

**ECONOMIC INTEGRATION AND
LABOUR LAW POLICY IN CANADA**

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Gilles Trudeau and Guylaine Vallée

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Gilles Trudeau est professeur agrégé et Guylaine Vallée est professeure adjointe, à l'École de relations industrielles de l'Université de Montréal.

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Economic Integration and Labour Law Policy in Canada*

by
Gilles Trudeau and Guylaine Vallée
Professors
Ecole de relations industrielles
Université de Montréal

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ABSTRACT

This paper analyses the evolution of Canadian labour policy and labour law in a more integrated continent. We discuss in the first part the assumption that continental economic integration has already constituted a factor in the evolution of our labour law. This economic integration, between the U.S.A. and Canada on one hand, and between the U.S.A. and Mexico in the other hand, had taken place long before its formalization through the F.T.A. and N.A.F.T.A.

In the second part of this paper, we discuss to what extent this formalization constitutes an additional factor in the evolution of our national labour law policy. After a review of the social content of the F.T.A., N.A.F.T.A. and its side Accord on labour standards, we conclude that it will become much harder to modify social and economic trends that have appeared as a result of the economic integration.

North America constitutes a more and more integrated economic continent. The Free Trade Agreement (F.T.A.)¹ between Canada and the United States came into effect on January 1, 1989 and, when fully applied, should eliminate most of the remaining commercial barriers that presently exist between the two countries. The free trade zone will also include Mexico when the North American Free Trade Agreement (N.A.F.T.A.), signed on December 17, 1992, comes into effect². These agreements, however, formally recognize an economic integration that has to a large extent existed for several years.

Through this paper, we will discuss the evolution of Canadian labour policy and labour law in a more economically integrated continent. We start by discussing the assumption that continental economic integration already constitutes a factor in the evolution of our labour law (I). We will discuss to what extent the **formalization** of this economic integration through free

¹ In Canada, the Agreement was ratified by An Act to implement the Free Trade Agreement between Canada and the United States of America, S.C. 1988, c. 65.

² In Canada, the Agreement was ratified by An Act to implement the North American Free Trade Agreement, (Bill C-115), adopted on May 27, 1993.

trade agreements constitutes an additional factor in the evolution of our national labour law policy. We assume that, with this formalization, it will become much harder to modify social and economic trends that have taken place as a result of the economic integration (II).

I. The Nature of Economic Integration and its Effect on the Development of Canadian Labour Law

Economic integration between the U.S.A. and Canada on the one hand and between the U.S.A. and Mexico on the other hand is not the result of the F.T.A. and N.A.F.T.A. They rather confirm and formalize a situation that has existed for years (A) and that has already largely affected the shaping of Canadian labour policy (B).

A. Economic Integration Based on Dependency

The continental integration that has taken place in North America with the application of the F.T.A. and N.A.F.T.A. is essentially commercial. These accords create a large continental market formed by the three countries in which goods, services and, to some extent, capital originating from any one of the three countries will be allowed to circulate freely, without commercial barriers imposed at the border of the other countries. However, when we consider the state of trade links among Canada, the U.S. and Mexico rather than the formal object of these free trade agreements, we are able to see that this economic integration already existed and that it was an integration founded on economic dependency.

The Canadian economy is largely dependent on exterior markets. In 1989, Canada was the second-largest exporting nation among the principal G-7 countries³. More than 70 % of Canada's total exports in 1989 were to the U.S. and 65 % of imports by Canada came from the U.S.⁴ Canada-U.S. relations have intensified since the middle of the sixties. They have been controlled, however, by a limited number of enterprises and have developed for a large part within transnational enterprises⁵. These commercial relations have taken place in the context of a relatively free market⁶. Before the achievement of the F.T.A., 73 % of Canadian imports from the U.S. were duty free, as were 71 % of American imports from Canada⁷. Furthermore, when tariffs were imposed by Canada and the U.S. on goods and services from the other country, they were very low⁸.

³ L'Accord de libre-échange nord-américain. Evaluation économique selon une perspective canadienne, Department of Finance (Canada), November 1992, on p. 6.

⁴ D. BRUNELLE and C. DEBLOCK, Libre-échange et continentalisation: le cas du Canada, Montréal, Groupe de recherche sur la continentalisation des économies canadienne et mexicaine, Cahier de recherche 91-1, January 1991, on pp. 12 and 34.

⁵ Ibid.

⁶ Expressed as a percentage of imports, the tariffs collected by Canada fell from more than 10% in 1955 to less than 4% in 1990. See Department of Finance, op. cit., note 3, on p. 8.

⁷ BRUNELLE and DEBLOCK, op. cit., note 4, on p. 12.

⁸ For example, the average of the Canadian tariffs on goods imported from the U.S.A. was 3.8% before the coming into effect of the F.T.A. The average of American tariffs imposed on Canadian goods was only 0.7%. See M.-A. MOREAU and G. TRUDEAU, "Les modes de réglementation sociale à l'heure de l'ouverture des frontières: quelques réflexions autour des modèles européen et nord-américain," (1992) 33 Cahiers de Droit 345, on p. 375.

