

Must Canada Change Its Labour and Employment Laws to Compete with the United States?

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Globalization has created new and increasingly complex market pressures that governments must cope with. In the United States, there is evidence that states compete with each other in a “race to the bottom”, weakening labour and employment regulation in order to attract industrial development. Given that Canada is more exposed to US competition than ever, the author considers whether such pressures will require Canadian jurisdictions to do the same in order to remain competitive. The theory underpinning the race to the bottom suggests that only in select circumstances is it advantageous to pursue regulatory convergence, since countries with strong labour and employment protections tend to have other national advantages that offset the higher costs associated with those protections.

A series of studies have examined the relationship between protections offered by labour and employment laws with trade and investment success, but the results have not been uniform. Building on those studies, the author develops a theory of that relationship which he assess against econometric analyses that try to measure the effects of those relationships globally. Analyzing Canada-US competitive dynamics through this theoretical framework, he concludes that Canada’s stronger labour and employment law protections are not likely to diminish its economic success. Deepening economic integration between Canada and the US drives regulatory competition in labour and employment law only if they are a predominant factor in competition between the two jurisdictions. Where that is not the case, competition in labour and employment laws is more likely to be the product of anxious political discourse.

The author considers the total proportion of the cost of Canadian goods and services exports that can be attributed to labour and employment laws and the extent to which Canadian producers can exploit competitive advantages not available in the US. He argues that Canadian workplace laws are not likely to affect competitiveness with the US because the direct cost implications of those laws are small both in relation to total production costs in traded industries and to other competitive advantages. Nor is there evidence that labour and employment laws are holding back Canadian productivity growth. He concludes that Canada need not adjust its workplace laws to compete with the US and that Canadian policy makers have room to establish laws that meet workers’ needs without downgrading its labour and employment law protections.

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Introduction

Hard times in Canada's manufacturing heartland have prompted some to argue that Canadian jurisdictions must "update" their labour laws or lose investment and market share to American "right-to-work" states like Indiana.¹ While such arguments generally come from the political right, they mirror longstanding concerns of the left. Critics of economic integration with the United States have long feared that it will inevitably lead to a "race to the bottom" in working conditions—one that would

1. See e.g. Kevin Werner, "Hudak's labour ideas would 'decimate' unions", *Hamilton Community News* (19 July 2012) online: Hamilton Community News <<http://www.hamiltonnews.com>> (Ontario Progressive Conservative Leader Tim Hudak's proposals to eliminate mandatory union dues checkoff).

eventually put significant economic pressure on labour and employment legislation in Canada.²

Yet, for many years following the Canada-US Free Trade Agreement, the labour policies of governments across Canada appeared to be driven by their political preferences rather than by international competitive pressures.³ Under the shelter of a relatively low Canadian dollar,⁴ Canada's exports to the US surged. Now that the dollar is near par, and is likely to remain so for the foreseeable future, it is once again pertinent to ask whether decisions like that of the American company Caterpillar to move its Ontario production facilities to Indiana⁵ are bellwethers of economic forces that will reshape Canadian labour and employment law.

In this paper I argue that they are probably not—that pursuing competitiveness with the US does not require a systematic weakening of Canadian labour and employment laws and that there is probably even room to strengthen the protection these laws offer to workers. It is not economic integration itself which poses a risk to Canadian labour and employment laws, but the misguided and at times opportunistic politics that it has generated.

Previous studies of the effects of Canada-US integration on Canadian social policy have theorized the economic and political factors likely to favour convergence or divergence, and have described trends across a range of policy fields.⁶ In the most recent and comprehensive of these

2. For a review of debates in the lead-up to the Canada-United States Free Trade Agreement, see Brian A Langille, "Canadian Labour Law Reform and Free Trade" (1991) 23:3 *Ottawa L Rev* 581.

3. See Michel Gauvin & Charles-Philippe Rochon, "Labour Legislation in Canada: Major Developments and Trends 1989–2003" (3 October 2003) online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

4. See Stuart Duncan, "Ten Years After: Cross-Border Export/Import Trends Since the Canada-United States Free Trade Agreement" (June 1999) online: Canada West Foundation <<http://www.cwf.ca>>.

5. See James S Hagerty, "Caterpillar closes plant in Canada after lockout" *Wall Street Journal* (4 February 2012) online: The Wall Street Journal <<http://online.wsj.com>>.

6. See Keith Banting, George Hoberg & Richard Simeon, eds, *Degrees of Freedom: Canada and the United States in a Changing World* (Montreal: McGill-Queen's University Press, 1997); Gerard W Boychuk & Keith G Banting, "The Paradox of Convergence: National Versus Subnational Patterns of Convergence in Canadian and U.S. Income Maintenance Policy" in Richard G Harris, ed, *North American Linkages: Opportunities and Challenges for Canada* (Calgary: University of Calgary Press, 2003); David Cameron & Janice Gross Stein

studies, published in 2005, Gomez and Gunderson concluded that forces of integration are tending to lead Canadian social policies to converge with American norms, and that Canadian legislators would find it hard to sustain purely equity-oriented labour policies which diverged from those norms.⁷ Yet none of the existing studies focus in a fine-grained way on the relationship between labour laws and Canada-US economic integration. This is problematic because the literature on the effects of integration suggests that globalization often leaves policy makers with significant degrees of freedom, and that factors specific to each policy field may determine the extent of that freedom.⁸ Existing studies also do not separate necessary effects of economic forces from those contingent on political forces or examine the specific economic and political forces operating on labour and employment laws distinctly from the forces operating on labour relations or labour and social policy more generally. As a result, while the existing literature offers sound theoretical starting points and describes a suggestive set of policy convergences, we are left without a clear picture of whether economic integration with the US will require changes to our labour and employment laws.

This paper builds on earlier studies to develop a theory of the relationships between economic integration and labour and employment laws, and then reviews a recent set of econometric analyses that try to measure the effects of those relationships globally. From that review,

“Globalization, Culture and Society: The State as Place Amidst Shifting Spaces” (2000) 26:Supp 2 Can Pub Pol’y S15; Rafael Gomez & Morley Gunderson “The Integration of Labour Markets in North America” in George Hoberg, ed, *Capacity for Choice: Canada in a New North America* (Toronto: University of Toronto Press, 2002) 104 [Gomez & Gunderson, “Labour Markets”]; Rafael Gomez & Morley Gunderson “Does Economic Integration Lead to Social Policy Convergence? An Analysis of North American Linkages and Social Policy” in Richard G Harris & Thomas Lemieux, eds, *Social and Labour Market Aspects of North American Linkages* (Calgary: University of Calgary Press, 2005) 309 [Gomez & Gunderson, “Economic Integration”]; Morley Gunderson “Harmonization of Labour Policies Under Trade Liberalization” (1998) 53:1 RI 24.

7. “Economic Integration”, *supra* note 6 at 347.

8. See Richard Simeon, George Hoberg & Keith Banting, “Globalization, Fragmentation, and the Social Contract” in Banting, Hoberg & Simeon, *supra* note 6 at 389; Cameron & Stein, *supra* note 6 (arguing that even if globalization is triumphant states may adopt different strategies in response); Gomez & Gunderson, “Labour Markets”, *supra* note 6 at 116–20 (discussing the conditions needed for globalization to impact on labour and employment legislation, as well as a number of scenarios where they may not be met).

I extract insights relevant to the Canadian context, and develop a theoretical framework for examining Canada-US competitive dynamics. I then analyze the factors likely to contribute to competitiveness in the Canada-US context. This makes it possible to draw inferences about the likely relationship between those laws and economic integration. Finally, I review changes in Canadian labour and employment laws over the last decade to test those inferences. My conclusion is different from that of Gomez and Gunderson, likely because it is based on an analysis that seeks to separate the effects of globalized economics from the politics of globalization, and focuses specifically on factors that affect the economic viability of Canadian employment and labour laws themselves.

Part I provides necessary background, showing how the Canadian-US trade relationship has evolved in recent years in a way that leaves Canada more exposed to US competition. Part II sets out a theory of the relationship between international economic integration and the labour and employment laws of industrialized countries like Canada, and considers the recent empirical literature in the light of that theory. Part III reviews the characteristics of competition between Canada and the US and its likely consequences for Canadian workplace law. The Conclusion briefly draws out policy implications.

It is important to note at the outset the modest scope of my argument. This paper addresses the capacity of governments to pass, maintain and enforce labour and employment laws protective of workers. It does not address the effects of economic integration on privately negotiated working conditions or on labour relations which may often be directly impacted for worse or for better by globalization, but in ways that lie beyond the scope of this paper.

I. Canada's Increased Exposure to Competition from the United States

Trade and investment relationships with the United States matter a lot to Canada. The US remains by far Canada's most important trading partner. In 2011 it accounted for just under 74% of all of Canada's goods

and services exports and just under 50% of its imports.⁹ These figures are down from 87% and 67%, respectively, in 2002,¹⁰ due not to a decline in Canada's exports to or imports from the US, but to the expansion of its trade with other countries. International competitiveness for Canada remains mainly competitiveness in and with the US.

The composition of Canada-US trade has changed quite dramatically since 2002, reflecting steady or increased US demand for Canadian commodities and a related rise in the value of the Canadian dollar. Canadian exports to the US grew rapidly in the 1990s following the implementation of free trade agreements between the two countries and the almost simultaneous and rapid decline in the relative value of the Canadian dollar. Goods exports expanded from about \$100 billion per year in 1991 to just under \$260 billion per year in 1998, while the Canadian dollar fell from just under 0.88 USD to less than 0.68 USD.¹¹ Vehicle and vehicle parts exports had by far the largest growth of any sector from 1988 to 1998—about \$37.7 billion.¹²

Around 2002, things began to change in important ways. The Canadian dollar began a gradual and steady appreciation, reaching parity in 2008, a point around which it has fluctuated for most of the time since.¹³ Whereas in 2001 the Canadian dollar was undervalued by 25% in purchasing power parity terms relative to the US dollar,¹⁴ by 2010 it was overvalued by about 22%.¹⁵ This removed an important competitive advantage enjoyed by Canadian export producers, and coincided with a profound shift in the

9. Industry Canada, "International Trade, Canadian Economy (NAICS 11-91)", online: Industry Canada <<http://www.ic.gc.ca>> .

10. *Ibid.* Most of the decline in the United States' share of imports to Canada is due to increased imports from China, Mexico and Germany.

