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## Canada

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## Canada

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# Canada

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## I. Foreign Investment\*

The most significant foreign investment event in 2010 is the Canadian government's refusal to allow BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan ("PotashCorp"). This action marks only the second rejection of a proposed transaction outside of the cultural sector in the twenty-five year history of the Investment Canada Act (ICA).

Apart from this decision, there has been a lack of action with respect to the 2009 amendments to the ICA, especially with respect to the review threshold of direct control acquisitions, the treatment of state-owned enterprise investors, and the national security review process for foreign investors. There has been, however, some activity in the ongoing lawsuit against U.S. Steel for its alleged failure to comply with undertakings.

### A. REJECTION OF BHP BILLITON'S PROPOSED ACQUISITION OF POTASH CORPORATION

The federal Industry Minister ("Minister") rejected BHP Billiton's bid for PotashCorp because it did not meet the "net benefit to Canada" test under the ICA. In general, the evaluation of this standard involves economic considerations (*e.g.*, the impact of the proposed investment on employment, capital expenditures, head office location, participation of Canadians in senior management, etc.) and the industrial and economic policy objectives of a province likely to be affected significantly by the investment. It is a relatively subjective process, and the Minister has very broad discretion. Moreover, there is very little interpretive history on this standard.<sup>1</sup>

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1. The first transaction to be rejected was the 2008 proposed acquisition by a U.S. company, Alliant Techsystems, of the geospatial business of MacDonald, Dettwiler and Associates Ltd. for (broadly speaking) "national interest" reasons, among other rationales reported such as the protection of Canadian sovereignty in the Arctic under the "net benefit" test.

The Minister's decision is regarded as a political response to the public relations campaign led by the Premier of Saskatchewan (the province in which most of PotashCorp's mines are located) that galvanized popular opposition to the deal. For example, there has been considerable discussion of potash as a "strategic resource," including by at least one member of the federal cabinet.<sup>2</sup> There also appears to be an inconsistency in the facts. As the basis for his decision, the Minister questioned whether BHP Billiton was prepared to make sufficient commitments with respect to capital expenditures and whether BHP Billiton had sufficient expertise in mining and marketing potash.<sup>3</sup> He also noted that PotashCorp is a member of Canpotex, the potash export-marketing firm.<sup>4</sup> Nevertheless, when BHP Billiton withdrew its application on November 14, 2010, it made public its proposed undertakings to the Canadian government; they appeared extensive and unprecedented in certain respects.

The international investment community will be listening attentively as the Minister provides more clarity on how, if at all, BHP Billiton has affected the Minister's review of future investments, especially as to prospects for future investments in other resource sectors such as oil and gas and perhaps in Canadian icons (e.g., Research In Motion). The government has been seen as a strong supporter of foreign investment in the past and will undoubtedly wish to promote itself as welcoming of foreign capital.

#### B. REVIEW THRESHOLD

A key change in the 2009 ICA amendments was that the threshold for review of direct acquisitions of control by WTO-member based investors was to increase from the 2009<sup>5</sup> level of C\$312 million in book value of assets of the Canadian business to C\$600 million in "enterprise value" ("EV") for the two years following the implementation of regulations.<sup>6</sup> In all likelihood, this amendment will decrease the number of transactions that will be subject to review; however, the government has still not promulgated final regulations. It is unclear why the government has delayed in promulgating regulations to implement the higher EV review threshold, but foreign investors should welcome regulations that offer certainty and emphasize the overall value of the target enterprise.

#### C. TREATMENT OF STATE-OWNED ENTERPRISE INVESTORS

Despite issuing guidelines three years ago regarding additional criteria the Canadian government will consider in reviewing investments by state-owned enterprises ("SOEs"), Canada has not to date taken a restrictive stance towards state-owned investment. The warming of Canada's relations with China in 2009, coupled with the economic recession (and the consequently higher demand for investment capital) and a softening of concerns

2. Eric Reguly, Andy Hoffman & Brenda Bouw, *BHP's Hopes Fade as Ottawa Calls Potash 'Strategic'*, THE GLOBE AND MAIL, Nov. 5, 2010, at B1.

3. See Jeffrey Hodgson, *BHP Potash Inexperience Weighed Against Bid-Canada*, REUTERS, Nov. 14, 2010, <http://www.reuters.com/article/idUSN1421378920101115>.

4. See Cassandra Kyle, *BHP Billiton Withdraws Potash Bid, Citing 'Net-Benefit' Bar*, POSTMEDIA NEWS, Nov. 15, 2010, <http://www.canada.com/news/Billiton+withdraws+potash+citing+benefit/3827505/story.html>.

5. The review threshold for 2010 is only C\$299 million due to deflation.

6. The amount would then be increased to C\$800 million for the two years following, and to C\$1 billion for the following two years, to be indexed according to inflation thereafter.

globally about SOEs<sup>7</sup> may all be factors underlying the government's reticence to restrict foreign investment by SOEs. Indeed, the Canadian government has not prohibited any major SOE investments since the introduction of the SOE Guidelines. These approvals confirm that the government is not inherently hostile to state-owned acquirers. In addition, it is clear that the government does not automatically presume that SOE investments raise national security concerns. Both of these developments should comfort SOEs seeking to invest in Canada.

