No matter how you slice it, we're headed toward a lumber fight

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By mid-October, the U.S. Lumber Coalition — a.k.a. The Coalition to those who have spent their lives in the trenches of softwood lumber battles — will be able to file new anti-dumping and countervailing duty complaints against Canadian softwood lumber exports. Unless a replacement for the 2006 Softwood Lumber Agreement can be negotiated in the next few months, it's a pretty safe bet that Lumber V will be launched.

These perennial disputes feature extremely disruptive punitive U.S. duties. When Canadian exporters are threatened with the full force of U.S. trade remedy laws most Canadian stakeholders opt for the "least worst" option: a government-to-government agreement to buy off The Coalition. Canada's attachment to the rules-based international trading system will be abandoned in favour of managed trade agreements that buy peace – at least until the next time.

A new agreement — SLA 5, if you're counting — will not be possible unless The Coalition's numbers are right for it to launch a complaint. In addition, Canadian lumber interests — especially the provinces — must agree on how they would prefer to be skewered this time. It's pretty clear to everyone that Ontario and Quebec are not on the same page as British Columbia.

How should exports be regulated under SLA 5? British Colombia prefers export taxes so that duties (based on alleged stumpage subsidies) go into its own coffers rather than the U.S. Treasury. Is this a silver lining? Would it help to explain Premier Christy Clark's public demands for a quick negotiated solution?

Canada-U.S. lumber disputes are mainly about "stumpage" – the fee the provinces charge for harvesting standing timber on Crown lands. Coalition members claim Canadian stumpage charges are too low, which means they are lower than the U.S., where the timber is harvested on lands owned by private companies. Compounding The Coalition's complaints is a B.C. prohibition on whole-log exports which prevents U.S. lumber mills from buying less expensive Canadian logs and milling them in their U.S. operations.

Ontario and Quebec have reformed their stumpage regimes since the 2006 SLA entered into force. Industry employment in Ontario has shrunk by 42 per cent or 26,000 jobs, while Quebec has reduced availability and charges much higher fibre costs than B.C. While Ontario and Quebec could agree to a new SLA, they will likely insist that it transition to free trade with clear and workable "exit ramps" for their good behaviour.

Lumber exporters in Atlantic Canada had a free pass under the 2006 SLA because stumpage rates were determined by private auctions. However, the recent U.S. Department of Commerce countervailing duty decision in Super-calendered Paper resulted in duties in the 20-per-cent range. Among the 14 countervailable programs found by the U.S. Department of Commerce was provision of stumpage by the Government of Nova Scotia at less than market value. This could draw Atlantic provinces' producers into the Coalition's net.

Industry consensus on the need for another SLA has been elusive. Mr. Richard Garneau, CEO of Resolute Forest Products, the biggest Canadian producer east of the Rockies, is less keen than B.C.'s Premier Clark is to negotiate. Garneau has been a very vocal critic of the 2006 deal. In testimony at the April 12 standing committee on international trade meeting, Garneau ran roughshod over supporters of the SLA. He said the 2006 deal worked well for B.C. but has been a disaster for Quebec and Ontario. He rejected claims of subsidization and wanted nothing to do with another agreement.

These differences are not new. Canada tried to negotiate a second extension before the 2006 SLA expired. Extension on the same terms was not an option after the Americans declined.

The Coalition was pleased to see the end of the 2006 SLA. It did not work well for them. Cross border lumber wars are always fiercely fought. Trade remedies (anti-dumping and countervailing duties) have provided quick and effective relief for the Coalition — and the nightmares for the Canadian lumber producers. The Coalition has little incentive to settle for an agreement less effective than successful AD/CVD litigation.

Most Canadian stakeholders attach great importance and high priority to a negotiated settlement. Garneau, though, is not interested. Even those who want to settle will be concerned by the terms. Reported Coalition demands for a single option with hard caps or strict quotas on Canadian exports have not been well received. British Columbia is requiring greater flexibility.

