

Final Report

for the

Canadian Employers Council Consultation Project: International Issues

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Executive Summary

1. Methodology

With funding from HRSDC, over the past year the Canadian Employers Council (“CEC”) has been engaged in a broad-based consultation project addressing emerging international issues and trends that shape labour law in Canada and abroad. As part of this process, the CEC prepared and circulated a Questionnaire in order to gauge the disparate views and opinions of leading Canadian employers on issues such as the increasing influence of multinational enterprises, the differential impact of globalization on developed and developing countries, the rise of anti-globalization as a political force, the growing demand for “fair” globalization and increased corporate accountability, and the obstacles currently facing global and hemisphere trade liberalization. The responses to the Questionnaire were presented in a draft report.

The draft report was discussed at a Conference which took place on December 3, 2007 in Toronto (see Appendix A below). Invitees to the Conference included all consultation participants, as well as representatives from government, academia, and the labour movement. Based on the results of the Conference and other feedback received during the month of December 2007, the report was finalized in early 2008. This is the final report.

2. International Labour Standards

The International Labour Organization (“ILO”), the key supra-national institution in the global labour standards arena, promotes social justice and internationally-recognized human rights and labour standards. In 1998 the ILO enacted the *Declaration of Fundamental Principles and Rights at Work* (“*Fundamental Declaration*”), which enshrines four fundamental rights: freedom of association and the effective recognition

of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The *Fundamental Declaration* is binding on all Member States.

In 1999 the ILO announced that the integration of social and economic goals into domestic policy-making through the promotion of “decent and productive work” would henceforth be its principal objective. To this end, the ILO has launched a “Decent Work Agenda” to assist Member States to identify their own unique goals and priorities, and to develop related policies and strategies in consultation with social partners and with the ILO’s assistance.

Furthermore, prompted by concerns about the social costs of globalization, labour standards are increasingly being linked to trade agreements in bilateral and regional settings. Originally included as side agreements, labour rights now often form part of the main text of bilateral and regional trade agreements.

The Questionnaire results demonstrate that many Canadian employers are aware of and support the ILO’s Decent Work Agenda, and are sensitive to the importance of reforming national systems taking into account national realities, priorities and concerns. Latin America was identified as the region most requiring Canadian support for the creation and implementation of Decent Work Country Programmes. Respondents identified initiatives to promote decent work through support for private enterprise and job creation in the private sector as a high priority at both the national and international level. Reflecting strong support for trade liberalization, 88% of Respondents indicated that the promotion of open trade and investment policies is a high priority. This is consistent with efforts of employers’ organizations at the international level to urge the ILO to recognize the importance of trade liberalization and economic expansion as key strategies for ensuring social, economic and political development.

3. Developments in the Western Hemisphere

The Summit of the Americas brings heads of state and governments of the 34 democratic nations in the western hemisphere together to help develop a more unified approach to the problems and concerns facing the region. The Summit the Americas process recognizes that true prosperity can be achieved only by protecting and respecting the basic rights of workers, as well as promoting equal employment opportunities and improving working conditions for people across the hemisphere. To that end, participating governments have agreed to develop new mechanisms to increase project effectiveness and provide other technical assistance to build the capacity of smaller economies, implement labour laws and standards effectively, foster equality of opportunity, and promote and protect the rights of all workers.

In 2001 labour matters were referred by the Summit of the Americas process to the Inter-American Conference of Ministers of Labour (“IACML”), a body organized under the Organization of American States and composed of the Ministers of Labour of all the countries participating in the Summit of the Americas process. Since then, the IACML has sought to build consensus by fostering high-level discussions among member countries with regard to labour and social issues.

Canadian employers appear to support the trend toward a stronger Canadian role in the Americas. Of the issues that are currently before the IACML and the Summit of the Americas Process, Respondents identified “Promoting the abolition of the worst forms of child labour”, “Promoting gender equality”, “Expanding trade and investment opportunities”, and “Strengthening democratic institutions” as high priorities. This appears to demonstrate that Canadian employers endorse the view that hemispheric issues of human rights and civil society can and should be addressed through multilateral processes.

4. Migration and the Demand for Labour

Faced with increasing competition to recruit workers in order to meet shortages in key industrial and service sectors, employers in developed countries are relying on migration of labour from developing countries on an unprecedented scale.

While immigration is an important source of new workers, the Canadian immigration system generally does not allow for targeted recruitment of immigrants with specific skills. Furthermore, the points system impedes the entry of workers with lower levels of education and skills and so does not address shortages of low-skilled labour.

The Temporary Foreign Worker Program (“TFWP”) allows eligible foreign workers to work in Canada for a limited period if the employer is unable to find suitable Canadian citizens or permanent residents to fill a position and the entry of foreign workers will not have a negative impact on the Canadian labour market. The Seasonal Agricultural Workers Program allows for the entry into Canada of farm workers for a period of up to eight months, to perform work in a sector in which few Canadian residents are willing to accept the associated working conditions and relatively low wages.

Employer responses to migrant worker issues reflect a growing concern over labour shortages, and specifically the need for skilled workers. Notwithstanding the complexity and costs of participating in the TFWP, more than half of Respondents reported that they employ temporary foreign workers in their domestic operations, and about half of the Respondents reported that their sector or industry could benefit from the expansion of temporary migration programs.

When asked whether the federal government should take into account labour demand and labour shortages when formulating or revising immigration policies, all of Respondents answered “yes”. The majority of Respondents identified the promotion of migration policies that maximize benefits for employment, growth and development in both

countries of origin and destination as a high priority. Most Respondents also placed high priority on eliminating discrimination, enhancing the integration of migrant workers in Canada, and developing programs to combat the trafficking in persons, especially women and children, in Canada and internationally.

5. Corporate Social Responsibility

Economic globalization, trade liberalization, technological change and the rise of the multi-national enterprise (“MNE”) underlie the development of corporate social responsibility (“CSR”). The importance and influence of the MNE has grown exponentially compared with that of government and worker organizations, both of which remain tied to their domestic jurisdictions. National, and even regional, legal systems addressing labour standards are not sufficient to cover MNEs operating on a global scale.

Not surprisingly, unprecedented emphasis is now placed on integrating social and environmental concerns into private sector decision-making processes. Drawing on the expertise of a multi-stakeholder advisory group, Industry Canada has released a *CSR Implementation Guide for Canadian Business*, a reference guide to CSR best practices. The Canadian government is also a signatory to the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (the “Guidelines”). The Guidelines, which are intended to help MNEs operate in harmony with government policies and societal expectations, establish voluntary principles for responsible business conduct in such fields as employment, industrial relations, human rights, the environment, combating bribery and consumer protection.

A large majority of Questionnaire Respondents agreed that CSR is important to the viability of their operations, and 81% of Respondents indicated that they have adopted voluntary codes of conduct or other CSR initiatives governing their Canadian operations. Of those organizations with employees located outside of Canada, 78% of Respondents indicated that they apply their CSR initiatives to their foreign based operations.

The overwhelming majority of Respondents indicated that CSR initiatives promote the competitiveness and financial performance of their business either in the short or long term. 69% of Respondents indicated that the financial community places a premium on enterprises that responsibly manage corporate responsibility risks, and 81% of Respondents agreed that CSR initiatives result in improved employee recruitment and retention.

Most Respondents expressed a preference that socially responsible corporate behaviour should not be regulated either domestically or internationally. However, many Respondents expressed uncertainty that voluntary CSR initiatives would help avoid government regulation of CSR. Divided opinion on the question of whether voluntary CSR avoids government regulation may reflect an expectation on the part of Canadian employers that government regulation of socially responsible corporate behaviour is likely in the future given the importance of the subject matter. It also suggests that Canadian employers are not principally motivated by “regulation avoidance” when they pursue CSR. On the contrary, Canadian employers appear to anticipate some form of government involvement to address the social deficit that has emerged as a result of globalization.

1. Introduction

Over the past two years, the Canadian Employers Council (“CEC”) has undertaken a broad-based consultation project (“CEC Consultation Project” or “Project”) addressing emerging international issues and trends that shape labour law in Canada and abroad. With funding from Human Resources and Social Development Canada (“HRSDC”), the purpose of the Project is to elicit and distil the experiences and concerns of Canadian employers on these important issues in an effort to achieve an improved understanding of the employer community’s views and positions on a range of emerging globalization issues.

A. Methodology

After being contracted by HRSDC in 2006, the CEC identified approximately 180 of Canada’s largest companies and business associations, and invited them to participate in the CEC Consultation Project (the “Participants”). Shortly thereafter, the CEC drafted a comprehensive paper for Participants entitled *Developments in the International Labour Dimension: An Overview for the Canadian Employer*. The CEC then prepared a detailed questionnaire (the “CEC Questionnaire”) in order to gauge the disparate views and opinions of Participants on issues such as the increasing influence of multinational enterprises, the differential impact of globalization on developed and developing countries, the rise of anti-globalization as a political force, the growing demand for “fair” globalization and increased corporate accountability, and the obstacles currently facing global and hemisphere trade liberalization. The CEC Questionnaire was sent out to Participants in March 2007. Responses were received throughout the spring and summer of 2007. Not all Participants responded; however, those Participants who responded (“Respondents”) ultimately reflected a broad range of sectors: banking, telecommunications, manufacturing, construction, transportation, broadcasting, natural resources, retail, and hospitality. Taken together, the Respondents represent over one

hundred Canadian employers in both the public and private sectors, including many with overseas operations.¹

During the late summer of 2007, the responses to the CEC Questionnaire were analyzed. The results were presented in a draft report that was circulated to all Participants for review and comment. The draft report was discussed at a Conference that took place on December 3, 2007 in Toronto. Invitees to the Conference included all Participants and Respondents. In addition, the CEC invited representatives from government, academia, and the labour movement to attend the Conference and provide their reactions to and comments on the draft report.

Based on the results of the Conference and other feedback received during the month of December 2007, the report was finalized in early 2008. This is the final report.

B. Structure of the Report

The report is divided into four sections. In the first section, International Labour Standards, we describe the primary sources of international labour standards, and consider the impact of international labour standards on domestic Canadian labour law. In the second section, Developments in the Western Hemisphere, we discuss initiatives such as the Summit of the Americas and the Inter-American Conference of Ministers of Labour to address the labour and social dimensions of hemispheric economic integration. In the third section, Migration and the Demand for Labour, we consider the role of migrant workers in the Canadian economy and how government policies can be tailored to better respond to Canadian employers' needs to fill existing and forecast skills shortages. In the final section, Corporate Social Responsibility, we consider the role of voluntary initiatives by Canadian businesses to operate their businesses in the globalized world in a socially responsible manner.

¹ Respondents were given the option of responding to the CEC Questionnaire on a confidential basis. Some Respondents chose this option. For this reason, the CEC is not in a position to name all the Respondents. Where a Respondent is named in this draft report, it is with the express consent of the Respondent.

2. International Labour Standards

A. The International Labour Organization

Created by the Treaty of Versailles in 1919 at the end of the First World War, the International Labour Organization (“ILO”) is the key supra-national institution in the global labour standards arena. The ILO’s mandate is to promote social justice and internationally-recognized human rights and labour standards. In 1944 the ILO adopted the “Declaration of Philadelphia,”² which set out the fundamental principles upon which the ILO continues to be based. These principles are:

- labour is not a commodity;
- freedom of expression and association are essential to sustained progress;
- poverty anywhere constitutes a danger to prosperity everywhere; and
- the war against want should be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort by the representatives of workers and employers, who enjoy equal status with representatives of the government, joining with them in free discussion and democratic decision-making with a view to the promotion of the common welfare.

The ILO’s primary role is to develop international standards in the form of Conventions and Recommendations through a tripartite process involving consultation with representatives of governments, workers and employers. Conventions are international treaties subject to ratification by the Member States (presently numbering 179), while Recommendations are non-binding guidelines for national policy and activity. The ILO has adopted more than 184 Conventions and 185 Recommendations on a broad range of subjects, including freedom of association, the right to organize, collective bargaining, abolition of child and forced labour, occupational health and safety, and equality of

² International Labour Organization Constitution, *Annex: Declaration concerning the aims and purposes of the International Labour Organization*, online: The International Labour Organization <http://www.ilo.org/global/About_the_ILO/Origins_and_history/Constitution/lang--en/index.htm#annex>.

opportunity and treatment.³ In addition, the ILO promotes the development of independent employers' and workers' organizations, and encourages state compliance by providing training and advisory services.

