



# THE HARPER RECORD

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# Continuity and Change<sup>1</sup>

*Canadian Trade and Investment Policy, 2006–08*

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WHEN THE CONSERVATIVE party came to power in February 2006, the multilateral trade system was in trouble. A series of high-profile collapses in global negotiations had signalled the beginning of an era of significant dysfunction and stalemate. The December 2005 World Trade Organization (WTO) Ministerial in Hong Kong had breathed new life into global trade talks, but it was to be short-lived. The much touted Doha Development Agenda was headed for its rockiest years yet. Indeed, the Conservative government has helmed Canada's trade agenda in the most serious years of crisis in the multilateral trade system. But this system, whose health is vital to Canada's interests, has not been the government's top priority.

The Conservative government has shifted Canadian attention to the pursuit of bilateral trade deals as part of a controversial trend forged by many other industrial powers. In addition to significant updating of the NAFTA framework, Canada has put particular emphasis for its bilateral strategy on the Americas as part of a new "neighbourhood" focus in foreign policy announced by Prime Minister Stephen Harper.

This chapter provides some critical reflection of Canadian trade and investment policies in 2006–08 from the perspective of Canada's development efforts to reduce poverty and protect human rights. What is the Canadian government's orientation to the WTO's ill-fated

Development Round? What can be gleaned from the pursuit of new bilateral agreements?<sup>2</sup> While much of this trade and investment agenda has been a constant in Canadian policy, there are new characteristics in the Harper era that should be examined. Given the reception of this agenda from civil society and Parliament, it is clear that trade and investment issues remain highly contested terrain and a likely flash-point for years to come on the Canadian public agenda.

### **Sidelined and subverting: Canada at the wTO**

#### *The Doha Development Agenda — What context for Canada?*

Launched in November 2001, in the context of global “togetherness” pressure after September 11, the Doha Development Agenda committed wTO members to put the needs of developing countries at the heart of global trade rules. This commitment came barely a year after the Millennium Summit at which the world’s governments pledged to reduce by half the proportion of people living in poverty by 2015. Developing countries, though not monolithic in their interests, were united in the need for significant reform in global trade rules to enable the achievement of development goals.

There was strong and widespread criticism of the net impact for developing countries of the previous Uruguay Round of wTO talks. Promised market access to Northern markets was illusory or delayed in agriculture and textiles, while the costs and development implications of new rules, for example to raise intellectual property standards and liberalize trade in services, were severe. The poorest countries had experienced declining shares of global trade, the haemorrhaging of prices for their exports, an onslaught of subsidized goods from wealthy countries that swamped local producers, and rising levels of poverty and inequity. As a result, business as usual was not on the menu for the South in the Doha Round.

In rough, Southern countries have expected not only a major re-balancing of global rules, but the creation of new arrangements to address the special constraints of developing economies. Developing countries have also been adamant that the wTO not expand its scope to create

new trade disciplines in areas such as government procurement, investment and competition.

The geo-political distribution of power in the global economy has also made for a new ball game. Brazil, India, South Africa, and other industrializing developing countries have significant clout and are no longer “policy takers.” Indeed the famous walkout of the Africa Group and others from WTO talks in Seattle in 1999 proved to be an early foreshadowing of the rocky ride ahead for the Doha talks. Though many developing countries clearly wield little negotiating power on their own, a plethora of new negotiating groupings that have developed over the course of the Doha talks have built creative and surprisingly resilient solidarity among Southern blocks.<sup>3</sup>

For its part, the Canadian government has seen its negotiating position marginalized in this new round, as bigger economies have commanded the front row seats. Canada went from being an actor in the heart of “the Quad” in the Uruguay Round to a spectator on the sidelines of the so-called Five Interested Parties (FIP) process, (India, Brazil, the E.U., U.S., and Australia). The “FIP” emerged as the power-brokering hub of the WTO after the Cancun Ministerial collapse of 2003. The FIP eventually accepted Japan into the fold, becoming the G-6, which continues its power hub role today.

### *Demise of the Development Agenda*

Any cautious expectations that existed at the launch of the Doha round that Northern countries would make space for a new pro-equity agenda in global trade rules have been woefully un-met. Significant Southern proposals to address development issues in trade rules been dismissed or attacked. And, with a few exceptions, the direction of negotiations across the three “pillars” of agriculture, industrial tariffs and services is distinctly *anti*-developmental.

