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GOVERNANCE BEYOND BORDERS

ISSUES PAPER

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The mission of the Law Commission of Canada is to engage Canadians in the renewal of law. The Commission recognizes that the phenomenon of globalization has an impact on each of the areas targeted in reform, and intends to consider the phenomenon within the perspective of law reform.

This project stems from previous work that the Commission has sponsored, notably “*Governing for the World*” in 2001 and, more recently, on concepts of citizenship and corporate social responsibility. Since 2002, the Commission has been participating at meetings organized by The Institute on Globalization and the Human Condition at McMaster University, as part of a project on globalization and autonomy, funded by SSHRC, McMaster University, and the University of Toronto. In addition, the Commission is beginning a partnership project with the Conference Board of Canada on the governance of corporate social responsibility.

The current project on governance and globalization is in its earliest stages. The comments received at this meeting will inform the research agenda of the Law Commission. In addition they will help the Law Commission draft its discussion paper on the subject and formulate its recommendations to Parliament.

I. INTRODUCTION

Life in Canada is constantly influenced by events and actions that occur beyond its borders. At times, this results in a perception that the world is becoming borderless. When an international body develops standardized weights and measures for packaging, our cereal boxes must reflect them. When a new virus emerges somewhere in the world, travellers to and from Canada may be exposed. Transnational corporations may have their head office, manufacturing facilities and sales divisions in different countries. At other times, however, it appears that borders are shifting, from the national level to the regional or local, as communications and markets facilitate transactions and exchanges between regional governments, private actors and communities. Still at other times, national borders seem to be strengthened in reaction to external threats such as transfers of poverty, violence or disease. Borders can be erected by groups seeking to protect their customs, values, traditions or identity. Barriers can also be raised indirectly through exclusion, for example, Internet discussions that are inaccessible to those who lack the technology.

This phenomenon is not new. Throughout Canada's history, these borders have existed and shifted along a continuum from porous to solid. Goods and services have long been traded between countries, individuals and companies on a formal or informal basis. There is a debate among scholars as to whether the current wave of globalization is very different from what has existed for millennia; however, a number of factors have contributed to some fundamental changes in the way our society is being governed. Since the early part of the 20th century, national governments had been seen as the principal players with respect to laws and policies. The ability of governments to control laws and public policies as well as provide a framework for private law and activities was captured by the concept of sovereignty.

In the last few decades, however, other players have entered the scene. Since the advent of the United Nations, governments have handed over more powers of governance over the Canadian public to international organizations. The spread of technology around the world has allowed people and entities to communicate and to connect with each other in

ways not previously possible. This has led to an increase in the sheer size and influence of private corporations, unions, advocacy groups and other civil society organizations such that their actions can have a great impact on the lives of Canadians. People also have access to greater amounts of information about what is taking place in most corners of the world and in the daily lives of other citizens. At the same time, governments at all levels are engaging directly in agreements and exchanges with entities in other countries. While the federal government continues to be identified with governance of the territorial borders that surround Canada, the actions of these other players often operate with a different notion of borders, as pointed out above.

Despite this constant interaction with others around the world, at many different levels, many decision-makers and stakeholders continue to think in territorial terms of State borders and to draw a line between domestic and international laws and policies. This issue paper asks whether this approach to law and policies reflects the reality of global interactions.

- Are our concepts in law and social policy appropriate to respond to the realities of globalization?
- Is the concept of sovereignty still relevant?
- Is the language that we use to define issues of public policy adequate?
- Do we have the right tools to measure the impact of our decisions and activities not only domestically but also internationally?
- What role, if any, should the federal government have in circumscribing the local or international activities of Canadians that have an impact on other countries?
- Are there new tools or instruments of governance that would contribute to a systematic approach to determine the impact of Canadian actions on the world and the impact of international or foreign actions on Canada in a way that enhances democracy and accountability both domestically and internationally?

These are some of the questions being posed by the Law Commission.