11. These figures rely on Stuart Duncan's calculations of goods trade data which he derived from Statistics Canada's reports of international trade merchandise goods (customs basis) and the Bank of Canada Annual Review exchange rate data. Duncan, *supra* note 4 at 3-5.

12. *Ibid.*

13. See Bank of Canada, "Canadian dollar vis-a-vis selected currencies", online: Bank of Canada <<http://www.bankofcanada.ca>> .

14. See Werner Antweiler, "The Canadian Dollar Slump—Cause for Concern?: Questions and Non-Technical Answers for Public Discussion" (27 November 2001) online: UBC <<http://strategy.sauder.ubc.ca>> .

15. See Werner Antweiler, "Purchasing Power Parity", University of British Columbia Sauder School of Business Pacific Exchange Rate Service (2012) online: UBC <<http://www.fx.sauder.ubc.ca>> .

composition of Canadian exports to the US. Since 2002, automobile and light vehicle manufacturing exports to the US have declined by about a third, while oil and gas extraction exports doubled; this is now by far the single most important sector in Canada-US trade.¹⁶

The factors behind the rise of the Canadian dollar appear to be durable. One of these factors is the rise in real energy prices. Since 2002, the value of the Canadian dollar has closely tracked those prices.¹⁷ The real price of oil in international markets is likely to increase in coming years, and growing demand for more expensive Canadian energy products would be expected to increase demand for the Canadian dollar. Global oil production capacity appears to have hit a ceiling, so increases in demand that accompany economic growth produce sharp peaks in price because supply cannot expand in response to increased demand.¹⁸

Another factor is the state of American public finances.¹⁹ The US current account deficit expanded more than sixfold between 1996 and 2006.²⁰ US government debt has increased steadily since 2000, and has reached levels not seen since the aftermath of the Second World War.²¹ This increases demand for foreign currencies with which to pay for imports and to purchase US debt, putting downward pressure on the US currency. American legislators appear to be far from agreeing on how to reduce the federal debt. The US current account deficit is likely related in large part to structural features of the Chinese economy that promote very high rates of corporate and individual savings, holding down the

16. The figures are based on calculations using data generated using Industry Canada's Trade Data Online report generator. Industry Canada "Trade Data Online (TDO)", online: Industry Canada <<http://www.ic.gc.ca>>.

17. See Michael Holden, "Is Canada Suffering From Dutch Disease?" (4 June 2012) online: Canada West Foundation <<http://blog.cwf.ca>>. See also Michael Holden, "Explaining the Rise of the Canadian Dollar" (Ottawa: Economics Division, Research Service of Parliament of Canada, 22 November 2007) online: Parliament of Canada <<http://www.parl.gc.ca>> [Holden, "Canadian Dollar"].

18. See James Murray & David King, "Oil's Tipping Point Has Passed" (2012) 481 *Nature* 433.

19. See Holden, "Canadian Dollar", *supra* note 17.

20. See Jian Wang, "With Reforms in China, Time May Correct the U.S. Current Account Imbalance" (2011) 6:1 *Economic Letters* 1 at 2.

21. See Supporting Evidence, "U.S. Federal Government Debt as a Percent of GDP Over Time" (2010) online: Supporting Evidence <<http://www.supportingevidence.com>>.

value of the Chinese yuan and leading to very high US trade deficits with China.²²

In sum, dollar parity is quite likely the new normal, with persistent negative effects on the competitive position of Canadian exporters. Any shelter from regulatory competition offered by an undervalued Canadian dollar is likely gone for the foreseeable future. Ontario's manufacturing sector, for example, has been in trouble since 2007. It is not surprising to hear calls to loosen labour and employment laws in the interests of competitiveness, and it is incumbent upon us to consider whether those calls are well-founded.

II. Impacts of Economic Integration on Labour and Employment Laws in Industrialized Countries: Theory and Evidence

The basic argument for reforming workplace laws is that they inevitably affect the ability of Canadian producers to win market share internationally, and the attractiveness of Canadian jurisdictions to foreign investment. If this argument holds, jurisdictions with higher labour standards should perform poorly in international trade and investment markets, and over time their legislators are likely to respond by dismantling those standards. In this part of the paper, I will critically examine the theoretical basis for such arguments, and then review the empirical literature.

A. Theory of the Impacts

(i) The Race to the Bottom Thesis

The idea that international economic integration will put downward pressure on national labour and employment laws is grounded in the longstanding race to the bottom thesis.

22. See Wang, *supra* note 20 at 3.

That thesis essentially consists of four propositions.²³ The first is that unit labour cost differences matter in international competition between enterprises for market share and between jurisdictions for investment. The second is that because goods, services and capital are much more internationally mobile than labour, production and jobs will move toward jurisdictions with labour market conditions and policy environments that favour low unit labour costs. Producers in such jurisdictions will gain international market share within supply chains or final goods and services markets. This will attract foreign direct investment. The third proposition is that labour and employment laws increase unit labour costs enough to matter in this competition. As a result—and this is the fourth proposition—trade and investment integration will drive a global market in labour regulation. Internationally mobile producers and domestic industries faced with international competition will respond to unit labour cost pressures by putting political pressure on national governments. Over time, governments will respond to this pressure, opting for low-cost regulatory environments in order to attract and retain production facilities and to ensure the future viability of enterprises within their borders. Such regulatory competition would be expected to affect Canada more than the US, because Canada’s trade and investment relationship with the US accounts for such a large share of the Canadian gross domestic product,²⁴ and because American labour and employment laws are generally considered to be less protective.²⁵

23. The various forms of this argument are discussed in Kevin Banks, “The Impact of Globalization on Labour Standards: A Second Look at the Evidence”, in John Craig & Michael Lynk, eds, *Globalization and the Future of Labour Law* (Cambridge, UK: Cambridge University Press, 2006) 77.

24. See OECD, *OECD Factbook 2010: Economic, Environmental and Social Statistics* (OECD Publishing, 2010) 30 at 33.

25. See Richard N Block & Karen Roberts, “A Comparison of Labour Standards in the United States and Canada” (2000) 55:2 RI 273 at 292–93; Richard N Block, “Labour Standards In The Canadian Federal Jurisdiction” (4 November 2005) online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

(ii) Why the Race to the Bottom Thesis Might Have Some Merit

There are good reasons to think that labour and employment laws can matter in unit labour cost competition. Some labour and employment laws directly raise unit labour costs or enable workers to take action to raise them.²⁶ For example, studies in many jurisdictions show that the direct cost increases imposed by minimum wage laws lead to lower profits or lower employment rates, which implies that increased wage costs are not offset by increased productivity.²⁷ Similarly, studies of collective bargaining outcomes enabled by collective bargaining laws show that high wages for union members are not fully offset by productivity gains, so profits tend to be lower.²⁸ The duty to accommodate persons with disabilities can sometimes entail significant costs for employers—costs which, to the extent that the law is effective, employers cannot charge back to employees in the form of lower wages.²⁹

There are also good reasons to think that unit labour costs often matter a great deal in international competition. By definition, they must matter

26. See Dani Rodrik, “Are Labour Standards in the South a Matter of Concern for Trade Policy in the North?” in Robert Z Lawrence, Dani Rodrik & John Whalley, eds, *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (Washington, DC: Overseas Development Council, 1996) [Rodrik, “Labour Standards”].

27. For a literature review focused on industrialized countries, see Morley Gunderson, “Minimum Wages in Canada: Theory, Evidence and Policy” (December 2005) online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>. For a summary of research on minimum wages in developing countries, see Richard Freeman, “Labor Regulations, Unions and Social Protection in Developing Countries: Market Distortions or Efficient Institutions?” Working Paper 14789” *National Bureau of Economic Research Working Papers* (March 2009) at 13–15, online: The National Bureau of Economic Research <<http://www.nber.org>> [Freeman, “Labor Regulations”].

28. See Peter Kuhn, “Unions and the Economy—What We Know and What We Should Know” (1998) 31:5 *Can J Econ* 1033.

29. See Kevin Banks, Richard Chaykowski & George Slotsve, “Employment Accommodation: How Does an Aging Population Matter and What Might It Mean for Law and Policy?” [forthcoming 2013]; Morley Gunderson & Douglas Hyatt, “Do Injured Workers Pay for Reasonable Accommodation?” (1996) 50:1 *ILRR* 92 (finding that accommodation costs are shifted back to employees in the form of lower wages if they return to an employer other than the accident employer, but not if they remain with their current employer, suggesting that workers compensation and other laws may be effective in the latter case).

at the margin for any profit-maximizing enterprise, and must constitute a major aspect of the cost structure of enterprises that produce labour-intensive goods and services. The collapse of the Soviet Bloc and the entry of China and India into the world trading system increased the supply of labour much more than the supply of capital. The dramatic drop in the capital-to-labour ratio could be expected to intensify unit labour cost pressures in the international economy,³⁰ driving down the price of labour relative to capital. This leads to more use of labour-intensive methods of production in the international economy, and to new opportunities to achieve low unit labour cost structures by locating advanced production technology where labour supply is high and wages are low. This is attested to by the dramatic success of China in the many areas of production where it has used sophisticated and modern production technology to become a low unit labour cost producer.³¹ Not surprisingly, in some trading relationships, high unit labour costs appear to be associated with lower rates of foreign direct investment (FDI) and capital formation, and low unit labour costs appear to be associated with higher rates of both.³²

(iii) Why Economic Integration is Less Likely to Undermine Labour Standards than the Race to the Bottom Thesis Would Suggest

Yet the global race to the bottom hypothesis fails to find much support in empirical research. As Gunderson points out, in order for economic integration to lead to reductions in the level of protection

30. Freeman has referred to this as the “Great Doubling” in the global labour supply, which he estimated as having reduced global capital-to-labour ratios by sixty-one per cent. See Richard Freeman, “The Great Doubling: The Challenge of the New Global Labor Market” in John Edwards, Marion Crain & Arne L Kalleberg, eds, *Ending Poverty in America: How to Restore the American Dream* (New York: New Press, 2007) 55.

31. See Gordon Betcherman, “Globalization and Employment—The New Players and What They Mean to Labour Markets Everywhere” (Presentation to Human Resources and Skills Development Canada Department of the Government of Canada, 24 March 2006) [unpublished].