There has been an excessive focus on generating new market access for Northern corporations into large developing country economies, unabashedly often described as the price to be paid for any minor scaling-back in unfair Northern trade practices. Pressures to open developing country borders would force weaker but vital developing industries to

“compete” with global corporate giants, while marginalized sectors of society would be exposed to increased price volatility.

Instructively, many Southern governments have also oriented their demands towards market access concessions for their products in the North. Limited political energy has gone to consideration of a trade framework that would enable all governments to meet their obligations to ensure decent work, address food insecurity and climate change, and reduce poverty. In short, the Doha “Development Round” has become a business-as-usual WTO trade round.

Most independent analyses have either drastically scaled back projections of poverty reduction gains from the Doha round or predict that the lion’s share of gains will flow to the developed world, while the majority in Africa and low-income countries will actually be made worse off.<sup>4</sup> So much for the development agenda.

Canada’s approach to the Doha Agenda, set under the previous Liberal government, has not changed much in recent years. “Development” has been rather narrowly cast as a question of time and money. That is, longer time frames for developing countries to hurry up and liberalize, and a rather disingenuous use of aid and technical assistance as a “development measure” to help developing countries adapt to trade rules not of their making.<sup>5</sup> Indeed, despite our successful experience as a mixed economy — partly open, partly closed, with a healthy role for government and public regulation to address market inadequacies — successive Canadian governments have advocated a more dogmatically open-border, market-based approach to development in trade rules.

#### *Old wine and old bottles: Canada’s WTO agenda since 2006*

As the Conservative party took power in 2006, trade negotiators were still basking in the success — from their view — of rescuing the WTO Hong Kong Ministerial from collapse. The celebration was short-lived. Within six months, WTO Director General Pascal Lamy would announce the suspension of the Doha talks, given the complete standoff in the negotiating positions of the G-6. Although negotiations would officially resume the following year, the period since Hong Kong has been marked more by stop than by go. Two years of any-minute-now progress and breakthroughs have left a wake of missed deadlines, pro-

tracted negotiating stalemates, and failed Mini-Ministerials, including most recently in July of 2008. The lack of a full WTO Ministerial in December 2007 was the first missed biennial Ministerial since the WTO was created in 1995.<sup>6</sup>

In effect, the Doha Development Agenda is dead. Whatever deal may eventually come out of these protracted negotiations (and it is not a sure thing that one will), it will not have the scope that any party originally intended. Developing countries in their new strength and sophistication have been able to prevent many of the agendas to which they are opposed, without, however, being able to achieve very much of their own.

Although Canada has reduced political clout at the WTO, the Canadian government (with little distinction in the transition from Liberal to Conservative stewardship) has been an active participant in corroding the developmental prospects for the Round. In agriculture, Canada has joined a handful of countries aiming to weaken tools for developing countries to safeguard food security and shield millions of small farmers from being undercut by cheap or dumped products.

In the NAMA (Non-Agricultural Market Access) negotiations on industrial tariffs, Canada has sought an aggressive formula for market access that would hit developing countries disproportionately hard. As the chair of the NAMA negotiations from 2006 thru 2008, Canada came under fire from developing countries and southern analysts, who charged that draft texts were poorly crafted and biased, disregarding previously negotiated commitments to the South.<sup>7</sup> In the services negotiations, Canada has pushed for an aggressive liberalization approach, while not defending the right of all governments to pursue regulation of services in the public interest.

Canadian civil society and producer groups have also voiced strong concerns that Canada is not effectively containing threats in WTO rules to our own domestic public interest. For example, aspects of the services negotiations threaten the ability to maintain effective and well-regulated public services, while key tenets of the Canadian agricultural system, notably supply management, are directly targeted by the liberalization drive of WTO talks. Ironically, after years of successful defences of the Canadian Wheat Board (CWB) before WTO panels, the Conservative

government has now distinguished itself through its election commitment to undo the Board's monopoly powers. If implemented, this would sound the death knell on a vital institution that increases farmers' power in highly concentrated corporate markets.<sup>8</sup>

Importantly, the past few years have seen a growing debate and challenge to the WTO's agenda — both within developing country government caucuses and among citizen movements around the world. Clear messages have been sent, to capitals and Geneva-based ambassadors, of the political costs at home for bad performance abroad. Citizens have mobilized nationally and globally, given the profound impacts of binding neoliberal trade and investment rules on lives, livelihoods, and the environment. Demands have grown for more consideration and debate of the public interest as it relates to the trade and investment regime, and for more accountability in policy agendas linked to States' binding obligations to human rights and the environment. There is a growing push for multilateral trade rules to provide more policy space for governments to discuss and decide appropriate development strategies with their own citizens as a matter of democratic practice.

