

# The Hollowing Out of Corporate Canada: Implications for Transnational Labor Law, Policy and Practice

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## INTRODUCTION

In the late 1990s, Jim Atleson and I taught parallel seminars on the effect of globalization on labor law, and arranged for our students—Canadians and Americans—to interact with each other. On one occasion, we set them to negotiating a collective agreement covering the North American auto industry. Students were assigned roles as the leaders or legal advisors of the U.S. and Canadian auto-workers' unions, and as executives or legal advisors of the American parent companies and their wholly-owned Canadian subsidiaries. We wanted them to comprehend the similarities and differences between the labor laws of our two countries, the difficulties of complying simultaneously with related but noncongruent legal regimes, and the conflicts of laws issues raised by applying domestic labor law to transnational relationships. We also wanted them to understand the problems posed not only by adversarial relations as between management and labor, but by serious divergences of interest and ideology within the ranks of each side.

They learned quickly. An e-mail sent by the American management team to its Canadian counterpart accused the latter of not role-playing in accordance with the assump-

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tions of the exercise. "You work for us," said the American team, "You are not supposed to take independent positions." With these dozen words, Jim's students provided important insights into the state of corporate Canada, the way in which corporate governance and structures influence human resources or industrial relations outcomes, and the prospects for transnational labor regulation. Perhaps they also revealed something about how these outcomes are shaped within each country.

Parenthetically, this was not just a case of life imitating art. In 1967, in defiance of a great deal of international and domestic law—and arguably the law of gravity—Chrysler Corporation and the United Auto Workers (UAW) signed just such a transnational collective agreement.<sup>1</sup> This reminds us that if we are to understand how transnational legal norms are established, enforced, and ultimately eviscerated, we have to look beyond legal texts at the structures, processes, and understandings of key actors, especially corporations.

### I. THE STATE OF CORPORATE CANADA

For better or worse, we are all of us linked on a food chain to corporations. The politics, prosperity, social well-being, and cultural life of Buffalo and Hamilton, Chicago and Toronto, Houston and Calgary, are very much defined by the nature, strength, and organization of their corporate communities. This is true in the obvious sense that corporations employ people, pay taxes, and contribute to local charities. It is also true in the less obvious sense that cities with head offices not only play a special role in the national and global economy, but generate a particular type of local prosperity and influence. Head offices generate a demand for accounting, advertising, design, financial, legal, and R & D services; and aggregations of these service providers in turn provide a market for high-end real estate, consumer goods, and culture. Conversely, the absence of head offices makes it very difficult to sustain any of the above.

Hence the phenomenon I have labeled "the hollowing

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1. David H. Blake, *Multi-National Corporation, International Union and International Collective Bargaining: A Case Study of the Political, Social and Economic Implications of the 1967 U.A.W.-Chrysler Agreement*, in *TRANSNATIONAL INDUSTRIAL RELATIONS* 137 (Hans Günter ed., 1972).

out of Corporate Canada”—the dwindling importance, affluence, and influence of the Canadian business community within the increasingly integrated economic space of North America.<sup>2</sup> Hollowing out has had a controversial history since I identified this phenomenon in the 1990s. Its very existence has been denied by several studies (the focus and/or methodologies of which were problematic, I would argue).<sup>3</sup> It has been welcomed as a sign that Canada is attracting foreign investment and adapting to the new realities of globalization.<sup>4</sup> It has been totally ignored by some (but not all) leading Canadian nationalists.<sup>5</sup> And it has been both applauded by bank presidents and influential business columnists, and damned by senior corporate executives and respectable economists.<sup>6</sup>

Hollowing out did not begin with the original Canada-U.S. Free Trade Agreement of 1989 or with the advent of

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2. Harry W. Arthurs, *The Hollowing Out of Corporate Canada?*, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 29 (Jane Jenson & Boaventura de Sousa Santos eds., 2000).

3. See, e.g., MICHAEL GRANT & MICHAEL BLOOM, CONFERENCE BOARD OF CANADA, “HOLLOWING OUT”—MYTH AND REALITY (2008); David Cavett-Goodwin, *The Hollowing Out of Corporate Canada—Quantitative vs. Qualitative Analysis* (Sept. 2008) (unpublished M.A. thesis, Carleton University) (on file with author).

4. See, e.g., DESMOND BECKSTEAD & W. MARK BROWN, STATISTICS CANADA, HEAD OFFICE EMPLOYMENT IN CANADA, 1999 TO 2005 (2006); John R. Baldwin & W. Mark Brown, *Foreign Multinationals and Head Office Employment in Canadian Manufacturing Firms* (Statistics Canada, Economic Analysis Research Paper Series Catalogue No. 11F0027MIE, No. 034, 2005); John R. Baldwin & Wulong Gu, *Global Links: Multinationals, Foreign Ownership and Productivity Growth in Canadian Manufacturing* (Statistics Canada, The Economy in Transition Series Catalogue No. 11-622-MIE, No. 009, 2005).