#### D. NATIONAL SECURITY

The new national security screening process introduced in 2009 has generated some anxiety among foreign investors, but, in fact, the government has not yet prohibited a transaction on national security grounds.<sup>8</sup> It seems likely that the current government's interpretation of "national security" will be more circumscribed than the broad range of industries potentially subject to review under the U.S. CFIUS process. That said, over the past few years Canadian politicians of all political stripes, both provincial and federal, have become acutely aware of the potential to use the ICA for political purposes, as is evident from the BHP Billiton transaction. At some future time, "national security" concerns might be used to justify review of a transaction that is unpopular and not otherwise reviewable. Indeed, there is no review threshold for national security purposes.

#### E. LITIGATION FOR FAILURE TO COMPLY WITH UNDERTAKINGS

In July 2009, the federal government commenced suit against US Steel for failure to comply with undertakings given in the context of US Steel's acquisition of Stelco in 2007. The suit is still ongoing. As reported in last year's Year-in-Review, this lawsuit to enforce undertakings is the first in the history of the ICA and alleges that US Steel failed to comply with its commitments relating to employment and production at its Canadian facilities.<sup>9</sup> The Canadian government has requested that the court impose a fine of C\$10,000 per day for the alleged breach of the undertakings. In response, US Steel has taken the position that it has not breached its undertakings, and its inability to meet the undertakings was a result of factors beyond its control: a type of "force majeure" that Industry Canada has accepted frequently in the past to excuse non-compliance with undertakings.

One new development is that US Steel's efforts to have the ICA provision providing for enforcement of undertakings declared unconstitutional did not succeed. On June 14,

7. This may be due in part to the collective efforts of organizations such as the International Monetary Fund and the International Working Group of Sovereign Wealth Funds to instill greater comfort with SWFs among host states through enhanced transparency and better governance. See generally SOVEREIGN WEALTH FUNDS, GENERALLY ACCEPTED PRINCIPLES AND PRACTICES—SANTIAGO PRINCIPLES, <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

8. It should be noted that Industry Canada intervened in 2009 on national security grounds in a proposed transaction involving the purchase by a Belgian company of a Canadian company, Forsys Metals Corporation, whose only asset was a uranium project in Namibia. The parties were advised by Industry Canada not to close pending further notice. The parties ultimately abandoned the transaction, and it is unclear whether a national security review was ever initiated.

9. John W. Boscardiol, et al., *Regional and Comparative Law: Canada*, 44 INT'L LAW. 613, 615 (2010).

2010, the Federal Court of Canada found that the potential monetary penalty was not penal in nature; rather its purpose was to promote the legislative goals of the ICA. Accordingly, Section 11 of the Canadian Charter of Rights and Freedoms, which provides protections to persons charged with an *offense*, did not apply.

## F. CONCLUSION

Until the Industry Minister's rejection of the BHP Billiton decision, Canada's foreign investment review process was following a relatively routine course with the recent amendments to the ICA having little impact. The review threshold is still unchanged, and screening of investments on national security grounds has not been used as a protectionist measure. The BHP Billiton decision has generated intense public debate about whether Canada should view its natural resources as strategic assets that should remain Canadian-controlled and the Minister's guidance on future transactions hopefully will offer some clarity regarding the current government's position and predictability for foreign (and Canadian) investors.<sup>10</sup>

## II. Competition Law\*

### A. LEGISLATIVE DEVELOPMENTS

In March 2009, Canada's federal government passed legislation to make far-reaching amendments to Canada's Competition Act (the "Act"),<sup>11</sup> including the Act's conspiracy offense. But, implementation of the amendments to the Act's conspiracy *offense* was delayed until March 12, 2010.

The new conspiracy offense applies to all conduct ongoing at or initiated after March 12, 2010, and makes it a *per se* criminal *offense* for competitors to enter into agreements that: (i) fix, maintain, increase, or control the price for the supply of a product; (ii) allocate sales, territories, customers, or markets for the production or supply of a product; or (iii) fix, maintain, control, prevent, lessen, or eliminate the production or supply of a product. Maximum penalties under the new *offense* are fourteen years imprisonment and a C\$25 million fine per count, up from the previous maximums of five years and C\$10 million per count.<sup>12</sup>

Unlike the previous (and now repealed) version of the *offense*, "the new conspiracy *offense* does not require proof that the agreement, if implemented, would prevent or lessen competition unduly."<sup>13</sup> The elimination of the requirement to prove market impact represents a fundamental shift in the nature of Canada's conspiracy *offense* and is intended to make it easier for the authorities to prosecute cartel activity in and affecting Canada.

10. Canadian shareholders of Canadian corporations also will want to know that the value of their holdings will not be limited by the fact that only Canadian companies are permitted to take over their respective companies.

\* Written by Mark Katz, Vice-Chair, ABA Canada Committee and Partner at Davies Ward Phillips & Vineberg LLP and Jim Dinning, Associate at Davies Ward Phillips & Vineberg LLP.