How did the Harper government approach this era of heightened citizen expectations and profound illness at the WTO? Canada remains rhetorically committed to the multilateral trade system and still uses its institutions to defend Canadian interests. Indeed, the WTO has been a pillar of Canadian trade strategy as a middle power that is highly dependent on trade but with limited scope for direct influence on our largest trading partner. Canada's 2007 WTO challenge of U.S. corn subsidies was cheered and then joined by Brazil, Argentina, and many other countries. But, while lamenting the WTO stalemate, Canada has displayed no interest in any significant re-think of our approach to multilateral trade policy.

Canada has essentially fiddled while the WTO burns. No consideration has been given to the possibilities of new allies and shared interests with the South's development agenda.<sup>9</sup> There has been no push for fundamental institutional reform of the WTO, let alone creative thinking about multilateral trade policy that might better meet our legal obligations to human rights standards and citizens expectations for an inter-

national agenda that promotes equity and safeguards health and the environment.

Keeping familiar wine in familiar bottles, the Harper government even asked David Emerson, the previous Liberal Trade Minister, to cross the floor and join the Conservative cabinet to continue leading Canada's trade agenda. Canadian voters, not least of all in Vancouver Kingsway who thought they voted Liberal, were shocked at this sacrifice of democratic principle. But it displayed a kind of pragmatism in Canadian trade policy that would be echoed by the Conservative government in the ensuing years, including in the bilateral agenda.

### **Canada and the pursuit of bilateral trade deals**

#### *Adding to the global spaghetti bowl*

As the multilateral system founders, large trading powers have accelerated the pursuit of bilateral trade agreements and partnerships — quite outside a development agenda. Canada has participated vigorously in this trend to sew up bilateral trade deals while whipping the proverbial Doha Round horse, which continues its loop of stagger and collapse.

Previous Canadian governments have pursued bilateral trade deals: NAFTA 1994, Israel 1997, Chile 1997, and Costa Rica 2002. Lower on the radar, talks with India and China for bilateral investment agreements have been pursued by Canada for some time. But the Harper government era has been marked by a much more aggressive pursuit and closure of bilateral trade and investment agreements, completing three deals in its short tenure, including the European Free Trade Association (EFTA) group of countries (Liechtenstein, Iceland, Norway, and Switzerland in 2007), Peru (2008), and Colombia (concluded 2008 but not yet signed or ratified at time of printing).

Several others have been launched though are not yet concluded, including with South Korea, Jordan, the Dominican Republic, Panama, and exploratory talks with CARICOM countries of the Caribbean. The recent Canadian push for bilateral trade agreements reflects the new prioritization of the Americas as a focus for Canadian foreign policy. There has also been a wave of bilateral investment agreement negotiations launched.<sup>10</sup>



Placed in the larger global context, these bilateral agreements have contributed to what has been termed a “spaghetti bowl” of bilateral trade and investment obligations around the planet, undermining attempts to build meaningful global rules.<sup>11</sup> The power dynamics of bilateral negotiations (typically between a Northern and a Southern country or sub-region) are much more uneven than in multilateral negotiations, in which small countries can band together with larger to form more powerful negotiating blocks. Bilateral negotiations in the modern era have produced highly controversial agreements. Concessions made in bilateral negotiations then erode both incentives and prospects at the global level for any substantive re-working of trade arrangements to favour global equity and international development goals.<sup>12</sup>

*Something old...*

Many features of Canadian bilateral trade deals pursued by the Harper government reflect a continuing commitment to the now long-standing NAFTA model. In the first instance, the bilateral deals maintain an essential orientation to further open borders for key goods and services exports. Moreover, while there may be cooperation agreements, financing, and phased-in implementation timing for the developing partners, there are none of the more substantive and innovative developmental elements that developing countries are fighting for at the WTO. For example, in agriculture there are no provisions for a “special safeguard mechanism” that would enable the developing country partner to raise duties in response to a sudden import surge, or a “special product” designation that would exempt crops key to food security from further tariff lowering.