The ILO's prominence on the world stage has grown since the World Trade Organization ("WTO"), at its 1996 Singapore Conference, entrusted the ILO with responsibility for the social and labour dimensions of global trade liberalization. Responding to its heightened role, in 1998 the ILO enacted the *Declaration of Fundamental Principles and Rights at Work* ("*Fundamental Declaration*") which enshrines four fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.⁴ All ILO member states are considered to be bound by the *Fundamental Declaration*, even if they have not ratified the Conventions underlying the principles of the *Fundamental Declaration*.

In 1999, the ILO announced that the promotion of "decent and productive work" would henceforth be the ILO's principal objective. To this end, the ILO launched its "Decent Work Agenda". The ILO's Decent Work Agenda assists Member States to identify their own unique goals and priorities, and to develop related policies and strategies in consultation with social partners and with the technical assistance of the ILO. The ILO describes the concept of Decent Work as the integration of social and economic goals into domestic policy-making, and is comprised of four key objectives:⁵

³ The International Labour Organization, online: <<http://www.ilo.org/global/lang-en/index.htm>>.

⁴ International Labour Conference, 86th Sess., *Declaration of Fundamental Principles and Rights of Work* (1998), online: <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT>.

⁵ International Labour Conference, 89th Sess. (Geneva: June 2001), *Report of the Director-General: Reducing the decent work deficit – a global challenge*, online: The International Labour Organization <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm>>.

- Realizing international labour standards including the fundamental principles and rights at work;
- Creating greater opportunities for women and men to secure decent employment and income;
- Enhancing the coverage and effectiveness of social protection for all; and
- Strengthening tripartism and social dialogue.

In May 2006, the ILO launched a “Decade of Decent Work in the Americas”, calling on all 35 countries of the Americas to implement individual Decent Work Country Programmes (“DWCPs”) for the period 2006-2015. DWCPs are initiatives aimed at pursuing the goal of decent work by creating a coherent and integrated decent work strategy at the national level. DWCPs allow the member states, together with workers and employers and with assistance from the ILO, to identify priority areas and intended outcomes within the DWCP. The priorities and targets are to be defined within the national development frameworks of the individual state and should reflect the states’s national priorities, resources and conditions.

B. Trade and Labour Standards

Prompted by concerns about the social costs of globalization, linking labour standards to trade agreements is, in part, an attempt to set a minimum social floor for future economic development and trade liberalization. Efforts to link trade and labour stalled at the multilateral WTO, but have flourished in the bilateral and regional settings. This makes trade agreements an important potential source of international labour standards.

(i) Developments Respecting the Trade-Labour Linkage

(a) The “Social Clause” at the WTO

The idea of linking international trade with labour issues was debated as early as the founding of the ILO in 1919 and later during negotiations for the creation of the International Trade Organization (ITO) in 1948. However, when the ITO failed to gain approval, the General Agreement on Tariffs and Trade (GATT), a less ambitious multilateral trade agreement without labour provisions, was brought into force.

With the advent of the WTO in 1994, the question emerged of whether to include a reference to labour standards, or a “social clause”, in the GATT. These discussions were prompted in part by the concern that the ILO was not powerful enough to enforce labour standards, and was too reliant on consensus and voluntary action. The prospect of adding a “social clause” was originally discussed at the Marrakesh ministerial meeting of the WTO in 1994.⁶ However, despite the support of much of the developed world, including the United States and France, proposals to introduce a social clause at the WTO drew the ire of developing countries. Led by Malaysia and Egypt, developing countries claimed that the addition of a social clause would represent a further protectionist measure designed to limit their ability to compete. In 1996, at the WTO ministerial conference in Singapore, the ministers adopted a declaration reaffirming their commitment to labour rights, but also proclaiming that the ILO, rather than the WTO, is the international body responsible for protecting labour rights.

Consistent with the Singapore declaration, the promotion of core labour standards did not form part of the agenda during the most recent round of trade negotiations. In fact, the so-called “Doha round” collapsed in July 2006, largely because the agenda became too broad and complex to be resolved. The refusal of certain developed countries to eliminate agricultural subsidies is also often cited as a main reason for the collapse.

⁶ Virginia A. Leary, “The WTO and the Social-Clause: Post-Singapore” (1997) 8 no. 1 *European Journal of International Law*, online: *European Journal of International Law* <<http://www.ejil.org/journal/Vol8/No1/art7.html>>.

(b) Trade and Labour Linkage in American Bilateral Trade Agreements

At the same time that the social clause failed to gain traction at the WTO, labour provisions began to emerge in bilateral and regional trade agreements. Originally included as side agreements, labour rights now often form part of the text of bilateral and regional agreements. Many recent agreements, particularly those signed by the United States, Canada and the European Union, contain labour provisions which attempt to set a minimum social foundation of the future development of trade.

As the most influential proponent of the social clause, the United States has been at the forefront of the trend toward including labour provisions in bilateral and regional trade agreements. The 1999 Textile Agreement between the United States and Cambodia expired in January 2005, but remains a useful model of a “positive incentives” approach to achieving labour standards compliance. Under that agreement, quotas for textile and apparel exports from Cambodia were increased as labour standards in those sectors improved. The ILO was responsible for monitoring labour standards. The quotas were increased by 9% in each of the first three years and by 14% in 2004. While the US-Cambodia agreement had unique characteristics and cannot, as such, be transposed directly to other countries, the agreement does highlight the potential of positive incentives.⁷

The CAFTA-DR trade agreement, one of the most recent bilateral trade agreements ratified by the US, eliminates tariff and other trade barriers with a view to creating a free trade zone between Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States. The main text of the agreement includes labour provisions, and stipulates that all parties agree to enforce their national labour laws. This obligation is subject to binding dispute settlement, including potential financial assessments and trade sanctions. The agreement also includes a provision in

⁷ Cleopatra Doumbia-Henry & Eric Gravel, “Free trade agreements and labour rights: recent developments” (2006) 145 *International Labour Review* 185 at 199.

which the parties reaffirm their commitments to the ILO's *Fundamental Declaration*. In addition, the agreement provides an institutional framework to support capacity-building within the member states. The United States has allocated twenty million dollars for capacity building within the following five priorities:

1. Modernizing the labour justice system;
2. Strengthening the ministries' capacity to enforce labour laws, conduct inspections and resolve labour disputes;
3. Reducing discrimination against women and harassment;
4. Establishing benchmarking, verification and monitoring processes in collaboration with the ILO and the Inter-American Development Bank; and
5. Supporting the Environmental Cooperation Agreement.⁸

US trade agreements with four countries that were signed by President Bush on fast-track authority are awaiting Congressional approval: Panama, Peru, Colombia, South Korea.⁹ Labour standards has been the single most controversial issue stalling implementation of these agreements.

(c) Trade and Labour Linkage in Canadian Bilateral Trade Agreements

While the international debate about linking trade with labour standards can be traced to 1919, the debate in Canada began in earnest in 1988 with the introduction of the Canada-US Free Trade Agreement. Ultimately, the Agreement did not include any link between trade and labour standards. However, when the North American Free Trade Agreement

⁸ CAFTA Policy Brief – July 2007, *CAFTA-DR – Labour Capacity Building: Promoting Effective Enforcement of Labour Laws in the CAFTA-DR Countries*, online: Office of the United States Trade Representative <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file739_13204.pdf>.

⁹ Bilateral Trade Agreements, *FTAs Pending Congressional Approval*, online: Office of the United States Trade Representative <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html>.

(NAFTA) was negotiated in the early 1990s, Canada, the United States and Mexico agreed to a labour side agreement at the insistence of the United States. NAFTA was, in fact, one of the first trade agreements to make reference to labour standards. In the NAFTA side agreement, the North American Agreement on Labour Cooperation (NAALC), Canada, the United States and Mexico agreed to enforce national labour laws and to submit violations to a mandatory dispute resolution process.

Since NAFTA, the trend toward including a social clause in Canadian bilateral trade agreements has continued. The free trade agreement between Canada and Chile, which was ratified in 1997, is modeled on NAFTA. The trade agreement is complemented by the Canada-Chile Agreement on Labour Cooperation (CCALC), the primary goals of which are the avoidance of social dumping and the advancement of fundamental labour principles and workers' rights.

The Canada–Costa Rica Free Trade Agreement came into force in 2001. Unlike previous free trade agreements, the labour provisions form an integral part of the agreement (rather than merely as a side agreement). Further, the agreement stipulates that both Canada and Costa Rica commit to complying with the *Fundamental Declaration*. However, unlike the NAALC and the CCALC, the agreement with Costa Rica does not provide an enforcement mechanism.

Prime Minister Harper recently announced the launch of trade negotiations with Peru, Colombia and the Caribbean Community (CARICOM)¹⁰. Concern over labour rights promises to be a significant obstacle to the conclusion of any agreement with Colombia, as the Canadian Labour Congress has issued a statement rejecting trade negotiations with Colombia on the basis of the country's history of human and labour rights violations, including allegations that 2,245 union leaders and activists were assassinated in the country between 1991 and 2006.¹¹

¹⁰ This is discussed in greater detail in section 3 below.

¹¹ Canadian Labour Congress, *Why a Canada-Colombia Free Trade Agreement is a Big Mistake* (7 November 2007), online: Canadian Labour Congress <http://canadianlabour.ca/index.php/colombia_projects/1277>.

C. Impact of International Labour Standards on Canadian Labour Law

Until recently, Canadian courts' reluctance to apply ILO Conventions directly to the interpretation of Canadian labour laws and the *Canadian Charter of Rights and Freedoms* (the "*Charter*") has limited the impact of international labour standards on domestic Canadian law. However, two important decisions of the Supreme Court of Canada signal the reversal of that trend and mark a potential watershed event in the development of Canadian labour law.

The first indication that the Supreme Court was prepared to bring ILO Conventions to bear on the interpretation of Canadian labour law came in the 2001 decision in *Dunmore v. Ontario*.¹² The issue in that case was whether the exclusion of agricultural workers from the Ontario *Labour Relations Act*¹³ (the "*LRA*") constituted a violation of the right to freedom of association guaranteed by section 2(d) of the *Charter*. In light of the ruling in *Alberta Reference*¹⁴ and subsequent cases that the reach of labour relations legislation must be left to the legislature, it seemed clear that Canadian workers could not claim a constitutional right to belong to a union, to participate in collective bargaining, or to engage in strike activity. Accordingly, one would have expected the Supreme Court to find that the exclusion of a particular group of workers from a labour relations statute was not a constitutional issue but a policy matter best left to the legislature. The Supreme Court held otherwise, finding that the exclusion of agricultural workers constituted an unjustifiable infringement of freedom of association.

Notably, the Supreme Court did not require the inclusion of agricultural workers in the *LRA*, nor did the Court require that these workers be afforded access to a collective bargaining regime akin to the *LRA*. Nevertheless, the *Dunmore* decision is groundbreaking because the Supreme Court considered even those ILO Conventions not ratified by Canada as providing a "normative foundation" with respect to trade union rights. In

¹² [2001] 3 S.C.R. 1016 [*Dunmore*].

¹³ S.O. 1995, c. 1, Sch. A.

¹⁴ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313.

particular, in 1996 the subject matter of *Dunmore* had founded a successful complaint to the ILO in Case No. 1900 (1996).¹⁵ In that decision, the ILO's Committee on Freedom of Association ("CFA") concluded that the exclusion of agricultural and other workers (including lawyers) from Ontario's labour legislation constituted a violation of freedom of association. Although the conclusions of the CFA are mentioned only briefly in the *Dunmore* judgment,¹⁶ and certainly were not treated as binding, it is likely that the Court was influenced by the CFA's conclusions, particularly since the Court referenced Convention 87 (and other unratified ILO Conventions specifically concerning agricultural workers) in its analysis.

