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Canada

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Canada

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Canada

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I. Overview¹

The year 2016 witnessed several significant developments for Canada. Namely, on the international front, Canada's government: (1) formally removed Canada's objector status to the United Nations Declaration on the Rights of Indigenous Peoples; (2) announced legislative amendments to implement the OECD's tax avoidance-related Multilateral Competent Authority Agreement for the Common Reporting Standard, and introduced tariff-reducing legislation; and (3) increased trade-mark protections, in line with the recently signed Comprehensive Economic and Trade Agreement with the European Union.

Domestically, the Canadian government mandated the obtaining of electronic travel authorizations by non-exempt individuals wishing to enter or transit through Canada, and began actively enforcing employer compliance with Canada's two primary immigration programs: the Temporary Foreign Worker Program and the International Mobility Program.

Finally, in the courts, the Supreme Court of Canada recognized the importance of the World Bank Group in combatting corruption, while, in a case presently under appeal—and having the potential to significantly impact the country's resource-exploration industries—Alberta's Court of Queen's Bench considered the interplay between the Federal *Bankruptcy and Insolvency Act* and certain provincial legislation governing the petroleum industry.

II. Canada Removes Objector Status to UN Declaration on the Rights of Indigenous Peoples²

In spring 2016, Canada dropped its objector status to the United Nations Declaration on the Rights of Indigenous Peoples (the "Declaration"). However, the history of the Declaration reaches back much further. On

* Edited by Angela E. Weaver. Individual authors will be identified by section.

1. Authored by Angela E. Weaver.

2. Authored by the Honourable Judge Del W. Atwood of the Provincial Court of Nova Scotia.

May 7, 1982, the United Nations Economic and Social Council authorized its Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish an annual working group on indigenous populations tasked with reviewing developments on the promotion and protection of the human rights and fundamental freedoms of Indigenous people.³ The working group initiated the start of a years-long inquiry into the pressing plight of Indigenous peoples, recognizing from its inception the need to promote and protect their human rights and fundamental freedoms.

However, as urgent as this task might have been, it took slightly more than twenty-five years for the General Assembly of the United Nations to adopt the Declaration on the Rights of Indigenous Peoples.⁴ On the day of its adoption, the United Nations High Commissioner for Human Rights, Louise Arbour (who had served as a justice of the Supreme Court of Canada from 1999 through 2004) observed that, “the hard work and perseverance of indigenous peoples and their friends and supporters in the international community has [sic] finally borne fruit in the most comprehensive statement to date of indigenous peoples’ rights.”⁵ Her comment crystalized the import of the legal breakthrough.

Yet, it must have discouraged the High Commissioner that her own national government was one of four states to have voted against the Declaration.⁶ Former Canadian Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, Chuck Strahl P.C., explained the nay vote as, “[b]y signing on, you default to this document by saying that the only rights in play here are the rights of First Nations. And, of course, in Canada, that’s inconsistent with our Constitution.”⁷

The contentious points underlying this supposed sovereignty-based objection appeared to be:

- Article 3 of the Declaration, which recognized Indigenous peoples’ right to self-determination, including the right to “freely determine their political status and freely pursue their economic, social and cultural development;”
- Article 4, which affirmed Indigenous peoples’ right to “autonomy or self-government in matters relating to their internal and local affairs;”

3. Economic and Social Council Res. 1982/32 (May 7, 1982).

4. G.A. Res. 61/295 (Sept. 13, 2007).

5. *United Nations adopts Declaration on Rights of Indigenous Peoples*, UN NEWS CENTRE (Sept. 13, 2007), available at <http://www.un.org/apps/news/story.asp?NewsID=23794#.WFOkIrL6Y>.

6. Voting Record of Resolution A/RES/61/295, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295>.

7. Steven Edwards, *Tories defend ‘no’ in native rights vote*, MONTREAL GAZETTE (Sept. 14, 2007), https://www.google.com/#q=http://www.pressreader.com/canada/montreal-gazette/20070914/281706905302273&*.

- Article 5, which acknowledged the right of Indigenous peoples “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions;” and, finally,
- Article 26, which declared that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”

Eminent human rights counsel Paul Joffe’s tour-de-force article, rebutting the former Conservative Government’s position on the Declaration, identified that the federal government failed to consult with Indigenous peoples regarding state action in which Indigenous rights and interests were at stake. It refused to meet with Indigenous organizations to discuss the Declaration, engaged in the disingenuous lobbying of states in opposing the Declaration, misled the Canadian public by insinuating the Declaration jeopardized the rights of non-Indigenous Canadians, cited solicitor-client privilege for not disclosing the legal basis for opposing the Declaration, ignored its human-rights obligations under the UN Charter, and politicized Indigenous rights, thereby undermining Indigenous security and development.⁸

Two developments in 2015, however, spurred a significant public policy shift regarding First Nations peoples. First, the Truth and Reconciliation Commission of Canada released its report into the tragic legacy of Indigenous residential schools. The Final Report of the Commission called upon the Government to adopt fully, and implement the Declaration.⁹ Then, nine months later, a new Parliament was elected under current Prime Minister Justin Trudeau. As a result, on May 10, 2016, Minister of Indigenous and Northern Affairs Carolyn Bennett reversed Canada’s objector status to the Declaration.¹⁰