While government procurement, competition and e-commerce are issues expressly resisted by the South as an area for new disciplines in multilateral negotiations, they are present in many Canadian bilateral FTAs. Canadian agreements also always contain an investment chapter. These chapters are based on the NAFTA Chapter 11 and offer protections and rights for foreign investors unparalleled in any other multilateral agreement. Provisions include investor rights to sue governments in closed commercial hearings over alleged public policy measures that interfere with profit-making.<sup>13</sup>

Importantly, since 2005 there has been significant evolution in public policy debate in Canada regarding investors' social responsibilities overseas. There is growing consensus on the inadequacy of voluntary measures to ensure good performance in environmental or human rights terms, particularly in the extractive sector — one of the main areas of Canadian investment in the Americas. Recommendations from a June 2008 report from Canada's Standing Committee on International Trade (CIIT) called for legislative measures to ensure corporate accountability to the implementation of human rights standards in any future Canada-Colombia trade deal. But these preoccupations are not reflected in any recent Canadian FTA or investment agreement. Rather, ineffectual exhortations to encourage corporations to respect social responsibility standards can be found in the preamble to the recent Peru and, likely, Colombia deals.

Many of the recently-launched bilateral deals also continue the NAFTA tradition of side-deals on labour and environment, despite the overall criticism of these as ineffectual tools to address the labour rights and environmental issues generated from liberalized trade.<sup>14</sup> The 2008 Peru Agreement was hailed by the government as carving new ground for labour protection. It mirrors the labour chapters of the recent deals signed by Peru and Colombia with the U.S. It includes the possibility of fines paid to a special jointly managed labour assistance fund by an offending government in cases of protracted violations. Since the same government is likely to be the main recipient of the funds, the mechanism has come under attack by opposition and labour voices as a means to "pay a fine" to oneself for labour rights violations.<sup>15</sup>

The essential point of the weakness of side-deals and labour chapters as a means to address the labour rights issues raised by trade liberalization has been stated well by the Canadian Association of Labour Lawyers, who point out that trade agreements are not written to improve labour standards, and their general effect has been to bring downward pressure on labour rights.<sup>16</sup>

Finally, a continued hallmark of Canadian bilateral trade deals remains the closed and non-transparent process for their negotiation. Input may be formally solicited from the public through internet-based consultation processes. However, these provide little if any informa-

tion to organizations seeking to understand and influence the government's agenda and have no feedback loop, rendering them pointless. In the summer of 2007, an internet-based consultation to help develop Canada's agenda for intellectual property issues was launched even as negotiators were already pursuing an IP agenda in bilateral trade talks with Peru and Colombia. Officials would provide no information on what Canada was seeking, and no response was ever received from letters of concern that were sent by civil society organizations.

Draft texts or even basic negotiating goals and positions are not disclosed or debated publicly on bilateral deals. Even for WTO processes there is more publicly available information on proposals and counter-proposals made by governments. It is important to note that, in contrast, industry groups have considerable access and substantive consultation roles on texts and positions.

*...Something new*

Apart from its breadth and pace, what else differentiates Canada's bilateral trade agenda in this period? There has been a decided Americas slant to the recent pursuit of bilaterals. Trade agreements seem to be the primary implementation feature of Canada's otherwise not well-defined new "Americas Strategy."<sup>17</sup> This strategy was launched in July of 2007 by the prime minister with ambitious talk of a higher profile for Canada in our own hemisphere to promote prosperity, security, and "the fundamental values of freedom, democracy, human rights, and the rule of law."<sup>18</sup> Understanding this wider foreign policy context provides important insight into some of the new features of the recent bilateral trade agenda.