Six years later, in *Health Services and Support Subsector Bargaining Assn. v. British Columbia* ("BC Health Services")¹⁷, the Supreme Court walked through the door opened in *Dunmore* to hold that the right to freedom of association protected by section 2(d) of the *Charter* includes a limited right to collective bargaining. The Supreme Court relied expressly on international labour law principles to conclude that collective bargaining should be protected by the *Charter*, signalling for the first time that these principles are directly relevant to the impact of *Charter* rights on workplace issues.

In determining the scope of freedom of association, the Supreme Court ruled that "...Canada's international obligations can assist courts charged with interpreting the *Charter*'s guarantees."¹⁸ The Court noted that Canada has endorsed the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the ILO's *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* ("Convention 87"), which documents "...reflect not only international consensus, but also principles that Canada has committed itself to uphold."¹⁹ Canada's ratification of these international Conventions, the Court determined, has recognized "...the right of the members of

¹⁵ Canadian Labour Congress (Complaint against Government of Canada) (1996), Case No. 1900, online: <<http://www.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/sindi/english/casos/can/can199702.html>>.

¹⁶ *Supra* note 12 at para. 41.

¹⁷ 2007 SCC 27 [*BC Health Services*].

¹⁸ *Ibid.* at para. 69.

¹⁹ *Ibid.* at para. 71.

unions to engage in collective bargaining, as part of the protection for freedom of association.” As a direct result, the Court held, section 2(d) of the *Charter* “...should be interpreted as recognizing at least the same level of protection.” In other words, international labour law principles – in particular the principles set out in ILO Convention 87 – form the *foundation* of the new *Charter* right of collective bargaining.

In addition, the Court highlighted a recent review by ILO staff of key principles concerning collective bargaining, finding support in this review for the proposition that “[t]he right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith”.²⁰ Given that the purpose of collective bargaining is to regulate the working relationship between the employer and employees, the “...principle of good faith in collective bargaining” compels the employer to engage in “...genuine and constructive negotiations”. Thus, the Court relied not only on ILO Conventions that form what it viewed as an “international consensus”, but also on the interpretation of these Conventions as articulated by ILO staff in Geneva.

D. The Canadian Employer Perspective

(i) ILO’s Decent Work Agenda and Canada’s Support of Other Countries’ Decent Work Country Programs

Since the launch of the Decent Work Agenda in 1999, the ILO has reoriented its strategic objectives to focus on the goal of “decent work for all”. The subsequent debate among states, workers and employers has highlighted a disparity of views about the meaning of decent work. It is notable that despite the current lack of consensus about what “decent work” involves, 71% of Respondents to the CEC Questionnaire indicated awareness of the ILO’s Decent Work Agenda.

²⁰ *Ibid.* at para. 77.

82% of Respondents stated that Canada should provide financial and technical support to countries wishing to develop their own Decent Work Country Programs (DWCPs), demonstrating Canadian employers' support for widespread creation and implementation of DWCPs. This also reflects Canadian employers' awareness of the importance of reforming national systems taking into account national realities, priorities and concerns.

When asked which countries or regions would benefit most from Canadian support for DWCPs, Respondents answered as follows: Latin America (59%), Africa (53%), Caribbean (41%), and South Asia (including India) (29%). Whether as a result of the large number of Canadian companies operating in Latin America, the Canadian government's current efforts to negotiate bilateral trade agreements in Latin America, the proliferation of the informal economy or current political trends in the region, Canadian employers have identified Latin America as the region most requiring Canadian support for the creation and implementation of DWCPs. Respondents also identified Africa as a region with a "decent work" deficit requiring Canadian support. The HIV/AIDS pandemic in Africa, and the humanitarian and political crises taking place in certain African countries such as Sudan and Zimbabwe, no doubt deepen concerns about the region. It is interesting to note that, in contrast, only 24% of Respondents considered that China could benefit from Canadian financial support of a DWCP despite concerns about that country's human rights record.

(ii) Creation of Programs that Promote Decent Work

Respondents were asked to rank on a scale of one (low priority) to five (high priority) the importance they ascribe to creating programs and policies that promote decent work through sustainable development of private enterprises. 12% of Respondents indicated that this is a low priority, while 64% assigned high priority. These responses appear to endorse employers' efforts at the international level to promote the development of private enterprises and job creation as key parts of the ILO's Decent Work Agenda. Employers' organizations have consistently advanced the view that in order to achieve

“decent work”, states must ensure that national conditions support the development and sustainability of private enterprise. The CEC Questionnaire results suggest that employers’ organizations should continue to remind the ILO that because the responsibility for creating jobs rests largely on the private sector in most countries, decent work initiatives must take employers’ needs and interests into account.

(iii) Regulation to Promote Innovation, Stimulate Economic Growth and Support for Enterprise Creation and Entrepreneurship

Only 12% of Respondents indicated that the creation of regulatory frameworks to support innovation, promote competition and stimulate economic growth was a low priority, while 59% indicated that this is a high priority. These responses suggest that policies to stimulate economic growth are important at both the national and international level.

When asked about the priority of the creation of credit and financial systems that most effectively support enterprise creation, 18% of Respondents indicated that this is a low priority, while 76% indicated that this is a high priority.

70% of Respondents ranked the development of strategies to promote entrepreneurship as a high priority. 70% of Respondents also indicated strong support for the development of strategies to promote employability of youth and migrants. In contrast, only 42% of Respondents expressed strong support for the development of strategies to promote women entrepreneurs in particular, suggesting that initiatives that address obstacles facing all workers, without regard to gender, are a top priority.

Based on these responses, it appears that Canadian employers consider support for enterprise creation and entrepreneurship to be of central importance. This is consistent with the message sent by employers’ organizations at the international level that, as part of the focus on enterprise creation, multilateral actors must encourage and support entrepreneurship at the national level.

(iv) Reduction of Regulatory Burden

59% of Respondents indicated that reducing the regulatory burden imposed on business by labour and employment legislation is a high priority, while only 12% of Respondents indicated that this is a low priority. This response no doubt reflects the importance of flexibility for employers, and the perceived economic disadvantages of rigidity in labour markets. This is a significant message from the employer community in the context of ongoing debates about the appropriate regulation of the employment relationship at the international level and discussions about new concepts such as “flexicurity”. “Flexicurity” is a strategy that combines the reduction of the regulatory burden on the employer, on the one hand, with a transfer of greater responsibility for social protection to the state, on the other. It appears that continued debate regarding the optimal level of regulation of labour and employment issues is necessary both at the international and national levels.

(v) Creation of Programs to Develop Skills

88% of Respondents indicated that creating and implementing programs and policies to develop employees’ skills and competencies in order to improve enterprise productivity is a high priority. Only 6% of Respondents indicated that skills development is a low priority.

At the international level, employers’ organizations have called for a greater emphasis on education and skills training as a means of creating decent jobs. The CEC Questionnaire responses suggest that Canadian employers support international and national efforts to facilitate training and update employees’ competencies. This appears particularly important in light of changing domestic economic conditions and the requirement that employers adapt to these new realities.

(vi) Creation of Programs to Respond to Pressures of Globalization

Respondents were asked to rank the priority placed on creating programs and policies to assist employers under pressure from increased global competition to restructure their workforce and/or operations. 58% indicated that this is a high priority, while 24% indicated that this is a low priority. These responses suggest some ambivalence on the part of Canadian employers about the importance, or perhaps the effectiveness, of initiatives designed to help employers to recognize and respond to the challenges of the globalization. This may be an area in which further social dialogue amongst the social partners could facilitate greater awareness of possible policies and programs which may assist employers respond to the pressures of globalization.

(vii) Social Dialogue to Contribute to Economic Growth

When asked about the priority placed by Respondents on the development of social dialogue at the national, sectoral and enterprise level aimed at achieving economic growth for the enterprise, 12% indicated that this is a low priority, while 53% indicated that this is a high priority. These responses suggest that Canadian employers recognize a meaningful role for social dialogue as a means to contributing to economic growth.

(viii) Promotion of Trade Liberalization

Reflecting strong support for trade liberalization, 88% of Respondents indicated that the promotion of open trade and investment policies is a high priority. This is consistent with efforts of employers' organizations at the international level to urge the ILO to recognize the importance of trade liberalization and economic expansion as key strategies for ensuring social, economic and political development.

(ix) Abolition of Child Labour and Forced Labour

Demonstrating strong support for the principals enshrined in the *Fundamental Declaration*, 94% of Respondents identified the abolition of child labour and forced labour as a high priority.

(x) Freedom of Association and Right to Collective Bargaining

The principles of freedom of association and the right to collective bargaining enshrined in the Fundamental Declaration and outlined in ILO Conventions No. 87 and 98 are extremely complex. In order to accurately reflect Canadian employers' opinions regarding these complex principles, particularly in light of the recent Supreme Court of Canada decision in *BC Health Services*, a follow-up questionnaire and consultation would be necessary. At the December 3, 2007 Conference a number of stakeholders specifically indicated that greater emphasis should be placed on freedom of association.

3. Developments in the Western Hemisphere

A. The Summit of the Americas

The Summit of the Americas brings heads of state and governments of the 34 democratic nations²¹ in the western hemisphere together to help develop a more unified approach to the problems and concerns facing the region. It should be noted that the "Summit of the Americas" describes both periodic, high-profile conferences of democratically-elected leaders, and the process of further discussion and consultation that is mandated by the Plan of Action negotiated at each such conference. The Summit of the Americas process has, from its inception, treated economic integration within the proposed Free Trade Area of the Americas ("FTAA") as one element of a hemispheric socio-political integration project. The breadth of the Summit process is reflected in the agenda of the first Summit

²¹ Cuba is excluded from the Summit of the Americas.

of the Americas in Miami in 1994. Issues discussed included: i) the strengthening of democratic institutions; ii) the fight against drug trafficking; iii) the growth of trade and commerce, better labour conditions and enhanced environmental protection; and iv) social issues, including poverty, health, education and job growth.

The *Declaration of Principles and Plan of Action* (the “Miami Declaration”) coming out of the Summit committed participating nations to pursuing a joint agenda for the strengthening of democracies in the Americas.²² The Miami Declaration established the goals of expanding prosperity through greater economic integration and free trade, eradicating poverty and discrimination, and encouraging sustainable development and environmental protection. It contained a series of specific initiatives, with one or more countries being designated to take on a leadership role with respect to each.²³ One of these initiatives was, of course, an agreement to work towards establishing a hemispheric common market (*i.e.* the FTAA) by 2005.

While the first and second Summits²⁴ each led to labour-related initiatives, it was the Third Summit of the Americas in Quebec City in April 2001 that proved a turning point in developing a hemispheric labour dimension. At the Quebec City Summit, leaders addressed common hemispheric issues and challenges identified through the processes established at the previous Summits. Social issues, such as access to education, poverty, human rights and democracy, were a significant focus of discussions.

²² First Summit of the Americas, *Declaration of Principles* (1994), online: <<http://www.summit-americas.org/miamidec.htm>>.

²³ First Summit of the Americas, *Summit of the Americas Plan of Action (1994)*, online: Summit of the Americas Information Network <<http://www.summit-americas.org/miamiplan.htm>>.

²⁴ The Second Summit was held in Santiago, Chile in April 1998.

The Quebec City Plan of Action (Part 11 – “Labour and Employment”)²⁵ recognized that true prosperity can be achieved only by protecting and respecting the basic rights of workers, as well as promoting equal employment opportunities and improving working conditions for people across the hemisphere. Governments also agreed to develop new mechanisms to increase project effectiveness and provide other technical assistance to build the capacity of smaller economies, implement labour laws and standards effectively, foster equality of opportunity, and promote and protect the rights of all workers.

B. The Inter-American Conference of Ministers of Labour

Notably, the Quebec City Plan of Action referred labour matters to the Inter-American Conference of Ministers of Labour (“IACML”), an existing body organized under the Organization of American States (the “OAS”) and composed of the Ministers of Labour of all the countries participating in the Summit of the Americas process. The IACML was directed in the Quebec City Plan of Action to develop a process to consider and address the labour and social dimensions of hemispheric economic integration. The fact that labour issues arising within the Summit of the Americas were to be dealt with at the highest ministerial level shows the overall significance of the hemispheric labour dimension.