A similar commercial relationship can be observed between Mexico and the U.S.A. The U.S.A. constitutes Mexico's most important trading partner. Seventy-five percent (75 %) of Mexican exports are shipped to the U.S., about the same proportion as for Canada⁹. Mexico represents the third largest partner for the U.S., after Canada and Japan¹⁰. On the Mexican side, the bargaining for N.A.F.T.A. must be seen as a part of a liberal economic policy that has guided other decisions of the Mexican government : participation in G.A.T.T., unilateral reductions of tariff barriers¹¹ and massive privatization of publicly owned enterprises. As in the case of Canada, negotiations between the U.S.A. and Mexico were based on important bilateral relations between the two countries.

The same cannot be said of relations between Canada and Mexico. Direct commercial exchanges between the two countries are limited, even if they have increased in recent years. In 1987 Canada exported US \$ 418 million of goods to Mexico and imported US \$ 882 million of goods from Mexico. Trade with Mexico represented only 0.4 % of total Canadian exports in 1987¹². Mexico represents Canada's seventeenth largest trading partner¹³. The Economic Council of Canada has found that two-thirds of Canadian exports to Mexico in 1987 consisted

⁹ Economic Council of Canada, "Libre échange: Canada - Etats-Unis - Mexique," in Au courant, vol. 13, No. 1, 1992, on p. 14.

¹⁰ T. THOMAS, Le libre-échange entre le Mexique, le Canada et les Etats-Unis: le contexte et les enjeux, general study, Library of Parliament, Research Branch, 1990, on p. 11.

¹¹ Ibid., on pp. 9 and 12.

¹² Economic Council of Canada, loc. cit., note 9, on p. 14.

¹³ THOMAS, op. cit., note 10, on p. 14.

of agricultural products or products with a high natural-resource content. The other third consisted of machinery and transportation equipment¹⁴. The nature of Mexican exports to Canada has changed over the last few years. Today, 70 % of Mexican exports to Canada consist of machinery and transportation equipment requiring no specialization. Most of this trade takes place within transnational companies¹⁵.

These figures indicate that Canada and Mexico share a common state of dependency on the U.S.A. with regard to their exports. Even though a large part of their exports were different, the Economic Council of Canada noted that, in 1987, 34 % of Canadian exports were comparable to Mexican exports. This "similarity index" between the exports of the two countries rose from 16 % in 1971 to 34 % in 1987. According to the Economic Council of Canada, this would indicate that the Mexican economic structure is becoming more and more similar to that of Canada¹⁶. This conclusion of the Economic Council of Canada is confirmed by more recent figures. Thus, the similarity of Canadian and Mexican exports to the U.S.A. increased from 30 % in 1985 to 43 % in 1990, or by almost 50 %¹⁷. This is one of the reasons that led Canada, after a long period of hesitation, to participate in the trilateral negotiations in order to preserve its privileged access to the American market, a market also coveted by Mexico. In the N.A.F.T.A. negotiations, Mexico and Canada were not allies but

¹⁴ Economic Council of Canada, loc. cit., note 9, on p. 14.

¹⁵ Ibid.

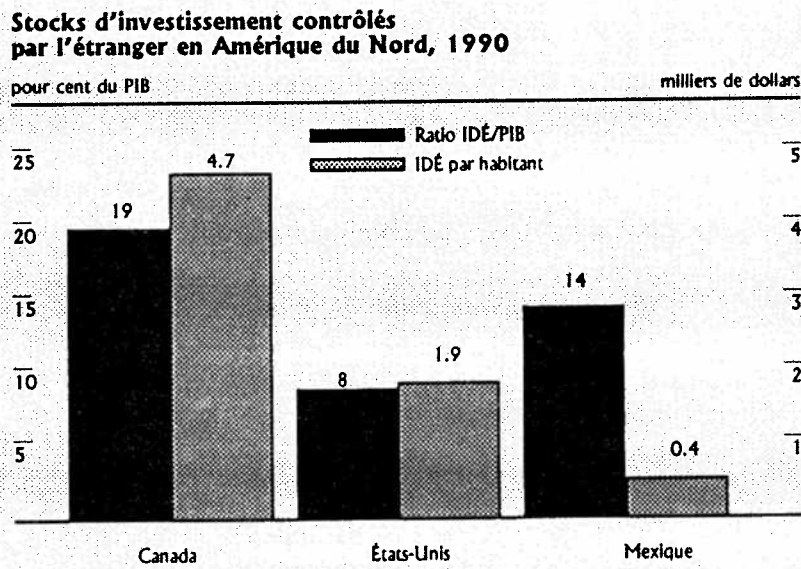
¹⁶ Ibid., on p. 15.

¹⁷ Department of Finance, op. cit., note 3, on p. 33.

rather competitors. It also indicates that there was no true trilateral bargaining among Canada, the U.S.A. and Mexico, but merely bilateral negotiations conducted in parallel¹⁸. At least, the state of trade relations among these countries gives some support to this analysis.

