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

Canada

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This article surveys selected developments in Canadian law during 2013.[1] This year's article highlights changes to the temporary foreign worker program, Canada's controlled good program, Canadian securities law, anti-corruption law, and Canada's new trade agreement with the European Union (EU).

I. Changes to the Temporary Foreign Worker Program

Since January 2009, Human Resources and Skills Development Canada (HRSDC) has implemented several significant policy changes relating to Canadian immigration law. For example, this past year, HRSDC eliminated the "occupations under pressure list" initiative, an initiative that had previously allowed employers to hire foreign workers in designated occupations with minimum to no advertisement requirements. In its place, HRSDC introduced more stringent minimum national advertising guidelines for all occupations before a labor market opinion (LMO) can be granted.[2] The advertising guidelines were modified on July 31, 2013, as a result of government concerns about the high number of foreign workers entering Canada.[3]

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1. For developments during 2012, see *Canada*, 47 Int'l Law. 549 (2013).

2. *Temporary Foreign Worker Program*, Emp. & Soc. Dev. Can. (July 7, 2013), www.esdc.gc.ca/eng/jobs/foreign_workers/variations.shtml.

3. John Petrykanyn, *Changes to the Temporary Foreign Worker Program – July 31, 2013*, Ont. Bar Ass'n (Oct. 15, 2013), http://www.oba.org/Sections/Citizenship-and-Immigration-Law/Articles/Articles-2013/October-2013/Changes-to-the-Temporary-Foreign-Worker-Program-Ju.

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The 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. But these new rules apply even to very highly skilled workers and management level employees. Any application for a LMO from an employer that fails to comply with the new minimum advertising requirements will be refused.

The National Occupational Classification describes positions in the four following levels: management or occupations that usually require a university degree, positions that require a college education or apprenticeship training, live-in caregivers, and trades.[4] An employer is in compliance with the minimum advertising efforts if (1) it advertises in three separate sources, (2) for a minimum of thirty days prior to the application, and (3) such advertising continues until a decision in respect of the LMO is rendered. The sources must include (1) the National Job Bank; (2) one publication of national circulation such as a national newspaper or job website; and (3) one other publication, either local or consistent with the practices within the occupation, such as advertising in trade publications, journals, or newsletters. All advertisements must include the employer's name, business address, and the wages being offered. Further, employers cannot require that a foreign worker be proficient in a language other than English or French, unless it can demonstrate that it is a bona fide requirement for job performance.[5]

"For live-in caregivers and trades, which may require high-school education or job-specific training, in addition to the Job Bank advertising requirements, employers must conduct recruitment activities consistent with the practice in the occupation, or demonstrate reasonable ongoing recruitment efforts."[6] Examples of acceptable advertisements include newspaper advertisements in publications of wide circulation or advertisements in community venues that are consistent with industry practices. Generally, advertisement requirements for occupations in this level are more onerous and will be more closely scrutinized.

For all the above 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 that include targeting communities facing barriers to employment, such as First Nations Canadians, older workers, and other disadvantaged groups.[7]

The wage range identified in the advertisement must represent an accurate range of wages being offered to Canadians and permanent residents working in the same occupation and geographical area and must include reference to benefits packages being offered. The wage range must always include the prevailing wage for the position. For purposes of the Temporary Foreign Worker Program, the prevailing wage is identified as the average

4. Human Res. & Skill Dev. Can. & Statistics Can., National Occupational Classification 2011 (2011), *available at* http://www5.hrsdc.gc.ca/noc/english/noc/2011/pdf/PrintableVersionNOC2011.pdf.

5. Brian Dingle, Borden Ladner Gervais, Government Introduces New Recruiting Requirements, Application Fee for LMOs in Advance of Proposed Legislative Changes (Aug. 2013), *available at* http://www.blg.com/en/NewsAndPublications/Documents/Publication_3463_1033.pdf.

6. Sergio R. Karas, *Obstacles to Hiring Foreign Workers Increasing*, Can. Emp. L. Today 4, 5 (Aug. 26, 2009), *available at* http://www.karas.ca/publications/Obstacles%20in%20hiring%20foreign%20workers.pdf.