5. For example, the Council of Canadians has shown no interest in the issue. However, other nationalists have taken it up. See MEL HURTIG, *THE VANISHING COUNTRY: IS IT TOO LATE TO SAVE CANADA?* (2003); Mel Watkins, *Hollowing Out*, CAN. DIMENSIONS, Jan.-Feb. 2008, available at <http://canadiandimension.com/articles/2008/01/11/1526>.

6. Harry W. Arthurs, *Constitutionalizing Neo-Conservatism and Regional Economic Integration: TINA x 2*, in ROOM TO MANOEUVRE? GLOBALIZATION AND POLICY CONVERGENCE 17 (Tom Courchene ed., 1999); Daniel Schwanen, *Constitutionalizing Neo-Conservatism and Regional Economic Integration: Comments*, in ROOM TO MANOEUVRE? GLOBALIZATION AND POLICY CONVERGENCE, *supra*, at 75.

NAFTA in 1993,<sup>7</sup> though these treaties certainly accelerated and institutionalized the process. Rather, hollowing out is the result of six long-term trends, all driven by the logic of North American economic integration. First, the United States—now more than ever—is Canada's dominant source of investment capital, our only significant export market, and an influential supplier of ideas about government policy, business organization, legal practice, employment relations, and much else.<sup>8</sup> Second, over the years, many important Canadian enterprises have been sold to American-based transnational corporations (TNCs).<sup>9</sup> Third, American investors and businesses have been willing and able to expand into sectors of the Canadian economy where foreign ownership or participation was previously restricted or banned.<sup>10</sup> Fourth, many leading Canadian corporations have been moving significant management functions abroad, or reinventing themselves as American companies. Fifth, in several sectors, leading Canadian companies have been hiring senior managers from the United States, some of whom in effect manage by remote control, from their American home base. And finally, recent changes in the corporate strategy and structure of American transnationals have reduced the autonomy of their Canadian subsidiaries and the range and importance of the corporate functions they con-

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7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Canada-United States: Free-Trade Agreement, U.S.-Can., Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281.

8. The United States is Canada's primary export market, accounting for 78.97% of total Canadian exports in 2007, as opposed to the 2.84% accounted for by the United Kingdom, Canada's second highest export destination. The United States is also Canada's leading import source, with 54.21% of total imports originating in the United States in 2007, compared with 9.41% from China, the second highest import contributor. See Trade Data Online, [http://www.ic.gc.ca/sc\\_mrkti/tdst/tdo/tdo.php#tag](http://www.ic.gc.ca/sc_mrkti/tdst/tdo/tdo.php#tag) (last visited Apr. 12, 2009).

9. For instance, MacMillan Bloedel was purchased by Weyerhaeuser in 1999, Eaton's was sold to U.S. Sears, Roebuck and Co. in 2000, the Hudson's Bay Company was sold to Jerry Zucker, a U.S. investor, in 2006, and Stelco, the steel giant, was acquired by U.S. Steel in 2007.

10. For example, Cerberus, an American financial institution played a leading role in the recent abortive takeover of BCE Enterprises, Canada's leading telecommunications company. Jacquie McNish et al., *Cerberus Woos Shaw, CanWest in Bid for BCE*, GLOBE & MAIL, May 18, 2007, at B1. Airlines, banks, newspapers, and television companies have been sheltered by various means from American control.

duct in Canada.<sup>11</sup>

This last type of hollowing-out, though the least visible, has the potential to be the most influential, especially in the area of employment relations. Here is what seems to be happening: in order to achieve economies of scale, take advantage of new information technologies, and operate effectively in global markets, TNCs have moved to more closely integrate or control their various units. As a result, Canadian subsidiaries of American firms have been transformed. No longer are they semi-autonomous “miniature replicas” of the U.S. parent firm, producing a wide range of goods or services specifically for Canadian consumption.<sup>12</sup> Now, they are often assigned more specialized functions and narrower mandates, and produce for global or regional markets. No longer are they widely-held publicly-traded corporations listed on the Toronto Stock Exchange. Now they have become wholly-owned subsidiaries of their parent firm. Their previous high-profile Canadian boards have been disbanded. Now their Canadian executives have been stripped of much of their authority and autonomy, and often report directly to American line managers. And many corporate functions such as finance, advertising, and legal affairs have departed Canadian head offices. Now they reside at global head offices in Chicago or New York.

Consequently, the CEOs, senior executives, and IR/HR managers of Canadian subsidiaries no longer enjoy the status or power they once did. If they exist at all, they may lack the authority to make important decisions on their own; and if they retain that authority, they may find themselves working within a framework of company policies formulated abroad, and reporting to senior managers who have little familiarity with or concern for Canadian conditions. For those who believe that all corporate action is determined by a single inexorable logic of efficiency and profit, this change in the decision-making processes of Canadian subsidiaries is of no consequence. Whoever makes the decisions, wherever they are made, however they are formulated, they are bound to come out more or less the same. However, for those who believe that business decisions are

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11. See generally Arthurs, *supra* note 2.