11. Bill C-10, Budget Implementation Act, 2009, 2d Sess. 40th Parl. (2009) (Can.).

12. *Id.*

13. Jim Dinning & Mark Katz, *Canada: Cartels*, GLOBAL COMPETITION (2010) available at <http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/941/canada-cartels/>.

Some of the prior defenses, including those available if the agreement or arrangement related to the exchange of statistics or credit information, cooperation in research and development, or defining product standards, are no longer available under the new *offense*. Other exceptions remain, including those for agreements between affiliates and agreements relating only to exports of products from Canada.

Additionally, liability can be avoided under the new conspiracy *offense* if it can be established that: (i) the impugned agreement is ancillary to a broader or separate agreement that includes the same parties; (ii) the impugned agreement is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement; and (iii) the broader or separate agreement, considered alone, does not contravene the conspiracy *offense*.

In addition to the new criminal *offense*, the Act now contains a new civil provision that applies to agreements between competitors that are not caught by the *per se offense* but have the effect of substantially lessening or preventing competition. Applications under this new provision are brought by the Commissioner of Competition ("Commissioner") to the Competition Tribunal ("Tribunal"); private applications are not permitted. Relief is limited to an order requiring the parties to cease engaging in the impugned conduct or, on consent, to taking any other action. The new civil provision includes an "efficiencies" defense that can be relied upon if the agreement has brought about or is likely to bring about gains in efficiency, and these gains will be greater than and will offset the effects of any prevention or lessening of competition that will result or is likely to result from the agreement.

## B. ADMINISTRATIVE DEVELOPMENTS

In September 2010, the Competition Bureau ("Bureau") published an information bulletin on its leniency program ("Leniency Bulletin").<sup>14</sup> The Leniency Bulletin details the Bureau's approach to recommending reductions in penalty ("leniency") for participants in cartel *offenses* who plead guilty and cooperate with the Bureau and the federal prosecutors, the Public Prosecution Service of Canada ("PPSC").<sup>15</sup> According to the Bulletin, the Bureau will recommend leniency if the PPSC has not yet filed criminal charges against the party, and the party has terminated its participation in the illegal activity, cooperates with the Bureau's investigation and any subsequent prosecution, and admits guilt. The timeliness of the party's cooperation and the value of the evidence offered will be important considerations in determining the level of reduction. The first party eligible for a leniency recommendation generally will receive a reduction of up to fifty percent of the fine that otherwise would have been recommended; the second applicant is reduced up to thirty percent. Subsequent applicants also may receive reductions to the fine that would have otherwise been recommended.

14. Competition Bureau, *Leniency Program* (Sept. 29, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>.

15. The Bureau investigates alleged criminal violations of the Act. Prosecutions are the responsibility of the PPSC, upon referral by the Bureau. The PPSC has independent discretion to accept or to reject the Bureau's recommendations, including with respect to sentencing and leniency. See *id.*

## C. MERGERS

In September 2010, the Bureau announced that it would hold a series of roundtables to explore the merits of revising its Merger Enforcement Guidelines ("MEGs").<sup>16</sup> The MEGs, issued in 2004, provide general guidance on the Bureau's analytical approach to merger review.<sup>17</sup> The roundtables will seek to assess whether the MEGs accurately reflect current Bureau practice and the potential impact of the revised Horizontal Merger Guidelines recently released by antitrust authorities in the United States.

## D. CARTELS

In July 2010, the Bureau announced that criminal charges had been laid against twenty-five individuals and three companies accused of fixing the price of retail gasoline in the province of Quebec.<sup>18</sup> These charges follow charges initially laid in June 2008 and bring the total number of accused to thirty-eight individuals and fourteen companies. To date, ten individuals and six companies have pled guilty in this case, with fines totaling over C\$2.7 million. Of the ten individuals who have pled guilty, "six have been sentenced to terms of imprisonment totaling fifty-four months," which is a sign of the Bureau's commitment to securing sanctions against individuals wherever possible.<sup>19</sup>

## E. ABUSE OF DOMINANCE

In February 2010, the Commissioner filed a notice of application with the Tribunal alleging that the Canadian Real Estate Association ("CREA"), a trade association representing almost 100,000 real estate agents, had abused its dominant position in the market for residential real estate brokerage services throughout Canada.<sup>20</sup> The Commissioner's application sought to strike down rules that "limit consumer choice and prevent innovation in the market for residential real estate services."<sup>21</sup> However, on September 30, 2010, the Bureau announced that it had reached an agreement in principle with CREA to settle

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16. Press Release, Competition Bureau, Competition Bureau to Consult on Merger Enforcement Guidelines (Sept. 7, 2010), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03284.html>.

17. Competition Bureau, *Merger Enforcement Guidelines* (Sept. 1, 2004), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html>.

18. Press Release, Competition Bureau, Criminal Charges Laid by Competition Bureau in Gas Price-Fixing Case (July 15, 2010), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03262.html>.

19. Press Release, Competition Bureau, Tenth Individual Sentenced in Quebec Price-Fixing Cartel (Dec. 7, 2009), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03168.html>.