32. See e.g. J Hatzius, “Foreign Direct Investment, Capital Formation and Labour Costs: Evidence from Britain and Germany” Centre for Economic Performance: Discussion Paper No 336 (March 1997) online: LSE Research Online <http://eprints.lse.ac.uk/20351/1/Foreign_Direct_Investment.pdf>.

offered by labour and employment laws, four conditions must hold. First, those laws must be implemented and enforced in a way that would raise costs and deter competitiveness. Second, the costs must not be offset by benefits emanating from the laws in question, or by shifting those costs back to workers. Third, decisions on investment and plant location must be influenced by the regulatory component of labour costs. Fourth, governments must respond to such pressures by downgrading their labour regulations.³³

There are several reasons why these conditions may not be met. First, many legislated labour standards may not raise unit labour costs much or at all, because their cost will be charged back to workers in the form of lower wages. For example, if laws mandate paid vacation periods without mandating other aspects of compensation, in competitive markets the cost of such mandates will fall upon employees, since both employers and employees are price takers.³⁴ All that happens in such instances is that the composition of total compensation is changed for some employees. Even in the absence of fully competitive markets, laws need not raise unit labour costs if they raise productivity enough to offset additional costs falling on employers. There are numerous examples of this, which I will discuss below.

Second, countries with protective labour and employment laws commonly have other competitive advantages which prove to be more important than any increases in unit labour cost attributable to those laws. Most international trade and investment continues to flow between wealthy industrialized countries. FDI flows into those countries to gain access to large markets, resource and technological endowments, good infrastructure, a skilled workforce, political stability and the rule of law.³⁵ In comparison to these advantages, the unit labour cost impacts of most labour and employment laws are modest. Similar advantages probably

33. See Gomez & Gunderson, "Labour Markets", *supra* note 6 at 119–20.

34. A price taker is a seller or purchaser of a good or service who does not have sufficient market power to influence the price at which he can sell or purchase that good or service in a competitive market. In other words, he must pay the market price set by forces of supply and demand. See Morley Gunderson, "Social and Economic Impact of Labour Standards" (December 2005) at 9–10, online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

35. See Bruce A Blonigen, "A Review of the Empirical Literature on FDI Determinants" (2005) 33:4 *Atlantic Economic J* 383 at 393.

account for the continued competitiveness of industrialized countries in international trade.³⁶ Of course, all other things being equal, one might still expect that trade and investment flows will be driven by unit labour cost differences. There is some evidence that certain labour standards adversely affect competitiveness in supply chain contracting for labour-intensive goods production.³⁷ But the point is that all other things are very often not equal, particularly in attracting foreign direct investment.

Third, in the developing world at least, economic growth often brings with it both greater economic integration (trade and FDI) and higher labour standards. In economic terms, the protections offered by labour and employment laws can be thought of as normal goods—that is, goods for which the demand will increase with national income.³⁸ Intuitively, the basis for this conjecture is that once peoples' basic needs are met, and once they begin to participate in the industrial economy, they are more likely to demand the protections afforded by labour and employment laws³⁹—and employers are more likely to be in a position to afford such protections. There is good evidence that increases in national income have brought improvements in working conditions around the world.⁴⁰ At the same time, increased national income tends to bring with it increased integration into the global economy, including more trade and FDI.⁴¹ Economic growth thus can bring simultaneous trends in integration and labour standards that run counter to the race to the bottom thesis. This does not imply that there will be no competitive pressures on labour and employment laws but it may dampen the effect of those pressures. In

36. See Banks, *supra* note 23 at 86.

37. See *ibid* at 92.

38. See Eric Neumayer & Indra de Soysa, "Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis" (2005) 34:1 World Development 31 at 36.

39. This theory would also suggest that once the gross domestic product (GDP) reaches a certain level it will cease to have a strong effect on labour and employment laws. Häberli, Jansen and Monteiro observe that this is the case. Christian Häberli, Marion Jansen & José-Antonio Monteiro, "Regional Trade Agreements and Domestic Labour Market Regulation" in Douglas Lippoldt, ed, *Policy Priorities for International Trade and Jobs*, (OECD, 2012) 287 at 312, online: OECD <<http://www.oecd.org>>.

40. See Robert Flanagan, *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (New York: Oxford University Press, 2006) at 174–79.

41. See Kimberly Ann Elliot & Richard B Freeman, *Can Labor Standards Improve Under Globalization?* (Washington, DC: Institute for International Economics, 2003) at 14–22.

the result, where economic development is rapid, competitive pressures might have a chilling effect on reform, discouraging improvements in labour standards rather than bringing about their decline.

Fourth, while there is little evidence that trade integration causes economic growth,⁴² some kinds of economic integration may bring improvements in labour standards. Export industries in the developing world often pay higher wages and provide better working conditions than enterprises producing only for domestic consumption.⁴³ This is in part because they employ more advanced production methods, and as a result can afford to pay more to secure the best talent and gain worker loyalty and commitment. In addition, one study has shown that regional trade agreements between industrialized and developing countries can lead to state-to-state and market pressures for better worker protections in developing countries, with some modest beneficial effects on labour and employment laws on the books and in practice.⁴⁴

Finally, there is some evidence that in the medium to long term, some labour and employment laws can help to create sustainable social and economic development, which in turn attracts FDI and improves trade competitiveness by bringing more social stability and more productive workplace relations. These possibilities are canvassed below.

For all these reasons, unit labour cost competition is only likely to undermine the willingness of policy makers to improve or maintain labour and employment laws where three conditions are met: (1) the particular laws in question actually do raise unit labour costs; (2) the unit labour cost differences between countries attributable to those laws are large in relation to other factors that affect national competitiveness; and (3) in the case of developing countries, industrial change accompanying economic growth does not bring improvements in worker protections equivalent to those that policy makers would be prepared to enact in the absence of regulatory competition. In sum, we can expect that strong labour and employment laws will often pose no international competitive disadvantage, especially to states that enjoy competitive advantages such

42. See *ibid*; Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton: Princeton University Press, 2007) at 29–30 [Rodrik, *Economics*].

43. See Neumayer & de Soysa, *supra* note 38 at 35 (reviewing research).

44. See Brian Greenhill, Layna Mosley & Aseem Prakash, “Trade-Based Diffusion of Labor Rights: A Panel Study, 1986–2002” (2009) 103:4 *Am Pol Sci Rev* 669.

as good infrastructure, political stability, well-functioning legal institutions and access to wealthy markets. Canada is such a state.

(iv) Circumstances in which the Race to the Bottom Thesis Might Nonetheless Hold Water: The Difference Between Developing and Industrial Countries

Nonetheless, we can also expect that under certain conditions labour and employment laws might affect competitiveness, and that international economic integration might therefore affect those laws. All three conditions identified immediately above are likely to be met in some regions, some industrial sectors and some trade relationships. In those cases, international trade relationships can be expected to generate pressures on those laws enacting high standards in pressures to keep standards low.

Developing countries lacking many of the competitive advantages that often overshadow unit labour costs can be expected to compete hard with each other on the basis of labour costs.⁴⁵ In many of those countries, important industries may be organized around business strategies that see the productivity gains from high labour standards as not being enough to offset the increased costs. In some industries, such as apparel and footwear, it is often most profitable to recruit a relatively docile workforce, pay a reservation wage just sufficient to maintain a full complement of workers under high turnover conditions, require employees to work unpaid overtime, and extract effort through fear of dismissal, intimidation and harassment.⁴⁶ The empowerment of workers through legal protections threatens the profitability of such business models. While these industries may offer improvements over working conditions in traditional sectors, they are likely to resist even those legislated protections that are considered basic by international standards. If it is mainly these industries

45. See Banks, *supra* note 23 at 87–91.

46. See Drusilla K Brown, Alan V Deardorff & Robert M Stern, “Labor Standards and Human Rights: Implications for International Trade and Investment”, IPC Working Paper Series No 119 (19 August 2011) at 10–18, online: International Policy Center, Gerald R Ford School of Public Policy, University of Michigan <<http://ipc.umich.edu>>.

that expand with economic integration and development, we can expect little improvement in labour standards.⁴⁷

In the case of industrialized countries, unit labour cost advantages may matter at the margin in competition between such jurisdictions if they have very similar endowments in other respects. Legislated worker protections are likely to be high enough, and production methods advanced enough, that economic growth will not necessarily generate further improvements in working conditions or a demand for even better legal protection.

Note that these channels of influence can be expected to run largely within, but not between, the developing and industrialized worlds. In industries where developing countries have a substantial unit labour cost advantage over industrialized countries, even the wholesale downgrading of an industrial country's labour law regimes would do little to offset that advantage. Labour cost differences between industrialized and developing countries are due much more to differences in the relative scarcity of labour and capital than to differences in the legal environment.⁴⁸ Producers in the industrialized world who are sensitive to labour cost competition will either have to shut down or switch to more capital-intensive methods of production. Industrialized countries will likely gain nothing by weakening their labour and employment laws in an effort to compete with the developing world.

In short, instead of leading to a global race to the bottom, global economic integration can be expected to bring pressures only on particular types of legislated worker protection—those raising unit labour costs—and only within particular trade relationships. In the developing world there is more potential for economically-driven regulatory competition, given the pervasiveness of labour intensive export production. Since legislation (and its enforcement) tends to be weaker in developing countries, regulatory competition is more likely to produce a chilling effect on the development of workplace laws (and their enforcement) than reduced worker protection levels. This has no necessary implications for labour and employment legislation in industrialized countries, since they

47. See Amy Luintsa, "Labor Standards and Trade" (2004) online: The World Bank <<http://www.worldbank.org>>.

48. See Christian Barry & Sanjay G Reddy, *International Trade and Labor Standards: A Proposal for Linkage* (New York: Columbia University Press, 2008) at 36–42.

compete mainly on other bases and cannot win in markets where low labour costs are the prime determinant of competitiveness, responding to developing world competition with deregulation is likely to be futile, at best. Rather, the main source of deregulatory pressures to which rational policy makers would respond, if any, would lie in similarly-situated industrialized states.