Since receiving its Summit-related mandate in 2001, the IACML has sought to build consensus by fostering high-level discussions among member countries with regard to labour and social issues. This has been a slow process given the number of countries involved (34), and the remarkable diversity of matters discussed (*e.g.* work in the informal economy, gender equality, fundamental rights of workers, migration, skills

²⁵ Third Summit of the Americas, *Plan of Action* (2001), online: Summit of the Americas Information Network <<http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/intermediary%20page%20-%20eng.htm>>.

development, occupational health and safety, professionalization of labour administration).

To say that the IACML process is ambitious is an understatement. Nevertheless, some concrete advances have been made to address the challenges inherent in the pursuit of labour integration amongst diverse countries. Within the IACML, there is a consensus that the first step to deeper hemispheric labour integration is to assist smaller, developing economies to modernize and democratize their labour laws and institutions. Such a goal is achievable only through the development of “horizontal cooperation” mechanisms. Horizontal cooperation is an approach that facilitates information sharing, technical exchanges and the development of best practices models through a mix of bilateral and multilateral initiatives. The work of the IACML has revealed that a horizontal cooperation approach to labour-dimension issues is not only more politically palatable (since it is less interventionist), but is also more practical in the short- to medium-term for addressing the wide disparities amongst countries. Horizontal cooperation could, over time, promote the conditions necessary for deeper labour integration.

Since 2003, when it became clear that the proposed FTAA was unlikely to be achieved by 2005, the IACML has shifted its focus to issues of labour administration, with an emphasis on professionalizing labour administration and enhancing the capacities of labour ministries. The IACML has also started promoting the development of hemispheric best practices in areas such as unemployment insurance, skills development, placement services, and migration.

The Fourth Summit of the Americas²⁶ effectively abandoned the initial notion that labour and social issues are merely an addendum to a hemispheric agenda of trade liberalization and economic integration. At the same time, many hemispheric leaders (most notably Hugo Chavez of Venezuela) came to the Fourth Summit declaring that the FTAA was “dead”. As such, the social dimension that first emerged as a counterbalance to trade

²⁶ The Fourth Summit of the Americas was held in Mar del Plata, Argentina in November 2005.

liberalization now appears to have supplanted trade as the principal matter of concern within the Summit process.

The work of the IACML is still preliminary. It is difficult to predict the nature and form of the labour dimension that could emerge if multilateral trade negotiations were to succeed. What is most interesting for present purposes is the participants' strong commitment to deal with labour and social issues as an inherent aspect of the hemispheric integration process. This commitment is rooted in several factors. First, from its inception the Summit of the Americas process has been a broad-based economic, social and political project to address poverty, political instability and social inequities in participating countries. By defining the process so broadly, participants are hard pressed to deny a link between trade and social/labour issues. Second, the two key trading blocs in the Americas, NAFTA and Mercosur,²⁷ have accepted a link between trade and labour standards. Third, and perhaps most significant, the Summit process has been under intense scrutiny from the anti-globalization movement. The ideological challenge of the anti-globalization movement, some elements of which view international economic integration as a corporate conspiracy to reap profits at the expense of third world workers, has fuelled public demand for substantive measures to address social dimension issues.

Like the ILO, the IACML is organized in a tripartite fashion. A hemispheric workers' organization, COSATE, and a hemispheric employers' organization, CEATAL, serve as official consultative bodies to the Ministers of Labour and fully participate in all IACML activities. CEATAL, of which the CEC is a leading member, has given priority to the following hemispheric issues: (1) enhancing regional economic integration; (2) promoting job creation; (3) encouraging investment; (4) expanding the capacities of, and professionalizing, labour administration; and (5) modernizing labour laws. Employers in many parts of the hemisphere commonly experience arbitrary enforcement of labour laws. Employers and their organizations in some countries also face hostile governments

²⁷ Mercosur / Mercosul is a trading bloc formed in 1991 by Argentina, Brazil, Paraguay, and Uruguay through the Treaty of Asunción.

that do not recognize the need for constructive social dialogue on issues of labour law and policy. CEATAL has called for hemispheric initiatives to professionalize and regularize labour administration, and to promote constructive social dialogue. CEATAL has actively supported proposals to establish a pan-American institution or mechanism to develop best practices in labour laws and administration.

C. The International Labour Organization

The ILO's role in international labour law is discussed more fully in section 2 of this report. It is nevertheless important to highlight here the ILO's active role in promoting labour standards in the Western Hemisphere. The ILO regularly participates in IACML meetings and projects, making presentations and assisting in studies conducted in the IACML's priority areas. The ILO also holds periodic regional meetings where government, employer and worker representatives from each country (including Cuba) participate in discussions about hemispheric labour issues.

D. The Canadian Employer Perspective

(i) Recent Developments in Canadian Foreign Policy

During the course of the CEC Consultation Project, the government of Canada announced its intention to re-align Canada's foreign policy to place a much greater emphasis on economic, political and social ties with the nations of Latin America and the Caribbean. This realignment comes at a time when trade with Latin America has grown to represent 15% of Canada's total trade outside the United States. Canada is now the third largest investor in Latin America and the Caribbean, and Canadians are making 2.5 million trips each year to the region.²⁸

²⁸ Notes for an Address by the Honourable Maxime Bernier, Minister of Foreign Affairs, to the House of Commons, *The Americas as a Priority*" (19 October 2007), online: Government of Canada http://www.canadainternational.gc.ca/brazil/highlights_actualites/Address_M_Bernier.aspx?lang=en.

During a tour of several Latin American and Caribbean countries in the summer of 2007, Prime Minister Stephen Harper declared that Canada would expand its role in the Americas. He announced a series of trade liberalization initiatives including the launch of trilateral free trade negotiations with Peru and Colombia, and free trade negotiations with CARICOM (the organization representing 15 nations of the Caribbean). Canada is also involved in ongoing negotiations with the Central American countries of El Salvador, Honduras, Guatemala and Nicaragua. On January 26, 2008 Canada and Peru concluded a free trade agreement. If the rest of the negotiations are completed, then these new free trade agreements would supplement Canada's existing free trade agreements with Chile, Costa Rica, Mexico (through NAFTA) and now Peru.

Canadian employers appear to support the trend toward a stronger Canadian role in the Americas. As discussed above, Respondents generally agreed that Latin America and the Caribbean would benefit from Canadian support of decent work initiatives. In addition, every Respondent who expressed an opinion on free trade in the Americas indicated general support for the negotiation of a comprehensive hemispheric free trade agreement. Given that the negotiation of such a comprehensive agreement is unlikely following the Fourth Summit of the Americas, it would appear that the only alternative trade liberalization strategy is the one adopted by Canada – to negotiate separate free trade agreements with individual countries or regional blocs.

(ii) Challenges to Administering Workplaces in Latin America and the Caribbean

Among Respondents to the CEC Questionnaire, few have large workforces in Latin America and the Caribbean. One Respondent with a significant hemispheric presence responded to the question, “Your enterprise has had a positive experience regarding the application and administration of labour laws in the Americas?”, by stating, “Strongly disagree”. The explanation provided was, “Poorly drafted legislation, poor administration and enforcement”. This response was echoed by other Respondents with workforces in Latin America.

The experiences of these Respondents in administering their workplaces in Latin America and the Caribbean are consistent with views that have been expressed during IACML and ILO meetings by employers and employer organizations from other countries. There is widespread concern among employers about the over-regulation of employment and inefficient (and occasionally arbitrary and capricious) enforcement of labour laws in many countries in the region. Such adverse conditions create uncertainty, and may discourage economic growth (particularly within the formal economy) and foreign investment.

(iii) Priorities for Canadian Employers

We asked Respondents to consider the various issues that are presently before the IACML and the Summit of the Americas Process, and to rank the priority of these issues on a scale of one (low priority) to five (high priority). The three issues that ranked as the highest priorities for Respondents were “Promoting the abolition of the worst forms of child labour”, “Promoting gender equality”, and “Expanding trade and investment opportunities”. A fourth issue that appears to be a significant priority of Canadian employers is “Strengthening democratic institutions”. It is surely notable that three of these four priority issues concern matters within the social dimension. Canadian employers appear to endorse the view that hemispheric issues of human rights and civil society can and should be addressed through multilateral processes.

Some issues that have been the focus of discussions within the IACML for the past decade were not rated as top priorities by Respondents. In particular, only 18% of Respondents ranked “Formalizing work within the informal economy” as a four or five. In fact, 47% ranked it as a one or two (*i.e.* low priority). In many countries of Latin America and the Caribbean, the informal economy accounts for over 50% of employment and economic activity.²⁹ Overall, there are 239 million people in the region who are

²⁹ International Labour Organization Report to the Director-General, *Decent Work in the Americas: An Agenda for the Hemisphere 2006-2015*, online: International Labour Organization

either working or available to work; approximately 103 million (or 43%) are employed in the informal economy.³⁰ Work within the informal economy is generally not regulated by existing laws, and workers typically do not have access to statutory entitlements and public benefit schemes. Two vulnerable groups, women and children, compose a significant proportion of workers in the informal economy. The ILO itself has identified informality as a key issue to be addressed through DWCPs in the Americas, since bringing jobs into the formal economy is a necessary first step to regulating working conditions and achieving the aims of “decent work” including the abolition of the worst forms of child labour and the promotion of gender equality.³¹

We do not interpret the relatively low priority placed on informality to mean that Canadian employers are indifferent to the social, economic and political challenges arising from the informal economies of Latin America and the Caribbean. There are several more compelling explanations for Respondents viewing the informal economy as a lower priority than other issues. First, Canadian employers with operations in Latin America and the Caribbean invariably operate within the formal economy. Although they are aware of the existence of, and problems associated with, informality, they are not directly impacted by problems arising within the informal sector. Second, employers have often viewed informality as a matter to be addressed by governments. There is little that Canadian employers can do directly to encourage economic development and job creation in the formal sectors of Latin American and Caribbean countries. Third, Canadian employers tend to perceive informality as a symptom of deeper structural problems within the economies and legal systems of Latin American and Caribbean countries. Therefore, Canadian employers can be expected to favour addressing these structural problems as a means to reduce informality.

http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_071488.pdf at 4.

³⁰ *Ibid.* at para. 10.

³¹ *Ibid.* at 56-58.

There is evidence in the CEC Questionnaire results to support the third point. Respondents viewed “Deregulating workplace laws including employment standards” and “Improving the administration and enforcement of workplace laws” as higher priorities than addressing informality. Although informality is a complex problem arising from numerous historical, economic and social factors, it is generally believed that the solution to informality lies, at least in part, in modernizing applicable laws and administrative processes, and improving enforcement mechanisms.³²

(iv) Canadian Employer Participation in Hemispheric Projects

Respondents were asked whether they would consider participating in technical cooperation projects to assist enterprises and employers’ organizations in the Americas. The majority of Respondents indicated that they would be prepared to participate in:

- Seminars/workshops on human resource management and industrial relations (65%)
- Development of best practices in areas such as collective bargaining exchanges (71%)
- Exchanges of personnel that would permit local managers to visit Canadian enterprises (76%).

Clearly, Respondents see a clear link between social development and political stability in the hemisphere, and economic growth. Canadian employers view Latin America and the Caribbean not only as a sphere of trade and investment opportunities, but also as a region of social concern. Respondents indicated that they favour Canadian government contributions to the development of DWCPs in the region, would support multilateral initiatives to address issues related to child labour, gender inequality, and democratic deficits, and would be willing to participate in CEC-sponsored technical cooperation

³² *Ibid.*

projects focused on the region. Respondents want both the Canadian government and the CEC to continue their work in all three areas – social, political and economic – through multilateral and bilateral initiatives.