In launching the Americas Strategy with a major speech in Chile, Prime Minister Harper raised concerns regarding the wave of governments choosing populist, authoritarian, and socialist paths in the region. With little reflection on the substantive differences among Latin America's new "left" economic experimentation, let alone the importance for countries to set their own development path, Harper warned against this trend. Canada was identified as offering a different, more balanced model to be emulated over the more extreme capitalism of the

U.S. At the same time, “free trade” was positioned explicitly as a means to set countries on the right path.<sup>19</sup>

While heralding human rights as core Canadian values and trying to differentiate Canada from the U.S., the prime minister courted U.S. allies in the region for trade partners, including Peru and, most controversially, Colombia, the government with arguably the worst human rights record in the region. Incredibly, Harper even lobbied for the U.S.-Colombia trade deal, urging Democrats who were withholding support for the deal on principled human rights grounds to support the deal to save democracy in Colombia. (See Katz elsewhere in this volume.)

The point to note is that previous Canadian governments often took pains to downplay the political implications of trade agreements, pointing to basic market efficiency theories as the rationale. With the Americas Strategy, the Harper government has identified bilateral trade deals as an explicit component of a new U.S.-style strategic approach for Canada’s role in the region to help keep governments on the “right” political path. Other analysts have also noted the growing links under the Harper government between the trade and security agendas in the Americas, as profiled in the Security and Prosperity Partnership Initiative with the U.S. and Mexico.<sup>20</sup> The link to a more U.S.-influenced trade agenda can also be seen in the details of the bilateral trade deals in the Americas. Perhaps the most significant policy departure is in intellectual property rights (IPRs).

At the multilateral level, there is a heated debate on the developmental impacts of high intellectual property standards. At the World Intellectual Property Organization (WIPO) and the WTO TRIPS Council, developing countries are working for a developmentally-friendly policy environment for technology issues, from protection of biodiversity and addressing bio-piracy, to technology transfers, to generic competition for medicines.

This development agenda for IPRs has been met with resistance and backlash from pharmaceutical companies, among others. Industry groups have mounted a number of initiatives to lock-in market protections and monopoly control.<sup>21</sup> Pursuing IPR commitments beyond WTO requirements has been a hallmark strategy for U.S. bilateral trade agreements. Canada has not historically been a promoter of this agenda. Yet,

as a part of the new focus on bilateral trade deals in the Americas, the Canadian government pursued intellectual property demands in the negotiations with Peru, Colombia, and the Dominican Republic. While the goals and agenda for Canada were never made public, one can assume Canada was not seeking to lower IP standards.

More generally, signals from the Harper government on intellectual property have been troubling. In 2006, Canada unilaterally changed its policies to increase data exclusivity protection for patented drugs from five to eight years.<sup>22</sup> This move surprised analysts, since it was a “concession” made outside the context of a trade negotiation and beyond what Canada’s WTO commitments require. It also had significant cost implications for Canadian health care.<sup>23</sup> The move to add IP to bilateral trade negotiations fits this trend of a growing pro-IPR orientation in Canadian policy.

Finally, it is worth noting a pragmatist trend on the bilateral agenda, perhaps one which is part of the commitment to rapid acquisition of new trade deals. While there is a new political framework clearly at play in the Americas and in the trade agenda generally, the government has also been adaptable to circumstance. When negotiations on the Andean pact for a joint agreement with Peru and Colombia began to falter, because the Colombia negotiations were more difficult, the Canadian government severed them and moved to close the Peru deal separately and in record time. When talks on intellectual property were proving difficult with these same Andean partners, Canada dropped its insistence on an IP chapter.

## **Parliament and civil society respond**

### *The context of minority government*

What has been the public and political reaction to the Canadian agenda on trade and investment since 2006? A defining part of the Canadian political context in the last five years has been minority governments. In the parliamentary system, a minority government still holds executive power and wields control over policy. But there is a sharp public and political sensibility that the mandate is limited, the threat of confidence motions is potent, and the legislative agenda requires careful manoeuv-

ring. The role of Parliament in shaping the public agenda, in addition to controlling legislative outcomes, becomes more pronounced. This has been no less true with respect to the trade agenda.

As a result, Parliament has become an important entry point for civil society and for the concerned public on trade issues. Where constituencies raised concerns, notably with the South Korea deal and Colombia, the role of parliamentarians and parliamentary committees has been important. Parliament has been able to question deals, prolong debate, and shape the media reporting on the negotiations, ultimately influencing the negotiating context. Other deals, such as with EFTA and the Dominican Republic, have received less public attention and correspondingly there has been less parliamentary involvement.

