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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Canada

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I. Overview

There were a number of significant developments in Canada in 2017. This article will focus on four distinct areas. Specifically, Section II discusses the competing rights of employees and employers in cases of workplace substance abuse in safety-sensitive industries. Sections III and IV detail the use of the long-established remedy of injunctive relief in cases involving new technology and the ever-shrinking global marketplace. Section V explores the continuing trend of increased enforcement of Canada's primary anti-corruption law, detailing the number of enforcement actions and highlighting the importance of prudent corruption-management strategies. Finally, Sections VI and VII outline new international trade agreements that offer opportunities to Canadian businesses, and Europeans seeking employment within Canada's borders. At the same time, however, new legislative sanctions have been imposed, which cast a shadow of risk over such commercial activities.

II. Managing Employee Substance Abuse in Safety-sensitive Industries²

Canadian law imposes significant duties upon employers to protect and advance the health and safety of employees.³ Indeed, some employers report feeling frustrated, even hamstrung, by restrictions on how to police and prevent the presence and use of drugs and alcohol in the workplace,

1. This article was edited by Angela E. Springate. Individual authors will be identified below by section.

2. This section was written by Theodore Goloff.

3. For instance, the Royal Canadian Mounted Police was found guilty on September 29, 2017, of violating safety obligations under the Canada Labour Code, in respect of a shooting rampage in Moncton, New Brunswick, which left three of its officers dead. The court held, *inter alia*:

It is beyond controversy that policing is a perilous occupation. . . . That does not mean that the risk should be ignored, nor that it is to be accepted as being part of the job and therefore no efforts need be made to reduce the frequency of risk or to mitigate the potential consequences of the risk or mitigate its occurrence.

R. v. The Royal Canadian Mounted Police, 2017 NBPC 06, para. 76.

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particularly in safety-sensitive industries. Two recent decisions involving Alberta's mining sector, *Suncor Energy Inc. v. Unifor Local 707A*⁴ and *Stewart v. Elk Valley Coal Corp.*,⁵ may provide needed guidance to employers regarding how to navigate the various cross-currents that arise in this context, namely the protection of privacy interests; recognition and accommodation of legitimate "disabilities," such as substance dependency; and maintenance of safety measures, which are paramount.

A. SUNCOR ENERGY INC. v. UNIFOR LOCAL 707A

It is settled law in Canada that "the dangerousness of a workplace is clearly relevant. . . . [However], it has never been found to be automatic justification for unilateral imposition of unfettered random testing with disciplinary consequences."⁶ Because random testing, among other things, violates fundamental privacy rights, the law requires "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace"⁷ before employers can take such action.

In *Suncor Energy Inc. v. Unifor Local 707A*,⁸ the Court of Appeal of Alberta clarified that evidence of positive drug and alcohol tests taken after safety incidents or near misses need not be particularized to the bargaining unit in order to provide an adequate basis for random drug testing if unionized, non-unionized, and contractor employees work side-by-side in interdependent and interchangeable activities. The court of appeal reversed the decision of an arbitration board, which had concluded that only evidence of a drug or alcohol problem within the bargaining unit was relevant and decisive. The board focused on the bargaining unit because that was the limit of its jurisdiction. Nevertheless, the court found that the board had conflated two distinct issues: its jurisdiction, and the power of the employer to establish a general substance abuse problem in the workplace. The court noted that the board, by focusing on the limits of its jurisdiction, had been asking itself the wrong question⁹ and had erroneously fettered its ability to consider relevant evidence.

Specifically, the court concluded that the board's inability to impose drug and alcohol testing beyond the bargaining unit did not render irrelevant the employer's overall experience with substance abuse. The employer should be permitted to establish the presence of a general workplace problem with substance abuse, and requiring the employer to provide refined and particularized evidence regarding only unionized employees, rather than the

4. *Suncor Energy Inc. v. Unifor Local 707A*, [2017] ABCA 313 (Can. Alta. C.A.).

5. *Stewart v. Elk Valley Coal Corp.*, [2017] S.C.C. 30 (Can.).

6. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, [2013] 2 S.C.R. 458, para. 31 (Can.).

7. *Id.*

8. *Suncor Energy Inc.*, [2017] ABCA 313 (Can. Alta. C.A.).

9. For the proposition that application of the wrong legal text may result in the decision being "unreasonable" and, therefore, subject to judicial review. *Id.* ¶ 49 (citing *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 (Can.)).

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entire workforce, represented an impermissible departure from the Supreme Court's decision in *Communications, Energy and Paperworkers Union of Canada v. Irving Pulp and Paper Ltd.*¹⁰ The court found that the board had set the bar too high for employers: "*Irving [Pulp]* calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision."¹¹

B. STEWART V. ELK VALLEY COAL CORP.

In *Stewart*, the Supreme Court of Canada provided guidance to employers who seek to ensure safety in inherently dangerous worksites and manage risks associated with employee substance abuse.¹² Here, the employer implemented a policy succinctly referred to as the "no-free accident" rule. It required employees to disclose any dependence or addiction issues before, not after, any drug-related incident occurred. An employee who had made the required disclosure would be offered treatment. But, an employee would be terminated, without exception, if he or she failed to disclose drug dependency or addiction, was involved in an incident, and tested positive for drugs.¹³

Stewart attended a training session where the policy was explained, and he signed a form acknowledging receipt and understanding of the rule.¹⁴ Nevertheless, Stewart used cocaine on days off, and he did not inform his employer. After he was involved in an accident, which was serious but did not involve injury, he tested positive for drugs. He also admitted to his employer that he thought he was addicted to cocaine. Stewart was terminated in accordance with the rule.¹⁵ He filed a complaint with the Alberta Human Rights Tribunal (AHRT), alleging discrimination based on disability, namely his drug addiction. The tribunal found that prima facie discrimination was not established.

