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Chapter 4
NAFTA and Proportionality: A Devil's Bargain

We will not weaken or renegotiate any energy provisions of the fta or the nafta. Specifically, we will not allow the Canadians to opt out of the proportionality clause or to limit its coverage solely to oil.
—US President Bill Clinton, 1993

Prime Minister Chrétien "came back with zero,zilch, nothing.... It's a complete sellout."
—Jean Charest, Progressive Conservative MP

As the age of easy oil passes, Canada is one of the few industrial countries with enough conventional oil to last decades. We could shut down Alberta's Sands entirely and still have enough oil to get Canadians through the transition to a low-carbon future. However, nafta's proportional energy-sharing clause stands in the way. Canada squanders its advantage by virtually giving the United States first access to over two-thirds of all its oil, including the less-dirty conventional kind. Simultaneously, Canada imports a lot of oil. It was about 40 percent in 2014, but will likely fall somewhat in the next few years, though still not enough to limit exposure for many Eastern Canadians. Thus, despite our rich resource endowment, Canada can't guarantee that in an international oil supply crisis Eastern Canadians will get first call on domestic oil.

To ensure oil security for Canadians and to combat climate change at the same time, Ottawa could order TransCanada's proposed Energy East pipeline to fully supply Ontarians and Quebecers with domestic conventional (non-fracked) oil. It could also redirect all Newfoundland oil to Atlantic Canadians. Both measures would end all oil imports. Canadians would also have to markedly cut their oil use. Until those measures are in place, Canada could create and fill strategic petroleum reserves. But nafta's proportionality rule undermines Canada's ability to ensure that residents get priority access to their own carbon energy, curbing emissions and protecting habitats.

The government of no other developed country is forbidden from guaranteeing its citizens first access to their country's energy resources. This matters because international oil supplies will almost certainly be disrupted in the near future. The only questions are when, how long shortages will last and the extent of the shortfalls. Canadians are expected to have faith that the market will provide. But the oil market is dominated by a few dozen petro-corporations that don't care if Canadians get first access to their own oil or natural gas; their only mission is to sell to the highest bidder. nafta was written before 9/11 and the "security trumps trade" era. Using the same logic for Canadians, ecological and energy security should trump nafta.

Only Ottawa can decide that energy and ecological security for Canadians overrides the market and nafta.

If Canadians were its only consumers, Alberta's Sands could supply us for about three hundred years.[1] Michael A. Levi, in a report on Alberta's oil sands for the New York–based Council on Foreign Relations, explains the impossibility of reconciling rising Sands production with falling carbon emissions. He asks readers to "Imagine...that oil sands emissions rose as expected over the next two decades and then stabilized in 2030 while total us and Canadian emissions dropped by 80% by 2050.... Oil sands' emissions then become equivalent to about 10% of us emissions by 2050, representing almost all emissions from Canada at that point."[2]

Canada cannot shut down all other uses of oil just so Alberta's Sands can reach whatever output level Big Oil wishes. But Canada can meet its target of reducing carbon emissions by 80 percent if it phases out Sands oil and relies instead on our slowly falling output of conventional oil and natural gas as transition carbon fuels to get Canadians to a low-carbon future run on renewables. Canadians cannot be convinced to seriously conserve if they don't see a direct link between their actions and their country's emissions. Unfortunately, nafta's proportionality rule means the more oil we conserve, the more Big Oil will export whatever is saved. If the conserved oil is sent to the us, Canada's export obligation under nafta's proportionality rule will grow.

What Is Proportionality?

Proportionality is "unique in all of the world's treaties," writes Richard Heinberg, a noted California energy expert. Cyndee Todgham Cherniak, a Toronto trade lawyer, says the energy chapter is unique for a trade agreement.[3] There are only three free trade agreements in the world that have energy chapters, and the other two don't have nafta-like proportionality clauses. It's unclear how many other countries the us has tried to impose an energy proportional sharing chapter on, but it is clear none has bitten. Heinberg concludes that "Canada has every reason to repudiate the proportionality clause, and to do so unilaterally and immediately."[4]

Proportional sharing requires nafta members to make available the current share of energy exports to other member countries even when facing energy shortages at home. Strictly speaking, "making energy available" is not a mandatory exporting obligation—but it might as well be. Canadians could theoretically buy up all the Canadian oil or natural gas made available for export, but buyers of crude oil and wholesale natural gas are not ordinary Canadians or small businesses. They are huge petro-corporations, most of them foreign owned and controlled, operating on a profit basis. Their buying decisions have nothing to do with supplying Canadians with our own energy. Unlike most major oil- and natural gas–producing countries, Canada has no government-owned energy firm to protect its citizens' energy and ecological interests.