12. See Isaiah A. Litvak, *The Marginalization of Corporate Canada*, BEHIND HEADLINES, Winter 2000-2001, at 1; Isaiah A. Litvak, *U.S. Multinationals: Repositioning the Canadian Subsidiary*, 3 BUS. CONTEMP. WORLD 111 (1990).

to some degree contingent, even contestable, then the structures and processes of corporate governance, and the identity and location of decision-makers, may indeed shape outcomes to a significant extent.

The hollowing out hypothesis obviously aligns with the latter view of corporate governance. The purpose of this Essay is to propose a number of hypotheses as to what hollowing out might imply for industrial relations and labor law in Canada and more generally. These hypotheses are, I confess, supported by only modest and often anecdotal evidence. Much more research is clearly needed.<sup>13</sup>

## II. TEN HYPOTHESES CONCERNING THE EFFECT OF HOLLOWING OUT ON CORPORATE BEHAVIOR<sup>14</sup>

*Hypothesis one:* Corporate behavior is determined not only by the impersonal logic of the market place, but by the way in which that logic is mediated by the understandings, assumptions, values, and interests of individual corporate decision-makers. These decision-makers—even when acting in text-book fashion to maximize the interests of the corporation—may well disagree amongst themselves about how to do so. Because of their differences and disagreements, it matters a great deal who has what influence on which decisions.

*Hypothesis two:* TNCs often have a national character that affects the outlook and analytical approach of their key decision-makers. This is true in several senses. TNCs have a national character because they are chartered by a particular country, and their governance structures are designed

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13. Several years ago I wrote the distinguished CEO of a Canadian bank congratulating him on his speech expressing great concern about the consequences of hollowing out and proposing that his bank should either provide funds to support research on the subject or undertake such research through its own research department. “More research” he replied, “would just confuse matters.” By contrast, for an exemplary effort to develop such evidence, see JACQUES BÉLANGER ET AL., *EMPLOYMENT PRACTICES IN MULTINATIONAL COMPANIES IN CANADA: BUILDING ORGANIZATIONAL CAPABILITIES & INSTITUTIONS FOR INNOVATION* (2006).

14. Some of these hypotheses about corporate governance have been explored in greater detail in Harry W. Arthurs & Claire Mummé, *From Governance to Political Economy: Insights from a Study of Relations Between Corporations and Workers*, 45 *OSGOODE HALL L.J.* 439 (2007).

to conform to (or avoid) its laws. Their dominant shareholders and creditors, core functions and facilities, and primary markets are often situated within that same country. Typically, many board members and key executives have been educated, recruited, and trained there as well. For all of these reasons, the political economy and business culture of that country tend to influence the way corporate actors see the world and react to it. Moreover, many of the principal providers of business services to TNCs—bankers, lawyers, consultants, advertising agencies, auditors—also tend to be located near the firm's head office, to have been brought up in the same business culture, and to share a similar worldview.

*Hypothesis three:* TNCs exercise considerable influence wherever they do business. They are obviously important economic actors. They invest money, raise capital, employ workers and managers, buy goods and services, and sell products. They are therefore also important political actors. They negotiate with host countries over the terms of their access to markets, and the outcomes of these negotiations ultimately depend upon or are translated into trade treaties, foreign ownership regulations, public procurement programs, and other public policies to which their own and foreign governments become formally committed. Moreover, TNCs expect host countries to ensure that their competition, environmental, and labor policies are business-friendly, to provide infrastructure and subsidies, and to legitimate business initiatives through symbolic and practical gestures. When other interests—such as those of labor—clash with the interests of business, TNCs expect host governments to mediate the clash, or to step aside and allow them to resolve the dispute on their own terms. Finally, as noted earlier, TNCs are important actors in civil society in both home and host countries: they shape urban skylines, provide funds for cultural institutions and universities, act as role models for employment and business practices, and contribute the time and influence of their officers and directors to civic causes.

*Hypothesis four:* The origin, governance structures, and internal policies of TNCs doing business in a given country or community are therefore important determinants of local economic health and social well-being. Obviously corporate structures and policies are not the only determinants: public policies, natural resources, soft and hard infrastructure, social and class relations, and geopolitical factors are impor-

tant as well.

*Hypothesis five:* Despite some management literature that foresees or proposes a contrary trend, TNCs have in fact been consolidating global control of their operations at head offices in their home country. Central control facilitates company-wide coordination of financing, production, distribution, technical innovation, and marketing strategies across all units of the business, rather than allowing each national subsidiary to conduct these according to its own idiosyncratic needs or preferences.

*Hypothesis six:* Consolidation of control within the TNC's head office is facilitated by the relative absence of geographic, cultural, linguistic, and legal-systemic barriers between central decision-makers and their foreign subsidiaries. American-based TNCs with Canadian subsidiaries encounter optimal conditions for consolidation.

*Hypothesis seven:* Consolidation of control, and other manifestations of hollowing out, have changed not only the site of corporate decision-making, but also its character and consequences. As a result, Canadian governments, unions, local businesses, and civic groups that must make arrangements with large and influential U.S.-based corporations find it more difficult not only to catch their attention, but also to persuade them to take account of Canadian law, policy, interests, or circumstances.

