

Summary of Conference: Where to from Here:
A Canadian Strategy for the UN Principles on Business and Human Rights?
Ryerson University, Toronto, Ontario, May 8, 2014

On May 8, 2014, a one day conference was held at Ryerson University in Toronto, Canada, organized around the question of whether a Canadian strategy should be developed to implement the United Nations Guiding Principles on Business and Human Rights (UNGPs), and if so, what should be the next steps. Eighty participants attended the conference, and countless others watched online. Questions were fielded from viewers as far afield as India. Participants and speakers came from inter-governmental organizations, governments, companies, industry associations, social responsibility investment organizations, consultants, international and Canadian non-governmental organizations, and Canadian and international academia (professors and students) from more than 10 different universities. A full video archive of the proceedings, as well as a 1.5 hour documentary that highlights some key moments, powerpoints of presenters, biographies of keynote speakers, and a listing of conference organizers, supporters and volunteers are all accessible at: <http://ryerson.ca/csrinstitute/business-humanrights/> Publication of a collection of Conference papers is planned for a special issue of the *International Journal of Canadian Studies*. In addition, a possible book building on the conference is being explored.

Morning Session

In an opening presentation, Dr. Kernaghan Webb from Ryerson University's Department of Law and Business in the Ted Rogers School of Management noted the need to move from what he referred to as a "heroic, ad hoc approach" to business and human rights, where individual businesses and other organizations adhere to human rights "against all odds", to a more systemic approach, where an institutional structure is in place to systematically meet human rights objectives. Dr. Webb also pointed out that the conference focus is on potential for development of a Canadian "strategy" for implementation of the UN Guiding Principles (UNGPs), in which governments, the private sector and civil society actors can all play a role. He suggested that a Canadian strategy stood in contrast to development of a national "plan" for UNGP operationalization, which is a specific responsibility of the Canadian government.

Lene Wendland, Advisor on Business and Human Rights, United Nations, Office of the High Commissioner on Human Rights, spoke on the origins and development of the UNGPs, which succeeded where other UN business and human rights initiatives had failed, and how it was informed by "principled pragmatism" with the goal of reducing corporate-related human rights harm to the maximum extent possible in the shortest possible period of time. She described UNGP's underlying framework as comprising three pillars: the state duty to protect (involving government policies, regulation and adjudication), the corporate responsibility to respect (involving acting with due diligence to avoid infringements and addressing adverse impacts), and the need for access to remedy (in both judicial and non-judicial forms). The UNGP contains no new legal obligations, but elaborates on the implications of existing obligations and practices for States and business. Ms. Wendland noted the growing convergence at the international level on the basic elements contained in the UNGP, as reflected in such diverse instruments as ISO 26000, the OECD MNE Guidelines, the IFC sustainability framework, the UN Global Compact, as well as instruments of the ILO and UNCTAD, among others. A working group has now been put in place to further UNGP dissemination and implementation.

John Sherman III, General Counsel, Senior Advisor and Secretary, SHIFT Project then spoke about the UNGPs from the perspective of corporate counsel. Mr. Sherman noted the growing realization of the integral role played by corporate counsel in implementing the UNGPs, and the growing perception among leading corporate counsel that adherence of the UNGPs is critically important as part of corporate due diligence. In particular, Mr. Sherman pointed out that soft law instruments such as the UNGPs and others such as ISO 26000 could be drawn on by courts as part of recognized standards of due diligence, and in that way play an important role in legal systems around the world. Mr. Sherman described a similar trajectory towards judicial acceptance of other soft law instruments.

Alex Neve, Secretary-General of Amnesty International Canada, suggested a Canadian strategy should focus on five key areas: (1) improved access to justice for foreign human rights victims associated with Canadian overseas operations (including making parent companies legally responsible for human rights abuses arising in their global operations, eliminating the *forum non conveniens* rule currently applied in Canadian courts, improving civil procedure laws on disclosure, and reducing corporate influence on the state); (2) the need for greater regulation of overseas operations of Canadian companies; (3) more effective enforcement of existing laws; (4) further enhancement of business and human rights standards to hold corporate actors to account; and (5) enhanced attention to protecting the rights of specific groups, particularly women, children, Indigenous Peoples and human rights defenders.

