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INTRODUCTION

I **was invited** to speak to this institute when I was a real lawyer. I am no longer working in that capacity, but Henry was too nice to revoke the invitation when my job responsibilities changed. So although I know even less law than I did a year ago, you still have to be polite because I am a client now. My current responsibility of strategy development for CP Rail System leads me to look at Canadian sovereignty and free trade from the perspective of a Canadian railway company operating across provincial, state and international boundaries in Canada and the United States.

Free trade under the Canada/U.S. Free Trade Agreement (FTA) is definitely affecting the movement of goods and services within and between Canada and the United States. The Canadian railway industry has seen a shift in the direction of certain types of commodity traffic as a result of the FTA. We expect this trend to continue.

Approximately one-third (6,600 mi.) of the total trackage operated by CP Rail System is now located in the United States. Between 1988 and 1993, total domestic Canadian tonnage shipped by CP Rail System decreased at a rate of 2.2% per year (or slightly more than 10% over these five years). By contrast, transborder tonnage increased at an annual rate of 7.2% (or slightly more than 40% over these five years).

Free trade pressures are pushing Canada, the U.S., and now Mexico, to harmonize legislation in many areas, including some not obviously related to trade. Theoretically, the exigencies of free trade may not support or even reflect the policy agendas of the participating sovereign states. Many argue that free trade threatens their normal policy-making powers. The degree to which Canadian sovereignty survives under free trade will influence the way Canadian railways and other industries do business in North America.

At the outset, I want to be clear that my view as an executive of a North American railway company is that free trade is, on balance, a good thing. I also believe that some degree of harmonization of legislation and regulation in areas that directly affect business and trade is a

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good thing, because the cost to North American businesses of complying with the diverse, complex and sometimes dissonant legislative and regulatory requirements of the provinces and states in which they operate is substantial.

As an American who has lived in Canada for many years, I also feel that the cultural differences between Canada and the U.S. are minor from a global perspective. While certainly not identical, Canadian and American cultures and values are already similar, or at least compatible enough that any further conformity imposed by free trade should not result in dramatic change for either country.

Recognizing that these are my biases, I propose to describe how I see North American free trade generally affecting Canadian sovereignty, and to look specifically at its effect in two areas of Canadian social policy that concern the railway industry - the environment and labor. Before I begin, let me delineate my conclusions:

FIRST, sovereignty in Canadian federalism has more than one application: there is Canada's sovereignty as a nation, and there is also the sovereignty of each of its ten provinces and two territories.

SECOND, although free trade is exerting pressures on the use of sovereign powers by both Canada and the provinces, these pressures can be attenuated in some areas of policy-making. A look at environmental and labor policy, in particular, illustrates this point.

THIRD, I believe the claim that free trade is a fundamental threat to Canadian sovereignty is overstated. I recognize that free trade will strongly influence the exercise of sovereign powers, but I do not see an irreconcilable conflict between the two. Canada's entry into the FTA and the North American Free Trade Agreement (NAFTA) is, in itself, an expression of sovereignty. The fact that future curtailment of sovereign powers could occur may be viewed as an incidental - and authorized - consequence of that primary expression of sovereignty.

FOURTH, free trade is hardly the greatest threat to Canadian sovereignty. The separatist movement in Quebec is a much greater threat. Compared to the pressures of conformity imposed by international environmental concerns and the increasing international focus on human rights, labor and other social policy issues, trade-related encroachments on sovereignty may be minor.

FIFTH, because the FTA and NAFTA are agreements between federal governments to which provincial and state legislatures are not parties, provincial and state sovereignty may be less affected by free trade imperatives.

FINALLY, there is another way to look at the influence of free trade on Canadian sovereignty; that is, to recognize it as a potential impetus for progressive change in social, economic, labor and environmental policies. Sovereignty in a small global marketplace is simply dif-

ferent from the sovereignty envisioned by the authors of Canada's *British North America Act* because the economic community in which Canada operates today has changed.