Progress does not always trace a straight line. As recently as November 2016, in a case involving the duty of a provincial government to consult with a local First Nation regarding a natural-gas development, counsel for the Province of Nova Scotia denied in their written pleadings that a duty to consult exists, given their assertion that the First Nation contesting the development was conquered.¹¹ The strategy impugns several Supreme Court of Canada decisions that affirm the existence of a governmental duty to consult with Indigenous peoples whenever their interests are at stake in cases involving state action.¹² While the Court has described reconciliation with Canada’s Indigenous peoples as being a process flowing from

8. Paul Joffe, *UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*, 26 NAT. J. CONSTIT. L. 121, 164-171 (2010).

9. *Final Report of the Truth and Reconciliation Commission of Canada Volume One: Summary 325*, TRUTH AND RECONCILIATION COMMISSION OF CANADA (2015), http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf.

10. Economic and Social Council, Rep. on the fifteenth session, U.N. Doc. E/2016/43-E/C.19/2016/11, at 8 (2016).

11. *Sipekne’katik v. Nova Scotia (Environment)*, 2017 NSSC 23 (2016).

12. See, e.g., *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at ¶ 11.

constitutionally guaranteed rights rather than a final legal remedy,¹³ its progress remains incomplete.

III. Common Reporting and Due Diligence Standard to be Implemented¹⁴

On June 2, 2015, Canada signed the Multilateral Competent Authority Agreement¹⁵ (MCAA). The MCAA governs the Common Reporting and Due Diligence Standard (CRS).¹⁶ The CRS was developed following a request at the G20 April 2009 Summit. The OECD was asked to develop a streamlined, automatic exchange of financial information between member countries aimed at combatting tax avoidance and evasion, as well as improving tax compliance. It concurred. In 2010, the MCAA was amended by Protocol, and was opened for signature on June 1, 2011, by members of the OECD and the Council of Europe, and non-member states alike.

The MCAA, currently with 87 signatories,¹⁷ is, in the words of Pascal Saint-Amans, OECD Centre for Tax Policy and Administration Director:

the most comprehensive multilateral instrument available for tax cooperation and exchange of information. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation includes automatic exchange of information, simultaneous tax examinations and international assistance in the collection of tax debts.¹⁸

The information exchanged annually will include all types of investment income (including interest, dividends, income from certain insurance contracts, and other similar types of income), but also account balances and sales proceeds from financial assets. The financial institutions that are required to report under the CRS do not only include banks and custodians, but also other financial institutions such as brokers, certain collective investment vehicles, and certain insurance companies. Reportable accounts

13. *Id.* at ¶ 32.

14. Authored by Sunita D. Doobay of TaxChambers LLP.

15. See *Multilateral Competent Authority Agreement*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf> (last visited Apr. 2, 2017).

16. *Standard for Automatic Exchange of Financial Information- Common Reporting Standards*, OECD, available at <https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> (last visited Nov. 24, 2016).

17. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, OECD (Nov. 2, 2016), <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf>.

18. *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, OECD (Nov. 2013), http://www.oecd.org/ctp/exchange-of-tax-information/MAC_Background_Brief_for_Journalists_November_2013.pdf.

include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.¹⁹

To date, the United States has not ratified the MCAA. Instead, it continues to rely on the provisions of the Foreign Account Tax Compliance Act²⁰ (FATCA) and bilateral intergovernmental agreements to ensure that financial institutions report to the IRS bank accounts held outside of the United States that are in excess of U.S. \$50,000.

On the tax front, on April 15, 2016, the Canadian Department of Finance announced legislative amendments to Part XIX of the Income Tax Act²¹ for the purpose of implementing the CRS in Canada. CRS will be implemented in Canada on July 1, 2017. Canadian Financial Institutions will report the following information on non-resident account holders to the Canada Revenue Agency (CRA):

- identifying information for the account holder (name and address);
- taxpayer identification numbers;
- date of birth;
- account number;
- account balance or value at end of the year; and,
- certain amounts paid or credited to the account.²²

Accounts held by certain type of entities, such as publicly traded companies, government entities, international organizations, and the Bank of Canada will not have to be reported. Likewise, Registered Retirement Saving Plans, Registered Retired Income Funds, Registered Private Pension Plans, Registered Disability Savings Plans, and Registered Education Savings Plans are not reportable entities.²³ Furthermore, trusts in respect of which the trustee is a reporting financial entity that reports with respect to all reportable accounts of the trust do not have to report.

On the question of whether a non-resident is a resident of a reporting jurisdiction, Canada will take an inclusive approach to information gathering. Rather than filtering on the basis of whether a non-resident is a tax resident of Canada or of the United States, Canadian financial institutions will simply gather all reportable non-resident financial accounts and remit the information to the CRA. The CRA, in turn, will scrutinize

19. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, *supra* note 17, at 3.

20. *Foreign Account Tax Compliance Act of 2009* is the name of the House and Senate bills in which the provisions first appeared. See H.R. 3933, 111th Cong. (2010) and S. 1934, 111th Cong. (2010).