Chief Justice McLaughlin, writing for the majority of the Supreme Court, noted the level of deference given to tribunals interpreting human rights statutes. It is their task "to interpret the statute in ways that make practical and legal sense in the case before them, guided by applicable jurisprudence. Reviewing courts should tread lightly."¹⁶ She stated that in order to make the case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experience adverse impact with respect to the service; and

10. *Communications, Energy and Paperworkers Union of Canada, Local 30*, [2013] 2 S.C.R. 458 ¶ 31 (Can.).

11. *Suncor Energy Inc.*, [2017] ABCA, para 46.

12. *Stewart*, [2017] S.C.C. 30 (Can.).

13. *Id.* ¶ 1.

14. *Id.*

15. *Id.* ¶ 2.

16. *Id.* ¶ 20.

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that the protected characteristic was a factor in the adverse impact.”¹⁷ Discriminatory intent is not required, nor must discrimination be direct.

The AHRT found that Stewart’s addiction did not play a role in his termination. Instead, the tribunal found that he was fired solely because he failed to comply with the policy. Moreover, expert testimony before the tribunal demonstrated that Stewart’s addiction did not diminish his capacity to comply. Indeed, Stewart expressed knowledge and understanding of the policy, as well as its purpose. The tribunal concluded that he simply failed to respect its terms.

The Supreme Court majority dismissed the notion that the test for prima facie discrimination required “a finding of stereotypical or arbitrary decision-making.”¹⁸ It held that the existence of arbitrariness or stereotyping is not a stand-alone requirement for proving prima facie discrimination. Requiring otherwise would focus incorrectly on whether a discriminatory attitude exists, rather than a discriminatory impact, and would change the nature of the inquiry. It did clarify, however, that in order for a protected ground to be considered to have been a factor in the decision, the ground must be material.

In their concurrence, Justices Moldaver and Wagner opined that prima facie discrimination had been demonstrated but agreed with the ultimate outcome because the employer had shown that the dissuasive effect of the policy would have been lessened if the employer was required to assess whether some other intermediate penalty might be appropriate. Given the nature of the employer’s workplace, the Justices reasoned that “it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship.”¹⁹ Justice Gascon, alone, felt that a drug policy that “in application, automatically terminates employees who use drugs prima facie discriminates against individuals burdened by drug dependence.”²⁰

III. Addressing Copyright Infringement in the Broadcasting Realm²¹

On March 20, 2017, the Federal Court of Appeal upheld a June 1, 2016 Federal Court Order (Order) granting a motion by Canadian broadcasters

17. *Id.* ¶ 24; The Chief Justice specified that “[w]here, as here, a tribunal concludes that the cause of the termination was the breach of a workplace policy, or some other conduct attracting discipline, the mere existence of addiction does not establish prima facie discrimination.” *Id.* ¶ 42.

18. *Id.* ¶ 45.

19. *Id.* ¶ 55.

20. *Id.* ¶ 60.

21. This section was written by Petra Stewart.

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for an interlocutory injunction against certain set-top box vendors.²² The injunction prohibits the vendors from, among other things, configuring, marketing and/or selling set-top boxes²³ that provide users with access to the Canadian broadcasters' copyrighted programs and allows the plaintiffs to implead additional set-top box vendors as defendants in the matter.²⁴

A. AT THE FEDERAL COURT

Canadian broadcasters (Bell Media Inc., Rogers Media Inc., and Groupe TVA Inc.) and Canadian broadcast distribution undertakings (Bell Canada, Belle Expressvu Limited Partnership, Rogers Communication Canada Inc., and Vidéotron s.e.n.c.) (plaintiffs), filed a Statement of Claim for copyright infringement²⁵ against five set-top box vendors (defendants) in the Federal Court of Canada on May 25, 2016, and moved the court for an interim injunction prohibiting the defendants from configuring, marketing and/or selling certain pre-loaded set-top boxes until the court rendered its final judgment.²⁶

The court granted an interlocutory injunction²⁷ substantially as requested by the plaintiffs, finding that the plaintiffs demonstrated (i) a serious issue to be tried; (ii) irreparable harm absent the injunction; and (iii) a balance of convenience in their favor, as required in order to support interlocutory relief.²⁸

The court found that the plaintiffs demonstrated a serious issue to be tried based on its finding that the plaintiffs presented a strong prima facie case of copyright infringement.²⁹ Plaintiffs have the exclusive right to broadcast their programs. As noted by the court, the defendants configure their set-top boxes with applications chosen by them; certain pre-loaded applications³⁰ provide and facilitate user access to illegal streaming websites (although they also provide access to legal streaming websites and content); users can view or download the plaintiffs' programs without the plaintiffs' authorization; and the defendants advertise their set-top boxes as offering a

22. See *Wesley v. Bell Canada*, 2017 FCA 55 (Can.).

23. "[E]lectronic devices that can be connected to [a] standard television set in order to provide additional functionalities to that television." *Bell Canada v. 1326030 Ontario Inc.*, [2016] FC 612 ¶ 5 (Can.).

