Canada

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This article reviews significant legal developments in Canada during 2011.[1]

I. Judicial Review of Investor-State Arbitrations Under NAFTA*

Ontario's highest appellate court has weighed in on the scope of judicial review of investor-state arbitration decisions conducted pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA). On October 4, 2011, the Ontario Court of Appeal released its decision in *Mexico v. Cargill, Inc.*,[2] affirming a lower court's decision refusing to set aside the damages portion of a NAFTA arbitration award in favor of Cargill. Although the Court of Appeal found that the standard of review to be applied by a domestic court in reviewing whether an international arbitration panel went beyond its jurisdiction is one of "correctness," it upheld the decision on the basis that reviewing courts should "intervene only in rare circumstances where there is a true question of jurisdiction."[3] The court did not overturn the arbitral tribunal decision even in the face of a less deferential standard of review. In so doing, it upheld the tribunal's expansive view of the types of damages recoverable by NAFTA Chapter 11 investor claimants.

The dispute began with Mexico enacting trade barriers to protect its sugar industry in response to a switch by the domestic soft drink industry from sugar to high-fructose corn syrup (HFCS), a low-cost substitute.[4] The barriers forced Cargill to shut down its U.S. HFCS production and distribution centers, as well as its Mexican HFCS distribution

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1. For developments during 2010, *see* Sandra Walker et al., *Canada*, 45 INT'L LAW. 471, 471–86 (2011). For developments during 2009, *see* John W. Boscariol et al., *Canada*, 44 INT'L LAW. 613, 613–29 (2011).

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2. United Mexican States v. Cargill, Inc., 2011 CANLII 622107 O.R. 3d 528, para. 86 (Can. Ont.O.A.C.).

3. *Id.* para. 44.

4. *Id.* paras. 4–5.

center operated by its subsidiary Cargill de Mexico (CdM).[5] Cargill submitted a Chapter 11 arbitration claim for damages suffered by both CdM in Mexico and by Cargill in the United States.[6]

The arbitration panel found for Cargill and awarded damages of US$77 million for up-stream and down-stream losses.[7] The down-stream losses were CdM's lost sales to the Mexican market and the up-stream losses were Cargill's lost sales to CdM.[8] The arbitration panel distinguished the NAFTA panel decision in *Archer Daniels Midland Co. v. United Mexican States*,[9] dealing with similar facts, in which recovery for up-stream losses was denied. The panel in Cargill took a broader approach, determining that recoverable losses suffered by Cargill were not limited to those in Mexico, but included the upstream losses suffered in the United States.[10]

Mexico contested the jurisdiction of the panel to award up-stream losses to Cargill.[11] Because the parties designated Toronto, Ontario, as the place of arbitration, Mexico initially asked the Ontario Superior Court of Justice to review the award on the basis of the grounds of review in the UNCITRAL Model Law (Model Law),[12] which applied to the arbitration.[13]

Mexico argued that the award of damages for up-stream losses to Cargill's U.S. operations was "beyond the scope of the submission to arbitration" under Article 34(2)(a)(iii) of the Model Law.[14] It relied on the fact that NAFTA Chapter 11 applies only to measures relating to investments that are in the territory of the party enacting those measures.[15] The application judge for the Superior Court held that the standard of review to be applied on issues of jurisdiction was reasonableness, and applied that standard to uphold the panel's award.[16]

The Court of Appeal considered the appropriate standard of review applicable to the decision of a Chapter 11 NAFTA arbitral panel.[17] It examined Article 34 of the Model Law and noted that an award may be set aside only when one of the listed deficiencies can be proven.[18] The court then considered Canadian case law, which held that reviewing courts should only interfere sparingly or in extraordinary cases.[19] Finally, it relied on a Canadian Supreme Court decision,[20] which stated that a tribunal must be correct in its

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5. *Id.* para. 6.
6. *Id.* para. 7.
7. *Id.* para. 10.
8. *See id.*
9. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Breach of Ch. 11 of NAFTA, ¶ 304 (Nov. 21, 2007), *available at* http://italaw.com/documents/ADMTateRedactedAward.pdf.
10. *See Cargill*, 107 O.R. 3d, para. 13.
11. *Id.* para. 14.
12. The UNCITRAL Model Law on International Commercial Arbitration was enacted in Ontario by the International Commercial Arbitration Act, R.S.O. 1990, c. II, art. 9.
13. *Cargill*, 107 O.R.3d 528, para. 9.
14. *Id.* paras. 14–15.
15. *Id.* paras. 36–65.
16. *Id.* para. 19.
17. *Id.* para. 26.
18. *Id.* para. 31.
19. *Id.* para. 33.
20. *See Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (Can.).

