



Canadian Labour Congress

Congrès du travail du Canada

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Labour Side Deals – Little Evidence of Binding Rights for Workers

In 1993 the Canadian Labour Congress stated that “the NAFTA side-deal changes nothing for workers”. At that time, the three signatories of the North American Free Trade Agreement (NAFTA) adopted an add-on called the North American Agreement on Labour Cooperation (NAALC) – the “labour side-deal” – which was largely cosmetic and intended to distract workers from the real impacts of corporate driven trade and investment in North America. In fact, the CLC said, the side-deal would do nothing to save Canadian jobs or to protect labour rights and standards in any of the three countries. History has proved us right.

In the 15 years of life of the NAALC, not one claim of labour rights violations in Canada, the US or Mexico has proceeded to an arbitration panel or sanctions; all have ended with bureaucratic consultations between ministries of labour. The CLC strongly agrees with the statement of the Canadian Association of Labour Lawyers (CALL) that “trade agreements are not written to improve labour standards and there is little evidence that such agreements can become vehicles for the enforcement of labour rights.”

The flaws in NAFTA were recognized by then Senators Barack Obama and Hilary Clinton, both contenders for the Democratic presidential candidacy for the 2008 US elections. Both campaigned on the need to “fix” NAFTA by incorporating labour and environmental provisions into the body of the main text of the agreement. On the campaign trail, Senator Obama said:

"We must add binding obligations to the NAFTA agreement to protect the right to collective bargaining and other core labor standards recognized by the International Labor Organization. Similarly we must add binding environmental standards so that companies from one country cannot gain an economic advantage by destroying the environment. And we should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors."

These promises remain unfulfilled.

In 2007, after a hiatus in Canadian trade negotiations, the Conservative government resumed negotiating NAFTA-style free trade agreements with a number of countries, primarily, but not only in the Americas beginning with Peru and Colombia. Stephen Harper subsequently signed both of these FTAs as well as one with Panama. The Canada-Peru FTA has been ratified by Parliament and is operational.

All Canadian trade negotiations include parallel agreements on labour and the environment. The labour side deals are called Labour Cooperation Agreements (LCA's). The first generation of LCAs were included in the North American, Canada-Chile and Canada-Costa Rica FTAs. The second generation LCAs, parallel to the FTAs with Peru, Colombia and Panama include some changes.

The CLC's critique of the labour provisions of first generation LCA (NAFTA, Chile, Costa Rica) was based on the following facts:

1. The labour provisions are found in side agreements rather than in the body of trade rules thus relegating them to secondary importance;
2. The agreements focus on the enforcement of existing domestic labour laws rather than on *raising* labour standards in the free trade jurisdictions;
3. The dispute resolution mechanisms (process of complaints) are slow, cumbersome, lack transparency and are based on a model of political cooperation and therefore depend on the discretion of the signatory bureaucracies rather than independent judicial or semi-judicial bodies;
4. But most importantly, in stark contrast to the rules established for investor rights, the agreements provide no reasonable possibility of trade sanctions, imposition of countervailing duties or the abrogation of preferential trade status in the event that one of the parties commits a violation of labour rights or standards.

On Canada's *second generation* LCAs (Peru, Colombia, Panama), the Canadian Association of Labour Lawyers (CALL) states: "While some improvements have been made in the Canada-Colombia agreement, the essential structure of the labour clauses found in previous trade agreements remains largely unchanged."

The *main text* of the recent deals now includes a brief Labour Chapter, which reminds the parties' of their obligations as members of the International Labour Organization (ILO) and their commitments to the ILO Declaration on Fundamental Principles and Rights at Work (1998). Parties must enforce their own labour laws. But the *substance* of the labour rights and obligations are still found in the LCA - *the side deal*.

One positive change from first to second generation LCAs is that the latter contain a common set of minimum rights and standards taken from the ILO declaration and requires the signatories to ensure that its statutes comply with ILO standards (an obligation that the parties already have as a result of their membership in the ILO.) However, a party is only prohibited from violating these ILO standards in circumstances where it can be established that the violation was an encouragement to trade or investment. Moreover, any labour rights violation in any non-trade-related sector of the economy (the large majority) may not be taken to a review panel under the agreement. Any impact or benefit the agreement could, therefore, have on enforcement of labour rights is substantially limited.

Another change is that should a complaint go through the long process of submission, acceptance, review, Ministerial consultation, review panel, etc. and the offender still refuses to comply with the report, the panel may impose *a fine of not more than \$15 million annually*, paid into a fund for cooperative activities such as workshops, conferences, etc. This is the only penalty for labour rights violations under the agreement and puts labour rights violations in a minor legal category of misdemeanour.

To put this measure into perspective, in September 2009, the Government of Mexico was ordered to pay US\$240 million plus interest to U.S. agricultural giant Cargill, Inc. as sanctions for breaching protections owed under Chapter 11 of NAFTA – the investment chapter.

The CLC has studied the new side-deal texts in-depth with the labour movements of Colombia and Peru with a view to determining the potential impacts on the labour environments in our countries. We have reached the following shared conclusions: although the new side-deals contain greater substantive labour rights than previous Canadian FTAs, they are still not binding in the same way that investor rights are. The adjudication procedure continues to be dependent on governments instead of independent bodies and does not establish effective sanctions for non-compliance.

The second generation side-deals, as found in Canada's trade deals with Colombia, Peru and Panama, do not provide enforceable rights for workers in any of the countries affected. The CLC will continue to advocate for a different regime for labour rights enforcement in our own and trading partner countries. This requires a fundamental re-thinking of the outdated NAFTA model of trade and investment agreements that serve to perpetuate the problems with the failed neo-liberal policies of the past.