24. *Wesley* [2017] FCA 55, para. 2.

25. *Bell Canada*, [2016] FC 612, para. 1; The plaintiffs also contend that the defendants are in contravention of the Radiocommunication Act, prohibiting the sale of equipment intended to receive programming that is illegally decrypted. Radiocommunication Act, R.S.C. 1985, c R-2

26. See *Proceedings Queries*, http://cas-cdc-www02.cas-satj.gc.ca/IndexingQueries/infp_moreInfo_e.php?court_no=T-759-16 (last visited Feb. 3, 2018).

27. The court determined that the plaintiffs actually sought an interlocutory injunction.

28. See *Bell Canada*, [2016] FC 612, para. 19 (citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (Can.)).

29. The court also found that the plaintiffs demonstrated a serious issue to be tried with respect to authorizing and inducing copyright infringement and violating the Radiocommunication Act. See *Bell Canada*, [2016] FC 612, para. 24-27.

30. In some cases, add-ons are necessary. *Id.* ¶ 8.

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means of avoiding cable fees.³¹ Notably, the Federal Court found that a statutory defense available in the Copyright Act,³² whereby persons who provide only “the means of telecommunication necessary for another person to [communicate content]” are not deemed to communicate that content to the public,³³ did not extend to the defendants.³⁴ Under Section 2.4, the court found that the defendants go well “beyond selling a simple ‘means of telecommunication’” as contemplated by Section 2.4, by actively choosing to configure their set-top boxes applications that they know facilitate unauthorized access to the plaintiffs’ copyrighted content.³⁵

B. AT THE FEDERAL COURT OF APPEAL

On appeal of the Order, the defendants³⁶ challenged the lower court’s finding that the plaintiffs demonstrated irreparable harm, but did not challenge the finding that the plaintiffs presented a serious issue to be tried, or the inapplicability of the Section 2.4 defense.³⁷ In its relatively brief March 20, 2017 judgment, the Federal Court of Appeal upheld the Order.³⁸

C. IMPLICATIONS

The Federal Court’s determination that the plaintiffs presented a strong *prima facie* case of copyright infringement, which supported the court’s decision to grant interlocutory relief, indicates that the plaintiffs have a good chance of succeeding at trial.³⁹ It is not clear whether the Section 2.4 defense may be available to pre-loaded set-top box vendors on slightly different facts than those before the Federal Court for the May 25, 2016 motion, especially given that the technology in question has substantial non-infringing use. But, in light of the trial court’s 2016 decision and the appeal court’s 2017 affirmance, the plaintiffs may continue to implead set-top box vendors who, if similarly situated to the defendants, will not be able to rely on the Section 2.4 defense to avoid a ban on the sale of their products at the pre-trial stage. Pre-loaded set-top box vendors may adjust their advertising, opt to install different applications, or exit the market. This is a “win” for Canadian broadcasters; however, new technology will continue to raise copyright and related issues, impacting traditional broadcasters and the rest of the entertainment industry.

31. *Id.* ¶ 7.

32. *Bell Canada*, 2016 FC 612 ¶ 34 (citing Copyright Act, R.S.C. 1985, c. C-42).

33. *Id.* at § 2.4(1)(b).

34. *See Bell Canada*, 2016 FC 612, para. 28.

35. *See id.*

36. Two of the defendants brought the appeal.

37. *See Wesley*, [2017] FCA 55, para. 4.

38. *Id.* ¶ 5.

39. *See Bell Canada*, 2016 FC 612, para. 28 (citing *Somerville House Books Ltd v. Tormont Publications Inc.* (1993), 50 CPR (3d) 390 (FCTD)) (success at interlocutory stage and at trial should occur when complete copying established)).

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IV. Widening the Net of Injunctive Relief: Third Parties and Extra-territorial Effect⁴⁰

On June 28, 2017, the Supreme Court of Canada issued its decision in *Google Inc. v. Equustek Solutions Inc.*⁴¹ A court in the province of British Columbia granted an injunction against Google Inc. (Google). The Supreme Court held that the injunction was valid even though Google was not a party to the action in which the injunction had been sought, and the order would have effect outside British Columbia.

Equustek Solutions Inc. (Equustek) is a technology company in British Columbia.⁴² It brought suit against Datalink Technologies Inc. (Datalink) and other defendants alleging that they stole confidential information from Equustek, while Datalink was acting as a distributor of Equustek's products, and used the information to produce a competing product.⁴³

Datalink filed a Statement of Defence denying the claims.⁴⁴ But, Datalink left British Columbia and continued to carry on business elsewhere.⁴⁵ During this time, Datalink continued to produce and market online the product that allegedly infringed Equustek's rights.