determination of a true question of jurisdiction. The Court concluded that the standard of review for true jurisdictional questions was correctness; a tribunal does not have the authority to expand its jurisdiction with an incorrect interpretation of its enabling statute.[21] The Court of Appeal then applied the correctness standard and found that there is no language in Chapter 11 that imposes a territorial limitation on the scope of damages.[22]

Despite finding that the standard of review is correctness (and, therefore, the tribunal's decision on its jurisdiction receives no deference), the Court was careful to state that reviewing courts are to take a narrow view of what constitutes a question of jurisdiction, especially in the context of international arbitration.[23] It cautioned that courts should rarely intervene in decisions "made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction."[24] When courts do intervene, they should avoid a review of the merits.[25]

The Court's decision is, in some ways, a departure from earlier cases that showed a degree of deference to arbitral tribunals, even in respect of jurisdictional issues. The switch to a less deferential correctness standard is, however, unlikely to lead to a rash of judicial review applications because it is tempered by the Court's recognition that true jurisdictional questions are rare and that arbitration under Chapter 11 will be subject to review only in exceptional cases.

II. Foreign Bribery Case: Niko Resources*

The June 24, 2011, guilty plea of Calgary-based Niko Resources Ltd. (Niko) represents the most significant development in Canada's efforts to fight foreign bribery since the 1999 implementation of Canada's Corruption of Foreign Public Officials Act (CFPOA). Along with investigations initiated by the RCMP in 2011 against SNC-Lavalin and Blackfire Exploration, and the continued prosecution of Nazir Karigar for the alleged bribery of officials in India, the Niko case appears to signal a new era of aggressive enforcement of foreign anti-bribery rules in Canada.

Niko pled guilty to a single charge of bribery under the CFPOA related to the provision of a $190,984 vehicle to the Energy Minister in Bangladesh and the payment of his travel costs of $5,000 to attend an Energy Expo in Calgary and for a trip to New York and Chicago to visit family. The Court accepted the sentencing recommendation (which included a fine and victim surcharge totaling $9,499,000) and the Probation Order under which Niko will be subject to Court supervision and regular, independent audits to confirm its compliance with the CFPOA.

A number of key points and observations can be gleaned from Niko's plea and sentencing:

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21. *Cargill*, 107 O.R. 3d, 528 paras. 41–42.
22. *Id.* para. 74.
23. *Id.* para. 44.
24. *Id.* para. 46.
25. *Id.* para. 47.

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1. Complexity of the investigation: This extensive multi-country investigation spanned six years and was complex and costly. The RCMP alone incurred expenses of $870,000 and had to work with authorities in six countries. In addition to demonstrating Canada's willingness to commit resources to CFPOA enforcement, this also reflects how costly it is for target companies who must devote significant internal resources and executive and board time, as well as retain external counsel and other advisors, to address these intensive investigations.
2. Influence of U.S. FCPA enforcement: Canadian authorities worked so closely with U.S. officials that the Crown characterized the prosecution as a "joint effort" by Alberta prosecution and the U.S. Department of Justice (DOJ).[26] The Probation Order, believed to be the first of its kind in Canada, was drafted in consultation with the U.S. DOJ and was described by the Crown as "a Canadianized version of similar enforcement actions in the United States,"[27] suggesting that Canadian prosecutors, and possibly courts, will be significantly influenced by U.S. precedent.
3. Sentencing factors before the Court: Although Niko had not come forward to voluntarily disclose these issues prior to the RCMP's initiation of the investigation, there were several mitigating factors before the Court. These included Niko's guilty plea, which avoided expending further Crown resources; its cooperation with authorities once it knew it was being investigated; its agreement to take remedial steps and cooperate on a go-forward basis its lack of a prior record; and that ultimately the bribes were found not to have any influence or effect. Aggravating factors considered by the Court included Niko's position as a large global company, the seniority of the bribed government official, the existence of two separate instances of bribery, and the significant resources expended on the RCMP investigation.
4. Real and substantial connection: Under Canadian common law, the commission of an offence under the CFPOA requires a "real and substantial" connection to the territory of Canada. Here, the parties agreed that there was a "real and substantial link between Canada and the offence."[28] Niko conceded that (i) it funded its subsidiary's acquisition of the vehicle and knew that the subsidiary had delivered it to the Minister and (ii) it had paid the travel and accommodation expenses of the Minister. The Court had before it a number of factors connecting Niko's Canadian operations to the impugned activity.
5. Guidance on anti-bribery compliance measures: Niko's Probation Order contains a number of continuing obligations including implementation of internal compliance controls.[29] The internal controls specified in the Order are particularly instructive when considered as a list of compliance measures expected of Canadian companies, and include:
   (a) internal accounting controls;
   (b) a rigorous anti-corruption compliance code;
   (c) conducting risk assessment to develop standards and procedures;
   (d) reviewing and updating at least annually;