(v) The Role of Politics

The influence of economic forces on labour and employment laws is, of course, mediated by politics. In industrialized countries, especially those that are democratic, economic pressures to downgrade legislated standards may well face strong political resistance.⁴⁹ Labour and employment laws often reflect widely shared norms and provide widely shared benefits. Significantly weakening them may antagonize large segments of the electorate in industrial democracies.⁵⁰ Even in open economies like Canada, most jobs neither produce for export nor compete with imports and are not the result of foreign investment. Sweeping reforms to workplace law in the pursuit of international competitiveness are likely to be a blunt instrument, affecting many people in ways to which they are likely to object, and benefiting only a minority of workers and enterprises. Further, the increased volatility associated with international economic integration can produce greater electoral pressures for social

49. As I have argued elsewhere, these political counter-pressures are much less likely in the developing world, where legislated labour and employment protections benefit less of the population; where business elites are often more powerful; and where balance of payments issues may force policy-makers to generate hard currency earnings through exports. These political forces are likely to generate competitive pressures on labour and employment laws despite potential longer-term gains in sustainable economic and social development brought by implementing modern labour policies and regulations. See Kevin Banks, "Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law" (2011) 32:1 Berkeley J Emp & Lab L 44 at 70-72.

50. See Gomez & Gunderson, "Labour Markets", *supra* note 6 (noting that governments may avoid changes to labour and employment laws because they do not wish to appear "mean-spirited" at 119).

policies buffering the working population against its effects,⁵¹ such as provisions requiring notice of dismissal or access to collective bargaining.

On the other hand, in politics, perceptions of competitive pressure may matter more than the reality. Politicians may actually believe that globalization requires the loosening of labour standards, or they may simply try to convince voters that such changes are necessary in order to further a broader deregulatory agenda. Legal norms and benefits that are not perceived to be widely shared within the working population may be more vulnerable to attack.⁵² *A priori*, there is no reason to expect that politics will operate in one particular direction or another in industrialized countries, or that its influence on labour and employment laws will not depend heavily upon the preferences of the government of the day.

B. Review of the Available Evidence

The available empirical studies fall into two categories. In the first are studies that carefully describe trends in labour and employment law and related fields in light of theoretical predictions of the effect of economic integration.⁵³ This approach has the virtue of presenting detailed developments in industrialized countries and grounding them in plausible theories. It cannot, however, shed much light on the relative importance of concurrent political and economic influences, because it does not systematically consider a sufficient number of points of comparison to permit that kind of inference. In the second category are studies that use econometrics to directly examine causal relationships between economic integration and labour and employment laws in a larger number of countries. While these studies lack some contextual detail, their virtue is in the strong causal inferences they provide.

51. See Geoffrey Garrett, *Partisan Politics in the Global Economy* (Cambridge, UK: Cambridge University Press, 1998) at 38–45.

52. This problem is acute in much of the developing world, where most of the workforce is in informal enterprises that lie beyond the effective reach of regulation.

53. See Banting, Hoberg & Simeon, *supra* note 6; Boychuk & Banting, *supra* note 6; Cameron & Gross Stein, *supra* note 6; Gomez & Gunderson, “Labour Markets”, *supra* note 6; Gomez & Gunderson “Economic Integration”, *supra* note 6; Gunderson, *supra* note 6.

The most relevant work in the first category is that of Gomez and Gunderson,⁵⁴ who looked at trends in the US and Canada on a wide range of matters: unionization rates, strikes, minimum wages, unemployment insurance benefit levels, workers compensation benefits, occupational safety and health laws, pay equity law, employment equity laws, age discrimination law, public pension systems, welfare and family benefits, overall public expenditures and employment standards legislation. Gomez and Gunderson found evidence of downward convergence in the level of strikes, minimum wages, unemployment insurance benefits, pay equity and employment equity. On the other variables they looked at, they observed a more mixed pattern or a pattern of sustained divergence. Overall, they concluded that in many areas there had been downward convergence towards the lowest common denominator,⁵⁵ and that some laws and workplace practices that imposed costs on employers were on the decline as economic integration between Canada and the US, and in the global economy, had increased. As indicated earlier in this paper, this conclusion should be treated with caution. The factors that reduce the incidence of strikes and inhibit unionization in a globalized environment are likely to be quite different from the factors influencing government decisions with respect to labour and employment laws. In addition, Gomez and Gunderson did not attempt to isolate the relevant variables to distinguish between the effects of economic globalization per se and the associated politics of globalization.

In the second category are three groups of studies which attempt to do this. One group examines the effects of labour standards on the key economic channels that can transmit regulatory competitive pressures: trade (which includes supply chain contracting) and FDI. Another is of a more recent line of work and it asks whether those pressures are in fact transmitted by trying to measure the effects of trade integration or FDI on labour standards. A third group examines the effects of changes in a trading nation's labour and employment laws on the likelihood of subsequent changes to the laws of its trading partners. I will briefly discuss each of the three groups of studies.

54. "Economic Integration", *supra* note 6.

55. *Ibid* at 345–46.

(i) Studies of the Impact of Labour Standards on Trade and Investment

Studies of the impact of labour standards on trade and investment have the virtue of relative simplicity. They search for a causal relationship that is necessary to deregulatory pressures running in the other direction: only if labour and employment laws produce disadvantage in competition for trade or investment could there be an economic justification for weakening them, or at least for not making them stronger. To specify a good model for that purpose, researchers simply need to identify laws that tend to raise unit labour costs, and to control for the effects of competitive advantages which may be more significant than unit labour costs.

Two important early studies by the Organization for Economic Cooperation and Development (OECD) show a positive association in aggregate global trade statistics between trade openness, FDI, and the implementation of the four core labour standards of the International Labour Organization (ILO).⁵⁶ However, neither of those studies controlled for other sources of competitive advantage, or separated trends in developing countries from trends in industrialized countries. Since trade and FDI flow mainly between wealthy industrialized states, the global aggregate figures analyzed by the OECD reflected mainly what was going on in those states. The correlations found in those studies may simply have reflected the tendency of OECD member states to have both highly legislated labour and employment standards and competitive advantages that allow them to attract the bulk of international trade and investment. They do not necessarily tell us anything about the independent effects, if any, of labour standards on trade or investment competitiveness.⁵⁷

A small body of contemporaneous and subsequent studies has avoided these difficulties. Some do so by isolating the effects of labour standards in industrial sectors and countries where differences in other competitive advantages will not overwhelm unit labour cost differences—for example, labour-intensive industries in developing countries. Some also control

56. The ILO's four core labour standards are freedom of association and the right to bargain collectively, freedom from forced or compulsory labour, the elimination of child labour, and the elimination of discrimination. See OECD, *Trade Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996); OECD, *International Trade and Core Labour Standards*, Policy Brief (2000).

57. These critiques are developed more fully in Banks, *supra* note 23 at 87–94.

directly for other advantages.⁵⁸ Most use sophisticated indices measuring the extent of legal violations, and not simply the state of the law on the books.⁵⁹ The pertinent findings of this literature are briefly summarized below.

As the OECD found, the core labour standards of the ILO are positively associated with overall export performance. This holds true even for particular standards, such as freedom of association and collective bargaining (FACB) rights, which tend to raise labour costs even after productivity is controlled for.⁶⁰ On the other hand, labour standards that raise unit labour costs do tend to adversely affect the trade competitiveness of developing countries in labour-intensive export industries.⁶¹ Further,

58. See e.g. Rodrik, "Labour Standards" *supra* note 26. Rodrik uses the population-to-land ratio and average years of schooling in those over twenty-five to control for other trade advantages, and uses black market currency advantage (as a proxy for policy distortions), population and income growth to control for other advantages in attracting FDI.

59. For example, Kucera has developed an index of violations of freedom of association and collective bargaining rights containing thirty-seven criteria referring both to *de jure* and *de facto* problems based on the International Confederation of Free Trade Unions' Annual Survey of Violations of Trade Union Rights, the US State Department's Country Reports on Human Rights Practices and the ILO's Reports of the Committee on Freedom of Association. This index has since been used in other studies such as that of Neumayer & de Soysa, *supra* note 38. See David Kucera, "Core Labour Standards and Foreign Direct Investment" (2002) 141:1-2 *Int'l Lab Rev* 31.

60. See David Kucera & Ritash Sarna, "Trade Union Rights, Democracy and Exports: A Gravity Model Approach" (2006) 14:5 *Review of International Economics* 859 (in a study of the trade success of 162 countries between 1993 and 1999, finding that stronger FACB rights are associated with higher total manufacturing exports).

61. See generally Rodrik, "Labour Standards", *supra* note 26. Rodrik examined the effect of a series of indicators of labour standards' implementation on competitive advantage in clothing and textiles industries, and on FDI in developing and industrialized countries. He found that hours of work and child labour standards had a statistically significant negative effect on comparative advantage in clothing and textiles industries in developing countries, and that in industrialized countries, only hours of work was statistically significant. Bakhshi and Kerr found that standards related to forced labour and union rights adversely affected trade flows in labour-intensive goods for a sample of forty-eight developing countries. Samira Bakhshi & William A Kerr, "Labour Standards as a Justification for Trade Barriers: Consumer Concerns, Protectionism and the Evidence" (2010) 11:1 *The Estey Centre J of Intl L & Trade Pol* 153. Busse found that indicators of the elimination of child labour, forced labour and of trade union rights were associated with weaker performance in labour intensive export industries in a large sample of developing countries. Matthias Busse, "Do Labor Standards Affect Comparative Advantage in Developing Countries?" (2002)

while labour standards tend not to affect the trade competitiveness of most producers in industrialized countries, there is some evidence that where their cost implications are heightened by market conditions, they can put one industrialized state at a disadvantage in comparison to another.⁶²

By contrast, while FDI can be sensitive to unit labour costs, there is no evidence that it responds in a systematically negative way to labour and employment legislation, either in the developing or industrialized world. On the contrary, FDI appears to be positively associated with ILO core labour standards, including FACB rights.⁶³ This may be because the key determinants of foreign direct investment, such as political stability, good government and good infrastructure, are almost always found in

30:11 World Development 1921. By contrast, Kucera & Sarna, *supra* note 60, found no significant relationship between FACB rights and labour-intensive exports. However, they did not analyze developing country trends separately or control for competitive advantages such as infrastructure, the rule of law or political stability so they could not isolate the effects of labour standards on competitiveness in the environments where it is likely to matter most. Similar to Kucera and Sarna, Bonnal found that in a sample of 112 countries, of which seventy were low-income, indicators of an effective right to strike were associated with stronger overall export performance between 1980 and 2004. Bonnal controlled for population density, per capita GDP, health conditions and labour productivity. The results were consistent with a positive relationship between higher labour standards and greater human capital and economic development. However, because the study did not separate results for developing and industrialized countries, and did not control for other important competitive advantages such as infrastructure, it does not provide a clear picture of the independent effect of the right to strike on export performance. Michaël Bonnal, "Export Performance, Labor Standards and Institutions: Evidence from a Dynamic Panel Data Model" (2010) 31:1 J Lab Res 53.