Ben Chalmers, Vice President, Sustainable Development, Mining Association of Canada (MAC) suggested that the mining industry is working on many fronts with many partners to translate the Respect pillar into demonstrable action at the mine site and community level including through human rights risk assessment methodologies and due diligence practices, stakeholder engagement, standards and revenue transparency. He described MAC's Towards Sustainable Mining (TSM) program, its strengths and components. Looking more broadly at the overall situation, Mr. Chalmers suggested that many of the "pieces of the puzzle" are in place (e.g., in terms of specialized actors and programs) but there was a need to use them in a more coordinated and strategic manner, and getting the balance right. Mr. Chalmers expressed support for the idea of a Ryerson University-supported meeting of Canadian private sector actors from a variety of different sectors, to share ideas and possibly identify areas for cooperation.

Huguette Labelle, Chair, Transparency International spoke of the need for a practical, implementable, comprehensive and inclusive (in terms of involvement of stakeholders) strategy. Recognizing that much work has already been done, she suggested that a first step would be scoping of what has been done and where are the gaps. She pointed to the Bangladesh tragedy as a situation, which illustrated multiple failures that had human rights elements: from the wages, to worker confinement, to the physical conditions, to worker safety. Ms. Labelle said that there are situations where adequate laws are in place but the government is weak, in which case industry leaders can play an important role in coming together to agree on standards and to pressure government for progress. International pressure may also be helpful.

Duane McMullen, Department of Foreign Affairs and International Trade, commended the Conference as a useful "idea mine" for the Government of Canada. He suggested the need to agree on overall higher goal of a prosperous world for all in which each person is respected, valued and included. He also noted that it is not just about reducing harms caused by business, but also businesses can cause great good. Mr. McMullen described situations where the presence of a company in a community could lead to other less savoury activities coming to an area, and the importance of firms staying on top of problems to address them in the early stages. Companies that have robust dialogue mechanisms can discover problems and issues early and perhaps take measures before they get big. Voluntary instruments can be powerful ways of achieving goals. Even though a Canadian Embassy office within a country may be small, it can band together with Embassy offices of other countries to be effective in encouraging positive action.

Afternoon Presentations

In his presentation that examined learning from the past to inform the future, Dr. Webb suggested that there are several examples from the recent past of Canadian government, the private sector and civil society stakeholders working together in support of human rights-related goals. He noted that on the horizon were potentially important developments concerning transparency and reporting, alignment of international concepts of free prior and informed consent and concepts of due diligence and materiality drawing on standards such as the UNGP and ISO 26000.

Wendy Brookes of the Department of Accounting, Faculty of Business, Brock University spoke about Indigenous Rights Violation Risk, and how it relates to the UNGPs. She suggested that indigenous persons have the right to free prior and

informed consent over their lands and resources, protected internationally through the UNDRIP and through s. 35 of the Constitution Act through aboriginal title (unresolved through the courts). Drawing on the Northern Gateway project as an illustration, Brookes asserted that the project provided an example of Indigenous Rights Violation Risk for many potentially affected indigenous communities. She recommended amendments to the Ontario Securities Act regulations pertaining to material risk in keeping with UN Guiding Principles 1, 2 and 3; and that non-compliant firms should face the possibility of delisting, regulatory fines, and oversight by an indigenous ombudsman.

In her presentation examining whether Canadian investment treaties are in line with the UNGPs, Carleton University's Stephanie Gervais noted UNGP Principle 9 stipulates that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States, for instance through investment treaties. The terms of investment agreements may constrain States from implementing human rights legislation, or put them at risk of binding arbitration if they do so. Gervais expressed concern that "regulatory chill" might take place, with States foregoing needed legislation that might negatively affect the value of foreign investment, rather than risk potential liability. Gervais recommended that states incorporate human rights language in investment agreements, create obligations for investors like impact assessments, and clarify the scope of the expropriation and national treatment clauses.