26. Transcript, at 22, lines 23–24.
27. *Id.* at 24, lines 23–24.
28. Agreed Statement of Fact, paragraph 56.
29. Transcript, *supra* note 26, at 39–45.

(e) assigning responsibility to senior corporate executive(s);
(f) periodic training and certification of directors, officers, employees, agents and business partners;
(g) systems for guidance and advice, confidential reporting of possible contraventions, and protection against retaliation;
(h) disciplinary procedures for violations;
(i) due diligence and compliance requirements for agents and business partners;
(j) standard provisions in agents and business partners contracts to prevent violations – representations and warranties, rights to audit books and records, and rights to terminate; and
(k) periodic review and testing of compliance systems.

III. Canadian Competition Law*

In 2011, the Canadian Competition Bureau (the Bureau) continued its aggressive enforcement stance, focusing on mergers, abuse of dominance, and anti-competitive practices.

A. Mergers

The Bureau challenged a completed merger in January 2011 that was below the Competition Act's compulsory notification thresholds, the first contested merger application in Canada since 2005.[30] The transaction involved the acquisition of a landfill site in British Columbia.[31] Based in part on the buyer's internal documents, the Bureau alleged that the buyer acquired the landfill to protect its monopoly position and eliminate competition from a prospective entrant.[32] The Bureau advised the buyer of its concerns prior to closing, but no resolution was reached. In a somewhat unusual step, the Bureau agreed to permit the transaction to close subject to a written undertaking from the buyer to preserve and maintain all approvals necessary for the operation of the landfill and pending determination of the Bureau's challenge to the acquisition.[33] Also of note is that the Bureau is seeking dissolution of the merger and has accordingly named the vendors as parties to the application as well.[34] The case was ongoing at the time of this writing. The Bureau has indicated that it intends to more aggressively examine the competitive implications of non-notifiable transactions and is investigating other mergers that fall in this category.[35]

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30. Competition Act, RSC 1985, c. C-34, pt. IX; Comm'r of Competition v. CCS Corporation et al. (2011) CT-2011-002 (Can. Comp. Trib.).

31. *CCS Corp.*, CT-2011-002, para. 1.

32. *Id.* paras. 21–28.

33. *Id.* para. 16.

34. *Id.* paras. 5, 13.

35. *See* Melanie L. Aitken, Comm'r of Competition, Keynote Speech at the Canadian Bar Ass'n 2011 Fall Conference (Oct. 6, 2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html; Melanie L. Aitken, Comm'r of Competition, Speech at the Canadian Bar Ass'n Spring Conference (May 3, 2011); Melanie L. Aitken, Comm'r of Competition, Speech at the Canadian Bar Ass'n Spring Conference (May 3, 2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03383.html.

The Commissioner also brought proceedings in 2011 for orders to prohibit a proposed joint venture between two major airlines, Air Canada and United Continental.[36] The Bureau challenged the transaction under the Competition Act's merger review provisions even though the joint venture did not involve either airline acquiring an ownership stake in the other.[37] According to the Bureau, the proposed joint venture constitutes a merger because it would "comprehensively integrate" the Canada/U.S. operations of Air Canada and United Continental to an extent that "is indistinguishable in all respects from common ownership."[38]

In addition to challenging the joint venture, the Bureau is also seeking to unwind certain cooperation agreements that form the underlying basis for the joint venture.[39] The Bureau is relying in this regard on the Competition Act's civil prohibition against agreements between competitors that prevent or lessen competition substantially.[40] The Bureau's application marks the first time that this provision has been utilized since it came into force in March 2010.[41]

B. Abuse of Dominance

The Bureau has challenged certain rules enacted by Canada's largest real estate board, the Toronto Real Estate Board (TREB), under the Competition Act's abuse of dominance provisions.[42] The Bureau alleged that certain TREB rules restrict its members' ability to offer services over the Internet and constitute an abuse of the dominant position held by TREB and its members in the supply of residential real estate brokerage services in the Toronto area.[43] This case echoes the Bureau's application against the Canadian Real Estate Association in 2010. Both applications focused on the ability of real estate associations to exclude or discipline non-compliant existing and prospective members by foreclosing access to an online real estate listing system. The TREB case was ongoing at the time of writing.

