XVIII WORLD CONGRESS OF LABOUR AND SECURITY LAW

Paris, September 5th to 8th 2006

TOPIC 1

TRADE LIBERALIZATION & LABOUR LAW : A CANADIAN PERSPECTIVE[1]

20 October 2005

Adelle Blackett* & Kirsten Mercer**
adelle.blackett@mcgill.ca

I- IDEOLOGICAL DEBATES AND LABOUR LAW

1. National debates

(a) Labour law and the globalization process

On one hand, there can be little doubt that the globalization process has impacted the development of labour law in Canada. The rising presence of transnational corporations (TNCs) in the Canadian economy means that those economic actors may be more difficult to

[1] Brian Langille, in "Canadian Labour Law Reform and Free Trade", (1991) 23 Ottawa L. Rev. 581 at 587, makes the following important observation about labour law in the Canadian context: "In Canada legislative jurisdiction over labour policy is constitutionally split, by virtue of judicial constitutional interpretation, between the federal and provincial governments. The federal government controls the labour policy for a set of specific industries such as airlines, railways, broadcasting, banking, grain handling as well as the federal public sector. It also, by virtue of constitutional amendment, controls unemployment insurance (as well as immigration policy) and as a result, and until recently, has had de facto control over macro-labour force adjustment policy. Other industries and sectors, covering about 90% of Canadian workers, fall under provincial legislative authority". An appreciation of this jurisdictional split is crucial if one is to study *Canadian* labour law. What follows is a discussion of trends in labour law in this country. Specific references, except where otherwise noted, can be seen as illustrative.

* Associate Professor, Faculty of Law & Member, Institute of Comparative Law, McGill University.
** B.C.L. & LL.B. Candidate, 2006, Faculty of Law, McGill University.

regulate,[2] not to mention that the fundamental orientation of the economy has shifted from that around which the post-war labour law system was developed.[3]

On the other hand, it would be inaccurate to suggest that- in spite of the changes in the economy- Canadian labour law is wholly dictated by the global market. As Kevin Banks observes:

> It would certainly be difficult to argue that reforms to Canadian labour legislation over the last fifteen years have been determined by international competitive pressures. Such reforms have in fact moved in dramatically different directions, at times favoring workers and at times favoring employers, depending upon the political orientation of the party in power. The Canadian experience suggests that governments still have a great deal of room to maneuver in writing labour laws.[4]

As will be discussed below, globalization (which in any event is multifaceted and not unidirectional) has had an impact on Canadian labour law, but Canadian labour law has an impact on the shape and nature of globalization. The State retains a strong sense of policy independence and are called upon by civil society actors to continue to act, albeit in increasingly disaggregated fashion. The degree and nature of governmental action is not surprisingly the subject of debate among political parties and economic actors in Canada. In particular, and as discussed below, the process of regional and hemispheric trade integration has been a locus for the expression of contested visions of the direction that governmental action should take in respect of transborder regulatory initiatives.

(b) Labour law and technological change

Both within and beyond the manufacturing sector, technology has had a powerful impact on labour law in Canada. The manufacturing sector has been dramatically affected by developments in transportation and production technologies,[5] with a resulting decline in the number of jobs in that sector.[6] In addition, developments in transportation technology[7] have led to a more fluid production cycle, and as a result, greater employment uncertainty and a decline in the number of permanent manufacturing jobs.[8]

Perhaps as significant to the Canadian labour market, however, is the increasing orientation towards the knowledge economy. As Harry Arthurs observes:

> [W]hile the long-term trend in employment in advanced industrial countries is for the labour force to include an increasing proportion on knowledge-workers, it is not at all clear that our present labour law system is capable of accommodating this new and substantial presence… Assumptions about an arms-length relationship between workers and employers are less easily applied to what Galbraith calls the technostructure.[9]

Whether this change is *good for Canada* is the subject of some debate in Canada. The nature of this debate has shifted in recent decades, as the reality of technological

---

[2] Arthurs, Harry, "Labour Law without the State?" (1996) 46 U.T.L.J. 1 at 6 and 24. Arthurs notes that at a time when corporations are more global than ever, the regulatory mechanisms lag far behind, and the Canadian union movement remains relatively isolated.

[3] *Ibid*. at 11-12.

[4] Banks, Kevin, "Globalization and Labour Standards -- A Second Look at the Evidence", (2004) 29 Queen's L.J. 533 at para 3.