Equustek was unable to locate Datalink or its suppliers and was unable to close Datalink websites hosted by other providers. As a result, Equustek requested that Google de-index the Datalink websites.⁴⁶ Google refused, so Equustek sought an injunction. The Supreme Court of British Columbia granted an interlocutory order enjoining Google from displaying any part of the Datalink websites on any of its search results worldwide.⁴⁷ Google appealed to the Court of Appeal of British Columbia, which dismissed the appeal.⁴⁸

The case then came before the Supreme Court of Canada, and the central issue was whether, in the circumstances of this case, it was appropriate for a court to grant an injunction against Google. The Supreme Court held that the injunction had been validly granted. Justice Abella wrote for the seven-justice majority. She applied the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*⁴⁹ to determine whether the criteria for granting an injunction had been met in this case. Google did not contest the first two criteria, conceding that there was a serious issue to be tried, and Equustek was suffering irreparable harm as a result of Datalink's alleged conduct.⁵⁰

40. This section was written by Adam Maunah.

41. *Google Inc. v. Equustek Solutions Inc.*, [2017] S.C.C. 34 (Can.).

42. *Id.* ¶ 2.

43. *Id.* ¶ 3.

44. *Id.* ¶ 4.

45. *Id.* ¶ 7.

46. *Id.* ¶ 12.

47. *See Equustek Solutions Inc. v. Jack*, [2014] BCSC 1063, para. 161 (Can.).

48. *See Equustek Solutions Inc. v. Google Inc.*, [2015] BCCA 265 (Can.).

49. *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 (Can.).

50. *Google Inc.*, [2017] S.C.C. 34 ¶ 26.

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Nevertheless, Google did dispute that the injunction issued against it was necessary to prevent that irreparable harm. In other words, Google argued that the court that granted the injunction erred in finding that the balance of convenience lay in favor of granting it. On this point, Justice Abella held that the balance of convenience favored the issuance of the injunction against Google. Datalink could not have continued to sell the product at issue without its websites being listed in Google search results.⁵¹ An earlier attempt by Google to de-list specific webpages following an injunction ordering Datalink to cease doing business online was unsuccessful, as Datalink circumvented the orders by moving the objectionable content to new pages within its websites.⁵²

In analyzing the balance of convenience element of the *RJR-MacDonald* test, Justice Abella also addressed two arguments Google raised in pleading that it should not be subject to the injunction. One was that it could not be the subject of an interlocutory injunction in a proceeding to which it is not a party. Justice Abella reviewed the extensive Canadian and British jurisprudence on this issue in support of the majority's conclusion that injunctions can bind non-parties, and it is appropriate to issue orders that bind non-parties whose acts or omissions facilitate the harm that the party seeking the injunction wishes to prevent.⁵³

Google also submitted that it was improper for a British Columbia court to issue an interlocutory injunction that had extraterritorial effect. On this issue, Justice Abella's reasons also laid out jurisprudence to the contrary. Where a court has *in personam* jurisdiction, it can enjoin the conduct of a person anywhere in the world if that is necessary to ensure that the injunction is effective.⁵⁴ It was necessary to enjoin Google from displaying search results for all Datalink sites anywhere in the world, not just on the Canadian site, google.ca, because users outside Canada would otherwise be able to search for and find Datalink's products, resulting in continued harm to Equustek.⁵⁵

The majority also dismissed the argument that since Datalink had left the jurisdiction and is not likely to return to defend the action, the interlocutory injunction is, in reality, a permanent injunction. It is in place until the conclusion of the trial or further order of the court. It is open to Google to have the injunction varied or vacated, which it had not done when the Supreme Court of Canada decided the case.⁵⁶

The interlocutory nature of the injunction was one of the issues on which Justice Suzanne Côté and Justice Malcolm Rowe disagreed with the majority in their joint dissent.⁵⁷ They opined that the injunction is effectively a

51. *Id.* ¶¶ 41-42.

52. *Id.* ¶¶ 14-15.

53. *Id.* ¶¶ 28-35.

54. *Id.* ¶ 38.

55. Google Inc., [2017] S.C.C. 34 ¶¶ 41-42.

56. *Id.* ¶¶ 51-53.

57. *Id.* ¶ 9.

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permanent injunction and that Equustek needed to meet a different test to get it.⁵⁸ This was one of the factors they cited in support of their overall thesis that a proper exercise of judicial restraint would have been to dismiss the application for this injunction.

V. Fighting Fraud and Corruption at Home and Abroad⁵⁹

The year saw a continued trend towards increased scope and enforcement of Canada's primary anti-corruption law, the Corruption of Foreign Public Officials Act (CFPOA).⁶⁰ In August 2017, Global Affairs Canada reported that there have been four convictions under the CFPOA to date, and there are four ongoing cases in which charges have been laid but not yet concluded.⁶¹ Global Affairs Canada reported that ten CFPOA investigations were active in August 2016, and it has not updated the statistic since that time.⁶² This article explores three recent CFPOA enforcement actions, as well as developments under the Extractive Sector Transparency Measures Act⁶³ (ESTMA) and consultations on implementing a Deferred Prosecution Agreement (DPA) regime.