This issue paper will set out some of the ways in which activities at the international level or by foreign governments have an impact here followed by the ways in which actions within Canada or by Canadians can have an impact on others. Then, we will examine whether we can identify values that would inform decision-making on these issues. Finally, we will review some possible new approaches to governance that would respond to the new roles of the actors and changing nature of borders. Before we begin to look at the issues, we will review the meaning of globalization and governance.

QUESTIONS:

- Is the premise of the paper correct?
- Are we asking the right questions?
- Is this approach of ‘the world on Canada’ and ‘Canada on the world’ an appropriate way of dividing up and responding to the issues?

A. The Meaning of “Globalization”

The term “globalization” has been used to describe many phenomena. In different contexts, it has been used to mean increased technological connectivity, the spread of capitalism, population migration or increased trade in goods and services and exchange of capital. In the context of this paper, the world “globalization” is used to mean the interdependence between local and international factors on policy issues facing society. The Law Commission is interested in exploring how our concepts of law are framed within this interdependence, where the boundaries between the domestic and the foreign become less clear.

QUESTIONS:

- Is this an appropriate definition of globalization for this purpose? Does it capture all the necessary elements? Can it be improved?

B. The Meaning of Governance

For the Law Commission of Canada, good governance is about a process for effective decision-making that takes place in a framework of openness and accountability. The process of governance must involve taking into account the interests of stakeholders, considering their input and being accountable to them for the decisions made. The United Nations provided the following list of characteristics of good governance: participation, transparency, responsiveness, consensus orientation, equity, effectiveness, efficiency, accountability and strategic vision. The Law Commission will examine these factors as they apply more particularly to public decision-making and government institutions.

II. GLOBALIZATION AND GOVERNANCE

The Law Commission approaches globalization within a perspective of governance. Its analysis is of interest because globalization is a process that only continues to increase in importance. In many respects, globalization challenges traditional concepts of governance. This section touches on a number of such topics, intended to stimulate thought and discussion.

A. Toward a multi-actor, multi-level system

Globalization increases the importance of actors who assume the traditional role of the State as the main actor in governance. Specifically, globalization affects the role of and relationships between countries, and lessens traditional ideals of absolute sovereignty. Over time, globalization leads to a system with “multiple actors” as opposed to “interstate system”. In this multi-actor system, the central State holds fewer powers of governance compared with decentralized powers, international institutions, business, and civil society.

Canada is not indifferent to this phenomenon.

Decentralized authorities

The federal government that is responsible for the signature of international treaties is seeing provincial and local authorities play an increasingly important role at the international level. For example, these authorities may multiply their own cooperative agreements and become active players in international life.

International institutions

Intergovernmental international institutions are another set of important actors. Canada participates in numerous such institutions. They enjoy competences in sectors of activity that once were the exclusive domain of States. In this transfer of competences, Canada is seeing its freedom of action reduced, notably in economic sectors (e.g. WTO), and political (e.g. UN), social (e.g. ILO), health (e.g. WHO) and military (e.g. NATO) sectors.

Business and corporate actors

As for corporations, whose importance continues to grow, they are primarily motivated by the search for better valuation conditions for their assets. This search, which can drive businesses to set up in foreign countries and use foreign goods and labour, exerts a considerable influence on governments, whether Canadian or foreign. Large corporations operating in a number of countries apply standards for labour practices, wages, human rights and environmental impacts that may or may not be consistent with the laws of the countries of origin or the countries of operation; their practices may reflect higher or lower standards than those imposed by national governments. Their influence on the economy can provide them with a great deal of power and influence over the lives of residents.

Non-governmental organizations

Finally, NGOs, which are becoming ever more organized on a global scale, are assuming the role of the voice of international civil society, acting on Canadian and international public opinion on a large number of political, economic, and social issues.

B. How to manage such a system

Faced with the phenomenon of globalization and the role played by these actors, and the standards that derive from their activities, Canadians seemed divided in their responses. They also are divided in their appreciation of the positive and negative effects of globalization on their everyday life and on society in general.