[5] UNCTAD, "World Investment Report 1994: Transnational Corporations, Employment and the Workplace" in *Labour & Employment Law: Cases Materials, and Commentary*, The Labour Law Casebook Group, ed. (Toronto: Irwin Law, 2004) at 929.

[6] *Supra* note 2 at 14-15.

[7] *Supra* note 5.

[8] *Supra* note 2 at 14-15.

[9] *Ibid*. at 17-18

change and the growth of the knowledge sector has become more widely understood and accepted. By no means resolved, the question of how Canadian labour law should respond to the rapidly changing workplace reality remains an issue of much debate.

(c) Labour law and changes in the organization of work

One of the features of the knowledge-economy is a general "flattening" of the workplace structure. As work becomes more knowledge-based, workers may increasingly incorporate managerial elements into their jobs. Several recent labour board decisions have addressed this issue, including the Ontario Labour Relations Board ruling regarding certification of workers within the Children's Aid Society of Ottawa-Carlton who had varying degrees of supervisory authority.[10] The issue has also been addressed by the Canada Labour Relations Board regarding low-level management workers in a telecommunications company.[11]

Another debate which has emerged in light of the changing organization of work is the place of part-time and contractual workers within organized labour. This will be discussed as in the following section.

2. Range of debate

The Canadian debate surrounding labour law and the "new economy" is both wide-reaching and animated. Assessments of what *should* be happening span the ideological spectrum,[12] while assessments of what *is* happening can also vary significantly. Though it is common for analyses to pronounce the fundamental shift in the nature of work in Canada, and the shrinking role for the state,[13] others are less willing to concede that the evidence supports such assertions.[14] In the end, it may be too early to tell how the Canadian state will ultimately respond to these fundamental changes in the economic infrastructure.

3. Legislative reforms

(a) The contract of employment

The debate about the contract of employment is representative of the pressures which characterize employer-employee relations in the globalization era. Legislative signaling about the ease with which companies can contract out elements of their production or service has been mixed at best, and (as with other labour reforms) has shifted with the ideology of the government in power.[15]

Furthermore, the definition of "employee" has been the subject of legislative and juridical[16] debate in Canada. Perhaps as hotly debated as who *is* an employee is the question of which workers *are not* employees- those explicitly left out of the labour law and collective bargaining frameworks. In Ontario, the dialogue between the legislature and the

[10] *Children's Aid Society of Ottawa-Carlton* [2001] O.L.R.D. No. 1234 (Ontario Labour Relations Board).

[11] *Re Quebec-Telephone* [1996] C.L.R.B.D. No. 36 (Canada Labour Relations Board)

[12] Though mainstream political discourse in Canada tends to gravitate towards the centre, advocacy networks on both the Left and the Right have been involved in the debate surrounding Canada's place in the new economy and the need (or not) for an accompanying regulatory infrastructure.

[13] For example, Betcherman et al. *Training for the New Economy: A synthesis report*, (Ottawa: Canadian Policy Research Network inc., 1998) at 1.

[14] *Supra* note 4 at para 18.

[15] *Ibid.* at para 3.

[16] See the decision *Winnipeg Free Press v. Media Union of Manitoba* (1999) (Case No. 443/97/LRA) (Manitoba Labour Board) for discussion of the legal test to determine employee status.

courts in regards to the status of farm workers in the province is a particularly apt illustration of the debate.[17]

(b)Termination of employment

In general, the heightened situation of job insecurity in Canada has provoked intense debate about how the state should respond. As Brian Langille and Guy Davidov note, "[t]here is much less employment security; in fact, the tacit commitment to long-term relations, which was so central to the industrial order in the post-war era, is said to be an endangered species."[18]

Case law on constructive dismissal illustrates the tension that pervades the reform of termination of employment frameworks. Though the question is far from resolved in the Canadian context, the Supreme Court of Canada, in *Farber v. Royal Trust*,[19] appears to have indicated an unwillingness to make it more difficult for employees to claim damages resulting from constructive dismissal.

