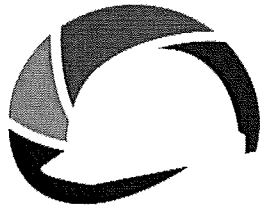


Hamilton-Brantford Building & Construction Trades Council

Chartered By The Building and Construction Trades Department AFL - CIO - CLC

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CBTU

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Speaking Notes HBBT Council Delegation January 18, 2017

Good Morning Mayor Eisenberger and esteemed Councillors, it is with great honour and privilege, I stand here to speak on a very important matter which has and will continue to affect this great City and the very foundations it is built on.

I will humbly begin....my name is Mark Ellerker and I am here representing 10,000 local construction workers and apprentices, who help to build and maintain our community's infrastructure on a daily basis, and our local economy. Construction makes up 15% of the Canadian economy and is a major economic driver in this community generating more than \$500 million annually.

I am here to talk about the importance of good trade, local business and local employment. We all know trade is good, it helps local employment and local business, and it is fundamentally one of the most beneficial ways to grow our economy and to secure important resources, goods and services that our community can not supply, or that we require for our community to be able to produce and supply when practical.

However, not all trade is considered equal. Some forms of trade can eliminate local employment, local business, and reduces a region's economic stability and economic security. This type of trade is detrimental and devastating to a local economy and its community. When trade is not used wisely, intelligently and with the most of honorable intentions it becomes very harmful to a community.

Balanced And Sustainable Trade:

In order to have good sustainable trade, there must be a balancing of interests and a standardization of industries within the agreement. A healthy trade agreement will provide an equal and level playing field for business and the economy promoting growth and development for all parties. This must be created by eliminating the exploitation of citizens, workers and the environment. Good trade requires comprehensive economic analysis and the input from all vested and affected parties in the community.

Good trade aligns international interests, and legislates equal and comparable governmental and sectorial regulations. It should utilize industries' best practices and recognize better standards for the benefit of all parties involved, and never exploiting the lowest standards to benefit only a wealthy few at the top of society. Good trade deals don't exploit third world workers by leveraging them against industrialized workers to erode and lower the industrialized workers higher standard of living. Good trade must not allow unregulated industries with lower standards to compete directly with regulated industries using higher standards. Good

trade should never allow foreign governments to subsidize competing business interests against unsubsidized local business interests.

How does an industry compete, or how does an individual business plan succeed if a competing business model is allowed to operate outside the legally accepted standards and regulation of that industry and its best practices? Or outside of what is acceptable to the community as a whole against the rules or laws that a community has democratically chosen, and outside the best interests of that communities own citizens? It is the fiduciary responsibility of an elected official to work in the best interest of their constituency, rather than in the best interest of a select few, or for the private interests of a competing third party at the detriment of their own constituency.

How Free Trade Deals Help Hamilton:

Under NAFTA the Greater Hamilton Region has seen the loss of thousands of good paying jobs, companies like Stelco, Proctor & Gamble, Westinghouse, BP, Firestone, Hoover, Camco, Petro Canada (Halton), John Deer (Welland), Stelwire (Welland), Stelpipe (Welland), Atlas Steel (Welland), GM Plant (St. Catharines), Sterling Trucks (London), Caterpillar (London) and Heinz (Almer) to name several. On March 3, 2015, Dennis DesRosiers, Canada's leading Automotive Analyst told a packed room of industry stake holders that no new car plants will be built in Canada, and that Canada will be lucky to maintain its current stock of automotive assembly plants, and that all future assembly plants will be built south of the Mason Dixon Line and Mexico.

Race To The Bottom:

As it is presently written, we see similar conditions in the TPPA; these conditions will not be beneficial for local construction and manufacturing businesses in our community. This should be a concern for everyone in the room. If there are no mechanisms in the TPPA to regulate and level the playing field for local businesses; I ask how this community benefits in direct competition with Malaysia, Vietnam, Singapore, Brunei, Mexico, Chile and Peru?

What's At Stake:

If you remember earlier I mentioned construction being 15% of Canada's GDP, what happens when foreign companies are allowed to bring their entire labour force, allowing them to work under their own conditions and standards on local projects. How does the City collect on deficiencies when the construction firm returns to Malaysia or Vietnam? How successful was Tim Horton's Field? How many deficiencies are still left to correct? How much will the total cost of Tim Hortons Field be to the City and tax payers after deficiencies and litigations with the French firm "Bouygues" and the Hamilton Ti-Cats has all been settled?

As an additional concern the Investor Dispute Mechanism (IDM's) in NAFTA and now the TPPA do not recognize Canadian Law or the Canadian Constitution. Originally in NAFTA these IDM's were premised to be necessary to protect Canadian and U.S. interests from the less evolved Mexican Legal System. The IDM's in NAFTA were even sold as a protectionary measure to assist Canada and US with Mexico. Now after 20 plus years of NAFTA, over two thirds of all legal proceedings involving IDM's under NAFTA have not been filed against Mexico, but instead against Canada for a collective sum of over \$180 Million with hundreds of millions still pending.

The majority of these decisions have involved Canadian environmental regulations, and these decisions and rulings have been made in complete secrecy and outside of Canadian courts. The TPPA goes further and allows lawsuits against not just Canada, but now provinces and even municipalities in complete secrecy, and without Canadian courts being involved. These IDM's will only cause a chilling affect, which will stop local governments

from discussing and passing any kind of progressive legislation for the protection of their own citizens, workers or environment, simply in fear of legal retaliation through an IDM.

Solutions Needed To Protect Municipalities And Balance Globalization:

The Federation of Canadian Municipalities lists many recommendations and best practices that they suggest municipalities should be developing and using to build sustainable regional economies along side globalization. The Federation of Canadian Municipalities openly recommends Best Value Tendering Practices and utilizing a structured Contractor Prequalification System. These valuable tools will assist in helping municipalities to deal with challenges presented by globalization and new trade deals like the TPPA. Other countries like UK, Australia and Germany have also developed Contractor Procurement Tier Systems to better gauge and rate the ability and capacity of construction firms tendering on regional and municipal projects.

The TPPA as written will undermine the City's procurement policies and will eliminate good paying sustainable local jobs that this community desperately requires. This needs to be addressed; the TPPA is not a fair trade deal but an unfair deal that protects only the interest of foreign corporations and investors at the expense of citizens, workers, and our environment. I urge you to support the proposed resolution as written in the joint letter. I also strongly urge this Council to closely review the City's current lowest cost construction procurement policy; and to review and implement the procurement recommendations from the Federation of Canadian Municipalities, and best practices like Contractor Procurement Tier System and Open Book Tendering from the UK and Australia.

Thank You,

Mark Ellerker
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Construction & Property Development Articles

Tiers

The difference between tier 1, 2, and 3 building companies

February 14th, 2012 | [Building Company](#), [Construction Industry](#), [Contracts](#), [Patterson Building Group](#), [Tiers Comments](#)

Every industry has a 'classification' or a 'rating' system. Sometimes these labels are official; other times they're just unofficial ways to describe a company's size and abilities. For example, small companies often call themselves 'boutique', while larger ones make their 'significant' size known. While these general labels are helpful, the construction industry has a very specific rating system. Building firms are classified as 'tier 1', 'tier 2', or 'tier 3', and since that doesn't really give much information away, we thought we'd explain what those terms mean.

What's the difference?

The tier system isn't a difficult one to wrap your head around – it's actually quite logical. Basically, Sydney builders are rated according to their capacity to take on certain projects. The size, resources, experience, and of course, money a company has determines the kind of projects they are able to take on, and therefore what 'tier' group they fall in to. In layman's terms, tier 1 companies are the big guns, and the tier 3 ones are the more modest firms. Over time, companies can move up the tiers if they fit the criteria.

Now, let's explore the different tiers a little more.

Tier 1

Tier 1 firms are the largest, wealthiest, and most experienced in the industry. This tier is so exclusive, in fact, that there are only 5 tier one contractors in the whole of Australia! Furthermore, all 5 are run under 2 parent companies. Here's the breakdown:

- Leighton Holdings – has Leighton Contractors, Theiss, and John Holland under its umbrella
- Lend Lease Infrastructure – controls Boulderstone and Abigroup.

These Sydney commercial builders take on major commercial projects such as motorways, railways, hospitals, universities, office towers, shopping centres and the like. They have the expertise, resources, and finances to

take on such large-scale projects. Tier one contracts are usually in the hundreds of millions and even billions price range.

Tier 2

Mid-tier companies are still key players in the construction industry. As the name suggests, they are somewhere in between tier 1 and 3. As a general rule, tier 2 companies are more likely to take on commercial (rather than residential) projects. Patterson Building Group is a tier 2 company, and we specialise in aged care, education, heritage, retail, and industrial projects.

Tier 3

Now that you know a little bit about the tier ratings, you can probably guess that tier 3 companies take on the smaller projects. There are a lot more of them around, and they have plenty of work to keep them busy. Tier 3 firms usually take on projects around the million-dollar range; sometimes a little more, sometimes a little less. The types of projects they take on are:

- Sizeable residential jobs, including rebuilding and refurbishing.
- Small-scale commercial work, such as building or refurbishing petrol stations, supermarkets, offices, and places like McDonalds.

These companies are essential to the industry, and they build up their portfolio with this type of work. They then have the opportunity to start moving up the tier ladder.

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BUILDING WITH PURPOSE:

PUBLIC INFRASTRUCTURE PROCUREMENT
AND COMPETITIVE ADVANTAGE

OCTOBER 2013



**Presented by the Devon Group at the 56th Annual Convention of the
Provincial Building and Construction Trades Council of Ontario**



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EXECUTIVE SUMMARY

In the next decade, Ontario and its municipalities will be making historic investments in public infrastructure including roads, highways, bridges and subways.

How these infrastructure investments are made will impact the short and long-term economy in many ways. This paper outlines how these investments should be made so that Ontario and its municipalities 'build with purpose'. This purpose-driven building is a pathway to employment for historically underrepresented people; can enhance health, safety, and training of workers; maximize social and economic benefit; and position Ontario to succeed in an increasingly competitive world economy.

Backed up with research and case studies, this paper makes procurement policy recommendations the province of Ontario should follow to ensure that Ontario and its municipalities build with purpose, including:

- Requiring contractors to provide skills training and meaningful employment opportunities to youth, local communities, unemployed/underemployed, and traditionally underrepresented populations of Ontario residents with specific participation and hiring targets during construction.
- Explicitly promote apprenticeship by requiring that bidders on provincially-supported construction projects either hold a trade certification or be registered as apprentices, and be registered with the Ontario College of Trades.
- Infrastructure Ontario to mandate prime contractors and sub-contractors to implement Best Practices that exceed the minimum requirements of the *Occupational Health and Safety Act* and its related regulations.
- Support community programs, such as Helmets to Hard Hats, Hammer Heads, etc., and sub-contract to trade contractors who also support such programs, or insist they be used.
- Infrastructure Ontario should include in its annual report a review of how general and trade contractors that performed work for Infrastructure Ontario supported community and industry programs that promote inclusiveness.
- Include a detailed Safety Plan in bid submissions that address the following: identification of known risks; a description of how health and safety factors will figure into the selection of sub-contractors and the incentive rewards of managers; identification of the required

training, certifications and licenses and a description of how these will be documented for both workers and managers; and a description of the ongoing inspection system for the project and the various roles and responsibilities that will pertain to health and safety.

- Procurement policies should include provisions that promote hiring local firms, local contractors, local subcontractors, and local workers.
- Procurement should not be approached as a zero-sum economic game in which one party's gain is another's loss; gaining lasting value from procurement means moving beyond price to capturing social and economic benefits as well as improving project quality.
- Procurement officials should frame their policies through a lens similar to Porter's four conditions in order to create a unique and long-lasting economic advantage for the region.

By implementing these recommendations, Ontario will not only build a world-class infrastructure in a cost-effective and safe way, but will also build a strong and sustainable regional economy in the short and long-term that has highly-trained, highly-skilled, highly-employable workers.

BUILDING WITH PURPOSE:

PUBLIC INFRASTRUCTURE PROCUREMENT AND COMPETITIVE ADVANTAGE

INTRODUCTION

Parts of the Canadian economy are in overdrive. Even with a high dollar, Canadian manufacturing remains comparably strong, and high commodity prices – in particular Alberta oil – are strengthening Canada’s trade balance. Canadians enjoy relatively low unemployment and a measure of stability in a turbulent global economy. The 2011 Global Economic Pulse survey indicated that 60% of Canadians view their economic situation in a positive light, the highest among G8 countries (Ipsos Ried, 2011). This prosperity is dotting the skylines of Canada’s biggest cities: there are currently 132 high-rise buildings under construction in Toronto. Mexico City ranks a distant second to us with 88, and New York City is in third with 86.

However, with this economic and development growth, mounting pressure is placed on aging infrastructure, roads, public transit systems, environmental and water works essential for economic growth and the well-being of Canadians. In Ontario alone, there is an ongoing, daily discussion about needed transportation infrastructure upgrades and the catastrophic consequences if these investments are not made, or not made wisely – not to mention the conversation about a multi-billion dollar casino project to be situated in the Greater Toronto Area.

After decades, or centuries in some cases, of continuous use, much of Canada’s public infrastructure is approaching the end of its useful life and will need to be repaired or replaced (Dupuis & Ruffilli, 2011). Necessarily, careful attention should be paid to the bottom line cost of these massive infrastructure investments, but also, procurement officials deciding how, where, and with whom these dollars are spent should consider the economic and social multiplier-effect this public money can have if deployed under the right conditions.

\$120 BILLION OPPORTUNITY TO BUILD WITH PURPOSE

Most Canadians agree that health and education spending have taken priority over investments in public infrastructure and that all levels of government are responsible for underinvestment (Mackenzie, 2013).

To narrow this infrastructure gap, Canada’s federal government has committed to spending \$40 billion between 2007 through 2014 to

support improvements to Canada’s public infrastructure. Analysts expect that as the projects are cost-shared with other levels of government, they will likely leverage total investments up to three times greater than the amounts contributed by the Government of Canada (Dupuis & Ruffilli, 2011). “The *Economic Action Plan 2013* delivers a new *Building Canada* plan, which will provide approximately \$53.5 billion in new and existing funding for provincial, territorial and municipal infrastructure between 2014 and 2024. In addition, over the next 10 years, the Government will make significant investments in First Nations infrastructure, and in federal infrastructure assets. Overall, federal infrastructure funding will total \$70 billion over 10 years, the largest federal investment in job-creating infrastructure in Canadian history” (Government of Canada, 2013). Moreover, Ontario has invested \$75 billion dollars in infrastructure since 2003, and plans to spend an additional \$13 billion in 2013-2014 (Ontario. Ministry of Infrastructure, 2013).

