THE 2004 DENNING LECTURE
Let them eat CAC...

Delivered at Gray's Inn on October 18, 2004

By Sir Michael Burton, Chairman of the Central Arbitration Committee and President of the Employment Appeals Tribunal

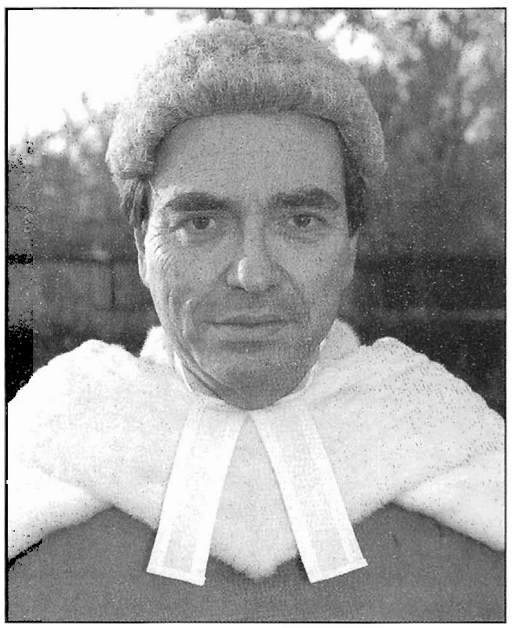
I AM very honoured to be giving this lecture, named after one of my great heroes, Lord Denning, in front of whom I was privileged to appear on more than one occasion and after one of whose most famous cases, High Trees, my house is named. But in addition, in a way the story I have to tell has its start with Lord Denning, as so much else has had in the history of the modern law.

It was a sunny day on Wednesday June 14 1972. Three dockers, Bernard Steer, Vic Turner and Alan Williams, soon to be known as the Pentonville Three, were committed to prison by an Order of the National Industrial Relations Court (the NIRC), presided over by Sir John Donaldson.

That court, the creation of the Conservative Government, was intended not just for the purpose of implementing the new Conservative Industrial Relations legislation but also in part, sitting as it did with a judge and two laymen, unrobed, in relatively informal surroundings and at relatively flexible hours, to encourage harmonious relations between the two sides of industry.

That Committal Order, coming as it did not long after the introduction of the new court in December 1971, in practice rendered this laudable intention unattainable. Some of you will remember the Official Solicitor's instruction of Peter Pain QC and Robert Alexander, and the late sitting on Friday evening of the Court of Appeal, when Lord Denning, with Buckley and Roskill LJJ, set aside the order for committal; but any chance of cordial relations, or even acquiescence, between the Trade Unions and the NIRC was gone.

Twenty-seven years later, at the birth pangs of the new Trade Union Recognition scheme, to be implemented by the Employment Relations Act 1999, the TUC and



the CBI issued a joint statement, which commenced as follows:

"The CBI and TUC are committed to achieving further improvements to Britain's employee relations. We believe that harmonious relations between employer and employee are best built on a relationship of mutual trust and respect. We welcome the Government's commitment to promoting partnership at work."

The CAC, of which I was appointed Chairman in early 2000, was the entity which was to operate the new Act and the new scheme, and hopefully the new *harmonious relations.*

Those of you who noticed the intentional pun in the Marie Antoinette-inspired title of the lecture — LET THEM EAT CAC — may be disappointed by the relative absence of any reference to the EAT this evening. This is largely because, though I mentioned both in the title, as I happen to straddle the two horses, or hats, of President of the EAT and Chairman of the CAC, I suspect many of you will know all there is to know about the EAT; and this is, particularly for those of you who are in-house lawyers, a very significant time for you to be entirely familiar with the new role of the CAC in respect of the Information and Consultation (I and C) Regulations.

Why, I wondered when I was appointed Chairman of the CAC, did it have such an unmemorable and uninformative name — the Central Arbitration Committee? This had been the body which had for many years been almost dormant, occasionally dealing with applications for disclosure of information by the ever-dwindling number of recognised trade unions, and available to officiate in arbitrations, had any been requested, which they were not. I suggested to the then Lord Chancellor, Lord Irvine, that perhaps the name had been kept in order to give the impression of continuity, of no radical change, and he did not disagree.