20. *Comm'r of Competition v. Canadian Real Estate Ass'n*, CT-2010-002, (Competition Trib. Feb. 8, 2010) (Can.), *available at* [http://www.ct-tc.gc.ca/CMFiles/CT-2010-002\\_Notice%20of%20Application\\_1\\_45\\_2-8-2010\\_2541.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Notice%20of%20Application_1_45_2-8-2010_2541.pdf).

21. Press Release, Competition Bureau, Competition Bureau Seeks to Prohibit Anti-competitive Real Estate Rules (Feb. 8, 2010), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03196.html>.



its application.<sup>22</sup> The settlement is intended to provide consumers a greater “ability to choose which services they want from a real estate agent when selling their home.”<sup>23</sup>

#### F. CLASS ACTIONS—INDIRECT PURCHASERS

Historically, Canadian courts have refused to certify price-fixing class actions on behalf of classes that include indirect purchasers on the ground that the plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis.<sup>24</sup>

Two decisions in 2009, *Irving Paper Ltd. v. Atofina Chemicals Inc.* (“*Irving*”)<sup>25</sup> and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (“*Pro-Sys*”),<sup>26</sup> marked a departure from this practice.

These class-certification decisions were upheld this year. The *Irving* and *Pro-Sys* defendants sought leave to appeal the class certifications: *Irving* involved leave to appeal from the Ontario Superior Court to the Ontario Divisional Court and *Pro-Sys* involved leave to appeal from the British Columbia Court of Appeal to the Supreme Court of Canada. Both leave applications were denied, and both judgments were upheld. As a result, the law in Ontario and British Columbia (two of the most significant provinces for class actions in Canada) is that class certification should be granted to indirect purchaser plaintiffs when the certification judge is satisfied that there is some basis in fact to find that proof of aggregate damages on a class-wide basis is a common issue. This very low standard, if followed in other cases and provinces, could significantly lower the barriers to competition class actions in Canada.

### III. United States-Canada Trade Relations\*

#### A. BORDER ISSUES

The United States and Canada continue to work towards a joint approach to border security aimed at addressing common threats and promoting economic cooperation. Senior government officials from both countries, including Attorney General Eric Holder, Department of Homeland Security Secretary Janet Napolitano, Canadian Minister of Justice and Attorney General Rob Nicholson, and Canada’s Minister of Public Safety Vic

22. Press Release, Competition Bureau, Competition Bureau Reaches Agreement in Principle in Real Estate Case (Sept. 30, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03293.html>.

23. Press Release, Competition Bureau, Final Agreement Paves Way for More Competition in Canada’s Real Estate Market (Oct. 24, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03305.html>.

24. See, e.g., *Chadha v. Bayer Inc.*, [2003] 223 D.L.R. 158 (Can.).

25. *Irving Paper Ltd. v. Atofina Chems Inc.*, 47025 [2009] O.J. 4021 QUICKLAW (O.S.C.J. Sept. 28, 2009) (Can.).

26. *Pro-Sys Consultants Ltd. v. Infineon Techs AG*, CA036142 (Sup. Ct. British Columbia May 6, 2008) (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/08/05/2008BCSC0575err1.htm>.

\* Written by Marcela B. Stras, immediate past Co-Chair of ABA Canada Committee and member at Cozen O’Connor.

Toews, met on November 10, 2010 to continue the discussions during the eleventh United States-Canada Cross-Border Crime Forum ("CBCF") Ministerial.<sup>27</sup>

To better combat threats and transnational crime, the American and Canadian officials discussed streamlining information sharing and enforcement efforts, as well as enhancing the ability of both countries to identify and respond to a wide range of threats. During the forum, officials underscored the importance of a shared vision for border security and highlighted progress made by the United States and Canada over the past year to safeguard the critical resources, infrastructure, and citizens of both nations.

Both countries also "participated in the official signing ceremony of a Memorandum of Understanding ("MOU") for the Sharing of Currency Seizure Information . . . [that] will help identify potential threats and assist in money-laundering and terrorist-financing investigations."<sup>28</sup> The MOU creates a "notification protocol for both countries when Canadian and American border officers intercept more than \$10,000."<sup>29</sup> The next United States-Canada Cross Border Crime Forum will be held in Ottawa, Ontario, in 2011.<sup>30</sup>

Earlier in the summer, the American and Canadian governments announced initiatives aimed at promoting security and economic cooperation, including an agreement to complete a joint threat and risk assessment addressing a wide range of border issues. The two countries also agreed to draft the first comprehensive plan to protect critical infrastructure, such as electrical grids and tunnels.<sup>31</sup> Both the United States and Canada have done their own threat assessments involving the shared border, but, under the new agreement, the two governments will conduct a joint threat assessment for the first time.

#### B. "BUY AMERICAN" AND OTHER "PROTECTIONIST" LEGISLATION

In February 2010, Canada and the United States reached an agreement that would allow Canadian companies to participate in American infrastructure projects financed under the American Recovery and Reinvestment Act ("Recovery Act"). Under the agreement, Canadian suppliers will be provided access to state and local public works projects under the Recovery Act in a range of areas, including programs of the U.S. Department of Energy, the U.S. Department of Housing and Urban Development, and the Environmental Protection Agency. These are areas of procurement where Canadian companies have traditionally been suppliers or sub-contractors in the United States.