C. Anti-Competitive Practices

The Bureau's civil proceeding against Visa and MasterCard continued in 2011.[44] The Bureau has alleged that the fees imposed on merchants by these credit card companies

36. Notice of Application, Canada Comm'r of Competition v. Air Canada et al. (2011) CT-2011-004 (Can. Comp. Trib.), *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2011-004_Notice%20of%20Application_1_45_6-27-2011_7637.pdf.

37. *Id.* para. 36.

38. *Id.* paras. 37, 39.

39. *Id.* paras. 21–31.

40. *Id.* paras. 54–62.

41. *See* Aitken, Keynote Speech, *supra* note 35.

42. Notice of Application, Canada Comm'r of Competition v. The Toronto Real Estate Board (2011), CT-2011-003 (Can. Comp. Trib.), *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Notice%20of%20Application_1_45_5-27-2011_7069.pdf.

43. *Id.* para. 3.

44. Notice of Application, Comm'r of Competition v. Visa Canada Corp. et al. (2010), CT-2010-010 (Can. Comp. Trib.), *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2010-010_Notice%20of%20Application%20pursuant%20to%20section%2076%20of%20the%20Competition%20Act%20%20Price%20Maintenance_1_38_12-15-2010_7965.pdf.

have the anti-competitive effect of driving up consumer prices.[45] The application was brought under the civil price maintenance provision, which prohibits parties from "influencing upward" the price at which products are supplied when such conduct has had, is having, or is likely to have an adverse effect on competition.[46]

The Bureau also secured a significant settlement in 2011 in a case involving one of Canada's largest telecommunications companies.[47] The company agreed to pay an administrative monetary penalty of CDN 10 million, the maximum permitted under the Competition Act, in relation to alleged misleading advertising practices.[48] This is the first time that the maximum penalty for misleading advertising has been secured. The Bureau alleged that the company made false or misleading representations about the prices at which certain of its services were available.[49] The company had used fine print disclosures, which the Bureau argued contradicted the general impression of its advertised pricing.[50] Under the consent agreement with the Bureau, the company did not accept the Bureau allegations, but agreed not to contest the allegations, to pay the penalty, and to modify all non-compliant advertising.[51]

D. Reports/Guidelines

In October 2011, the Bureau released newly revised Merger Enforcement Guidelines (MEGs).[52] The MEGs set out the analytical framework used by the Bureau to review mergers and acquisitions under Canada's Competition Act.[53] The most notable change is the Bureau's statement that it need not define relevant markets as part of its analysis.[54] This follows the example of U.S. antitrust enforcement authorities but is inconsistent with the (limited) Canadian case law on point.

IV. WTO Challenges to the Green Energy Act*

In May 2009, the Province of Ontario passed the Green Energy and Economy Act, an objective of which is to "stimulate the green energy sector in Ontario" by "creating green

45. *Id.* paras. 1–4.

46. *See* Competition Act, R.S.C. 1985, c. C-34, pt. VIII, art. 76 (Can.).

47. Consent Agreement, Comm'r of Competition v. Bell Canada (2011), CT-2011-005 (Can. Comp. Trib.), *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2011-005_Consent%20Agreement_1_45_6-28-2011_7559.pdf.

48. Press Release, Canada Competition Bureau, Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay $10 Million for Misleading Advertising (June 28, 2011), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html.

49. *See id.*

50. *See id.*

51. Consent Agreement, *supra* note 47, paras. 2–3.

52. Canada Competition Bureau, Merger Enforcement Guidelines (2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

53. *Id.* at 1.

54. *Id.* para. 3.1.