A. CONVICTION UPHeld IN *R v. KARGIAR*

The most noteworthy development in CFPOA actions in 2017 was the release on July 6, 2017 of the first Canadian appellate level decision to address the scope of the CFPOA.⁶⁴ The Ontario Court of Appeal upheld the conviction of Nazir Kargiar, an Ottawa-based businessman who was sentenced to three years in prison for his role in a scheme to offer bribes to Indian officials on behalf of a Canadian technology company, CryptoMetrics. Kargiar argued on appeal that the foreign corruption offence required proof of an agreement between the accused and the foreign public official. Because the evidence only revealed an agreement between him and his partners, and not with any of the Indian officials, he argued that the conviction could not stand.

The court rejected the argument and confirmed that the foreign corruption offence casts a wide net. It prohibits giving or offering bribes to

58. *Id.* ¶ 66 (citing 1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd., [2014] ONCA 125 (Can.)).

59. This section was written by John W. Boscarior, Robert A. Glasgow, and Claire Seaborn.

60. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.) ("CFPOA"). The CFPOA is Canada's primary legislation criminalizing bribery of foreign officials by Canadians, whether that bribery occurs within Canada or abroad.

61. See *Canada's Fight against Foreign Bribery: Eighteenth Annual Report to Parliament*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng> (last updated Oct. 11, 2017).

62. See *Canada's Fight against Foreign Bribery: Seventeenth Annual Report to Parliament*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-17.aspx?lang=eng> (last updated Oct. 20, 2016).

63. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39 § 376 (Can.).

64. *R v. Kargiar*, [2017] ONCA 576 (Can.).

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foreign officials as well as “agreeing” to give or offer bribes, regardless of whether the targeted official agrees or if the bribe was actually offered or paid. Specifically, the appeal court noted that the offence is committed when a person “directly or indirectly gives, offers[,] or agrees to give or offer” a bribe to a foreign public official.⁶⁵ Accordingly, the offence is committed as soon as the accused agrees to give or offer a bribe, regardless of who else is party to the agreement.

The court also rejected an attempt to narrow the ‘real and substantial’ connections committed prior to the June 19, 2013 amendments to the CFPOA, which extended the foreign corruption offence’s extraterritorial reach to acts committed abroad by Canadian citizens, residents, and corporations. Even in the absence of nationality jurisdiction, the court found that Canadian citizenship could be considered, in addition to other factors, in determining whether there was a real and substantial link with Canada, the jurisdictional test established by the Supreme Court of Canada in *R v. Libman* in 1985.⁶⁶

B. ACQUITTALS IN *R v. WALLACE*

A second noteworthy anti-corruption decision from 2017 is *R v. Wallace*, in which the Ontario Superior Court of Justice dismissed the case against former SNC-Lavalin executives accused of bribing Bangladeshi officials in connection with the Padma Bridge project.⁶⁷

The acquittals followed from the court excluding evidence derived from a wiretap that the Royal Canadian Mounted Police had obtained based on information provided by the World Bank, which the Court found amounted to uncorroborated speculation, gossip, and rumor.⁶⁸ The court emphasized the need to corroborate such sources and noted that reliance on anonymous whistleblowers without further attempts at corroboration was unlikely to meet the warrant requirements. The prosecution elected to present no other evidence against the defendants, resulting in their acquittals. Although clearly a setback to Canada’s foreign bribery enforcement efforts, the dismissal on evidentiary grounds leaves ample room for prosecutions on similar facts in the future.

C. PENDING CHARGES AGAINST SNC-LAVALIN AND OTHERS

A fifty-day trial is scheduled for September 2018 to prosecute the high-profile and large-scale corruption and fraud charges against SNC-Lavalin, which arose from contracts SNC-Lavalin held in Libya between 2001 and

^{65.} *Id.* ¶ 43.

^{66.} *R v. Libman*, [1985] 2 S.C.R. 178 (Can.).

^{67.} *See R v. Wallace*, [2017] ONSC 132 (Can.).

^{68.} *Id.* ¶ 71.

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2011.⁶⁹ Two matters will be combined into a single hearing: the first is against SNC Lavalin Group Inc. and two of its subsidiaries, and the second is against two former SNC-Lavalin executives, Sami Bebawi and Stephane Roy. The company has acknowledged some wrongdoing in Libya by executives who have since left the company, but it claims to have overhauled its ethics and compliance procedures.

D. DPA REGIME CONSULTATIONS

The Canadian regime is distinct from that of the United States, in not allowing any form of Deferred Prosecution Agreement (DPA).⁷⁰ DPAs allow companies to settle criminal charges against them by agreeing to pay a fine, adopt remedial measures, and possibly be subject to ongoing monitoring by an independent third party. The absence of such a regime has led to situations where companies that may have been willing to come forward and settle charges against them through a DPA were instead faced with a choice to either plead guilty or vigorously defend the charges (regardless of potential monetary cost).

Following the example of the United Kingdom, Canada is investigating adopting a DPA regime. On September 25, 2017, Canada began consultations with public stakeholders regarding whether Canada should adopt such a regime; how it should be constructed; and, importantly, how DPAs would interact with the Federal Integrity Regime for Public Procurement, which debars persons and entities convicted or charged with CFPOA and other offences. It is likely that some form of Canadian DPA regime will be implemented in 2018.