62. Van Beers examined the effects of a synthetic index of labour standards (working time, regulation of fixed term contracts, employment protection and employee representation rights) on bilateral trade between OECD countries. He found a significant negative impact on exports of both labour-intensive and capital-intensive commodities produced with higher-skilled labour, and no significant effect for goods produced with unskilled labour. He argued that the inelastic demand for high-skilled labour in OECD countries causes labour costs to rise more for high-skill labour intensive commodities as a result of labour standards protection than for low-skilled, where capital can be substituted for labour. Cees Van Beers, "Labour Standards and Trade Flows of OECD Countries" (1998) 21:1 The World Economy 57.

63. See Kucera, *supra* note 59 at 33. Kucera assessed the literature as suggesting that higher labour costs negatively affect FDI, but that ILO core labour rights protections positively affect FDI, even after controlling for labour productivity, population, GDP per capita, trade as a percentage of GDP, exchange rates, literacy levels and urbanization (*ibid*).

states that also protect core labour standards. There is indeed evidence of the converse proposition: where such favourable conditions are relatively equally distributed between highly integrated jurisdictions, labour standards do matter to investment decisions. Manufacturing investment within the US has tended to flow toward right-to-work states, and other states have tended to compensate by offering more subsidies.⁶⁴ It may also be that protection of core labour standards helps to bring about some of those favourable conditions.⁶⁵ Further research would be required to determine to what extent each is true.

(ii) Studies of the Impact of Trade and Investment Integration on Labour Standards

It is harder to study the impact of trade and investment integration on labour standards. Such studies need to control for a large number of causal factors that may come between the independent and dependent variables of interest. In addition to controlling for the buffering effects of other sources of competitive advantage, such studies should control for three other factors. One is the stage of economic development, because economic development may be associated with more political demand for labour standards, and may even be caused in part by improved labour standards. The second is changes in the sectoral composition of the economy in favour of more advanced capital-intensive methods, which may be associated with increased trade. The third is the dampening or amplifying effect of politics, through a range of factors including the ideology of governments, levels of labour force participation and education (which can increase demand for labour protections), the extent of democracy, the percentage of the economy that is traded and disruptions such as civil wars. A handful of recent papers have attempted to take account of these factors. Those studies have consistently found that the effects of the stock and flows of FDI on global trends in ILO core labour standards, including

64. See Robert Crandall, *Manufacturing on the Move* (Washington, DC: Brookings Institution, 1993).

65. See Kucera *supra* note 59 at 37.

FACB rights, when examined separately, are generally positive or neutral. This is true both within the developing world and at the global level.⁶⁶

With respect to trade openness, the picture is more mixed. Two studies, one by Arestoff and Granger, and the other by Busse, have examined its effects on all four core labour standards, and their conclusions diverge. One suggested that the effect of trade on an index of measures of respect for core labour standards was, if anything, small and perhaps positive.⁶⁷ The other found that trade openness was positively related to the elimination of discrimination and child labour, but negatively related to a civil liberties index which included FACB rights.⁶⁸ Neither study looked at many independent variables, or disaggregated its sample to examine the industrialized and developing world separately, so neither provides a very fine-grained picture of the relationship between trade and labour standards in contexts where that relationship can be expected to matter more. Robert Flanagan did include a detailed set of controls and instrumental variables in his study of the relationship between trade openness and measures of core labour standards. He found that except for the area of employment discrimination, there is no evidence that countries with liberalized trade are more likely to have inadequate labour rights than countries with restricted trade.⁶⁹ Flanagan's study did not however separate out what was happening in labour-intensive industries in the developing world, so it did not bring into sharp focus the relationship between trade and labour standards where that relationship is most likely to be negative. Nor did any of these studies include controls for political conditions, so they do not permit an assessment of the relative importance of trade integration and domestic politics.

Four more recent studies focusing on FACB and employment protection rights do bring these aspects of the trade-labour standards

66. See Neumayer & de Soysa, *supra* note 38; Layna Mosley & Saika Uno, "Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights" (2007) 40:8 Comparative Political Studies 923.

67. Florence Arestoff & Clotilde Granger, "Does Trade Openness Affect Core Labour Standards?" (2004) online: The European Trade Study Group <http://www.etsg.org/ETS2004/Papers/Arestoff_Granger.pdf> (finding a small but statistically insignificant positive effect).

68. Matthias Busse, "On the Determinants of Core Labour Standards: The Case of Developing Countries" (2004) 83:2 Econ Letters 211.

69. Flanagan, *supra* note 40 at 73–80.

relationship into sharper focus. They examined the developing world separately, though still at a highly aggregated level, and included a set of variables related to domestic politics. FACB and employment protection rights are a good object of study because they can be expected to raise unit labour costs under a wide range of conditions.

Of those four studies, two focus on FACB rights. They appear to point in different directions. Neumayer and de Soysa found that trade integration had a positive effect on FACB rights for a sample of 160 industrialized and developing countries, and for another sample restricted to developing and middle-income countries.⁷⁰ By contrast, Mosley and Uno found that trade openness had a negative impact on FACB rights in a sample of 90 developing countries between 1986 and 2002.⁷¹ The difference in findings may be related to differences in measures of violations of labour rights. Mosley and Uno used yearly index scores, so they could pick up changes over time that would not be reflected in Neumayer and de Soysa's analysis of a single longer period.⁷² The difference in findings might also relate to differences in country samples, Mosley and Uno having excluded more middle-income countries and transitional (former communist) countries, thus focused on states most likely to rely on low labour costs for international competitiveness. In any event, the difference in the findings of the two studies suggests that for many countries the effects of trade openness on national labour standards are small enough that estimates of trends within large global samples are quite sensitive to how the studies are designed.⁷³ Both studies found much larger effects for variables related to the political institutions and histories of states.⁷⁴

70. *Supra* note 38.

71. *Supra* note 66.

72. Neumayer and de Soysa argue that Mosley and Uno should have included year dummy variables to control for year-specific exogenous global trends in labour rights that might skew their results. See Neumayer & de Soysa, *supra* note 38 at 35.

73. While both studies analyze samples of developing countries, the samples are very large and include middle-income countries; neither study controls for labour intensity in export industries or for the presence or absence of competitive advantages such as infrastructure. Therefore, they may understate the impact of trade openness on FACB rights.

74. These include regional dummy variables (large negative effects for East Asia and Pacific, South Asia and Latin America) and the left or rightward tilt of the government. See Neumayer & de Soysa, *supra* note 38. They also include measures of regional average standards and the extent of democracy. See Mosley & Uno, *supra* note 66.

The other two recent studies are particularly interesting because they focus on employment protection laws. Those laws have been the object of intense public debate in Europe, where they tend to be more protective of workers than elsewhere. They have come under pressure with rising unemployment, facing sustained criticism that they impede economic adjustment and job creation and thus impair global competitiveness. These criticisms remain debatable, but there is little doubt that they have gained political traction. In one of the two studies which looked at 28 OECD countries, Fischer and Somogyi found that country rankings on an index of trade and investment integration were correlated with weaker employment protections for full-time workers, but also with improvements in the protection of atypical workers, even after controlling for a host of factors including the political leaning of the government.⁷⁵ On the other hand, their study also found that economic integration had much smaller effects than the political ideology of the government and expenditure on unemployment benefits, which is likely an indicator of the political salience of unemployment. In the other study, Häberli, Jansen and Monteiro found a connection between the portion of trade flows attributable to trade agreements and a deterioration in employment protection laws and employment benefits, but only for trade agreements linking high-income countries.⁷⁶

Overall, the picture emerging from this empirical literature is consistent with the theory developed above. Labour and employment legislation, even where it stands to increase unit labour costs, most often will have no impact on the trade or investment competitiveness of industrialized countries, which means that economic integration has no necessary implications for how those countries set their labour and employment laws. Such integration is likely to directly influence labour and employment laws only where there is great sensitivity to labour costs. This can happen where other more important factors in international competition are barely present or are nearly equal as between countries, or where labour costs are a very large share of the total costs of production

75. Justina Fischer & Frank Somogyi, "Globalization and Protection of Employment" (2012) Swiss National Centre of Competence in Research: Trade Regulation, Working Paper No 2012/20, online: World Trade Institute <<http://www.wti.org>>. Other variables in the regression included the unemployment rate, unemployment benefit spending, population size, national income, the rate of GDP growth and year fixed effects.

76. Häberli, Jansen & Monteiro, *supra* note 39.

for trade. Otherwise, domestic political factors—notably, the political leanings of governments—tend to play a greater role.

(iii) Effects of Labour Standards in One Country on Standards in Another

On the basis of the studies just discussed, most of the impact of globalization on workplace laws may result not from any inevitable economic logic but from what domestic political discourse sees as the requirements of international competitiveness. That discourse may be subject to international influence through the globalization of ideas and ideologies. A recent study by Davies and Vadlamannati suggests that this channel of influence may often be more significant than economic globalization itself.⁷⁷ That study used spatial econometric methods to estimate whether the level of respect for FACB rights in a given country depends on what that level is in other countries. The study covered 148 developing and industrialized countries from 1985 to 2002. It captured the combined effects of both FDI stocks and flows and the beliefs of politicians about the relationship between FDI and labour rights practices. Since earlier studies, reviewed above, have found that FDI itself has little effect on labour standards, any effects found using this method would appear to reflect mainly the views of political decision makers about how best to compete for investment. Davies and Vadlamannati found that measures of FACB rights in different countries are interdependent and have declined in law and practice over time.⁷⁸ In low-income countries, labour standards interdependence was most evident in enforcement; in middle-income countries, competition was concentrated in labour laws; and in high-income countries, it was focused on both, but there was less interdependence than in other countries. Competition appears to occur only within income groupings, consistent with the view that where other competitive advantages associated with income level are present, they exert the greatest influence on FDI flows. But the results also suggest

77. Ronald B Davies & Krishna Chaitanya Vadlamannati, “A Race to the Bottom in Labour Standards? An Empirical Investigation” (October 2011) at 21, online: Christian-Albrechts-Universität zu Kiel <http://www6.bwl.uni-kiel.de/phd/downloads/schneider/ws1112/paper_davies.pdf>.