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jobs and providing clean renewable power to Ontario."[55] A key component is the Feed-in Tariff (FIT) program, which permits companies to sell electricity from wind, solar, hydro, biomass, biogas, and landfill gas projects back to the provincial energy grid at guaranteed rates for the next twenty years.[56] At issue in World Trade Organization (WTO) proceedings are domestic content requirements for goods and services procured for wind power projects greater than ten kilowatts and all solar projects, which are imposed within FIT contracts.[57]

In September 2010, Japan requested WTO Dispute Settlement Understanding consultations with Canada, which were joined by the United States and the European Union.[58] Consultations did not resolve the matter, and on July 20, 2011, the WTO Dispute Settlement Body established a panel, which was composed on October 6, 2011.[59] In August 2011, the European Union initiated its own WTO complaint against the FIT program, with the United States and Japan joining in consultations.[60]

Both Japan and the European Union allege that the FIT Program breaches the General Agreement on Tariffs and Trade (GATT) Articles III.4 and III.5 (national treatment obligations), Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs)[61] (referring back to GATT national treatment obligations), and Articles 1.1, 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures[62] (prohibiting subsidies that are contingent on the use of domestic content).[63] The complainants do not allege breach of the WTO Agreement on Government Procurement (GPA),[64] which prohibits measures used to encourage local development such as domestic content requirements ("offsets"). While Canada has extended its commitments under the GPA to certain provincial entities as a result of the Canada–U.S. "Buy American" agreement, it has not listed the Ontario Power Authority (OPA) in the GPA Annex 2 commitments for Ontario, with the effect that procurement of energy by the OPA is not subject to the disciplines of the GPA.[65]

55. *General Information About the Green Energy and Green Economy Act*, ONT. POWER AUTH., http://fit.powerauthority.on.ca/general-information-about-green-energy-and-green-economy-act (last visited Feb. 15, 2012).

56. *Id.*; *FIT Program Pricing*, ONT. POWER AUTH., http://fit.powerauthority.on.ca/fit-program-pricing (last visited Feb. 15, 2012); *Renewable Technologies*, ONT. POWER AUTH., http://fit.powerauthority.on.ca/renewable-technologies (last visited Feb. 15, 2012).

57. *Feed-In-Tariff Program Overview*, ONT. POWER AUTH., http://fit.powerauthority.on.ca/program-overview (last visited Feb. 15, 2012).

58. *Summary of Canada-Certain Measures Affecting the Renewable Energy Sector*, WORLD TRADE ORG. (Oct. 6, 2011), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.

59. *Id.*

60. *Summary of Canada-Measures Relating to the Feed-in Tariff Program*, WORLD TRADE ORG., (Jan. 20, 2012) http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.

61. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

62. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1867 U.N.T.S. 14 [hereinafter SCM Agreement].

63. The Complainants also claim a breach of GATT art. XXIII, para. 1, Nullification or Impairment. *See* General Agreement on Tariffs and Trade, art. XXIII, para. I, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

64. Agreement on Government Procurement, April 15, 1994, 1869 U.N.T.S. 508.

65. Agreement Between The Government of Canada and The Government of The United States of America on Government Procurement, U.S.–Can., annex 2, Feb. 12, 2010, *available at* http://www.interna-

GATT Article III.4 obligates member countries to ensure that imported products are afforded treatment no less favorable than that afforded to domestic products, in respect of all laws, regulations, and requirements affecting their internal sale, use, or distribution.[66] Article III.5 prohibits the adoption of certain internal quantitative regulations that directly or indirectly require that products subject to the regulation be supplied from domestic sources.[67] Canada can be expected to argue that GATT national treatment obligations are not applicable because the FIT Program falls within GATT Article III.8, which carves out, "laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale."[68] An issue will be whether energy purchased under the FIT Program is "purchased for governmental purposes" and "not with a view to commercial resale" (for example, if energy procured under the FIT Program is exported by Ontario). Canada may also claim the FIT program does not violate national treatment obligations because foreign and domestic companies are subject to the same requirements, and therefore the program is not "discriminatory."

The TRIMs Agreement provides that no WTO member country shall apply any trade-related investment measures in a manner that is inconsistent with GATT Article III (national treatment).[69] Among the measures identified as inconsistent with GATT Article III are those which are mandatory or enforceable under law, or compliance with which is necessary to obtain an advantage, and which require "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."[70] The FIT Program arguably falls within the illustrative list in that it conditions the receipt of an advantage (the purchase of energy at guaranteed rates) upon the purchase or use of products and services from a domestic source. Again, the issue will be whether the government procurement exemption in GATT Article III.8 applies to exempt the FIT Program from national treatment obligations.

