major political parties. They view leaving NAFTA or the now USMCA with totally unjustified gloom and doom anxiety.

In renegotiating NAFTA there was a matter that had never been discussed. As has already

been stated, in 1989 Canada and the US signed the Canada-U.S. Free Trade Agreement (FTA) and in 1994 NAFTA was built upon the FTA and superseded it. As such, it appears that the FTA was never abrogated, so it must be still on record. It should be recalled that the energy proportionality rule was first formed in the FTA. Hence if the energy proportionality provision has been deleted in NAFTA 2.0, could it still be maintained through the provision in the FTA? If so, and if Canada wanted to get rid of this nightmare, all it would have to do is give a six month notice and the FTA would be abrogated. So this need not be a serious issue.

Strangely, the NDP has never taken an enlightened stand on NAFTA, has never examined its negative impact on our country, and has never advocated its abolition. Given this, what has been the NDP's response to the new agreement? On October 1 Jagmeet Singh and the NDP's trade and deputy trade critics, Tracy Ramsey and Karine Trudel, made a [statement](#), entitled: "NDP: Trade with U.S. and Mexico - New Name, Worse Deal." They correctly assess that the new deal will hurt dairy, poultry and egg farmers and will adversely affect pharmacare, but like all the other news media they make no mention of the elimination of both the energy proportionality rule and Chapter 11 with its provision allowing corporations to sue Canada. This indicates that they either haven't read the text of the new agreement or that they simply don't understand the significance of what has happened. What a hopeless political alternative.

One can't help wondering what Tommy Douglas and the CCF-NDP of a previous era would do at a time such as this. In all likelihood, they might assess that because of the elimination of chapter 11 and the energy proportionality rule, this is a somewhat better deal for Canada, but nevertheless, they would advocate that we give a six-month notice and simply get out of our current partial economic straitjacket. Is there any prospect of the NDP ever being revived in the way the British Labour Party under Jeremy Corbin suddenly became aware of its original socialist roots?

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John Ryan, Ph.D., is Retired Professor of Geography and Senior Scholar at the University of Winnipeg.

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