*The power of constituency and citizen action: Korea and Colombia*

Canadian labour, notably the auto-workers' union, mobilized in significant numbers against the Korea deal, based on the likely adverse consequences for Canada in terms of manufacturing exports and jobs.<sup>24</sup> Opposition parties, through the Standing Committee on International Trade (CIIIT), devoted significant resources and time to hearings, questioning officials and ministers repeatedly on the terms of the deal. The Canada-Korea deal remains not concluded, due not only to public critique but also significant challenges in the negotiations themselves and domestic political uncertainties in South Korea.

The Canada-Colombia deal was intended to be a quick process. Negotiators of the deal, launched in July 2007 alongside Peru, aimed to wrap up the talks by the end of that year. The executive power of Canadian government meant that nothing, in principle, stood in the way of a signing, save the negotiations themselves. Achieving a quick deal with Canada was important to the political agendas of both President Alvaro Uribe, who needed a good housekeeping seal of approval from the international community, and of Prime Minister Harper. For the latter, the deal was the flagship initiative of his new Americas Strategy and a nice deliverable for President George Bush, who could use Canada's approval as motivation to move the U.S. agreement through Congress.

But neither civil society nor Parliament would let the Colombia deal go by without a fight. Human rights, labour, and development or-

ganizations mobilized significant media attention at Canada's choice of Colombia as a trade partner. For its part, while the CIIT was slow to take up Colombia, being preoccupied with the larger South Korea deal, it eventually forced Minister Emerson to appear to answer questions. The CIIT also undertook a major study on the human rights and environmental impacts of the deal.

The visit to Canada of U.S. Congressman Michel Michaud, a leader in the Democratic caucus against the U.S.-Colombia deal, played an important role in alerting Opposition parties and the Canadian government to the wider geopolitical implications for Canada in forging ahead to sign with Uribe, especially in the context of the impending U.S. elections. Colombia sent senior officials and the Vice-President to Ottawa, and Ottawa sent ministers to Bogotá in an obvious effort to regain moral ground and set the public record straight regarding the "commitment" of the Colombian government to human rights and democracy. This, notwithstanding the continued serious human rights violations in Colombia and a growing political scandal that was engulfing the Uribe administration, linking it to paramilitary death squads.

The Canadian government concluded negotiations with Colombia in June 2008, and with incredibly audacity announced that the deal was done just days before the CIIT was to wrap up hearings and produce its recommendations regarding the agreement. But with the negotiations closed, the CIIT report was superfluous. Parliament was not amused. This final act of arrogance united all three Opposition parties. The recommendations in the CIIT report include that no agreement with Colombia should proceed without a human rights impact assessment and without legislative provisions for ensuring corporate accountability of Canadian companies to human rights standards for their operations in Colombia. Shortly after the report's release, the Conservative party disassociated itself from the recommendations.

#### *Power and vulnerability for the Harper trade agenda*

On the whole, the Harper trade and investment agenda has obvious momentum. On the multilateral front, it is so similar to previous Canadian agendas that it generates little controversy. But on bilateral issues (and on NAFTA), which are more infused with signature new foreign policy

directions, the agenda is more vulnerable. Parliament has the power to demonstrate that the new directions are a minority agenda and may not reflect the majority political will of the country. Could this ever have substantive policy effect? Not easily, but maybe.

The power of executive government, including the power to negotiate and ratify new treaties, remains intact. But the Conservative government, as part of its new “accountability” agenda, has brought in policy that requires all new international treaties to go before Parliament before ratification.<sup>25</sup> The new policy affords the possibility that Parliament can discuss, debate, or even vote on a treaty (even if not binding). If parliamentary opposition were united in the majority against a particular treaty, a vote could display that the will of Parliament opposes a deal. The jury is out on whether the government would exercise its legal authority to continue with the deal, or bow to Parliament’s wish not to ratify. This would pit the government’s commitment to parliamentary accountability against its commitment to free trade agreements. The government’s recent dismissal of the CIIT report on Colombia bodes ill for the “accountability” side.

One thing is certain: recent public debate over the direction of trade and investment policy is unlikely to diminish. The world’s current triple crises — finance, food and climate — are all linked to an overly dogmatic commitment to the liberalization of capital, trade, and investment flows. These predilections are compounded by inadequate public oversight and regulation to safeguard the interests of ordinary people and the environment. The debate — in Canada and globally — will continue.