4. Migration and the Demand for Labour

While populations are growing in much of the developing world, the labour force in industrialized countries is aging and declining due to decreased fertility rates, longer life expectancy and the aging of the baby boom generation. Employers in developed countries face increasing competition to recruit workers in order to meet shortages in key industrial and service sectors, and are relying on migration of labour from developing countries on an unprecedented scale. The International Organization of Employers (“IOE”) estimates that the total number of migrants doubled from 75 million to 150 million between 1965 and 2000,³³ with some 120 million of these individuals thought to be migrating to pursue employment and economic opportunities.³⁴

The gap between the supply and demand for labour is expected to continue widening in coming years, and employers are expected to turn increasingly to local and national governments and other social partners to identify skills shortages and propose and implement measures aimed at ameliorating the situation.

A. Migration and the Demand for Labour in Canada

Like other developed countries, Canada is facing the challenge of both an aging workforce and a shift over the last few decades from a primarily resource-based to a knowledge-based economy. Factors such as technological change, hiring and retirement practices, training and education, and the nature of work will continue to interact with population change to create localized, industry specific shortages. For example, a

³³ “Migration”, online: International Organisation of Employers <<http://www.ioe-emp.org/en/policyareas/migration/index.html>>.

³⁴ *Ibid.*

number of industries in Alberta are experiencing unprecedented demands for labour flowing from the development of the oil sands. Similarly, within Ontario's health care sector, an older than average age profile combined with a lower than average retirement age has resulted in a shortage of workers.³⁵ The construction sector faces a nation-wide labour shortage.³⁶

It is not surprising, then, that Canadian employers are increasingly looking to immigration, the mobility provisions of the NAFTA and the General Agreement on Trade in Services ("GATS"), as well as a variety of federally administered migration programs such as the Temporary Foreign Worker Program ("TFWP") and the Seasonal Agricultural Workers Program ("SAWP"), to meet their labour needs.

(i) Immigration

Immigration is an important source of new workers. Canada's immigration system is currently structured to award more points toward landed immigrant status to candidates with higher levels of education, training and experience. However, while immigration is critical to increasing the size of Canada's labour force generally, it is not clear that current immigration policies effectively address current skills shortages. The Canadian system generally does not allow for targeted recruitment of immigrants with specific skills. In addition, the points system impedes the entry of workers with lower levels of education and skills and therefore does not address shortages of low-skilled labour. Furthermore, applications for immigrant visas far outnumber the number of visas issued,

³⁵ Peter Hicks, *New Policy Research on Population Aging and Life-Course Flexibility*, online: Government of Canada Policy Research Initiative <http://policyresearch.gc.ca/page.asp?pagenm=v6n2_art_02>.

³⁶ Kelly Cryderman, "Foreign Worker Woes" *Calgary Herald* (1 July 2007), online: Canada.com <<http://www.canada.com/calgaryherald/story.html?id=698590a0-f2e0-45f2-820d-4cbab6c9a2c3&k=26540>>. In 2002, the Canadian Labour and Business Centre identified skills shortages as a major problem and skills shortage issues in the construction, manufacturing, education and health care sectors ranked among the top five concerns for managers and the top ten for labour leaders in Canada.

and it can take years for an immigrant visa to be processed.³⁷ Consequently, employers with immediate labour needs cannot rely on immigration to provide short term relief.

(ii) The Temporary Foreign Worker Program

The TFWP allows eligible foreign workers to work in Canada for an authorized period of time if an employer can demonstrate that a) it is unable to find suitable Canadians or permanent residents of Canada to fill a position, and b) the entry of foreign workers will not have a negative impact on the Canadian labour market. In 2005, Canada accepted almost 100,000 workers through the TFWP³⁸ and that number is expected to continue to grow in the coming years.

An employer seeking to hire temporary workers under the TFWP must first determine whether a Labour Market Opinion (“LMO”) is required. An LMO is an opinion issued by Service Canada about whether there are enough Canadian citizens or residents to fill the job, and is required in most cases. An LMO request requires an employer to make reasonable efforts to hire or train Canadian citizens or residents for the position and provide proof of such efforts. Upon confirmation that there are not enough Canadians available to fill the jobs, a positive LMO will be issued and an employer may then make a job offer to a foreign worker. The foreign worker is then eligible to apply for a work permit from outside of Canada. Once a work permit is approved, the foreign worker must present himself or herself at a port of entry with the required documentation.

Workers entering Canada on temporary permits are divided into categories according to the level of skill required for their employment. These categories are determined by the National Occupation Classification (“NOC”). The low skilled worker category includes jobs that require lower levels of formal training, such as food and beverage servers and

³⁷ *Hiring Temporary Foreign Workers: What Employers In The Canadian Energy Industry Need To Know: Differences Between Immigrants and Temporary Foreign Workers*, online: Petroleum Human Resources Council of Canada <<http://www.petrohrsc.ca/english/htfw01.html>> at para. 4.

³⁸ Government of Canada, *Canada's New Government Announces New Measures to Help Ontario Employers Interested in Hiring Foreign Workers* (8 December 2006), online: Canada News Centre <<http://news.gc.ca/web/view/en/index.jsp?articleid=261419>>.

hotel cleaning staff. A permit can be issued to a foreign worker in the low skilled category for a maximum of 24 months.³⁹ Upon reaching the end of the permitted term, the foreign worker is required to return to his or her home country for a minimum of four months before applying for a subsequent work permit. The skilled worker category includes managerial, professional and technical occupations that require post-secondary training, such as hotel managers, cooks and chefs. The approval process for skilled and low skilled workers functions in substantially the same way; however, a skilled worker may be granted a permit for up to 36 months, which period can be extended, and the conditions can be changed from within Canada. In addition, skilled workers are permitted to bring their families pursuant to the Spousal Program, under which spouses and partners are given an open employment authorization to work in Canada. This mechanism is designed to assist Canadian employers in recruiting skilled workers.⁴⁰ Finally, skilled workers are more likely to have the option of immigrating to Canada under the requirements of the points system mentioned above.

Relocating workers to Canada is an expensive proposition. The costs can include such items as recruitment costs, government fees, travel expenses, accommodation, programs for spouses and children, and language classes. Employers hiring foreign workers in jobs requiring lower levels of formal training are also financially responsible for the worker's travel to and from Canada, for arranging accommodation, and for paying health care premiums. The TFWP application process also takes considerable time: while it is possible to bring temporary foreign workers to Canada more quickly than immigrants, the full application process can take as long as six months to complete.⁴¹

³⁹ *FW 1 Foreign Worker Manual*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/EnGLIsh/resources/manuals/fw/fw01e.pdf>> at 27.

⁴⁰ Chantal Blouin et. al., *Engendering Canadian Trade Policy: A Case Study of Labour Mobility in Trade Agreements* (June 2004), online: Status of Women Canada <http://www.swc-cfc.gc.ca/pubs/pubspr/0662367138/index_e.html>.

⁴¹ *Supra* note 37 at para. 4.

Despite these impediments, temporary foreign labour has been critical to the continuing success of businesses in some industries. This can be seen in Western Canada, where almost 11,000 temporary foreign workers arrived in Alberta within the first nine months of 2006, an increase of 46% from the same period in 2005.⁴²

In response to criticism and demands from Canadian employers to help address labour shortages, as well as the findings of two Federal-Provincial working groups in Alberta and B.C., the Federal Government announced improvements to the TFWP in December 2006 and again in February 2007.⁴³ Regional Lists of Occupations Under Pressure have been implemented to expedite the process for receiving a positive LMO. These lists include positions for which there is a recognized skills shortage among Canadian workers. Employers hiring workers for positions on these lists need to conduct only minimal recruitment efforts before turning to foreign workers. Other changes aimed at expediting the process for hiring foreign workers include allowing employers to complete and submit TFWP application forms online, and processing work permit applications at the same time as the application for an LMO. In addition, the maximum duration of a permitted stay for low skilled workers under a new Pilot Project for Occupations Requiring Lower Levels of Formal Training has been extended from 12 to 24 months.⁴⁴

(iii) Trade Agreements

Both NAFTA and GATS contain provisions to help Canadian employers address labour shortages. For example, under Chapter 16 of NAFTA, the LMO requirement is eliminated for Mexican and United States citizens entering Canada in the categories of business visitors, traders and investors, intra-company transferees and members of 63 specified professions.⁴⁵ Canada has also made commitments under GATS to facilitate

⁴² *Supra* note 36.

⁴³ Government of Canada, *Canada's New Government makes improvements to the Temporary Foreign Worker Program* (23 February 2007), online: Canada News Centre <<http://news.gc.ca/web/view/en/index.jsp?articleid=278449&>>.

⁴⁴ *Ibid.*

⁴⁵ The North American Free Trade Agreement, *Chapter Sixteen Temporary Entry for Business Persons*, online: Foreign Affairs and International Trade Canada <<http://www.dfait-maeci.gc.ca/nafta-alena/chap16-en.asp>>.

the entry of skilled workers in specific sectors, including by removing the LMO requirement for business visitors and for nine categories of professionals.⁴⁶

(iv) The Seasonal Agricultural Worker Program

Foreign workers have become essential to the agricultural sector as fewer Canadian residents are willing to accept the associated working conditions and relatively low wages. The Seasonal Agricultural Workers Program (“SAWP”) allows for the entry into Canada of farm workers for a period of up to eight months. The workers spend an average of 17 to 20 weeks in Canada each year performing manual work on 1,800 farms in nine provinces.⁴⁷ Agreements with countries of origin are designed to ensure that workers from the Caribbean and Mexico arrive in Canada in time to meet seasonal labour needs and remain for the duration of the harvest, thus providing employers with a reliable supply of workers to meet seasonal needs.

As with the TFWP, approval of an employer’s request to hire a foreign worker under the SAWP is based on the employer’s inability to find Canadian workers to fill the positions. Once approval is granted, migrant sending countries select and screen workers who then sign a standard contract of employment with a specific employer. A naming system determines which workers return to farms each year.

While labour groups are dissatisfied with certain aspects of the SAWP, including the requirement that workers live on the employer’s farm and legislative restrictions on the ability of seasonal workers to organize and bargain collectively, trends in the agricultural industry such as expanding production and wage rate pressures suggest that demand for low wage seasonal migrant workers will continue to rise.

⁴⁶ *Supra* note 38.

⁴⁷ Maxwell Brem, *Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural Workers Program*, online: The North South Institute, Policy Brief <http://www.nsi-ins.ca/english/pdf/MigrantWorkers_Eng_Web.pdf>.

B. The Canadian Employer Perspective

Employer responses to the migrant worker issues canvassed in the CEC Questionnaire reflect a growing concern over labour shortages, and particularly the need for skilled workers.

(i) Employment and Integration of Temporary Foreign Workers

Notwithstanding the complexity and costs of participating in the TFWP, more than half of Respondents reported that they employ temporary foreign workers in their domestic operations. When asked to provide details about their enterprise's workforce requirements, one Respondent pointed to an "acute shortage of skilled workers in construction" as a reason for turning to temporary foreign workers to fill its employment needs. Further, of those Respondents that employ temporary foreign workers, 78% have had experience in integrating those workers into their domestic operations.

(ii) Immigration Policy

When asked whether the federal government should take into account labour demand and labour shortages when formulating or revising immigration policies, 100% of Respondents answered "yes". This reflects a demand for both skilled and unskilled labour to fill shortages. It is interesting to note that the immigration system currently targets foreign workers seeking to immigrate into Canada based on labour demand in only a few select areas, such as information technology professionals. In most cases, labour demand is not a relevant consideration. In contrast, under the TFWP labour demand and shortages are a paramount consideration.

Responses to the CEC Questionnaire suggest that Canadian employers also rely on immigration to address specific labour shortages. One Respondent noted that "demand simply exceeds supply in certain industries or type of work. Canadians cannot meet the

demand.” Another Respondent observed that “managing labour demand and shortages will be a major challenge for employers in the coming years. The Federal Government will need to support employers by revising immigration policies to respond to more specific demands.” Another employer pointed to certain areas of the country experiencing acute labour shortages in responding that “Alberta is and will continue to face a labour shortage, particularly for skilled workers. Similarly, the rest of Canada will be facing a growing skilled worker shortage as baby boomers retire.” Other Respondents were explicit in their criticism of current immigration policy, which does not properly take labour demand into account. One Respondent expressed support for recognizing trades as part of the skill qualifications that are considered in making immigration decisions, and another Respondent suggested that demand for labour should be the primary criteria for entry into Canada in the foreseeable future.