78. *Ibid.*

that politicians' perceptions of the impacts of collective labour rights on competitiveness are having an effect on the level of protection afforded to workers in many countries around the world, including industrialized nations.

C. Conclusions

It appears that deepening economic integration between Canada and the US might drive regulatory competition in labour and employment law, but only if few other things matter more to competitiveness between the two jurisdictions, and only with respect to workplace laws that actually raise unit labour costs. In other circumstances, competition in labour and employment laws is more likely to be the product of anxious or manipulative political discourse than of any economic imperative. The issue could therefore be framed in these terms: do Canadian jurisdictions stand in much the same position in relation to the US economy as US states do, or does being part of a separate country with distinct institutions and advantages give Canadian governments more room to maneuver?

In the next part, I will consider the proportion of the total labour cost of Canadian goods and services exports that can be attributed to labour and employment laws, the extent to which Canadian producers can exploit competitive advantages not available in the US, and (most important to Canadian economic competitiveness in the long run) the likely effects, if any, of Canadian labour and employment laws on productivity growth.

III. The Impact of Labour and Employment Laws on Canadian Competitiveness, and Vice Versa

A. Labour Costs Arising from Workplace Laws as a Proportion of Total Canadian Exports

Any labour cost difference attributable to labour and employment laws is likely a small share of labour costs, which are in turn a small share of total production costs in the principal goods sectors in which Canada exports to the US: direct and indirect labour costs represent less

than one-fifth of total production expenditures.⁷⁹ While there is little information on the net total cost of labour and employment regulation to Canadian employers, what information is available suggests that it does not constitute a large fraction of total labour costs in traded industries. Union wage premiums in Canada have declined in recent decades, and were estimated in 1999 to average 7.7% after controlling for employee and workplace characteristics.⁸⁰ Moreover, our labour relations laws do not require any particular labour cost outcome. Where market factors call for wage concessions from employees, employers are free to bargain hard to obtain them.

Turning to employment standards, employers in the federal jurisdiction reported that employment standards legislation imposes only small costs.⁸¹ If that is true, it is likely to be true across the country, given the similarities between labour standards in Canadian jurisdictions.⁸² Minimum wage laws are largely irrelevant in most export industries except agriculture, as workers on average are paid well above the statutory minimum. In 2004, Canadian employment protection laws⁸³ were ranked by the OECD as among the most flexible (for employers) in the industrialized world.⁸⁴ These observations imply that changes to Canadian labour and employment laws could at most yield very small gains to Canada's competitiveness with the US.

B. Do Labour and Employment Laws Create a Competitive Disadvantage?

Any competitive disadvantage that Canada's labour and employment laws might create in relation to the US in attracting international investment is probably small in relation to other differences between the

79. This calculation is based on data from Statistics Canada. See "CANSIM Table 301-0006: Principle Statistics For Manufacturing Industries", online: Statistics Canada <<http://www.statcan.gc.ca>> .

80. See Tony Fang & Anil Verma, "Union Wage Premium" (2002) 3:9 Perspectives on Labour and Income 13, online: Statistics Canada <<http://www.statcan.gc.ca>> .

81. See Federal Labour Standards Review, "Fairness at Work: Federal Labour Standards for the 21st Century" by Harry W Arthurs (Gatineau, Que: Human Resources and Skills Development Canada, 2006) at 31.

82. See *ibid* at 43.

83. These laws provide protection to workers with indeterminate employment contracts against dismissal, regulate collective dismissal and regulate temporary forms of employment.

84. OECD, *Employment Outlook 2004* (Paris: OECD, 2004).

two countries. One way to put the matter into perspective is by looking at the annual international competitiveness rankings of the World Economic Forum (WEF),⁸⁵ which are derived from surveys of business leaders around the world. These rankings are not based on the actual causes of competitive success in investment and trade markets, but they are useful because they measure perceptions of competitive advantage and disadvantage held by international investment decision-makers.⁸⁶

The first thing that emerges from comparing the 2011–2012 WEF competitiveness rankings of Canada and the US is their similarity on many criteria: infrastructure, technological readiness, goods market efficiency and macroeconomic environment indicators. Looking beyond those similarities, however, each country has a series of distinct and important advantages that are likely to make competition for investment between the two countries complex and multifaceted. The US has advantages in business sophistication (nine top-twenty rankings versus Canada's four, and much higher rankings on most indicators), in innovation (seven top-ten rankings versus two, with much higher rankings on five of seven indicators), in market size (not surprisingly), and in labour market efficiency (six top-twenty rankings versus four, with large differences on four of nine indicators). Within labour market efficiency, the main disparities in favour of the US are related to the ease and cost of terminating employment, which accounts for three of the four largest ranking differences. The fourth indicator was cost and productivity. While Canada's productivity is of course key to competitiveness, I will show that productivity problems are not likely due in any significant way to Canada's labour and employment regulations.

85. World Economic Forum, *The Global Competitiveness Report 2011–2012* by Klaus Schwab (Geneva: 7 September 2011) online: World Economic Forum <<http://www.weforum.org>>. All rankings discussed herein are contained in country summaries at the end of the report.

86. The factors treated by the WEF as relevant to competitiveness are consistent with those identified in other surveys that ask investors what is most important in international investment decision making. The perceptions recorded in WEF rankings are therefore likely to be good predictors of such decisions. Another survey of business leaders conducted by the Harvard Business School confirms WEF perceptions of the strengths and weaknesses of the US. See e.g. Michael E Porter & Jan W Rivkin, *Prosperity at Risk: Findings of the Harvard Business School's Survey on U.S. Competitiveness* (2012) online: Harvard Business School <<http://www.hbs.edu/competitiveness/pdf/hbscompsurvey.pdf>>.

On the other side of the scorecard, Canada had a pronounced advantage in perceptions of the quality of its institutional environment—that is, government law making, regulation and enforcement processes. Here Canada held eleven indicator rankings in the top twelve countries in the world, compared to one held by the US, and ranked significantly higher on eighteen of the twenty-one indicators. Canada also held an advantage in perceptions of the quality of its health and primary education systems, with Canada outpacing the US on life expectancy and quality of primary education—the two indicators of greatest relevance in comparisons between industrialized countries. Canada was also significantly ahead in perceptions of the quality of its higher education system, in math and science education, and in the management of the education system. Finally, Canada was ranked more highly on the overall state of financial market development, largely on the strength of perceptions of the soundness of its banks; on financing through local equity markets; and on the availability of financial services. It is also worth noting that for employers who provide health insurance benefits to their employees, Canada’s public health care system significantly reduces total labour costs.⁸⁷

All of this suggests that Canada need not compete for investment on the basis of US-style labour and employment laws. Some of the most competitive economies in the world rely upon advantages similar to Canada’s: good government, the quality of health and education systems, and a sound financial sector. They enjoy considerable room to set their own labour and employment laws. In fact, on four of the WEF’s five labour and employment law-related indicators of competitiveness, half or more of the ten most competitive countries in the world ranked lower than Canada.⁸⁸

87. See Government of Ontario, News Release, “Ontario Maintains Health Cost Advantage over U.S.” (12 November 2010) online: Government of Ontario <<http://www.sse.gov.on.ca>> (citing a KPMG study estimating an average annual cost advantage of \$524 000 for a company of almost 100 employees—working out to savings of approximately \$5 240 per employee).

88. Four of those countries (Germany, Finland, Sweden and the Netherlands) ranked far below Canada on all (or all but one) labour market regulation indicators, and had among the lowest rankings in the world (bottom 40 of 142) on at least three WEF labour market indicators. See Schwab, *supra* note 85.

Of course, such rankings present only a snapshot in time. In the longer term, productivity growth is probably the most important determinant of competitive advantage.⁸⁹ In this respect, Canadians have reason for concern. Canada's productivity growth rate has lagged behind that of the US for many years, and the gap in those rates shows no sign of narrowing.⁹⁰ The reasons for it have proven somewhat elusive, despite much study,⁹¹ but the existing research does not suggest that Canada's productivity problems stem from its regulatory environment.⁹² Current thinking points elsewhere, toward aspects of private sector business decision making that lead to low levels of investment in research and development, keep Canadian firms disproportionately small, and avoid creative destruction in highly competitive markets.⁹³ While some of these phenomena may be related to Canada's internal trade rules or its tax law and policy, there is no suggestion in the literature that labour and employment law is to blame.

This is consistent with the more general theoretical and empirical writing on the relationship between economic growth and labour and employment law—a literature of interest because economic growth is, by definition, the product of labour force growth and productivity growth. This literature suggests that the effects of labour and employment laws on economic growth are generally indeterminate, meaning that they can be good or bad depending upon the details of their design and upon the institutional, cultural and political context within which they operate, and that they are often too small to detect in cross-country comparisons.⁹⁴ This is not surprising: sustained economic growth rates are the result of

89. See Andrew Sharpe, "Unbundling Canada's Weak Productivity Performance: The Way Forward" (2010) Centre for the Study of Living Standards, online: CSLS <<http://www.csls.ca/reports/csls2010-02.pdf>>; Someshwar Rao, "Cracking Canada's Productivity Conundrum" (2011) 25 IRPP Study 3.

90. According to Rao, labour productivity growth in Canada in the 2000s slowed to an average of just 0.7% per year: less than half the rate in the 1990s and far below the 2.7% annual growth in the US. See *ibid* at 7–11.

91. See Sharpe, *supra* note 89; Don Drummond, "Confessions of a Serial Productivity Researcher" (2011) 22 Int Productivity Monitor 3.

92. See *ibid* at 7.

93. See *ibid* at 7–10.

94. See Freeman, "Labor Regulations", *supra* note 27 at 32–34; Toke Aidt & Zafirios Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington, DC: World Bank, 2002).

a complex set of factors, among which labour and employment laws are generally not identified as major players.⁹⁵ Further, the productivity effects of labour and employment laws may run in different directions, depending upon the design and context of those laws.

To the extent that they directly or indirectly increase costs to employers or slow adjustment to markets or technological innovations, labour and employment laws may impede investment in productivity-enhancing organizational or technological changes.⁹⁶ Laws, for example, that impose excessive costs upon employers for terminating the employment of redundant employees or that stipulate outdated and inefficient means of achieving health and safety protection can have this effect.