21. Income Tax Act, R.S.C. c L-1 (hereinafter ITA).

22. *Common Reporting Standard*, CANADA REVENUE AGENCY, <http://www.cra-arc.gc.ca/gncy/bdgt/2016/qa08-eng.html> (last visited Nov. 24, 2016).

23. *FATCA and the Canada-US Intergovernmental Agreement (IGA): Information for Clients*, CANADIAN BANKERS ASSOCIATION, <http://www.cba.ca/fatca-and-the-canada-us-intergovernmental-agreement-iga-information-for-clients> (last visited Apr. 10, 2017).

the information to determine whether the account holder is a resident of a reporting jurisdiction and, if so, remit the information to the reporting jurisdiction.

Part XIX of the ITA proposes to phase in compliance with CRS. Accounts opened after July 1, 2017, will be deemed new financial accounts. For each new individual account opened after June 30, 2017, the Canadian financial institution in question will have to obtain a self-certification, the purpose of which is to assist the financial institution in determining the residence of the individual.²⁴ An entity opening a new account will also have to provide a self-certification indicating its tax residence. Further self-certification will be required in the case of passive non-financial entities, such as trusts and foundations, to identify whether the controlling persons are reportable persons.²⁵ The need to look through a passive non-financial reporting person will arise if its residency is not determinable. By 2019, extant financial accounts with a balance over \$1,000,000 must be reviewed. By 2020, the protocol will apply to accounts with balances exceeding \$250,000.

IV. Geographical Indication Protection Expands Under CETA²⁶

The day after signing the Comprehensive Economic and Trade Agreement (“CETA”) with the European Union on October 30, 2016,²⁷ the Government of Canada introduced legislation to implement the trade deal. In addition to eliminating ninety-five percent of existing tariffs applied to goods traded between the two jurisdictions, CETA expands the trade-mark protection of geographical indications to a wide array of agricultural products.

Under Canada’s current trade-mark legislation, protection of geographical indications extends only to wine and spirits. For example, covered products such as cognac and champagne can only be labelled as such if they originate from the respective geographic regions of Cognac and Champagne. The Trade-mark Act (Act) defines geographical indications (GI) as an indication, word or symbol, that identifies a wine or spirit as originating in the territory, region, or locality of a member of the World Trade Organization, where a quality, reputation, or other characteristic of the wine or spirit is essentially attributable to its geographical origin.²⁸

24. *Id.*

25. *Id.*

26. Authored by Daniel G.C. Glover, Julia L. Johnson, and Taha Qureshi of McCarthy Tétrault LLP.

27. See *Comprehensive Economic and Trade Agreement*, GOVT. OF CANADA (Oct. 30, 2016), <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

28. See *Trade-marks Act*, R.S.C. 1985, c. T-13, § 2 (hereinafter, “Act”).

Canada's Bill C-30 expands the definition of a GI to include agricultural foods and products, including products such as milk, olives, and beer.²⁹ Similarly, it grants to Canadian producers of agricultural foods and products, such as maple syrup, access to equivalent protection in the European Union. Commercial adoption or use of any new protected GI is prohibited,³⁰ and no person may use a protected GI for comparative advertising purposes on packaging or labels.³¹

The changes extend to import and export procedures. Covered products may not be exported or imported if the product itself, or its label or packaging, bears a protected GI, but the product does not originate from the territory, or was not produced in accordance with the law.³²

The protections will be accorded in two main phases. Certain pre-cleared GIs and their translations will be entered by the Registrar of Trade-marks on the coming into force of the Act.³³ These will be sheltered from future attack based on disuse, use as a customary name, or confusion (these provisions appear to be designed to deter domestic producers from ambushing European or Korean GIs, pursuant to CETA and the Canada-Korea Free Trade Agreement). Future GIs may be fast-tracked by being added to Annex 20-A of CETA.

Where fast-tracking is unavailable, new GIs must be approved by a responsible Minister of the Canadian Government, and then subject to an objection process. They are also subject to subsequent possible expungement based on disuse, use as a customary name, or confusion.³⁴ Presumably, this path will be used in respect of non-European Union GIs, such as Basmati rice.

Moreover, as part of the Registrar of Trade-marks' supervision of the list of GIs, translations must be included for GIs of agricultural foods and products.

The listing of GIs provides new grounds of attack for trade-mark opposition including on the basis that the proposed GI does not qualify as a GI at the time the Minister proposes it be added to the list, either because it does not originate in the listed territory, or because a quality, reputation, or other characteristic of the product or food is not essentially attributable to its geographical origin. Such argument may lead to interesting expert evidence on terroir in future cases. Other possible grounds for opposition include that the proposed GI is identical to a term customary in common language in Canada, that it is not protected under the laws of the country of

29. Bill C-30, *An Act to Implement the Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States and to Provide for Certain other Measures*, 1st Sess, 42nd Parl, 2016 (hereinafter, "Bill C-30").

30. Act, *supra* note 28, at § 11.15(1)-(3).

31. *Id.* at § 11.16(3)-(4).

32. Bill C-30, *supra* note 29, at § 71.

33. *Id.* at § 115.