(iii) Expansion of Temporary Migration Programs

50% of Respondents reported that the sector or industry in which they operate could benefit from the expansion of temporary migration programs. Respondents in the construction, food packaging and processing, natural resources and power industries all noted that expansion of these programs could target critical skills shortages in their industry and others. This finding echoes a 2006 survey, which reported that 66% of employers in Canada have difficulty filling skilled positions due to a lack of suitable talent.⁴⁸ This is well above the average of 40% of employers globally according to this survey of 33,000 employers across 23 countries.⁴⁹ That survey also suggests that closer links between employers and educators, increased investment in training and more flexible use of talent are among the actions required to address shortages.⁵⁰

⁴⁸ Eric Beauchesne, “Our skill shortage near top: international survey shows only Mexico has a worse problem” *CanWest News Service* (21 February 2006), online: Canwest News <<http://www.canada.com/victoriatimescolonist/news/business/story.html?id=a6bf06c4-2fb5-46c3-ab90-06b8cd9808a3>>.

⁴⁹ Supply / Demand, *Talent Shortage Survey 2007: Global Results*, online: Manpower <<http://files.shareholder.com/downloads/MAN/115284672x0x87523/a49c96c9-cbfe-47ac-9207-476be0e84c20/Talent%20Shortage%20Survey%20Results%202007%20FINAL.pdf>>.

⁵⁰ *Supra* note 48.

(iv) International Labour Migration

60% of Respondents identified the promotion of migration policies that maximize benefits for employment, growth and development in both countries of origin and destination as a high priority for Canadian business. Similarly, 67% of Respondents placed high priority on expanding legal avenues for migration in Canada, including the expansion of the TFWP. In contrast, only 35% of Respondents placed a high priority on expanding labour mobility in regional integration schemes and pursuant to multilateral or bilateral free trade agreements. A third of Respondents ranked this as an issue of moderate priority. These responses suggest that there is broad employer support for expanding all migrant worker programs, particularly the TFWP.

Although Canadian employers have been criticized from some quarters about the treatment of agricultural and low skilled temporary workers and their access to collective bargaining, 67% of Respondents placed high priority on eliminating discrimination and enhancing the integration of migrant workers in Canada. Similarly, 80% of Respondents placed high priority on developing programs to combat the trafficking in persons, especially women and children, in Canada and internationally. The high priority accorded to such programs corresponds with the importance of expanding legal avenues for migration into Canada.

Questionnaire Respondents accorded moderate priority to issues such as supporting programs that raise awareness about the issue of migration; supporting programs that build the capacity of governments of developing countries to develop effective labour migration policies; promoting social dialogue, with direct involvement of employers and workers, in connection with formulation of migration policies; and improving the collection and dissemination of labour migration statistics in Canada. This suggests that meeting existing labour shortages, and continuing to meet shortages as they arise, is the pressing challenge for Canadian industry, while programs to raise awareness and policy formulation are of secondary importance.

(v) International Trade Liberalization

Respondents were asked what specific issues the CEC should consider in advancing the employer position regarding the link between international trade liberalization and international migration. Rather than specifically addressing this link, responses largely focused on ways of improving the present avenues and policies for access to temporary workers. Suggestions included creating a major role for government in helping employers to identify future workforce needs; improving immigration processes, such as demographics studies and links with educational institutions to identify and attract talented and highly skilled resources; avoiding over-regulation; striking a balance between international trade liberalization and international migration; implementing structural and legislative initiatives; simplifying administration; and, finally, protecting existing Canadian employment opportunities.

5. Corporate Social Responsibility

Economic globalization, trade liberalization, technological change and the rise of the multi-national enterprise (“MNE”) are all factors underlying the development of corporate social responsibility (“CSR”)⁵¹. Simply put, the current economic, social and environmental reach of MNEs is unprecedented. Critics argue that the rise of the MNE has caused an accountability gap between the voluntary international labour standards set by the ILO, and domestic labour and social rights legislation. The importance and influence of the corporate employer and, more specifically, the MNE has grown exponentially compared with that of government and worker organizations, both of which have remained tied to their domestic jurisdictions. National (and even regional) legal systems addressing labour standards would not be sufficient to cover MNEs now operating on a global scale.

⁵¹ The International Organization of Employers (“IOE”) defines corporate social responsibility (“CSR”) as initiatives by companies voluntarily integrating social and environmental concerns in their business operations and in their interaction with their stakeholders. CSR includes: (1) compliance with domestic laws, even if those laws are not vigorously enforced; (2) adherence to international standards; and (3) adoption of voluntary codes of conduct.

Not surprisingly, the United Nations, the ILO, non-governmental organizations (“NGOs”), the Canadian federal government and business leaders alike now place an unprecedented emphasis on integrating social and environmental concerns into private sector decision-making processes.

Changing public attitudes are also an important part of the context in which CSR has been adopted. Awareness of global environmental and social issues has increased significantly, fuelled by the development of global communications systems enabling corporations to control production activities on an ever-widening scale.⁵² Political pressure from organized lobby groups, in particular the anti-globalization movement, has created a new imperative for accountability with regard to both labour standards and environmental issues. Corporations are now more aware than ever of the need to account for their labour practices, if for no other reason than to prevent these practices from becoming subject to binding international regulation.⁵³

Finally, the phenomenon of the “business case for CSR”, which directly links a company’s engagement in CSR initiatives to its fiscal health, has yielded some encouraging results and pressed an ever greater number of corporate leaders into action. A corporation that spends heavily on advertising and promotion in order to establish its corporate image is highly vulnerable to adverse publicity that could tarnish its brand. Steps must be taken to protect the corporate image, and adopting a code of conduct is seen as one way to accomplish this objective. Socially responsible investment and shareholder action on social issues have had a tremendous influence on corporations’

⁵² Rhys Jenkins, *Corporate Codes of Conduct, Self Regulation in a Global Economy*, Technology, Business and Society Programme Paper Number 2 (Geneva: April 2001), online: United Nations Research Institute for Social Development <[http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/E3B3E78BAB9A886F80256B5E00344278?OpenDocument](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/E3B3E78BAB9A886F80256B5E00344278?OpenDocument)> at 8.

⁵³ Jill Murray, *Corporate Codes of Conduct and Labour Standards*, online: International Labour Organization <<http://www.ilo.org/actrav/actrav-english/telearn/global/ilo/code/main.htm>> [*Corporate Codes of Conduct and Labour Standards*].

decisions to adopt responsible practices, in part because data now supports the financial benefit of doing so⁵⁴.

A. Developments in the Monitoring and Regulation of CSR Initiatives

(i) The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO adopted a Tripartite Declaration of Principles Concerning Multi-National Enterprises and Social Policy (the “MNE Declaration”) in 1977, which was updated in 2000 to take into account the 1998 *Fundamental Declaration*. The MNE Declaration’s aim is to “... encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise.”⁵⁵ The MNE Declaration calls on Member States to ratify ILO Conventions on Freedom of Association, Right to Organize and Collective Bargaining and Discrimination. Compliance with the MNE Declaration’s guiding principles is voluntary, and is not intended to affect obligations arising from the ratification of ILO Conventions. The impact of the MNE Declaration on the global business community has arguably been relatively limited⁵⁶.

⁵⁴ A 2007 study by Goldman Sachs of six sectors that are considered leaders in implementing environmental, social and governance policies to create sustained competitive advances have outperformed the general stock market by 25% since August 2005. In addition, 72% of these companies have outperformed their peers over the same period. See the Goldman Sachs Group Inc. “GS Sustain” (22 June 2007), online: http://www.unglobalcompact.org/docs/summit2007/gs_esg_embargoed_until030707pdf.pdf. The sectors covered were energy, mining, steel, food, beverages and media.

⁵⁵ See Article II of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva: November 1977) as amended at its 279th Session (Geneva: November 2000), online: International Labour Office <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

⁵⁶ Although the ILO Committee on Multinational Enterprises may interpret the terms of the MNE Declaration and receive reports from Member countries on its application, it appears that the MNE Declaration cannot be used to redress the misuse of MNE power, even when such power is used in breach of the MNE Declaration itself. Instead, disputes are referred to the Committee for an “interpretation” of the MNE Declaration; however, the Committee lacks the power to sanction a breach. Like the OECD Guidelines, the impact of the MNE Declaration on the global business community has arguably been relatively limited. *Supra* note 52 at 8.

(ii) The United Nations' Global Compact

Launched in 2000, the UN Global Compact seeks to advance responsible corporate citizenship by challenging world business leaders to voluntarily “embrace and enact” ten core principles in the areas of human rights, labour, the environment and anticorruption. Now endorsed by most national governments, a variety of unions and NGOs, in addition to 3,000 companies in 100 countries, the Global Compact creates a platform for structured dialogue and sharing of best practices, rather than monitoring corporate practices or enforcing a binding set of regulations.

The labour principles of the Global Compact state that businesses should strive to uphold freedom of association and the effective recognition of the right to collective bargaining; eliminate all forms of forced and compulsory labour; effectively abolish child labour; and eliminate discrimination in respect of employment and occupation. Signatories to the Global Compact commit to issue a clear statement of support for the initiative, to integrate the core principles into their business strategies and operations, and to annually communicate their progress in this regard. Participants also commit to engage in public advocacy for the Global Compact and partnering with UN organizations.

In April 2006, the Global Compact launched its Principles for Responsible Investment, which is now endorsed by over 180 leading institutional investors representing more than \$8 trillion in managed assets. The principles, which are voluntary, include six overarching principles and a set of 35 possible actions that institutional investors can take to integrate environmental, social and corporate governance considerations into their investment activities⁵⁷.

⁵⁷ *Principles for Responsible Investment hit \$8 trillion Mark on First Year Anniversary* (29 April 2007), online: United Nations Global Compact http://www.unglobalcompact.org/NewsAndEvents/news_archives/2007_04_30.html>.

At the second Global Compact Leaders Summit in July 2007, executives from leading Global Compact signatory member corporations adopted the 21 point Geneva Declaration, which spells out concrete actions for governments, Global Compact participants and for the role of business in society. The Secretary-General called on governments to support the Global Compact, business leaders to ensure that the Compact is fully implemented within their companies and through their suppliers and business partners, and asked civil society and labour leaders “to remain vigilant and engaged and continue to hold businesses accountable for their commitments”⁵⁸.

(iii) ISO 26000

The International Standards Organization (“ISO”), made up of a network of international standards institutes of some 146 countries, is developing an ISO standard in the field of social responsibility. The objective is to produce a guidance document for use by businesses and other organizations, which can be understood and used by non-specialists to assist organizations in effectively addressing their social responsibilities in various cultures, societies and environments. The proposed standard, to be known as ISO 26000, will simply be a guideline standard and not suitable for certification.

In March 2005 the ISO Working Group on Social Responsibility held its first meeting, in Brazil, to begin development of the ISO 26000 standard. A total of 225 experts from 43 ISO member countries and 24 liaison organizations participated in the meeting, which focused on process and timeline issues. Since then, the Working Group has decided on the structural outline and contents of the standard, and created a draft project plan that targets publication of a fully fledged standard. The second working draft of ISO 26000 was discussed at the third working group meeting in Sydney, Australia in January 2007.

⁵⁸ *Business Leaders Adopt Declaration on Responsible Business Practices* (6 July 2007), online: United Nations Global Compact <http://www.unglobalcompact.org/NewsAndEvents/news_archives/2007_07_06c.html>.

Development of the standard will continue in coming months and is expected to be finalized during 2009⁵⁹.

(iv) The UN Draft Norms

After a four-year consultative process, the UN Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights adopted the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the "UN Draft Norms") in August 2003. Distilled from existing international instruments and principles, the UN Draft Norms address the human rights responsibilities of businesses "within their sphere of influence," including practicing non-discrimination; ensuring safe and healthy work environments, adequate remuneration, environmental protection, freedom of association and freedom from forced labour and child labour; and maintaining transparency.

