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This article highlights selected legal developments in Canada during 2009 in the areas of foreign investment review, competition law, the softwood lumber dispute, Buy American, NAFTA Chapter 11 cases, temporary foreign workers, and the transition to International Financial Reporting Standards.

## I. Foreign Investment Review**

In 2009, Canada launched a major overhaul of its foreign investment review process with amendments to the Investment Canada Act (ICA). In particular, a national security screening mechanism for foreign investments into Canada was introduced, and the monetary threshold for the general review of foreign investments (not relating to national security review) was significantly increased. In addition, Canada saw its first lawsuit filed against a foreign investor who allegedly failed to comply with undertakings given in respect of a 2007 investment.

### A. NEW THRESHOLD FOR REVIEW

Under the ICA, the federal Industry Minister must approve acquisitions of control of Canadian businesses that meet certain monetary thresholds on the basis that they are of "net benefit to Canada."[1] The new review threshold for direct acquisitions (if the target is not engaged in cultural activities[2]) is to be increased from Can$299 million in book value of the assets of the target Canadian business to Can$600 million in its "enterprise value" (EV). The amendments have also eliminated the lower review threshold of Can$5 million

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* The editor of this 2009 international law year in review was John W. Boscariol, Co-Chair, ABA Section of International Law Canada Committee, Partner and Leader of the International and Investment Law Group at McCarthy Tétrault LLP. Contributions of various authors are noted in each section. The 2008 year-in-review article for the Canada Committee is available at 43 INT'L LAW. 1057 (2009).

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1. Investment Canada Act, R.S.C., ch. 28 (1985) (1st Supp.), amended by 2009 S.C., ch. 16 (Can.).

2. A "cultural business" includes the publication, distribution or sale of books, magazines, newspapers, and the production, exhibition, distribution, or sale of film and music recordings. *Id.* ch. 14.1(6)(b).

(in book value of assets) for targets that are engaged, even minimally, in transportation services, financial services and uranium production, leaving only cultural business activities subject to the lower review threshold (as long as the foreign investor or the vendor is ultimately controlled by nationals or governments of a World Trade Organization (WTO) member country). These changes may significantly reduce the number of foreign investments subject to review.

The new review threshold will not be in effect until implementing regulations are in force. Draft regulations issued by the Government in July, among other things, define EV.[3] If the current draft regulations are finalized for investments in private companies or acquisitions of substantially all the assets used in carrying on a Canadian business, the review threshold would almost double and would triple in four years.[4] For investments in Canadian publicly traded entities, the review threshold is expected to capture fewer such transactions than previously.

## B. National Security Review Process

The most significant change to the ICA for many foreign investors is the establishment of a national security review process. Under this new regime, a national security review may be launched where the Government regards a foreign investment as potentially "injurious to national security."[5] Pursuant to such process, the Canadian Government may prohibit or attach conditions to a foreign investment in an existing Canadian business or in the establishment of a new Canadian business. If the investment has already been completed, it may order a divestiture.

### 1. *Potential Issues for Concern*

The scope of "national security" is not defined, nor are there plans to provide guidance. Without a clear definition, it is uncertain what factors the Canadian Government will consider potentially injurious to national security. For example, would the purchase of critical infrastructure or energy assets be captured? This uncertainty is further complicated by the broad application a national security review may have, catching not just large transactions, but also smaller transactions that fall below the general review threshold, minority investments that do not constitute an acquisition of control, and transactions where the target may not have a strong Canadian presence.

Foreign investors considering investing in Canadian interests may also be concerned that there is no formal mechanism to obtain pre-clearance of these transactions on na-

3. The draft regulations define EV as: (a) for acquisitions of control of a Canadian business involving the acquisition of a publicly traded Canadian corporation or other publicly traded entity (a Canadian or non-Canadian trust, partnership or joint venture), the market capitalization of the entity, plus its total liabilities minus its cash and cash equivalents; and (b) for asset acquisitions or the acquisition of a private entity, the book value of the assets of the target (the current method of calculating the review threshold). Kevin Ackhurst & Paul Beaudry, *Canada: Draft Investment Canada Regulations Establish National Security Review Process And General Review Thresholds*, MONDAQ, July 22, 2009, http://www.mondaq.com/canada/article.asp?articleid=83468.

4. If implemented in 2010, the review threshold will increase to Can$800 million by 2012 and to Can$1 billion by 2014, and is indexed thereafter.

5. Investment Canada Act ch. 25.3(6).

tional security grounds. But, early submission of a required filing will trigger a forty-five day period during which the Minister must give notice of review or possible review, except in the case of non-control minority investments. Finally, investors may expect potentially significant delays to apply if a national security review is invoked, adding as much as 130 days if the maximum prescribed periods are fully utilized.

### 2. *Mitigating Considerations*

Despite the uncertainty generated by the introduction of the national security review process in Canada, foreign investors should not be overly concerned for two reasons. First, there is no indication that the Government has been significantly frustrated in its ability to address national security concerns in the past, possibly because national security issues were shoe-horned into the "net benefit to Canada" consideration. Second, the Canadian Government's perspective on "national security" is likely to be more circumscribed in practice than in the United States. An example of this is the treatment of the Dubai Ports World's acquisition of P&O's port services business in 2006, which ignited a highly political debate in the United States, but was quietly approved in Canada.