*Hypothesis eight:* The hollowing out of corporate Canada may have adverse effects on everyone connected to it on the food chain. Specifically, local providers of corporate support services—the financial services industry, large law firms, advertising firms, software designers, providers of industrial research, commercial real estate firms—confront declining markets for their services. And the “food chain” reaches right down to include construction workers who might have worked on high rise office towers that are never built, service workers in up-scale restaurants that are struggling for lack of business, and salespersons in luxury shops with a shrinking client base. The implications for local labor markets are serious indeed, especially in Canada's largest cities where once-significant head office populations dwindled considerably in the decade between 1985 and 1995, the high point of the hollowing out phenomenon.

*Hypothesis nine:* In principle, the hollowing out effect might be offset by the growth of indigenous Canadian TNCs, but this has not so far happened to any great extent.



There are relatively few Canadian-based TNCs of any significant size; nor are they more likely to appear any time soon. In fact to the contrary: hollowing out is likely to increase, not diminish.

*Hypothesis ten:* Because the world of work is largely regulated by “the law of the shop”—by the web of rule that emerges in every workplace—one might expect that changes in corporate structures and policies would become more immediately and dramatically manifest in that domain rather than in the domain of state law.<sup>15</sup> This is likely true not only in non-union workplaces, where management is the sole or dominant author of the law of the shop, but also in unionized workplaces where management is in principle only a joint author with the union.

### III. THE LONG-TERM EFFECTS OF HOLLOWING OUT ON INDUSTRIAL RELATIONS AND LABOR LAW

In common with their peers in most advanced countries, “right thinking” members of Canada’s elites—elected officials, civil servants, commentators, policy advisors, academics—have succumbed to “globalization of the mind.”<sup>16</sup> In particular, a transnational consensus has held (at least until recently) that deregulation of labor markets is essential for the promotion of competitiveness and general prosperity. While the specific modalities and outer limits of deregulation remain somewhat subject to debate, adherents of this consensus view generally accept that the power of unions should be curtailed, that labor standards should be made more flexible, that the cost of pensions and other social entitlements should be reduced, and that workforce discipline should be maintained.

Oddly, the idea that labor markets should be deregulated has gained widespread acceptance in parts of Canada’s “hollowed out” business community, even though Canada’s own experience suggests that collective bargaining and high labor standards pose little threat to its growth,

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15. See generally H.W. Arthurs, *Labour Law Without the State?*, 46 U. TORONTO L.J. 1 (1996).

16. H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J.L. & SOC’Y 219, 222 (1998).

efficiency, or competitiveness.<sup>17</sup> Indeed, there is considerable support in the same circles for the promotion of high performance workplace systems that provide expanded training opportunities for workers, compensation policies that reward good performance, and enhanced job satisfaction through the creation of quality circles and similar strategies of worker self-management.<sup>18</sup>

Why should the Canadian business community be so committed to deregulatory policies despite evidence favoring a contrary approach? In part, no doubt, it truly believes that deregulation is in its own best interest. In part, however, it has simply aligned itself with the dominant thinking at the American head offices to which its members report, and amongst its American customers, suppliers, and professional advisors. This alignment with the dominant assumptions of their American "relevant other" is nothing new for Canadians. Business people and unionists, professionals and professors have all borrowed frequently from American policy approaches and legislative models in the labor field. Notable examples include the Wagner Act, occupational health and safety laws, and laws against workplace discrimination and harassment. This is hardly surprising. Many leading IR/HR and labor law academics were educated at leading American graduate schools; much of what they read and some of what they write is published in American journals; Canadian labor scholars, courts, and boards frequently cite American cases, studies, and articles; many of our legal and IR/HR practitioners belong to American professional associations; much of their work involves American-owned companies and American-affiliated unions; and public understanding of Canada's political economy is significantly influenced by images and messages emanating from American media. The United States, to reiterate, is Canada's most relevant other.<sup>19</sup>

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17. See HARRY ARTHURS, FED. LAB. STANDARDS REV., FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY 251-66 (2006), available at [http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/fls/pdf/final\\_report.pdf](http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf).

18. The debate in the literature on high performance workplace systems is captured in BÉLANGER ET AL., *supra* note 13, at 41-44.

19. I have reviewed the historical evidence in H.W. Arthurs, *National Traditions in Labor Law Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL'Y J. 645 (2002).

Thus, in an era of deregulation, an era when labor's rights are being everywhere retrenched rather than enhanced, the wonder is not that the American example is influential in Canada, but that Canada has so far managed to maintain significant elements of its own mildly progressive labor law system. However, with our policy makers increasingly committed to the logic of globalization and regional integration, with our professional and academic establishments increasingly aligned with the United States, and with corporate Canada increasingly hollowed out, things may be changing. There are subtle and not so subtle pressures to reengineer our labor law and industrial relations systems so that they conform more closely to those of the United States. That, we are told, is what we will have to do if we wish to exploit our privileged location within the new North American economic space. Given Canada's heavy dependence on foreign—especially American—trade and investment, these are pressures that no government will lightly disregard.