On the other hand, labour and employment laws can foster productivity in a number of ways. Some laws correct for well-documented market failures that lead to relatively unproductive work practices. For example, occupational health and safety laws often correct for employee information failures and optimism bias, and keep employers from externalizing the costs of injuries and illnesses.⁹⁷ Those problems could reduce the productivity of enterprises and harm the overall productivity of an economy by depriving them of the skills and talents of workers who would otherwise be available to continue in productive employment and by directly imposing costs that reduce output per worker.⁹⁸ Mandated, universal standards such as access to maternity leave or to reasonable accommodation of disabilities may eliminate adverse selection problems faced by individual employers who, in the absence of a universal requirement, would be inclined to offer such benefits in order to recruit from the widest possible talent pool and to foster employee

95. See generally Rodrik, *Economics*, *supra* note 42 at 13–55.

96. See Gunderson, *supra* note 6 at 33.

97. See Christine Jolls, “Employment Law” (2007) Yale Law School, Public Law & Legal Theory Research Paper No 132 at 10–14, online: Social Science Research Network <<http://ssrn.com>>.

98. Human Resources and Skills Development Canada estimates the annual costs of occupational injuries and diseases in Canada to be more than \$19 billion. These costs include medical, compensation and rehabilitation costs, as well as time lost from uninjured workers trying to help injured workers, lower staff morale, damage to materials and equipment and productivity losses from injured or alternate workers. Jaelyn Gilks & Ron Logan, “Occupational Injuries and Diseases in Canada, 1996–2008: Injury Rates and Cost to the Economy” (2010) at 13, online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

commitment.⁹⁹ Such mandated standards can also enhance the efficiency of labour markets by supporting greater labour force participation by women and minority groups.¹⁰⁰ As for wrongful dismissal and employment protection provisions, such as termination notice or severance pay requirements, they may (if appropriately designed) eliminate adverse selection problems for employers while giving employees an incentive to acquire firm-specific skills and to put forth more effort.¹⁰¹ Advance notice requirements can enhance labour market efficiency in the event of layoffs by helping workers find jobs that make full use of their skills and experience.¹⁰² The introduction of minimum wages and occupational safety and health laws have at times had a “shock effect”, improving productivity by providing incentives to eliminate “sweatshop” practices based on piece rate systems.¹⁰³ Collective bargaining has at times had similar effects, leading to modernization of production systems and to higher levels of worker commitment and training.¹⁰⁴ Laws mandating employment benefits or enabling collective bargaining have also helped

99. See Jolls, *supra* note 97 at 22–23 (in the absence of legislation mandating employee benefits, employer offers of benefits related to illness or to propensity to take time off work will disproportionately attract less productive employees).

100. See Banks, Chaykowski & Slotsve, *supra* note 29.

101. See David I Levine, “Just-Cause Employment Policies in the Presence of Worker Adverse Selection” (1991) 9:3 *J of Lab Econ* 294; Michele Belot, Jan Boone & Jan van Ours, “Welfare Improving Employment Protection” (2007) 74 *Economica* 381.

102. See Gunderson, *supra* note 6 at 31–32.

103. See Michael Piore, “International Labor Standards and Business Strategies” in *U.S. Department of Labor, International Labor Standards and Global Integration: Proceedings of a Symposium* (Washington, DC: US Department of Labor, 1994).

104. See Mark Barenberg, “Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production” (1994) 94:3 *Colum L Rev* 753 at 921–26; William Lazonick, *Competitive Advantage on the Shop Floor* (Cambridge: Harvard University Press, 1990) (collective bargaining facilitated by the US’s *National Labor Relations Act* led to greater effort by workers and better use of human capital by management in the post-World War II period); Wolfgang Streek, *Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies* (London: SAGE Publications, 1992) (collective bargaining structures in Germany provide incentives to employers to train employees and invest in advanced production methods); Lowell Turner, *Democracy at Work: Changing World Markets and the Future of Labor Unions* (Ithaca, NY: Cornell University Press, 1991) at 163–71 (comparative industrial relations in the US and West German auto industries provide an example of such effects).

to facilitate political settlements and social stability in times of economic adjustment or crisis, allowing economic development to proceed.¹⁰⁵

Whether workplace laws help or hinder productivity will therefore depend upon their design—whether they strike the right balance between competing incentives. Additionally, especially in the case of collective bargaining laws, the effects may depend upon national histories of labour relations which affect the capacity of parties to trust each other and cooperate over the longer term.¹⁰⁶

In short, there is no theoretical or evidentiary basis for concluding that Canada's labour and employment laws are undermining its productivity growth. It cannot be safely assumed that a labour or employment law harms productivity or economic growth even if it tends to increase costs to some or all employers. Their effects are often complex and multidirectional, and *good* laws can increase productivity.

Finally, to the extent that part of Canada's future competitiveness with the US lies in resource extraction, its economy and policy makers may in any event be shielded from pressures to develop a low-cost labour and employment regulatory environment, or for that matter to pursue more innovative and sophisticated business practices. Resources are not mobile; countries with resource needs that they cannot meet at home must satisfy them in international markets. Thus, for example, if Canada is in fact becoming an "energy superpower" and the US remains unable to meet its own energy needs, the US economy may demand Canadian energy products whether or not they are competitive with those of US producers.

C. *The Role of Electoral Politics*

As we have seen, then, Canadian governments would appear to have little reason to change labour and employment laws to compete with the US. The competitiveness payoffs to such changes, if any, are likely

105. See Freeman, "Labor Regulations" *supra* note 27 at 33–35; José Campos & Hilton Root, *The Key to the Asian Miracle: Making Shared Growth Credible* (Washington DC: Brookings Institution, 1996).

106. See e.g. Belot, Boone & van Ours, *supra* note 101 (discussing conditions under which employment protection laws can enhance welfare); Aïd & Tzannatos, *supra* note 94 (discussing conditions affecting the relationship between collective bargaining and economic performance).

to be very small; there are alternative paths available to Canada; and some of Canada's key traded sectors are likely to be somewhat sheltered from competition from US producers. Given these considerations, and the electoral risks in dramatically weakening widely shared labour and employment rights, it would be surprising to see Canadian legislators flocking to do so. Changes are more likely to reflect domestic political factors.

In fact, a review of changes to Canadian labour and employment statutes and regulations between 2001 and 2011 suggests that this has been true. In quantitative terms, reforms enacted across the country during this period tilt heavily toward adding, rather than removing, employee protections.¹⁰⁷ Qualitatively, laws have responded, albeit cautiously, to key issues of the day,¹⁰⁸ including work-life conflict, the erosion of the value of the minimum wage, and more awareness of the discriminatory impact of mandatory retirement and the effects of bullying in the

107. With the help of research assistants, I reviewed all of Labour Canada's annual compendia summarizing legislative and regulatory changes in employment standards, labour relations, occupational health and safety, and workplace human rights laws between September 1, 2001 and August 31, 2011. Those compendia are complete except for the period between September 1, 2006 and August 31, 2009. From September 1, 2006 to August 31, 2007, only employment standards compendia were produced, and from September 1, 2007 to August 31, 2009, no compendia were produced at all. For that 2006–2009 period, and for the period between September 1, 2011 and August 31, 2012, we directly analyzed all legislative changes to labour relations laws and hours of work provisions in employment standards statutes. We examined both substantive and procedural amendments, and identified all changes likely to increase or decrease employee protection. We excluded any changes that affected only public sector or construction industry employees. We also excluded minimum wage increases as they are fairly routine. Our totals should be treated as approximate, especially at the margins, but they leave little doubt that deregulation did not dominate workplace legislation in Canada between 2001 and 2011. Between September 1, 2001 and August 31, 2007, and between September 1, 2009 and August 31, 2011, we counted 209 amendments that stood to increase employee protection and only 46 that stood to reduce it. Our examination of labour relations amendments between September 2006 and August 2009 and hours of work amendments between September 2007 and August 2009, and of both types between September 2011 and August 2012, gave us no reason to think that had changed. The Labour Canada reports for 2001 to 2006 are available online and the other reports are on file with the author. See Human Resources and Skills Development Canada, "Highlights of Major Developments in Labour Legislation", online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

108. The qualitative observations set out in this paragraph are drawn from the author's review of Labour Canada compendia. *Ibid.*

workplace. By contrast, legislative reductions in employee protections were concentrated in four areas: hours of work, paid holidays, limitations on collective bargaining and exclusions from employment standards coverage.¹⁰⁹ Even in these areas, the number of changes that enhanced employee protection roughly equalled the number that reduced it.

There is some merit to the argument that many of these reforms stood to make little difference to unit labour costs, and that reductions in employee protections happened exactly where one would expect if international competitive pressures were at play. Rights to organize and bargain collectively are associated with wage premiums not fully offset by productivity gains. Restricting hours of work in a given day or week or requiring premium rates above certain limits may also raise employer costs without improving productivity, especially where large fixed-cost capital investments require continuous operations (as in manufacturing), or where it is more expensive to recruit, train and provide benefits to additional workers than to require longer hours.¹¹⁰ Exclusions from the coverage of employment standards statutes most often involve exemptions from maximum hours provisions.

However, a closer look at reforms in these fields reveals no pattern attributable to international economic integration. Consider first the past decade's reforms to collective bargaining laws. Apart from legislation directed at the public sector and the construction industry (which are not traded sectors) only a handful of those reforms could affect the protection and support of organizing and bargaining rights, either positively or negatively. Most of the reforms on the negative side of the ledger came shortly after the election of new and relatively conservative governments in British Columbia in 2001 and Saskatchewan in 2008. Both provinces expanded the employer right to communicate views to employees during organizing campaigns, and Newfoundland did the same in 2012.¹¹¹ The BC amendments also directed the provincial labour

109. These accounted for three-quarters of the total.

110. See Juliet B Schor, *The Overworked American—the Unexpected Decline of Leisure* (New York: Basic Books, 1991) at 59–66.