When discussing the benefits of public infrastructure spending, most commentary focuses on two dimensions:

PRODUCTIVITY – RESEARCH

1. Research suggests that every dollar invested in public infrastructure lowers business costs by an average of 11 cents and improves productivity (Ontario. Ministry of Finance, 2010).

JOBS

2. Infrastructure investment creates short-term jobs, many of which are in construction and trades which are good for short-term economic growth.¹

There is, however, more to be said for construction procurement as an instrument for increasing economic inclusion for traditionally underrepresented populations, building a more skilled, highly-trained workforce, and creating enduring competitive advantage for Ontario. Favouring bidders for public infrastructure projects to employ people who are underrepresented in the building and trades sector, to meet high training, health, and safety requirements, and to source local content (building materials, equipment, technology etc.) can have a tremendous long-term impact on Ontario’s prosperity and competitiveness in the short and long-term.

This paper examines the social and economic benefits that accrue when inclusive procurement provisions are used in public sector building and construction procurement. It argues that while there are many positive economic indices to celebrate in the current Canadian economy, public sector construction procurement policy can and should be used as an instrument of sustainable competitive advantage. With a forecasted spend of \$12 billion in the next two years, policymakers have an historic opportunity to *build with purpose*.

¹ Construction jobs make up about 7% of Canada's total workforce or 1,267,000 persons employed (Statistics Canada, 2013).

SCOPE OF RESEARCH

Building on research gathered from across North America and elsewhere, this paper argues that Ontario should pursue inclusive public sector procurement strategies to improve the province's competitive advantage, defined by criteria laid out below. The paper focuses on the policy tools available for public procurement for two reasons:

1. Public infrastructure spending across Canada is considerable; it peaked at \$65 billion in 2011 and 2012 with municipal government spending at \$27.3 billion, followed by provincial spending at \$22.7 billion, and the federal government spending \$5.4 billion annually (Canadian Manufacturers & Exporters, 2009). Public infrastructure projects are, therefore, an ideal mechanism to utilize procurement best-practices that go beyond traditional contract performance – identified within this paper as “secondary procurement” policies.
2. Governments lead by example and can use their procurement policies to encourage wider acceptance of standards in the private sector (Arrowsmith, 2010) and spur innovation and long-term economic advantage.

“With so much money in the pipeline – and with the health of the global economy riding on the success of infrastructure investment – the efficiency of infrastructure delivery is particularly important at present. If done right the investment boom could become a boon, because infrastructure investment is appealing in many ways: it creates and sustains employment; there is a large element of domestic inputs relative to imports; it improves productivity and competitiveness by lowering producer costs; it benefits consumers through higher-quality services; and it improves the environment when infrastructures that are environmentally sound substitute for infrastructures that are not.” (Flyvbjerg, 2009)

WHAT IT MEANS TO BUILD WITH PURPOSE

In *NONZERO: the Logic of Human Destiny*, Robert Wright uses game theory to argue that economies and societies improve as they move away from playing zero-sum games to non-zero-sum games: In zero-sum games, the fortunes of the players are inversely related. In non-zero sum games, one player's gain need not be bad news for the other(s). Indeed, in highly non-zero sum games, the players' interests overlap entirely. In 1970, when the three Apollo 13 astronauts were trying to figure out how to get their stranded spaceship back to earth, they were playing an utterly non-zero sum game, because the outcome would either be equally good for all of them, or equally bad. (It was equally good.) (Wright, 2000, P. 5)

Procurement policies have, in the past, been seen as a zero-sum game. The purchasers, in this case government agencies, win if they are able to extract price concessions from the vendor and vice versa. The primary objective of procurement as traditionally constructed is to obtain goods, works or services on the best terms; in fact, in some public-sector procurement policies price is the sole determinant for bid awards (Arrowsmith, 2010).

Public procurement should no longer be a zero-sum game, rather other considerations must be acknowledged to create a lasting social and economic benefit stemming from public procurement on infrastructure.

The construction labour market and the construction industry have distinct features that have historically caused an underinvestment in skills: because it is viewed as a commodity and bidders are rewarded primarily for submitting the lowest cost bid, or one slightly lower than the next highest bidder, the tendency has been for the construction labour market to undersupply skilled labour and over supply unskilled (or semi-skilled) labour. This creates a race to the bottom for cost while not adequately factoring in other economic and social advantages of a smarter, more thorough analysis of bidders – thus creating a non-zero sum procurement process.

In order to avoid a race to the bottom and a bidding system that solely seeks the lowest cost, the tendering process is an opportunity to introduce requirements that could not only level the playing field and reduce this type of cut-throat behaviour, but also develop enhanced socio-economic benefits. While procurement policies have long been viewed as a potential platform for environmentally preferable purchasing, and indeed much

has been written about “green” or “environmentally friendly” practices in government procurement processes, a federal government wide review of procurement conducted in 2005 concluded “further work remains to be done to examine the role of existing socio-economic benefit policies with impacts on procurement...” (Lastewka, 2005). Procurement policies that go beyond the so-called “primary” objective of obtaining goods, works or services on the best terms and focus on other potential benefits are secondary procurement policies (Arrowsmith, 2010).

Building with purpose demands an examination of the economic and social benefits that are attained through the introduction of secondary procurement policies for public infrastructure projects (Coggburn, 2005). To build with purpose, we must examine:

BUILD TO PROMOTE INCLUSION

How would the introduction of secondary procurement policies improve the participation of historically underrepresented people (people with disabilities, Aboriginal people, minorities) in the skilled workforce and act as a catalyst for enduring economic development?

BUILD TO ENHANCE HEALTH AND SAFETY

What is the demonstrable effect of procurement policies that mandate enhanced occupational safety and training standards on productivity, quality of work and timeliness?

BUILD TO MAXIMIZE SOCIAL AND ECONOMIC BENEFIT

What social and economic net benefit is realized for every unit of construction and trades training mandated through public procurements?

BUILD TO IMPROVE HIGH-QUALITY COMPETITION AND IMPROVE ONTARIO'S ECONOMIC COMPETITIVENESS

How does obliging bidders on public infrastructure projects to meet minimum local content requirements improve local demand conditions, help incubate related and supporting suppliers and contribute to robust competition? Can government invest infrastructure dollars in a way that promotes innovation and creates competitive advantage vis-à-vis other regions and other countries?

For each of these questions, this paper provides research and case studies to support the policy recommendations contained herein.

BUILDING TO PROMOTE INCLUSION

QUESTION

How would the introduction of secondary procurement policies improve the participation of historically underrepresented people (e.g. people with disabilities, Aboriginal people, ethnic minorities) in the skilled workforce and act as a catalyst for enduring economic development?

RESEARCH

Extractive industries such as mining and oil and gas dominate the Financial Post's Profit Margin Index (FP 500, 2010). Moreover, major upgrades to hydroelectric generation and transmission are underway or under consideration across Canada.² In many cases, these projects will occur on or adjacent to First Nation's treaty lands and in close proximity to some of the poorest communities in the country.

One such example is the Ontario's Ring of Fire, a crescent shaped swath of land in Northern Ontario rich with mineral deposits. The Ring of Fire represents an “unparalleled economic opportunity: over \$3 billion worth of new capital investments in the mining sector were announced in 2011, including a new chromite smelter in Sudbury. Proposed Ring of Fire mine developments are expected to create more than 1,500 permanent jobs and develop key processing and transportation infrastructure. The new transportation infrastructure required to serve the communities will provide year round access to otherwise isolated communities.” (Emerging Stronger, 2013)

Workforce inclusion can be improved through the use of procurement set-asides that limit participation to particular groups. These preferences involve, for example, contracting with small businesses owned by socially or economically disadvantaged individuals, particularly ethnic minority groups.

These are not new policy tools and indeed during the Carter Presidency in the United States, the Public Works Employment Act of 1977 was passed and provided that at least 10 per cent of each federal grant for public work projects under that Act should be allocated to minority business enterprises (McCrudden, 2007).

² Some examples include the Conawapa Generating Station; Keeeyask Infrastructure and Generating Station Projects; Pointe du Bois Spillway Replacement and the Riel Reliability Improvement Initiative.

More recently in Canada, a Contracting Policy Notice by the Federal Government issued in 1996 concerning “Aboriginal Business Procurement Policy and Incentives” formally notified federal departments and agencies that the government had approved a strategy to promote Aboriginal business development through the federal government procurement process.

This policy had several objectives: increased participation by Inuit firms in business opportunities in the Nunavut Settlement Area economy; improved capacity of Inuit firms to compete for government contracts; and increased access by Inuit to on-the-job training (e.g., apprenticeship, skill development, upgrading and other job-related programs). It also provided greater opportunities for Inuit to receive training and experience to successfully create, operate, and manage Northern businesses (McCrudden, 2007).

Moreover, in order for a bid to be qualified under this policy, the bidder must certify that an Aboriginal business would perform at least 33% of the value of the work performed under the contract.

Critics claim that set-asides disrupt/pervert market forces in two ways:

1. They limit competition, and because contractors that do compete may pass on the cost of compliance to the government.
2. Some have also argued (Arrowsmith, 2010) that set-asides result in higher prices and/or a compromise on quality, as they limit competition and may have workforces that face steeper on-the-job learning curves and are, at least initially, less efficient than other established enterprises.

Nevertheless, set-asides have proven themselves useful. For example, they allow governments to work closely with a limited group of firms on an ongoing basis to improve those firms’ practices (Arrowsmith, 2010).

Set-asides or other inclusive procurement policies can contribute to the competitive advantage of Ontario in two ways.

First, as the example below of the Malmesbury prison shows, an inclusive procurement policy helps flow capital to underdeveloped communities and underprivileged peoples. This, in turn, increases local demand for goods and services that catalyzes entrepreneurs to open local businesses that contribute to a healthy, productive workforce and local economy well beyond the period of time of one specific project.

Second, the jobs that are created by construction projects result in the skilling of those who have traditionally been unable to access the skilled workforce. The biggest generation in Canadian history, the baby boomers, have started retiring. Last year, the first baby boomers turned

65, and by 2030, for the first time ever, Canada will have more people over the age of 65 than under the age of 20. Over the next two decades, the number of seniors will double. As a result, the ratio of working-age Canadians to seniors is expected to fall from 4-to-1 in 2011 to 2-to-1 in 2030 (Honourable Diane Finley, 2012). A skilled labour force, particularly one with specialized skills such as those transferred through construction and trades work, is critical to compete domestically and internationally (Porter, 1998).

“Governments must work together to address infrastructure, transportation, processing, electricity pricing and availability, and Aboriginal education and labour market access... Costs need to be shared between federal, provincial, and municipal governments and their private sector partners” (Emerging Stronger, 2013).

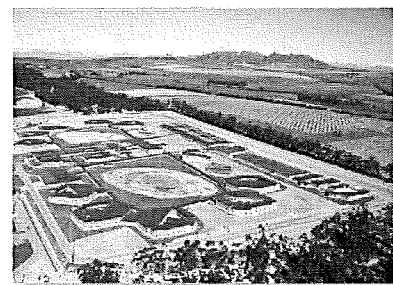
CASE STUDIES

SOUTH AFRICA

South Africa is a leading jurisdiction for targeted or affirmative procurement. Research shows that the financial premiums born by the state in South Africa in adopting affirmative procurement policy in the construction industry, in particular, have proven to be nominal compared with outcomes and the overall benefits (Watermeyer, 2000). Targeted Procurement has proven effective in directing capital flows into underdeveloped or disadvantaged rural communities on conventional construction projects.

“In South Africa, Targeted Procurement has been used mainly to target those groups of society that were disadvantaged under the apartheid system. It has however also been used within South Africa to support local economic development, to promote growth within the small business sector and to target the unemployed in poverty alleviation programmes” (Watermeyer, 2000).

The Malmesbury Prison complex is the project that gave birth to Targeted Procurement in South Africa in 1996. The Prison contract proved to be more efficient at channelling money into communities



Malmesbury Prison Complex

Source: <http://www.secelec.co.za/projects/project10.htm>

than some focused poverty alleviation programs in South Africa involving the construction of community buildings. (Watermeyer, 2000).

Malmesbury is a small rural town approximately 70 km from Cape Town, South Africa. Those involved in the development of the Targeted Procurement procedure were unaware of any target group businesses in Malmesbury and considered that a 10% goal might be achieved if contractors who fell into the target group were drawn from the Cape Town area. The result was thirty percent of the value of \$13 million (US) worth of contracts being channelled into this community through targeted enterprises.

THUNDER BAY

Inclusive policies can contribute to the skilling building. The Sheet Metal Workers Local 397 in Thunder Bay, for example, hired a First Nations liaison to assist in actively recruiting Aboriginals. In the 10 months since the position has been created, 16 Aboriginals have joined the union and received training and job opportunities.

Workers came onto the Detour Lake gold mine job “green, with no prior experience” and received training in the sheet metal trade. The First Nation’s liaison emphasizes that once these new union members are certified as sheet metal workers, they will have the opportunity to work anywhere in North America.

The First Nation liaison with the union encourages First Nation communities to “use unionized companies to build their projects so any community members working on the project will have an opportunity to continue working in construction once the project is completed” (Garrick, 2012).

BLOODVEIN FIRST NATION

In early 2012, the governments of Canada, Manitoba and Bloodvein First Nation announced an access project to link Bloodvein First Nation with the all-season road project underway in northern Manitoba. When the access road was completed in the spring, the benefits to Bloodvein First Nation were clear. The access road was completed with approximately 50 local residents and the community’s construction company working on the project.

Prior to the access road project, Bloodvein signed an initial \$7.75 million community benefits agreement (CBA) with East Side Road Authority (ESRA) in 2009 to undertake pre-construction work, including wilderness clearing, site preparation and gravel crushing for the all-season road project. As a result of the CBA, Bloodvein First Nation Construction Ltd. was established. The successful company has since purchased its own gravel crusher, excavators and heavy equipment trucks. Additionally, the community has established two quarries to

supply gravel to the all-season road project and a camp to house workers. Roland Hamilton, Chief of Bloodvein First Nation, credits the project for providing community members jobs and further economic development opportunities to service the newly established camp.