CANADIAN SOVEREIGNTY AND FEDERALISM

I do not pretend to be an authority on the subject of "sovereignty." But I like the definition put forward by Johan D. van der Vyver in his 1991 article entitled "Sovereignty and Human Rights in Constitutional and International Law."[1] He holds that there are three basic elements of sovereignty within the meaning of international law:

a) external independence;
b) internal autonomy; and
c) territorial integrity.

He goes on to say, quoting from other sources:

> The external dimension of sovereignty denotes "the right of the state freely to determine its relations with other states or other entities without the restraint or control of another state." The internal dimension of sovereignty is "the state's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respect." Finally, the territorial dimension of sovereignty finds expression in "the complete and exclusive authority which a state exercises over all persons and things found on, under or above its territory."[2]

In a federalist state such as Canada, where legislative powers have been meted out between federal and provincial governments, these attributes can be applied at both federal and provincial levels. How so?

In his text, *Constitutional Law of Canada*,[3] Peter Hogg observes:

> In a federal state, governmental power is distributed between a central (or national or federal) authority and several regional (or provincial or state) authorities, in such a way that every individual in the state is subject to the laws of two authorities, the central authority and a regional authority. . . . The central authority and the regional authorities are "coordinate," this is to say, neither is subordinate to the other. The powers of the Legislature of Ontario are not granted by the Parliament of Canada, and they cannot be taken away, altered or controlled by the Parliament of Canada. And the Legislature of Ontario, even acting in concert with all the other provincial Legislatures, is likewise incompetent to take away, alter or control the powers of the Parliament of Canada.[4]

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[1] Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321 (1991).

[2] *Id.* at 419-420.

[3] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (2d ed. 1985).

[4] *Id.* at 80.

One of the ideals of federalism, then, is that the regional authorities comprised by the federation are "coordinate" powers - not subordinate, either to each other or to the central authority. In some federalist states, the central authority is actually subordinate to the regional authorities. In Canada this is not the case. Under the *Constitution Act*,[5] the Canadian provinces have been granted legislative jurisdiction in the following areas:

- property and civil rights in the province;
- direct taxation;
- intra-provincial trade and commerce;
- environmental law in the province;
- labor law relating to provincially regulated industry;
- criminal procedure.

Some of the basic powers of the federal parliament are as follows:

- inter-provincial trade and commerce;
- taxation (direct and indirect);
- environmental law;
- labor law relating to federally regulated industry;
- criminal law.

The overlap in the federal and provincial jurisdictions is obvious. As well, there are ways in which the legislative authority of both the provinces and parliament may be curtailed.

Although the provinces do not have complete autonomy, they do have a sufficient degree of independent legislative jurisdiction to be regarded as "sovereign" entities in relation to a number of key areas including social, economic, criminal, public health, labor and environmental policy-making. Generally, within these legislative spheres and within their provincial boundaries, the manner in which they function under the *Constitution Act*[6] has all three attributes of sovereignty described by Mr. van der Vyver: external independence; internal autonomy; and territorial integrity. The social policies of the Canadian provinces, as reflected in provincial legislation, are by no means uniform.

THE FTA AND NAFTA - EFFECT ON SOVEREIGNTY

The three main attributes of sovereignty are more ideals than actual characteristics of real sovereign states, because in the late twentieth century individual states must co-exist in an increasingly interwoven web of relationships. An extensive network of international laws, treaties, regulations and diplomatic alliances has developed among nations, dealing with everything from the use of international waters to tax matters, human rights and the extradition of criminals. Sovereign states are not always free to do as they wish, even within their own

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[5] Canada Act, R.S.C., c. 11-44 (1982); *including* The Constitution Act (1982).

[6] *Id.*

territorial boundaries. Even so, free trade is seen by some as one of the greatest threats to sovereignty. In Canada, where we have not succeeded in removing barriers to trade even between provinces, perhaps this is to be expected.