Of course, the American model of deregulation is not the only model being offered in this age of globalization. Some commentators believe that a new transformative labor law is emerging, based on universal human rights and core labor rights, and firmly embedded in the deep structures of international and transnational law.<sup>20</sup> They argue, indeed, that the promulgation of broad aspirational standards by United Nations agencies such as the International Labour Organization, or in regional covenants such as the European Convention on Human Rights, represents our last best hope for social justice in a globalized world.<sup>21</sup> Others contend that, by focusing on the development of a body of “soft” labor law, by promoting best practice by corporations and encouraging them to undertake responsible self-regulation, by engaging the moral conscience and market power of international civil society, we will somehow make the world

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20. See, e.g., ROY J. ADAMS, *LABOUR LEFT OUT: CANADA'S FAILURE TO PROTECT AND PROMOTE COLLECTIVE BARGAINING AS A HUMAN RIGHT* (2006); James Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PENN. J. LAB. & EMP. L. 479 (2002); Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 61, 61-84 (2005).

21. See Macklem, *supra* note 20.

safe for workers.<sup>22</sup>

These two approaches are closely related in one respect. Given the relative weakness of transnational unions and social movements,<sup>23</sup> and the virtual absence of international institutions with democratic accountability, legislative capacity, and enforcement powers, the international approach seems to depend largely on corporations voluntarily bringing themselves into compliance with international labor standards. Is this a fatal flaw? Will global corporations of their own volition or under threat of moral censure stop insisting on deregulated labor markets, stop lowering their labor costs by out-sourcing and off-shoring work, and stop “union-proofing” their employees? I am doubtful that voluntary initiatives will ultimately bring fairness to the world’s workers—or indeed that they should.<sup>24</sup> But more to the point, even if self-regulation by employers was desirable and efficacious, Canada would still confront a serious problem: many decision-makers with the ultimate authority to modify corporate IR/HR policies and actions within Canada are located outside the country.

I conclude, then, that until effective and accountable transnational or international labor regimes begin to emerge, or until employers voluntarily adopt more worker-friendly practices, Canada will have to make labor policy and administer labor laws using its old, imperfect domestic institutions and processes. The serious limitations of these institutions and processes—given continental integration and hollowing out—are what I will explore next. I will do this by means of two scenarios.

The first has to do with efforts to persuade TNCs to create or retain jobs in Canada. Negotiations concerning the

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22. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, (Feb. 23, 2000), <http://www2.law.columbia.edu/sabel/papers/ratchPO.html>.

23. See James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004).

24. See Harry W. Arthurs, *Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* (Joanne Conaghan et al. eds., 2001), reprinted in *ETHICS CODES, CORPORATIONS AND THE CHALLENGES OF GLOBALIZATION* (Wesley Cragg ed., 2005).

provision of infrastructure improvements, loan guarantees, training grants, or other incentives might once have been conducted between Canadian government officials and the locally-based CEO of its subsidiary. The CEO in turn would have reported to a Canadian board of directors comprising influential Canadian bankers, lawyers, and investors. While no doubt significant investment decisions would have been subject to the approval of the parent company, the Canadian CEO and board would have been influential proponents of the proposed Canadian operation. Now, however, the Canadian boards of many U.S.-based subsidiaries have been effectively filled with mere placeholders and their CEOs generally enjoy much-diminished autonomy.<sup>25</sup> As a result, the proposed Canadian plant enjoys no particular advantage when the TNC's global board weighs up alternative sites in, say, Kentucky or China. To be sure, decisions about opening or closing plants are largely driven by considerations of business advantage; but at least at the margins those decisions are the outcome of complex and dynamic negotiations within and outside the company—negotiations in which the absence of influential Canadian voices represents a likely disadvantage.

How do new investment and plant closing decisions affect labor relations? On the one hand, large scale shifts in investment patterns obviously affect the overall Canadian labor market and therefore the aggregate power of Canadian unions and the wage levels of Canadian workers. This became evident in the late 1980s to early 1990s, when following the initiation of the original Canada-U.S. Free Trade Agreement, Ontario—the manufacturing heartland of Canada—lost some 230,000 manufacturing jobs;<sup>26</sup> and it has become evident again during the past decade, with over 250,000 jobs lost so far,<sup>27</sup> and many more losses in prospect.

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25. See Arthurs, *supra* note 2.

26. STATISTICS CANADA, CANSIM, tbl.282-0008, LABOUR FORCE SURVEY ESTIMATES (LFS), BY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS), <http://estat.statcan.ca> (search “E-STAT” for “282-0008”; then narrow fields to “Ontario,” “Employment,” “Manufacturing,” “Both sexes,” “15 years and over,” “1988” to “1993”).