As construction on the all-season road project moves north, the Bloodvein quarries will continue to supply construction crews. A new \$15 million CBA was signed in 2012, which will give Bloodvein sole source contracts to clear wilderness and crush gravel over 5 years for the all-season road project. ESRA, in turn, provides a mentoring relationship that includes project and contract administration services. It also includes safety training and guidance regarding construction practices.

It is expected that in addition to the CBA, construction of the all-season road and bridges on Bloodvein traditional territory will generate further jobs and economic development opportunities, including \$106 million in contracts over the next five years. All told, the all-season roads project will inject almost \$129 million dollars over the next five years into the Bloodvein community, whose population is a mere 1,669 people. That represents an income of \$77,290 per person in a community where the average annual income is \$15,000.

RECOMMENDATION

- Include mandatory provisions in procurement qualifications that require local contractors to provide skills training and meaningful employment opportunities to youth, unemployed/underemployed, and traditionally underrepresented populations of Ontario residents with hiring targets.

BUILD TO ENHANCE HEALTH AND SAFETY

QUESTION

What is the demonstrable effect of procurement policies that mandate enhanced occupational safety and training standards on productivity, quality work and timeliness?

RESEARCH

Traditionally, procurement policies for infrastructure projects have limited themselves to securing compliance with general legal requirements—for example, a requirement for contractors to pay workers the minimum wage applicable by law within the jurisdiction.

Jurisdictions have differing levels of minimum training and on-site health and safety requirements for construction projects.

Construction is a highly skilled, highly labor intensive and highly mobile industry with a constantly changing mix of contractors and subcontractors for each new project. For worksites to function productively and cooperatively and for construction to be completed on time, the often hundreds, if not thousands of workers on the site must have confidence that their colleagues possess adequate training on the tools and techniques required to get the job done (Waites, 2002).

In the construction industry some contractors invest in apprenticeship and skills development, and others do not. Most people agree that contractors who do not invest in apprenticeship and skills development have a cost advantage over contractors who do; the playing field is not entirely level, but should be as those that invest in apprenticeship and skills development are creating a long-term economic and social benefit.

Canada's labour productivity growth continues to lag behind [the U.S.]. Over the last 30 years, U.S. labour productivity growth has outpaced that of Canada by an average of 0.8 per cent a year (Emerging Stronger, 2013). Despite Canada's lag in labour productivity, it should be noted that as much as one-quarter of Ontario's labour productivity growth in the 2000s can be attributed to improved infrastructure (Conference Board of Canada, 2010).

In 2010, The *Expert Advisory Panel on Occupational Health and Safety* report made recommendations regarding worker training. The report recommends that every Ontario worker and supervisor receive mandatory information about workplace rights and responsibilities before they start their job; that every construction worker receive entry-level training on construction site safety; and that there be rigorous training standards for those who work at heights and in other high risk settings (Dean, 2010).

Research suggests that building trades programs (those offered by unions) have the highest quality training facilities and the best training program for both apprentices and journeypersons. Typically, these apprenticeship and journeypersons training programs require thousands of hours of closely supervised, on-the-job training, plus an additional 1,000 hours or more of related classroom and shop instruction (Waites, 2002).

From a skills building perspective, it is incompatible for public policies to support and advocate both expansion of the apprenticeship system and more industry investment in skills development on the one hand, and then on the other, give employers who do not contribute to the apprenticeship system and who make no direct investments in skills training a cost advantage when bidding on public procurements (O'Grady, 2006).

A single public infrastructure project will require hundreds of well-trained, experienced craft personnel in numerous occupations and classifications and may involve dozens of subcontractors. Indeed a construction project of any magnitude typically involves at least 15 individual tradecrafts (e.g., plumbers, pipefitters, electricians, carpenters), hundreds, even thousands of craft personnel and dozens of contractors and subcontractors (Waites, 2002).

Worthy of note and concern, the skilled labour work force is declining as it collectively approaches retirement age. An assessment of construction labour by markets from 2013 to 2021 for Ontario estimates 20,000 new work force entrants will join the province's construction work force, but over the same period an estimated 75,000 workers will retire (Construction Sector Council, 2013). The challenge will be to create attractive working and remunerative conditions sufficient to attract the number of replacement workers that will be needed over the next nine years.

An absence of qualified trades can cripple a construction project in terms of schedule, quality and/or cost. Trades need to be proficient in the use of increasingly complex tools and undertake complicated procedures to meet today's construction standards, including the use of green technologies and new building materials.

This is why the quality—not just the quantity of available apprenticeships—of training has never been more important than today. A recent study by the Ontario Construction Secretariat reviewed MTCU apprentice registration and completion data, which provides initial evidence confirming higher completion rates in the unionized sector. A comparison of estimated completion rates for union and non-union apprentices shows estimates of union completion rates to be 30% higher than non-union (Ontario Construction Secretariat, 2013).

About \$200 million in training and workplace safety programming is provided annually by construction trade unions in Ontario. The Workplace Safety Insurance Board of Ontario (WSIB) data shows a marked difference in lost time injuries between union and non-union employers (O' Grady, 2006). The lost time injury rate of non-union contractors is more than double that of union contractors. A recent study of WSIB claims in electrical and mechanical disciplines found that the average unionized contractor had a lost-time rate of 10.0 days per 1,000 workers compared to 21.5 days among non-union contractors (St. John, 2012). In addition to human suffering, workplace injuries are a major contributor to construction cost overruns.

The Building Trades Councils are taking it upon themselves to address the need for enhanced safety training to those entering the skilled trades workforce. The Central Ontario Building Trades (COBT) established the Hammer Heads program, which equips graduates with health and safety training that goes above and beyond the requirements of WHIMS and Fall Protection. The COBT devotes over \$1 million annually to train program participants. The first two weeks of the program are focused exclusively on health and safety training. This ensures that when graduates leave the program, they can be leaders in safety on the job site (Central Ontario Building Trades, 2011).

In addition to avoiding workplace injuries, lost workdays and project overruns research is emerging that shows a link between workplace safety training and productivity. This link was made apparent by the Chair of the Expert Advisory Panel on Occupational Health and Safety, who recommended:

The Ontario government should develop procurement policies that consider the occupational health and safety performance of suppliers in order to motivate a high level of performance. The initial focus could be on the purchasing of services... Furthermore, to demonstrate its commitment

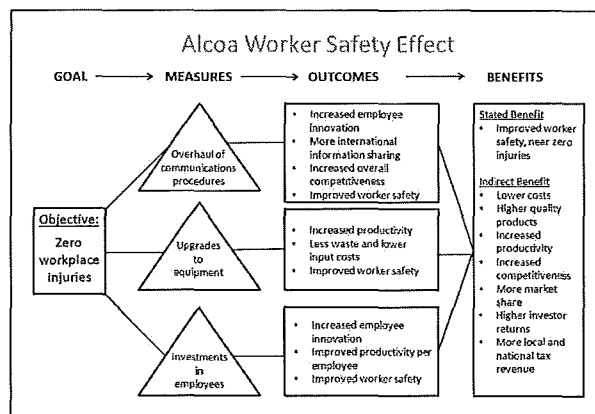
to enhancing health and safety performance throughout the supply chain, the government must ensure that such provisions are included in the procurement policies and procedures of the Health and Safety Associations that the new prevention organization will oversee (Dean, 2010).

CASE STUDIES

ALCOA

In 1987, Alcoa – one of the world's largest producers of aluminum – was losing ground to competitors, and its stock price was in a slide. To the dismay of investors and analysts, Alcoa choose to focus on one goal: zero workplace injuries.

What was not apparent to investors at the time was that Alcoa's drive for zero workplace injuries would entail the most radical corporate realignment in the company's history, and that this would positively impact every area of Alcoa's business. It would necessitate investments in people and equipment that would launch the company from laggard to leader in just a few years.



Adapted from Duhigg, (2012). *The Power of Habit*. Toronto: Double Day Canada

Alcoa overhauled internal communications procedures to ensure the CEO received notification within 24 hours of a safety incident, and presented a plan to prevent such an incident from occurring in future. This reorganization of entrenched habits of internal communications meant the ease and speed with which information could travel from the factory floor to the executive suite improved exponentially.

Continual employee safety training improved both overall productivity and workplace safety. Replacing dangerous machines to reduce workplace injuries resulted in a higher quality product with which to compete in the market. And less dangerous spillage of molten aluminum meant less wasted product, driving down costs.

Alcoa did not publically attach the safety drive to a profit-motive, but as the safety campaign gathered steam, Alcoa's costs came down, quality rose, innovation excelled and overall productivity reached new heights. For example, an international corporate email system, introduced well before its time for the purpose of sharing safety information, quickly became a way for employees to share every manner of business information in real-time, and gave Alcoa an enormous advantage over the competition for several years.

Alcoa recognized that safety procedure was a keystone habit—a habit that if changed would have repercussive effects on other habits, spilling over to transform the entire company.

The push for a higher standard of safety produced startlingly positive results for shareholders, employees, local and national economies, and the thousands of communities in which Alcoa operates. By the year 2000, Alcoa's annual net income was five times what it was when the zero workplace injury initiative began in 1987, and the growth in the company's market capitalization and stock price directly reflected that. The worker safety campaign was also a success—Alcoa's injury rate fell to one-twentieth the U.S. average (Duhigg, 2012).

HAMMER HEADS

The Hammer Heads program, established by the Central Ontario Building Trades, runs three 12-week training programs of 15 participants each year. The participants are given extensive health and safety training, and an introduction to a selection of 28 different trades through hands-on training. Almost 100% of the participants are linked to apprenticeship upon graduation.

Concert Properties is a real estate enterprise that has worked closely with their contractors to place Hammer Heads graduates on their construction sites. The successful partnership has been so worthwhile that Concert Properties “will be making references in [their] future scopes of work that the trades will have to be involved in taking on a Hammer Heads graduate” (Central Ontario Building Trades, 2011).

Providing training through the Hammer Head program not only increases the skilled work force, but also improves the community. Because the program is limited to applicants in priority neighbourhoods or under-resourced communities, many of the participants were on social assistance. The program allows them to “pursue apprenticeship programs and become contributing members of society, thus decreasing the impact on Ontario Works, city-run shelters and homelessness, rather than drawing from them” (Central Ontario Building Trades, 2011).

The success of the program is dependent on its partners, who recognize the importance of investing in their human resources to remain

leaders in their industry. One such partner is Tridel, an award winning, Toronto-based condominium builder with a 70-year history in Canada. Tridel works with the Hammer Head program in an ongoing way and recognizes the value Hammer Heads graduates bring to the construction sites including professionalism, training, and focus on safety.

CALAPPRENTICESHIP.ORG

The Registered Apprenticeship system of training, run by affiliates of the State Building and Construction Trades Council of California, combines both classroom instruction with on-the-job training. Apprentices learn occupational skills in the classroom and that experience and skilling is expanded to include hands-on, paid, on-the-job training.

“The Apprenticeship Programs train men and women to craftsman status. By participating in a program, local apprenticeship training committees shape applicants with character, aptitude, motivation and good personality traits into competent journeymen and journeywomen who have in-demand skill sets, comprehensive knowledge, positive attitudes and superior abilities.

The benefits of the Union Apprenticeship Programs include the opportunity to learn while you earn; state-of-the-art training; career advancement opportunities; excellent wages and benefits; safe working conditions; and pride and dignity” (About Apprenticeship, 2013).

In California alone, there are over 250 union-sponsored apprenticeship programs. These programs invest nearly \$9,000 a year per student on average while unions spend \$200 million a year for apprenticeship programs in California training over 20,000 individuals per year.

RECOMMENDATIONS

- Policies for public procurement contain secondary provisions that explicitly promote apprenticeship by requiring that bidders on provincially-supported construction projects to either hold a trade certification or be registered as apprentices, and be registered with the Ontario College of Trades.
- Infrastructure Ontario mandate prime contractors and sub-contractors to implement Best Practices that will exceed the minimum requirements of the *Occupational Health and Safety Act* and its related regulations.
- Infrastructure Ontario give preference where possible to general contractors that directly support community programs such as Helmets to Hard Hats, Hammer Heads, etc., and sub-contract to trade contractors who also support such programs.

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- Infrastructure Ontario should include in its annual report a review of how general and trade contractors that performed work for Infrastructure Ontario supported community and industry programs that promote inclusiveness.
 - Include in bid submissions a detailed Safety Plan that addresses the following: identification of known risks; a description of how health and safety factors will figure into the selection of sub-contractors and the incentive rewards of managers; identification of the required training, certifications and licenses and a description of how these will be documented for both workers and managers; and a description of the ongoing inspection system for the project and the various roles and responsibilities that will pertain to health and safety.

BUILD TO MAXIMIZE SOCIAL AND ECONOMIC BENEFIT

QUESTION

What social and economic net benefit is realized for every unit of construction and trades training mandated through public procurements?

RESEARCH

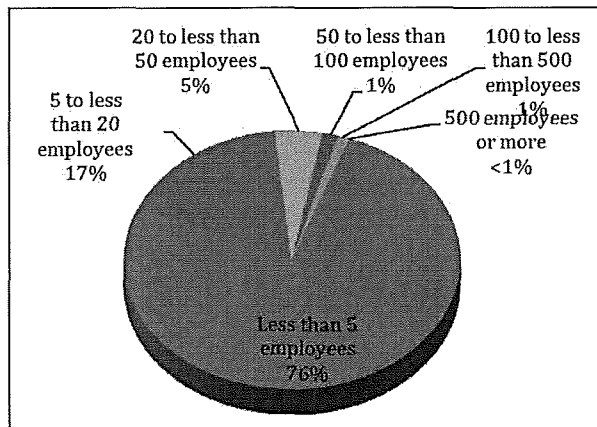
Traditionally, economic development policies have included measures such as subsidies, tax reductions, government guarantees, and low-interest financing which have only an indirect effect of stimulating demand. However these supply-side interventions are falling out of fashion as it is demonstrated that they simply do not deliver a net benefit.³

As with workforce inclusion policies, policies that limit participation to a particular group, sometimes called set-asides or carve outs, can be used to provide economic opportunities for small and medium enterprises (SMEs) in the communities in which they operate. This demand-side policy intended to induce the growth of SMEs by increasing the demand for their products and services. The more immediate effect of this type of policy can be creating jobs (and therefore people with incomes who themselves create demand with their purchasing power); triggering innovation; and generating a competitive and innovative supplier base for goods and services used by both the public and private sector (Bolton, 2006). Research indicates that public procurement, for example, has had more success triggering “innovation impulses” than R&D subsidies (Elder, 2007).