34. Act, *supra* note 28, at § 11.12-11.13.

origin, that it is confusing with a registered, applied-for, or common law trade-mark, and that the proposed translation is not faithful.³⁵

Exceptions to the new rules can protect existing Canadian trade-mark rights, and provide relief for common linguistic usage. For example, the new rules do not apply to GIs that are identical to common names, such as Valencia orange and Black Forest ham.³⁶ Furthermore, an exception applies to GIs that are confusing with respect to a registered Canadian trade-mark, a Canadian trade-mark previously used, but not yet abandoned, or a pending Canadian trade-mark, provided that the use or application be in good faith, without knowledge that the trade-mark in question is a protected GI.³⁷ This exception to the GI rules is significant, as it protects existing good faith trade-marks in Canada.

Finally, the amendments allow any interested person to challenge the presence of a GI on the Registrar's list of protected GIs. The Federal Court has new, exclusive jurisdiction to summarily hear an application for such a challenge, and to order the Registrar to remove an indication or translation from the Registrar's list on any valid grounds.³⁸ The amendments also provide greater power to the Registrar, allowing it to reject, in its discretion, a statement of objection that it determines does not raise a substantial issue.

V. Government Introduces Electronic Travel Authorization³⁹

In 2016, a new era of airline passenger pre-screening dawned in Canada. Following the American example, Canada now requires that airline passengers provide personal and background information before travelling. The initiative aims to minimize the number of visitors who may be deemed inadmissible when appearing at a port of entry.

Electronic travel authorizations (eTA) were made available as of March 15, 2016, and visa-exempt foreign nationals flying to, or transiting through Canada were expected to obtain them. The requirement became mandatory as of September 29, 2016, such that individuals not otherwise exempt from obtaining an eTA will face considerable difficulty when attempting to board a flight to Canada. Travelers are well advised to determine whether they require an eTA and, if so, to make an application well in advance of the anticipated travel date.

Amendments to the Immigration and Refugee Protection Act (IRPA) created the requirement for visa-exempt foreign nationals to apply for an eTA, and establish the means by which the application must be made (*i.e.*, through the electronic system),⁴⁰ while the Immigration and Refugee Protection Regulations (IRPR) create the requirement for visa-exempt

35. Bill C-30, *supra* note 29, at § 62(1).

36. *Id.* at § 65(1).

37. *Id.* at § 67.

38. *Id.* at § 67.

39. Authored by Sergio R. Karas of Karas Immigration Law Professional Corporation.

40. Immigration and Refugee Protection Act, S.C. 2001, c 27, S.11 (1.01) (Can.).

foreign nationals to obtain an eTA before entering Canada, unless they are otherwise exempt by the regulations.⁴¹

The eTA imposes a new entry requirement for visa-exempt, non-U.S. foreign nationals travelling to Canada by air (travelers entering by land, sea, or rail are not required to obtain an eTA). The eTA program will pre-screen travelers to ensure their admissibility into Canada. The list of countries whose citizens require an eTA is found in section 190 of the IRPR.⁴² American citizens and certain other small groups are exempt from obtaining an eTA. Specifically, section 7.1(2) of the IRPR exempts holders of a Temporary Resident Visa (TRV) from obtaining an eTA;⁴³ section 7.1(3) describes other travelers that are exempt.⁴⁴ Individuals who are required to obtain a TRV⁴⁵ by reason of their country of citizenship need not obtain an eTA, as they are prescreened at a visa post outside of Canada.

In terms of process, to apply for an eTA, foreign nationals must submit an application online. Applicants must provide passport details, personal details, occupation, previous travel, responses to background questions (to assess for health, criminality and immigration-related concerns), contact information, and a nominal filing fee. A text area at the end of the application form allows the applicant to briefly indicate if there are additional details for consideration. Here the applicant may express an urgent need to travel to Canada, or provide other relevant information. No documents can be uploaded or added to the eTA application.

After the application is received, the system creates a prospective application, performs an identity search to determine if the applicant already

41. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.).

42. *Id.* at S.190. "A foreign national is exempt from the requirement to obtain a temporary resident visa if they

(a) are a citizen of Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Brunei Darussalam, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Federal Republic of Germany, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Portugal, Republic of Korea, Samoa, San Marino, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sweden or Switzerland;

(b) are

(i) a British citizen,

(ii) a British overseas citizen who is re-admissible to the United Kingdom, or

(iii) a citizen of a British overseas territory who derives that citizenship through birth, descent, naturalization or registration in one of the British overseas territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Island, Saint Helena or Turks and Caicos Islands; or

(c) are a national of the United States or a person who has been lawfully admitted to the United States for permanent residence.

43. *Id.* at S.7.1.(2).

44. *Id.* at S.7.1.(3).