7. *Changes Made to Minimum Advertising Requirements for All Labour Market Opinion Applications in Canada*, Sterling (Apr. 25, 2013), http://www.sterlingrelocation.com/news_events/news/2013/changes_made_minimum_advertising_requirements_labour_market_opinion_applications_canada.html.

hourly wage for the requested occupation in the specified geographical area, in accordance with wage surveys available from HRSDC.[8]

For a unionized position, the wage rate must be consistent with the wage rate established under the collective bargaining agreement. Foreign workers cannot be paid lesser wages than those set out in the collective agreement for the specific position and level of experience. In addition, "benefits provided to Canadian workers or permanent residents must be extended to temporary foreign workers."[9]

To address unique circumstances, HRSDC reserves the "discretion to set the prevailing wage rate that an employer must offer," whether or not the position is covered by a collective agreement.[10] Variations apply to minimum advertising requirements and wage rates for the following certain occupations where special procedures apply:

- academics,
- camp counselors,
- entertainment sector,
- exotic dancers,
- foreign government workers,
- international graduates,
- live-in caregivers,
- owners/operators,
- seasonal and cultural workers,
- specialized service technicians/specialized service providers, and
- warranty work.

HRSDC may require an employer to pursue alternative or additional recruitment efforts (i.e., increased duration of the advertisement or broader distribution) if it believes that the occupation requires additional efforts that would yield qualified Canadian citizens or permanent residents who may be available for the particular occupation and region.[11]

Employers are also requested to participate in the HRSDC Monitoring Initiative.[12] Two new consent clauses under the "Declaration of Employer" section have been added to the LMO application form, and employer participation is voluntary. It is unclear at the moment whether this initiative will eventually be mandatory. The initiative is designed to strengthen the integrity of the Temporary Foreign Worker Program.

8. *Stream for Lower-Skilled Occupations*, EMP. & SOC. DEV. CAN. (Jan. 29, 2014), www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml.

9. *Evaluation: Temporary Foreign Workers Program*, EMP. & SOC. DEV. CAN. (July 26, 2013), www.esdc.gc.ca/eng/publications/evaluations/skills_and_employment/2013/july.shtml.

10. *Stream for Lower-Skilled Occupations*, *supra* note 8.

11. *Id.*

12. *Backgrounders–Improvements to the Temporary Foreign Worker Program*, GOV'T OF CAN. (Aug. 18, 2010), http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp; *see* EMP'T & SOC. DEV. CAN., LABOUR MARKET OPINION APPLICATION: HIGHER-SKILLED OCCUPATIONS, *available at* http://www.servicecanada.gc.ca/eforms/forms/esdc-emp5517(2014-01-012)e.pdf (last visited Mar. 20, 2014).

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II. Canada's Controlled Goods Program

Canada's Controlled Goods Program (CGP) was created under the authority of the Defence Production Act[13] and the Controlled Goods Regulations.[14] It aims to strengthen Canada's defense trade controls by controlling the proliferation of defense-related goods by preventing and detecting the unlawful examination, possession, or transfer of such goods.[15]

The security assessment form was updated in June 2013 to include a privacy notice indicating the purpose for which personal information is being collected and the various agencies to which it may be disclosed. Although the notice and consent does not specifically refer to disclosure to a foreign government, a broad notification is given that information will be "used and disclosed in accordance with the Act."[16]

A frequent complaint voiced by the Canadian defense and security industry is that Canada's Controlled Goods List is now more restrictive than the U.S. Munitions List. To address this deficiency, recent commitments from the Canadian government promise to reduce the number of items on the list of controlled goods. This will allow Canadian companies to better compete in the defense and security market by permitting goods and technology to be more freely transferred and accessed within the domestic market and by lessening administrative burdens.