(c) Collective bargaining

The collective bargaining infrastructure in Canada may be ill-suited to face the reality of labour relations in a globalized economy, although the sense of crisis currently experienced in the United States context is not nearly as acute. As Brian Langille notes, "[t]he Canadian system of collective bargaining is highly decentralized and is legislatively based upon individual and plant-specific bargaining units. There is, in general, little legal support for firm-wide, industry-wide, or sectoral bargaining."[20] Langille further notes:

> The lack of broader-based bargaining structures and the legally fragmented nature of collective bargaining rights in Canada constitute another major flaw and obstacle to optimal results in the labour market. Collective bargaining rights are legally limited, generally, to single locations of a single firm. Bargaining authority is not even firm-wide, let alone sectoral or province-wide, and the division of legislative authority in Canada makes country-wide bargaining authority or structures even more difficult.[21]

Interested observers of new economy challenges to the Canadian industrial relations framework – including the extent to which these rights and freedoms are constitutionalized – will follow with interest the law on sudden plant closings, as it has been interpreted in Quebec. The most recent and arguably most compelling example surrounds initiatives to unionize the multinational but highly centralized retailer, Wal-Mart, in Canada.

The first Wal-Mart cases in Canada stem from Windsor, Ontario, in which a deeply adversarial and ultimately unsustainable unionization battle was waged, during which Wal-Mart was found to have used threats, promises or undue influence in the exercise of its free speech during an organizing campaign, by failing to answer the question of whether it would close the particular store if the union was successful in its unionization drive.[22] There may be a relationship between this organizing effort and legislative changes in Ontario that removed a hallmark of Canadian labour relations law, membership cards, to require a secret ballot vote.

---

[17] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 570.

[18] Langille & Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999), 21 Comp. Lab. L. & Pol'y J. 7 at 18.

[19] *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846.

[20] *Supra* note 1 at 592.

[21] *Ibid*. at 616.

[22] *United Steelworkers of America v. Wal-Mart Canada Inc.,* [1997] O.L.R.D. No. 207 (O.L.R.B) (Upheld on review: *Wal-Mart Canada Inc. v. United Steelworkers of America,* [1997] O.J. No. 3063 (Div. Court), leave to appeal refused.)

In Quebec, however, nascent unionization initiatives at Wal-Mart have been initially successful. Yet case law from the former labour court[23] has been interpreted to support a general right of enterprises governed by the Québec labour code to go out of business, either completely or in part, [24] even if the cessation of activities is based on "socially reprehensible considerations" like anti-union animus.[25] A recent decision of the new Quebec Commission des relations du travail, in response to the closure by Wal-Mart of its first unionized store in Quebec (Jonquière) on 29 April 2005 takes an important step toward reducing the impact of this interpretation, by underscoring the importance of ensuring that the enterprise has truly, definitively closed.[26] Needless to state, this situation has garnered the attention of numerous Quebec legal scholars. The following newspaper articles may be of interest:

- Jean-Guy Belley & Patrick Forget, "La fermeture de Wal-Mart n'a pas eu lieu", Le Devoir, Montreal, 21 May 2005, p. A7

- Jean-Guy Belley & Patrick Forget, "Des prejudices prévisibles: Ce qu'a fait Wal-Mart à Jonquière est un affront à la primauté du droit," La Presse, Montreal, 6 June 2005, p. A22

- Michel Coutu, "Le droit de propriété, seul droit fundamental?" Le Devoir, Montreal, 1 June 2005, p. A7.

- Guylaine Vallée et al., "Relations de travail: le cas Wal-Mart – Quelle responsabilité sociale," Le Devoir, Montreal, 15 February 2005.

- Pierre Verge, "Dans la foulée de la fermeture d'un Wal-Mart, Un employeur a-t-il le droit de fermer une enterprise pour un motif "antisyndical?"" Journal du Barreau, 15 March 2005, pp. 1 & 7.

(d) Wage-fixing methods

Wage-fixing frameworks are not a central feature of the current labour law debate in Canada. It is worth noting, however, that many workers fall outside of even the most basic of minimum-wage schemes. These workers (day labourers, farm workers) are often among the most economically marginalized of Canadian workers. For insight into the huge crevice that this phenomenon represents in Canadian labour law, see the recent Quebec human rights tribunal case.[27]

Also of interest is the recent report issued by the Manitoba Low Wage Community Inquiry, called *Paid to be Poor*. The report's recommendations include strategies and principles which stem from a call for an increase to minimum wage, and a general strengthening of employment standards and the environment of the working poor.[28]

---

[23] *City Buick Pontiac (Montréal) Inc.* v. *Roy* [1981] T.T. 22.