The provinces and territories collaborated to develop an offer that enabled Canada to reach this agreement with the United States by opening up their procurement markets. Under the provisions of the World Trade Organization Agreement on Government Procurement ("GPA"), Canada and the United States have agreed to offer each other perma-

27. The annual CBCF focuses on expanding cooperation on key cross-border crime and security issues with a focus on cross-border investigations and prosecutions. The forum brings together senior public safety and law enforcement officials and prosecutors to address cross-border issues, including terrorism, mass-marketing fraud, interoperability, and organized crime.

28. Press Release, Public Safety Canada, Canada and the United States Meet to Discuss Cross-Border Crime and Border Security at the 11th Cross-Border Crime Forum Ministerial, (Nov. 10, 2010), *available at* <http://www.publicsafety.gc.ca/media/nr/2010/nr20101110-eng.aspx>.

29. *Id.*

30. *Id.*

31. Under the agreement to establish a critical infrastructure action plan, the countries will share information, assess and manage risks, and increase the ability to prepare for and respond to disasters.

ment market access at the sub-federal level. This means that Canadian suppliers will have guaranteed access to U.S. sub-federal procurement, and American suppliers will have guaranteed access to provincial procurement in accordance with undertakings under the GPA.

Because some of the measures are temporary, Canada and the United States have agreed to begin discussions within one year to explore the possibility of additional reciprocal access to procurement markets on a permanent basis. In this spirit, both countries also have agreed to establish a fast-track consultation process should similar “Buy American” provisions be applied to future funding programs.

Shortly after resolution of the “Buy American” problem, Canada became concerned by what it viewed as new protectionist legislation: the Foreign Manufacturers Legal Accountability Act of 2010. The proposed legislation would require manufacturers sending goods into the United States to have legal representation or business agents in the United States in case there is a problem with the foreign products. The bill appears to be targeted at Chinese products. The bill is meant to avoid instances like the situation that arose with drywall from China, where homeowners in the United States were made ill from the drywall but had no recourse against the manufacturer in China.<sup>32</sup> The bill is in committee at present, with no action pending, although it does enjoy bipartisan support.

#### IV. Trade Controls\*

##### A. INCREASED PROSECUTION ACTIVITY

New activity in export control prosecutions over the past year indicates that the Canada Border Services Agency (“CBSA”) is continuing to pursue aggressive enforcement of trade controls.

On May 29, 2010, CBSA charged Steven and Perienne de Jaray with exporting 5,100 controlled dual-use electronic chips to Hong Kong without a permit, contrary to the Export and Import Permits Act, and for failing to report the export contrary to the Customs Act.

On July 6, 2010, Canada had its first successful prosecution under the Iran Sanctions Regulations. The accused, Mahmoud Yadegari, had attempted to ship dual-use pressure transducers to Iran through Dubai. These transducers could be used in heating and cooling applications, as well as in centrifuges for enriching uranium. An Ontario provincial court judge found that Yadegari “knew or . . . was willfully blind that the transducers had

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32. By requiring foreign manufacturers to appoint registered agents, the bill, S. 1606, would significantly lessen the burden upon U.S. litigants in connection with service of process. This requirement would obviate the need for American litigants to utilize the Hague Convention to affect service upon entities domiciled in foreign countries. However, S. 1606 would not violate the Hague Convention, because that treaty governs only the service of process abroad within the territory of a foreign country, and not service (such as service upon a registered agent) within the United States. In addition, S. 1606 specifically requires that a foreign manufacturer’s registered agent be located in a state in which the company has a “substantial connection to the importation, distribution or sale of [its] products. . . .”

\* Written by John W. Boscariol, immediate past Co-Chair of the ABA Canada Committee and Partner and Leader of the International Trade and Investment Law Group at McCarthy Tétrault LLP.

the characteristics that made them restricted.”<sup>33</sup> Because Yadegari failed to apply for and obtain the required permits, he was found guilty of violating the Sanctions Regulations and other federal legislation, including the Export and Import Permits Act and the Customs Act. On July 29, 2010, he was sentenced to twenty months in jail in addition to fifteen and one-half months of pre-sentence custody.

On November 10, 2010, in the first case of its kind involving Myanmar, CBSA charged Kenn Borek Air and its former general manager for exporting a de Havilland DHC-6 Twin Otter airplane and 149 aircraft parts without valid export permits.