The proportionality clause says that if the government of any nafta member country takes action that cuts the availability of energy for export to another nafta member country, it must continue to export the same proportion of total "supply" that it has over the previous three years.[5] If it cuts energy available for export to another member country, it must also cut the supply of that energy domestically to the same extent. When nafta came into force in 1994, it built upon and superseded the 1989 Canada–us Free Trade

Agreement (fta). Mexico was added and the agreement altered, but the fta's energy proportionality clause was retained.

The 1980s neoliberal thinking on energy that underlay the Canada–us fta was this: it's good if a corporation decides to supply Market A rather than Market B, for profit reasons, but it's bad if governments protect residents by ensuring that Market A is served for energy security, energy sovereignty or ecological reasons. Energy exports can rise or fall through changes made by the "market," but elected officials cannot intervene to provide energy security to citizens who elect them. If TransCanada, for example, decided to ship more Western Canadian conventional oil to Eastern Canadians, it would not violate nafta's proportionality rule. But if Ottawa ordered TransCanada to send Eastern Canadians conventional oil for energy and ecological security reasons, it would likely contravene nafta. The clause casts a chill over debates on Canadian energy and ecological options, but has never been invoked. Since the fta and nafta began, no Canadian government has been inclined to put Canadian environmental and energy interests first.

In addition to proportionality, nafta's article 605 throws another curveball. Exporters can't disrupt "normal channels of supply" or "normal proportions among specific energy" goods by, for example, substituting light crude for a heavier variety. Proportionality is based on total "supply," not "production."

The distinction matters and shows proportionality's bizarre logic. Supply includes domestic output, drawdowns of domestic inventory and imports. The almost 700,000 barrels of oil a day that Canada imports are added to domestic oil to form Canadian "supply." In 2011, Canada had to offer 73 percent of its total domestic oil output to the us.[6]

The gap between total supply and domestic output is much less for natural gas because we import only 15 percent of total supply, though such imports are rising.[7] When imports are subtracted from Canada's natural gas exports, Canada sends just under half of its net natural gas output to the us. In future, it will be easier to end liquefied natural gas exports to Asia than to stop natural gas exports to the us because it would not violate a treaty.

Mexico Exempt from Proportionality

When nafta started in 1994, Mexico was America's third-greatest supplier of foreign crude oil. It still is. Canada was second then but has since zoomed past Saudi Arabia to become America's greatest foreign supplier by far. During nafta negotiations, Mexico resisted strong us pressure to sign on to proportionality. Consequently, Mexico is a full member of nafta but is exempt from the energy proportionality rules. With an eye on domestic opinion, Mexico issued "five Nos." One "No" was a rejection of proportional sharing. Formally guaranteeing oil exports to the U.S. contravened Article 27 of Mexico's Constitution: "Under no circumstances may foreigners acquire direct ownership of lands or waters."[8] Sovereignty over Mexico's energy resources was and still is a revered part of Mexico's heritage and identity. Acceding to proportionality would have violated one of the proudest chapters in Mexican history. Every March 18, Mexicans celebrate Energy Independence Day to mark the day in 1938 when Mexico expropriated the foreign-controlled oil companies. Publicly, Mexican governments portray themselves as the nation's resolute defenders. Privately, they were opening up Pemex, the popular, nationalized oil company set up in 1938 to replace big foreign oil. Fabio Barbosa, an energy expert at unam university in Mexico City, wrote me to say that "at the start of the nineties," when Mexico was loudly rejecting proportionality, it "was exporting everything it could."[9] In 1990, Teresa Gutiérrez-Haces, a political economy professor at unam, invited Canadian critics of the fta to Mexico City. It was the first time Mexicans had heard about energy proportionality. Gutiérrez-Haces and others set up rmalc, the Mexican network on free trade, to stop Mexico joining nafta.[10] She contends that the Canadian critics, who had just lost the fta battle in Canada, alerted Mexican activists and government to proportionality's dangers.

Did Mexico cede anything to get out of proportionality? Yes. It had to allow bids from us and Canadian corporations for government procurement contracts, a departure from allowing only domestic bids. Mexico also had to open parts of its petrochemical and electrical industries to foreign ownership.[11] However bad it was for Mexico, debt agreements were temporary deals that lacked the greater permanence of proportionality for Canada. Canadian energy researchers Terisa Turner and Diana Gibson write that "though Mexico was forced to agree to some compromises, it maintains control over the three key aspects to energy resource sovereignty: pricing, production and export levels, confirming that Canada could choose a different path."[12]

America's Version of Proportionality

Unlike Mexico, the us has no formal exemption on proportional energy sharing. Until recently, it may as well have. But now the us sends Canada about half the oil it imports and growing amounts of refined oil, including gasoline. However, since the us is and will remain a net importer of a quarter to a third of its crude oil, it in effect re-exports to Canada the oil it imports.[13] nafta's proportionality rule therefore does not really apply to the us.