[24] *Place des Arts*, *supra* note 29; Another interesting example is that of the investigation of the US NAO into the closures of McDonald's restaurants in Montreal. *U.S. NAO Submission No. 9803*. The submission was withdrawn as the complaining parties came to an agreement with the Quebec government to have a provincial council study anti-union animus-motivated plant closures.

[25] *City Buick Pontiac*, *supra* note 25, at 26.

[26] *Boutin c. Wal-Mart Canada,* 2005 QCCRT 502 at para 53. [*Boutin*]

[27] *Commission des droits de la personne et des droits de la jeunesse c. Centre Maraicher Eugene Guinois Jr. Inc.*, No 760-53-000001-048, 14 avril 2005. (Unreported) In particular the assessment of damages at para 222 and following is illustrative of the reality of low wages in the sector. The Commission's assessment of damages in the value of lost wages is as low as $29.15/day in the case of one of the workers.

[28] Manitoba Low Wage Community Inquiry, *Paid to be Poor*, (Winnipeg, 2005). The report is available online at www.just-income.ca.

(e) Duration of work and changing work conditions

"There is now a proliferation of part-time, casual and temporary (or otherwise short-term) arrangements, more multiple job holders, and more people who work at home".[29] The policy response to this reality has been broader than simple legislative reform. Human Resources and Social Development (formerly Human Resources Development Canada) has been actively studying the phenomenon of the changing nature of work, and the shifting reality of the work week for Canadians. Some attempts have been made to address these shifts, but no major policy initiatives have been taken as yet.

(g) Labour mobility

Internationally, the problem of labour mobility is the subject of consideration in Canada's immigration "formula". Access to permanent residency in Canada is determined by a points system, and striking the correct balance regarding those elements which a prospective immigrant to Canada must have is a hotly debated question. Though the current "formula" gives preference to professionally trained candidates, many argue that this is ineffective, and priority ought to be given to trades-people, and other groups of workers. This continues to be the subject of great ideological and pragmatic debate in Canada.

In addition, the NAFTA framework contemplates temporary labour mobility schemes. The NAFTA Chapter 16 makes special provisions for business people and professionals to enter Canada.[30]

Furthermore, there remains a question of inter-provincial labour mobility. While in some cases, provinces are eager to make reciprocity agreements, regional labour mobility within the country remains an issue of considerable debate.

4. How is this visible in:

(a) Court decisions

In Canada, issues of national debate are frequently the subject of *dialogue* between the judiciary and legislative bodies. This process of exchange often reflects some of the tensions surrounding a particular question, with the courts playing a reformist or a conservative role, depending on the issue and the context. A good example of a labour law debate as the subject of such dialogue is that of farm workers in Ontario, briefly mentioned above. A Conservative government in Ontario passed legislation which explicitly prohibited farm workers from organizing and bargaining collectively. The law was challenged in the courts on the grounds that it limited the farm workers' Charter-protected right to freedom of association. The law was overturned, and the legislature then redrafted the impugned provision. A challenge of the revised legislation is currently pending in Ontario, on freedom of association and equality grounds.

Dunmore also points to the dialogue which engages international bodies (like the ILO), the legislature and the courts. A recent example is found in the *330th Report of the Committee of Freedom of Association*, in which the committee notes both the juridical and legislative developments in the case, as well as offering an overview of the ILOs role and response to these changes.[31]

---

[29] *Supra* note 19 at 31.

[30] *NAFTA*, Ch. 16, Art. 1608. Business people are defined as workers entering the country for the provision of services, provided they do not intend to establish a permanent residence. This provision would encompass farm workers and other day labourers.

[31] ILO Committee on Freedom of Association, *330th Report of the Committee on Freedom of Assoiation*, GB.286/11 (Part I) (Geneva: International Labour Office, 2003) at para 24-27.

(b) Collective bargaining processes

Though less well documented in the Canadian context, the issues surrounding labour in the new economy are likely felt most acutely at the level of collective bargaining. Anecdotally, one of the most frequently cited reasons for strikes and lockouts is a breakdown of negotiations surrounding employer rights to contract out the work of their operation.

The recent developments surrounding successor rights (in particular the development of jurisprudence surrounding s. 45 of the *Quebec Labour Code* discussed below) has added an element of tensing into collective bargaining processes. The implied or actual threat of closing operations in the even that unionization proved unworkable[32] can be a powerful factor at the bargaining table.