Fundamental to free trade is the desire to dismantle barriers to the flow of trade across international borders. Many obvious barriers have been eliminated - tariffs and subsidies - and the focus has shifted to those that are less obvious. It is the free trade imperative of eradicating these "low-visibility" trade barriers that seems to threaten sovereignty. In his article, *The Limits of Free Trade: Sovereignty, Environmental Protection, and NAFTA*,[7] Michael Dunleavy states:

> As economic theory and the reality of a shrinking world have driven nations toward economic integration through bilateral and multilateral trade arrangements, the issues raised by the lowering of trade barriers have begun to change, trade issues have become far more difficult to extract from the social and political context in which they arise, and resolutions are far more difficult to arrive at than was the case with the threshold issues of trade negotiations, such as tariffs or overt subsidization. Quite simply, the new issues being raised strike closer to the heart of what constitutes state sovereignty and political independence, making them both theoretically complex to address and politically volatile.[8]

Mr. Dunleavy's view is that when we are dealing with potential trade barriers which, nonetheless, may be justifiable as instruments of legitimate social and other policies unrelated to trade, we are dealing with issues that threaten sovereignty:

> Simply by virtue of making determinations on these questions, negotiators and tribunals threaten to usurp the traditional decision-making role of the sovereign state. When domestic policy considerations on issues indirectly related to trade are transformed into trade issues, subject to the rules and agreements in the international trade area, this more or less directly pits trade liberalization against state sovereignty. . . . This raises extremely serious questions about the freedom of an electorate to choose their policies in the context of a trade agreement. One might argue that such trade agreements are approaching a quasi-constitutional status when they operate to override democratic interests.[9]

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[7] Michael Dunleavy, *The Limits of Free Trade: Sovereignty, Environmental Protection, and NAFTA*, 51 U. TORONTO FAC. L. REV. 204 (Spring 1993).

[8] *Id.* at 206.

[9] *Id.* at 206.

FREE TRADE AND CANADIAN SOVEREIGNTY IN ENVIRONMENTAL AND LABOR POLICY-MAKING

Whatever the threat to Canadian sovereignty posed by North American free trade may be, I believe that the risk is justified by the economic benefits of a strong North American trading zone. I propose to examine the so-called threat in the context of Canadian sovereignty as expressed through its environmental and labor policies. I have chosen these areas because environmental and labor laws have a direct impact on railways, such as CP Rail System, operating in Canada and the United States. As well, in Canada the provincial legislatures and the federal parliament both have jurisdiction in these areas. To the extent that free trade influences environmental or labor policies, the sovereignty of both the provinces and the nation are affected.

1. Labor

Under the *Constitution Act*,[10] the Canadian parliament has jurisdiction over unemployment insurance and labor in certain industries operating in the national economic sphere. These include banking, telecommunications, the airlines and interprovincial railways. The provinces have jurisdiction over labor in all other industries - and these industries employ approximately 90% of the Canadian labor force. With respect to this 90%, collective bargaining and labor standards legislation also come under exclusive provincial authority.

With the introduction of the Canada/U.S. FTA, it was feared that the elimination of trade barriers would drive individual provinces and states to reduce labor protections, and so lower the cost of labor, in order to attract businesses and keep them operating in their respective jurisdictions. In his article, *Canadian Labour Law Reform and Free Trade*,[11] Brian Langille refers to this as the "race to the bottom" syndrome. Theoretically, the problem might be exacerbated in the field of Canadian labor policy because of the parallel jurisdiction of individual provinces in labor law. G. Betcherman and M. Gunderson, in their article, *Canada-U.S. Free Trade and Labour Relations*,[12] suggest:

> In all likelihood the greatest effect of the FTA on industrial relations will be indirect, through pressure to harmonize labour laws. This will occur as governments (both federal and provincial) will be forced to reassess laws regarding collective bargaining, employment standards, and human rights, given that their cost consequences could make it more difficult for competitive firms to compete against American

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[10] *Canada Act*, R.S.C., ch. 11-44 (1982); *including* the *Constitution Act* (1982).

[11] Brian Langille, *Canadian Labour Law Reform and Free Trade*, 23 OTTAWA L. REV. (1991).

[12] Gordon Betcherman & Morley Gunderson, *Canada-U.S. Free Trade and Labor Relations*, 41 LAB. L.J. (1990).