The importance of the SME sector to the Canadian economy has been growing steadily over the past 40 years. Whereas the SME sector accounted for roughly one quarter of the Gross Domestic Product (GDP) then, it now accounts for approximately 42 per cent of Canada’s private sector GDP (Industry Canada, 2012). Of the approximately 1 million businesses with employees in Canada, over three-quarters employ fewer than five people, and over 97 percent of businesses have less than 50 employees (Statistics Canada, 2012).

³ Recently a Massachusetts Tax Expenditure Commission pegged overall foregone state revenue from tax breaks (including loans to companies, loan guarantees, grants, tax breaks and incentives) at an estimated \$26 billion in 2012, more than the total amount of tax revenue the commonwealth expects to collect during the fiscal year. Few of these incentives came with mechanisms for reviewing their effectiveness or recovering lost revenue if the beneficiaries fail to produce the hoped-for economic benefits (Chieppo, 2012).

MAJORITY OF BUSINESSES IN CANADA ARE SMALL



TOTAL OF 1,048,900 PRIVATE SECTOR FIRMS WITH PAID EMPLOYEES

Source: Statistics Canada. (2009) Table 527-0002 - Employer businesses in the private sector, by employment dynamics and firm size, annual (number)

Another important characteristic of the SME sector is its role in job creation. A 2011 study of small businesses showed private sector firms with fewer than 100 employees created 618,000 net jobs in the Canadian construction industry, while firms with 100-499 employees created 122,991 net jobs. In the construction industry, small businesses account for 73 per cent of employment (Industry Canada, July 2012).

Maximizing local content is a demand-side policy intended to induce the growth of SMEs by increasing the demand for their products and services. Its more immediate effect can be creating jobs, triggering innovation, and creating a competitive supplier base for inputs into public infrastructure projects (Bolton, 2006).

CASE STUDIES

FER-PAL

One such example of procurement triggering innovation is Fer-Pal construction, a Toronto based company specializing in the repair and installation of water mains.

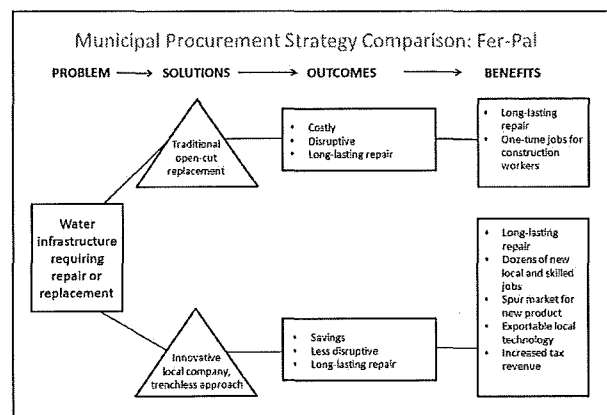
Underground water mains in municipalities around North America are deteriorating with age and are in need of repair. Traditionally, open-cut replacement of the pipes was the only solution, a costly and disruptive procedure.

In 2002, the City of Toronto chose an innovative, Toronto-based company to make structural repairs to underground water mains that otherwise

would have required the digging of a trench. The results demonstrate the benefits of inclusive public procurement.

Fer-Pal Construction Ltd. was established in Toronto in 1986 as a provider of trenchless water main rehabilitation services. In 2002 Fer-Pal began offering Cured-in-Place Products (CIPP), a new approach they developed to restore structurally compromised water mains without the need to dig them up. The City of Toronto was Fer-Pal's first contract for CIPP. The City took a risk on a local innovative firm, which runs counter to the traditional behavior of public officials, decision-makers and procurers alike (Elder, 2007).

"We're the largest installer of these products in Canada and the United States right now, and our CIPP installation business is growing," Vice President and Principal Shaun McKaigue says. "We've been installing CIPP for a while, so we have a leg up on our competitors, but we're investing in research and development to stay ahead."



In the summer of 2012, Fer-Pal joined the Toronto trade mission to Chicago, where there was considerable interest in the company's services. As a result of that trip, a representative of the State of Illinois visited Fer-Pal's North York headquarters in September to witness the installation of CIPP in an old and leaking water main. Fer-Pal is considering opening a third office in Illinois, and expects to add another 20 jobs to the Toronto office as a result. In the next five years Fer-Pal is expecting to hire 100 more workers.

While it is clear that SMEs are an important factor in Canada's economy, "only 7% of Ontario's SMEs export. The average value of Ontario's SME exports would rank it 47th out of 50 states in the US" (Ontario Chamber of Commerce, 2012).

By choosing a local, highly-skilled company for public procurement, and opening up the market for Fer-Pal's innovative product, the City of Toronto spurred economic benefits that have lasted a decade—good jobs, more tax revenue, municipal savings and an industry leading company with an exportable, sought-after technology headquartered in Toronto.

BRUCE POWER

Bruce Power is Canada's first private nuclear generator and largest nuclear facility in North America in terms of output with a total output capacity of 6,224 MW. The 2,300-acre site on the shores of Lake Huron houses the Bruce A and B generating stations, which each hold four CANDU reactors. Over the last 11 years, Bruce Power has invested \$7 billion in the life extension and refurbishment of all eight units.

The employment and economic benefits to Ontario from refurbishing and operating the Bruce and Darlington reactors are substantial: almost 25,000 jobs and annual economic activity of over \$5 billion over the refurbishment period 2014 through 2024. The long-term operational benefits comprise 15,600 jobs and an annual economic benefit of \$2.5 billion (Canadian Manufacturers and Exporters, July 2010).

"The \$10 billion refurbishment at Bruce Power made it the biggest infrastructure project in Ontario in recent years, but that's one of the stories that is never told," Duncan Hawthorne, CEO of Bruce Power, said. Another \$36 billion in investment will follow in 2016.

"On our site, we've done things with skilled trades that people thought were impossible," like using specially-designed robotics to remove highly radioactive materials. "These are techniques and technologies developed in Ontario for Ontario," but "these are the messages that don't get out." (Ontario Chamber of Commerce, 2012)

RECOMMENDATION

- Procurement policies should include provisions that promote hiring local firms, local contractors, local subcontractors, and local workers.

BUILD LASTING COMPETITIVE ADVANTAGE

QUESTION

Can government invest infrastructure dollars in a way that promotes innovation and creates competitive advantage vis-à-vis other regions and other countries?

RESEARCH

In 1998, Michael Porter, a Harvard University scholar and a leading authority on the competitiveness of nations and regions, introduced a new way of looking at national competitive advantage. This paper borrows from Porter's *Determinants of National Competitive Advantage* and applies his four determinants concept to explain how procurement policies for major public infrastructure projects can be translated into enduring competitive advantage. Like Porter, we understand "competitiveness depends on ... having strong domestic rivals [competing on a level playing field], aggressive home-based suppliers, and demanding local customers" (Porter, 1998).

Specifically, an economy's competitive advantage is determined by four conditions:

1. *Factor Conditions:* These include skilled and trained labour, and infrastructure, such as a broad array of innovative small and medium enterprises that can supply specialized inputs. Porter argues that simply having a general workforce that is high school, or even college-educated, represents no competitive advantage in modern international competition. Rather, to support competitive advantage, a factor must be highly specialized to an industry's particular needs (e.g., boilermakers require over 6,000 hours of training in order to work on supercritical nuclear power plant boilers).
2. *Demand Conditions:* Competitive advantage is gained when buyers, in this case government procuring large infrastructure projects, are demanding and pressuring suppliers to meet high standards. These buyers prod bidders to improve, to innovate, and to upgrade their workforces. Government procurement can be used to create demand. For example governments were among the first movers to use procurement to stimulate domestic supply of "green" products and services. The private sector followed.

3. *Related and Supporting Industries*: This determinant lends itself to the discussion of maximum use of local content as a source of competitive advantage: “suppliers and end-users located near each other can take advantage of short lines of communication ... and an ongoing exchange of ideas and innovations. Companies have the opportunity to influence their suppliers’ technical efforts and can serve as test sites for R&D work, accelerating the pace of innovation”.

4. *Firm Strategy, Structure, and Rivalry*: Domestic competition is a necessary ingredient for innovation and individual motivation to work and expand skills, which are also important to competitive advantage. Mandating local content in public-sector bids helps involve sectors of the population who have traditionally been marginalized from the skilled workforce and helps create innovative firms who are able to compete in the global marketplace.

Each of these four conditions contains critical elements discussed in this paper. Building to promote inclusion and building to enhance health, safety, and training create a specialized and highly-trained workforce and associated industry leaders, which speaks to Porter’s ‘factor conditions.’ Ontario and municipalities are able to create ‘demand conditions’ which spur innovation and cause firms and workers to upgrade their technology, their know-how, and their ability to do complex work in innovative and cost-effective ways. Conditions 3 and 4 described by Porter are also within reach; as Ontario moves forward with major investments, local competition can be fostered and enhanced.

RECOMMENDATIONS

- Procurement officials should frame their policies based on a lens similar to Porter’s four conditions in order to create a unique and long-lasting economic advantage for the region.
- Promotion and awareness building of the economic benefits of inclusive procurement should be undertaken.

John Stuart Mill rightly observed that “no great improvements in the lot of mankind are possible, until a great change takes place in the fundamental constitution of their modes of thought” (Mill, 1963). Today, policy makers face a clear choice: they can pursue narrow zero sum procurement practices focused strictly on cost considerations and short-term payoffs or they can build with purpose. That is, they use public sector construction procurement as a non-zero-sum tool to skill a new generation of workers, to make workplaces safer, and to drive social and economic inclusion at a time of growing economic inequality.

POLICY RECOMMENDATIONS

Ontario and its municipalities should build with purpose and during public infrastructure procurement processes, should:

- Require contractors to provide skills training and meaningful employment opportunities to youth, local communities, unemployed/underemployed, and traditionally underrepresented populations of Ontario residents with specific participation and hiring targets during construction.
- Explicitly promote apprenticeship by requiring that bidders on provincially-supported construction projects either hold a trade certification or be registered as apprentices, and be registered with the Ontario College of Trades.
- Infrastructure Ontario mandate prime contractors and sub-contractors to implement Best Practices that will often exceed the minimum requirements of the *Occupational Health and Safety Act* and its related regulations.
- Support community programs such as Helmets to Hard Hats, Hammer Heads, etc., which sub-contract to trade contractors who also support such programs, or insist they be used.
- Infrastructure Ontario should include in its annual report a review of how general and trade contractors that performed work for Infrastructure Ontario supported community and industry programs that promote inclusiveness.
- Include in bid submissions, a detailed Safety Plan that addresses the following: identification of known risks; a description of how health and safety factors will figure into the selection of sub-contractors and the incentive rewards of managers; identification of the required training, certifications and licenses and a description of how these will be documented for both workers and managers; and a description of the ongoing inspection system for the project and the various roles and responsibilities that will pertain to health and safety.
- Procurement policies should include provisions that promote hiring local firms, local contracts, and local subcontractors.
- Procurement should not be approached as a zero-sum economic game in which one party’s gain is another’s loss; gaining lasting value from procurement means moving beyond price to capturing social and economic benefits as well as improving project quality.
- Procurement officials should frame their policies based on a lens similar to Porter’s four conditions in order to create a unique and long-lasting economic advantage for the region.

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FEDERATION
OF CANADIAN
MUNICIPALITIES

FÉDÉRATION
CANADIENNE DES
MUNICIPALITÉS

Municipal principles for free and fair international trade:

- 1. Reasonable procurement thresholds:** Inappropriately low or broad procurement thresholds may force municipalities to tender projects when tendering is neither practical nor financially justified.
- 2. Streamlined administration:** Ensuring that municipal procurement policies are free-trade compliant will likely create new costs and may require specialized expertise. The administrative design of these rules must be as streamlined as possible and developed in close cooperation with municipal procurement practitioners.
- 3. Progressive enforcement:** Enforcing provisions of any deal should be progressive, starting with verbal or public warnings before moving to financial penalties, and should recognize and not penalize inadvertent non-compliance, particularly in cases where municipalities do not have the expertise to appropriately apply the rules.
- 4. Canadian content for strategic industries or sensitive projects:** A trade deal must recognize strategic and public interest considerations before barring all preferential treatment based on country of origin. There may be industries of strategic significance to a particular region, such as transit, or projects where considerations of quality, public benefit, environmental protection or business ethics means that a local government may wish to implement minimum Canadian-content levels. This should be allowed, within reason.
- 5. Dispute resolution:** A dispute-resolution process, like the one in NAFTA, may require a careful review of the municipal role in that process so they can appropriately defend their policies and by-laws as an order of government.
- 6. Consultation and communications:** Consultation and communications during negotiations are required to ensure any resulting agreement responds to municipal concerns.
- 7. Reciprocity:** Canada's negotiating position must support reciprocity in Canadian and foreign municipal procurement practices.



Cabinet Office

New Models of Construction Procurement

Introduction to the Guidance for Cost Led
Procurement, Integrated Project Insurance and
Two Stage Open Book

2 July 2014

FOREWORD

As Government Chief Construction Adviser, I welcome this guidance for these three models of construction procurement, Cost Led Procurement, Integrated Project Insurance and Two Stage Open Book. These models encompass principles of early supplier engagement, transparency of cost, integrated team working and collaborative working. They are fully consistent with the objectives of the Government Construction Strategy (May 2011) and the ambitions of the Industrial Strategy for Construction, *Construction 2025* (July 2013). Their adoption will contribute considerably to the reductions in the cost of construction that both Government and industry are seeking.

In introducing these models, our aim is to provide cost certainty, which is an essential element of providing better long-term value from the delivery of construction projects. It is vital that clients enter the procurement process knowing what their projects *should* cost and that the procurement vehicle adopted provides them with confidence of what their projects *will* cost.

I therefore commend the models as vehicles for implementing these best practice principles on construction projects, in central Government departments and agencies, in the wider public sector and in the private sector. I look forward to them being adopted widely over the coming years.

Peter Hansford

Government Chief Construction Adviser

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INTRODUCTION

In 2011 the Government Construction Strategy set out to achieve savings in construction procurement of up to 20% by making efficiencies through reforming procurement practices and effecting behavioural and cultural change. This was reinforced in 2013 by the industry's own ambitions as set out in the Industrial Strategy for Construction (Construction 2025).

In 2012, Government with the support of industry, established a programme to trial three new models of procurement proposed by industry (Cost Led Procurement; Integrated Project Insurance; Two Stage Open Book) that were incorporated within the Strategy. These models draw together and utilise a range of common principles (which are described on page 7), together with specific features, in changing the way government buys construction services.