II- BUSINESS LAW AND LABOUR LAW

5. Modifications to labour law resulting from:

(a) Legal position of employees in event of a transfer of an undertaking or part thereof

The *Ontario Labour Relations Act*[33] bound successive employers and dispensed with the need to demonstrate that a sale of a business had taken place if substantially similar services are subsequently provided at the premises under the direction of another employer. The Ontario courts have also addresses this question. In *Ajax(Town) v. National Automoile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222*[34], the Supreme Court agreed with the Ontario Court of Appeal that the historic "nexus" between the town of Ajax and the successive owner of the bus company was enough to constitute a sale of the bus operation, pursuant to the act.[35]

In the Quebec context, similarly, certification can extend to the subsequent employer when substantially the same work is being performed.[36] The issue is addressed in s. 45 of the Quebec *Labour Code.* The provision provides for protection of certification in the event of the transfer of an undertaking. When the *Labour Code* was amended in 2001, although some changes were made to that legislation, they largely maintained the situation as it pertained to employees following the transfer of all or substantially all of an undertaking.

The provision has been the subject of great debate in addition to considerable study and litigation. In *Ivanhoe Inc. v. UFCW, Local 500*,[37] for example, the Supreme Court of Canada upheld a Quebec Labour Court's position that a certification could extend to a new subcontractor, at least where the employees of the company contracting out the work had been covered by the certification before the work was originally subcontracted.[38] The Supreme Court of Canada (SCC) emphasized the wide discretion of labour tribunals in determining and weighing the factors to be applied in deciding what is the transfer of an undertaking, and the tribunals' authority to develop specific tests responsive to the situation in a given industry.

---

[32] *A.I.E.S.T., local de scene no. 56 c. Societe de la Place des Arts de Montreal*, [2004] 1 R.C.S. 43. [*Place des Arts*]

[33] *Labour Relations Act*, S.O. 1995, ch. 1.

[34] *Ajax(Town) v. National Automoile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222* (1998), 41 O.R. (3d) 426 (Ont. C.A.) (affirmed by the Supreme Court of Canada, 2000 SCC 23). [*Ajax*]

[35] *Ibid*. at para 2.

[36] *Quebec Labour Code*, R.S.Q. c. C-27, s. 45. [*QLC*]

[37] *Ivanhoe Inc. v. UFCW, Local 500* (2001) SCC 47.

[38] *Ibid*.

In 2003, the Quebec government responded to widespread employer objections that restrictions on subcontracting were impairing the competitiveness of Quebec businesses. It amended the successor rights provision of the *Labour Code* to provide that bargaining rights do not follow "the transfer of part of the operation of an undertaking" unless what is transferred are not only "functions or the right to operate" but also "most of the elements that characterize the part of the undertaking involved".[39]

Particularly timely on the place of collective bargaining in the Canadian context, and in particular in the Canadian public sector, is the ongoing British Columbia teachers' strike. The BC Teachers' Federation has mobilized its members against the provincial government's legislated contract- which has been denounced by the Committee on Freedom of Association of the ILO.[40] Though the outcome of the teachers' strike is not yet known, the surrounding legal dialogue among the legislature, the courts and the ILO present us with yet another example of the struggle to incorporate international norms and law into the domestic process.

(b) Worker's rights in the case of employer insolvency

In the case of employer insolvency, workers fall into an unfortunate jurisdictional crevice in the Canadian legal landscape.[41] Bankruptcy is the subject of federal legislation, particularly the *Bankruptcy Act*,[42] but labour and employment legislation otherwise falls largely within provincial jurisdiction. Beyond vacation pay (which is deemed to be held in trust and therefore not part of the bankrupt estate), legislation doesn't generally protect pay owed to workers.[43]

(c) Collective redundancy procedures

Mass layoffs are largely unregulated in the Canadian context, with minor exceptions. The *Canada Labour Code* imposes an obligation on companies to provide 16 weeks notice for layoffs of 50 employees or more within a four week period.[44] Beyond these provisions, layoffs are not regulated by business law in Canada.

III- INTERNATIONAL TRADE AND LABOUR LAW

6. Economic integration agreements

Canada is closely tied to the United States, and has, since 1987, had a **Free Trade Agreement** with the US. Since 1994, Canada has been a member of the trilateral **North American Free Trade Agreement** (Canada- Mexico- US). In addition, Canada has been an active participant in the as-yet unsuccessful negotiation of a **Free Trade Area of the**

[39] *QLC*, s. 45.