Certain individuals choose to emphasize the positive effects of globalization, in the opening of borders, greater choice for the consumer, and a greater exchange of ideas and understanding of others. Others, however, perceive only the negative effects, such as the decline of the Nation-State, social tensions, a loss of identity, and an increase in terrorism, criminal activity, disease, and economic instability. Many Canadians feel they are the victims of globalization, because they feel bound by decisions made outside the country, decisions on which they have little or no influence. They also describe themselves as powerless in the face of actions by others that affect environmental quality, disparities between rich and poor, peace, and world security.

Whether alternative globalists or defenders of the market economy, their responses can be understood in terms of the governance of globalization, the role of the actors involved, and the standards that derive from these activities.

*In 2001, 50% of Canadians believe Canada has a moral obligation to help people in other countries suffering because of war, natural disasters or poverty. However, in another poll, when comparing a number of priority areas, Canadians believe that ensuring common environmental standards, strengthening the Canadian economy, ensuring that Canada can restrict imports in order to protect Canadian jobs and helping Canadian businesses are more important than reducing inequality between rich and poor countries. Centre for Research and Information on Canada. *Canada and World Affairs: CRIC Survey Results* (Ottawa: CRIC, July 2001) and Matthew Mendelsohn, Alasdair Roberts, and Robert Wolfe. *Good Governance at Home and Abroad: Global Governance Relationships in Transition* (Ottawa: Law Commission of Canada, December 2002).*

QUESTIONS:

- Are there other factors that would be appropriate to discuss that affect governance in a context of globalization?

- Would it be useful to more closely examine the elements touched upon above, in particular with regard to manifestations of the phenomenon of globalization and the descriptions of the Canadian actors?
- Are there counterbalances adapted to governance within the context of globalization?
- Should the Law Commission of Canada take on other questions?

Given that the actors, the standards, and the approaches to the question of governance in a context of globalization are diverse and heterogeneous, at this stage the Law Commission will focus its attention on the major Canadian actors (e.g. federal government, provincial, territorial, and local governments, native communities, business, and Canadian civil society) and the standards that derive from them, under the dual aspects of the impact of globalization on Canada (III), and the impact of Canada on the world (IV).

III. IMPACT OF GLOBALIZATION (EXTERNAL PRESSURES) ON CANADA

For a country like Canada, whose neighbour is the United States and whose economy and society are very open to the world, the effects of globalization are felt by the majority of Canadians in their everyday lives.

A. Multiple effects of globalization

These effects can take different forms, depending on the actors and the standards under which the forces are at play, including:

Institutions and international agreements

- International agreements and the actions of international institutions limit the autonomy of Canadian public powers, while leading in return to an influence on the policies of the other participating countries;

- As one measure of this impact, we note that more than one third of the laws adopted by the Canadian federal Parliament derive from the application of international agreements;
- The federal government represents the country at multilateral meetings held by international institutions such as the United Nations, the World Trade Organization, the Pan-American Health Organization, the North American Treaty Organization and a large number of other institutions. These meetings cover topics ranging from foreign development to free trade to standards for health products and security measures. Along with Foreign Affairs Canada and International Trade Canada, a number of federal departments may be involved in negotiations and agreements.
- In some areas with oversight mechanisms, decision-making is delegated to international bodies of experts. The move towards standardisation is seen by many as contributing to a more efficient and less costly regulatory framework. At the same time, others worry that it may unduly limit the “sovereignty” of national governments to deal with issues in accordance with the wishes of their citizens. Some worry as well that harmonization may prevent experimentation with regulatory frameworks or hinder flexibility or adaptability to local circumstances. Finally, due to the disparity of power between nations and limited citizen participation, many argue that rules made at the international level are not legitimate.
- The need to ensure greater legitimacy, efficiency and better accountability in the development of policies at the international level is of primary importance. Reform of the United Nations is part of this effort. The issue of strengthening international forums to ensure greater democratization and greater legitimacy is beyond the scope of this paper; however, it is an issue that preoccupies Canadians a great deal and is the subject of work currently being undertaken by Foreign Affairs Canada.