The same disproportionate relations among the three countries can be found concerning foreign investments. Among the parties to N.A.F.T.A., Canada is the country with the most direct foreign investments, as shown in the following chart.

Chart 1 - Foreign Investments in North America, 1990.



Sources : Statistique Canada, *Bilan des investissements internationaux du Canada*, n° de cat. 67-202; U.S. Department of Commerce, *Survey of Current Business* (juin 1991); Banco de Mexico, *The Mexican Economy 1991*.

Based on : L'Accord de libre-échange nord-américain. Évaluation économique selon une perspective canadienne, Department of Finance (Canada), November 1992, on p. 11.

¹⁸ G. VALLEE, "L'intégration économique nord-américaine et le droit du travail au Canada," paper presented at the International Congress of Sociology of Law, Mexico, July 1992, published in Document de recherche 93-04, École de relations industrielles, Université de Montréal, August 1993, on pp. 6-8.

In 1990, the U.S.A. constituted the main source of foreign investment in both Canada and Mexico. Sixty-four percent (64 %) of foreign capital in Canada and 63 % of foreign capital in Mexico in 1990 came from the U.S.A. Only 7 % of foreign capital invested in the U.S.A. originated from Canada¹⁹. There are no significant relations between Canada and Mexico concerning foreign investment.

Table 1 - Sources of Foreign Investments in North America, 1990.

Origine des investissements étrangers en Amérique du Nord, 1990
(millions de dollars)

Pays d'origine	Pays de destination		
	Canada	États-Unis	Mexique
Canada	--	53,100	486
États-Unis	80,400	--	22,261
Mexique	1	646	--

Sources : Statistique Canada, *Bilan des investissements internationaux du Canada*, n° de cat. 67-202;
U.S. Department of Commerce, *Survey of Current Business* (juin 1991);
Banco de Mexico, *The Mexican Economy 1991*.

Based on : L'Accord de libre-échange nord-américain. Évaluation économique selon une perspective canadienne, Department of Finance (Canada), November 1992, on p. 21.

These figures indicate that the F.T.A. and N.A.F.T.A. confirm rather than create a continental capitalism²⁰, which is characterized not by the globalization of trade in the world, but by the free circulation of goods, services and investment within a continental bloc, itself in competition with other international integrated markets. This North American continentalism

¹⁹ Department of Finance, op. cit., note 3, on p. 20.

²⁰ D.BRUNELLE and C. DEBLOCK, Le libre-échange par défaut, Montréal, vlb éditeur, 1989, on pp. 242-245.

has not been based on equal interdependence among Canada, the U.S.A. and Mexico, but rather on the "asymmetrical interdependence"²¹ of Canada and Mexico towards the U.S.A. Inside this North American continental economy, some fear the reinforcement of labour division among the three countries : resources in Canada; technology and capital in the U.S.A.; cheap labour in Mexico²². This labour division would encourage strategies of delocalization that have already begun with *maquiladoras*. Such a "continentalization" of the economy would confirm the renunciation, by Canada and Mexico, of an international multilateral trade policy²³.

B. Development of Canadian Labour Law Institutions

Part A shows how Canada and the United States had joined in an integrated economic and commercial zone long before the implementation of the F.T.A. in 1989. It is also clear that the trade links between the two countries are characterized by Canada's strong economic dependency on the U.S.A. This economic integration appears to be an important factor in explaining similarities in labour legislation in the two countries.

²¹ D. BRUNELLE and C. DEBLOCK, "Canada, Mexico, and Continentalism: an Analysis of the New Parameters of Integration," 1992, to be published, on p. 14.

²² On the concentration of cheap labour in Mexico, see D. MASCHINO, "Salaires et relations du travail dans un contexte de libre-échange nord-américain. La comparaison Mexique-Québec," Le marché du travail, October 1992, on p. 6 et seq.

²³ THOMAS, op. cit., note 10, on p. 17.

In Canada, the main legislative jurisdiction over labour policy belongs exclusively to the provinces²⁴, the federal government retaining authority only over labour policy that applies to specific industries of national importance such as radio and television, railways, airlines, banking and grain handling. Despite this decentralization in jurisdiction over labour policy in Canada, only one model of labour legislation prevails, a model largely borrowed from the American *Wagner Act*. In the last years of World War II and in the following decade, most of the ten Canadian provinces and the federal legislature enacted collective bargaining legislation embedding to a large extent the model of labour relations that had been formalized by statute in 1935 in the United States²⁵.

In addition to economic integration between the two countries, it must be kept in mind that the adoption of the American legislative model in Canada was preceded by the appearance of a labour movement very close to American labour organizations. Although the first labour unions in Canada were Canadian, just a few years after the conclusion of the *Treaty of Reciprocity* of 1854²⁶, the first international American labour unions appeared in Canada. Lipton explains the development of American trade unionism in Canada as follows :

"Why affiliation to U.S. unions? Here are some reasons : The undeveloped condition of the Canadian economy; its interflow with the U.S. economy;

²⁴ The judicial precedent on this question is *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. On this subject, see G. W. ADAMS, *Canadian Labour Law*, Aurora, Canada Law Book Inc., 1985, on pp. 100 *et seq.*

²⁵ See A. ADAMS, *op. cit.*, note 24, on pp. 12 *et seq.*

²⁶ E. THEROUX, "Du traité de réciprocité à l'Accord de libre-échange," (1991) 25 *Revue juridique Thémis*, 227.