Government promotes the adoption of these common principles, which are encapsulated by each of the three new models of procurement that sit within a range of appropriate procurement models available for clients to adopt. If clients and suppliers want to achieve the same level of outcomes demonstrated by the trial projects, then the steps and techniques set out in the guidance will help them to achieve this.

The models bring together existing effective practices and behaviours that leading practitioners are already using to help generate savings reported by Government (£447m in FY 2012/13 savings and £840m in FY 2013/14)¹. These guidance documents are intended to further spread the benefits available to public bodies from the adoption of best practice techniques. They are to be read in conjunction with other recent Government guidance addressing procurement reform (See Annex B for examples).

The models seek to change the way public sector clients buy construction to a process where the supply chain responds to an outline client requirement and declared budget. This contrasts with the historical process of the supply chain building up a price against a detailed client requirement without understanding what the client can afford.

The models represent evolution rather than revolution and establish clearly defined client-led collaborative processes developed from existing best practice. They are intended to achieve

¹ *Government Construction: Construction Cost Reductions, Cost Benchmarks & Cost Reduction Trajectories to March 2014*

efficiency gains that can be released for additional work, create new employment and industry activity, make projects more affordable and fundable, and make the UK construction industry more competitive.

This initiative is the result of the efforts of a number of significant contributors from within both the public and private sectors. A delivery group, support group and trial project mentors have been overseeing the programme of trial projects to test out these models. They have monitored progress and have gathered evidence of outcomes. Annex A provides a list of contributors who have been closely engaged with this initiative to ensure its progress and success.

Case study reports are an output of this process and the draft guidance documents were produced by the mentors drawing on this evidence. The guidance documents provide practical support to clients and suppliers wanting to replicate the benefits achieved by leading practitioners.

These documents represent the next step in the journey to achieving transformation and embedding best practice in conjunction with the implementation of Infrastructure UK's Infrastructure Routemap and Building Information Modelling Level 2. They are also consistent with the principles in BS 8534: *Construction procurement policies, strategies and procedures: Code of practice*.

A list of other relevant publications and guidance is set out in Annex B.

To receive further information, obtain support or to attend future events relating to these guidance documents, please get in touch with us at:

GovernmentConstructionTeam@cabinet-office.gsi.gov.uk

WHY READ THE GUIDANCE DOCUMENTS?

The purpose of these guidance documents is to assist clients, consultants, Tier 1 contractors and Tier 2/3 subcontractors and suppliers to understand and adopt a consistent approach to the procurement and delivery of the Cost Led Procurement, Integrated Project Insurance and Two Stage Open Book models.

The new procurement models are based around delivery by integrated project teams working collaboratively. Along with reducing costs, the models are expected to: contribute to improved programme certainty, reduce risk, encourage greater innovation, and improve relationships across clients and the supply chain. The models do not deliver the cheapest construction project, but will deliver the most cost effective and value for money outcome.

The guidance documents will give clients the greatest opportunity to repeat the outcomes of other successful projects. It will also enable clients to deliver:

- consistent application of leading practices / behaviours;
- consistent effective behavioural change; and
- continuous improvement and performance management.

This document describes the common features applicable to the three new models of procurement. It also summarises their unique features. Each set of guidance also highlights the benefits of adoption at each stage, details the core processes and principles and provides step by step support through the model, and addresses key client and industry questions. The trial projects demonstrated how to obtain the maximum benefits from the new models, and that forms the basis of the guidance. These can be used by clients and their integrated teams as the basis for further briefing, training and support when procuring and delivering any project or programme of work.

If clients and suppliers want to achieve the same level of outcomes demonstrated by the trial projects, then the steps and techniques set out in the guidance adopted as a whole will help them to achieve this. The outcomes demonstrated in the trials are a result of the whole process of the model rather than a selection of elements.

The clients leading the trial projects used processes and systems that are easily adaptable to any project or programme of work. In publishing this guidance, it is assumed that the models will be applied by individuals skilled in construction procurement. This skill combined with these guidance documents will generate the

successful outcomes described. The guidance documents focus on the specifics of the new procurement models rather than the generalities of best practice in construction procurement.

THE NEW MODELS OF PROCUREMENT

Common Principles

The presumption for all the new models of procurement is that high levels of supply chain integration, innovation, and good working relationships between client and industry will lead to a significant change in the costs and risks of construction projects.

All three models are designed to considerably reduce the commercial risk of construction procurement, execution and commission. The models all require clients to:

- Clearly define the desired functional outcome including specific requirements, e.g., carbon reduction, use of apprentices etc.
- Identify typical costs and delivering the outcomes based on available data, benchmarking and cost-planning work. This will enable the client to set a realistic yet challenging cost ceiling, that would be achieved or bettered, and costs would be further reduced over a series of projects or programmes of work.
- Engage with the supply chain that embraces the principles of Early Contractor Involvement (ECI) and a high level of supply chain integration; and ensure that on completion of the capital phase the specified output performance is achieved.
- Apply a robust review process to ensure appropriate scheme definition, create commercial tension, monitor scheme development and address any unnecessary scope, risks and potentially missed opportunities.
- Take steps to ensure that those appointed to carry out the processes of the models, whether internal or external to the client organisation, have the skills to do so effectively.

The specific features of each of the new models of procurement are described below.

Cost Led Procurement (CLP)

The client selects one or more integrated supply chain teams from a framework. Teams are selected on their ability to work in a collaborative fashion to deliver below the cost ceiling on the first project, and achieve cost reductions on subsequent projects while maintaining the required quality outcomes.

In competition, two or three integrated framework supply teams are then given the opportunity early in the life of projects to develop their bids with the client team, allowing them to bring their experience to innovate and drive cost reductions. Provided at least one of the supply teams can beat the cost ceiling, it will be selected on the relative scored attractiveness of its commercial and physical proposition and of its team members before being awarded the contract to deliver the project.

Should none of the teams be able to deliver the work within the affordable budget, the project is offered to suppliers outside the framework. The expectation is that this would be unusual on a well-managed framework delivering similar types of projects, where the client and suppliers have an excellent understanding of cost.

If the scheme price cannot be matched or bettered, it should not proceed. Under these circumstances the client may have to reconsider its budget or specification. There is a burden on the client to select a realistically challenging price, and work to enable its achievement by the industry supply chain.

Integrated Project Insurance (IPI)

This approach incorporates many features common to the other two models, together with the introduction of an innovative project insurance product. It is being trialled for the first time by Ministry of Defence and the outcomes from its adoption during the pre-procurement stages on the RM Lympstone project are the subject of an initial case study published alongside this document. The outcomes from the MoD trial project will continue to be monitored and reported, and guidance has been published with this document to permit full consideration of the merits of this innovative approach by those interested to trial its adoption.

In implementing Integrated Project Insurance, the client holds a competition to appoint the members of an integrated project team (IPT) who will be responsible for delivering of the project. Scoring may include elements assessing competence, capability, proven track record, maturity of behaviours, proposals for removing waste and inefficiency, and fee declaration.

The chosen team then works up a preferred solution that will deliver the outcome defined by the client, with savings against existing cost benchmarks.

The difference between this and existing procurement models is the adoption of a single (third party assured) insurance policy to cover risks associated with delivery of the project. This policy packages up all construction-related insurances currently held by the client and supply chain

members. It also takes a top slice of commercial risks, covering any cost overruns on the project above and beyond a “pain-share” threshold which is split transparently between client and the contracted parties (including any key members of the supply chain).

The model introduces third party independent facilitation and assurance of the scheme through a series of gateways. The facilitation helps ensure good value for money and that a wholesome, balanced commercial position has been struck which an insurer can take on board.

With excess cost overruns (up to a “cap”) covered by this policy, it removes the potential for a blame culture to try to pass on liability within the team. Payment of claims is based on the demonstration of loss not the assignment of blame. Yet in order to secure the insurance in the first place, the team will have to prepare a credible proposal, validated by the independent expert assurer to ensure that the commercial tension is maintained, and that the insurer is comfortable that it can be delivered.

Two Stage Open Book (2SOB)

The Two Stage Open Book² model sees the client invite prospective team members for a single project or from a framework to bid for a project based on an outline brief and cost benchmark. A number of contractors and consultant teams compete for the contract in a first stage with bidders being chosen based on their capacity, capability, stability, experience, strength of their supply chain, and fee (profit plus company overhead). As a second stage, the successful contractor and consultant team are appointed to work up a proposal on the basis of an open book cost that meets the client’s stated outcomes and cost benchmark.

The Two Stage Open Book differs from Cost Led Procurement in reducing industry bidding costs, enabling faster mobilisation and in providing the opportunity for clients to work earlier with a single integrated team testing design, cost and risk issues ahead of start on site on award at the end of the second stage.

At the heart of this model is a systematic approach to early contractor/subcontractor engagement. The model includes deadlines for their design and risk contributions during the first stage, and has an agreed fixed price and clear risk profile before the client authorises the construction stage.

² There are other forms or variants of two stage open book that are used. The form described in this document and the accompanying guidance is the one defined and recommended by the Procurement/Lean Client Task Group Report and informed by the evidence from the procurement trial projects.

Supply Chain Collaboration³

In conjunction with Two Stage Open Book, or other early contractor involvement options, a framework/alliance or project team can use a Tier 2 supply chain intervention. The bidding Tier 1 contractors propose their preferred supply chains. The client, with other team members, then works with the appointed Tier 1 contractor to re-engineer that supply chain to ensure best value. This is not Tier 2 nomination by clients; it is the use of the preconstruction phase for a systematic joint review process.

This process ensures earlier involvement and better understanding by Tier 2 supply chain members, and potential sharing of supply chain members among more than one Tier 1 contractor on more favourable common terms. In both cases it leads to proven substantial cost savings.

Selecting which of the models to adopt

At the point of preparing a business case for any project or programme of work, and developing this into a project brief, a client will need to decide which procurement model best fits the project or programme and the capabilities of the client and supply chain. This will be based on the client's required resource commitment, the benefits, and the client's requirements and objectives. If a client wishes to adopt a procurement approach that reflects the Common Principles set out in this document, then the three models described here provide methodologies for doing this.

A useful tool in the pre-procurement planning process is the Infrastructure UK Routemap⁴ which will be re-launched in July this year. This will also assist clients in choosing the appropriate procurement model.

Choices being made in selecting each model

As highlighted above, the models require clients to adopt the common principles outlined on page 7 of this document. However, each model has distinguishing characteristics that mean that a set of choices is being made in selecting a particular model. The choices being made are outlined in Table 1 below, which clients should consider in relation to their existing or planned capability and capacity. Though not essential, the implementation of Cost Led Procurement (CLP), Integrated Project Insurance (IPI), Two Stage Open Book (2SOB) or Supply Chain Collaboration (SCC) is also particularly suited to call off procurement frameworks.

³ With recognition that some Tier 1 contractors offer self delivery.

⁴ <https://www.gov.uk/government/organisations/infrastructure-uk>

Table 1: Choices being made in selecting each model		
Key considerations	Choices being made	
Selection of integrated team on its ability to deliver the project's objectives	Down select to 2-3 bidders CLP	Down select to single alliance or partner IPI / 2SOB
Maintenance of competitive tension	Mini competition (selection on basis of tender price and design) CLP	Mini competition (selection on ability to deliver ⁵) followed by open book accounting ⁶ IPI / 2SOB
Overall programme duration : design development stage	2-3 designs worked up during mini competition CLP	Single design worked up following 1st stage selection IPI / 2SOB
Integrated team remuneration during early supply chain involvement stage	Winning bidder recovers pre-contract costs through construction contract CLP	Stage 1 client engagement covers costs of early involvement / preconstruction phase IPI / 2SOB
Form of contract	Suitable collaborative forms ⁷ CLP	Alliancing forms (with option of suitable collaborative forms) ⁸ IPI / 2SOB
Allocation of risk	Key risks identified during early supplier involvement with allocation and mitigation defined by contractual arrangements and establishment of appropriate joint risk pot CLP / 2SOB	Client and integrated project team covered by "no blame" integrated project insurance product throughout with predetermined sharing of capped benefit and risk IPI

⁵ Evaluation would also include criteria relating to the assessment of the Most Economically Advantageous Tender (MEAT).

⁶ In addition 2SOB relies on Tier 2/3 mini competitions run by the Tier 1 Contractor during the preconstruction phase.

⁷ For example, CLP: any of JCT, NEC or PPC.

⁸ For example, IPI: bespoke multi party alliance, JCT/CE or PPC suitably amended for IPI; 2SOB: PPC or a JCT/NEC with the addition of a conditional preconstruction phase agreement.

Table 1: Choices being made in selecting each model			
Key considerations	Choices being made		
Promotion of close collaboration / integration ⁹	Target cost with appropriate gain-pain share CLP	Independent facilitation is employed to support “no blame” insurance product, together with appropriate target cost gain-pain share. IPI	Direct client engagement with all tiers, with option of target cost gain-pain. 2SOB¹⁰
Incentivisation of efficiency	Through appropriate gain-pain share mechanism CLP / IPI / 2SOB	Option of lump sum OHP 2SOB	
Independent validation	Option of independent technical and financial validation CLP / 2SOB	Risk assurers are employed to give independent technical and financial validation permitting inception of “no blame” insurance product IPI	

⁹ With recognition that some Tier 1 contractors offer self delivery.

¹⁰ For example, through applying Supply Chain Collaboration.

All the models are designed to obtain early proposals for savings and improved value on the understanding that a collaborative approach will be adopted for project delivery.

Reinforcing the common principles underpinning the different models, they are not mutually exclusive and clients have the option to adopt the following combinations if properly structured (i.e. with regard to the earlier comment in this document that the steps and techniques set out in the guidance need to be adopted as a whole at each key stage in the process):

- A Cost-Led Procurement selection process followed by Two Stage Open Book and/or Integrated Project Insurance and/or further Supply Chain Collaboration;
- An Integrated Project Insurance model followed by further Supply Chain Collaboration;
- A Two Stage Open Book model combined with Integrated Project Insurance and/or followed by further Supply Chain Collaboration.

In considering the option to implement any of the above combinations relating to Integrated Project Insurance:

- It should be noted that the IPI model would not proceed to insurance policy inception if: any alliance members have been selected on lowest cost tendering; or the proposed form of contract does not include “*no blame/no claim*” undertakings and related mechanisms suitable for IPI;
- For these particular reasons, early contact should be made with the mentors (refer to Annex A).