Given the lack of certainty regarding the national security process, until there is greater clarity on how national security will be interpreted, foreign investors contemplating investment in a sector potentially linked to national security should consult with legal counsel to consider early confidential discussions with the Canadian Government to assess and address any potential concerns.

## C. Compliance with Undertakings

For the first time in the history of the ICA, the Industry Minister is suing to enforce binding commitments or undertakings given in respect of a foreign investment. In July 2009, the Canadian Government applied for an order against U.S. Steel mandating compliance with undertakings made in respect of U.S. Steel's acquisition of Stelco in 2007.[6] The Government alleges that U.S. Steel failed to comply with its commitments relating to employment and production at its Canadian facilities. The Canadian Government also requested that the court impose a daily fine of Can$10,000 for the alleged breach of the undertakings. In response, U.S. Steel argued that it has not breached its undertakings and that its inability to meet the undertakings was a result of factors beyond its control.

While this development is significant, there are reasons to believe that the facts in this case are extraordinary, and that such a response by the Canadian Government will remain exceptional. Nevertheless, the U.S. Steel case should alert foreign investors to the fact that the Canadian Government takes undertakings seriously and monitors compliance.

6. News Release, Industry Canada, Industry Minister Clement Takes Further Steps to Hold U.S. Steel to Its Investment Canada Act Commitments (July 17, 2009), *available at* http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html.

## II. Competition Law*

### A. Legislative Developments

On March 12, 2009, the Canadian Parliament passed legislation incorporating significant amendments to Canada's Competition Act (the Act).[7] A summary of the key amendments is provided below.

#### 1. *Merger Review*

The Act's merger review process has been amended to be much more closely aligned with the U.S. merger review procedures under the Hart-Scott-Rodino Antitrust Improvements Act. Thus, a notifiable transaction may not be completed until the expiry (or early termination) of a thirty-day waiting period following notification. Before the expiry of this thirty-day period, if issues remain that it wishes to investigate, the Competition Bureau (the Bureau) may issue a supplementary request for information, in which case the proposed transaction may not be completed until thirty days after the requested information is provided to the Bureau.

Additionally, the transaction size threshold for pre-merger notification has been increased. Now, transactions will not be notifiable if the book value of the target's assets in Canada, or its annual gross revenues from sales in or from Canada, do not exceed Can$70 million (up from the previous Can$50 million threshold). This threshold amount will increase in subsequent years according to a formula that is tied to changes in the inflation rate.

Finally, the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one.

#### 2. *Cartels*

Effective March 12, 2010, the amendments will repeal the Act's existing conspiracy offense and replace it with a per se criminal prohibition against agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers, or territories. Unlike the current conspiracy provision, the new offense will not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly. But, liability can be avoided if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offense and is necessary for giving effect to the objective of that broader agreement. Maximum penalties under the new offense are fourteen years imprisonment and a Can$25 million fine per count, up from the current maximums of five years and Can$10 million per count.

Also effective March 12, 2010, all other agreements between competitors that have the effect of lessening or preventing competition substantially will be dealt with under a new civil provision. The Bureau will be able to apply to the Competition Tribunal (the Tribunal) under this new provision for an order to remedy the effects of such agreements.

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7. Bill C-10, Budget Implementation Act, 2009, 2d Sess. 40th Parl., 2009.

### 3. *Increased Penalties/Expanded Offenses*

Additional amendments were also enacted to expand the scope of certain offences or increase their penalties. These include: (a) granting the Tribunal the power to order an administrative monetary penalty of up to Can$10 million for contravention of the abuse of dominance provisions and up to Can$15 million for subsequent contraventions; (b) increasing the maximum penalties for misleading advertising and obstruction of a Bureau investigation; and (c) expanding the bid-rigging offense to include a prohibition against persons agreeing to withdraw their already-submitted bids.

### 4. *Pricing Matters*

The amendments repealed the Act's price discrimination, predatory pricing, and promotional allowance offenses. But conduct that could formerly be addressed under these provisions may still form the basis of an application under the Act's abuse of dominance provisions. The price maintenance offense was also repealed, but replaced with a similar civil provision under which the Bureau can apply to the Tribunal for relief in situations where the price maintenance conduct is having or is likely to have an adverse effect on competition in a market. Private parties are also entitled to apply to the Tribunal for remedies under this new provision.

## B. Administrative Developments

On August 5, 2009, Melanie Aitken was appointed as Commissioner of Competition (Commissioner) for a five-year term. As Commissioner, Ms. Aitken will be the head of the Bureau and have the statutory responsibility for administering and enforcing the Act. In addition to aiming to ensure the effective, transparent, and efficient implementation of the amendments to the Act, Ms. Aitken has stated that one of her priorities as Commissioner will be to "bring forward responsible cases to clarify the law."[8] As a result, an increased number of cases are expected to be brought in the coming years.