45. *Id.* at S.179.

exists in the databases, and associates the application with any existing unique client identifier (UCI). If no adverse information is found, the system will notify the applicant by e-mail that the eTA has been approved. An eTA is valid for the earlier of five years, or the expiry of the applicant's passport.⁴⁶ A designated officer can cancel it in certain enumerated instances.⁴⁷

Where an application cannot be automatically approved, it will be sent for manual review by the Immigration, Refugees and Citizenship Canada (IRCC) Operations Support Centre (OSC), where officers can request additional documents, or a security screening, or both. Where a decision cannot be made due to the need for an interview or other factors, the application will be referred to a visa office, while other circumstances—including applications that result in the need for a Permanent Resident Determination or a Temporary Resident Permit—will require assessment in an overseas mission. Cases referred to overseas missions will be handled in the same way that Temporary Resident Visa applications are processed. An officer may request an interview with the applicant. Applicants whose eTAs are refused will receive an e-mail explaining the decision.⁴⁸

Unlike a Temporary Resident Visa, no counterfoil is provided on approval of an eTA, so there exists no physical proof of the presence or validity of an eTA. Rather, eTAs are enforced using the Canada Border Services Agency (CBSA) Interactive Advance Passenger Information (“I-API”) system. I-API is an enhancement of the previous Advanced Passenger Information (“API”) program, automating the previous manual process, and requiring air carriers to submit traveler API earlier—at check-in instead of takeoff. I-API will confirm whether any necessary IRCC authorization to travel (a visa or eTA) is linked to the traveler's passport and, if, and only if, such is the case, permit the printing of a boarding pass.⁴⁹

The advent of eTAs raise legal concerns. It is unclear whether there is sufficient legislative authority for the making of a determination that a visa-exempt traveler is inadmissible to Canada prior to such traveler appearing at a post of entry for a full examination, or if such runs afoul of the basic principle of fairness. Also, in preventing a traveler who requires an eTA and does not possess it from boarding a flight bound for Canada, the eTA system implicitly deputizes airline personnel to enforce immigration legislation. These issues will spark litigation.

46. *Id.* at S.12.

47. *Id.* at S.12.06.

48. *Id.* at S.182.1.

49. See *Electronic Travel Authorization*, GOVT. OF CANADA (Dec. 1, 2016), <http://www.cic.gc.ca/english/resources/tools/temp/eta/>.

VI. Canada's Employer Compliance Regime: Arguably the World's Most Stringent⁵⁰

On December 1, 2015, Canada's employer compliance regulatory regime came into force.⁵¹ The regulations (the Regulations) were designed to encourage employer compliance by providing a range of consequences for infringing the conditions of Canada's two main immigration programs: the Temporary Foreign Worker Program (TFWP), which encompasses all work permits issued in furtherance of a Labour Market Impact Assessment (LMIA), and the International Mobility Program (IMP), encompassing all work authorizations issued without an LMIA.⁵² The regulations also allow the Government to address situations where employers have benefited financially from disregarding the law.

Regardless of the program utilized, the Regulations compel employers to live up to the terms of the foreign worker's employment as disclosed at the time of the application. These include: wage, working conditions, benefits, vacation days, occupation, location of employment, and job duties.⁵³ Employers must maintain, for six years, all documents required to demonstrate compliance with the terms of the foreign worker's employment.⁵⁴

Employment and Social Development Canada/Service Canada (ESDC) administers the employer compliance regime. ESDC can perform two types of audits:

- an inspection;⁵⁵ and/or
- a review under ministerial instruction.⁵⁶

An Employer Compliance Review (ECR), a third type of audit under the TFWP, is conducted in the course of assessing a new LMIA application.⁵⁷

The Regulations allow ESDC to conduct inspections without a warrant on any premises where a foreign worker performs work,⁵⁸ except where the foreign worker is employed in a private dwelling (which auditors may enter with the occupant's consent, or with a warrant).⁵⁹ During an inspection,

50. Authored by Jacqueline Bart and Carrie A. Wright of BartLAW Canadian Immigration.
51. Immigration and Refugee Protection Regulations, SOR/2002-227, §§ 209.93-209.997 (Can.).

52. See *Harper Government Brings in Stiff New Penalties for Those Who Abuse Foreign Worker Programs* (July 6, 2015), <http://news.gc.ca/web/article-en.do?nid=996239>.

53. Immigration and Refugee Protection Regulations, SOR/2002-227, §§ 209.2(1)(a)(iii), 209.3(1)(a)(iv).

54. *Id.* at §§ 209.2(1)(b)(i), 209.2(1)(b)(ii), 209.3(1)(c)(i), 209.3(1)(c)(iii).

55. *Id.* at §209.5; see *Employer Compliance Inspections*, GOVT. OF CANADA (Jan. 26, 2016), <http://www.cic.gc.ca/english/resources/tools/temp/work/permit/compliance.asp>.

56. See *Revocation of Work Permit Due to Public Policy Considerations*, GOVT. OF CANADA (Jan. 21, 2016), www.cic.gc.ca/english/resources/tools/temp/work/permit/revocation.asp.

57. See *Temporary Foreign Worker Program Compliance*, GOVT. OF CANADA (May 5, 2016), www.esdc.gc.ca/en/foreign_workers/employers/employer_compliance.page#h2.1-h3.5 ("TFWP Compliance").

58. IRPR, *supra* note 47, at §§ 209.8(1), 209.8(3), 209.9(1), 209.9(3).

59. *Id.* at §§ 209.8(5), 209.9(5).