TRIAL PROJECTS AND OTHER EVIDENCE

The programme has drawn on many previous examples of public sector clients using processes that correspond to these models of procurement in varying degrees. The Trial Projects programme demonstrates, by reference to contemporary evidence, that a client-led approach to these processes supported by clear pre-construction phase¹¹ contractual commitments will:

- create successful integrated teams;
- generate significant savings and improved value for clients; and
- create benefits for Tier 1 contractors and Tier 2/3 subcontractors and suppliers.

Published case study reports¹² are an output of monitoring the progress and outcomes of the trial projects. They help ensure that central and local government learn from the trial projects, so that the effective processes can be adopted across public sector construction projects.

The reports highlight savings and review the full extent to which the common characteristics, specific features and other key initiatives such as Building Information Modelling, the Infrastructure Routemap and Government Soft Landings have been implemented. They also highlight important enablers for efficiency relating to the strategic procurement context, e.g., the use of frameworks to deliver strategic relationships and continuous improvement.

In reporting savings, organisations are using the standard counting method developed for assessing the overarching Strategy related savings. For example, the audited FY 2012/13 cost reductions reported for DEFRA / Environment Agency and Ministry of Justice provide further validation of the savings reported in the two case studies from these central government departments.

The monitoring of the trial projects follows an approach developed by the Trial Projects Support Group that is based on previous methods¹³. The outcomes have been independently analysed and audited. Where appropriate, extracts are quoted throughout the guidance documents.

The full Trial Project Case Studies are published at: [Case Study Reports](#).

Currently the guidance for Two Stage Open Book is informed by evidence from five full case studies (with three more in outline), while evidence for Cost Led Procurement is informed by a

¹¹ Full details of the Pre-Construction Phase relevant to each model can be found in the respective Guidance.

¹² Case study reports are produced at four stages: Kick-off Meeting; Brief / Team Engagement; Decision to Build; Build and Occupy.

¹³ The established methods have been developed by Constructing Excellence.

single case study. Other evidence supports the case for implementing these new models of procurement. For example, certain principles incorporated within these models are common to those adopted in delivering the Education Funding Agency's (EFA) and Highways Agency's (HA) programmes. This has contributed to significant cost reductions for EFA and HA reported in: *Government Construction: Construction Cost Reductions, Cost Benchmarks & Cost Reduction Trajectories to March 2014.*

Integrated Project Insurance incorporates many features (common to Cost Led Procurement and Two Stage Open Book) that leading practitioners have also successfully implemented elsewhere for some time. The outcomes from trialling these features during the pre-procurement stages on the Ministry of Defence RM Lympstone project - and the measures needed in preparing for the adoption of the innovative integrated project insurance product - are the subject of an initial case study published alongside this document. In the meantime, guidance has been published to permit full consideration of the merits of this innovative approach by those interested to trial its adoption.

Early involvement and collaboration are the centre-piece of all three models, and the business case has evolved over more than a decade. Two important sources of additional case studies are as follows:

- Over 600 projects in all, managed through demonstration programmes over the last 15 years (managed by Constructing Excellence, see <http://constructingexcellence.org.uk/resources/demonstrationprojects>).
- The Strategic Forum for Construction's "Business Case for integrated collaborative working" (2010) analysed 14 projects where there was rigorous data on the six key attributes of integration and collaboration (see www.strategicforum.org.uk/ayty8.shtml) concluding that "*the more integrated and collaborative your team is, the more successful your projects will be and the more benefits they will deliver for you all*".

As the Trial Projects programme continues, additional case studies will reveal new challenges, solutions and techniques. These will be captured in future updates to these guidance documents. As the models are adopted across central and local government, feedback will be obtained from clients and their integrated teams. This continuing feedback process will inform future updates to these guidance documents.

ANNEX A – AUTHORS AND CONTRIBUTORS

The following individuals have mentored the trial projects and have led the creation of these guidance documents.

Mentors

Model	Mentor	Affiliation
Cost Led Procurement	Vaughan Burnand	VEB Lean Ltd.
Integrated Project Insurance	Martin Davis	Integrated Project Initiatives Ltd.
Two Stage Open Book	David Mosey	King's College London

Contributors

The new models of procurement were originally defined by the members of the Procurement and Lean Client Task Group. The members of this group are identified in Appendix A of the task group's report, which can be found at:

<https://www.gov.uk/government/publications/government-construction-task-groups>

Members of the Trial Projects Delivery and Support Groups, together with other mentors and academics have contributed the creation of these guidance documents, and the accompanying trial project case study reports. These individuals are:

Trial Projects Delivery Group	
Phil Wilbraham (Chair)	Heathrow Ltd
Andrew Butt/ Nisha de Silva/ Elizabeth Jacobs	Cabinet Office
Alan Couzens/ Steve Hudson	Infrastructure UK
Alan Johnston	Homes and Communities Agency
Bill Hughes/ Nigel Miller/ Emily Simmons	Ministry of Defence
Chris Ollier	Home Office
Ray Stephens	Department of Health
Rob Taylor	Environment Agency
Terry Stocks	Ministry of Justice
Jason Russell/ John Hesp	Surrey County Council
Keith Heard/ John Collingwood	Hampshire County Council
Alan Turner	Supply Chain Management Group

David Mosey	King's College London
Denise Bower	ICE, Leeds University
Mark Bew	BIM Task Group
Steve Fox	Bam Nuttall
Tim Jones /Beverley Waugh	Connect Plus
Trevor Hursthouse	SEC Group
Trial Projects Support Group	
Don Ward (Chair)	Constructing Excellence
Peter Groves /Elizabeth Jacobs	Cabinet Office
Alan Muse	Royal Institution of Chartered Surveyors
Alasdair Reisner	Civil Engineering Contractors Association
Deborah Hynes	Constructing Excellence
Harry Townley	Balfour Beatty
John Carlisle	Sheffield Business School
Jonathan de Souza	Galliford Try Plc.
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Kevin Thomas	Integrated Project Initiatives Ltd.
Academic Partners	
Alison Ahearne	Imperial College London
Ian Trushell	Glasgow Caledonian University
John Connaughton	University of Reading
Martin Ball/ Rob Garvey	University of Westminster
Peter McDermott	University of Salford

ANNEX B – RELEVANT PUBLICATIONS

- Construction 2025 (Industrial Strategy: Government and Industry in Partnership), July 2013 <https://www.gov.uk/government/publications/construction-2025-strategy>
- Government Construction Strategy May 2011
<https://www.gov.uk/government/publications/government-construction-strategy>
- Government Construction Strategy: Cost Benchmarking Principles and Expectations and Cost
<https://www.gov.uk/government/publications/construction-cost-benchmark-data>
- Cost Reduction Validation Method
<https://www.gov.uk/government/publications/construction-costs-departmental-reductions-2010-2011>
- Government Trial Projects (Cabinet Office website)
<https://www.gov.uk/government/collections/government-construction#government-construction-strategy>
- Highways Maintenance Efficiency programme Supply Chain Management Toolkit [January 2014]
<http://www.highwayefficiency.org.uk/efficiency-resources/lean-toolkit.html>
- Infrastructure Carbon Review (HM Treasury) 2013
<https://www.gov.uk/government/publications/infrastructure-carbon-review>
- Infrastructure Routemap (IUK), January 2014 (to be added once re-published)
<https://www.gov.uk/government/news/government-launches-new-guide-to-infrastructure-delivery>
- JCT Constructing Excellence (Sweet & Maxwell)
http://www.jctcontracts.com/JCT/contracts/view_family.jsp?familyId=180
- NEC3 Option C (Thomas Telford)
<http://www.rics.org/uk/shop/contracts/NECcontracts/nec3/>

- PPC2000 (amended 2013) (Association of Consultant Architects and Association of Consultancy and Engineering)
http://www.ppc2000.co.uk/ppc2000_benefits.html
- Procurement/Lean Client Task Group Report, July 2012
<https://www.gov.uk/government/publications/government-construction-task-groups>
- Axelos Common Glossary <http://www.axelos.com/?DI=635846>



Steven Shrybman
sshrybman@goldblattpartners.com
Our File No. 16-226

April 18, 2016

Mr. Gil McGowan
President
Alberta Federation of Labour
Parkington Plaza, #300
10408 - 124 Street
Edmonton AB T5N 1R5

Dear Mr. McGowan:

Re: Labour Rights and Mobility in the Trans-Pacific Partnership

You have asked for our assessment of the potential impact of the labour rights and mobility provisions of the Trans-Pacific Partnership (TPP)¹ on Canadian workers.

As you know, under free trade regimes Canadian workers must compete with workers in other countries who are often paid far less to do similar work, and who may have no right to join a trade union, or any other basic labour rights. This is true for workers in the manufacturing sector, and ever increasingly for those in many service sectors as well.

Chapter 19 of the TPP concerns labour rights and is presented as the means for addressing problems workers confront in the global trade environment, but for the reasons described below, it is unlikely to have any salutary effect on them. The essential deficiency of these TPP rules is the inevitable consequence of their failure to specify any measurable standard by which the purported protection of labour rights might be assessed or enforced.

Chapter 12 of the TPP concerns the rights of foreign temporary workers and is certain to make things much tougher for many Canadian workers by allowing both domestic and foreign companies to bring foreign workers (and often their spouses) to Canada to take jobs that

¹ The Parties to the TPP are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

Canadians are ready, willing and able to fill. Under these rules, Canada has foresworn the right to apply needs tests, to require labour certification tests, or to impose any numerical limit on workers who Canada has accorded the right to work in Canada as long as for three years.

One can find information about the TPP on the website of Global Affairs Canada, which includes links to the text itself and a “Technical Summary of Negotiated Outcomes”. As the following analysis demonstrates, the technical summaries include several misleading statements about the nature of these outcomes that consistently tout TPP benefits that are unsubstantiated, while ignoring any mention of adverse impacts.

It is noteworthy that at a time when the Liberal government is proposing to review Canada’s temporary foreign workers program and ask a parliamentary committee for proposals to fix the program,² it has signed a trade agreement that will foreclose virtually any reform to protect Canadian workers from having to compete with foreign workers for jobs in Canada.

PART I: LABOUR RIGHTS

Chapter 19: *Labour*, sets out provisions that oblige TPP Parties to adopt laws and practices concerning labour rights recognized in the 1998 Declaration of the International Labour Organization (ILO), and to have laws governing minimum wages, hours of work, and occupational safety and health. It also requires the establishment of various processes to facilitate consultation, public input, and cooperation concerning labour matters, and would establish a Labour Council of Party representatives.

The following sets out and provides an assessment of the key provisions of the chapter.

Core Labour Rights

Article 19.3: *Labour Rights* provides in part as follows:

1. *Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:*
 - (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;*

² The Globe and Mail, Feb. 17, 2016 <http://www.theglobeandmail.com/news/politics/temporary-foreign-workers-program-faces-federal-review/article28792323/>.

- (c) *the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and*
- (d) *the elimination of discrimination in respect of employment and occupation.*

The most important thing to appreciate about TPP obligations concerning these core labour rights is that it fails to require the parties to also adopt and implement the ILO Conventions that give substance to the high-minded principles of the Declaration. While the ILO Declaration sets out the broad principles concerning fundamental labour rights, it includes no delineation of these rights or other indication of the steps that must be taken to give them effect. Thus a Party may have signed and ratified the Declaration, but failed to adopt the Convention that describes the minimum and concrete actions that a nation must take to actually implement them.

For example: Article 2 of the Declaration:

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

...

The Declaration provides no further indication of what steps must be taken into to put this broad principle into practice. For these details, one must look to the ILO Conventions on *Freedom of Association and Protection of the Right to Organise*, 1948 (No. 87)³ and to the *Convention on the Right to Organise and Collective Bargaining Convention*, 1949 (No. 98).⁴ Under the former, workers have the right:

- to establish and, to join organisations of their own choosing without previous authorization (Article 2).

³ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Entry into force: 04 Jul 1950) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO

⁴ Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Entry into force: 18 Jul 1951) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:31223

- to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes, and to be free from government interference with this right (Article 3).⁵

Moreover, in some cases, while the Declaration may have been adopted by a Party, the relevant Convention has not. For example, Canada and some other TPP parties have not adopted or ratified the *Convention on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* which, *inter alia*, protects the right of workers to establish independent trade unions.⁶

It is important to note that the omission of any reference to the Conventions was a deliberate rejection of proposals by the International Trade Union Confederation⁷ that it do so. Thus while the Canadian government has touted the enforceability of the TPP labour rules,⁸ when it comes to the central question of core labour rights, the Parties have rejected the inclusion of any objective standards or criteria by which compliance might be measured.⁹ That approach to labour rights should be contrasted with detailed TPP rules that protect intellectual property, or the rights of foreign investors and service providers.

In other words, the central commitments of Chapter 19 concerning core labour rights are only hortatory. While the Parties are exhorted to implement certain broad principles of the ILO Declaration, those principles are so ill-defined as to confound any notion that a TPP Party could be held to account for failing to give them meaningful effect.

Minimum Wages, Hours Of Work, And Health And Safety

Article 19.3(2) provides as follows:

Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

⁵ Idem.

⁶ Idem Article 2.

⁷ <http://www.ituc-csi.org/trans-pacific-partnership-labour>.

⁸ Technical Summary of Negotiated Outcomes: Labour Chapter <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/18-labour.aspx?lang=eng>

⁹ Here again ILO conventions exist that give substantive expression to the aspirational principles of the Declaration, including the Convention concerning Minimum Age for Admission to Employment (No. 138), and the Convention concerning the Abolition of Forced Labour (No. 105).

A similar problem exists with respect to the obligation of the Parties to regulate acceptable conditions of work, because no standards are established by which this commitment might be measured. Therefore a Party may comply with this obligation simply by having laws that, for example, govern hours of work even if the maximum hours of work are clearly excessive. Other matters may be simply ignored, such as those concerning termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement. Moreover, as noted below, and no matter how modest these labour protections may be, they may nevertheless be waived to attract foreign investment or promote trade.

Waiving Core Labour Rights And Protections

Article 19.4: Non Derogation, provides as follows:

The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations:

(a) implementing Article 19.3.1 (Labour Rights), if the waiver or derogation would be inconsistent with a right set out in that paragraph; or

(b) implementing Article 19.3.1 (Labour Rights) or Article 19.3.2 (Labour Rights), if the waiver or derogation would weaken or reduce adherence to a right set out in Article 19.3.1, or to a condition of work referred to in Article 19.3.2 (Labour Rights), in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory,

in a manner affecting trade or investment between the Parties.