27. An analysis of Canada's labour force statistics by Erin Weir of the Progressive Economics Forum puts Ontario manufacturing job loss between November 2002 and November 2008 at 250,800 jobs—a decline of 22.5%. Posting of Erin Weir to The Progressive Economics Forum, *Ontario's Manufacturing Crisis*, <http://www.progressive-economics.ca/2008/12/11/ontario->

On the other, at the level of the individual firm, unions and workers now know that having a positive relationship with local management may not mean very much, given that crucial decisions are going to be taken by distant decision makers at the U.S. head office with little or no Canadian input. That knowledge makes workers nervous. Sometimes they react by becoming quiescent; sometimes they become militant; but in either event, the shift in the locus of corporate decision making may alter the labor-management dynamic quite significantly.

My second scenario has to do with the way Canadian labor law is made. Until the 1990s, labor legislation—in Ontario at least—was generally enacted after careful study by experts and the search for consensus amongst government, management, and labor stakeholders. However, with continental integration there is no longer much call for distinctive Canadian expertise; and with hollowing out, there is no longer much of a management community to consense with. Moreover, with the growing risk of disinvestment, labor has lost much of its ability to influence public policy; and with labor's declining influence, Canadian governments have largely lost their appetite for progressive labor legislation. Worse yet, governments have even sought to overcome the effects of labor board decisions unfavorable to TNCs by enacting legislation to retroactively undo their effects<sup>28</sup> or by marginally less blatant strategies such as directing labor boards to reach different decisions, purging them of recalcitrant members, or stripping them of resources and powers.<sup>29</sup>

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manufacturing-crisis/ (Dec. 11, 2008). Indeed, from November 2007 to May 2008, employment dropped by 8.3% in this sector. See STATISTICS CANADA, *supra* note 26, at tbl.282-0088. Andrew Jackson suggests that in November 2008 alone, Ontario lost 42,000 manufacturing jobs. Posting of Andrew Jackson to The Progressive Economics Forum, *Ontario Falls Off a Cliff*, <http://www.progressive-economics.ca/2008/12/05/ontario-falls-off-a-cliff/> (Dec. 5, 2008); see also CENSUS SNAPSHOT: CANADA'S CHANGING LABOUR FORCE, 2006 CENSUS, CANADIAN SOC. TRENDS, (2008), available at <http://www.statcan.gc.ca/pub/11-008-x/2008001/article/10575-eng.pdf>.

28. The practice is not frequent, but for two well-documented instances see Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 524-42 (1981), and Eric Tucker, *Wal-Mart and the Remaking of Ontario Labour Law*, INT'L UNION RTS., vol. 2, issue 2, 2005, at 10.

29. Harry Arthurs, *Who's Afraid of Globalization? Reflections on the Future of Labour Law*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 51, 58 (John D.R. Craig & S. Michael Lynk eds., 2006).

Thus, hollowing out attributable to continental economic integration and changes in the governance structures of TNCs appears to have altered the content and administration of Canadian labor law, as well as the means by which it is made and, ultimately, its symbolic and practical effects.

Finally, changes in the corporate structure of TNCs may affect labor-management relations in the workplaces of their Canadian subsidiaries. Given the diminished corporate autonomy of those subsidiaries, many of them are managed locally by senior executives who are posted to Canada for fairly short periods, and then reassigned to other countries or to a more senior position at the international head office. In some cases, these executives arrive in Canada with specific orders to cut costs, resist unionization, or institute working practices, without regard to Canadian law or local custom.<sup>30</sup> In many others, they arrive with little feel for the dynamic of Canadian labor relations, labor law, or local shop-floor practices. In either case, it seems probable that transient executives with no local experience and no prospects of a long-term career in Canada are less likely to internalize the values of Canada's industrial relations and labor law systems than senior corporate officials who reside more or less permanently in Canada.<sup>31</sup>

As I have already indicated, these values are somewhat different from American values. There is a greater acceptance of collective bargaining in Canada, for example, which arguably might shape the strategies Canadian-based managers adopt during organizing campaigns, the way they behave at the bargaining table, their reaction to strikes, and what they say to the media about unions.<sup>32</sup> Different values are also deeply embedded in the legal structures and doctrines of our two countries. Take the default position con-

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30. It is by no means unknown for foreign-based TNCs to send executives or lawyers from their head office to Canada to deal with labor disputes over the heads of local management. See, e.g., *United Steelworkers of Am. v. Radio Shack*, [1980] 1 Can. L.R.B.R. 99; *United Steelworkers of Am. v. Wal-Mart Can. Inc.*, [1997] O.L.R.B. Jan.-Feb. 141 (Can.).

31. See BÉLANGER ET AL., *supra* note 13, at 46-48.

32. See, e.g., John Logan, *How "Anti-Union" Laws Saved Canadian Labour: Certification and Striker Replacements in Post-War Industrial Relations*, 57 RELATIONS INDUSTRIELLES / INDUS. REL. 129 (2002) (Can.). But see Ishak Saporta & Bryan Lincoln, *Managers' and Workers' Attitudes Toward Unions in the U.S. and Canada*, 50 RELATIONS INDUSTRIELLES / INDUS. REL. 550 (1995) (Can.).

cerning contracts of employment. In the United States, people are presumed to be employed at will; in Canada, they cannot be dismissed without reasonable notice.<sup>33</sup> These baseline positions must surely affect hiring practices and HR policies, and perhaps as well the attitudes of Canadian workers towards job security.