ESDC is authorized to ask the employer, or any employee, any relevant questions,⁶⁰ compel the employer to produce for examination any documents found on the premises,⁶¹ use copying equipment on the premises, require the employer to make copies, or remove documents to make copies for examination,⁶² take pictures or make video/audio recordings,⁶³ examine anything on the premises,⁶⁴ compel an employer to use any computer or electronic device on the premises to allow the auditor to examine any documents contained in, or available to, the device,⁶⁵ and require any person on the premises to accompany or assist the auditor.⁶⁶

In the event an employer is found non-compliant, the Regulations provide for a number of consequences, including the following:

- a warning;⁶⁷
- administrative monetary penalties up to \$100,000 per violation,⁶⁸ to a maximum of \$1 million per year, per employer;⁶⁹
- one-, two-, five- or ten-year, or permanent bans from utilizing Canada's immigration programs;⁷⁰
- publication of employer's name and address on a public website with details of the violation(s) and/or consequence(s);⁷¹ and,
- the revocation of previously-issued LMIA's.⁷²

The appropriate penalties for violations are determined based on a points system, which takes into account the following factors:

- the type of violation as defined by the Regulations;⁷³
- the employer's compliance history;⁷⁴
- the severity of the violation;⁷⁵
- the size of the employer's business (for financial penalties only);⁷⁶ and
- whether the employer voluntarily disclosed information about potential non-compliance before an inspection was initiated.⁷⁷

60. *Id.* at §§ 209.8(2)(a), 209.9(2)(a).

61. *Id.* at §§ 209.8(2)(b), 209.9(2)(b).

62. *Id.* at §§ 209.8(2)(c), 209.9(2)(c).

63. *Id.* at §§ 209.8(2)(d), 209.9(2)(d).

64. *Id.* at §§ 209.8(2)(e), 209.9(2)(e).

65. *Id.* at §§ 209.8(2)(f), 209.9(2)(f).

66. *Id.* at §§ 209.8(2)(g), 209.9(2)(g).

67. *Id.* at § 209.996(4)(d).

68. *Id.* at § 209.98 and Schedule 2.

69. *Id.* at § 209.992(1).

70. *Id.* at § 209.99(1).

71. *Id.* at § 209.997.

72. *Harper Government Brings in Stiff New Penalties for Those Who Abuse Foreign Worker Programs*, *supra* note 52.

73. Immigration and Refugee Protection Regulations, SOR/2002-227 §§ 209.97, S.2 (Can.).

74. *Id.* at §§ 209.991(1)(a)(i), 209.991(1)(b)(i), Schedule 2.

75. *Id.* at §§ 209.991(1)(a)(ii), 209.991(1)(b)(ii), Schedule 2.

76. *Id.* at Schedule 2.

77. *Id.* at § 209.991(1)(d).

In addition to consequences for non-compliance with the Regulations, violations may also constitute offences under the *Immigration and Refugee Protection Act*,⁷⁸ including:

- misrepresentation,⁷⁹ or aiding and abetting misrepresentation;⁸⁰ penalties for these offences include up to five years in jail for officers and directors of the corporation/employer, and up to \$100,000 in fines,⁸¹ and employees can be banned from entering Canada for a period of five years;⁸² and
- allowing an employee to work without proper authorization;⁸³ penalties include up to two years in jail for officers and directors of the corporation/employer, and up to \$50,000 in fines.⁸⁴

The imposition of penalties for these offences is not limited to employers in Canada. The Immigration and Refugee Protection Act extends the applicability of the Act outside of Canada.⁸⁵ In addition, there is no requirement that employers knowingly employ a foreign worker without proper authorization. The Act indicates that a person who fails to exercise due diligence in this regard is deemed to know that the work was not properly authorized.⁸⁶

This extensive immigration compliance regime is one of the most rigorous compliance regimes in the world. It makes Canada arguably the toughest on employers who fail to comply with the Regulations, so they must proactively review compliance documentation. It follows then, that corporate counsel should also conduct immigration due diligence in merger and acquisition transactions to verify that their clients do not inherit liabilities.

VII. *World Bank Group v. Wallace*, 2016 SCC 15⁸⁷

In April of 2016, the Supreme Court of Canada decided *World Bank Group v. Wallace*,⁸⁸ and in the process, confirmed that international organizations enjoy immunity from compulsory legal process in member states, absent an express waiver. The Court also defined the parameters of the disclosure that an accused can seek from third parties when challenging judicial authorization to obtain wiretap evidence.

78. Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

79. *Id.* at § 126.

80. *Id.* at § 127.

81. *Id.* at § 128.

82. *Id.* at § 40(2)(a).

83. *Id.* at § 124(1)(c).

84. *Id.* at § 125.

85. *Id.* at § 135.

86. *Id.* at § 124(2).

87. Authored by Adam Mauntah of the Department of Justice, Canada Revenue Agency Legal Services. The opinions expressed herein are those of the author and do not necessarily reflect those of the Government of Canada.

88. *World Bank Group v. Wallace*, 2016 S.C.R. 15 (Can.).