BUT I suspect the reason was a more emotive one. The CAC was in fact the direct descendant of the old Industrial Court, set up in 1919. Although we are relatively informal, and very much a part of our remit is to encourage conciliation and compromise, we are a court. Our Northern Irish equivalent is called the Industrial Court, but I rather think that if we had been called the Industrial Court rather than the CAC, the shades of the NIRC, the National Industrial Relations Court, would have come back to haunt us. And so, not only in nomenclature

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but also in the very powers of the court, the lessons have been learned.

We do not have and do not wish the sanction of contempt of court, the spectre of the Pentonville Three. We prefer other methods. In our Recognition cases, if an employer fails to co-operate with the ballot and fails to comply with a remedial order made by the CAC then, pursuant to paragraph 27 of the First Schedule to the 1999 Act, the CAC can declare the union recognised without a ballot. If a method of collective bargaining is imposed by the CAC on the parties, and either the employer or the union fails to comply with it, their obligations under the agreement are enforceable, but not by the CAC; by virtue of paragraph 31 of the First Schedule, enforcement must be sought in the ordinary courts. These are the kind of sanctions which we welcome. It has therefore been particularly important, as I shall discuss later, that in the structure established to bring into effect the Information and Consultation Directive (2002/14/EC of 11 March 2002) the CAC should not be expected to impose sanctions for breach of its orders, and I am pleased to say that as a result of discussions, as I shall explain later, that has now been achieved.

IT is well established in this country that collective agreements are rarely legally-binding and that the courts have not been regularly involved in the determination of collective disputes. There is therefore a tradition of voluntarism in which disputes are settled by the parties, perhaps with the assistance of bodies such as ACAS and its predecessors. The CAC has accordingly developed, in tune with this culture, as a judicial body with the authority to encourage and assist the parties to reach agreement wherever possible.

What this all adds up to is that the Government in 1999 had a ready-made vehicle to handle legislation in the area of collective employment relations, and the CAC was a logical home when they were looking for a body to resolve disputes arising under the legislation relating to European Works Councils and Trade Union Recognition. It was kindly acknowledged by the Department of Trade and Industry, in its review this year of the 1999 Act, that the CAC had managed applications for recognition effectively, and I am pleased that this confidence in the CAC, which was reflected by flattering comments in the Parliamentary debate, led to the decisions to make the CAC the enforcement body under both the European Company Statute legislation, which I do not believe is going to increase our workload significantly, and the I and C Regulations, in which there has already been considerable public interest.

Another influential cultural factor is that I now hesitate to use the phrase 'the two sides of industry'. The Joint Statement by the CBI and TUC, to which I have referred, emphasised the importance of mutual trust and respect. This signalled an end to the two 'sides' rigidly maintaining entrenched positions although there can never be any doubt that their interests inevitably differ. The CAC nevertheless welcomes this new level of understanding and the opportunity to make a contribution to more harmonious employment relations.

I think it is worth looking briefly at the CAC's experience on trade union recognition. The legislation came into effect on 6 June 2000 and we have now received nearly 400 applications. Recognition was always likely to be a contentious issue, and I am sure the Government was anxious to ensure that there was no repetition of the controversy that pervaded the previous legislation in the late 1970s. For that reason the current legislation is detailed, tightly-drawn and with very specific timetables. In practice, it has not proved to be contentious and, although we have had a number of high-profile 'customers', the legislation has had only limited exposure in the public domain. I like to think that the CAC has played a significant part in progressing applications efficiently and in a relatively low-key fashion.

One weapon in the CAC's armoury is the ability to issue formal decisions at several stages as the process proceeds, and there have been more than 400 decisions to date. Some have required a high level of sophistication, for example looking at the definitions of 'worker' and 'trade union'. There have however only been eight applications for judicial review, in two of which permission was not granted. Of the other six, two remain outstanding.

We have not yet suffered a serious defeat and there has only been one genuine precedent set by an appellate court. That was the Court of Appeal's decision in the Kwik Fit case, upholding the CAC's position, which dealt with the determination of the appropriate bargaining unit. The CAC has therefore established its credentials, if it needed to, as a judicial body.