To be fair, evidence on this point is somewhat equivocal. On the one hand, it is widely believed that when Canadian firms are taken over by American TNCs, acquire American-based managers, or fall more directly under the control of their American parent firm, labor-management relations tend to deteriorate. On the other, some evidence suggests that American-based head office managers seldom intervene directly in routine IR/HR functions at their Canadian branch plants. How to reconcile these two observations? One possibility is that a mandate from head office to improve the subsidiary's "bottom line" will generate sufficient pressure on local management that no more explicit forms of intervention are required: local managers know that to achieve their financial objectives, they must adopt leaner staffing policies, sterner work practices, and tougher bargaining positions. Another is that local managers are carefully trained to adhere to the IR/HR philosophy of the American parent firm—including, all too often, union avoidance; that they are provided with detailed "scripts" they must follow if unions appear; that they are suitably rewarded for adhering to the parent firm's philosophy; and that consequently there is no need for more intrusive action by head office. A third is that while head office intervention is unlikely in routine matters, it is much more so when labor difficulties in Canada have the potential to engender a crisis, set a precedent, or incur financial costs that would affect American operations. Whatever the explanation, it is entirely plausible that hollowing out may contribute to, and in some cases directly cause, the convergence of IR/HR policies and practices as between the parent TNC and its Canadian subsidiary.

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33. See Roy J. Adams et al., *Discipline and Discharge in Canada and the United States*, 41 LAB. L.J. 596 (1990); Randall Scott Echlin, *From Master and Servant to Bardal and Beyond: 200 Years of Employment Law in Ontario, 1807-2007*, ADVOCATES' SOC'Y J., Winter 2007, at 11; Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-35 (1976).



But “plausible” is not the same as “proven.” We need to know much more about how American subsidiaries in Canada organize their IR/HR functions, how much autonomy they allow to their locally-based managers, how they respond to advice from local professional advisors,<sup>34</sup> and how these arrangements actually affect workplace relations.

#### IV. THE FUTURE OF HOLLOWING OUT: FORCES WORKING AGAINST FURTHER INTEGRATION OF CANADIAN AND AMERICAN LABOR LAW

However, even if research confirms my hypothesis—that the hollowing out of corporate Canada generates pressures that are changing Canadian IR/HR practices and Canadian labor law—it does not follow inevitably that Canadian workplaces will become indistinguishable from those in the United States. The forces of continental integration are not the only forces at work. Contrary tendencies can be detected as well.

The first of these is growing ambivalence within Canada corporate elites concerning the advantages of hollowing out. While continuing to acknowledge the benefits of globalization and North American integration, some business and financial leaders have begun to realize that the new dispensation may have disadvantages as well. The comparative advantage they derive from their Canadian knowledge and connections may be a wasting asset; their proposals for significant Canada-based business initiatives are sometimes given short shrift by U.S. head offices or U.S. investors; and they may not welcome the prospect of having to relocate to the United States in order to build their businesses or advance their careers. The extent and intensity of this sentiment are not yet clear; nor is it clear what, if anything, those who share it might do to change their situation.

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34. For a study of the role played by labor lawyers in advising their TNC clients in Canada and other countries, see Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transitional Regime of Labour Law*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* 273 (Richard P. Appelbaum et al. eds., 2001) (this author notes that “Transitional” should be “Transnational”). For a different perspective, see Susan Bisom-Rapp, *Exceeding our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 *COMP. LAB. L. & POL'Y J.* 257 (2004).

One option would be for the business community to renew the implicit Canadian social contract of the 1950s and 1960s. This contract, in effect, helped Canadian business by providing decent infrastructure and ensuring a positive social environment, while protecting it from foreign competition or—in the case of the automobile industry—managing trade so as to ensure favorable terms for both Canadian companies and subsidiaries of foreign firms operating in Canada.<sup>35</sup> In exchange, workers received the benefits of a welfare state, and of reasonably robust labor legislation.

This arrangement worked to the mutual advantage of labor and management and for the general good as well. Canada's universal, publicly-funded health care system relieved auto manufacturers of the significant financial burden of providing private health insurance to their unionized Canadian workers; and Canada's strong public education systems produced well-educated workers who could be trained at lower cost and would achieve higher productivity than their U.S. counterparts. As a result, despite the fact that the Canadian Auto Workers secured collective agreements that were often more favorable than those negotiated by its American counterpart, the UAW, Ontario for some years produced more automobiles than any American state. (That distinction has recently passed to Mexico.) However, while renewal of this social contract might conceivably preserve or restore Canada's competitive advantage,<sup>36</sup> and resuscitate its business community, it is not being seriously advocated by leading elements of that community.