The World Bank Group is composed of five organizations, including, *inter alia*, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The Integrity Vice-Presidency (INT) is an independent investigative unit within the World Bank Group.⁸⁹ The INT received tips about corruption in the process for awarding a contract to supervise construction of a bridge, which was being funded partly with World Bank Group loans.⁹⁰ Given that a Canadian firm and some of its principals were alleged to have engaged in corrupt practices, INT voluntarily shared with the Royal Canadian Mounted Police (RCMP) certain documents from INT's investigation. The RCMP obtained a wiretap authorization,⁹¹ allowing the RCMP to intercept private communications.⁹²

The RCMP investigation led to charges under the Corruption of Foreign Public Officials Act.⁹³ Having received the pre-trial disclosure to which they were entitled,⁹⁴ the four accused in the matter brought an *O'Connor*⁹⁵ application, seeking records from INT that had not been provided to the RCMP and, therefore, not included in its disclosure. The accused wanted to compel two INT investigators to testify in the proceedings.⁹⁶ Moreover, they brought a *Garofoli*⁹⁷ application, arguing that the affidavit sworn by the RCMP officer in support of the application for the wiretap authorizations was deficient, and that the authorization should therefore not have been granted.⁹⁸ The accused sought the additional evidence for their *Garofoli* application.

The Court considered whether the World Bank Group could be compelled to produce records, and whether its personnel could be compelled to testify. The World Bank Group submitted that the INT enjoys immunities from which the IBRD benefits,⁹⁹ including the inviolable¹⁰⁰ nature of its archives and the status of its personnel as being immune from legal process.¹⁰¹

The Court unanimously accepted these submissions. Interpreting the relevant provisions of the IBRD and IDA Articles of Agreement (the

89. *Id.* ¶ 13; see also *Annual Update*, WORLD BANK, <http://pubdocs.worldbank.org/en/118471v475857477799/INT-FY16-Annual-Update-web.pdf>.

90. 2016 S.C.R. 15 at ¶ 14.

91. Criminal Code, R.S.C. 1985, c C-46 (Can.), §§185-186.

92. 2016 S.C.R. 15 at ¶ 16.

93. Corruption of Foreign Public Officials Act, S.C. 1998, c 34 (Can.).

94. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

95. *R. v. O'Connor*, [1995] 4 S.C.R. 411 (Can.).

96. *Id.* ¶ 23.

97. *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (Can.).

98. *Id.* ¶¶ 34-35.

99. Immigration and Refugee Protection Act, C. 2001, c 27 at ¶ 32.

100. *IDA Articles of Agreement*, INTERNATIONAL DEVELOPMENT ASSOCIATION, <https://ida.worldbank.org/sites/default/files/IDA-articles-of-agreement.pdf> (last visited Apr. 10, 2016).

101. *Id.* at Article VII, §8 and Article VIII, §8.

Articles), which have the force of law in Canada,¹⁰² the Court held that the Ontario judge who issued the subpoenas had interpreted the provisions too narrowly: the term “archives” covers all records, not only those that have a historical value with which the term “archives” may be associated in everyday language.¹⁰³ The immunities in both sections five and eight of the Articles were held to be absolute and not functional such that the World Bank Group need not prove that the immunity is required for it to carry out a particular function.¹⁰⁴ The Court also held that the World Bank Group did not waive immunity by assisting the RCMP, as INT had clearly stated it was acting without prejudice to its right to claim immunity.¹⁰⁵

The scope of an *O'Connor* application for third-party records in the context of a *Garofoli* application was narrowly defined by the Court: only documents of probative value to what the officer who swore the Affidavit knew or ought to have known will be relevant, and the scope of disclosure ordered by the Court will be limited accordingly.¹⁰⁶ The accused, having received disclosure from the Crown, would have to show the relevance of other records in light of that information; their arguments as to the relevance of the INT records were held to be speculative.¹⁰⁷

This decision is seen as recognizing the important role of the World Bank Group in combating corruption.¹⁰⁸ It is a judicial statement that countries must accept that, for international organizations to function properly and benefit its supporters, the records and personnel of such organizations cannot be subject to undue judicial or executive interference by any member state.

VIII. Redwater and its Implications for Directors and Officers¹⁰⁹

A. BACKGROUND

On May 19, 2016, the Alberta Court of Queen’s Bench (the Court) released its highly anticipated decision in the *Redwater Energy Corporation (Re)* case.¹¹⁰ The case involved a Calgary-based oil and gas company that was petitioned into bankruptcy by its secured lender.¹¹¹ A summary of the salient facts are as follows.

102. Bretton Woods and Related Agreements Act, R.S.C. 1985, c B-7.

103. Immigration and Refugee Protection Act at ¶¶ 70-74.

104. *Id.* ¶ 64.

105. *Id.* ¶¶ 95-96.

106. *Id.* ¶¶ 138-40. Whether the alleged facts are true is a matter to be determined at trial.

107. *Id.* ¶¶ 142-143.

108. Annual Update, *supra* note 89, at 6.

109. Authored by Melissa N. Burkett and Taylor Schappert of Osler, Hoskin & Harcourt LLP.

110. *Redwater Energy Corporation (Re)*, 2016 CanLII 278 (Can. Alta. Q.B.) (“Redwater”).