Japan and the European Union allege that the FIT Program violates the Agreement on Subsidies and Countervailing Measures (SCM Agreement) because it is a prohibited "subsidy" that is contingent on use of domestic over imported goods.[71] SCM Agreement "battle lines" will be drawn on whether the FIT Program is a "subsidy." Government procurement programs may be considered a subsidy if the procurement confers a financial benefit because the price paid by government is artificially high. Apart from the factual issue of pricing, Canada can be expected to defend this allegation by asserting that the purchasing body is a private body and is not carrying out a function normally vested in government, and therefore there is no "benefit conferred."

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tional.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ENG-Canada-USA_Government_Procurement.pdf.

66. General Agreement on Tariffs and Trade 1947, Nov. 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

67. *Id.* art. III at para. 5.

68. *Id.* art. III at para. 8.

69. TRIMS Agreement, *supra* note 61.

70. *Id.* art. II, at para. 1 (in conjunction with para. 1(a) of the Illustrative List).

71. SCM Agreement, *supra* note 62, at arts. 1.1, 3.1(b), 3.2.

The challenge to the Green Energy Act raises complex legal issues that will be followed by both private sector market participants and governments around the world. The Ontario FIT program is not unique but was modeled after successful initiatives in several European countries, including Germany, Spain, and Denmark.[72] To the extent that the WTO proceedings impose disciplines on such programs, the impact will be global.

V. Canadian Securities Law*

Canadian securities are generally regulated by provinces rather than the federal government.[73] Each province has its own securities regulatory authority (commonly referred to as securities commissions), which vary in structure from province to province.[74] Through recognition and oversight by the securities commissions, a number of stock exchanges and self-regulating organizations facilitate the functions of the securities commissions.[75]

A. Reference Re Proposed Canadian Securities Act

In Canada, pursuant to section 53 of the Supreme Court Act, the Governor in Council can refer important questions of law or fact to the Supreme Court of Canada (SCC).[76] The question presented was whether "the annexed Proposed Canadian Securities Act [is] within the legislative authority of the Parliament of Canada."[77] To determine whether an act is within Parliament's legislative power "we must first identify the main thrust of the proposed legislation having regard to its purpose and effects and then ask whether the scheme meets the indicia set out in *General Motors*,"[78] establishing the pith and substance of the act; then the act must comport with the subject matters listed in sections 91 and 92 of the Constitution Act 1867.[79]

B. Quebec and Alberta[80]

Both the Appellate Courts of Alberta and then Quebec heard and answered in the negative on this question.[81] The majority found that the pith and substance of the Proposed Canadian Securities Act (the Act) could not be distinguished from current provincial legis-

72. *Ontario Unveils North America's First Feed-In Tariff*, ONT. POWER AUTH., (Mar.12, 2009), http://fit.powerauthority.on.ca/march-12-2009-ontario-unveils-north-americas-first-feed-tariff.

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73. DAVID JOHNSTON AND KATHLEEN DOYLE ROCKWELL, CANADIAN SECURITIES REGULATION 13 (4th ed. 2006).

74. *Id.* at 14–15.

75. *Id.* at 15.

76. Supreme Court Act, R.S.C 1985, c. S-26, § 53 (1985), *available at* http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html (references by Governor in Council).

77. *Archived–Fact Sheet on Reference to the Supreme Court of Canada on the Proposed Canadian Securities Act*, DEP'T OF FIN. CAN. (May 5, 2010), http://www.fin.gc.ca/n10/data/10-051_3-eng.asp#cont.

78. *Reference Re: Securities Act*, SCC 66, para. 92 (2011).

79. *Reference Re: Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, para. 19 (Can.).

80. *See Reference Re: Power of Parliament to Regulate Securities*, 2011 QCCA 591 (Can.), *available at* http://www.canlii.org/en/qc/qcca/doc/2011/2011qcca591/2011qcca591.html; *Reference Re Securities Act*, 2011 ABCA 77 (Can.), *available at* http://www.canlii.org/en/ab/abca/doc/2011/2011abca77/2011abca77.html.