Another force working against further hollowing out in Canada, and further convergence of U.S. and Canadian labor policies and practices, is that American business has been revealed as suffering from serious structural weakness, and American government from a failure of regulatory

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35. For matters relating to the implementation of the Agreement Concerning Automotive Products, see 19 U.S.C. § 2011 (2006). *See also* PRADEEP KUMAR & JOHN HOLMES, CHANGE, BUT IN WHAT DIRECTION? DIVERGENT UNION RESPONSES TO WORK RESTRUCTURING IN THE INTEGRATED NORTH AMERICAN AUTO INDUSTRY (1993); Pradeep Kumar & John Holmes, *Continuity and Change: Evolving Human Resource Policies and Practices in the Canadian Automobile Industry*, QUEEN'S PAPERS INDUS. REL. [Q.P.I.R.] 1 (1996) (Can.).

36. *See* ARTHURS, *supra* note 17. For a review of the literature, see Bernard Adell, On Paradigms and Platforms: Approaches to Regulating Labour Standards in the New Economy (2006) (unpublished study) (on file with author).

imagination and performance. These compounding crises have produced several effects. The first is that for fear of importing America's severe difficulties, Canadians may become less susceptible to "globalization of the mind" which, as I earlier suggested, has often predisposed them to the views of their neo-liberal American counterparts. The second is that with the advent of a new administration in Washington, America's labor and social policies may come to more closely resemble those of Canada.<sup>37</sup> That is certainly the hope and expectation of many of supporters of President Obama and the Democratic Party. At a minimum, in light of recent experience, America's long-running experiment in the deregulation of labor and other markets is unlikely to continue. And the third is that recent American domestic crises, coupled with ongoing security concerns and nativist anti-immigrant sentiment, have led to a thickening of the Canada-U.S. border, and to increased resistance by significant elements in the United States to the easy movement of people, goods, and services across that border—all of which are likely to interfere with continental economic integration.

If indeed this latter prediction holds true, American protectionism might well lead to a diminished presence of U.S.-based TNCs in Canada. This would reverse the effects of the hollowing out of corporate Canada, and leave a greater proportion of Canadian employers and their workers with the opportunity to resolve their differences free from head office control and American influence, and in accordance with Canadian laws, practices, and values. However, they would likely be doing so in the shadow of dramatic restructuring of a Canadian economy struggling to cope with the withdrawal of American capital, diminished availability of American trade secrets and technology, and reduced access to American markets. These would not be optimal conditions in which to attempt to reestablish Canada's postwar

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37. Compare Michele Campolieti et al., *Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada*, 61 *INDUS. & LAB. REL. REV.* 32 (2007), with Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 *FORDHAM URB. L.J.* 247 (2008), and Meghan Brooke Phillips, *Using the Employee Free Choice Act as Duct Tape: How Both Active and Passive Deregulation of Labor Law Make the EFCA an Improper Mechanism for Remediating Working Class Americans' Problems*, 111 *W. VA. L. REV.* 219 (2008), and James Gray Pope et al., *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers' Rights*, 11 *J. LAB. & SOC'Y* 125 (2008).

social contract.

A final counter-tendency to hollowing out is rooted in the dawning recognition by the “defiant publics” of many countries—those of Canada and the United States included—that a “hollowed out” world in which corporations are everywhere present, but nowhere accountable, is a world fraught with dangers.<sup>38</sup> Jim Atleson’s *Voyage of the Neptune Jade* is an example of how “defiant” working people might somehow be able to reach across national boundaries and beyond national law in order to act in solidarity to defend themselves against such dangers.<sup>39</sup> On the other hand, solidaristic action is difficult to sustain across space and time, as Atleson acknowledges. Workers in different countries have competing, as well as complementary, interests; “defiant publics” may become quiescent unless they can translate their critique of the *status quo* into a positive, long-term program of social and economic reform. What is needed, then, is not just solidarity, not just defiance, but a new regulatory architecture. And that architecture will somehow have to acknowledge the unique and consequential structure of TNCs, the actors whose conduct it would be primarily designed to constrain.

#### CONCLUSION

Seen in light of these counter-tendencies, the “hollowing out of corporate Canada” turns out to be neither about a particular Canadian problem, nor about the way in which TNCs govern themselves, nor even about the possible effects of corporate governance on labor law, policy, and practice. It is a phenomenon that confronts all advanced economies, that implicates public as well as private governance, and that affects all social and economic relations, not just those unique to the workplace. In short, to borrow Atleson’s phrase, the “values and assumptions” of Canadian labor law are embedded in the foundations of contemporary American capitalism and secreted in the DNA of U.S.-based transnational corporations, its unique institutional expression and most powerful agents. Those assumptions are therefore vulnerable to destabilization by the traumatic changes that

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38. See DANIEL DRACHE, *DEFIANT PUBLICS: THE UNPRECEDENTED REACH OF THE GLOBAL CITIZEN* (2008).

39. Atleson, *supra* note 23.

that form of capitalism and those corporations are now experiencing.