It has not really applied to the us regarding natural gas either. But that is rapidly changing. Fracking in the Barnett shale play near the us Gulf coast and the Marcellus and Utica shale plays in New York, Pennsylvania, Ohio and West Virginia are spectacularly boosting us natural gas output and displacing natural gas imports from Canada. The us is projected to become a natural gas net-exporter by 2019.[14] Gas exports to Ontario and Quebec from nearby Pennsylvania and New York are becoming significant. This means that nafta's proportionality rule could in future apply to significant quantities of us natural gas exports to Canada. This obligation could hinder even us energy security when American natural gas output starts to fall. By 2007, when the us reached its peak of importing natural gas, Canada supplied 83 percent of it.[15] us dependency on natural gas imports at their height—15 percent—never matched their import level of oil, 60 percent.

When the Canada-us Free Trade Agreement was negotiated in the late 1980s, us natural gas production had been declining for fifteen years, and it was not expected to recover. Getting unlimited access to Canada's natural gas through proportional sharing was one of Washington's major goals in the fta. To do so, it needed to end Alberta's and Canada's long-standing protections of natural gas for domestic consumers. In 1949, Alberta's Social Credit government had passed legislation that assured Albertans' first right to their own natural gas and placed other Canadians' needs above those of exports. Ten years later, John Diefenbaker's Progressive Conservative government in Ottawa copied Alberta's special protection of natural gas. When his government set up the National Energy Board in 1959, it reserved twenty-five years of "proven" supply of natural gas for Canadians, before it would issue long-term export permits. These Alberta-first and Canada-first policies were in place until the late 1980s, when the Canada–us fta was being negotiated.[16]

Greenhouse gas emissions are growing faster from producing Sands oil than from Canadians using oil. Does nafta's proportionality clause allow Canada to cut oil exports to the us for conservation reasons, or because the oil is dirty? No. The only grounds for reducing the oil available for export to the us is to be running out of it. Unfortunately, the Sands' abundant oil won't let us do that. Canada is allowed to cut oil output under proportionality, but Canadians would suffer. If Canada cut oil output by 10 percent, it would mean a twenty-seven-day oil shortage in Canada. If, on the other hand, we adopt a Canada-first oil policy by exiting from nafta's proportionality rule and phasing out oil exports, we can cut oil output by over two-thirds without shuttering any gas stations in this country. While proportionality prohibits Canada from reducing energy exports for conservation reasons, the gatt (the General Agreement on Tariffs and Trade) allows it. Canada would revert to gatt rules if it ends proportionality or leaves nafta. [18]

Long-time US Attempts to Grab Canadian Energy Resources

Washington has aimed to gain control over Canadian energy resources since 1952, when the Paley Report identified Canada as the most secure source for many of the kinds of raw materials their military economy needed.[19] In 1970, three years before Arab countries in opec embargoed oil exports to the us, Labor Secretary George P. Shultz warned that oil-exporting countries were banding together. He recommended that the us seek "safe" supplies from Canada.[20] Joe Greene, Canada's energy minister in Pierre Trudeau's government, was eager to give the us access to Canada's energy resources and criticized us quotas that limited oil imports from Canada. Schultz's and Greene's wishes came true two decades later in the 1989 Canada–us Free Trade Agreement (fta).

The fta and nafta are not the only ways for the us to secure control over Canada's oil and natural gas resources. us corporate ownership is also very effective. The us has used American-owned oil corporations as extensions of its foreign policy since before World War II.[21] us fta negotiators insisted on "proportional sharing" to prevent Canada from reducing oil exports to the us, as it had after the 1973–74 Arab oil embargo.[22] To ward off the genuine threat of oil shortages in Quebec and the Atlantic provinces, Canada had redirected oil it had been exporting to the us to those provinces instead. For us negotiators and their corporate backers, getting proportionality was the major coup of the 1989 fta. It hadn't occurred to the us National Association of Manufacturers (nam) that "free trade" could include a guaranteed right to Canadian energy. But R.K. Morris, nam's director for international trade, was delighted when it did. "When we got such a great deal on energy [in the fta]," he told journalist Linda McQuaig, "We were crusaders for the deal." [23]

Leaving NAFTA

Exiting from nafta would not automatically release Canada from its proportionality obligations. Canada would also have to withdraw from the earlier fta with the us. An Act of Parliament, to participate in an agreement, can be changed more easily than changing the international agreement itself. The real issue is political and not narrowly legal. An informed Canadian public could put pressure on politicians who appear to amend or even dispense with nafta while preserving proportionality. The us got much better access to foreign oil through the fta and nafta than it did by starting the International Energy Agency after the 1973–74 Arab oil embargo. us Secretary of State Henry Kissinger persuaded other industrial countries to sign a non-binding oil-sharing pact to counter opec's oil cartel power, obliging iea members to share oil if international supplies fall 7 percent or more.[24]