Actions by foreign governments

- Many laws that have extraterritorial application, notably American, apply to Canadian companies and citizens (e.g. the provision of more detailed identification prior travel and the Helms-Burton Act, U.S. legislation intended to prevent foreign individuals and companies from dealing with Cuba);
- The rules for jurisdiction in foreign courts grant these courts competences to hear litigation involving Canadian companies and individuals, who have few or no ties to the territory within their jurisdiction;
- US monetary policy and, to a certain extent, European monetary policy, affects the value of the Canadian dollar and Canadian monetary policy;
- Pollution flow arising from the industrial and economic activity of foreign countries affects Canadian resources and our environment;

Foreign businesses

- Many foreign companies are trying to obtain better access for their products and services on the Canadian market, the elimination of all trade barriers, and increased protection, in particular for their investments, to receive subsidies, etc.;
- Many foreign and Canadian companies use, private mediation and arbitration to resolve their differences rather than the courts;

NGOs

- NGOs such as the ISO have adopted international standards that are referred to in certain Canadian laws and that effect the regulation of Canadian products and services;
- Certain NGOs are organized on a global level, and exert an influence on international public opinion and on decision-makers.

QUESTIONS:

- This list is incomplete and imperfect. How could it be improved?

- Are there other factors that result from globalization and have an impact on Canadian society?

B. The question of sovereignty

Obviously, the first factor that is highlighted by these illustrations of the impact of the world on Canada is sovereignty. [The debate over this question is timely, as illustrated by current work on “smart regulations” and on cultural diversity, etc.][*sic*]

Although sovereignty is difficult to define, it is helpful to recall that, in its classic legal definition, sovereignty is the supreme power of a State over its territory and its inhabitants, and independence from and foreign authority outside its borders. However, it seems clear that absolute sovereignty has never truly existed and that, over time, it has come to be subjected to more conditions and constraints.

Within this context, sovereignty can be seen as a set of competences, or powers, which are defined in their content and mode of practice by international law. In legal terms, sovereignty is variable in content: for example, every time a State enters into a treaty with another State, it renounces certain rights, accepts certain obligations, and in so doing limits the scope of its competences; even as it obtains correlating rights and obligations from the other party.

QUESTIONS:

- Is the concept of sovereignty adequate to support and articulate the aspirations held by Canadians when they speak of the sovereignty principle?
- How should competences be exercised? This questions evokes the notions of Canadian transparency, consultation, and influence, and the mode of interstate cooperation – transfer of competencies, harmonization, mutual recognition or coordination.
- What values should they defend and promote? This question touches on what degree of territorial, economic, and social autonomy is sought.

IV. CANADA'S IMPACT ON THE WORLD

Not only do people move across boundaries through travel and immigration, their concern extends beyond domestic boundaries to the needs of people in other countries. As the world becomes more connected and interdependent, Canadian actions, both domestic measures and international policy positions, may have a greater impact on others.

The polls indicate that Canadians vacillate between wanting to preserve Canada's ability to make its own laws and policies in some areas, while at the same time, wanting our country to help and not hinder other countries, particularly those known as the 'developing world'.

When questioned, 78% believe that the government should withhold contracts from Canadian businesses operating abroad that do not respect environmental or labour laws of other countries. 54% believe that Canadians boycotting these companies are doing the right thing. Matthew Mendelsohn, Alasdair Roberts, and Robert Wolfe. Good Governance at Home and Abroad: Global Governance Relationships in Transition (Ottawa: Law Commission of Canada, December 2002).

A. Canadian players that have an impact on the world

A number of Canadian players engage in activities that can have implications for other countries.

Governments

- Some government laws and policies, federal, provincial and territorial, that are focused on domestic issues and the lives of Canadians can impact on the lives of people in other countries. For example, the requirement that immigrants are sought for their expertise and professional qualifications may result in a "brain drain" from other countries. Other examples include waste disposal and industry subsidies.

- Some laws have extraterritorial application, for example, the prosecution of Canadians who sexually exploit children while abroad.
- Governments also support or promote projects within other countries for example, through development projects, trade missions or the sharing of expertise in law reform.