> firms, which tend not to face such strong regulatory constraints. Retrenchment could conceivably involve restrictions on new initiatives and reduced enforcement or updating or even repeal of existing initiatives.[13]

But, the dreaded "race to the bottom" has not occurred. Ironically, the reason may be that put forward by P. Weiler in *Governing the Workplace.*[14] Mr. Weiler argues that the result of the competitive pressures arising out of the parallel jurisdiction of all Canadian provinces in labor legislation is actually labor policies that are more progressive.

> One reason why Canada's laws have been so much more innovative and progressive is that in Canada the basic constitutional responsibility for the law at work resides at the provincial rather than the federal level. . . . (T)he fact that each province has this responsibility for the major industries within its borders means that the provinces also have both the opportunity and the incentive to act, in Brandeis's phrase, as "laboratories for social experimentation." Almost all the significant advances in the Canadian law of the workplace first took hold in individual provinces (as did many of the pioneering efforts in health care, civil rights, and other policy fields) and then spread gradually through a natural process of emulation and competition to other jurisdictions across the country, including the federal government. . . .[15]

In fact, both Ontario and British Columbia have recently enacted legislation which, far from diminishing worker protections, strengthens them considerably. The 1992 B.C. *Labour Relations Code*:

- prohibits the hiring of replacement workers during strikes and lockouts;
- grants broader rights to dependent contractors to unionize;
- enhances mediation and arbitration services to expedite dispute resolution;
- makes union certification easier to obtain; and
- restricts the manner in which employers may organize their affairs in order to avoid union successor rights.

In Ontario, the *Employment Standards Act* and *Labour Relations Act* were amended in 1993. The amendments extended successor rights protection of unionized workers and made union certification easier.

The fact that, prior to the FTA, competition among Canadian provinces with parallel legislative jurisdiction in labor precipitated neither a "race to the bottom" nor an abandonment of provincial sovereignty suggests that similar competition between Canada, the U.S. and

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[13] *Id.* at 459.

[14] PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

[15] *Id.* at 302.

Mexico as a result of the FTA and NAFTA is unlikely to do so. There has been no evidence of a reduction in labor protection in Canada thus far; furthermore, it is an obvious but important point that both the FTA and NAFTA are agreements between federal governments. Canadian provincial governments, therefore, are free to enact and enforce their own labor laws and regulations, and these will not be subject to direct attack under the FTA or NAFTA as barriers to trade.

Nonetheless, changes in labor law resulting from pressures brought about through the FTA and NAFTA need not necessarily be bad, nor must they necessarily be viewed as a threat to sovereignty. On this point, Mr. Langille asks: "What is wrong with Nova Scotian voters preferring a government which makes a decision to trade-off labor rights for jobs and investments? Is that not simply a rational choice and one which we should not second-guess?"[16]

2. Environment

In Canada, both the provincial legislatures and the federal parliament have legislative jurisdiction over the environment. The "race to the bottom" syndrome has also been seen as a potential threat to sovereignty in environmental regulation. Some think that individual provinces and states will scramble to lower environmental standards so as to reduce production costs and attract and keep businesses. Sovereigntists and environmentalists also fear that legitimate environmental regulations may constitute barriers to trade and, therefore, be disallowed.

This kind of issue arose in a dispute between the U.S. and Canada over a Canadian regulation requiring that all salmon and herring caught within Canada's 200-mile limit off the west coast be landed and processed in British Columbia (B.C.). The matter was initially taken up under the General Agreement on Tariffs and Trade (GATT). Canada argued unsuccessfully that the regulation was justified as a form of quality control and a means of ensuring conservation of fish stocks. The GATT panel thought otherwise. In response, Canada brought in new regulations more directly tied to conservation. The requirement for processing in B.C. was dropped, but the landing requirement was maintained, ostensibly so that B.C. could monitor potential over-fishing. The U.S. filed another complaint, this time under the then recently executed FTA. The FTA dispute resolution panel found that the regulation constituted an unfair impediment to trade. The environmental concern of over-fishing might have been a partial justification for the regulation, but the 100% landing requirement went beyond legitimate environmental concerns and was obviously adopted for economic reasons.