Although it is a net oil exporter, Canada has been an iea member from the start. This means Canada is obliged to share oil in a severe shortage with fellow members, most of whom are net-consuming countries. It's a bit like being the chicken in the middle of a wolf pack. Today's iea is stuck with an emergency response system set up to meet 1970s conditions. Western governments assumed then that oil supply disruptions would be short-lived, oil-producing countries would always want to sell their oil, and the West could remove any government that held it to ransom by bombing, invading or seizing its oil supplies.[25] All these assumptions have been disproven. The peaking of deliverable conventional oil in the world shows that supply disruptions are likely to be long-term. The 2003 invasion of Iraq actually reduced its oil output for four years.

The iea's sharing system has never been tested fully. When Hurricane Katrina devastated New Orleans in 2005, international oil supplies fell by only 1.5 percent, well below the iea's 7 percent trigger level. Out of goodwill, Canada and European iea members voluntarily sent the us additional oil for sixty days. But no general sharing among iea members occurred. Unlike trade agreements, where failure to comply can spark trade sanctions, the iea has no enforcement mechanism. From the us perspective, leaving natural gas out of the iea agreement has been a shortcoming. In contrast, nafta covers all forms of energy, including natural gas, and it gives the us continuous rather than just emergency access to Canadian oil.

Proportionality is a lasting way to get someone else's oil. It doesn't take an extraordinarily deep shortage to trigger it. In contrast to its long-standing Middle East policy, the us gets first access to foreign oil, Canada's, without costly invasions or military bases. However, because of its "addiction to oil," the us is still vulnerable to politically motivated oil embargoes. If Americans reduced consumption by a third they could live entirely off their domestic oil output and still use more than twice the world's per capita level.

America's National Energy Policy

After taking office in the hanging-chads election of 2000, President George W. Bush appointed Vice-President Dick Cheney to develop a National Energy Policy (nep). Cheney's group recommended energy security, energy self-sufficiency and support for American energy firms. The latter was soon demonstrated when mounting us pressure persuaded cnooc, a Chinese state oil company, to end its bid to take over Unocal, an American oil company.[26] It was almost as if Cheney had copied Pierre Trudeau's nep, which had so incensed Ronald Reagan and us oil corporations.

Mexico's assertion of energy sovereignty appeared to pay off, at least rhetorically. Cheney's national energy policy report expressed respect for Mexican sovereignty, in contrast to Canada's, where it assumed the us could take as much Canadian energy as it wanted. "Canada's deregulated energy sector," the report stated, "has become America's largest overall energy trading partner, and our leading foreign supplier of natural gas, oil and electricity." It noted that the continued development of Canada's recoverable heavy oil reserves "can be a pillar of sustainable North American energy and economic security."[27] It mattered that Mexico asserted energy sovereignty during nafta negotiations and Canada did not. It matters even more now, in the current era of rising climate change disasters, the end of easy oil and energy insecurity. The us promotes diversifying oil imports, so it is not too reliant on any one country. While the us expects to import much more Alberta Sands oil, it does not anticipate that most imported oil will come from Canada. Richard N. Haass, President of the Council on Foreign Relations, wrote that the Sands are not "critical to us energy security." Better security is the benefit the us gets by getting Canadian oil. Even if production costs are generally higher in Canada, "externality costs" associated with us military and diplomatic operations are nil. There's another advantage to Canadian oil for us petro-corporations. Despite costly production, Sands oil has been a bargain for us refiners since 1997. An oil glut in mid-continent due to bottlenecks in pipeline capacity has often led to a much lower oil price than for offshore oil imports.[28]

Origins of the FTA's Proportionality Obligation

Canada entered the fta and nafta under very different conditions from today's. Then it was widely assumed that the world had plenty of cheap, easy oil. Few had heard of climate change chaos. With Canada's huge land mass, small population and seemingly endless resources, Canadians were especially susceptible to these assumptions. Before 9/11, securing energy supplies was on few Canadians' minds. It made sense to many that Canada should seek virtually guaranteed access to us oil and natural gas markets that in the past had been partly blocked. In return, Canada would give the us first call on the majority of our apparently limitless energy reserves. None of these assumptions now hold.