Canadians' need for jobs in the United States; trade solidarity; the Canadian workers' desire for organization, and their readiness to use anything to get it - east, west, north or south of the border."²⁷

In 1911, 89.7 % of unionized Canadian workers were members of international unions²⁸. Since that time, in spite of a significant trend toward the "Canadianization" of unions, international unions have always been an important part of the labour movement in Canada. In 1989, 32.4 % of unionized workers in Canada were still members of international unions.

In the two countries, collective bargaining plays the same role, at a very decentralized level. The framework of the system, the nature and functions of the social actors and the institutions within the system are highly similar, if not the same, on both sides of the border. Moreover, a set of general labour standards legislation, including health and safety and worker's compensation regulations, has the same function in both countries mainly with respect to the non-union part of the labour force²⁹.

²⁷ C. LIPTON, The Trade Union Movement of Canada 1827-1959, Second Edition, Montreal, Canadian Social Publications Limited, 1969, on p. 23.

²⁸ M.L. COATES, D. ARROWSMITH and M. COURCHENE, The Current Industrial Relations Scene in Canada 1989, Kingston, School of Industrial Relations/Industrial Relations Centre, Queen's University, on p. 20.

²⁹ On the comparison between Canadian and American labour legislation, see G. TRUDEAU, "L'impact de l'Accord de libre-échange canado-américain sur les relations du travail au Québec et leur encadrement juridique," (1991) 25 La Revue juridique Thémis, on p. 279.

It has been said that Canadian collective bargaining legislation has been much more favourable to the union movement than has its American counterpart³⁰. This characteristic of Canadian legislation has even been presented as one of the factors explaining the significantly higher union density in Canada³¹. American legislated labour standards have also been perceived as being "much less restrictive for employers (...) as compared to [those in] Canada."³² However, these differences in the two sets of national labour legislation do not change the fact that American and Canadian labour and employment laws are much alike. It would be very difficult to find two other countries in the world with such highly similar labour legislation.

It is also interesting to note that in sectors where economic integration between the two countries has been more accentuated, such as in the automobile industry and professional sports, there has been some transnational collective bargaining.

The above factors cannot explain all aspects of the convergence of and divergence between two different systems of labour policy. Other factors, such as political institutions and backgrounds, can also play an important role. Thus, it should not be forgotten that a number of important differences exist between the Canadian and American models, such as a higher

³⁰ B. LANGILLE, "Canadian Labour Law Reform and Free Trade," (1991) 23 Ottawa Law Review, 581, on p. 587.

³¹ P.C. WEILER, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," (1983) 96 Harvard Law Review, 1769.

³² LANGILLE, loc. cit., note 30, on p. 594.

degree of protection for workers and unions under Canadian legislation. These divergences may also be explained by the differences in political institutions in each country³³. Such factors certainly contribute to explaining the more important divergences that can be seen between the Mexican and the American models of labour legislation.

II. Specific Effects of the Formalization of Economic Integration

As part I shows, economic integration of North America was to a large extent realized before the F.T.A. and N.A.F.T.A. were concluded. This integration can be perceived as an explanation of the importance of the American influence in shaping Canadian labour law and the industrial relations system³⁴.

This does not mean that the formalization of North American economic integration through the F.T.A. and N.A.F.T.A. will not affect the development of Canadian labour policies (B). In order to assess these effects, we will first analyse how the F.T.A. and N.A.F.T.A. formalized the existing economic integration in North America (A).

³³ For instance, the New Democratic Party, a political party that is very close to the labour movement, has played a major role in shaping Canadian labour policy. See P.G. BRUCE, "Political Parties and Labor Legislation in Canada and the U.S.," (1989) 28 Industrial Relations, 115.

³⁴ MOREAU and TRUDEAU, loc. cit., note 8, on pp. 375 and 376.

A. The content of the F.T.A. and N.A.F.T.A.

The F.T.A. established a free trade zone between Canada and the U.S.A. The Agreement is essentially commercial and does not deal with social matters and the social regulation that would apply to the enlarged market. When fully in force³⁵, the F.T.A. will allow the free circulation of goods, services and, to some extent, investments between Canada and the U.S.A. The F.T.A. does not provide for free circulation of persons, except business persons.

The Agreement preserves the complete sovereignty of the two participating countries. No centralized agency is created and no centralized binding regulations can be elaborated within the existing framework. However, one chapter of the Agreement sets up a mechanism to settle implementation and compliance disputes (Chapter 18) and another deals with disputes concerning antidumping and countervailing duty cases (Chapter 19). In Chapter 19 cases, the decisions of the binational panel are binding upon the government concerned³⁶.