The test the panel used to make this determination may be dis-

[16] Langille, *supra* note 11, at 620.

turbing to sovereigntists. It implies, according to Michael Dunleavy:

> If no environmental regulation can be passed in the future that may have an incidentally beneficial effect in the trade realm, this will place a heavy onus on the enacting party to justify environmental regulations. High standards that are completely justified by environmental concerns and possibly desired by the electorate are at risk if they have tangential trade benefits under such a test.[17]

I do not share this concern, particularly in the context of the FTA. First, sovereignty in environmental policy is already compromised regardless of free trade agreements. As Mr. Dunleavy himself recognizes:

> Environmental protection was not limited to the domestic context. Many environmental problems are simply too diffuse or enormous for individual states to handle, and this has resulted in a burgeoning area of international cooperation on the environment. On a diverse slate of environmental issues, states have come to recognize the danger or the futility of acting alone and have agreed to regulate the international scene. The hazardous waste trade was carefully regulated. Ozone-destroying chlorofluorocarbons (CFCs) were banned. International players began to talk about issuing "trading permits" for the burning of fossil fuels to help encourage reductions to curb global warming.[18]

In short, environmental issues are often international in scope because pollution crosses arbitrary international borders. Through international environmental treaties, laws and agreements, there is already considerable pressure to harmonize environmental standards throughout the world and, in particular, between Canada and the United States.

Second, the environmental standards of Canada and the U.S. are already relatively compatible. The two countries recognize, quite apart from their respective trade interests, that some consistency is desirable. An abandonment of sovereignty in respect of environmental policy through a "race to the bottom" is therefore unlikely.

With the entry of Mexico under NAFTA, the dynamic may be altered. While the consequences of NAFTA on North American environmental policies are largely unknown at this time, a few things may be noted:

1. Article 904 of NAFTA provides, in part:

> 1. Each party may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply

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[17] Dunleavy, *supra* note 7, at 213.

[18] *Id.* at 213-214.

> with the applicable requirements of those measures or to complete the Party's approval procedures.[19]
> 2. Notwithstanding any other provision of this Chapter, each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the levels of protection that it considers appropriate . . . .[20]

2. Article 1114 provides, in part:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[21]

Under the September 14, 1993 side deal on NAFTA, Canada, Mexico and the United States agreed that fines could be levied for failure to enforce their own domestic environmental protection laws. Mexico and the U.S. also agreed to the imposition of trade sanctions for such failure. These provisions, and others in NAFTA relating to the environment, are loosely worded, but they do indicate an attempt to respect the sovereignty of the signatories in environmental policy-making. How they will be applied in the future is difficult to predict.

MITIGATION OF FREE TRADE THREATS TO SOVEREIGNTY

In my view, the two main ways in which the threats to Canadian sovereignty posed by free trade may be reduced are harmonization of policies and dispute resolution mechanisms.

1. Harmonization of Policies

To the extent that the policies of Canada, the United States, Mexico and their respective provinces and states are in greater conformity, the possibility that those policies will be attacked as a violation of trade principles under the FTA or NAFTA is reduced. When such attacks are reduced, so also are the threats to sovereignty.

But, there are many who argue - and I agree with them to some extent - that harmonization itself threatens sovereignty. However, those who see free trade as the primary motivation for harmonization fail to recognize that there are other pressures being exerted in that direction. I have referred earlier to the need for international conformity on environmental laws, a need arising primarily out of a realization that environmental problems are often international in scope. There is also significant pressure for greater international harmony in human rights

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[19] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 904.
[20] *Id.*
[21] *Id.* at art. 1114.

legislation arising out of an ever increasing focus by the international community on social and human rights matters.

In terms of environmental policy, Canada's freedom to set its own course is already somewhat curtailed by virtue of its participation in a number of international agreements. For example, Canada is a signatory to the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987), the *Convention on Long-Range Transboundary Air Pollution* (1979), and the 1985 and 1988 Protocols under that convention dealing with reduction of sulphur dioxide levels and with nitrogen oxide pollution. Canada and the U.S. have also been negotiating on the control of acid rain and are taking action on pollution and water level issues concerning the Great Lakes. In light of these non-trade pressures toward policy harmonization, I see free trade in North America as a lesser threat to Canadian sovereignty, at least with regard to environmental and labor policy.