[40] Committee on Freedom of Association Report, Report No. 330 *(Vol. LXXXVI, 2003, Series B, No. 1),*Case No. 2166. View the conclusions of the report at http://webfusion.ilo.org/public/db/standards/normes/libsynd/LSGetParasByCase.cfm?PARA=7101&FILE=2166&hdroff=1&DISPLAY=CONCLUSION

[41] In spite of this fact, recent airline bankruptcies (or near bankruptcies) in Canada have seen unions playing an important role in attempting to forge an agreement (making significant concessions where needed) or salvage what they can for workers in the even of insolvency.

[42] *Bankruptcy and Insolvency Act,* R.S. 1985, c. B-3. (s. 126 addresses workers pay as that of an unsecured creditor.)

[43] Adams, Roy, "Employment Standards in Ontario: An Industrial Relations System Analysis", (1987) 42 Relations industielles 46.

[44] *Canada Labour Code*, R.S. 1985, c. L-2, Div. IX, s. 211 and following.

Americas.[45] Canada has also signed a number of bilateral trade agreements including with Chile and Costa Rica.

7. Regional agreements and labour law

(a) NAFTA legal system

Though the NAFTA itself is largely silent on labour issues[46], Canada, Mexico and the US have signed a "side deal" on labour issues known as the North American Agreement on Labor Cooperation (NAALC).[47] The NAALC came into force in 1994, and "seeks to promote fundamental labour standards, compliance with labour laws, and the enforcement of those laws in each country."[48]

The NAALC and NAFTA arrangements have been extensively documented.[49] For a list of Canadian commentaries, see:

Adelle Blackett, "Towards Social Regionalism in the Americas", (2002) 23 Comp. Labor Law & Pol'y Journal 901.

Marie-Anne Moreau & Gilles Trudeau, *La cause sociale dans l'Accord de Libre-echange Nord Americain* in XX Relations Industrielles/ Industrial Relations, 393.

Pierre Verge, "Vers une graduelle "continentalisation" du droit du travail? Apercu de l'impact des accords plurinationaux americains en matieres de travail", (2004) XXXV Revue Etudes internationals 286.

(b) Implementation mechanisms

Though the rules themselves are not intended to have supranational effects, there is a mechanism by which states party to the agreement can trigger a review of the enforcement of another state's domestic legislation. As noted above, the first step of the process involves consultation through the NAOs. If consultation is not effective, a government may call for an Experts Panel to examine the issue. If the issue is still not resolved, and if it falls within a set of issues identified in the agreement, [50]a government may invoke the dispute settlement provisions of the agreement.[51]

> In such a case, an arbitral panel may review the matter and issue a report containing its findings, its determinations as to whether there has been a persistent failure to enforce the law effectively, and recommendations for resolution of the dispute.[52]

Ultimately, an unresolved dispute may lead to suspension of NAFTA trade benefits, however, sanctions may only be imposed by an arbitral Panel where "there has been a persistent pattern of failure" by the party to enforce its laws in three areas: "occupational safety and health, child labour, or minimum wage technical labour standards." [53]

---

[45] Canada is also a member of OPEC, APEC, the G-8. For the purpose of this discussion, we will focus on the NAFTA framework. In addition, Canada continues to negotiate bilateral trade agreements with other countries in the region.

[46] With the exception of limited provisions for highly skilled workers.

[47] *North American Agreement on Labor Cooperation (NAALC)*, 32 I.L.M. 1499 (entered into force Jan. 1, 1994).

[48] *Ibid*. art. 39.

[49] A most comprehensive treatment is available in Lance Compa, "The North American Free Trade Agreement (NAFTA) and the North American Agreement on Labor Cooperation (NAALC)" in *International Encyclopedia of Laws, Labour and Industrial Relations*, (Roger Blanpain, ed., 2001).

[50] *NAALC*, at art. 39(1).

[51] Mercury, James & Bryan Schwartz, "Linking Labour, the Environment, and Human Rights to the FTAA", (2001) 1 Asper Rev. of Int'l Bus. and Trade Law 37 at para 9.

[52] *Ibid*.

[53] *NAALC*, art. 39(1).

8. Civil society consultation

At the time of the negotiation of the NAFTA, civil society was not widely consulted. In part, the negotiation of a side agreement on labour- in addition to an agreement on the environment- was an attempt by the Liberal government to respond to criticisms that the agreements did not reflect the priorities and values of Canadians. The negotiation of the NAALC itself was not widely consultative.