The Agreement concluded among Canada, the U.S.A. and Mexico in December 1992 creates a larger free trade zone comprising the three countries. As under the F.T.A., this

³⁵ The F.T.A. entered into effect on January 1, 1989 and will be gradually implemented by January 1, 1999.

³⁶ The F.T.A., s. 1904 (9). On the mechanism set up by Chapter 19, see E. SAUCIER, "Les aspects procéduraux du mécanisme de règlement des différends en matière de dumping et de subventionnement," (1991) 25 Revue juridique Thémis, 523.

Agreement provides for the free circulation of goods and services within the free trade zone. Moreover, it guarantees more open conditions governing investment. N.A.F.T.A. does not allow the free circulation of persons, except business persons³⁷.

Even though N.A.F.T.A. is essentially commercial, it deals to some extent with social matters. This is done exclusively in the preamble of the Agreement, which states that the three signatories resolve to "create new employment opportunities and improve working conditions and living standards in their respective territories" and to "protect, enhance and enforce basic workers' rights." These provisions remain very general and are not enforceable as such. This is in striking opposition to the route that European integration has followed so far³⁸.

More extensive provisions on social matters are now found in a side Accord, concluded in August 1993. This Accord resulted from intensive negotiation among the representatives of the three countries over labour and environmental issues related to the implementation of a free

³⁷ For an overview of N.A.F.T.A., see among others, S. GLOBERMAN, "Canada's interests in North American economic integration," (1993) 36 Canadian Public Administration, 90, on pp. 91 et seq.

³⁸ See MOREAU and TRUDEAU, loc. cit., note 8. H. SMIT, "The Relevance of the EEC Experience to Additional Prospective Sectoral Integration Between Canada and the United States," (1985) 10 Canada - United-States Law Journal, 53. The different treaties that have led to the European integration contain several provisions dealing with social matters. They also empower different community bodies and jurisdictions to develop and implement social policies and regulations. This has permitted the development of a body of sophisticated European social and labour legislation. See E. VOGEL-POLSKY and J. VOGEL, L'Europe sociale 1993: illusion, alibi ou réalité, Université de Bruxelles, 1991, 270 p.; G. GUERY, La dynamique de l'Europe sociale, Paris, Dunod, 1991, 270 p.; N. CATALA and R. BONNET, Droit social européen, Paris, 1991, 422, p.; G. LYON-CAEN and A. LYON-CAEN, Droit social international et européen, 7th ed., Paris, Dalloz, 1991, 323 p.

trade zone. The new Clinton administration has made the conclusion of this and another side Accords a prerequisite to the ratification of N.A.F.T.A. in order to prevent a "race to the bottom" in environmental and labor standards.

This side Accord, constituting the social aspect of N.A.F.T.A., sets out very ambitious objectives and obligations(1). But although the consultation and co-operation mechanisms it establishes cover a wide range of subjects (2), very few are subject to the binding dispute resolution mechanism (3).

1. Objectives and obligations

The objectives of the side Accord are set out in very general terms in Article 1. It is intended mainly to improve working conditions and living standards in each of the three countries, and to encourage co-operation and the exchange of information among the three on their respective labour legislation. More specifically, the Accord is also intended to promote a wide range of labour principles, including freedom of association, the right to bargain collectively, the right to strike, minimum employment standards, prevention of occupational injuries and illnesses, etc. (Annex 1). The Parties also wish to promote the effective enforcement by each party of the labour legislation in force in its territory, and foster transparency in its administration.

It must be emphasized that right from the beginning of the side Accord, in the reference to Annex 1, it is very clearly established that no minimum common standard will be adopted. The objectives of the Accord are to be pursued with total respect for each Party's national sovereignty and subject to the legislation in effect in each of the three countries.

These objectives are given concrete form in a number of obligations in Part II of the Accord. Article 2 establishes a general obligation in these terms :

"Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."

This provision explicitly illustrates and confirms several of the inherent limitations of the social aspect of N.A.F.T.A., i.e. the lack of common standards, complete respect for national sovereignty and legislation, and non-binding obligations reliant on moral suasion.

The other obligations are more specific. Each of the Parties agrees to "promote compliance with and effectively enforce its labor law through appropriate government action" (Art. 3). This Article refers in particular to the establishment of an adequate system for receiving complaints from different labour representatives and bodies, an inspection system, mediation, conciliation and arbitration services, and procedures for applying sanctions or obtaining redress for violations of labour law.

Each Party also agrees to ensure that any person with a legally recognized interest has access to judicial or quasi-judicial tribunals for the enforcement of that country's labour law and collective agreements (Art. 4). Proceedings of these tribunals must be fair, equitable and transparent, and must offer adequate redress (Art. 5). Finally, the Parties are also obliged to ensure that the labour legislation in effect in each country is published or otherwise made available (Art. 6) and must promote public awareness of its labour laws (Art. 7).