The UN Draft Norms call on companies to be subject to periodic monitoring and verification by the UN or independent agencies, implying a level of enforcement that goes significantly further than the voluntary compliance and reporting encouraged by the Global Compact. In contrast to purely voluntary initiatives that focus on MNEs' "commitment" to CSR, the UN Draft Norms are the first attempt to establish an international framework for mandatory CSR standards applicable to all businesses. Currently, the UN Draft Norms are not legally enforceable but have the status of a draft proposal, meaning that they can be subject to review and consideration by the UN Commission on Human Rights.

⁵⁹ For general information, see *ISO in Brief – International Standards for a Sustainable World* (2006), online: International Organization for Standardization <http://www.iso.org/iso/en/prods-services/otherpubs/pdf/isoinbrief_2006-en.pdf>.

In July 2005, Professor John Ruggie of the United States was appointed by the UN Secretary-General as a Special Representative and given the mandate of identifying and clarifying standards for corporate responsibility relating to human rights, elaborating the regulatory role of states in this context, developing methodologies for undertaking human rights impact assessments and compiling a compendium of best practices⁶⁰. In his February 2006 interim report, the Special Representative strongly criticized the UN Draft Norms for becoming “engulfed by its own doctrinal excesses,” making exaggerated legal claims and creating confusion because of conceptual ambiguities⁶¹. He noted that the UN Draft Norms are said to merely restate existing international legal principles, but at the same time they claim to be the first non-voluntary initiative at the international level. The Special Representative noted that there is little authoritative basis in international law for asserting that the provisions of the UN Draft Norms are binding on corporations.

In March 2007, the Special Representative submitted a second interim report to the UN Human Rights Council, which included a “mapping” of existing human rights standards and initiatives along a continuum⁶². These initiatives ranged from the state duty to protect human rights to voluntary initiatives by business enterprises. The report also included results of Fortune Global 500 firms and government surveys regarding human rights policies and management practices, as well as information on human rights impact assessments. The Special Representative has requested a one year extension of his mandate in order to formulate recommendations to the UN Human Rights Council.

⁶⁰ United Nations, Press Release, SG/A/934, “Secretary General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations and Other Business Enterprises” (28 July 2005), online: United Nations <<http://www.un.org/News/Press/docs/2005/sga934.doc.htm>>.

⁶¹ John Ruggie, “Draft Interim Report of the Secretary-General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises” (February 2006), online: Business for Social Responsibility <http://www.bsr.org/meta/BSR_Ruggie-Interim-Report_200603.pdf>.

⁶² John Ruggie, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts” (March 2007), online: Business and Human Rights Resource Centre <<http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>>.

B. CSR in Canada

In 2002, the Government of Canada surveyed a cross-section of Canadian business leaders and published a summary report entitled *Corporate Social Responsibility: Lessons Learned*.⁶³ Based on this survey, the following objectives were identified as key drivers for implementing CSR:

- Improve corporate reputation and enhance brand image
- Earn and maintain a social license to operate
- Establish or improve reputation with investors, bond agencies and banks
- Reduce and manage business risks
- Increase employee morale and productivity
- Attract and maintain employees
- Maintain a good track record for managing social and environmental performance in order to successfully compete for access to resources
- Ensure access to markets/customers
- Ensure corporate values: “the right thing to do”
- Meet changing stakeholder expectations
- Increase cost savings/improve the bottom line
- Improve relations with stakeholders/dispute resolution/issues management
- Provide valuable input to strategic planning and achieve a better understanding of sustainability issues facing the corporation
- Stimulate innovation and generate ideas
- Expedite permitting/improved relations with regulators

⁶³ CSR Publication, *Corporate Social Responsibility: Lessons Learned*, online: Natural Resources Canada <http://www.nrcan.gc.ca/sd-dd/pubs/csr-rse/toc_e.html>

Since that time, Canada's corporate community has increasingly recognized the benefits of integrating CSR into core business strategy and operations. According to a 2005 KPMG study,⁶⁴ CSR reporting by Canadian businesses has increased dramatically since 2002. After Japan and the United Kingdom, Canada now ranks third among the 16 nations included in the study, compared to its 11th place ranking in 2002.

The Canadian public's strong interest in socially responsible investing has led to the creation of more than 70 investment funds that are managed pursuant to a set of ethical screening investment criteria. The Social Investment Organization estimates that in Canada, as of 2006, \$503.6 billion in assets were invested according to socially responsible guidelines. This figure represents 19.6% of the combined retail mutual fund and institutional investment markets, a dramatic increase since 2004⁶⁵. The launch of the Canada's first socially responsible exchange trade fund, the iShares CDN Jantzi Social Index Fund in May 2007, suggests that socially responsible investing in Canada has now become mainstream.

The Canadian government, for its part, now actively promotes CSR implementation. Drawing on the expertise of a multi-stakeholder advisory group, Industry Canada has released a *CSR Implementation Guide for Canadian Business*⁶⁶. Intended to serve as a reference guide of best practices, the guide sets out a six-stage implementation framework aimed at helping Canadian businesses to develop and implement effective CSR strategies. The Canadian government is also a signatory to the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational

⁶⁴ KPMG *International Survey of Corporate Responsibility Reporting 2005*, online: KPMG Global Sustainability Services, June 2005 <<http://www.kpmg.ca/en/industries/enr/energy/documents/KPMGCRSurvey.pdf>>. KPMG's triennial survey analyzes trends in CSR reporting of the world's largest corporations, including the top 250 companies of the Fortune 500 and the top 100 companies in each of the 16 countries surveyed.

⁶⁵ Social Investment Organization, *Canadian Social Investment Review 2006: A Comprehensive Survey of Socially Responsible Investing in Canada* (March 2007), online: <<http://www.socialinvestment.ca/documents/SRIRReview.pdf>>.

⁶⁶ Industry Canada, *Corporate Social Responsibility: An Implementation Guide for Canadian Business* (March 2006), online: Government of Canada <[http://strategis.ic.gc.ca/epic/site/csr-rse.nsf/vwapj/CSR_mar2006.pdf/\\$FILE/CSR_mar2006.pdf](http://strategis.ic.gc.ca/epic/site/csr-rse.nsf/vwapj/CSR_mar2006.pdf/$FILE/CSR_mar2006.pdf)>.

Enterprises (the “Guidelines”)⁶⁷. The aim of the Guidelines is to help MNEs operate in harmony with government policies and societal expectations. In keeping with the notion of CSR, and to promote the contribution of business to social development and the promotion of basic worker rights, the Guidelines establish voluntary principles for responsible business conduct in such fields as employment, industrial relations, human rights, the environment, combating bribery and consumer protection⁶⁸.

Although the profile of CSR is gaining ground in Canada, the process has been slow and much work remains to be done. In a 2006 survey conducted by Ipsos Reid and Canadian Business for Social Responsibility (“CBSR”) – a leading non-profit national membership organization of Canadian companies – 68% of over 1,000 Canadians polled said that they paid attention to issues related to CSR, but only a third of those polled indicated that they were aware of specific companies with CSR initiatives.⁶⁹ In March 2005, CBSR concluded that it would be premature for a UN Global Compact country network to be established in Canada, partly due to lack of awareness and commitment within the private sector and lagging support from the government⁷⁰. While three-quarters of leading Canadian companies reported that they were actively engaged in CSR activities,⁷¹ Canadian business has been criticized for a number of years for its low per capita membership in the Global Compact⁷². Although the number of Canadian corporations opting to participate in the Global Compact initiative has grown from seven in 2003 to 33 in 2005 and 45 in 2007, Canadian participation this still represents less than 1.5% of all the companies that are signatory to the Compact.

⁶⁷ *The OECD Guidelines for Multinational Enterprises: Revision 2000*, online: The Organisation for Economic Co-operation and Development <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

⁶⁸ As an OECD member country, Canada has established a National Contact Point, which is an interdepartmental committee composed of representatives from the Department of Foreign Affairs and International Trade, Industry Canada, Human Resources Development Canada, Environment Canada and Natural Resources Canada. The National Contact Point promotes the Guidelines, deals with inquiries and helps solve problems arising between business and labour. However, the National Contact Point’s enforcement power is relatively weak, since it can only publicize violations as opposed to imposing sanctions.

⁶⁹ Ipsos Reid, Press Release, “Corporate Social Responsibility (CSR) in Canada” (20 April 2006), online: Ipsos News Center <<http://www.ipsos-na.com/news/pressrelease.cfm?id=3054>>.

⁷⁰ See, *The United Nations Global Compact in Canada: Exploring the Feasibility of a UNGC Network in Canada* (Toronto: 2005), online: Canadian Business for Social Responsibility <www.cbsr.ca>.

⁷¹ *Ibid.*

⁷² In “Lagging behind the world: Not enough of Canada’s business leaders are contributing to the global debate over ethical practices” *Ottawa Citizen* (5 December 2003).

C. The Canadian Employer Perspective

(i) The Importance of CSR to the Viability of Respondents' Operations and the Adoption of CSR Initiatives

Not surprisingly, over 81% of Respondents strongly agreed or agreed that CSR is important to the viability of their operations, and no Respondent disagreed with that proposition. Further, 81% of Respondents indicated that they had adopted voluntary codes of conduct or other CSR initiatives governing their Canadian operations, and of those organizations with employees located outside of Canada, 78% of Respondents indicated that they applied their CSR initiatives to their foreign based operations. This is similar to the results of a 2006 survey conducted by Ipsos Reid and CBSR⁷³, in which three quarters of leading Canadian businesses surveyed indicated that they were actively engaged in CSR activities.

(ii) Respondents' CSR initiatives

While a majority of employers indicated that they had adopted CSR initiatives, there is a striking lack of uniformity in the coverage of those initiatives. Initiatives described ranged from “general business conduct policy” to waste recycling, financial support for a local safe communities foundation, monetary support for food banks in the developing world, and establishing internal dispute resolution processes for employees regarding human rights legislation and harassment.

This lack of uniformity may contribute to lagging public awareness about the specific content of CSR initiatives. The Ipsos Reid / CBSR survey found that of 1000 Canadians polled, only 33% of respondents surveyed said they knew of a Canadian company that has “made an explicit commitment to CSR”⁷⁴.

⁷³ *Supra* note 69.

⁷⁴ *Ibid.*

In addition, Canadian corporations' commitment to applying an explicit set of principles regarding the human rights dimensions of their operations, for example by citing the ILO declarations or policies or the UN Global Compact, falls far short of survey results conducted by UN Special Representative Ruggie in his survey of Fortune Global 500 companies⁷⁵. In that survey, 75% of responding companies cited ILO declarations or Conventions and 62% cited the Global Compact in their CSR policies. In contrast, only 13% of organizations responding the CEC Questionnaire described their CSR initiatives by citing either of these two reference points.

(iii) CSR Initiatives and the Promotion of Competitiveness, Financial Performance and Cost Reduction

The overwhelming majority of Respondents, some 87%, indicated that CSR initiatives promote the competitiveness and financial performance of their business either in the short or long term. One employer succinctly summed up its position on CSR as follows: "Corporate responsibility creates business opportunities while creating value. It's good for the planet, it's good for the people and it's good for our bottom line".

When asked to provide additional comments, Respondents defined "competitiveness" for their organizations differently. Responses ranged from competitiveness translating into "credibility and respect", to safety, environmental protection, energy conservation, and brand value.

When asked to specifically address whether CSR reduces operating costs through waste and energy intensity reduction, some 44% of Respondents either strongly agreed or agreed, with 38% neither agreeing nor disagreeing and only 19% disagreeing. One Respondent noted that "by integrating environmental and social considerations into our operations and product design, we find opportunities to reduce costs through eco-efficiencies, energy conservation, dematerialization and waste reduction". One Respondent who agreed with the statement noted that its strategies for waste/energy

⁷⁵ *Supra* note 61.

reductions and recycling were not part “a CSR agenda per se”, while another Respondent who agreed with the statement observed that costs savings would be realized in the long term even though CSR initiatives might add to costs in the short term.