## C. Cartels

Guilty pleas continued to be made following an investigation into price fixing in the retail gasoline market in Quebec province. Between March and October 2009, seven individuals and two companies pleaded guilty for their roles in the conspiracy.[9] Since charges were first laid in June 2008, "nine individuals and six companies have pleaded guilty, with fines totaling over Can$2.7 million. Of the nine individuals who have pleaded guilty, five have been sentenced to terms of imprisonment totaling forty-eight months."[10] Also in 2009, four air cargo carriers, Qantas, Air France, KLM, and Martinair, pleaded guilty for

8. Melanie L. Aitken, Commissioner of Competition, Speech at the Canadian Bar Association, Competition Law Section, Annual Conference (Sept. 25, 2009), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html.

9. Press Release, Competition Bureau, Ninth Individual Sentenced in Quebec Price-Fixing Cartel (Oct. 23, 2009), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03145.html.

10. *Id.*

their roles in an air cargo cartel affecting Canada.[11] Total fines imposed on the companies exceeded Can$10 million.

### D. Abuse of Dominance

The Bureau announced on June 16, 2009 that it had entered into a consent agreement with two commercial waste collection firms, Waste Services (CA) Inc. and Waste Management of Canada Corp., to resolve issues raised by contracts each company used with its respective customers on Vancouver Island (British Columbia).[12] The Bureau alleged that the two companies jointly engaged in an abuse of dominance by using long-term contracts and restrictive terms to lock in customers and exclude competitors. Notably, neither the Bureau's press release nor the consent agreement indicates that the Bureau found any agreement or understanding between the companies with respect to the challenged conduct.

### E. Class Actions

Two decisions in 2009 certified price-fixing class actions on behalf of a class, which includes indirect purchasers.[13] Previous cases involving price-fixing claims by indirect purchasers had been denied class certification on the ground that the plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis.[14] In those cases, the defendants successfully argued that there was not sufficient evidence that the increased price was passed through to each indirect purchaser. If left undisturbed on appeal, the decisions could significantly broaden the scope for indirect purchaser price-fixing class actions in Canada.

## III. NAFTA Chapter 11 Cases*

In 2009, several significant developments under Chapter 11 of NAFTA (the investment chapter) involved Canada. For instance, Dow AgroSciences LLC filed its Notice of Arbitration against Canada in relation to measures by Quebec banning the sale of certain pesticides; the Government of Canada filed its rejoinder in the arbitration commenced by Merrill & Ring Forestry L.P. relating to log export measures by British Columbia; and there were some procedural orders by the arbitration tribunal in the arbitration commenced by V. Gallo.

This article focuses on substantive developments, including: (i) a Notice of Intent to Arbitrate filed against Canada by AbitibiBowater Inc. for damages of $300 million; (ii) a revised Statement of Claim filed by Centurion Health relating to private health care ser-

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11. Press Release, Competition Bureau, Fourth Guilty Plea in Air Cargo Price-Fixing Conspiracy (July 7, 2009), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03094.html.

12. Press Release, Competition Bureau, Competition Bureau Cracks Down on Joint Abuse of Dominance by Waste Companies (June 16, 2009), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03081.html.

13. Irving Paper Ltd. v. Atofina Chems. Inc., 47025 [2009] O.J. 4021 QUICKLAW (O.S.C.J. Sept. 28, 2009); Pro-Sys Consultants Ltd. v. Infineon Techs. AG, L043141 [2008] B.C.S.C. 575 (Can.).

14. *See, e.g.*, Chadha v. Bayer Inc. [2003], 223 D.L.R. (4th) 158 (O.C.A.) (Can.).

* Prepared by Cliff Sosnow, Prakash Narayanan, and David Peaker, at Blake, Cassels & Graydon LLP.

vices in Canada; and (iii) a Statement of Claim filed by Clayton/Bilcon relating to environmental assessments by Nova Scotia.

### A. AbitibiBowater Claim

On April 23, 2009, AbitibiBowater Inc. (Abitibi) submitted a Notice of Intent to Arbitrate for an alleged violation of Chapter 11 by the Canadian Government.[15] The claims arose out of legislation enacted by the Government of Newfoundland after the announcement by Abitibi of its intention to close its Grand Falls mill located in Newfoundland. Abitibi argued that the legislation violated NAFTA Articles 1110 (Expropriation), 1105 (Minimum Standard of Treatment), 1103 (Most Favored Nation Treatment) and 1102 (National Treatment). Abitibi claimed more than Can$300 million in damages and costs.[16] Among other things, the legislation, which was specific to Abitibi, terminated timber licenses, land rights, and water use rights held by Abitibi in the Province, in addition to revoking several agreements and a Charter lease. Furthermore, it expropriated various other rights and interests held by Abitibi and limited the compensation available and liability for actions associated with the operation of the legislation.