When Obama stopped TransCanada's Keystone xl oil pipeline in January 2012, he broke the understanding underlying the proportionality rule by ending unlimited US access to Canadian energy. nafta was broken, but it is not yet widely acknowledged as such. In other countries, governments are grappling with carbon emissions and energy security. But the business-as-usual crowd in Canada expects to carry on as before. We can't. Canada has only a decade of proven supplies of conventional oil and natural gas. Yet Canadian governments keep pushing forward, unaware that we're heading for a cliff as dangerous as Alberta's Head-Smashed-In Buffalo Jump.
Albertans are in for a shock. They assume their province has decades of natural gas remaining, yet it has only nine years of "estimated established reserves." Each year there are new finds, so Alberta will not run out in nine years—but the trend is strongly downward. In the past twenty years, the province has added new net additions of natural gas in only one year, 2008. Yet instead of conserving natural gas so Albertans can use it to heat their homes, schools and workplaces during the province's frigid winters, Alberta exports over 40 percent of it and uses more and more to produce Sands oil. The province used to sensibly give priority to supplying Albertans first and other Canadians second, before any natural gas could be exported.[29]

Albertans saw the province's natural gas as their birthright in a way that oil never has been. In 1949, the province reserved the supply of natural gas for Albertans for thirty years and required licences to remove gas from the province. These rules remained until the late 1980s, when the province dropped protection of natural gas for Albertans to fifteen years and ended the distinction between exports and natural gas for Canadians outside Alberta. By the late 1990s, Alberta no longer had enough established reserves of natural gas for all Alberta users, so it introduced the slippery language of protecting "core" Alberta users for fifteen years.[30] Alberta's Conservative government finally dropped the pretence of reserving natural gas for Albertans in 2013, when it replaced the Energy Resource Conservation Board with the Alberta Energy Regulator.

Alberta's former government put an optimistic spin on future supplies of the province's natural gas because of a "produce and profit" today mentality: let the future take care of itself. But it won't. The Alberta Energy Regulator estimates that Alberta has only 33.5 trillion cubic feet of remaining established reserves of natural gas.[31] Since the province produces about 3.6 million trillion cubic feet a year, those reserves won't last long. And neither coal-bed methane nor shale gas will save the day for Alberta. After over a decade of development, coal-bed methane produces only 8 percent of Alberta's natural gas output, while shale gas produces a miniscule 0.1 percent.[32]

A growing share of Alberta's dwindling natural gas is used to make Sands oil. Ziff Energy predicts that such gas use will almost triple between 2011 and 2020 and equal the natural gas Albertans used in 2011.[33] Natural gas use to make Sands oil already burns 10 percent of all the natural gas used in Canada.[34] capp and Statistics Canada do not tell us what percentage of Sands oil is exported, but it's likely about the same as Canada's total oil exports—over 70 percent. So a growing portion of Alberta's falling supplies of natural gas is embedded, in effect, in Canada's growing export of Sands oil. Under present production techniques, the rise of Sands oil output depends on greater and greater cannibalization of Alberta's natural gas.

On the precautionary principle, Alberta should return to the rule that it will not permit the removal of any natural gas from the province unless there are at least fifteen years of "established" supply for all Alberta users. If there are natural gas surpluses beyond Albertans' long-term needs, they should be sold to other Canadians. To stretch out established natural-gas reserves for Albertans, the province will have to quickly phase out gas exports and its rising use to fuel the Sands. If Alberta ends natural gas exports to the us—1.52 trillion cubic feet in 2011—Alberta's established natural gas reserves would extend from nine to about fifteen years.[35] Phasing out natural gas use in the Sands would lengthen Alberta's proven natural gas reserves still further. Gaining a decade of natural gas for Albertans is crucial to Alberta's transition to a low-carbon society.

China is also now taking climate change seriously. The Europeans have been there for some time. Canada will not be able to resist international pressure to take serious action to cut greenhouse gases for long, meaning expanding the Sands will become a non-starter. So although Canada has lots of Sands oil, we will be unable to use most of it. That leaves Canada with two options: we could rely increasingly on oil imports from unstable opec countries or stretch out the lifespan of our conventional oil by phasing out exports and seriously cutting domestic use.

Proportionality: The "Alberta Chapter"

Marci McDonald, Washington bureau chief for Maclean's magazine, covered the us capital during Brian Mulroney's prime ministership (1984–93). In her book Yankee Doodle Dandy, she contends that James Baker, Ronald Reagan's Secretary of the Treasury, got the energy proportionality provisions on the table during a dramatic showdown at the fta talks. Baker was a prominent oil industry lawyer based in Houston. McDonald contends that the six giant us oil corporations lobbied for unrestricted access to Canada's energy.[36] We don't know how often they bent the Reagan government's ear on Canadian oil and gas in the fta talks, but if business was conducted as it was several years later in the nafta talks, it was many times a day. us officials held an astonishing 12,000–16,000 meetings with corporations during the nafta talks. Mexican and Canadian negotiators often complained that their us counterparts acted like agents of the private sector.[37] Was McDonald right that it was us oil corporations that insisted on the virtually mandatory proportionality clause? Insiders know who dreamed up and pushed the fta's obligatory version of proportionality, but they aren't talking. Canadian authorities were determined that it stay that way. Pat Carney, Canada's Energy Minister during the fta talks, gave all her personal files on the negotiations to the National Archives, which promptly shredded them. "They were destroyed on purpose," Carney later reflected. "They wouldn't have been destroyed without someone's authority."[38] Gordon Ritchie, Canada's deputy chief trade negotiator, was "surprised" that the media focused on what he "regarded as a non-issue, the provisions on energy." His insider's account in Wrestling with an Elephant says nothing about who pressed the proportionality rule. He did "not see what all the fuss was about."[39]