2. Consultation and co-operation mechanisms

The side Accord establishes a consultation mechanism with the general mandate of overseeing the implementation of the Accord, facilitating consultations between the Parties, addressing questions by any Party and handling any complaints that may be submitted (Part III of the Accord). This mechanism is embodied in the Commission for Labor Cooperation, itself consisting of a Council and a Secretariat.

The Council comprises the labour minister of each Party. It will promote co-operative activities among the three countries in the many areas listed in Article 11, i.e. occupational safety and health, child labour, human resource development, labour statistics, labour-management relations and collective bargaining procedures, employment standards, etc.

The Secretariat, comprising representatives of each of the three Parties, provides the administrative support necessary for the implementation of the side Accord.

In addition, each of the Parties is to establish a National Administrative Office (NAO), mainly to provide the Commission with any information requested relevant to the Accord, in particular as concerns the legislation and administrative procedures relating to labour in effect in the country in question.

3. Dispute resolution mechanism

Any matters concerning the application of the side Accord must be settled as much as possible through co-operation and consultation by the Parties. The dispute resolution mechanism is designed primarily in this light (Part IV of the Accord).

Accordingly, one country may request consultations at the ministerial level regarding any matter within the scope of the side Accord. The Parties concerned must make every attempt to settle the question through consultation. At this step, the Accord gives a very wide definition of subjects that may be addressed through ministerial consultations. Note, however, that only the three Parties to the Accord, and not the various social actors in a country, can request such consultations.

If a matter has not been resolved after ministerial consultations, a Party may request that an Evaluation Committee of Experts (ECE) be established (Art. 23). The ECE is to analyse "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter" considered by the

ministers. Nevertheless, no ECE may be convened to consider a matter that is not trade-related or is not "covered by mutually recognized labor laws."³⁹

Thus it is clear that at the point where matters are dealt with by the ECE, the Parties have considerably limited the application of the dispute resolution mechanism. In fact, only matters relating to occupational health and safety and other technical labour standards⁴⁰ may be submitted to the ECE. Furthermore, an additional restriction has been introduced at this step, concerning the relation of the issue to international trade⁴¹ and to labour laws mutually recognized by the two Parties to the complaint⁴².

The ECE comprises three members selected by the Council from a roster of experts drawn up in consultation with the ILO. It must submit a draft evaluation report within 120 days after it is established, and a final report within 60 days after the presentation of the draft report.

³⁹ An independent expert must rule on whether a matter is covered by mutually recognized labour laws. See Annex 23 of the side Accord.

⁴⁰ This expression is defined in Article 49 of the side Accord, and refers to laws and regulations directly related to the prohibition of forced labour, labour protection for children and young persons, minimum employment standards, elimination of employment discrimination, equal pay for men and women, prevention of and compensation for occupational injuries and illnesses, and protection of migrant workers. The definition also specifies that the establishment of standards and levels concerning minimum wages and union protection for children is not subject to the side Accord; in these two areas, only the application of the general standards is subject to the Accord.

⁴¹ As defined in Article 49.

⁴² Ibid.

Each of the three Parties will have the opportunity to present its views to the ECE on the draft report.

After the final report is submitted, each of the two countries not covered by the report may request consultations to determine whether there has been "a persistent pattern of failure" by the third country "to effectively enforce" the standards that are the subject of the ECE report, bearing on "occupational safety and health, child labor or minimum wage technical labor standards" (Art. 27). At this and the following steps, the field of application of the dispute resolution mechanism becomes quite narrow.

If such a matter remains unresolved after these consultations, a Party to the Accord may request a special session of the Council to attempt to reach a mutually satisfactory resolution of the dispute (Art. 28). If the matter still has not been resolved within 60 days after the Council has been convened, any consulting Party may request that the Council convene an arbitral panel to consider the matter, by a two-thirds vote of the Council members.

The terms of reference of the panel are firstly to determine whether the alleged persistent pattern of failure is trade-related and covered by mutually recognized labour laws (Art. 29). If so, then the panel is to :

"... examine... whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, and to make findings, determinations and recommendations in accordance with Article 36(2)." (Art. 33(3))

The panel comprises five members appointed by the Parties to the complaint, in accordance with the procedures set out in the Accord. It must submit an initial report within 180 days after the last panelist is selected (Art. 36). The final report is to be submitted within 60 days after presentation of the initial report, and must take account of any comments by the disputing Parties on the initial report.

If the panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical labour standards, the disputing Parties may agree on an action plan. If no such plan can be agreed on or if the plan is not fully implemented, the panel may meet again to establish an adequate plan or to determine whether the plan adopted has been fully implemented (Art. 39). In both cases, the panel may impose a monetary enforcement assessment⁴³. The panel is responsible for ensuring that the plan is implemented and that any such assessment is paid.

If the Party complained against fails to pay a monetary enforcement assessment, the complaining Parties may suspend the application to the Party complained against of N.A.F.T.A. benefits in an amount not exceeding the monetary enforcement assessment (Art. 41). This suspension of benefits may be extended from year to year until the assessment has been paid or

⁴³ Annex 39 of the side Accord describes the limits and items to be taken into account by the panel in determining the amount of the assessment payable.

the action plan fully implemented. The resolution of disputes concerning these matters falls under the jurisdiction of the panel.