#### B. TARGET: IRAN

Canada enacted a number of additional sanctions measures against Iran this year. On June 18, 2010, amendments to the Iran Sanctions Regulations came into force, implementing United Nations Security Council Resolution 1929 into Canadian law. The amendments included the following:

- a prohibition on persons in Canada and Canadians outside Canada from making any property or any financial or other related service available to Iran, persons in Iran, or Iranian entities or their agents for the purpose of investing in commercial activity in Canada involving uranium mining, production or use of specified nuclear materials, and technology;
- the addition of a number of individuals and entities to the list of designated persons subject to an assets freeze;
- the addition of materials, equipment, goods, and technology to the list of items that are prohibited for export to Iran;
- a prohibition on providing any technology to Iran with respect to any activity related to ballistic missiles capable of delivering nuclear weapons; and
- a prohibition on the export to Iran of any battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles, or missile systems.<sup>34</sup>

Following similar actions taken by the United States and the European Union, Canada enacted its own unilateral sanctions against Iran that add to the compliance burden of Canadian companies doing business internationally, especially financial institutions and firms operating in the oil and gas sectors.

The new measures, implemented under Canada’s Special Economic Measures Act (“SEMA”) on July 22, 2010, prohibit the following:

- making any new investment in the Iranian oil or gas sectors;
- providing to Iran items used in refining oil or liquefaction of gas;
- establishing correspondent banking relationships with Iranian financial institutions;
- providing or acquiring financial services to allow an Iranian financial institution (or a branch, subsidiary, or office) to be established in Canada, or vice versa;
- purchasing any debt from the Government of Iran;

33. *R. v. Mahmoud Yadegari*, (O.C.J. July 6, 2010) (Can.), available at [http://isis-online.org/uploads/isis-reports/documents/Yadegari\\_Reasons.pdf](http://isis-online.org/uploads/isis-reports/documents/Yadegari_Reasons.pdf).

34. Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran, SOR/2010-154 (Can.).

- dealing with listed designated persons involved in nuclear, chemical, biological, and missile proliferation;
- providing to Iran arms and related material not already banned or items that could contribute to Iran's proliferation activities; and
- providing a vessel owned or controlled by, or operating on behalf of, the Islamic Republic of Iran Shipping Lines with services for the vessel's operation or maintenance.<sup>35</sup>

### C. SPECIAL OBLIGATIONS FOR FINANCIAL INSTITUTIONS

Under Canadian sanctions legislation applicable to Iran and various other countries, federally and provincially regulated financial institutions in Canada, including foreign branches, are required to review their systems and records on a continuing basis to determine whether they are in possession or control of property of certain listed designated persons, persons acting on behalf of designated persons, or persons owned or controlled by them. Monthly reports as to whether such entities are in possession or control of this property must be submitted to the applicable financial regulatory agency.

Accordingly the Office of the Superintendent of Financial Institutions ("OSFI") released its Instruction Guide: Designated Persons Listings and Sanctions Laws on June 14, 2010. It addresses the application of Canadian sanctions laws pertaining to Iran and other countries and provides guidance on monthly reports, freezing and unfreezing assets, and related issues for federally regulated financial institutions.<sup>36</sup>

### D. TENTATIVE STEPS TOWARD LIBERALIZING ENCRYPTION CONTROLS

Controls over the export or transfer of information security items and technology continue to present a challenge for many Canadian businesses. Failure to comply can have substantial financial and reputational consequences. In many cases when product is detained or seized by CBSA just prior to export because of compliance uncertainties, the ensuing delays can strain customer relations and result in cancelled contracts and lost business.

In response to significant concerns expressed by the Canadian business community regarding the effect of these controls on its competitive position in the international marketplace, this year the Export Controls Division of Foreign Affairs and International Trade Canada ("ECD") began consultations on cryptographic controls and means of facilitating the permit process.

On October 19, 2010, ECD released new guidelines on its policies regarding the application for and granting of permits for the export or transfer of cryptographic goods, software, and technology.<sup>37</sup> The guidelines identify several multi-destination permits now available to exporters of cryptographic items. These permits enable exporters to ship or

35. Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.).

36. John Boscarior, *Sanctions Alert: The Brave New World of Doing Business With Iran*, MCCARTHY TÉTRAULT, July 12, 2010, [http://www.mccarthy.ca/article\\_detail.aspx?id=5064](http://www.mccarthy.ca/article_detail.aspx?id=5064).

37. *Export Permits for Cryptographic Items*, FOREIGN AFFAIRS AND INT'L TRADE CAN., Oct. 28, 2010, [http://www.international.gc.ca/controls-controles/export-exportation/crypto/Crypto\\_Intro.aspx?lang=eng](http://www.international.gc.ca/controls-controles/export-exportation/crypto/Crypto_Intro.aspx?lang=eng).

transfer items to consignees in multiple countries with flexible terms and conditions, and they include the following permits:

- a “broad-based permit” for exports of hardware, executable software, and associated information and enhancements, to a wide range of countries;
- a “co-development permit” for exports of controlled software, source code, and other technology containing cryptographic functionality and related technical data and assistance for product development, to affiliates in a wide range of countries;
- a “bona fide Canadian and American corporations permit” for exports of hardware, executable software, and associated information and enhancements, to foreign consignees that are majority-owned by Canadian- or American-based parent companies;
- a “regime decontrol (ancillary cryptography) permit” for exports of any goods or technology that meet the definition of “ancillary” cryptography;
- a “java permit” for exports of hardware and executable software into which the Java Runtime Environment has been integrated, and associated information and enhancements, to a wide range of countries; and
- a “financial institutions permit” for exports of hardware, executable software, and associated information and enhancements, to financial institutions in a number of countries that have enacted legislation to counter money laundering.<sup>38</sup>