Canada had little bargaining power in the fta talks because before they began, Mulroney's government gave away all their aces in the 1985 "Western Accord" between Ottawa and the Western provinces. Canada gave up its ability to set a higher price on the oil and natural gas it exported, determine the price at which Canadians buy back their own energy from foreign transnationals, and conserve sufficient amounts for Canadians' future needs by restricting exports. But the Western Accord was a temporary policy that could have been overturned at the next election. To prevent this, proportionality and an energy chapter were placed in the fta and then nafta.

After discarding its aces, Canada was the demandeur in the fta talks. The treaty meant more for Mulroney's political agenda and prospects than for us president Ronald Reagan's government, so Canada's bargaining power was further weakened. Canada's aim was to get relief from us protectionism, while the primary us goal was to gain assured access to Canadian energy and end Canadian restrictions on us corporate ownership and control. The us won entirely on energy and partially on ownership, while Canada lost on gaining greater access to the us market, but got the face-saving device of ineffective trade dispute panels instead. Eighteen years after negotiating the fta, Gordon Ritchie sounded despondent when writing about it in the Globe and Mail: "Canadian exporters, far from being guaranteed protection against the unfair application of us trade laws, are actually in a worse legal position than exporters from non-nafta countries."[40]

There was glee over proportionality in some Canadian quarters. "Critics say the problem with the [fta] is that under its terms Canada can never impose another nep on the country," stated Carney. "The critics are right," she continued. "That was our objective....If the Americans promise not to block our energy exports, we promise in turn not to turn off the tap on energy supplies shipped under contract."[41] Peter Lougheed was the fta's most effective booster. He enthused that "the biggest plus of this [agreement] is that it could preclude a federal government from bringing in a National Energy Program ever again."[42] Helmut Mach, Alberta's official trade representative during the fta negotiations, confirmed that the separate energy chapter was added because of optics: "Alberta's objective was to maximize energy exports to the us. Alberta also wanted to allow oil and gas incentives for exploration. The nep hung over the head of the major economic activity in Alberta at the whim of the Canadian federal government because of their power over exports. Alberta's objective was to never let a nep happen again." But like Ritchie, Mach dismissed the proportionality clause's effectiveness in ensuring that there never be another Canadian nep. The clause was technical, Mach argues. "Does anybody believe Canada would impose export restrictions in the next fifty years? So there was no thought that proportionality would have to be applied." Alberta played such a leading role in fashioning the fta's energy chapter that some us negotiators and Canadian negotiators called it the "Alberta Chapter."

Once Mulroney's government had signed on to proportionality, they promoted it strongly to Mexico during the nafta talks. Carlos Salinas, Mexico's president, wrote: "It was extremely significant that Canada had accepted a [proportionality] clause ensuring the supply of oil. With that precedent, the Canadians argued that if Mexico did not agree to the same thing, in the current nafta, they would threaten to retract the clause from the bilateral agreement [fta]. That would force the United States to put enormous pressure on us."[43]

1993 Election on NAFTA

The 1980s and 1990s were an era dominated by nostalgia, a yearning to return to the good old days of cheap plentiful oil, capitalism unfettered by governments and regulation, and the return of us power after the Vietnam War debacle. It was a brief historical lull of corporate rights romanticism and endless talk of a borderless world between the 1970s oil crises and the current debates around peak energy, climate change and border security. Corporate elites viewed Canada's problem as the opposite of energy sovereignty. Their issue was how to get assured entry into the us market for "excess" Western Canadian oil and natural gas during a temporary glut. This thinking and these interests placed the energy proportionality millstone around Canada's neck.

In the 1988 election, a slim majority of Canadians voted to defeat the fta, but divided their votes between the Liberals (32 percent) and the ndp (20 percent). These voters got their chance again in 1993. It was the Liberal Party's first trip to the polls after their fierce opposition to the fta in 1988.

The Liberals were wary of unreservedly endorsing nafta, the successor deal to the fta. nafta was signed and ready to start in January 1994, two months after Canada's 1993 federal election. There was still time for a new Canadian government to reopen or reject nafta. In their "Red Book" campaign platform, the Liberals promised that if elected they would "renegotiate both the fta and nafta to obtain [among other things] the same energy protection as Mexico."[44] This was the Liberals' way of saying end proportionality.