THE CAC has also had to demonstrate sufficient flexibility to assist the parties, where appropriate, to reach agreement, but most of this work is hidden from the view of everyone except the parties to the case. There are two aspects to this. One is keeping our eyes and ears open to the possibility of a voluntary agreement on recognition, which has happened in some 50 cases to date, and the other is resolving specific issues at the various stages of the statutory process. The latter is again not obvious to the outside world but much is achieved, for example by deputies meeting the parties informally, by CAC staff assisting the parties or by ACAS helping to take things forward through conciliation. What this shows is that, despite having legal powers, the CAC seeks to avoid the necessity of subjecting employers and trade unions to formal judgments.

The CAC has also attempted to be as user-friendly as possible in the way it conducts its business. For example, we appoint a Case Manager to guide the parties through the process, we publish guidance which we hope provides concise and straightforward information about the way we operate; and we hold hearings

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not unduly legalistic.
As I mentioned earlier, the DTI Review was generally positive about the way the CAC had handled the challenges of recognition, and it is noteworthy that the new Employment Act incorporates a mix of fine-tuning and a limited number of major additions to the statute without there being many changes to the way the CAC operates.
All in all, I feel the CAC is in a very good position to undertake its new responsibilities under the I and C Regulations.

AT the time of presenting this lecture, the Regulations in their final form have yet to emerge, but I think it is fair to assume that the latest version, which many of you will have seen and digested, is almost the definitive article. The DTI's draft Guidance, for which consultation does not end until 22 October, offers further clues as to the way the Regulations will work. As you know, these Regulations, which put into effect the Government's obligations under the I and C Directive, introduce a wholly new structure for enforcement of an entitlement of employees to be consulted and given information by their employers. It is anticipated that, by gradual implementation, some 38,000 employers will be affected by 2008 — starting with employers employing at least 150 employees on 6 April 2005, reducing to 100 on 6 April 2007 and 50 on 6 April 2008. A request to negotiate an I and C agreement is triggered by one or more requests in writing sent either to the employer or to the CAC by at least 10% of the workforce.
The CAC's role is clearly defined, although my reading of the Regulations is that there are perhaps 12 different types of applications that can be submitted to the CAC. There is therefore an immediate distinction between the I and C process and that of Trade Union recognition, in that the latter is one process which always starts at the same point even if it ends at different ones, and in which the CAC remains in overall supervision. The position with I and C is that the CAC may enter the process, make a decision and then disappear, unless a later application is made to it.
There are sanctions for non-compliance with our orders. Although such sanctions do not include Pentonville, fines of up to £75,000 can be imposed. As I explained earlier, I was very keen to avoid the CAC being required to apply sanctions, and I am happy that the Regulations made no such provision, and assigned the responsibility for the imposition of sanctions to the EAT.
Irrespective of the CAC's authority to issue formal decisions, the Regulations also empower us to establish whether disputes can be settled by conciliation in respect of any application or complaint made to it. We intend to make full use of that provision, as we have in the other jurisdictions in which we have a role. I also remain fully convinced that we have the relevant experience and expertise among our Deputy Chairmen and Members for our new role.
There are two areas in the I and C Regulations in which the CAC may have to adjust to changes. The first of these is that there is a right of appeal to the EAT on points of law. This is not simply a concern about my two hats or horses. It is because in relation to Trade Union recognition we have been subject only to judicial review. However, I have no reason for believing that this will lead to more challenges to our decisions or that appealing is in some sense easier than JR has been up to now, as any appeals will have to be on points of law. I do not believe that the general run of our hearings will need to be more legalistic or that the format or content of our decisions will have to change.

SECONDLY, the CAC could well meet a higher proportion of unrepresented parties. The right to request an information and consultation procedure is given to employees and, although they may have representatives, they may not necessarily be trade union officials. I am sure the relative informality of the CAC's procedures can help us with this, and we will also have to make sure that our guidance material reflects the fact that they may well be read by those inexperienced in legal processes. There will be similarly inexperienced employers, although recognition has shown us that such employers have not found our guidance or processes too intimidating.
I would now like to move on to have a look at the I and C provisions themselves, with the caveat that some of what I am going to say is speculative, given that the Regulations have yet to be finalised. There are a number of principles behind the Regulations which are useful to draw out as they explain why certain things happen in certain ways. Briefly, these are as follows:

FIRST, there is scope for employers to take the initiative by securing what is described as a pre-existing agreement or by initiating negotiations under the Regulations with a view to reaching a voluntary agreement. There are therefore opportunities for employers to develop arrangements that accord with the needs of their business rather than ending up with the standard provisions. Such arrangements could potentially reflect the structure of the business by, for example, covering more than one undertaking.
Secondly, any information and consultation machinery has to cover *all* employees. Employers are therefore well advised to review the coverage of any arrangements which they have currently in place.
Thirdly, the way the Regulations work is that the standard provisions operate as a default position. This appears to mean that if an employer ignores a request from its employees, it could find that it is subject to the standard provisions, and that any opportunity to challenge the validity of the employees' request has passed. Although it is possible that there will be some amendment to the present draft Regulations in this regard, if there is not, doing nothing could therefore be a dangerous option.
Fourthly, there is a three-year moratorium in specific instances. For example, if there is a negotiated agreement which has

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not been terminated, employees cannot make a valid request within three years of the date of that agreement. Employers are therefore offered a period of stability provided information and consultation arrangements are in place.

Finally, the employees can make their request direct to their employer or through the CAC. The latter type of request is described, perhaps misleadingly, in the DTI Guidance as an 'anonymous' request whereas it cannot be truly anonymous as the employees will need to reveal their names to, at least, the CAC so that we can check whether they are employees within the undertaking. The CAC then passes on to the employer only the number of such employees.

Four bodies are involved in enforcement — the CAC, the Employment Tribunals, the Employment Appeal Tribunal (EAT) and the Civil Courts with the division of labour as follows:

- The CAC's role is effectively to facilitate the establishment of I & C arrangements, and to direct that the parties take steps to implement the legislative requirements.
- The Employment Tribunals will deal with complaints from individuals over an employer's failure to grant time off to I & C representatives and complaints of unfair dismissal/detriment.
- The EAT's role was, not surprisingly, one of my concerns at the early stage of discussion of the new Regulations. I was anxious to ensure that it remained an appellate body, and did not have to take first-instance decisions. That has been agreed. It will act as the appeal body. It will also be in a position to deal with penalties against employers who refuse to comply with CAC decisions
- The Civil Courts will be able to award compensation where representatives disclose information given to them by the employer in confidence.

Let me offer a few thoughts on the way in which the Regulations might work in the light of the principles I have described.

The process could start by employees requesting information from the employer to allow them to determine the number of employees within the undertaking and thereby decide, first, whether the employer falls within scope of the Regulations and, secondly, how many requests have to be made to meet the 10% criterion. If the employer refuses to provide the information, an employee or an employee's representative can make a complaint to the CAC which could issue an order. Although under Regulation 37 that order could be relied on as if it were a declaration or order made by the High Court (or Court of Session in Scotland) the most probable next step is that the employees will submit requests anyway. There is nothing in the Regulations that says employees have to know the total number of employees or the 10% threshold figure before they start submitting requests. It seems to me that an employer will achieve little, apart from a short delay to the process, by refusing to provide the necessary information.

THE next stage is that employees may start submitting requests. It is part of the Regulations that the requisite number of requests has to be made within a six month period, so it may be advisable for employers to keep a record of the date of receipt, either by the employer or by the CAC. An employer then has three options: to accept that it has an obligation to initiate negotiations, to do nothing or to challenge the validity of the employees' request. Taking those in reverse order, an employer can make an application to the CAC to decide whether the employees' request was valid. In summary, validity could cover three aspects:

1 - that the number of requests falls below the 10% threshold, that they were not made within the six-month timescale or that they were not made in the correct form;
2 - that the three-year moratorium applies;
3 - that the employer does not employ the required number of employees to come within the auspices of the Regulations or that the employer is not, to quote Regulation 2, "a public or private undertaking carrying out an economic activity, whether or not operating for gain".

Before anyone asks, I am not going to be drawn on the question of the definition of an "undertaking". I will leave that for our first case. There is however some information on this in the DTI Guidance.

The important point to emphasise here is that this is the opportunity for the employer to challenge the validity of the employees' request if it wishes to do so. Subject to any change in the present draft Regulations, if an employer exercises my second option of doing nothing, they may well find that the opportunity for challenging validity has passed and that they will be subject to the standard provisions, effectively by default.