Abitibi argued that the legislation constituted an expropriation and did not meet any of the criteria necessary to make it lawful. Abitibi argued that there was no valid public purpose for the expropriation, on the basis that the Newfoundland legislation would not save any jobs at the mill or in the surrounding community, and was too specific in its focus on one investor to constitute an exercise of a general right to control the Province's natural resources. Moreover, Abitibi alleged that the expropriation was discriminatory, in that it applied only to one company and precluded that company from recourse to the courts, and that the expropriation was accomplished without due process and in violation of the minimum standards of international law. To support this latter assertion, Abitibi stated that the Province rushed the legislation into law and did so absent meaningful consultation with Abitibi. Finally, Abitibi stated that the compensation offered was inadequate, in that it was offered for some assets but not others.

Abitibi claimed that it was denied fair and equitable treatment, in contravention of Article 1105. It based its claim on the assertion that the expropriation was arbitrary, irrational, and discriminatory, that it excluded Abitibi from access to the courts, and that it violated Abitibi's legitimate expectation of equal treatment vis-à-vis other investors.

Finally, by singling out a single foreign investor (Abitibi's Canadian operations), Abitibi claims that the legislation was discriminatory in contravention of Articles 1102 and 1103. Abitibi alleged that other companies acted in similar ways, but were not subject to similar legislative reactions.

As of this writing, no Notice of Arbitration appears to have been served, so no tribunal has been convened or hearing dates set. The status of consultations, if any, is not known.

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15. Press Release, AbitibiBowater Inc., AbitibiBowater Submits NAFTA Notice of Intent in Response to Illegal Expropriation of Rights and Assets in Newfoundland and Labrador (Apr. 23, 2009), *available at* http://www.abitibibowater.com/media/latest-news.aspx?id=636&detail=true&reqid=1279914.

16. *Id.*

B. CENTURION HEALTH CORPORATION CLAIM

A Notice of Arbitration and a revised Statement of Claim were filed against the Government of Canada by Centurion Health, a U.S. company that provides private health care services. The claim included allegations that Canada violated Article 1102 by providing Canadian investors with easier access to the health care market than U.S. investors. This claim was based on allegations that there are numerous privately owned medical facilities operated in Canada, none of which is owned by a U.S. company. Additional claims are made that the provinces and territories are not sufficiently accountable to the federal government with respect to health care delivery, and that this has resulted in breaches of NAFTA obligations, which have caused harm to the claimant. The claim also included allegations that both Articles 1103 and 1104 were breached, suggesting that Canada has entered into trade agreements since NAFTA that accord better treatment to investors from other countries. The claim alleges that Canada treated the plaintiff arbitrarily in violation of Article 1105, abusing "its delegated authority to run the health care monopoly."[17] The factual basis for the claim of an expropriation in violation of Article 1110 was that some of the claimant's medical technology was apparently shipped back to the United States. Finally, the claim alleged that Articles 1502(3)(a) and 1503(2) were breached by the Canadian Government's failure to ensure that municipalities and regional health care authorities abide by Canada's Chapter 11 obligations. It is alleged that municipalities unfairly draw out zoning applications in an effort to discourage U.S. investment in this area.

C. CLAYTON/BILCON CLAIM

The complainants' Statement of Claim and the Canadian Government's Statement of Defense were filed in 2009.[18] The claim stemmed from the environmental assessment of a quarry and marine terminal in Nova Scotia, and argued that both the federal Government and the Government of Nova Scotia breached their Chapter 11 obligations towards the complainant U.S. investors. In claiming that the initial permit had more restrictive terms than those usually found in permits for similar mines, and that the environmental evaluation was more comprehensive than what is typical for such mines, the claimants alleged a breach of Article 1102. The claimants also argued that certain actions of the Department of Fisheries and Oceans (DFO) were unreasonable, and constituted a breach of Article 1105: the DFO allegedly stalled "test blasts" at the site, established arbitrary criteria for the test blasts, and set unreasonable conditions for fish habitat compensation, among other things.[19] Moreover, the complaint argued that the panel assembled to conduct the evaluation did not follow an "analytical decision-making framework" that the claimants suggest was mandatory.[20] Finally, with respect to Article 1105, the claimants asserted that

17. Notice of Arbitration for Claimant at 35, Jan. 5, 2008, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CenturionHealthCorp.pdf.

18. Foreign Affairs and Intl. Trade Canada, NAFTA Chapter 11 Investment, Cases Filed Against the Government of Canada (Nov. 26, 2009), http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/clayton_archive.aspx?lang=en.

19. Statement of Claim at 36(a)-(c), William R. Clayton, et al v. Canada (2009), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/BilconStatementClaim+Exhibits.pdf.

20. *Id.* at 36(d).

there was a refusal to sell a public road to the claimants, and this refusal was irrational and motivated by bias.[21] The complainants are seeking damages in excess of Can$100 million.[22]

The Government's defense argued not only that these breaches did not occur, but also that certain parts of the claim were outside the jurisdiction of the arbitral panel as they are untimely, and the claimants lacked standing. The Government alleges that the initial permit was granted to a Canadian company that later partnered with Bilcon and that no evidence was provided to show that Bilcon acquired an interest in the permit to operate the quarry. Furthermore, the Government argued that no NAFTA breach could have existed before such an assignment of interest to Bilcon, and therefore the assignment could not give rise to such a breach. The Government argued that complaints about the conduct of the panel itself could not be considered as the panel should not be considered an organ of the Government.