E. DEVELOPMENTS UNDER ESTMA

In 2015, Canada adopted Extractive Sector Transparency Measures Act (ESTMA), a federal anti-corruption regime that requires extractive sector companies operating in Canada to report on payments made to foreign and domestic government entities.⁷¹ Beginning on June 1, 2017, this obligation extended to reporting payments made by extractor sector companies to Canadian indigenous government entities, an obligation that had been deferred for two years.⁷²

These enforcement actions and legislative developments demonstrate that Canadian and U.S. companies exposed to bribery and corruption must adopt prudent corruption management strategies to address serious enforcement risks.

69. Bertrand Marotte, *SNC's fraud, corruption hearing set for 2018*, THE GLOBE AND MAIL, <https://www.theglobeandmail.com/report-on-business/sncs-fraud-corruption-hearing-set-for-2018/article28929552/> (last updated Mar. 25, 2017).

70. *Id.*

71. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 376 (Can.).

72. See *Information on ESTMA*, NATURAL RESOURCES CANADA, <http://www.nrcan.gc.ca/mining-materials/estma/18184> (last updated July 21, 2017).

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VI. Facilitating Access to Canada's Labour Market for European Citizens⁷³

The Canada-European Union: Comprehensive Economic and Trade Agreement⁷⁴ (CETA) came into force on September 21, 2017. The agreement includes temporary entry provisions for inter-company transferees, contractual service suppliers, independent professionals, short-term business visitors, and investors. Citizens of EU member states who qualify under one of these categories are exempt from the requirement to obtain a Labour Market Impact Assessment.⁷⁵

Currently, the following 28 EU member states qualify under CETA: Austria, Belgium, Bulgaria⁷⁶, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania⁷⁷, Slovakia, Slovenia, Spain, Sweden, and United Kingdom.

CETA's temporary entry provisions may be divided into four categories: inter-company transferees; contractual service suppliers and independent professionals; investors; and business visitors.⁷⁸

A. INTER-COMPANY TRANSFEREES

The CETA inter-company transferee provisions allow citizens of EU member states to obtain work permits in order to transfer to a subsidiary, branch, or parent company in Canada and vice versa. The foreign national must have been employed by an enterprise located in an EU member state for at least one year prior to the transfer.⁷⁹

Intra-company transferees may qualify under one of the following three categories:

Senior Personnel are employed in a senior position within an EU enterprise and are responsible for (i) primarily directing the management of the enterprise, a department, or sub-division of the company, and (ii) exercising wide latitude in decision making, which may include having authority to personally recruit, dismiss, or take other personnel actions. Senior personnel receive only general supervision or direction from higher-level executives or supervise and

73. This section was written by Jacqueline R. Bart and Annsley Kesten.

74. Canada-European Union Comprehensive Economic Trade Agreement art. 8.27(2) (signed on Oct. 30, 2016), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-accg/text-texte/10.aspx?lang=eng>, [hereinafter CETA].

75. *Id.*

76. Romanian and Bulgarian citizens are not currently considered visa exempt in Canada. They are, therefore, required to apply for CETA work permits or business visitor status through visa offices outside of Canada. *See id.*

77. CETA, *supra* note 74.

78. *Id.*

79. *Id.*

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control the work of other professional employees and exercise day-to-day discretion over company operations.⁸⁰

Specialists are employees who possess (i) uncommon knowledge of the enterprise's products or services and its application in international markets, or (ii) an advanced level of expertise or knowledge of the enterprise's processes and procedures such as its production, research equipment, techniques, or management.⁸¹

Finally, Graduate Trainees must (i) possess a university degree, and (ii) be temporarily transferred to Canada for career development purposes or to receive training in business techniques or methods.⁸²

Senior Personnel and Specialists are eligible for work permits for the lesser of three years or the contract duration, with possible extension of up to eighteen months. Graduate Trainees are eligible for work permits for the lesser of one year or the length of the contract, with no extension available.⁸³

Spouses of EU citizens who are intra-corporate (company) transferees to Canada are eligible for an open work permit for the same duration as their spouses' work permit.⁸⁴

B. CONTRACTUAL SERVICE SUPPLIERS AND INDEPENDENT PROFESSIONALS

Under this category, Contractual Service Suppliers and Independent (self-employed) Professionals who seek to supply services in Canada on a temporary basis may be eligible for a work permit. Professionals of either category must be citizens of an EU member state; must be engaged in the temporary supply of services in Canada for a period not exceeding twelve months; and must provide a service in accordance with the Annex 10-E concordance table.⁸⁵

Contractual Service Suppliers are employees of an EU enterprise that have a contract to supply a service to a Canadian consumer. The EU enterprise cannot have an establishment in Canada. Contractual Service Suppliers must have been an employee of the EU-headquartered enterprise for at least one year and must possess three years of professional experience in the activity that is the subject of the contract. The employee may only

80. *Id.*

81. CETA, *supra* note 74.

82. *Id.*

83. *Id.*

84. *See CETA, supra* note 74, at Chapter 10, Annex 10-F. Note that the ICT spousal provisions do not apply to citizens of the UK or Denmark.

85. *Id.* at Chapter 10, Annex 10-E. Several sectors are excluded under the Independent Professional category, including: medical and dental services; veterinary services; midwifery services; nurse, physiotherapist and paramedical services; and higher education services. But, these sectors are included under the Contractual Service Supplier category.