Nadine Grant of Plan Canada and Mark Sitter of Sherritt International spoke about learning and good practice from integrating child rights into NGO-business partnerships. Plan Canada's Child Centred Community Development approach calls upon all duty bearers, including the private sector partners, to play their role in furthering the rights of children and youth. Grant referred to three case studies involving mining companies that are attempting to further the ten principles in the Children's Rights and Business Principles. Mark Sitter spoke about Sherritt International's efforts to address sexual exploitation of teenage girls by contract workers in the construction phase of Ambatovy, the company's subsidiary operation in Madagascar. Among other things, Sherritt/Ambatovy reached out to UNICEF for guidance, and developed an internal no tolerance policy, a code of conduct, and related training in relation to employees, contractors and sub-contractors.

Sara L. Seck of Western University discussed a strategy for legal education pertaining to implementation of the UNGPs. From the perspective of legal education, it is accepted that lawyers have many obligations to clients involved in business activities, including both private law obligations of competence and ethical obligations of loyalty, confidentiality and candour. Other more specific ethical obligations include a duty not to counsel a client to engage in, or to assist a client in illegal activities. These ethical rules are clearly triggered by various public (criminal law, tax law) and private (tort, breach of contract) laws. These rules might also be triggered by public international law, including international human rights law. While the UNGPs are not law, they have been integrated into numerous international CSR frameworks and raised as a normative standard in transnational litigation. By increasing normative expectations that human rights risk management is part of good business practice, the UNGPs are relevant to legal education.

Stephanie Meyer (with Steffen Kramer) of Stratos Inc. described a collaborative approach to UNGP Strategy development and implementation, involving active participation and collaboration from government, civil society and private sector actors. They recommended: (1) mapping out the institutional context and possible participating stakeholders; (2) creation of a multi-stakeholder steering committee to ensure adequate coordination and governance, ensuring that key elements are in place to support UNGP implementation (e.g., oversight, advocacy/pressure, dialogue, information sharing, guidance, and training); (3) clear articulation of the roles for government, the private sector and civil society; and (4) development of an implementation plan. They suggested that this approach requires use of a change management approach to make the transition to effective UNGP implementation in Canada.

In "Regulating the Void: Enforcing Workers' Rights to Safety in a Globalized Garment Industry" Louise Reilly of Stanford University examined UNGP implementation through the lens of the recent Bangladesh worker tragedies and

development of the Accord on Fire and Building Safety. She notes that the Accord has become a binding contractual commitment for those apparel firms who sign on to it. Fearing unlimited liability, a competitor non-binding instrument has been created. Drawing from the Bangladesh experience, Reilly suggests that education and awareness are key, as are roles played by government, private sector and civil society actors.

Discussion of Possible UNGP Implementation Strategy for Canada, Possible Next Steps and Conclusions

Amongst participants, there was widespread support for the value of developing a UNGP implementation strategy for Canada, with the strategy involving public sector, private sector and civil society elements, and there was support for the value of further exploration of exactly how this could be done. Ryerson University, in the form of the Organizing Committee, expressed a willingness to explore playing a leadership role in this work. At the same time, there was recognition that the Conference involved only a small number of interested parties, and of the value of proceeding slowly and methodically. A wide variety of specific ideas were proposed, building on the three-part UNGP state duty to protect, private sector responsibility to respect, and access to remedy framework. There was support for drawing on the collaborative approach to strategy implementation and the four recommendations therein suggested in the Stratos presentation. Immediate next steps include: providing and making publicly accessible the full video archive of the conference (completed), producing and posting a 1.5 hour documentary of the conference that highlights some key points (completed), posting the powerpoints (where available) of the speakers (completed), publishing a special journal issue of papers flowing from the Conference (in progress), preparing and posting a short summary of the Conference (completed), and offering the opportunity for sharing basic Conference participant information, and further online communications, as a direct follow up to the conference (in progress). All the above mentioned conference information is available at: <http://ryerson.ca/csrinstitute/business-humanrights/>

Additional steps could involve establishing an interactive platform for post-conference communication and information sharing among Conference participants and others, identification of a core multistakeholder steering team for further action, and more elaborate exploration of particular ideas (e.g., a follow up on conference/workshop devoted to sharing of insights with respect to private sector approaches used by diverse Canadian industry sectors, or conference/workshop examining possible and actual state approaches and/or possible and actual civil society contributions). An online moderated discussion could take place over a series of weeks in order to flesh out ideas. In conclusion, it was widely agreed that that this is a process that optimally involves dialogue, collaboration and information sharing among diverse stakeholders.

- K.W.