## IV. Canada-United States Trade Relations*

### A. Softwood Lumber Dispute

The United States-Canada Softwood Lumber Dispute is one of the longest-running trade disputes in modern history. The core of the dispute has been the claim by the U.S. lumber industry that the Canadian federal and provincial governments unfairly subsidized the Canadian industry by setting stumpage fees to harvest timber at below-market prices. The dispute can be divided into four parts.

#### 1. *Background*

Lumber I: The dispute began in 1982 when the U.S. lumber industry petitioned the United States government to impose a countervailing duty on all imports of softwood lumber from Canada.[23] The Department of Commerce (Commerce) ultimately determined that Canada's stumpage system was not specific to any single industry, and was thus not countervailable.

Lumber II: In 1986, the U.S. lumber industry once again filed new petitions. This time Commerce determined that the Canadian programs were countervailable with a duty of fifteen percent ad valorem.[24] But before the duty was imposed, the U.S. and Canadian governments entered a Memorandum of Understanding (MOU) that created a phased tariff.

Lumber III: In 1991, Canada informed the United States that it was withdrawing from the MOU.[25] Commerce, in response, self-initiated a countervailing duty investigation and again imposed countervailing duties on all softwood lumber imports from Canada.

21. *Id.* at 36(b).
22. *Id.* at 42(a).
* Prepared by Marcela B. Stras, Co-Chair of Canada Committee, Chair of Business Immigration and Trade Practices at Cozen O'Conner.
23. Fair Labor Coalition, U.S.-Canada Lumber Trade Dispute: A Brief History 1 (2009), http://www.fairlumbercoalition.org/doc/dispute_history.pdf.
24. *Id.*
25. *Id.*

Commerce's determination was appealed by Canada to a binational panel under the Canada-U.S. Free Trade Agreement. The panel voted along national lines and determined that the Commerce determination was not supported by substantial evidence. The United States challenged the panel's decision before an extraordinary challenge committee. In 1996, the United States and Canada reached a five-year agreement, the Softwood Lumber Agreement, ending Lumber III.[26] Under the terms of the agreement, Canada was limited to 14.7 billion board feet in softwood lumber exports to the United States per year. But, when the agreement ended in 2001, both countries were unable to reach a new agreement.

Lumber IV: As soon as the 1996 Softwood Lumber Agreement ended, the U.S. lumber industry again filed new a countervailing duty claim.[27] But this time the industry also filed an antidumping claim claiming price discrimination. In April 2002, Commerce issued affirmative countervailing and antidumping decisions and imposed both duties. From this point, the challenges were many and from both sides. They mainly consisted of WTO Appellate Body and NAFTA Chapter 19 decisions, administrative and government actions, and even court cases.

Finally, in April 2006 the United States and Canada reached a tentative settlement under which the United States would end all duties if all lumber prices stayed above a certain range. Below the price range, a mixed export tax/quota was imposed. The 2006 Softwood Lumber Agreement (SLA) also established a dispute resolution mechanism at the London Court of International Arbitration (LCIA).[28] Since its enactment, both governments have had consultation and arbitration requests before the LCIA.

### 2. *2009 SLA Update*

In March 2008, the LCIA tribunal determined that Canada breached the SLA by failing to calculate quotas properly during the first half of 2007. On February 26, 2009, the LCIA issued a decision on a remedy for the breach, which Canada was to cure by March 28, 2009.[29] According to the LCIA, an appropriate adjustment for the breach is that Canada must collect an additional ten percent ad valorem duty on softwood lumber shipments from the Eastern Canadian provinces until Can$68.26 million had been collected. Instead of collecting the duties, Canada offered the U.S. government a payment of US$36.66 million, an offer that was quickly rejected. In response, on April 2, 2008, Canada asked the LCIA to determine whether Canada had cured the breach with the payment offer. On September 28, 2009, the LCIA found that the payment offer did not cure the breach, that no government-to-government payment could cure a breach of the SLA because it would have no effect on softwood lumber exports to the United States.[30] According to the U.S. Trade Representative (USTR), a consequence of the LCIA's decision is that the United States may continue to impose the ten percent ad valorem duties on

26. *Id.* at 2.

27. *Id.*

28. John R. Crook, *Contemporary Practice of the United States: United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration*, 102 AM. J. INT'L L. 192 (2008).

29. Announcement of the Office of the United States Trade Representative, Tribunal Finds Canada Failed to Cure Breach of the Softwood Lumber Agreement (Nov. 4, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/september/tribunal-finds-canada-failed-cure-breach-softwood.

30. *Id.*

softwood lumber imports from the Canadian provinces of Ontario, Quebec, Manitoba, and Saskatchewan until it has collected the Can$68.26 million.[31] Under the SLA, the LCIA decisions are binding with no right to appeal.[32] The 2006 SLA is to remain in force for seven years with a possibility of a two-year extension.