111. Bill 42, *Labour Relations Code Amendment Act*, 3rd Sess, 37th Parl, British Columbia, 2002 [BC *Labour Relations Code Amendment Act*]; Bill 6, *Trade Union Amendment Act*, 2007, 1st Sess, 26th Leg, Saskatchewan, 2007 [Saskatchewan *Trade Union Amendment Act*]; Bill 37, *An Act to Amend the Labour Relations Act*, 1st Sess, 47 Gen Ass, Newfoundland and Labrador, 2012 [Newfoundland & Labrador *Labour Relations Amendment Act*].

board to take account of the principle of “foster[ing] the employment of workers in economically viable businesses” and excluded workers covered by a collective agreement from many of the provisions of the labour standards statute.¹¹² The Saskatchewan amendments made secret ballot votes a prerequisite to the certification of a bargaining agent, and raised the level of employee support required to trigger such a vote from twenty-five to forty-five per cent.¹¹³ In 2003, amendments to the Quebec *Labour Code* limited the types of business transfer in which existing collective bargaining rights would bind the successor employer.¹¹⁴ From 2010 to 2012, federal statutes removed the right to strike or lockout in a few major private sector bargaining units, and either directly imposed the terms of settlement or remitted matters in dispute to binding arbitration.

These amendments are modest in both number and scope. This set of reforms is too sparse to show a national pattern; they are intermittent and are restricted to a few jurisdictions. The only clear commonality that emerges is that some newly elected conservative governments, early in their mandates, enacted measures that tended to make union organizing more difficult; but this is nothing new.

The other side of the ledger must also be considered in order to complete the picture. In 2005, Ontario returned to its labour board the power to certify a union as bargaining agent when employer unfair labour practices make it unlikely that a certification vote would reflect the true wishes of employees, and the power to order the interim reinstatement of an employee who claims to have been dismissed for union activities during an organizing campaign.¹¹⁵ Also in 2005, Saskatchewan’s labour board was given more power to help a union and employer reach a first collective agreement.¹¹⁶ Nova Scotia provided access to expedited arbitration of rights disputes under collective agreements in 2006.¹¹⁷ In 2008, New Brunswick permitted applications to treat two employers operating under common control and direction as a single employer for

112. BC *Labour Relations Code Amendment Act*, *supra* note 111.

113. Saskatchewan *Trade Union Amendment Act*, *supra* note 111, cl 3(2)(a).

114. Bill 31, *An Act to amend the Labour Code*, 1st Sess, 37th Leg, Quebec, 2003, cl 2.

115. Bill 144, *An Act to amend certain statutes relating to labour relations*, 1st Sess, 38th Leg, Ontario, 2005.

116. Bill 87, *The Trade Union Amendment Act*, 1st Sess, 24th Leg, Saskatchewan, 2005.

117. Bill 219, *Trade Union Act (amended)*, 1st Sess, 59 Gen Ass, Nova Scotia, 2005.

the purposes of collective bargaining.¹¹⁸ In 2010, Quebec strengthened its existing prohibition on the use of replacement workers during strikes.¹¹⁹ In 2012, Newfoundland did the reverse of what Saskatchewan did in 2008, by providing for certification without a vote if a union demonstrates sixty-five per cent support in a bargaining unit. It also provided for stronger remedies for breach of the duty to bargain in good faith, and set time frames for the resolution by binding interest arbitration of disputes over the negotiation of first collective agreements.¹²⁰ In sum, it cannot be said that there has been any trend across Canada over the past decade toward weaker protection of private sector rights to organize and bargain collectively.

The same can be said about the regulation of hours of work and overtime rates. Two provinces lowered mandatory overtime premiums or reversed a decision to increase them;¹²¹ four added new exclusions from overtime restrictions;¹²² and two loosened regulation of hours-averaging

118. Bill 76, *An Act to amend the Industrial Relations Act*, 2nd Sess, 56 Leg, New Brunswick, 2008.

119. Bill 399, *An Act to modernize the provisions relating to Strikebreakers and to again amend the Labour Code*, 1st Sess, 39th Leg, Quebec, 2010.

120. Newfoundland & Labrador *Labour Relations Act Amendment*, *supra* note 111.

121. See Bill 48, *Employment Standards Amendment Act, 2002*, 3rd Sess, 37th Parl, British Columbia, 2002 and BC Reg 307/2002 (lowering overtime premiums for long-haul truck drivers); NLR 38/03 (repealing new overtime provisions that were to take effect on April 1, 2003, which would have the minimum overtime rate set at one-and-a-half times an employee's regular rate of pay and leaving the minimum overtime rate fixed at one-and-a-half times the provincial minimum wage rate).

122. See BC Reg 307/2002, *supra* note 121 (excluding "high technology professionals" and expanding the category of excluded managers); BC Reg 375/2003 (expanding the category of high tech professionals); BC Reg 432/2003 (expanding the definition of "farm worker"); NS Reg 76/2005 (excluding "information technology professionals" from overtime provisions, effective March 11, 2005); SOR/2006-92 (excluding commission sales workers in banking from the application of maximum hours and overtime provisions); Bill 2, *Employment Standards Amendment Act*, 5th Sess, 38th Leg, Manitoba, 2006 (excluding managers from provisions regarding standard hours and overtime); Man Reg 6/2007 (establishing a standard work week of 50 hours and workday of ten hours for landscaping operations between April 15 and November 30).

agreements.¹²³ In contrast, one province increased mandatory overtime premiums;¹²⁴ one restored a maximum work week of forty-eight hours;¹²⁵ and two tightened the regulation of hours-averaging agreements.¹²⁶

One might suggest here that I am looking in the wrong place—that regulatory competition has affected enforcement capacity rather than the law on the books. Some enforcement budgets have shrunk significantly in relation to the number of workers and workplaces subject to regulation.¹²⁷ Informed observers have long argued that the budgets of Canadian labour departments and their stature within government are on the decline.¹²⁸ This is plausible: cuts to enforcement capacity are less likely to attract political resistance than highly visible legislative reforms. Yet it is far from clear that international regulatory competition is to blame. The evidence reviewed above strongly suggests that any such decline is less likely to be driven by economic necessity than by a combination of political developments, including the declining political power of the

123. Hours-averaging agreements are where an employee agrees that his or her average hours worked over a period of weeks will serve as the basis for determining whether overtime premiums must be paid or whether mandatory maximum hours caps have been exceeded. See Bill 48, *Employment Standards Amendment Act, 2002*, 3rd Sess, 37th Parl, British Columbia, 2002; Bill 2, *Employment Standards Amendment Act, 5th Sess, 38th Leg, Manitoba, 2006* (excluding managers from provisions regarding standard hours and overtime).

124. See NS Reg 172/2005.

125. See Bill 63, *Employment Standards Amendment Act (Hours of Work and Other Matters)*, 2004, 1st Sess, 39th Leg, Ontario, 2004.

126. See *ibid*; Bill 23, *Employment Standards Code Amendment Act, 5th Sess, 5th Leg, Manitoba, 2011*.

127. See Leah F Vosko, Mark P Thomas & Mary Gellatly, “New Approaches to Enforcement and Compliance with Regulatory Standards: the Case of Ontario, Canada” (2011) Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper Series: Paper for the Law Commission of Ontario Vulnerable Workers and Precarious Work Project at 30 (finding that funding levels are ten per cent lower than in 1997 without adjusting for inflation).

128. See Harry W Arthurs, “By What Immortal Hand or Eye?—Who will Redraw the Boundaries of Labour Law?” in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland, Or: Hart Publishing, 2006) 373 at 375–77.

labour movement, the rise of identity politics, the dissolution of class consciousness, and the ascendancy of neoliberal policy thought.¹²⁹

What role does international economic integration play here? Harry Arthurs has argued that it brings what he calls a conditioning framework of ideas that shape our sense of what is possible and desirable, creating political anxiety about labour and employment law and its effect on prosperity. The rhetoric of fear about investment relocation that has attended even modest labour law reforms in Canada over the past two decades clearly supports his view.¹³⁰ Yet research in a number of regulatory fields shows that fears do not often materialize, probably because it is seldom worth relocating or avoiding a particular jurisdiction simply to avoid regulation.¹³¹ The evidence reviewed here also suggests that international competition is dressed up for a more central role in this political theatre than it plays in the real world. It is our anxious imaginings of their effects on Canada's international competitiveness, much more than the reality of those effects, that serves to drain public support for labour and employment laws, to strengthen the hand of their opponents, and to marginalize labour ministers at the cabinet table.

Conclusion

I have argued in this paper that there is no need to downgrade Canadian labour and employment laws in order to compete with the US. Canada is highly integrated into international trade, but our policy makers have considerable room to manoeuvre and to experiment with laws to meet workplace needs. Labour policymaking can and should continue to focus on taking evidence-based steps to ensure the fair and decent treatment of workers in a way that is consistent with a productive and dynamic economy.

129. See Harry W Arthurs, "Labour Law Without the State" (1996) 46:1 UTLJ 1; Harry Arthurs, "Labour Law After Labour" (2011) Research Paper No 15, Comparative Research in L & Political Econ: Research Paper Series.

130. See e.g. "Sobey's Slams 1st Contract Plan" *CBC News* (November 30, 2012) online: CBC News <<http://www.cbc.ca/news>>.

131. See Bruce Carruthers & Naomi Lamoreaux, "Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards" (2009) online: Faculty of Economics, Yale University <<http://www.econ.yale.edu>>.

Some further but more tentative policy conclusions flow from this. The first is that policy-makers can respond to the increased demand for legislative protection that will result if the unionization rate continues to fall and bargaining power of unions continues to decline. This may well happen. The decentralized structure of collective bargaining in Canada leaves unions in a weak position to resist concessions in a globally competitive environment.¹³² The US experience suggests that as collective bargaining coverage shrinks, demand for legislation to fill the resulting void in workplace regulation will grow.¹³³

Given today's political discourse, workers' rights advocates might take little comfort from the assurances that governments do have the capacity to respond to global market pressures on working conditions. Those who would like to see governments play a more active role need to offer an alternative to the conditioning framework of ideas that makes such a role seem risky or otherwise undesirable. The necessary political will and resources will not flow without a new and coherent approach toward competitiveness in the international economy. That approach would be proactive about cultivating the attributes that Canada needs to compete successfully, including good government, a strong and sustainable health care system and a high quality public education system. It would also have to include a strategy to turn around the decline in Canada's productivity growth. These needs go far beyond the ambit of workplace regulation, yet if we do not deal with them Canada may lose the advantages that give it room to manoeuvre in the area of labour policy. We may then face constraints that today are more conjured out of rhetoric and fear than grounded in economic reality.

132. See Fang & Verma, *supra* note 80 (declining union wage premiums in Canada are attributed in part to globalization); Gomez & Gunderson, "Economic Integration", *supra* note 6 at 332–37.

133. See Paul C Weiler, *Governing the Workplace* (Cambridge: Harvard University Press, 1990) at 22–23.