ECD states that any exporter seeking to rely on these more flexible multi-destination permits must have a comprehensive export compliance plan in place, including procedures that “ensure employees at all levels of a company understand and act in accordance with the letter and spirit of” Canada’s trade controls.<sup>39</sup>

#### E. OTHER LEGISLATIVE DEVELOPMENTS

On June 19, 2010, ECD announced its proposal to amend item 5500 (Goods and Technology for Certain Uses) of the schedule to the Export Control List.<sup>40</sup> This is a “catch-all” control designed to cover unlisted goods and technology that could be used in the development or production of chemical, biological, or nuclear weapons. The proposed amendment provides that an exporter is required to submit an application only if the item’s properties (i.e., technical characteristics or capabilities) and any other information made known to the exporter would lead a reasonable person to suspect that it would be used in the specified proliferation contexts. The Minister of Foreign Affairs is designated as the person responsible for making determinations that an item meets the criteria applicable to these catchall controls. The list of exempt destination countries also is reduced to those that participate in certain multilateral export control regimes. The amendment expands the list of weapons subject to control to include nuclear explosive and radiological dispersal devices.

On July 13, 2010, in response to North Korea’s sinking of the South Korean naval vessel Cheonan, Canada added North Korea to its Area Control List (“ACL”), which identifies those countries to which exports and transfers of all goods and technology are prohibited without a permit.<sup>41</sup> Belarus and Burma are the only other countries now on

38. *Id.*

39. *Id.*

40. Order Amending the Export Control List, Pt. I, 144 C. Gaz. 25 (2010) (Can.).

41. Order Amending the Area Control List, C. Gaz., Pt. II, 144 C. Gaz. 16 (2010) (Can.).

the ACL. In October, Canada announced that it also would be implementing additional import, export, and investment sanctions against North Korea under the Special Economic Measures Act.

As of December 2010, transactions involving any of the following countries should be red-flagged and carefully screened for compliance with Canadian trade controls: Belarus, Burma, Iran, Lebanon, Cuba, Syria, Cote d'Ivoire, Democratic Republic of the Congo, Eritrea, Guinea, Iraq, Liberia, North Korea, Pakistan, Sierra Leone, Somalia, Sudan, and Zimbabwe.

## **V. Immigration\***

A number of significant developments took place in 2010 in Canadian Immigration law and policy. The most important are outlined below.

### **A. TEMPORARY FOREIGN WORKER PROGRAM**

Citizenship and Immigration Canada introduced a number of changes to take effect on April 1, 2011 with respect to the hiring of temporary workers, including:

[A] more rigorous assessment of the genuineness of the job offer; a two-year prohibition from hiring temporary foreign workers for employers who fail to meet their commitments to workers with respect to wages, working conditions, and occupation; and a limit on the length of time a temporary foreign worker may work in Canada before returning home.

Employers seeking to hire temporary foreign workers, including live-in caregivers, will now be assessed against past compliance with program requirements before authorization can be granted. Employers found to have violated worker rights may be refused authorization to hire a foreign worker.

In cases in which employers have not met their previous commitments to workers, they may be denied access to the temporary foreign worker program for two years. Offending employers' names also would be published on the Citizenship and Immigration Canada website to inform other temporary foreign workers already in Canada. Employers will be given the opportunity to explain the circumstances before any such action is taken against them.

A four-year cumulative limit also is being imposed on many temporary foreign workers' employment in Canada. After a four-year work term, they will now have to wait four years before becoming eligible to again work temporarily in Canada. The limit does not affect eligibility for permanent residents or foreign workers admitted to Canada under NAFTA or other international agreements.

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These changes are intended to provide more certainty to employers and employees concerning the duration of work permits and the rights and duties of both employers and employees in connection with the hiring of temporary workers.<sup>42</sup>

#### B. INFORMATION TECHNOLOGY WORKERS

As of October 1, 2010, the Information Technology Workers Program has been discontinued and foreign workers who intend to qualify in that category will have to obtain a positive Labor Market Opinion. Because of this change, employers who wish to hire temporary foreign workers previously eligible for facilitated processing are now required to apply for a Labor Market Opinion.

#### C. FEDERAL SKILLED WORKER PROGRAM

On June 26, 2010, Citizenship and Immigration Canada announced a number of measures primarily designed to control the number of applications in its large inventory and to reduce pressures on processing capacity. In addition, changing economic conditions and a more difficult labor market have resulted in declining incomes for new immigrants and difficulties in securing appropriate employment. The government reduced the number of eligible occupations in the Federal Skilled Worker category from thirty-eight occupational titles in the National Occupational Classification ("NOC") to twenty-nine occupational titles in that list, making some substitutions and important deletions. The government also imposed a maximum global annual cap of 20,000 applications of which up to 1,000 applicants per occupation will be allowed. It is expected that the government will devise a system to notify the public in advance as to when the maximum number of applications for a particular occupation is about to be reached.