The Liberals won their majority on the pledge not to sign nafta into force unless they got changes to energy, water and us protectionist actions.[45] So Prime Minister Jean Chrétien had to appear to do something. He reportedly approached us authorities behind closed doors but was summarily rebuffed. Democratic President Bill Clinton refused to reopen nafta, especially on energy. "We will not weaken or renegotiate any energy provisions of the fta or the nafta. Specifically, we will not allow the Canadians to opt out of the proportionality clause or to limit its coverage solely to oil,'" Clinton wrote in a letter leaked at the time.[46]

Bill Richardson, a prominent Democrat and supporter of nafta, said that if Chrétien revived talks on the pact before Congress voted on it in mid-November, "that will hurt us."[47] Thomas Axworthy, former principal secretary to Pierre Trudeau, taught at Harvard University then. In his view, a public intervention by Chrétien, with the Canadian election mandate to renegotiate in hand, could well have scuppered nafta: "In 1993, when Bill Clinton was fighting to get nafta passed by Congress and facing very stiff opposition, had the newly elected Chrétien even uttered the word 'renegotiate,' nafta's opponents in the US would have used Canada to defeat the legislation."[48] Rather than push back against US resistance to change NAFTA, Chrétien's government issued the following "interpretation": "In the event of shortages or in order to conserve Canada's exhaustible energy resources, the government will interpret and apply the NAFTA in a way which maximizes energy security for Canadians. The government interprets the NAFTA as not requiring any Canadian to export a given level or proportion of any energy resource to another NAFTA country. The government will keep Canada's long-term energy security under review and will take any measures that it deems necessary to the future energy security of Canadians, including the establishment, if necessary, of strategic reserves."[49]

These were the protections Canadians needed. But observers disagreed on whether the statement was a facing-saving device or not. Don McRae was one of the few experts who believed it was not. Currently a business and trade law professor at the University of Ottawa, McRae argued in 1993 that Canada could feasibly maintain that the declaration on energy security was legitimate, given that this position was made clear prior to NAFTA's proclamation. The declaration is "an indication of what the government intends to do if a dispute issue arises under the agreement," McRae said. "Whether the US immediately disagrees, lets it rest without any comment or whether it seems to act in accordance with that interpretation, these are all things that a tribunal or a court or a panel might take into account." He also noted that these types of statements carry greater weight if they remain uncontradicted. They have. The lack of American protest over Chrétien's declaration could be interpreted as tacit approval.[50]

Other experts doubted that Chrétien's statement would stand up in a NAFTA dispute resolution tribunal. US trade representative Mickey Kantor bluntly said, "None of these statements change the NAFTA in any way." Jean Charest, then one of the two Progressive Conservative MPs elected in the 1993 federal election said Chrétien "came back with zero, zilch, nothing....It's a complete sell out." Chrétien's "interpretation" may have brought moral force to Canada's declaration to "maximize energy security for Canadians." It could also prove useful for a future government to dust off and use when the next oil shortage strikes.[51] Why was Chrétien's government so weak on this file? Several reasons were advanced at the time. Washington opposed renegotiation, so the Canadian government faced a choice of accepting NAFTA as is or scuttling it entirely. The Liberals were not the strong economic nationalists that the John Turner Liberals were in 1988. Chrétien's government was moving toward the neoliberal, unregulated capitalism model that disastrously triggered the Great Recession of 2008–09. As well, speculation was rife that if Canada got an exemption on energy, the US Congress would demand an end to protection of Canadian cultural industries, such as magazines, television, books and films. Energy-producing provinces and Big Oil were also adamantly opposed to altering or ending NAFTA. The main reason Chrétien was such a pushover on renegotiating NAFTA was that in turfing the Progressive Conservatives so soundly, voters inadvertently gave the Liberals too many seats. Majority governments forget election promises more than minority governments. The next election was four years off and the Liberals hoped that voters would forget the issue by then. They did.