Uncertainties about the U.S. election have increased the urgency of demands for a negotiated solution. The Western provinces want a managed-trade agreement and they want it soon – before November.

The election is increasing the focus of U.S. trade law administration on prosecution and enforcement. U.S. trade remedy laws have been amended and enhanced to make them more effective.

The prospect of a Donald Trump presidency adds urgency to an expedited negotiation. Hillary Clinton, who is being pushed to the left on trade by Sen. Bernie Sanders' success in the primaries, has promised to appoint a special prosecutor to defend U.S. trade interests.

No matter who is the next president, the incoming administration will have to show it will be tougher on enforcement. And it will be completely disorganized and unfocussed for months into 2017. The U.S. Lumber Coalition will have an unimpeded run down the field until the countervailing duties rates and AD margins are announced, and maybe thereafter. The pressure to negotiate and compromise is entirely on Canada. The Coalition benefits from any delays.

President Barack Obama and Prime Minister Justin Trudeau have instructed their trade ministers to identify options or a framework for resolution by the time of Obama's visit to Ottawa in late June.

At the end of Trudeau's state visit in March, Obama noted: "each side will want 100 per cent, and we'll find a way for each side to get 60 percent or so of what they need, and people will complain and grumble, but it will be fine."

Mutually unsatisfactory agreements are generally the best solutions and work well between governments. In softwood lumber, the private interests represented by The Coalition have leverage which must be satisfied. Compromise for reasons which might motivate governments is not in the Coalition's DNA.

US Trade Representative Michael Froman and Canada's Trade Minister Chrystia Freeland have a big challenge and delay increases The Coalition's leverage in any negotiations. The Coalition has a clear right to file complaints if the evidence supports its position. If the facts appear to support their position, The Coalition members have nothing to lose by launching investigations. Indeed, recent tightening of U.S. Anti-Dumping and Countervailing Duty laws was not and is not targeted only at Chinese steel. These tougher trade remedy laws will apply in Lumber V investigations.

The Coalition will be encouraged by the subsidy margins in super-calendered paper and by the methodology employed by the U.S. Department of Commerce in that investigation. The Canadian Government was quick to challenge Commerce department's methodology in super-calendered paper. The NAFTA and WTO challenges have begun. Canadian officials say they are confident they will prevail.

Trade remedy investigations are very time consuming and expensive with extensive legal teams racking up thousands of dollars per hour- U.S. dollars — in fees. Dispute settlements under NAFTA and the WTO are a slow, expensive and uncertain process.

Canadian stakeholders are not sitting on their hands waiting for negotiations to succeed or fail. They have been "lawyering up" as they hope for the best and prepare for the worst.

Some producers in Central Canada are confident stumpage reforms have eliminated subsidies and that the soft Canadian dollar will minimize dumping margins. Resolute is gearing up for a fight. Others too must be prepared. Hoping the problem will go away is neither a sound nor a prudent business strategy.

The legal fees will be mind-boggling, which is part of the problem. For them, litigation is far more lucrative than settling. But costs may also help to drive the solution. The relative peace of the SLA period has saved industry on both sides of the border hundreds of millions in legal fees. Neither side wants a bad deal, but there is also a premium value to be placed on certainty.

If the remedy duties are diluted or eliminated, The Coalition will have gambled and lost. But trade litigation is a means to an end. Canadian exporters want and need to limit disruption to trade. For The Coalition, an agreement can bring relief without the risk of remedies being overturned by dispute settlement under NAFTA or the WTO.

Experienced negotiators don't start at a bottom line. There will be plenty of fencing and jousting on the way to common ground. But as Canada's provinces struggle to get on the same page, it's vital to remember that delays and uncertainty always favours The Coalition. And because of this, notwithstanding the best efforts of both federal governments, Canadians need to brace themselves to deal with litigation before a settlement is reached.

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