[emphasis added]

In describing these provisions, Canada makes two assertions concerning the protection of laws relating to acceptable conditions of work, which at best, must be regarded as misleading. These are that TPP labour rules:

- ensure that laws provide acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety;
- include a non-derogation clause that prevents TPP Parties from derogating from their domestic labour laws in order to encourage trade or investment.

It is true that Article 19.4 disparages the temptation a Party might have to weaken or abandon the measures it has implemented to protect labour rights, but even here the rules are highly qualified. To begin with, Article 19.4 would not prevent a party from weakening measures to protect core labour rights to encourage trade or attract foreign investment, so long as it does not do so in a manner that is “inconsistent” with such rights. However, as noted, core labour rights are undefined and establish no minimum baseline. Moreover, any state that might be prompted to seek enforcement of these provisions, however nebulous they may be, would confront the further challenge of proving that any weakening of core labour protections occurred “in a manner affecting trade or investment.” Establishing such a causal connection, given the difficulties of measurement and the variety of factors that might come into play, would be a very significant challenge.

Even more problematic is the treatment accorded the obligation to adopt and maintain rules governing acceptable conditions of work (Article 19.3(2)). This commitment may in fact be abandoned altogether except in respect of export processing or free trade zones. In other words, TPP parties are free to abandon any and all commitments to minimum wages, hours of work, health and safety rules as these generally apply to workers for the purpose of encouraging trade or foreign investment.

The Obligation to Enforce Labour Laws

Article 19.5: *Enforcement of Labour Laws* provides:

- 1. No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.*
- 2. If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure. . . .*
- 3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of another Party.*
[emphasis added]

Two points are worth noting in respect of this obligation. The first is that Article 19.5(1) compounds the difficulty of enforcing TPP provisions concerning labour rights (noted above), by requiring that any failure to enforce labour measures be both i) sustained or recurring; and ii) have the result of affecting trade or investment. Given these qualifications on any enforcement action, it is difficult to imagine a challenge succeeding even the most egregious and ongoing cases of abuse of the most minimal protection for core labour rights.

The other point to make is that by exposing a Party to the risk of being challenged for failing to enforce its labour laws, an incentive is created for Parties to keep those domestic commitments modest given the absence of defined minimum standard of protection.

Importing Goods Produced With Child Or Forced Labour

Article 19.6: *Forced or Compulsory Labour* provides:

Each Party recognises the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. Taking into consideration that the Parties have assumed obligations in this regard under Article 19.3 (Labour Rights), each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.

Here again the TPP Parties have rejected entreaties¹⁰ to include a commitment to adopt and implement ILO conventions on child and forced labour or to otherwise ban the importation from or outsourcing to jurisdictions where such practices are condoned.¹¹ Instead Parties are required to ‘discourage’ the importation of goods made by forced labour or forced child labour but there is no delineation of the actions that a Party must take (or even consider) to do so, only that they are free to pursue “initiatives it considers appropriate.”

Corporate Accountability

Article 19.7: *Corporate Social Responsibility* provides:

Each Party shall endeavour to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party. [emphasis added]

This provision pertains to the activities of enterprises (most often transnational corporations) as opposed to those of the state itself.

Once again the Parties have rejected the inclusion of any standard by which the notion of *corporate social responsibility* might be measured, notably those set out in OECD Guidelines for

¹⁰ This formulation is likely in order to conform to existing US trade law which does not now impose an outright ban in such circumstances. Section 1307 of the *Tariff Act* of 1930 19 USC 1307 (1930) amended in 2000, prohibits the importation of such goods only to the extent that the US also produces such goods in such quantities to satisfy domestic consumption. The legislation was clearly motivated to prevent unfair competition which would undercut US manufacturing, rather than taking a stand on principle against forced labour.

¹¹ See for example ILO Convention No. 182 *On The Worst Forms Of Child Labour*, 1999, and Convention No. 138 *On The Minimum Age For Admission To Employment And Work*.

Multinational Corporations.¹² Rather, under this Article, each Party shall ‘endeavor to encourage enterprises to voluntarily adopt CSR initiatives on labor that have been endorsed or supported by that party.’ The approach is even more remarkable because the adoption of such a code of conduct would be voluntary in any event.

This exceedingly soft approach to encouraging good behavior by corporate and private investors and service providers is contrasted with the extensive and substantive rights these private interests are accorded under the TPP, including the unilateral right to seek compensation when their rights as investors are allegedly infringed.¹³

Procedural Guarantees

Article 19.8: *Public Awareness and Procedural Guarantees* sets out various obligations for the Parties to establish domestic procedures to enforce labour laws, such as they may establish. The procedures are reasonably well delineated and are, for the most part, consistent with Canadian norms with respect to administrative and judicial remedies concerning the infringement of labour rights. However, as noted, the overarching problem that belies the utility of such provisions is the failure of the TPP to impose the obligation on the Parties to establish even minimum standards for the protection of labour rights to which these procedures might be applied.

Public Submissions

Article 19.9 requires that each Party “provide for the receipt and consideration of written submissions from persons of a Party on matters related to this Chapter . . .” The Parties are obliged to consider matters raised and to provide a timely response, which may or may not be in writing. There is no other description of the actions that might be taken by a Party in response, or any requirement that it take any action, regardless of the concerns raised.

Cooperation And Dialogue

The major portion of the labour chapter is dedicated to spelling out various modalities for engaging labour and employer groups in consultations and dialogue for the purpose of promoting cooperation on labour matters. Areas of potential cooperation are delineated in detail under Article 19.10(6). Article 19.11 sets out procedures for inter-Party dialogue about similar matters. Article 19.12 would establish a Labour Council composed of senior governmental representatives at the ministerial or other level which is to meet every two years. Articles 19.13 through 19.15 set out further requirements concerning labour and public engagement.

¹² <http://www.oecd.org/corporate/mne/>

¹³ The right to Investor-State Dispute Settlement (ISDS) is established under Chapter 9 of the TPP.

It is beyond the scope of this opinion to speculate about the potential utility of these provisions. However, because of the absence of any enforceable commitments to labour rights, if the labour provisions of the TPP are to have any salutary effect, that would have to be found in these processes of dialogue and consultation.

Dispute Resolution

The dispute provisions of the TPP are set out in Chapter 28, and may *inter alia* be invoked under Article 28(1)(b):

wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement;

In promoting the TPP, the Canadian government has emphasized the enforceability of the regime in summarizing the labour chapter of the Agreement, stating that:

*Canada is committed to fundamental labour rights, and supporting high labour standards through a fully enforceable TPP Chapter is a key part of that commitment.*¹⁴

And underscoring the point by describing the labour chapter as containing:

*... enforceable commitments to protect and promote internationally recognized labour principles and rights. This includes the International Labour Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work.*¹⁵

One might justifiably be skeptical about the likelihood of Canada's commitment to enforcing the labour rights set out in the TPP for several reasons. To begin with, invoking formal dispute resolution is not a common occurrence and brings with it certain risks to Canada's international standing and relationships. In addition, Chapter 17 clearly engenders a preference for consultation and dialogue. It is also important to appreciate that the interests of labour, to the extent they are considered at all in trade negotiations or enforcement decisions, have certainly not been given any priority.

But by far the most important reason to doubt that a formal dispute will ever be brought to enforce the labour provisions of the TPP is that – for the reasons described in some detail throughout this analysis – the obligations of Parties in respect of labour rights are far too vague

¹⁴ See fn 8.

¹⁵ *Idem*.

and qualified to be enforced. There is simply no objective standard by which compliance with any of the commitments set out in Chapter 17 could be measured.

Moreover, any doubt on the question is quickly resolved when one has regard to the detail and precision with which the rights investors, foreign service providers and intellectual property rights holders are set out in the texts of the TPP.

PART II: CHAPTER 12 - TEMPORARY ENTRY FOR BUSINESS PERSONS

Background

Temporary foreign workers (TFWs) have been able to enter and work in Canada since the 1960s, and their right to do so was formally introduced in legislation in the 1970s. While generally focused on skilled workers, temporary foreign worker programs were expanded to lower-skilled occupations in 2002.

As described in study published by C.D. Howe Institute:

Between 2002 and 2013, Canada eased the hiring conditions of TFWs several times, supposedly because of a reported labour shortage in some occupations, especially in western Canada. By 2012, the number of employed TFWs was 338,000, up from 101,000 in 2002, yet the unemployment rate remained the same at 7.2 percent. Furthermore, these policy changes occurred even though there was little empirical evidence of shortages in many occupations. When controlling for differences across provinces, I find that changes to the TFWP that eased hiring conditions accelerated the rise in unemployment rates in Alberta and British Columbia.¹⁶

However, in 2013, a number of media accounts showing that many employers preferred hiring under the TFW program, even when Canadian workers were ready and willing to work, prompted the federal government to take some modest steps to reign in growing abuse of the program.¹⁷

¹⁶ Gross; *Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages* Commentary No. 407, C.D. Howe Institute.

¹⁷ *Idem* p. 7. Among the reforms was a limit of 10 per cent on the proportion foreign workers could represent of a company's work force in low-paying jobs, and prohibited employers from hiring them in regions of high unemployment. As described below, under the TPP neither constraint would be permitted for workers from most TPP member countries.

At the same time, however, the federal government was engaged in negotiating TPP labour mobility rules that greatly exacerbate pressures on Canadian labour markets by removing the principal safeguard of Canada's TWF program, namely the requirement that a company prove that the TFWs were needed to fill job vacancies caused by domestic labour shortages.¹⁸ If implemented, TPP rules will simply trump this key requirement and other requirement of Canada's TWF program intended to ensure that the employment opportunities of Canadian workers are protected.

Analysis

The TPP is not the first international trade agreement to include labour mobility disciplines.¹⁹ While a comparative review of these regimes is outside the scope of this opinion, by Canada's estimate the scope of TPP provisions concerning temporary workers is much broader than that of previous commitments. For example, in describing its virtues, Canada claims that the TPP:

- secures commitments on temporary entry provisions beyond those included in the WTO *General Agreement on Trade in Services* (GATS);
- provides new commitments for business visitors providing after-sales services, as well as new commitments to extend coverage for business visitors providing after-lease services;
- improves commitments for intra-company transferees;
- provides new commitments for investors to establish a commercial presence in these markets;
- provides new commitments for certain highly-skilled professionals and technicians covering a wider range of occupations;
- provides new commitments to extend temporary entry privileges, as well as the right to work, for the spouses of certain covered business persons.²⁰

As the following analysis describes, the essential effect of TPP labour mobility rules is to prohibit Canada from imposing any limit on the number of foreign workers entitled to enter the country so long as they fall under one of the broadly defined categories of workers Canada has

¹⁸ Under Canada's TFW Program, employers must first obtain approval of a Labour Market Opinion (LMO) from Employment and Social Development Canada and foreign candidates must apply for a work permit to Citizenship and Immigration Canada (CIC). To obtain that approval, the employer, *inter alia*, must show that it made reasonable efforts to hire or train Canadians for the job. However, an LMO was not needed for companies hiring workers through intra-firm transfers or from a country with an international agreement like NAFTA.

¹⁹ Both NAFTA (Chapter 16) and CETA (Chapter 12) include labour mobility rules.

²⁰ Canada: *Technical Summary of Negotiated Outcomes: Temporary Entry for Business Persons Chapter*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/11-TemporaryEntry.aspx?lang=eng>.

agreed to admit. Furthermore, for the large majority of such workers, Canada is prohibited from administering a labour certification test before that worker can enter Canada and be given a work permit.

THE SCOPE OF TPP LABOUR MOBILITY RULES

To begin with, it is important to note that the scope of TPP labour mobility rules is considerably larger than its title suggests. While presented under the heading “TEMPORARY ENTRY FOR BUSINESS PERSONS,” (Chapter 12 of the draft text) these rules are neither limited to “business persons” nor to their “temporary” entry – at least not as these terms would be commonly understood.

Under Article 12.1 business person means:

(a) a natural person who has the nationality of a Party according to Annex I-A (Party-Specific Definitions),²¹ ... [emphasis added]

who is engaged in trade in goods, the supply of services or the conduct of investment activities;

In other words, under the TPP a “business person” is *any citizen* of a Party, whether skilled or unskilled. Moreover, in many cases the spouses of these ‘business persons’ are also entitled to come to Canada to work regardless of their skill level or qualifications. A description of the categories of workers whom Canada has agreed to provide work permits to under these TPP rules is considered below.

The other ‘misnomer’ of the Chapter’s title concerns the use of “temporary” to describe the entry rights in question. For some workers covered by Canadian commitments²² the length of stay may be as short as 6-12 months, but for many others it may be as long as three years. In all cases, these limits may be extended, and no limit is placed on the duration or number of extensions that may be permitted.²³

²¹ See Annex I-A natural person who has the nationality of a Party means: (a) with respect to Australia, a natural person who is an Australian citizen as defined in the *Australian Citizenship Act 2007* as amended from time to time, or any successor legislation; (b) with respect to Brunei Darussalam, a subject of His Majesty the Sultan and Yang Di-Pertuan in accordance with the laws of Brunei Darussalam; (c) with respect to Canada, a natural person who is a citizen of Canada under Canadian legislation.

²² These are set out in Annex I2-A to Chapter 12; *Canada’s Schedule of Commitments for Temporary Entry for Business Persons*. <https://ustr.gov/sites/default/files/TPP-Final-Text-Annex-12-A-Temporary-Entry-for-Business-Persons-Canada.pdf>.

²³ See description of these provisions below.

DE-REGULATING ACCESS TO THE CANADIAN LABOUR MARKET

The key commitment of Chapter 12 is set out in Article 12.4: *Grant of Temporary Entry*. It provides in part as follows:

1. *Each Party shall set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that Party.*

...

3. *The sole fact that a Party grants temporary entry to a business person of another Party pursuant to this Chapter shall not be construed to exempt that business person from meeting any applicable licensing or other requirements, including any mandatory codes of conduct, to practise a profession or otherwise engage in business activities.*

...

In accordance with 12.4(1), Canada and the other Parties (with the exception of the United States)²⁴ have set out their commitments in Annex 12-A to the TPP. In Canada's case these correspond to four general categories of workers: i) business visitors, ii) intra-corporate transferees, iii) investors, and iv) professionals and technicians. In each case Canada's commitments are reciprocal.