### B. The Buy American Provisions

The Buy American provisions in the U.S. stimulus package,[33] which became law on February 17, 2009, have caused new friction with Canada. Specifically, the target has been Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA), which requires that all of the iron, steel, and manufactured goods used in ARRA-funded projects for construction, alteration, maintenance, or repair of "a public building or public work" be "produced in the United States."[34]

In response, in June 2009, Canada's mayors narrowly passed a resolution to block U.S. companies from bidding on city contracts. The resolution, which was passed at the Federation of Canadian Municipalities conference in Whistler, B.C., stated that the federation should support cities that adopt policies that allow them to buy only from companies whose home countries do not impose trade restrictions against Canadian goods. The resolution was later withdrawn to give the Canadian government time to lobby the Obama administration for an exemption or other resolution to the problem.

In August of 2009, the Canadian government opened negotiations with the Obama administration, seeking changes to Buy American rules by offering a deal to provide American firms greater access to provincial and city procurement in Canada in exchange for allowing Canadian companies to bid on contracts for stimulus-funded state and municipal projects in the United States. In return for added, but temporary, access to Canadian subnational contracts, the Harper government asked that the United States grant a waiver to Canadian firms from the Buy American provisions in the stimulus package. The Obama administration suggested that Canadian provincial governments sign the WTO's Government Procurement Chapter, which would have the same effect as a new bilateral agreement with the United States of banning government conditions on goods and services contracts. At the time of this writing, the USTR is reviewing the Canadian proposal, negotiations are moving slowly, and no resolution is in sight.

31. *Id.*

32. *Id.*

33. Buy American Act, 41 USCA §§ 10a-10d (2009).

34. Section 1605(b) of ARRA sets forth three situations that warrant a finding by the head of the relevant federal procuring department or agency that application of ARRA's Buy American provision should be waived: 1. Application would be "inconsistent with the public interest"; 2. "Iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality"; and 3. Use of US-produced iron, steel and manufactured goods would "increase the cost of the overall project by more than 25 percent." American Recovery & Reinvestment Act of 2009 § 1605, PL 11-5 (2009).

## V. Temporary Foreign Worker Program*

Under the Service Canada/Human Resources and Skills Development Canada's (HRSDC) Temporary Foreign Worker Program, employers are permitted to hire foreign workers to work temporarily in Canada both to fill Canadian labor shortages and to bring new skills and knowledge to help the economy.[35]

When a Canadian employer seeks to hire a foreign worker on a temporary basis, Section 203 of the Immigration and Refugee Protection Regulations requires an assessment of the impact that hiring the temporary foreign worker is likely to have on the Canadian labor market. In making this assessment, HRSDC considers such factors as:

> (a) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or Permanent Residents; (b) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian Citizens or Permanent Residents; (c) whether the employment of the foreign national is likely to fill a labor shortage; (d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally acceptable Canadian standards; (e) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian Citizens or Permanent Residents; and, (f) whether the employment of the foreign national is likely to adversely affect the settlement of any labor dispute in progress, or the employment of any person involved in the dispute.[36]

### A. Changes to Advertising Policies by Service Canada

In January 2009, the Canadian government implemented several significant policy changes, eliminated the 'Occupations under Pressure list' initiative, which allowed employers to hire foreign workers in designated occupations with minimum or no advertisement, and introduced more stringent minimum national advertising guidelines under which all occupations are now subject to the new minimum recruitment requirements before a Labor Market Option (LMO) can be granted in favor of a foreign worker.[37] The new requirements follow a general rule that lower-skilled positions, for which a foreign worker is being considered, will be subject to more onerous advertisement and recruitment requirements.

For all the occupational levels, advertising must have been carried out no more than three months before the employer seeks permission to hire a foreign worker. The employer should also demonstrate reasonable ongoing recruitment efforts (specific to each

* Prepared by Sergio R. Karas at Karas & Associates.

35. Human Resources and Skills Development Canada, Temporary Foreign Worker Program (Jan. 7, 2010), http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml.

36. Immigration and Refugee Protection Regulations, 203(3)(a)-(f), SOR/2002-227 (Can.).

37. Human Resources and Skills Development Canada, Temporary Foreign Worker Program Minimum Advertising Requirements (Aug. 6, 2009), http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/advertrecrutment.shtml.

region), which include communities that face barriers to employment (e.g. Aboriginals, older workers and other disadvantaged groups).[38]

In addition, as part of the LMO process, employers should provide proof of advertisement and the results of their efforts to recruit Canadians or permanent residents. These records have to be maintained for six years as stipulated in provincial and federal legislation, such as the Income Tax Act.[39]

### B. Elimination of Application to Extend a Labor Market Opinion

Effective April 27, 2009, all employers must submit a new LMO application when requesting permission to hire a foreign worker, even where the person has previously received an initial LMO and is currently working for the same employer. The application to extend a LMO has been discontinued. In cases where employers anticipate that their human resource needs will continue beyond the period covered in the temporary foreign worker's work permit, employers should apply for a new LMO at least four months prior to the date the Work Permit expires, to ensure that a new LMO is obtained with sufficient time, and avoid unnecessary delays that can disrupt the issuance of a new Work Permit.[40] This constitutes a significant policy change that will pose severe challenges to many employers, as new evidence of recruitment efforts will have to be submitted with the new LMO application.