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receive remuneration from his or her EU employer for the services performed in Canada.⁸⁶

Independent Professionals are self-employed professionals who have been contracted to supply services to a Canadian consumer. Applicants must possess at least six years of professional experience in the sector of activity that is the subject of the contract.⁸⁷

In addition to these requirements, applicants under either category must possess (i) a university degree or qualification demonstrating knowledge of an equivalent level, and (ii) professional qualifications, if required to practice an activity pursuant to the laws or requirements in the province or territory where the service will be supplied in Canada.⁸⁸

Under this category, foreign nationals are eligible for work permits for a cumulative period of no more than twelve months in any twenty-four-month period or for the duration of the contract, whichever is less. This validity period may only be extended at the immigration officer's discretion, provided that sufficient evidence is presented to justify the need for extension.⁸⁹

C. INVESTORS

Investors are defined under CETA as persons who establish, develop, or administer the operation of an investment in a capacity that is supervisory or executive.⁹⁰ CETA investor provisions apply to individual investors as well as employees of corporations. In either case, the individual investor or the investing employer must have committed, or be in the process of committing, a substantial amount of capital.⁹¹

There is no minimum dollar threshold to fulfil the requirement of "substantial" investment capital. Substantiality is determined using a proportionality test, in which the amount invested is weighed against one of the following factors: (i) the total value of the particular enterprise in question; or (ii) the amount usually considered necessary to establish a viable enterprise of the nature contemplated.⁹² In all cases, the investment must be significantly proportional to the total investment.

CETA Investor work permits may be issued for up to one year. Extensions are only available at the immigration officer's discretion, if the applicant sufficiently demonstrates the need for the extension.⁹³

^{86.} *Id.*

^{87.} CETA, *supra* note 74.

^{88.} *Id.*

^{89.} *Id.*

^{90.} *Id.*

^{91.} *Id.*

^{92.} CETA, *supra* note 74.

^{93.} *Id.*

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D. BUSINESS VISITORS

Under CETA, short-term business visitors and business visitors for investment purposes may enter Canada for a number of regular visits related to a specific project. Business Visitors are work permit exempt, provided that they do not engage in selling goods to the general public; receive remuneration from a source in Canada; or provide services to Canadian consumers.⁹⁴ Examples of permissible activities include: engaging in meetings and consultations; receiving inter-company training; negotiating sales agreements and purchasing; and providing after-sales services.⁹⁵ If the applicant does not qualify under Immigration, Refugees and Citizenship Canada's (IRCC) general Business Visitor provisions,⁹⁶ the maximum length of stay for CETA Business Visitors is ninety days in any six-month period.

VII. Balancing Opportunity and Risk in Trade and Commerce with the Ukraine⁹⁷

The Canada-Ukraine Free Trade Agreement (CUFTA) and the Foreign Investment Promotion and Protection Agreement (FIPA) are intended to create business opportunities in Ukraine and with Ukrainian companies. At the same time, however, a framework of sanctions laws raises the potential of legal conflict. Thus, trade and investment are encouraged, but only after appropriate due diligence.

A. FACILITATING TRADE AND COMMERCE

The CUFTA was adopted by Parliament on August 1, 2017.⁹⁸ The CUFTA deals with the elimination of tariffs on goods, though it also includes disciplines on central government procurement and intellectual property.

Under the CUFTA, Ukraine has eliminated 86 percent of tariffs on Canadian exports, and Canada has eliminated 99.9 percent of all tariffs, including 99.9 percent of its agriculture tariffs.⁹⁹ Canadian imports of eggs, poultry, and dairy continue to be subject to high-tariff barriers.¹⁰⁰ Canada

94. Except in accordance with *CETA*, *supra* note 74, at Chapter 10, Annex 10-D, *e.g.* after-sales services.

95. *Id.* at Chapter 10, Annex 10-D.

96. See *Immigration and Refugee Protection Regulations*, SOR/2002-227, §§ 186(a), 187.

97. This section was written by Chelsey Colbert, Kevin Massicotte, and Clifford Sosnow.

98. Canada Gazette, SI/2017-37 (Can.), Canada-Ukraine Free Trade Agreement Implementation Act, S.C. 2017, c. 8 (Can.).

99. See *Canada and Ukraine: Creating Jobs and Opportunities Together*, GOVERNMENT OF CANADA, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/canada-ukraine.aspx?lang=eng>.

100. *Customs Tariff*, S.C. 1997, c. 36 (Can.); Schedule, Customs Tariff 2017, § 1, Chapters 2 and 4.

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also has a FIPA with Ukraine,¹⁰¹ which provides investors with protection against discriminatory investment measures and compensation for expropriation.