Corporations and Other Corporate Actors

- Domestic activities of corporations can impact on other countries through their import activities or through the quality and price of exported goods, such as online pharmaceutical sales to foreign countries.
- Corporations can affect the movement of people by recruiting workers, facilitating foreign adoptions and promoting tourism. These activities all impact on the resources spent or available in foreign countries.
- Many corporations carry out operations in other countries. Companies extract natural resources, engage in manufacturing, advertise their products, open branches or promote franchises of their business and outsource services such as the preparation of tax returns.
- Corporations also engage in multilateral international negotiations aimed at standardizing or harmonizing aspects of their business.

Non-governmental Organisations

- Charitable organizations such as the Red Cross operate in other countries and bring with them their own practices for record-keeping, service provision and administration which can have an impact on the standards in these other countries.
- Canadian advocacy groups interact with other like-minded groups at international activities and work to influence government-negotiated positions.

- They also work domestically and in foreign countries to support changes in other countries, including by raising funds, developing projects and drawing media attention to situations.

Individuals

- As tourists, individuals can have a direct impact on other countries through their choices of activities, accommodations, meals and souvenirs.
- On the home front, the choices that Canadians make as consumers or investors can also affect the business activities that take place in other countries.

QUESTIONS:

- Are there any other elements that should be taken into account when dealing with the impact of Canadian players?
- Are there other players that should be analyzed?

B. Governance of activities that affect others

All of the above actors can impact on other countries in positive or negative ways. As “citizens of the world”, Canadians may want to ensure that they have a say in these activities and that the decisions reflect certain values. If we are truly living in an interdependent world, then should we not consider the impact of our actions on others as a matter of course? Two examples raise some of the complex issues involved.

Corporate Social Responsibility

With respect to multinational corporations, there has been a great deal of study and discussion among stakeholders, business groups, academics and decision-makers of the need for social responsibility. While many Canadian corporations operate in a socially-responsible manner, problems arise when companies engage in corruption with foreign officials, use harmful labour practices that fail to respect people’s rights, exacerbate the

situation in conflict zones, ignore cultural practices and traditional land or negatively impact on the environment.

Many advocacy groups maintain that the activities of corporations abroad should be more forcefully regulated by governments using tools and approaches here in Canada. Other groups assert that restrictions placed solely on Canadian corporations will fail to stop other foreign corporations from harmful operations and will simply harm the competitiveness of the Canadian industry. A number of questions arise regarding who should govern the behaviour of Canadian corporations and by what methods? Who defines other countries' best interests? How can such decisions be made in a democratic way and corporations held accountable? To what extent can Canadian governments regulate such activities outside its territorial borders? Will Canadian action alone improve the situation or is an international agreement needed?

Development Assistance

In a number of areas, Canadian government departments and private institutions provide expertise to other countries by funding and sending experts to work with officials in those countries. Examples include justice system reform, the set-up of health care systems or programs, law enforcement expertise and agricultural production. Expertise is also provided when parties agree on to proposed standard practices or contract terms that reflect Canadian norms.

There may be no coordination of these activities between players and the representatives may not be reflecting the values supported by Canadians. For example, should private law firms be controlling the standard terms used in cross-border contracts without guidance from a central authority? Should teams of experts, for example, in the private sector, provide advice to foreign governments, which may be in their own interest rather than that of the other country? Is the provision of advice regarding a private health care system consistent with Canadian values in the absence of other options?

QUESTIONS:

- What other examples could be used to illustrate governance activities that affect others?

VALUES

The former unified Department of Foreign Affairs and International Trade held consultations in 2003 to ask Canadians their opinions on foreign policy development. As a result of these discussions, the federal government obtained input on the values and priority issues for future international activities as well as the appropriate role for the government. It was acknowledged in the final report on consultations that Canada has a role to play in the “development of effective international legal norms incorporating cross-cultural values and inclusive processes”¹. Certainly, on substantive issues, the positions adopted by Canada may influence the final negotiated agreement, which is then applied to all signatory countries.