81. *Reference Re: Power of Parliament to Regulate Securities*, 2011 QCCA 591, para. 226; *Reference Re Securities Act*, 2011 ABCA 77, paras. 47–49.

lation.[82] The majority then turned to determine whether the Act fell under the federal "trade and commerce" head of power.[83] The SCC set out five indicators to determine whether a law was validly enacted under the trade and commerce head of power:[84]

> (1) The impugned legislation must be part of a regulatory scheme, (2) the scheme must be monitored by the continuing oversight of a regulatory agency, (3) the legislation must be concerned with trade as a whole rather than with a particular industry, (4) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting, and (5) The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

Both Courts found that the Act failed the last three indicators.[85]

C. Supreme Court of Canada[86]

In a unanimous decision, released on December 22, 2011, the SCC held that "[t]he *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*".[87] The Court found that the main thrust of the *Act* is to regulate all aspects of securities trading in Canada.[88] The SCC found that the pith and substance of the *Act* is in addressing the local concerns of protecting investors and ensuring the fairness of the markets through regulation of the participants.[89] The *Act* would have the effect of duplicating and displacing current provincial and territorial securities regimes.[90]

Next, looking to the *General Motors* indicia, the SCC found that the *Act* does not fall within the general trade and commerce power. The SCC primarily addressed the latter three indicia.[91] For the third indicia, the SCC concluded that the *Act* overreaches the scope of the trade and commerce power by descending into industry-specific regulation.[92] For the fourth indicia, the SCC answered this question, in part, in the negative.[93] While the provinces are unable to address systemic risk at a national level, due to the *Act*'s intru-

82. *Reference Re: Power of Parliament to Regulate Securities*, 2011 QCCA 591, para. 119; *Reference Re Securities Act*, 2011 ABCA 77, paras. 23–24.

83. *Reference Re: Power of Parliament to Regulate Securities*, 2011 QCCA 591, para. 184; *Reference Re Securities Act*, 2011 ABCA 77, para. 33.

84. *See* Gen. Motors of Canada, Ltd. v. City Nat'l Leasing, [1989] 1 S.C.R. 641, 23–24 (Can.), *available at* http://scc.lexum.org/en/1989/1989scr1-641/1989scr1-641.html; Kirkbi AG v. Ritvik Holdings Inc. [2005] 3 S.C.R. 302, 16 (Can.) *available at* http://scc.lexum.org/en/2005/2005scc65/2005scc65.html, which do not establish a formal test for interpreting the Constitution Act, 1867, but ask the Court to assess the legislation against the five indicators.

85. *Reference Re: Power of Parliament to Regulate Securities*, 2011 QCCA 591, para. 182; *Reference Re Securities Act*, 2011 ABCA 77, para. 40.

86. *Reference Re Securities Act*, 2011 SCC 66 (2011).

87. *Id.* para. 134.

88. *Id.* para. 106.

89. *Id.* para. 128.

90. *Id.* para. 106.

91. *Id.* para. 110.

92. *Id.* para. 117.

93. *Id.* para. 121.

sion into local contracts and provincial regulation, this intrusion cannot be sufficiently justified.[94] For the fifth indicia, due to the "opt-in" nature and the day-to-day regulation of securities that the *Act* concerns itself with, the *Act* would not perish if a particular province declined to participate.[95]

The SCC looked at whether the *Act* "addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns."[96] Against the backdrop of these indicia, the SCC held in the negative.[97] While provisions in the *Act*, *intra vires*, address federal concerns (systemic risk), the day-to-day thrust of the *Act* is concerned with regulating contracts and property matters within provinces. Going forward, the SCC clearly announced that this issue may be best resolved through coordinated and collaborative efforts.[98]

D. Proposed Acquisition of TMX Group by Maple Group Acquisition Corporation

In the summer of 2011, the TMX Group faced a take-over bid by the London Stock Exchange.[99] The failure of that takeover bid precipitated a new coalition of thirteen of the most significant Canadian capital market users to form the Maple Acquisition Corporation (Maple).[100] The TMX Board of Directors approved the $3.8 billion takeover.[101] Maple is seeking approval from Canadian regulators to pursue its two-step transaction to acquire 100% of the outstanding shares of TMX Group Inc.[102] Furthermore, Maple is vying for the acquisition of Alpha Trading Systems Limited Partnership, Alpha Trading Systems Inc., The Canadian Depository for Securities Limited, and CDS Clearing Depository Services Inc.[103] The goal is to create a centrally integrated clearing group that can provide all market participants efficient and new capabilities.[104] This acquisition bid raises several novel issues for Canadian regulators. This market shift is one of centralization that proposes to centralize the Canadian stock exchanges.