### C. Proof of Past Compliance

A further policy change involves an effort to monitor compliance: employers seeking a new LMO, may be required to show proof of past compliance with the terms of previous offers of employment to temporary foreign workers (e.g., wages and working conditions).[41] Unless requested, employers are not required to submit proof of compliance with their LMO application. But from a practical point of view, it would be prudent to do so to avoid unnecessary document requests and delays. A negative LMO could be issued if a return employer refuses to demonstrate proof of compliance with the terms of previous offers of employment.

### D. Changes to the Federal Skilled Worker program

In addition to the changes to the LMO process announced by Service Canada, on November 28, 2008, the Federal Skilled Worker Permanent Resident Program was also overhauled by Citizenship and Immigration Canada, as a result of consultations with stakeholders and recognition of the changing economic conditions.[42]

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38. *Id.*
39. *Id.*
40. Resources and Skills Development Canada, Temporary Foreign Worker Program Elimination of the Foreign Worker Application to Extend a Labour Market Opinion (June 23, 2009), http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/whatsnewextlmo.shtml.
41. *Id.*
42. Citizen and Immigration Canada, Eligibility for Federal Skilled Worker Applications (Jan. 8, 2010), http://www.cic.gc.ca/english/immigrate/skilled/apply-who-instructions.asp#list.

For those applicants who do not have an Arranged Employment Confirmation, or who do not qualify for one of the streams in the new Canadian Experience Class (CEC- graduate students in Canada or Temporary Foreign Workers), or who are not selected by a Provincial Nominee Program (PNP), the road towards permanent residence has become rockier. For those applicants, the new selection criteria now hinges upon possessing education and experience in one of the listed occupational categories published in the new Ministerial Instructions, which can be adjusted from time to time. This change was implemented to provide the Canadian government with greater control over the occupational background of would-be permanent residents and to accommodate industry sectors where a labor shortage may exist, while at the same time making it more difficult for those applicants in other occupations to meet the requirements.

Under the new selection criteria, comprised of a list of thirty-eight occupations, applicants must first demonstrate that they are qualified and possess at least one year of experience in a designated occupation in the immediately preceding ten-year period, prior to submitting an application for permanent resident status under the regular Federal Skilled worker class.[43] In practice, the occupations list acts as a filter.

This change does not affect applicants who can apply under the CEC, have Arranged Employment confirmations, or have been selected under PNPs.

All applicants in the Federal Skilled Worker program must still score at least 67 points out of a maximum of 100 points under the government's assessment criteria, which includes factors such as age, education, work experience, language ability, arranged employment, and adaptability factors.[44] If an applicant meets the new criteria, he or she will benefit from shorter processing times, as promised by Citizenship & Immigration Canada.

The changes in the Foreign Worker Program and to the Federal Skilled Worker selection criteria represent signs of the changing economic times. Employers are advised to seek competent legal counsel to consult about the specifics of each situation before filing applications requesting permission to hire foreign workers.

## VI. Transition to International Financial Reporting Standards*

International Financial Reporting Standards (IFRS) will replace Canadian Generally Acceptable Accounting Principles (Canadian GAAP) for publicly accountable enterprises (PAEs)[45] commencing with accounting periods beginning on or after January 1, 2011.

IFRS are a single set of global accounting standards that have been developed over the last three decades by the International Accounting Standards Board (IASB) and its predecessor, the International Accounting Standards Committee. The IASB cooperates with national standards setters to achieve convergence in accounting standards around the world. IFRS began to be widely applied around the world following the European Commission's 2005 adoption of IFRS for public companies reporting within the European

43. *Id.*

44. Citizen and Immigration Canada, Skilled Workers and Professionals: Who Can Apply (Jan. 8, 2010), http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp.

* Prepared by John C. Roberts, Partner at McInnes Cooper.

45. PAEs include public companies and entities that hold assets in a fiduciary capacity for a broad group of outsiders as one of their primary businesses (excluding non-profit and government entities).

Union. Today, over 100 countries either require or permit the use of IFRS for public company reporting.[46]

There are fewer rules and more alternatives under IFRS than under current Canadian GAAP, and considerable judgment will be required to determine which alternative is the most appropriate treatment. The amount of disclosure required under IFRS regarding the choice of alternatives will be greater than what is required under current Canadian GAAP.

The large accounting firms, Canadian Accounting Standards Board (AcSB) and Canadian Institute of Chartered Accountants have each published extensive materials providing detailed descriptions of the accounting issues raised in the transition. The Canadian Securities Administrators (CSA) have also published concept papers and notices describing proposed changes to Canadian securities rules in connection with the implementation of IFRS.

The purpose of this article is not to provide a detailed review of the differences between IFS and current Canadian GAAP or the proposed changes to Canadian securities laws; but instead to analyze the decision to adopt IFRS and some of the burdens that IFRS will impose on smaller public companies in Canada.

## A. Canada's Decision to Adopt IFRS

Following a lengthy review and consultation process on whether to maintain a separate Canadian GAAP and, if not, whether to converge with U.S. GAAP or IFRS, the AcSB adopted a 2006 strategic plan to converge current Canadian GAAP for PAEs with IFRS by 2011.