Obama Threatens to Pull Out

The issue of renegotiation came to life again during the 2008 US presidential election. Barack Obama and Hillary Clinton both pledged to renegotiate NAFTA to bring in tougher environmental and labour standards during the Ohio primary for the Democratic Party's presidential nomination. To show she was serious, Clinton asserted, "We will opt out [of nafta] unless we renegotiate the core labour and environmental standards—not side agreements, but core agreements." Later, she went further. If elected she would pull out of nafta within six months of winning the White House.[52] Not to be outdone, Obama raised the rhetorical bar: "We should use the hammer of a potential opt-out as leverage to ensure we actually get labour and environmental standards that are enforced."[53]

By threatening to use nafta's opt-out provision to bully Mexico and Canada into accepting the American way on altering nafta, Obama and Clinton inadvertently reminded Canadians and Mexicans that their country could leave nafta simply by giving six months' notice. What had been a fairly minor American story from Ohio became much louder as it reverberated back and forth across the border. The prospect of an Obama presidency sparked a lot of "will he or won't he?" worry among the business-as-usual crowd in Canada. Would Obama really reopen nafta? How could the Canadian government help convince him not to? Canada used the energy card to try to bully Obama into withdrawing his opt-out threat. By putting energy on the table if Obama forced nafta renegotiation talks, Harper unintentionally gave Canadian critics an opportunity to reopen the proportionality debate. David Emerson, then Canada's trade minister, warned that "if you open [nafta] for one or two issues, you cannot avoid reopening it across a range of issues." He added that "Americans' privileged access to Canada's massive oil and gas reserves could be disrupted if Washington cancels the nafta accord as Democratic presidential candidates threaten." Harper made a similar, if more subtle, threat in New Orleans in April 2008. But by telling Americans they have a sweet deal with Canada on energy, Canadian officials raised the question of whether Canadians got a sour deal.[54]

Once he wrestled the Democratic nomination away from Clinton, Obama began to listen more to us corporate power than to blue-collar voters in Ohio, whose demand for protection from cheap Mexican labour had pushed him into making the rash anti-nafta promises. Obama softened his renegotiation stance, saying his rhetoric had gotten overheated and he wouldn't unilaterally withdraw from nafta. Harper was overjoyed. "Once we reopen it," he observed, "it would be very hard to get that cat back in the bag."[55] He was right. Once the myth of nafta's inviolability is breached it can easily be breached again. But just six weeks later, Harper advocated just that. Irked by a growing "Buy America" campaign that saw many us cities and states refuse bids from foreign companies, including those from Canada, Harper campaigned to create "a new trade deal" with the us to put the awarding of local contracts under a continental free trade umbrella.[56]

To avoid appearing to contradict his previous opposition to reopening nafta, Harper called it a new deal rather than a renegotiation. By the time he became president, Obama was ready to comply fully with the petro-elites while still talking a good green game. Obama's message that the Sands are a necessary evil had become realigned with that of Ottawa, Alberta, Big Oil and the corporate media: even if it's dirty, the us must take it, as the alternative is to rely on Iran or Venezuela. This is faulty logic that conveniently ignores conservation: if the us reduces its per capita oil use to French or British levels, it can stop importing oil altogether and still use twice as much as the world average.

Playing the US Game

Cyndee Todgham Cherniak, a top international trade lawyer in Toronto, describes an ingenious way to reduce the proportion of energy exports Canada must make available to the us while staying in nafta. It would not require a tricky round of nafta renegotiations in which the us, if it agreed to let Canada out of the proportionality obligations, would surely demand that Canada give up something really major. Canada could play the same hardball game the us used against Canada on softwood lumber, Cherniak argues: create a bogus case for reducing Canada's energy exports and then delay a us proportionality challenge by dragging out the process for selecting the nafta panel to hear the case. Selecting a mutually agreed-upon chair can take a long time. If Canada drew out the process beyond three years and then lost, it could still win, since Canada's required energy exports are based on their share in the past three years. The clock keeps ticking. When proportionality is redetermined after Canada loses this hypothetical panel case, the energy share Canada must make available for export to the us would have dropped a lot. When Canada loses the case, Cherniak says, "Canada can say 'We made a mistake. Sorry, bad Canada.' But, we protected our people for three or four years. Canada should play the us game. Why shouldn't we do it?" [57]

It's intriguing, but it's very unlikely to happen because of the power imbalance between the us and Canada that lies at the heart of what's wrong with nafta. Cherniak did not suggest this, but to pull it off, Canada would need to elect an ndp or Liberal government, adopt Yankee-style confidence and fend off us tantrums. Washington takes us national energy security very seriously. It would also require a majority government's four-year mandate. If a minority government tried to pull off Cherniak's scenario, it would likely fall before the three-year period of declining Canadian oil exports to the us was up. The successor government could well cave in to us demands that Canada abide by its existing proportional exporting obligation.

Besides, if timid Canada suddenly got the moxie to force down virtually mandatory energy exporting to the us the way Cherniak outlines, it would also have the courage to demand that nafta renegotiation talks be held. Canada could insist on getting a Mexican-style exemption on energy proportionality as a non-negotiable demand. If the us and Mexico refused, Canada would have the grounds and Canadian public support to use the six-month exit rule to leave nafta. Exiting, then lowering exports and redirecting domestic oil and natural gas to serve Canadians first, would present the next Canadian government with a fait accompli. If you are going to be bold, you may as well go all the way.