Canada's securities climate is being questioned in regulation and market orientation. In both instances, the push is towards a concentration of power approach. As of the date of submission the Canadian regulators have yet to make a decision but their decision is eagerly anticipated.

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94. *Id.* paras. 120–21.
95. *Id.* para. 123.
96. *Id.* para. 124.
97. *Id.* para. 125.
98. *Id.* paras. 130–33.
99. Letter from Luc Bertrand, Maple Group Acquisition Corp., to Susan Greenglass, Dir. of Mkt. Regulation (Oct. 3, 2011), *available at* http://www.osc.gov.on.ca/documents/en/Marketplaces/xxr-maple_20111007_pro-aquisition.pdf.
100. *Id.*
101. *OSC Seeks Input on Maple bid for TMX Group*, The Globe and Mail, Oct. 7, 2011, *available at* http://www.theglobeandmail.com/globe-investor/osc-seeks-input-on-maple-bid-for-tmx-group/article2194512/
102. Letter from Luc Bertrand to Susan Greenglass, *supra* note 99.
103. *Id.*
104. *Id.*

VI. New Immigration Guidelines for Specialized Knowledge Workers*

Multinational employers who wish to transfer certain employees for assignments in Canada can usually take advantage of the provisions related to Intra-Company Transferees. The Immigration and Refugee Protection Act (IRPA)[105] regulations provide special transfer rules for senior managers, executives, and "specialized knowledge workers" who are being transferred between branches, divisions, or subsidiaries, of companies under common control. The Intra-Company Transferee category was created to permit international companies to temporarily transfer qualified employees to Canada to improve management effectiveness, expand Canadian exports, and enhance the competitiveness of Canadian entities in overseas markets.

"Specialized knowledge" is generally defined as a very high level of knowledge of a company's product or service, or, an advanced level of knowledge or expertise in the organization's processes and procedures. Individuals who possess specialized knowledge have often been instrumental in developing a specific product, software, or process or may have intimate knowledge of the company's international operations.

In response to concerns about inconsistency in the decision-making process at ports of entry and visa posts abroad, Citizenship and Immigration Canada published Operation Bulletin 316 in July 2011 to summarize the criteria to assess specialized knowledge applicants.[106] Immigration officers must assess various factors including: (a) education; (b) special knowledge different from that generally found in a particular industry (and which is valuable to the employer's competitiveness in the marketplace); (c) the number of years of experience that a person possesses in a specialized field; (d) the salary to be paid (because a higher salary may indicate whether the employee possesses specialized knowledge); (e) relevant training; and (f) supporting documentation (including the resume, reference letters, academic transcripts, and other documents to support the claim). Immigration officers have been instructed to determine whether the occupation level in the parent company is similar to that in the position sought by the specialized knowledge worker in Canada. Salaries must be realistic in terms of Canadian wage levels for the occupation concerned. Non-cash allowances or per diems (such as hotel and transportation paid by the employer) are not to be included in the calculation of the overall salary and are not acceptable for the purposes of claiming that a worker possesses specialized knowledge. Further, officers are directed to compare salaries against the Human Resources and Skills Development Canada guide, which contains the average salaries for a specified geographical location.

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* This section was authored by Sergio R. Karas, Karas & Associates, Toronto.

105. Immigration and Refugee Protection Regulations, SOR/2002-227 § 205 (Can.) *available at* http://www.canlii.org/en/ca/laws/regu/sor-2002-227/latest/sor-2002-227.html.

106. *Operational Bulletin 316-Assessing Intra-Company Transferees Under Specialized Knowledge*, CITIZENSHIP & IMMIGRATION CAN., July 4, 2011, http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob316.asp.

VII. Kyoto Protocol

On December 7, 2011, the Government of Canada announced through its Environment Minister, the Honorable Peter Kent, that Canada would not take on a second commitment under the Kyoto Protocol on Climate Change.[107]

107. Peter Kent, *Canada's National Statement at COP17* ENVIRONMENT CAN., Dec. 7, 2011, *available at* http://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=B4D21F4D-4845-4544-B2B0-F09D56B1EC60. *See also Canada to Withdraw from Kyoto Protocol*, BBC NEWS (Dec. 13, 2011), *available at* http://www.bbc.co.uk/news/world-us-canada-16151310.