The AcSB decided to discontinue its strategy of U.S. GAAP harmonization, partly in recognition that the Financial Accounting Standards Board (FASB) was in the process of adopting a convergence program to move U.S. GAAP from a detailed, rule-oriented focus towards a more principles-based focus, similar to IFRS. The AcSB also anticipated lower cost of compliance with a principles-based accounting framework such as IFRS versus the rules-based U.S. GAAP system, and that the use of IFRS would improve accessibility to global capital markets, possibly reducing the cost of capital for Canadian companies and thereby improving their global competitiveness.

The principal concerns expressed about IFRS convergence during the AcSB strategic review were:

- that the same transaction might be treated differently in financial statements of different entities;
- multiple sets of financial reporting standards would impose an unwarranted burden; and
- the potential uncertainty as to which set of standards should apply in some circumstances.[47]

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46. AICPA, International Financial Reporting Standards (IFRS) (2008), http://www.ifrs.com/pdf/IFRSUpdate_V8.pdf.

47. AcSB, Accounting Standards in Canada: New Directions 12 (2006), http://www.acsbcanada.org/documents/item19614.pdf

The U.S. Securities and Exchange Commission (SEC) published a proposed roadmap (Roadmap) on November 14, 2008[48] that could lead to the use of IFRS by U.S. issuers beginning in 2014. The SEC will decide by 2011 whether to mandate the use of IFRS for U.S. issuers on the basis of the progress of meeting certain milestones set out in the Roadmap. New SEC Chairman, Mary Schapiro, told the Senate Banking Committee during her confirmation hearing that she "will not be bound by the existing roadmap that's out for public comment,"[49] citing concerns about the independence of the IASB and the quality of the IFRS accounting standards:

> When it comes to international accounting standards, it's critical that these standards are converged in a way that does not kick off a race to the bottom. American investors deserve and expect high standards of financial reporting, transparency, and disclosure–along with a standard setter that is free from political interference and that has the resources to be a strong watchdog. At this time, it is not apparent that the IASB meets these criteria, and I am not prepared to delegate standard-setting or oversight responsibility to the IASB.[50]

Charles Neimeier, a member of the Public Company Accounting Oversight Board has also criticized the Roadmap and proposed a return to the policy of convergence, "not planned capitulation."[51] He believes that the focus should be placed on quality, not speed.

If the United States' transition proceeds, there will likely be additional changes to IFRS as the IASB makes concessions to the United States, which will add additional costs to Canadian issuers. It is not entirely clear why the AcSB felt the need to act in advance of the United States on this issue.

### B. Smaller Public Companies

Concerns were expressed to the AcSB during the strategic planning process that smaller public companies would have greater difficulty coping with IFRS because they have fewer resources available to deal with the challenges. The AcSB noted that smaller public companies may also have less complex businesses and transactions which would tend to make the transition easier. But, based on experience with the EU transition to IFRS, financial disclosures may be expected to increase by upwards of thirty percent over that required by current Canadian GAAP.

The Expert Panel on Securities Regulation recognized that principles based regulations should be complimented by proportionate based regulation to tailor regulation appropri-

48. Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers Release No. 33-8982, 73 Fed. Reg. 70,816 (proposed Nov. 14, 2008).

49. Sarah Johnson, *Mary Schapiro Vows to Be Tough Enforcer*, CFO, Jan.15, 2009, *available at* http://www.cfo.com/article.cfm/12958299?f=singlepage.

50. Questions from Senator Carl Levin for Mary Schapiro, Nominee to be Chair of the Securities and Exchange Commission (Jan. 8, 2009), *available at* http://levin.senate.gov/newsroom/supporting/2009/PSI.SchapiroResponses.012209.pdf.

51. Charles D. Neimeier, Member PCAOD, Keynote Address on Recent International Initiatives, 2008 Sarbanes-Oxley, SEC and PCAOB Conference (Sept. 10, 2008).

ately to small public companies.[52] Some elements or proportionate based securities regulation already exist in Canada, principally with respect to venture issuers listed on the TSX Venture Exchange which, due to their small size and early stage of development are often subject to less onerous regulatory requirements.

The U.S. Roadmap proposed a phased three-year transition depending on company size.[53] This recognizes that the benefits of the conversion to IFRS may not be as great for smaller issuers. There has been no similar recognition to date in Canada that the costs of IFRS may exceed the benefits for smaller issuers. This is surprising–given the abundance of smaller issuers in Canada and the recognition of the need for proportionate regulation.

It remains to be seen whether many venture issuers will have the expertise, systems, or resources in place to complete the transition to IFRS, and whether any proportionate based regulation will be provided with respect to the transition to IFRS for venture issuers.

52. Expert Panel on Securities Regulation, Final Report and Recommendations (2009), *available at* http://www.expertpanel.ca/eng/documents/Expert_Panel_Final_Report_And_Recommendations.pdf.

53. Large accelerated filers (revenue exceeding US$700 million) would be required to transition first, followed by accelerated filers (revenue exceeding US$75 million), and then non-accelerated filers.