(iv) CSR Initiatives as Response to Consumer and Stakeholder Demand and the Impact of CSR on Brand Image

A 2005 Conference Board of Canada survey found that 81% of Canadians were more likely to buy from companies they viewed as being socially responsible⁷⁶. A similar perception of consumer demand is reflected in the CEC Questionnaire responses. 75% of Respondents strongly agreed or agreed that CSR initiatives are responsive to consumer demand, with only 6% disagreeing. Similarly, 69% of Respondents strongly agreed or agreed that enhanced corporate reputation and brand image is a result of their enterprise’s CSR initiatives, with only 7% disagreeing with the statement. 100% of Respondents either strongly agreed or agreed that corporations cannot afford to disregard the opinions of environmental organizations, activist groups, suppliers, local communities and special interest groups.

A banking industry Respondent identified CSR initiatives as tools to counter the “general negative perception” of the banking industry by the Canadian public, and another Respondent noted that corporate responsibility initiatives are responsive to all stakeholder needs and concerns. The importance of being responsive to stakeholders other than the direct consumer is reflected in one Respondent’s comment: “in the ‘connected’ world activists are increasingly sophisticated and powerful”.

Also interesting, though, is the scepticism on the part of some Respondents about the correlation between implementation of CSR initiatives and consumer demands, as well as the impact of CSR on brand image. One Respondent noted that there was “still only a

⁷⁶ Susan Flynn, *Winning with Integrity: The Business Case for Corporate Social Responsibility*, (Greenland, NH: Tidewatch Consulting), online: Canadian Business for Social Responsibility <<http://www.cbsr.ca/files/ReportsandPapers/WinningwithIntegrityAMpdf.pdf>>.

weak correlation” between CSR initiatives and consumer demand, although the Respondent conceded that “when things go wrong, customers immediately question CSR commitment”. Another Respondent indicated that “while [enhanced brand image due to CSR initiatives is] a desired result, [we are] not able to identify or determine if or extent to which [this] has occurred”. Another Respondent noted that while its corporate brand was enhanced by the company’s CSR initiatives, the “connection between CSR and brand is still evolving”.

(v) Financial Premiums Resulting from CSR Initiative Implementation

69% of Respondents either strongly agreed or agreed that the financial community places a premium on enterprises that responsibly manage corporate responsibility risks, while 57% of Respondents either strongly agreed or agreed that improved relations with investors are a result of CSR initiatives. This latter number is slightly lower than anticipated given the rise in ethical investment in, and media coverage of, socially responsible corporations. Moreover, a Conference Board of Canada survey indicated that 77% of Canadians are more likely to invest in socially responsible corporations⁷⁷.

One Respondent noted that “we believe that our financial performance is partly linked to environmental and social responsibility by attempting to reconcile economic, environmental and social objectives, we minimize risks, and in many instances realize significant gains”. However, there is scepticism on the part of other Respondents about the link between CSR and investment or investor perception. One Respondent noted the “level of premium [that the financial community places on socially responsible enterprises] is not clear and not universally applied, but appears to be gaining interest”. Another Respondent was aware of socially responsible investment screening tools in financial indices such as the Dow Jones Industrial Index and the Financial Times Stock Exchange index (FTSE), but concluded that CSR was “not yet being used as a determinant for investment”.

⁷⁷ *Ibid.*

One Respondent described the impact of its CSR initiatives on investor relations as minimal but increasing, while another noted that although corporate responsibility initiatives do not necessarily result in better relations with its investors, “it certainly provides our investors with more reasons for investing in [the company]”.

Some 60% of Respondents strongly agreed or agreed that CSR initiatives improve relations with regulators. Comments ranged from there being “limited evidence that regulators even look at CSR as a criterion” to CSR “build[ing] relationships with regulators who in turn view us more positively”. One Respondent noted that its strong environmental programs played a “positive role when applying for permits or certificates of approval” from government.

(vi) CSR Policy Adoption as a means of Attracting Employees and Resources

In a 2005 Conference Board of Canada survey, 79% of Canadians indicated that they would prefer to work for companies they view as socially responsible⁷⁸. Respondents’ perceptions and experiences with employee recruitment and retention seem to accurately mirror such preference. 81% of Respondents either strongly agreed or agreed with the statement that CSR initiatives result in improved employee recruitment and retention, and only 6% disagreed.

Respondents commented that “employees take pride in the successful programs and practices that we have developed over years ... [R]esearch also shows a strong correlation between employees’ attraction and retention with ... overall record for sustainable development performance, company’s reputation for applying clear ethical principles, company’s level of community involvement”. One Respondent noted that “more and more employees/potential employees are considering the ‘ethics’ of a business as very important”, and another indicated that employees would see CSR activity as an important differentiating factor between prospective employers.

⁷⁸ *Ibid.*

While only 31% of Respondents strongly agreed or agreed with the statement that CSR initiatives result in increased access in the competition for resources and capital for the enterprise, only 6% disagreed while 56% neither agreed nor disagreed. One Respondent noted that it was recognizing “better access to resources at present than in past, based on recognition that CSR risk is a factor in any Capex spend[ing]”.

(vii) CSR and Government Regulation of Socially Responsible Corporate Behaviour

An overwhelming 80% of Respondents said that socially responsible corporate behaviour should not be regulated either domestically or internationally, and only 19% of Respondents ranked the avoidance of government regulation of CSR as a low priority.

However, when asked whether they felt that voluntary CSR initiatives would assist in avoiding government regulation of CSR, 56% of Respondents either strongly agreed or agreed, while 19% disagreed and 25% neither disagreed nor agreed. One Respondent firmly stated that there was “no room for government regulation in this space outside of traditional financial reporting, and even if there is a role, it is too soon to know what the role is”, another appeared resigned to governments being involved by noting that “we are moving in the direction of regulation”. Divided opinion on the question of whether voluntary CSR avoids government regulation may reflect an expectation on the part of Canadian employers that government regulation of socially responsible corporate behaviour is likely in the future given the importance of the subject matter. It also suggests that Canadian employers are not principally motivated by “regulation avoidance” when they pursue CSR. On the contrary, Canadian employers appear to anticipate some form of government involvement to address the social deficit that has emerged as a result of globalization.

(viii) Canadian Business and Voluntary International CSR Frameworks

Resignation about the inevitability of government regulation of CSR may in part be reflected in Respondents' striking lack of monitoring of voluntary international CSR frameworks. When asked whether they monitor OECD, ILO, UN and ISO CSR regulation initiatives, only 50% of Respondents said yes.

44% of Respondents placed low priority on becoming a member of the U.N. Global Compact, while only 19% ranked this as a higher priority of four or five. When asked about the priority of implementing the UN's Principles for Responsible Investment, only 33% of institutional investors responded higher priority of four or five. These responses are comparable to those found by the CCSR in 2005⁷⁹ and suggest that Canada still lags behind other countries in awareness, interest and recognition of international CSR initiatives.

(ix) Sharing Best Practices Regarding Socially Responsible Initiatives

While 63% of Respondents placed a high priority on developing best practices and forming alliances with like-minded businesses (and only 6% rated it a low priority), developing such partnerships with not-for-profit actors or government institutions was seen as less important, with only 31% ranking it as a high priority and 50% ranking it as a low priority. This is not surprising given the responses to the public-private and tripartite CSR initiatives such as the Global Compact reviewed above.

⁷⁹ *Supra* note 70.

(x) Implementing CSR Strategies

Developing and implementing effective CSR strategies and addressing key environmental challenges both rank highly as priorities of Respondents, with 69% giving a high priority to the former and 63% giving high priority to the latter. Priorities accorded to addressing environmental challenges may in part be explained by the prominence of natural resource based industries and organizations in Canada, and the emphasis that has been placed on corporate environmental stewardship for many years even prior to the rise of CSR on a pan-industry basis in Canada.

(xi) Publicizing Respondents' CSR Initiatives

A slightly larger portion of Respondents placed a lower priority on publicizing their CSR initiatives either through developing marketing strategies to promote the enterprise's involvement in CSR initiatives, or publishing sustainability reports or information regarding CSR initiatives as part of corporate reporting practices, than on the actual development and implementation of such practices.

This tends to support the results of a recent report of sustainability consultant, Stratos Inc., which determined that while the number of Canadian corporations that engage in corporate sustainability reporting has increased dramatically over the past half decade, some 30% of the companies on the Toronto Stock Exchange Composite Index still do not disclose corporate sustainability information.⁸⁰

⁸⁰ See *Gaining Momentum: Corporate Sustainability Reporting in Canada* (15 March 2006), online: Stratos <http://stratos-sts.com/publications/2005_Gaining_Momentum.pdf>.

6. Conclusion

The responses to the CEC Questionnaire demonstrate a high level of recognition and support for the connection between social and economic development. Most Respondents are aware of the ILO's Decent Work Agenda and endorse Canada's support of programs to promote decent work, particularly in Latin America. Canadian employers also generally support initiatives at the multilateral and bilateral levels to promote sustainable private enterprises, entrepreneurship, training and skills development, and trade liberalization.

Canadian employers are alert to the importance of establishing flexible regulatory frameworks that support innovation, promote competition and stimulate economic growth. Support for enterprise creation and entrepreneurship at the national and international level is crucial, and the promotion of trade liberalization and economic expansion are high priorities for Canadian employers.

The labour market in Canada is rapidly becoming globalized as, in the face of pockets of skills shortages across the country, Canadian employers turn to migration as a crucial source of both skilled and unskilled workers. As the Canadian population ages, labour shortages are projected to increase, heightening the importance of labour migration to the success of the Canadian economy. The CEC Questionnaire responses confirm that a significant number of businesses employ foreign workers through existing programs, and advocate for the reformulation of immigration policies. The promotion of migration policies that takes into account labour market demand and that maximize benefits for employment, growth and development in countries of origin and destination is also endorsed by most Respondents.

Finally, the CEC Questionnaire results indicate that Canadian businesses view integrating social and environmental concerns into their core business strategy as a high priority. While some Canadian employers view government regulation of socially responsible

corporate behaviour as inevitable, voluntary measures adopted by enlightened employers may prove to be the most effective means of closing the perceived “accountability gap” between international labour standards and domestic labour and social rights legislation.

Appendix A

Report on December 3, 2007 Conference Proceedings

Introduction

The CEC Consultation Project Conference took place on December 3, 2007 at the MaRS Discovery District in Toronto. Invitees to the Conference included all Participants and Respondents. In addition, representatives from government, academia and labour were invited and attended the Conference.

Generally, the purpose of the Conference was to discuss the impact of globalization on Canadian employers. More specifically, the purpose of the Conference was to provide both Participants and Respondents as well as stakeholders with the opportunity to comment on the contents of the draft report regarding the positions taken by Canadian employers on various international labour law issues.

Program

Welcome and Introductory Remarks, Introduction to Methodology

- **Brian W. Burkett**, Heenan Blaikie LLP and Counsel to the CEC
- **John Craig**, Heenan Blaikie LLP

Panel #1 – Reactions from the Social Partners

- *Moderator:* **Brian W. Burkett**, Heenan Blaikie LLP
- *Participants:* **Debra Robinson**, Human Resources and Skills Development Canada (HRSDC) and **Jeffrey Sack**, Sack Goldblatt Mitchell LLP

Panel #2 – Reactions from the Academic Community

- *Moderator:* **John Craig**, Heenan Blaikie LLP
- *Participants:* **Professor Kerry Rittich**, University of Toronto, Faculty of Law, **Professor Anil Verma**, University of Toronto, Centre for Industrial Relations and **Professor Michael Lynk**, University of Western Ontario, Faculty of Law

Panel #3 – Reactions from the Employer Community

- *Moderator:* **Sonia Regenbogen**, Heenan Blaikie LLP
- *Participants:* **Kathrin Bohr**, Canadian Business for Social Responsibility (CBSR) and **Andrew Finlay**, Scotiabank

Lunch with Guest Speaker, Donald Johnston

Conclusions

One of the comments that was raised by a number of speakers at the Conference was that the Canadian employer community should undertake a more fulsome analysis of the issue of freedom of association (including collective bargaining and strikes) in light of recent jurisprudential developments.

The presentations made at the Conference, along with the comments of Conference attendees, have been incorporated into the final version of the Report.