The CUFTA is intended to create commercial opportunities for Canadian and Ukrainian companies; however, there are several laws imposing economic sanctions on Ukraine that raise important due diligence issues. Thus, this is a unique situation wherein Canada has entered into a free trade agreement with Ukraine while maintaining economic sanctions against it at the same time.¹⁰²

B. IMPOSING SANCTIONS

Three laws, collectively referred to as Sanctions Laws, impose sanctions on trade and investment affecting Canada-Ukraine commerce and add a layer of risk to the opportunities created by the CUFTA and the FIPA. The three laws are the Special Economic Measures (Ukraine) Regulations (“Ukraine Regulations”),¹⁰³ the Justice for Victims of Corrupt Foreign Officials Regulations (“Magnitsky Regulations”),¹⁰⁴ and the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations.¹⁰⁵

Each Sanctions Law includes a list of designated individuals and/or entities¹⁰⁶ with whom certain transactions are prohibited. In addition, a person doing business “on behalf of” a listed person also is susceptible to the three Sanctions Laws.¹⁰⁷

These prohibitions apply to Canadian citizens, wherever situated, and to anyone in Canada, including corporations incorporated in Canada, whether Canadian or foreign owned (these entities and persons are referred to collectively as Covered Persons¹⁰⁸). Specifically, Covered Persons cannot deal directly or indirectly in any property, wherever situated, of the listed

101. Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments, 1994 Can. T.S. No. 23.

102. Canada also imposes sanctions on FIPA partners Lebanon, Russia, and Venezuela. *See Current Sanctions Imposed by Canada*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/sanctions/countries-pays/index.aspx?lang=eng> (last updated Jan. 16, 2018).

103. Special Economic Measures (Ukraine) Regulations, SOR/2014-60 (Can.); *See* Special Economic Measures Act, S.C. 1992, c. 17 (Can.).

104. Justice for Victims of Corrupt Foreign Officials Regulations, SOR/2017-233 (Can.); *See* Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 10 (Can.).

105. Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 (Can.); *See* Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (Can.).

106. The lists are found in the schedules to the Sanctions Laws.

107. *See* Special Economic Measures (Ukraine) Regulations, SOR/2014-60, § 3(a) (Can.); *See also* Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 Assets, § 2(a) – (b) (Can.); *See also* Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 2 (Can.).

108. *See* Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 § 2 (Can.); *See also* Special Economic Measures Act, SC 1992, c. 17, § 2 (Can.); *See also* Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 2 (Can.).

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individuals and/or entities.¹⁰⁹ Covered Persons also may not enter into or facilitate any transaction involving such property, either directly or indirectly.¹¹⁰ Finally, the Sanctions Laws also prohibit Covered Persons from providing financial services in respect of the property of the listed individuals or entities.¹¹¹

In a similar fashion, the Ukraine Regulations and the Magnitsky Regulations also prohibit making goods, wherever located, available to a designated person.¹¹² In this way, one can see the potential conflicts that may arise. For example, the Ukraine Regulations specifically prohibit investment in Crimea.¹¹³ They prohibit the importation of goods from Crimea, regardless of their origin, and the exportation of goods, wherever located, to Crimea.¹¹⁴ Since both the CUFTA and the FIPA include Crimea, establishing investments in or entering into commercial relations with persons located in Crimea may raise serious legal conflict with the Ukraine Regulations.¹¹⁵

The Magnitsky Regulations do not include the names of any Ukrainians;¹¹⁶ however, the Magnitsky Regulations include Russians, and since the Regulations extend to indirect business dealings,¹¹⁷ the Law could be contravened by doing business with a company located in Ukraine owned or controlled by a Russian person listed in the Magnitsky Regulations.

1. *Criminal Liability for Non-compliance*

The Sanctions Laws impose criminal liability for violations. Summary conviction (a less serious offence) involves fines of up to \$25,000, or prison for up to one year, or both. For an indictable offence (a more serious offence), liability is a prison term of up to five years or fines in any amount at the discretion of the court.¹¹⁸

109. See Special Economic Measures (Ukraine) Regulations, SOR/2014-60, § 3(a) (Can.); See also Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 Assets, § 2(a) (Can.); See also Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 2 (Can.).

110. See SOR/2014-60, § 3(b); See also SOR/2014-44 Assets, § 2(b); See also S.C. 2017, c. 21, § 2.

111. See SOR/2014-60, § 3(c) and (e); See also SOR/2014-44 Assets, § 2(c); See also Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 2.

112. See SOR/2014-60, § 3(d); See also S.C. 2017, c. 21, § 2.

113. See SOR/2014-60, § 4.1

114. See *Id.* § 4.1(c)–(d).

115. *Id.* §§ 1 and 4.1(a).

116. The Magnitsky Regulations list designated individuals, as set out in Schedule 1. Venezuelan and South Sudanese entities and individuals also are on the list. SOR/2017-233.

117. S.C. 2017, c. 21, § 3 (a) – (c).

118. Criminal Code, R.S.C. 1985, c. C-46, § 734(5)(a) – (b) (Can.); S.C. 1992, c. 17, § 8; S.C. 2017, c. 21, §11.

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2. *Duty to Determine and Disclose*

Covered Persons are required to determine on an ongoing basis whether they are in violation of the Sanctions Laws.¹¹⁹ Therefore, Covered Persons have a due diligence obligation in any commercial relationship with Ukrainian companies to be cognizant of changes in Ukrainian corporate ownership or control that could bring once-permitted dealings into conflict with the Sanctions Laws.

119. S.C. 1992, c. 17, § 6; S.C. 2011, c. 10, § 8; S.C. 2017, c. 21, § 6.

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