2. *Dispute Resolution*

To the extent that greater harmonization of policies does not occur and is not imposed by the FTA or NAFTA, the dispute resolution mechanisms provided for in these agreements offer an avenue for challenging specific policies as constituting barriers to trade. Some see these mechanisms as further threats to sovereignty. Dunleavy notes that under the FTA, not only governments, but

> . . . third parties such as businesses or industries affected by legislation can apply for a trade ruling under Chapter 19 of the *Agreement*. . . . This raises the possibility of interested industries lobbying through the dispute process to have restrictive environmental and other legislation overturned (since Chapter 19 decisions are binding under the FTA).[22]

However, the fact that dispute resolution mechanisms are provided for in the FTA and NAFTA indicates that free trade imperatives do not necessarily dictate non-trade related policies. Nor are they always successful in imposing harmonization to the detriment of the exercise of sovereign powers. As Mr. Dunleavy himself notes:

> Although dispute resolution mechanisms are an integral part of any trade agreement, in which some disputes can always be expected to arise, they can also represent manifestations of the failure of parties to agree on fundamental issues. In the context of environmental considerations, for example, the failure of the parties to come to terms on the issue of how to handle the potential conflict of trade and environmental protection may require them to rely more heavily on the dis-

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[22] Dunleavy, *supra* note 8, at 236.

pute settlement provisions to handle these conflicts when they arise.[23]

I do not agree that dispute resolution mechanisms signal a failure to agree on fundamental issues. I see them as a means of allowing sovereign states to agree to disagree on certain policies in specific areas. In the absence of such mechanisms, disagreement on these policies might have scuttled any over-all trade deal because the parties would have been incapable of comprehensively resolving - much less harmonizing - their differences.

Thus, while dispute resolution mechanisms provide a means of challenging sovereign policy-making authority on a specific, case-by-case basis, they also, and perhaps more significantly, allow sovereign authority to be recognized and accommodated.

CONCLUSIONS

I return to the conclusions which I outlined earlier:

1. The concept of sovereignty in the Canadian federalist context has more than one application. As a result of the *Constitution Act*, which distributes legislative powers between the provincial legislatures and the federal parliament, it is appropriate to speak not only of the sovereignty of Canada, but of the separate sovereignty of each province within its sphere of legislative jurisdiction.
2. While North American free trade may influence the use of sovereign powers by both Canada and its provinces, increasing harmonization of laws and the provision of dispute resolution mechanisms in the FTA and NAFTA can actually, and perhaps ironically, mitigate the detrimental effect on sovereignty. I believe there are other forces driving the move toward harmonization of legislation than those presented by free trade. The existence of dispute resolution mechanisms represents a realization that harmonization of laws will not likely ever be complete.
3. Canada's entry into the FTA and NAFTA was, in itself, an expression of sovereignty. That the consequences could involve a restraint on the future exercise of sovereignty may be regarded as incidental - and authorized - ramifications of that expression.
4. Free trade is hardly the greatest threat to Canadian sovereignty. It is insignificant compared to other, and not necessarily detrimental, pressures of conformity imposed by issues such as international environmental concerns and the increasing international focus on human rights, labor and other social policy issues.
5. Because the FTA and NAFTA are agreements between federal governments, to which Canadian, American and Mexican provincial and state governments are not parties, it is possible that the

[23] *Id.* at 235.

pressures of free trade will be less effective with respect to the exercise of sovereign powers by such governments.

Instead of looking at free trade as a threat to sovereignty, I see it as a potential impetus for progressive change. Whether any particular change represents a race to the bottom or to the top often depends on one's perspective. With industry's enhanced flexibility to do business throughout North America, individual jurisdictions will be more aware of what their counterparts are doing, and there is the likelihood that some creative cross-fertilization of ideas will be the result.