If the employer accepts the employees' request as being valid, the process moves on. I will come back to that in a minute because I need to say a few words about pre-existing agreements.

The position with pre-existing agreements is that, where one is in place and over 40% of employees request statutory I and C arrangements, an employer has to initiate negotiations, which means that an employer will be compelled to review the existing arrangements. But this 40% is of course a considerably higher hurdle than the usual 10%.

If fewer than 40% of employees make a request, the employer can hold a ballot to endorse the employees' request. If a ballot takes place, the request is endorsed if it is supported by the majority voting and at least 40% of the employees — criteria that are very familiar to the CAC.

If the request is endorsed, the employer must begin negotiations. If it is not, the three-year moratorium comes into play. Employees can complain to the CAC that the ballot has not been held, that it has been held prematurely or that there were procedural problems with it.

The CAC is empowered to order a re-run if appropriate. An important point to emphasise

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here is that it is the responsibility of the employer to arrange the ballot; there is nothing to stop an employer using an outside agency but there is no requirement to that effect.

If there is a valid request but the employer relies upon a pre-existing agreement, employees can also complain to the CAC that there is no valid pre-existing agreement. Such an agreement must:

1 - be in writing;
2 - cover all employees;
3 - have been approved by the employees;
4 - set out how the employer is to give the information to employees or their representatives and to seek their views.

If the CAC finds that there is no pre-existing agreement, it can order the employer to begin negotiations. If there is a pre-existing agreement, the employer can run a ballot if it prefers.

It seems to me that, for the reasons I gave earlier, it does makes sense for employers to consider seriously negotiating such an agreement as it can be tailored to the specific needs of the employer and employees. If it has been "approved" by the employees, it is perhaps unlikely that between 10% and 40% of employees would seek to challenge it or that 40% of the employees would, in a ballot, endorse a change in the arrangement.

This brings us to the point where an employer has either decided or agreed to initiate negotiations or has been required to do so. One observation here is that an employer might have decided to initiate negotiations, but that can be challenged by employees on the grounds that the notification was not in a proper form. Again a complaint can be made to the CAC, which can make a declaration. If that declaration is that the notification was not in the correct form, I cannot see any consequences other than the employer having to do it again properly.

If an employer decides to go down the road of initiating negotiations, the first step is to make arrangements for the employees to appoint or elect negotiating representatives. The choice of appointing or electing appears to be the employer's, on the conditions that all employees are entitled to take part in the process and that the result is that all employees are represented by a representative.

There is no prescribed formula for deciding the number of representatives although common sense would dictate that it might be advisable to consult in some way with employees to avoid problems later. If the employer does not take these steps, the employees can submit a complaint to the CAC which can order the employer to comply. Again, an order might be actionable in itself but, if an employer is proving uncooperative, a more likely result is that the standard provisions will apply by default.

THE negotiating period is lengthy and provides, to my eyes, a very reasonable timescale to conclude the negotiations. The period is six months, commencing three months after the date of the employees' request or the date the employer's notification was issued.

A negotiated agreement must fulfil certain conditions, but there does appear to be a considerable degree of licence for employer and employee to agree arrangements that accommodate their own needs. The conditions are less prescriptive than the standard provisions, which is perhaps one reason for employers at least to consider seriously a negotiated agreement. Such agreement must set out the circumstances in which the employer must inform and consult, and must either provide for appointment or election of I and C Reps or for direct information and consultation.

One important condition is that a negotiated agreement must be "approved". That approval can be given by *all* the negotiating representatives or by a majority of the negotiating representatives and either approval in writing from 50% of the employees or 50% of the employees voting in favour in a ballot.

There are requirements relating to any ballot held and a complaint can be made to the CAC if employees feel those requirements have not been met. The significant point here is that employers can choose the method of approval; however it is only the balloting process that can be challenged.

Leaving aside negotiated agreements for the moment, I would like to look briefly at the standard provisions which apply if the employer fails to honour its duty to initiate negotiations, or if a negotiated agreement is not concluded within the time limit.