One specific procedure concerns Canada, with regard to the enforcement of a panel determination imposing a monetary enforcement assessment or requiring the full implementation of an action plan. Rather than suspending N.A.F.T.A. benefits if Canada fails to comply with the determination, a complaining Party may request that the Commission take proceedings in a domestic Canadian court to have the determination executed. When filed before such a court, the panel determination shall become an order of the court and shall be enforceable as such (Annex 41A of the side Accord).

Note also that the application of the side Accord as it relates to labour standards gives rise to constitutional problems in Canada. Although the Accord was signed by the federal government, it deals with issues that are to a large extent under exclusive provincial jurisdiction. Consequently, for the Accord to be fully implemented in Canada, the agreement of the provinces must be obtained, as stipulated in Annex 46.

In the following section, we will see to what extent this formalization will modify the development of Canadian labour policy.

B. Potential Effects of the Formalization on Canadian Labour Policy

In this section, we will first examine the effects of the formalization of economic integration on the *raison d'être* of labour law⁴⁴ (1). Then we will discuss the potential effects of the formalization on the content of labour legislation (2).

1. Effects on the *Raison d'Être* of Labour Law

From a historical perspective, labour law originated from the excesses of the *laissez faire* and free market policies that prevailed in western countries during the Industrial Revolution⁴⁵. The state first defined some basic labour standards in order to ensure human dignity in the workplace. Some rules were enacted regarding child labour, hours of work and sanitary conditions⁴⁶. The state also gradually legitimized the existence of coalitions of workers and,

⁴⁴ The term "labour law" here is used in a very broad sense, including "employment law" as well. On the distinction between labour law and employment law, see B. LANGILLE, "Labour Law is a Subset of Employment Law," (1981) 31 University of Toronto Law Journal 200.

⁴⁵ See, for example, Les relations du travail au Canada, Report of the staff relations task force, H. D. WOODS chairman, Privy Council Office, December 1968, on pp. 13-14.

⁴⁶ See particularly the legislation adopted in Great Britain, Ontario and Quebec in the 19th century to impose some basic labour standards in factories. On the Quebec legislation, see particularly A.C. CÔTÉ, "L'Acte des manufactures de Québec, 1885, un centenaire," (1985) 40 Relations industrielles, 623.

later on, even promoted peaceful mechanisms to settle labour disputes and to foster unionism and collective bargaining⁴⁷.

The original *raison d'être* of labour law was twofold. First, it had a protective function in favour of the working class, by imposing some minimum labour standards and giving workers the possibility of counterbalancing employers' bargaining power in establishing working conditions⁴⁸. However, this legislation had another *raison d'être*, namely as a guarantee of stable conditions for the production of goods and services. Furthermore, the gradual improvement of working conditions enhanced mass consumption, which permitted the development of mass production.

It appears that these traditional *raisons d'être* of labour law are not taken into account either by the F.T.A. or by N.A.F.T.A. This is even more obvious when one considers the side Accord to N.A.F.T.A. dealing with labour standards. This omission could very possibly alter the future development of labour law.

In the context of the F.T.A. and N.A.F.T.A., labour seems to be a commodity. Labour law is perceived as an obstacle to free trade among the participating countries. In the debate on

⁴⁷ See generally, J. M. WEILER, "The Role of Law in Labour Relations," a text prepared for the Research Advisory Group in Law, Society and the Economy, Royal Commission on the Economic Union and Development Prospects for Canada.

⁴⁸ This is true at an individual and collective level since labour law has challenged the presumption of equality of the contracting parties stated by private law.

North American free trade, national labour laws have been reduced to one of the elements of commercial competition among the producers of the participating countries. The social legislation of a country, depending on its content, may be seen either as a cost of production that unduly affects the competitiveness of an enterprise with regard to its foreign counterparts or, on the contrary, as a state subsidy that amounts to an unfair commercial practice⁴⁹.

This reduction of national labour legislation to its commercial dimension could first be seen in the F.T.A. This Agreement was completely silent on social matters. However, it provided for a resolution mechanism for disputes concerning antidumping and countervailing duties that could take social matters into account. For example, would it not be possible to challenge the right-to-work laws in force in some American states through this mechanism, arguing that they amount to an unfair state subsidy?⁵⁰ And the same applies to N.A.F.T.A. For the reasons stated below, it is our view that the side Accord on labour standards contains major flaws that will prevent it from changing this trend significantly.

The emphasis that the free trade agreements place on the commercial dimension of integration will certainly affect the future development of labour law. Rather than being on the protective aspect of a given labour standard, the focus will be on its possible effects on the competitiveness of enterprises. In the context of divergent national labour laws, it seems

⁴⁹ On the concept of state subsidies, see J. STANFORD, Going South, Cheap Labour as an Unfair Subsidy in North American Free Trade, The Canadian Centre for Policy Alternatives, December 1991, on pp. 12 et seq.