#### D. LANGUAGE REQUIREMENTS

Citizen and Immigration Canada has said that "under changes to the Federal Skilled Worker program and the Canadian Experience Class, all new applicants are required to include the results of an English or French language test."<sup>43</sup> The language testing requirements include native speakers of English or French. In the past, "applicants had the option of either proving their language ability through a language test or written submission. The written submission was intended for people whose first language is English or French" or for those people who have completed a significant portion of their education, particularly higher education, in either language.<sup>44</sup> This option is no longer available.

The imposition of uniform language testing for native English or French speakers has resulted in public backlash, as it appears to be an unnecessary requirement for those who speak one of Canada's official languages, but the government contended that devising a mechanism to separate immigration applicants based on language was impractical.

42. *Improvements to the Temporary Foreign Worker Program*, CITIZENSHIP AND IMMIGRATION CANADA, Aug. 8, 2010, <http://www.cic.gc.ca/english/DEPARTMENT/media/backgrounders/2010/2010-08-18.asp>.

43. *Changes to Proof of Language Requirements Will Help Better Position Newcomers to Adapt to Canada's Labour Market*, CITIZENSHIP AND IMMIGRATION CANADA, June 26, 2010, <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-06-26a.asp>.

44. *Id.*



## E. INVESTORS

Canada's Immigrant Investor Program was designed to attract experienced businesspeople who bring significant economic benefits to Canada and who invest considerable capital in immigrant investor funds. In recent years, the financial requirements imposed by immigration authorities in this particular application category have fallen behind those set out by other countries in their own immigrant investor programs. On June 26, 2010, the government announced changes that include new eligibility criteria for applicants who submit applications after the date of the announcement. The changes require new investors to have a personal net worth of C\$1.6 million, up from C\$800,000, and to make an investment of C\$800,000, up from C\$400,000. According to the government, higher investment amounts means that provinces and territories will receive a greater amount of capital to put toward economic development within their regions, and "higher personal net worth criteria mean that the program can attract investors with valuable global business links and the resources to make secondary investments into the Canadian economy."<sup>45</sup> The government continues to argue that the changes compare favorably with immigrant investor programs administered by other countries that require much higher minimum investments and higher net worth.

In addition to the changes, because of an increase in inventory, the government declared an "administrative pause" to manage the application intake. The government did not announce any measures to address the slow processing times in the Federal Investor Program or persistent concerns over the screening of individuals who have potentially obtained their net worth through questionable activities. (Over the years, individuals from emerging markets who cannot provide appropriate documentation to justify their wealth or who have ties to criminal organizations have begun to focus their attention on Canada's Investor Program.)

## F. LIVE-IN CAREGIVER PROGRAM

The Live-In Caregiver Program brings to Canada thousands of caregivers who care for young children or the elderly in family homes. Most applicants come from the Philippines. A number of regulatory and administrative changes were proposed in December 2009 to improve worker protections and to make a transition to permanent residence easier.

The amendments to the regulations under the Immigration and Refugee Protection Act include the following points:

- The time in which caregivers can complete their two years of work to qualify for permanent residence has been expanded. Caregivers now have four years to meet the requirements instead of three.
- There is a more flexible assessment of work requirements. Caregivers who work overtime may apply for permanent residence sooner. They may now become eligible after 3,900 hours over a minimum of twenty-two months, with a maximum of 390 overtime hours, or two years at regular full-time rates.

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45. News Release, Citizenship and Immigration Canada, Canada Re-Opens Immigrant Investor Program (Nov. 10, 2010), *available at* <http://www.cic.gc.ca/english/department/media/releases/2010/2010-11-10a.asp>.

- The uncertainty faced by caregivers has been reduced because of the elimination of a second medical examination that had been administered after the completion of two years of employment. Some caregivers have been denied permanent residence on the ground that an illness was discovered in a standard second medical examination after a caregiver had completed the requirements of the program. Citizenship and Immigration Canada now has the authority to assess medical admissibility in an application for permanent residence based on the medical examination administered before coming to Canada as a temporary resident.<sup>46</sup>

At the same time, a number of administrative changes were announced:

First, employment contracts must now address employer-paid benefits; accommodations; duties; hours of work, including overtime hours; wages; holiday and sick leave entitlements; and terms of termination or resignation. Second, new employer-paid benefits now include transportation to the place of work in Canada from the live-in caregiver's country of residence, private medical insurance before activation of provincial health coverage, workplace safety insurance or equivalent insurance if the former is unavailable, and all recruitment fees associated with hiring a live-in caregiver. Third, there is emergency processing of labor market opinions and work permits for caregivers already in Canada who face abuse, intimidation, or threats in their current jobs. Fourth, there is a new caregiver telephone service offered through the CIC Call Centre that informs employers and caregivers living in Canada of their rights and responsibilities under the program.<sup>47</sup>

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46. *Improvements to the Live-In Caregiver Program*, CITIZENSHIP AND IMMIGRATION CANADA, Aug. 18, 2010, <http://www.cic.gc.ca/english/DEPARTMENT/media/backgrounders/2010/2010-08-18a.asp>.

47. *Id.*