111. *Redwater Energy Corp. Certificate of Filing*, GRANT THORNTON (Nov. 2, 2015), http://www.granthornton.ca/resources/creditor_updates/documents/Redwater%20Energy%20Corp/Certificate%20of%20Filing%20-%20Nov%202015%20-%20Redwater.pdf.

A trustee, empowered to act in respect of all of the property of the debtor,¹¹² purported to take possession and control of the Alberta Energy Regulator (AER) licenses, permits, and approvals for twenty of Redwater's approximately 127 licensed properties, while disclaiming the others.¹¹³ In response, the AER issued closure and abandonment orders (the Abandonment Orders), advising the Trustee that it must abandon Redwater's wells and facilities on behalf of the licensee, and that disregarding the Abandonment Orders would result in the AER commencing abandonment proceedings and seeking recovery of its costs from the Trustee.¹¹⁴ The AER subsequently applied for an order compelling the Trustee to comply with the Abandonment Orders (the Application). The Application was supported by the Orphan Well Association (the OWA), a non-profit organization that operates under the delegated authority of the AER and whose purpose is to conduct abandonment or site reclamation activities on specific properties designated by the AER as orphans.¹¹⁵

The issues before the court were whether federal bankruptcy legislation granted the trustee the power to disavow itself of some, or all of the assets of the debtor, and whether Provincial environmental legislation required the trustee to assume the debtor's environmental liabilities related to the oil and gas assets.

B. THE PARTIES' POSITIONS

The Trustee, relying on the doctrine of Federal paramountcy, argued that an operational conflict existed between the Bankruptcy and Insolvency Act (BIA) and the Oil and Gas Conservation Act and Pipeline Act (collectively, the Environmental Legislation), and that section 14.06(4) of the BIA provided that the Trustee had no personal liability, whereas the Environmental Legislation imposed personal obligations on the Trustee to comply with the AER's orders.¹¹⁶ The AER argued that section 14.06 of the BIA permitted the Trustee to disclaim an interest in real property only, that the interests at stake did not constitute real property, and that the Trustee was not required to comply in its personal capacity, but rather as the trustee of the estate,¹¹⁷ with the AER's orders.

C. THE COURT'S DECISION

Chief Justice Wittmann held there to be an operational conflict between the BIA and the Environmental Legislation: the BIA allowed the Trustee to renounce some assets, and not be responsible for environmental

112. *Redwater*, ¶¶ 14-15; Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3 ("BIA"), §§ 16(3) and 20(1).

113. *Id.* ¶ 22.

114. *Id.* ¶ 23.

115. *Id.* ¶¶ 33-35.

116. *Id.* ¶ 86.

117. *Id.* ¶ 91.

abandonment and remediation work, while the Environmental Legislation did not allow the Trustee to renounce licensed assets because “licensee” includes a trustee or receiver.¹¹⁸ Therefore, the Environmental Legislation must be inoperative to the extent of the conflict. The AER filed a Notice of Appeal on May 27, 2016.

D. BULLETIN 2016-10

Anticipating the Redwater decision, the AER released Bulletin 2016-10, which “remind[s] licensees and their directors and officers of their statutory responsibilities when ceasing operations because of insolvency.”¹¹⁹ The bulletin, together with the Redwater decision, reinforces that the AER may enforce environmental abandonment and remediation work against a licensee, including through taking action against directors and officers personally.¹²⁰

In Alberta’s current economic climate, the impact of Redwater on directors and officers of struggling oil and gas companies is significant.¹²¹ One possible implication of Bulletin 2016-10 is that liquidation will become preferred to restructuring in light of abandonment obligations that continue post-restructuring.

E. BULLETIN 2016-16

After Redwater, the AER released Bulletin 2016-16, which imposed changes designed to “minimize risks to Albertans” arising from the decision.¹²² The implications of Bulletin 2016-16 are significant, and include the following:

- license approval delays—the AER will process license eligibility applications as “non-routine;”
- uncertainty for existing transactions—the AER may require evidence that a license holder and its officers and directors continue to maintain adequate insurance before approving existing but previously unused licenses or transfer applications; and,
- limiting opportunities for smaller producers—the AER will require all transferees to have a demonstrated liability management ratio (LMR) of 2.0 or higher immediately following a license transfer. The

118. *Id.* ¶ 181.

119. *Bulletin 2016-10: Obligations of Licensees When in Insolvency or When Otherwise Ceasing Operations*, THE ALBERTA ENERGY REGULATOR (Apr. 8, 2016), <https://www.aer.ca/documents/bulletins/Bulletin-2016-10.pdf>.

120. *Id.*

121. *E.g.*, in Redwater, the estimated cost of complying with the Abandonment Orders was over \$5,000,000, whereas the deemed value of those assets was only \$547,000 (*Redwater* at ¶ 72.).

122. *Bulletin 2016-16: Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, THE ALBERTA ENERGY REGULATOR (June 20, 2016), <https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf>.

consequence is that smaller producers, more likely to have a LMR less than 2.0 are effectively prevented from transferring or acquiring licenses.

Bulletins 2016–10 and 2016–16 demonstrate the AER’s intent to use all available regulatory avenues in response to Redwater. In the meantime, directors and officers of struggling oil and gas companies must be mindful of possible liability for the environmental and remediation actions (or inactions) of companies in these difficult times.