⁵⁰ This hypothesis is presented in Stanford, op. cit., note 49, on p. 28.

obvious that this consideration will not lead to a general improvement in national labour standards⁵¹.

2. Potential Effects on the Content of National Labour Law

If free trade does not produce a general improvement in national labour legislation, could it bring about a "race to the bottom" in social standards among the three countries? This question has been examined by several authors and was at the centre of the debate on the F.T.A. and N.A.F.T.A., at least in Canada⁵². No definite answer has been proposed so far, given the complexity of the question. However, the inclusion of Mexico, and eventually of other Central or South American countries, in the free trade zone has enlivened the debate. While there is less fear of a decline in national labour standards when labour conditions are equivalent in the countries involved⁵³, the threat is amplified when labour conditions and legislation differ sharply from one state to another in the new integrated market.

⁵¹ For example, in Quebec, the government announced an economic action plan. According to the Minister of Industry and Trade, this plan is centred on a deregulation of the labour market mainly by giving up some vested rights in collective agreements, collective agreements extended by government decrees and in the Labour Code («La relance économique passe par l'abolition de certains acquis», *Le Devoir*, 30 août 1993, p. 2.)

⁵² For a detailed account of this debate, see LANGILLE, *loc. cit.*, note 30.

⁵³ In Canada, where the provinces have the most jurisdiction over labour law, it does not seem that a "race to the bottom" has occurred between the provinces, even though they are already largely integrated. See LANGILLE, *loc. cit.*, note 30.

A "race to the bottom" would result from the mobility of capital. In selecting a location, a multinational firm can take advantage of differences in the costs of production that would result from establishing a plant in one country rather than another. This possibility adds a new source of pressure both on the negotiation of working conditions and on national legislation.

The formalization of economic integration brought about by the F.T.A. and eventually N.A.F.T.A. gives new credibility to the argument. Even though it does not create the mobility of capital⁵⁴, it facilitates and fosters plant relocation. This argument has already been widely used in Canada, mainly in collective bargaining and the first effects of a "race to the bottom" may well be seen in collective agreements. This threat will also be used to prevent the state from enacting any new social legislation, or to convince the government to downgrade existing legislation⁵⁵.

⁵⁴ For instance, the phenomenon of *maquiladoras* in Mexico, which can be seen as both a manifestation of the mobility of international (mostly American) capital and of economic integration with the U.S.A., appeared even though no treaties between Mexico and the U.S.A. have formalized it. On *maquiladoras*, see S. PETERS, "Labor Law for the Maquiladora: Choosing Between Workers' Rights and Foreign Investment," (1990) II Comparative Labor Law Journal, 226.

⁵⁵ This argument is more likely to be considered in the context of the changing role of the state in Canada. Some studies, even though not in labour law, have shown that North American economic integration accompanies a fundamental transformation of the role of the state in Canada. Since the end of the 30's and until recently, the role of the state in Canada was based on Keynesianism. In the last decade, an evolution toward a neo-liberal conception of the role of the state has been noted. According to this new conception, the market plays a larger role both in economic and social regulation. The idea of a free trade agreement with the U.S.A. gained momentum at the same time mainly through the recommendations of the Macdonald Commission. Moreover, it is to be noted that, in the same decade, the Canadian Charter of Rights was entrenched in the Constitution, guaranteeing thereby the supremacy of neo-liberal individualist values. See D. BRUNELLE, "Le rapport des «sages» et la Loi constitutionnelle de 1982: une analyse régressive," in Le droit dans tous ses états, edited by R. D. BUREAU

Moreover, the mechanism provided by the side Accord to N.A.F.T.A. on social legislation will not decrease the risk of weakened social policy in Canada. Aside from the fact that the side Accord imposes no uniform and centralized labour standards, it contains major flaws that defeat the purpose for which it was negotiated. First, the enforceable provisions of the Accord deal only with health and safety, child labour and minimum wages. It leaves aside important parts of Canadian social legislation such as those dealing with freedom of association, the right to organize, the right to bargain collectively and the right to strike, and minimum labour standards on such issues as unjust dismissal, pregnancy leave, hours of work, job security and so on. It is worth stressing the fact that, just like the first labour laws adopted more than a century ago, the side Accord addresses only matters related to basic human dignity in the work place.

Secondly, and perhaps most importantly, the side Accord contains no provision preventing any of the three countries from deregulating its labour market. No enforcement mechanism that would ensure any upgrading and harmonization of social legislation is included. On the contrary, N.A.F.T.A. promotes competition among states on the basis of labour costs and nothing in the side Accord prevents this competition from leading to deregulation in areas of social policy. Even under the F.T.A., N.A.F.T.A. and the side Accord, it is the logic of the market that will prevail in shaping the social dimensions of North American economic integration.

and P. MACKAY, 1987, Wilson et Lafleur, on pp. 35 to 53. This evolution in the role of the state undermines our earlier assertion that there exists a fundamental difference between the role of the state in Canada and the U.S.A.