In the intervening years between NAFTA and the current negotiations surrounding a FTAA, the landscape has changed considerable in regards to expectations for civil society participation. In the wake of the implosion of the Multilateral Agreement on Investment (MAI), the Canadian government has been extremely wary of appearing to neglect civil society consultation. The FTAA and other current trade negotiations have animated Canadian and international civil society.[54] For a sample of some of the contributions being made to the debate see:

Canadian Labour Congress:

http://canadianlabour.ca/index.php/economy_internationa

Rights & Democracy: www.dd-rd.ca

Council of Canadians: www.canadians.org

9. Efforts at harmonizing labour regimes within the regional block

"The NAALC in no way requires the harmonization of laws but rather sets out guiding principles that the parties are committed to promote."[55] In fact, it is perhaps better to see the labour side-agreement as what Harry Arthurs has called "a conditioning device".[56] Harmonization is not required, as the agreements themselves "habituate us to the acceptance of a particular set of values".[57]

10. Commercial sanctions in support of workers rights in international trade relations

Canada's trade policy tends to rely on the force of soft law and suasion, for the enforcement of labour rights with trading partners.

A related development, however, has been the recent discussion at the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT), surrounding a recent investigation into the human rights and environmental record of Canadian Companies operating overseas. The report called on Parliament to put forward a comprehensive response to the current gap in legislation. If this initiative develops, it will represent a first step for Canada in holding its own MNEs to account for their treatment of workers and the environment beyond domestic borders.

[54] Blackett, Adelle, "Toward Social Regionalism in the Americas", (2002) 23 Comp. Labor Law & Pol'y Journal 901.
[55] *Supra* note 51 at para 6.
[56] S*upra* note 2 at 21-22.
[57] *Ibid*.

IV- SOFT LAW *AND THE EMERGENCE OF NEW ACTORS*

11. Multinational Enterprises

(a) MNEs and Corporate Codes

A complete survey of the diverse experience with Canadian corporate codes is beyond the scope of this exercise.[58] A study undertaken by a Canadian NGO surveyed the experience of Canadian corporations with CCCs. The study sought to evaluate the prevalence and content of codes of conduct of Canada's largest corporations operating internationally. Highlights of the findings of that study are excerpted below.

Some of the original findings of the study are:

- although 42% of the companies who responded to the survey agreed that international business has a role to play in promoting the protection of international human rights and sustainable development, only one in five companies of the total number surveyed reported having adopted a code of conduct for its international operations.
- only 14% of companies responding to the survey reported having codes of conduct which refer to all the core labour standards that are now recognized as basic human rights by the Organization for Economic Co-operation and Development (OECD): freedom of association and the right to collective bargaining, non-discrimination in the workplace, elimination of exploitative child labour, and the prohibition of forced labour. Although a total of six companies claimed to have codes dealing with core labour standards, only one company in fact supplied a code which contained reference to those rights!
- one third of the firms that have adopted codes of conduct refer to some part of the core labour standards as defined by the International Labour Organization (ILO) and OECD. If it is assumed that the 55 companies that did not respond to the survey do not have codes that refer to OECD standards, only 6 % of Canada's largest corporations have codes dealing with some of these rights.
- only 14% of companies with codes have some independent mechanism to ensure respect of its provisions.
- half of the firms responding to the survey reported that they apply more stringent environmental and labour standards when operating in countries where standards are less rigorous than Canadian norms.

The study would also seem to indicate that Canadian companies are reluctant to speak about their relations with workers abroad. Only 43 of the 98 companies solicited responded to the questionnaire or the telephone inquiries. Even more worrisome is the fact that even companies that report having codes of conduct are reluctant to share them with the public.[59]

---

[58] For a model Code of Conduct, see the Clean Clothes Campaign *Model Code* at Appendix 1 & the Canadian Labour Congress' *Model Clause for Collective Bargaining* at Appendix 2.

[59] Forcese, Craig, "Commerce with Conscience: Human Rights and Corporate Codes of Conduct", (Montreal: International Centre for Human Rights and Democratic Development, 1997). The analysis was based on a study of 98 of Canada's largest corporations by the Canadian Lawyers' Association for International Human Rights, in collaboration with the International Centre for Human Rights and Democratic Development (ICHRDD).