In those consultations, Canadians identified a number of values to govern foreign policy. They covered: process-oriented values (e.g. coherence and coordination of policies, multilateralism, transparency, participation, and direct citizen involvement, stability and consistency), and substantive values (e.g. equity, sustainable development, democratic governance, democratic pluralism and cultural diversity, social development, security, and international ties). In order to respond to values expressed by Canadians, there may be a need to adopt new approaches which recognize Canada’s place in an interdependent world.

¹ Department of Foreign Affairs and International Trade. *A Dialogue on Foreign Policy: Report to Canadians* (Ottawa: Department of Foreign Affairs and International Trade, 2003) at p. 12.

V. CONCLUSION

The phenomenon of globalization raises many questions and issues, some of which are explored in this issue paper.

A. A New Way of Thinking: Impact Assessment - The Notion of Global Public Goods

In 1999, the United Nations Development Program produced a report entitled “Global Public Goods: International Cooperation in the 21st Century”. The book takes the familiar notion of national public goods, that is, those goods (or bads) from which no one can be excluded such as national defence and pollution and expands it to the global level. Global public goods also include goods that have been made public by design such as basic education and those that go unchecked such as communicable diseases. The report notes that as the world has become more interdependent, policy-making has remained essentially national with no regard for spillover to other countries, be they good or bad. The authors note that by looking through the lens of global public goods, countries can internalize these “externalities” before they spill over and adopt approaches which address issues often considered to be domestic but that are, in fact, linked to global challenges, such as HIV/AIDS, security issues and indebtedness. Such an approach might avoid incoherent activities such as having an immigration policy that contributes to a brain drain from developing countries or having domestic banks lend money to developing countries at high interest rates, only to turn around and send official development assistance to those same countries. Thus, the provision of public goods may not need additional resources if incentives encourage the provision of goods rather than the creation of bads. In other areas, the benefits to overall growth, development and stability in the world may far outweigh the costs. The approach centres on optimizing the allocation of resources.

B. A New Way of Operating: Integration

If we are living in a truly interdependent world, then domestic concerns and impacts on other countries could be considered throughout the policy and decision-making process. Within governments, international impacts could be integrated with domestic policy-making. The notion of “external affairs” traditionally the purview of the departments of Foreign Affairs Canada and International Trade Canada could be adopted horizontally throughout all ministries and all levels of government. Actors at all levels could be made aware of the impact of their choices and activities on foreign countries.

Given the increased role of non-state actors in international affairs, there may be a need for a coordinating body to ensure that Canadian values are respected in activities that impact on other countries. Such an institution would require the involvement of all stakeholders representing business, government, organizations, and Canadian citizens as well as foreign governments and citizens. There may also be a need for greater participation by non-state actors as well as other levels of government in international negotiations that have been, up until now, limited to federal government representatives. This would be more in keeping with increased privatization and the devolution of responsibility away from central governments. It would also allow a greater diversity of approaches suitable to regional levels.

C. A New Way of Communicating: Monitoring and Accountability

The Canadian government could have transparent and responsible negotiating positions in international bodies and negotiations, based on wide-ranging consultations with all stakeholders. Notions of secrecy may have to be revisited.

Apart from a new institution to oversee the activities of non-state actors, a government-regulated system of monitoring and required reporting for multinational corporations would allow Canadians themselves as well as others in the industry to influence the activities of these actors through their consumption patterns and investments. Such oversight mechanisms may better ensure socially acceptable practices abroad.

QUESTIONS:

- What do you think of these policy approaches?
- Should Canadian government regulate foreign activities of Canadian players and to what extent?
- Can we identify a set of values that would underpin our interactions with other countries? What values should be reflected in any policy approach developed by Canadian government?
- What instruments could Canadian governments use?
- Can a coherent approach be adopted covering all activities of Canadian players abroad?

Comments received will assist the Law Commission in the preparation of a discussion paper that will engage a greater number of people in the reform process. After consulting and debating on these issues in Canada and beyond, the work of the Law Commission culminates in the preparation of a final report to Parliament.

We thank you and invite your comments.