The first duty on the employer is to arrange a ballot to elect information and consultation representatives. The conditions attached to the ballot are listed in Schedule 2 to the Regulations, but one important point is that an independent supervisor must be appointed by the employer. There is also a method for calculating the number of representatives to be elected. If the employer does not arrange a ballot, or if the ballot does not meet the required conditions, an employee or representative can complain to the CAC which can order the employer to arrange and hold the ballot. If the employer fails to comply with that order, the employee can apply to the EAT for a penalty notice of up to £75,000. Note that it is the EAT and not the CAC which imposes any sanctions, consistent with the anxiety I expressed earlier. This sanction does not apply to the appointment or election of representatives under negotiated agreements.

The standard provisions themselves require employers to provide information on, in summary:

1 - The undertaking's activities: Reg 20(1)(a);
2 - Employment within the undertaking: Reg 20(1)(b);
3 - Decisions likely to lead to substantial changes in work organisation or contractual relations: Reg 20(1)(c).

There are conditions attached to providing information such as timeliness. In addition to providing information, an employer must *consult* on items (1)(b) and (1)(c), and the nature of that consultation is defined to the extent that for item (1)(c) — substantial changes — the employer must consult "with a view to reaching agreement on

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decisions within the scope of the employer's powers". There is therefore quite an onerous responsibility on employers. However Regulation 20(5) provides that if the employer is under a duty to consult under TUPE or under TULRA in respect of impending redundancies then there is no need for duplication and, provided that the employer notifies the I and C reps in writing of that fact, it is absolved from the duty to consult them.

WHERE a negotiated agreement has been reached or where the standard provisions apply, a complaint can be made to the CAC that an employer has not complied with the terms of an agreement or with one or more of the standard provisions. The CAC can make an order and, as before, an application can be made to the EAT for a penalty notice up to £75,000. Where alleged failure to comply with a negotiated agreement is concerned, the CAC will have to look at its terms. In the case of the standard provisions, the potential problem areas would appear to be:

A failure to provide *any* information;

- A failure to provide information in accordance with the timing, method and content requirements;
- A failure to consult on items (1)(b) and (1)(c);

A failure to consult in the manner prescribed.

There are two final issues on which the CAC may be called into action. These are (i) where a decision is sought on whether it was reasonable for an employer to require a recipient to hold information in confidence and (ii) whether information could be *withheld* by an employer on the grounds that it would seriously harm the functioning of, or be prejudicial to, the undertaking.

I am not going to speculate here on what the CAC's 'line' is likely to be. I hope that we will be able to draw, to a certain extent, on our lengthy experience of applications from Trade Unions for disclosure of information, although I accept that the provisions are not directly comparable. I hope that we can gain the confidence of employers that we are seriously understanding of their genuine needs for confidentiality. Of course if information is disclosed in confidence to an employees' representative, and that confidence is breached, for example by the representative disclosing it to a competitor, that could have very serious consequences, but such breach of duty must be dealt with by the civil courts, injunction and/or damages.

That therefore is a summary of the way I see the Regulations working. If you need something more definitive, that will have to wait for the final version of the Regulations and the CAC's first few cases.

Let me leave you with some final thoughts.

First, I would hope that employers are not opposed in principle to informing and consulting. It is seen as being part of good employment relations and I am sure there are business benefits. There are certainly advantages in reaching voluntary agreements.

Secondly, employers need to audit their present arrangements so that, at the very least, they are in a better position to defend any requests. The important point is to use opportunities to gear arrangements to the needs of the employer and the employees. It is also an opportunity to look at the scope of any collective agreement with trade unions and to examine ways of accommodating the information and consultation requirements.

Thirdly, if an employer does receive a request, it should not be ignored, as the employer may well find that the statutory provisions apply. Anyone who is unsure of his position should feel free to talk to the CAC and test our user friendliness. The CAC may have judicial powers but we will use them reluctantly and only when necessary.

LASTLY, it will be very interesting to see how this self-standing structure of I and C representation fits with Trade Union recognition. Those employers with recognised Unions have become used to disclosure of sensitive information to the Trade Unions. The most organised and experienced employee representatives are likely to be within a recognised Union. But the I and C representative need not and may not be unionised and may not be experienced. This may result in more Union recognition agreements, or it may not. There may be difficulties for employers if the I and C reps are not Union officials — or it may actually create new opportunities. We at the CAC will be well placed to watch the interplay between our two jurisdictions of recognition and Information and Consultation. ■