Kamil Ahmed notes that CCCs rarely have material sanctions. He concludes that "CCCs as they stand today are therefore substantively toothless due to lax monitoring and enforcement mechanisms".[60]

For additional contributions to the discussion surrounding CCCs in the Canadian context see:

Harry Arthurs, "Private Ordering and Workers Righgts in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation" in Joanne Conaghan et al. *Labour Law in an Era of Globalization*, (Oxford: Oxford University Press, 2001).

Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Conduct", 8 Indiana J. of Global Legal Studies 410.

Guylaine Vallee, Gregor Murray, Michele Coutu, et al., *Les codes de conduite des entreproses multinationalescanadiennes: aux confines de la regulation prove et des politiques publiques du travail.* (Ottawa: Canada Law Commission, 2003).

Pierre Verge, *Configuration diversifiee de l'entreprise et droit du travial,* (Quebec: Universite Laval, 2003).

12. *Soft law* impact on labour law and collective bargaining:

In general terms, labour law in Canada is evolving slowly towards a more supranational understanding of the importance of soft law and –what Stephen Toope calls "interpenetration of normative traditions".[61] Toope suggests that "old metaphors of national sovereignty and statism are being sloughed off by the Court as they are replaced by new metaphors of transnationalism…"[62]

This is evident, to a certain extent, in the adoption and adherence of CCCs and other voluntary schemes. We can see that Canadian corporations have begun to gravitate towards some of the international right regimes, including the UN Global Compact- which lists 25 Canadian companies[63] affiliated with its voluntary framework.

The ILO Declaration framework provides a useful lens through which to examine the questions raised in the above discussion of excluded groups and vulnerable workers. Though Canadian labour law is a long way from filling the many cracks and crevices within its structures, noteworthy attempts are being made. Of note is the recent Bernier Report in Quebec. The Bernier Report was commissioned by the government of Quebec in an attempt to identify those groups of workers which were in atypical or nontraditional work relationships in order to identify how best to protect these workers through labour relations law.[64] The Law Commission of Canada's report "Is Work Working?" is another example of an attempt to draw marginalized workers into the mainstream of Canadian labour law in the spirit of the ILO Declaration.[65]

---

[60] Ahmed, Kamil, "International Labour Rights- A Categorical Imperative?", (2004), 35 R.D.U.S. 145 at 178-9.

[61] Stephen J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 534 at 534.

[62] *Ibid*.

[63] A searchable database is available on the Global Compact website, and a basic search indicates that 25 Canadian companies are subscribe to the Compact. None of these 25 companies is identified as subcontractor. http://www.unglobalcompact.org/Portal/ (viewed October 10, 2005).

[64] *Bernier Report*, "Les Besoins de Protection Sociale des Persones en situations de travail nontraditionelle", (Quebec: Gouvernement du Quebec, 2003). The report is available online at: http://www.travail.gouv.qc.ca/actualite/travail_non_traditionnel/Bernier2003/RapportFinal.html.

[65] Law Commission of Canada, "Is Work Working? Work Laws that do a Better Job" (Ottawa: Law Commission of Canada, 2004). The report is available online at: http://www.lcc.gc.ca/research_project/er/tvw/dp/2004_dis_paper_b-en.asp.

Although the meaning of "soft law" must be scrutinized particularly carefully in a field like labour law for which a mix of state based mechanisms and self-regulatory actions (law of the workplace) by the social partners themselves have interacted, it is important to consider how the instruments may be used differently, now. For example, should one be concerned that for a group of particularly vulnerable workers, farm workers, a professional syndicate, the Union des producteurs agricoles (UPA), has a "code of conduct", financed by the Québec government, to encourage large agricultural factories to provide the most basic of services, like toilet facilities, to these workers, and that the UPA should refer to that code to escape responsibility before the Quebec Human Rights Tribunal in one of the most flagrant examples of discrimination at work (and, as a result, failure to provide "decent work" as understood by the ILO as an expression of the need for fundamental principles and rights at work) to have come before Quebec courts?[66] Once again, with "soft law", the question really rests on the normative authority and democratic legitimacy of the framework that is claiming the authority of law.[67]

[66] See *Centre Maraîcher*, *supra* note 27.

[67] See Adelle Blackett, « Global Governance, Legal Pluralism and the Decentered State : A Labor Law Critique of Codes of Corporate Conduct » (2001) 8 Indiana J. Glob. Leg. Studies 401.