The essential thrust of Chapter 12 is to remove domestic controls on the number or qualifications of foreign workers that may be given a work permit and enter Canada for those categories of workers for which reciprocal commitments are made. Thus for three of the four categories of workers it has specified Canada has undertaken:

*[to] grant temporary entry and provide a work permit or work authorization ... ,
and will not:*

*(a) require labour certification tests or other procedures of similar intent as a
condition for temporary entry; or*

(b) impose or maintain any numerical restriction relating to temporary entry.²⁵

²⁴ The United States is the only TPP country to make *no commitments* under Chapter 12. Consequently, American workers gain no temporary entry access to Canada under the TPP that doesn't already exist under NAFTA.

²⁵ TPP 12-A (Canada)(B)(4).

For the other category of foreign workers, “business visitors”, Canada has also foresworn the right to “impose or maintain any numerical restriction relating to temporary entry” or to require that they obtain a work permit prior to entry to Canada.

These constraints effectively remove the possibility of imposing the needs test that is a central feature of the Labour Market Opinion required under Canada’s TFW program. Thus, in stating the nature of the reciprocal commitment expected of other nations, Canada stipulates that in making a matching commitment in its schedule that nation do so:

without reserving the right to impose or maintain an economic needs test or numerical restriction for those business persons.

In other words, foreign workers covered by Canada’s commitments under the TPP are entitled to work in Canada even if domestic workers are readily available to fill those jobs and regardless of the unemployment rate in Canada.

THE EXPANSIVE DEFINITIONS OF TEMPORARY FOREIGN WORKERS

The rights of a foreign worker to enter Canada and obtain a work permit to be employed here depends upon whether the individual falls within one of the four categories for which Canada has extended that opportunity. Those categories are, in many cases, very broadly defined. This is particularly true for workers employed by a transnational corporation with operations in Canada and another TPP nation, and is virtually wide open for employees who fall within the definition of being Intra-Corporate Transferees.

To qualify, an Intra-Corporate Transferee must be someone who falls within the definitions of being a “management trainee on professional development”, a “specialist”, or an “executive or manager” of the company. The broadest of these subcategories is the “specialist” which is someone who has worked for the company for more than a year (if Canada stipulates that requirement) and who is an employee:

... possessing specialized knowledge of the company’s products or services and their application in international markets, or an advanced level of expertise or knowledge of the company’s processes and procedures.

Arguably any individual employed by the company for a year could, by dint of that experience or any company-specific training, be said to have specialized knowledge of the company or its products, including many otherwise unskilled workers. Moreover, a claim by a company that its employee had such knowledge would be very difficult to test or corroborate.

That same corporation has other means for bringing workers to Canada who cannot be qualified as “specialists.” This would include individuals who are “business visitors” who are persons for whom:

(a) the primary source of remuneration for the proposed business activity is outside Canada; and

(b) the principal place of business and the predominant place of accrual of profits remain outside Canada,

and are engaged in various activities, including sales, after-sales/leasing service, production management, or “consultations with business” associates.

However, for such employees the terms of entry are less generous, for they are only entitled to stay in Canada for six months (unless their stay is extended), and may not bring their spouses with them.

Another option for temporary entry applies to individuals who qualify under the heading “Professionals or Technicians”²⁶ in which case the length of stay may be for a period of up to one year, or as extended. The particular categories vary from Party to Party, but to illustrate, the schedule for Chile is attached as an Appendix “A” to this opinion.

Unlike the categories for “Business Visitors” and “Intra-Corporate Transferees”, Professionals and Technicians need not be compensated from or have a principal place of business outside Canada. They may simply be hired and paid by a Canadian company. This explains why it is only this category of foreign worker for which any manner of wage protection is afforded (see discussion below).

As described above, several of these categories of foreign workers who may enter Canada under the TPP are obviously very broadly defined. Moreover, the category of Intra-Corporate Transferees designated as “specialists” is so broad as to be essentially self-defining because any employee who has worked for the company for a year and attended a company seminar or training session (however modest), could be qualified as a specialist under the TPP.

THE RIGHT OF SPOUSES TO WORK IN CANADA

The right of spouses to enter Canada and be given a work permit traces that of their partner to certain extent. For example, in the case of Intra-Corporate Transferees:

Canada shall grant temporary entry and provide a work permit or work authorization to spouses of Intra-Corporate Transferees of another Party where that Party has also made a commitment in its schedule for spouses of Intra-Corporate Transferees, and will not:

²⁶ Canada’s Annex I schedule includes country specific lists of the categories of professionals and technicians that fall within this category.

- (a) *require labour certification tests or other procedures of similar intent as a condition for temporary entry; or*
- (b) *impose or maintain any numerical restriction relating to temporary entry.*

Spouses are entitled to remain in Canada for as long as their partners are allowed to remain. However, unlike their partners, spouses need not themselves be qualified under any of the categories set out in Canada's questions and are nevertheless entitled to any job they can find or to carry out any work they are qualified for.

MINIMUM WAGE PROTECTION

With one exception, there is no compensation standard or minimum wage protection for foreign workers that is set out in Chapter 12. That exception is for "professionals and technicians" who, under Canada's schedule of commitments, must receive:

remuneration at a level commensurate with other similarly-qualified professionals within the industry in the region where the work is performed. Such remuneration shall be deemed to not include nonmonetary elements such as, inter alia, housing costs and travel expenses.

No other category of worker, including those that are likely to be far more numerous, is entitled to a minimum wage guarantee or protection.

It is beyond the scope of this opinion to assess the potential application of federal or provincial minimum wage standards to foreign workers. However, putting aside the question of whether a foreign worker would be aware of or have a practical means to enforce such rights, it is difficult to see how minimum wage protections or other employment standards would apply to workers who are paid and employed by companies operating outside Canada, as would be the case for foreign workers who fall within the Intra-Corporate Transferee, or business visitor categories.

Moreover, and as noted, TPP labour rules (Chapter 17) do not establish minimum standards for wages, hours of work, or health and safety, and no country is prevented from derogating from such requirements to attract foreign investment other than in *foreign trade zones*²⁷ (Canada has none).

²⁷ Article 19.4(b)

THE RIGHT TO REQUIRE FOREIGN WORKERS TO BE QUALIFIED

For three categories of foreign workers²⁸ Canada has committed to “grant temporary entry and provide a work permit or work authorization” to a foreign worker or investor and will not “require labour certification tests or other procedures of similar intent as a condition for temporary entry”.

However, Article 12.4(3) provides:

The sole fact that a Party grants temporary entry to a business person of another Party pursuant to this Chapter shall not be construed to exempt that business person from meeting any applicable licensing or other requirements, including any mandatory codes of conduct, to practise a profession or otherwise engage in business activities.

Thus while a foreign worker is entitled to enter Canada and be given a work permit, he or she may be required to meet domestic licensing or other requirements. This is certainly an important safeguard to ensure that work performed or services provided in this country are carried out according to Canadian standards – assuming of course that enforcement, which will often be a provincial responsibility, is effective. The unanswered question is why foreign workers are entitled to enter Canada and be given a work permit when they may or may not be qualified, under Canadian law, to carry out the work or perform the services they have come to Canada to carry out.

SAFEGUARDS IN THE CASE OF LABOUR DISPUTES

Article 12.4(4) offers some protection against foreign workers being used to replace Canadian workers who are on strike or otherwise involved in a labour dispute. It provides:

A Party may refuse to issue an immigration formality to a business person of another Party if the temporary entry of that person might affect adversely:

- (a) the settlement of any labour dispute that is in progress at the place or intended place of employment; or*
- (b) the employment of any natural person who is involved in such dispute.*

However, the Article would not prevent the deployment of foreign workers who are already in Canada.

²⁸ For the category of Business Visitor, a work permit is not required as condition of entry, but no explicit waiver is given with respect to certification.

SAFEGUARDS FOR BORDER MEASURES

Article 12.2(3) provides:

Nothing in this Agreement shall prevent a Party from applying measures to regulate the entry of natural persons of another Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that those measures are not applied in a manner as to nullify or impair the benefits accruing to any Party under this Chapter.

It is not clear what eventuality this rule contemplates, but the proviso that any restriction on the entry of foreign workers not nullify or impair the benefits other Parties expect to derive under TPP rules is an important qualification.

ENFORCEMENT

The dispute resolution provisions of Chapter 12 are set in Article 12.10: *Dispute Settlement*, and provide in part as follows:

1. *No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) regarding a refusal to grant temporary entry unless:*

(a) *the matter involves a pattern of practice; and*

(b) *the business persons affected have exhausted all available administrative remedies regarding the particular matter.*

... ..

[emphasis added]

The dispute procedures of Chapter 28 may be invoked when a Party alleges that another Party has failed to meet its obligations under certain TPP provisions, including those in Chapter 12. Where an arbitral panel agrees that is the case, the offending Party is to bring itself into compliance with TPP rules. Where it fails to do so, compensation may be sought by the complaining Party, in lieu of which, it may retaliate.

Chapter 28's dispute procedures may not be invoked by private investors, as is the case for disputes arising under TPP investment rules. This does not mean, however, that Chapter 12 rules might not come into play in an investor-state claim for damages under Chapter 9 of the TPP because foreign investors are one of the categories of "business persons" entitled to enter Canada. A denial of entry rights might accordingly be cast as an infringement of investor rights under Chapter 9. Moreover, a foreign investor may claim that any restriction on the entry of

foreign workers that causes harm to an investment is an infringement of the broad rights and entitlements it is accorded under TPP investment rules.

As for Party to Party enforcement proceedings under Chapter 28, the need to prove a “pattern of practice” of refusing to grant entry makes the prospect of state-to-state dispute resolution remote for reasons similar to those discussed in respect of dispute settlement under Chapter 19. This is to be contrasted with the rights of foreign investors to claim damages for each and any breach of the investor rights established under Chapter 9.

When a Party refuses to permit Canadians to work in its jurisdiction, affected workers are obliged to exhaust all available administrative remedies provided by that Party, if any. If that fails they (or more likely the company that employs them) might press its national government to invoke dispute resolution where the denial reflects a “pattern of practice.” If Canada responds to such an entreaty, dispute resolution, which would likely to take at least a year, may uphold the complaint. In such a case, compensation be awarded, and if it is unpaid, retaliatory action may be taken.

During the years that are likely to elapse while the entry of Canadian workers is being blocked to a particular State, workers from that State will nevertheless continue to enjoy the benefits of having unfettered access to jobs in Canada in accordance with Canada’s commitments.

A more likely cause of harm to Canadian workers (over and above the flow of foreign workers into Canada through the ‘open door’ created under TPP rules), would arise when foreign or domestic corporations abuse the right to bring foreign workers to Canada, to import workers that do not fall within the parameters of Canada’s commitments.

Cases of such abuse have been reported and documented.²⁹ It is also important that the TPP imposes no obligation on the corporations that may traffic in foreign workers, and provides no recourse against them. The only remedy for Canadian workers who discover that a company is abusing TPP rules will be to press Canada to step up monitoring and enforcement of the flow of foreign workers into Canada.

For these reasons, one should not expect a speedy resolution for disputes concerning non-compliance or abuse of TPP temporary foreign worker rules.

However the more important point is that even where TPP rules are fully complied with, absent full employment in a particular sector of the domestic economy, the interests of Canadian

²⁹ See discussion above, and as one example, the HD Mining Company in northern British Columbia set as a job condition the ability to speak Chinese as a job pre-requisite to defeat the chances of a domestic worker being hired (CBC 2012).

workers are likely to be seriously harmed by the inflow of foreign workers to fill scarce jobs that domestic workers are ready and able to fill.

CONCLUSION

The labour rights provisions of the TPP include no substantive or even minimum standards by which compliance could be measured, and so there is no realistic prospect of holding TPP Parties to account for any failure to establish and preserve core labour rights or reasonable standards for wages, hours of work, health and safety or other work related matters. At their highest, TPP labour rules will have a hortatory effect and may inform the labour dialogue and consultation processes described by the TPP, should these take place.

However, in the context of the TPP, this potential and marginal gain for workers, should it arise, must be considered in light of the adverse impacts of the regime for working people.³⁰ This is patently apparent in the case of TPP labour mobility rules that remove the ability of Canada to regulate the inflow of foreign workers to take jobs unemployed Canadians are qualified for and ready to perform. If implemented, these affects will likely be immediate, severe in times of high unemployment, and because they will be entrenched in a multi-party international treaty, effectively irreversible.

Yours truly,



Steven Shrybman
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³⁰ Several critiques of the TPP have been published by unions and civil society groups to document the adverse impact the TPP will have on the auto sector, drug prices, and other social services.

APPENDIX A

Canada will grant the following specialty occupations temporary entry for the nationals of Chile.

Professionals:

All occupations listed in the National Occupational Classification (NOC) levels 0 (Managers) and A (Professionals), except for:

All health, education, and social services occupations and related occupations
All professional occupations related to Cultural Industries
Recreation, Sports and Fitness Program and Service Directors
Managers in Telecommunications Carriers
Managers in Postal and Courier Services
Judges, Lawyers and Notaries except for Foreign Legal Consultants

Technicians:

The following occupations listed in the NOC level B (Technician) unless otherwise indicated:

Civil Engineering Technologists and Technicians
Mechanical Engineering Technologists and Technicians
Industrial Engineering Technologists and Technicians
Construction Inspectors and Estimators
Engineering Inspectors, Testers and Regulatory Officers
Supervisors in the following:

- Machinists and Related Occupations
- Printing and Related Occupations
- Mining and Quarrying
- Oil and Gas Drilling and Service
- Mineral and Metal Processing
- Petroleum, Gas, and Chemical Processing and Utilities
- Food, Beverage, and Tobacco Processing
- Plastic and Rubber Products Manufacturing
- Forest Products Processing
- Textile Processing

Contractors and Supervisors in the following:

- Electrical Trades and Telecommunications Occupations
- Pipefitting Trades
- Metal Forming
- Shaping and Erecting Trades
- Carpentry Trades
- Mechanic Trades
- Heavy Construction Equipment Crews
- Other Construction Trades
- Installers, repairers, and servicers

Electrical and Electronics Engineering Technologists and Technicians

Electricians

Plumbers

Industrial Instrument Technicians and Mechanics

Aircraft Instrument, Electrical, and Avionics Mechanics, Technicians, and Inspectors

Oil and gas well Drillers, Services, and Testers

Graphic Designers and Illustrators

Interior Designers

Computer and Information Systems Technicians*

International Purchasing and Selling Agents

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