As part of its stated efforts to align with the U.S. strategy of "build[ing] higher walls around a smaller yard,"[17] the Government of Canada held a formal consultation round (between November 19, 2013, and December 20, 2013) on the proposed amendments to the Schedule to the Defence Production Act. The notice of consultations indicates that "PWGSC proposed reducing the administrative and compliance burdens on Canadian companies and individuals by reducing the number of controlled goods to those that have strategic significance or national security implications which require Canadian domestic controls" and that "proposed reductions to the Schedule to the *Defence Production Act* will also support the global competitiveness of Canadian aerospace, defence, satellite and security industries by minimizing the administrative and compliance burdens imposed by government while taking into account Canada's security requirements."[18]

III. Recent Updates in Canadian Securities Law

The year 2013 has been one of noticeable developments in the Canadian securities law area. Excluding many others, this update will focus on two particularly noteworthy devel-

13. Defence Production Act, R.S.C. 1985, c. D-1 (Can.).
14. Controlled Goods Regulations, SOR/2001-32 (Can.).
15. *See Controlled Goods Program*, PUB. WORKS & GOV'T SERVS. CAN. (Apr. 17, 2013), http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/index-eng.html.
16. PUB. WORKS & GOV'T SERVICES CAN., CONTROLLED GOODS PROGRAM SECURITY ASSESSMENT APPLICATION, http://ssi-iss.tpsgc-pwgsc.gc.ca/pdf/dmc-cgd/es-sa-eng.pdf (last visited Mar. 20, 2014).
17. Jennifer Stewart, Dir. Gen., Indus. Sec., Departmental Oversight Branch, Pub. Works and Gov't Services Can., Presentation to the Aerospace Summit on Global Supply Chain: Canada's Implementation of the New International Traffic in Arms Regulations (ITAR) Dual National Rule (Sept. 28, 2012), *available at* http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/publications/presentations/presentation-2012-09-eng.html.
18. *Consultations on the Proposed Amendments to the Defence Production Act*, PUB. WORKS & GOV'T SERVICES CAN. (Mar. 5, 2014), http://iss-ssi.pwgsc-tpsgc.gc.ca/dmc-cgd/consultations/consultations-details-eng.html.

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opments, (1) the *Kaynes v. BP*[19] decision from the Ontario Superior Court and (2) the announcement of the Cooperative Capital Markets Regulator.

A. Ontario Court Applies Spirit and Letter of Secondary Market Liability Provision

Kaynes v. BP involved a motion by BP to dismiss the plaintiff's (Kaynes) action for lack of jurisdiction. The issue of jurisdiction in relation to Part XXIII.1 of the Ontario Securities Act (OSA)[20] has not been in question since the 2012 *Abdula v. Canadian Solar* (*Abdula*) decision.[21] *Abdula* concerned an Ontario resident enforcing Part XXIII.1 of the OSA against Canadian Solar, a responsible issuer.[22] But Canadian Solar was not a reporting issuer in Ontario. Noting here that the "real and substantial connection to Ontario" was not at issue, the issue before the court of appeal in *Abdula* was whether the term "publicly traded" applied to issuers not listed on any Canadian exchange. Judge Hoy opined that the term "publicly traded" is not limited to "publicly traded in Canada."[23] Therefore, an issuer who does not list shares on a Canadian exchange may still be captured by OSA section 138.3's civil liability for secondary market misrepresentations regime.

Unlike *Abdula*, *Kaynes v. BP* concerned the issue of the "real and substantial connection" element of a responsible issuer. The Ontario Superior Court upheld the letter and spirit of the secondary market liability section of the OSA by determining that an Ontario court does have jurisdiction to hear a matter involving an issuer who is no longer a reporting issuer in Canada but who caused the statutory tort of misrepresentation to be committed in Ontario.[24]

Plaintiff Kaynes brought a proposed class action against BP, Plc, alleging that the company made misrepresentations connected to its Operational Management Systems and Safety Systems designed to reduce the risk of oil spills (e.g., the Deepwater Horizon Gulf Oil Spill). Excluding Canadian residents that opt out, the proposed class included Canadians who purchased BP shares on the Toronto Stock Exchange, New York Stock Exchange (NYSE), or European Exchanges and who reside in Canada. The proposed class period was from May 9, 2007, to May 28, 2010. BP ceased being a reporting issuer in Canada on January 12, 2009. BP currently does not maintain any offices in Ontario. BP argued that the Ontario court did not have jurisdiction for the claims arising from the Canadian class members who purchased on the NYSE and European Exchanges because the defendant BP lacked a real and substantial connection with Ontario.[25]

Since the Supreme Court of Canada released *Club Resorts v. Van Breda*, the Canadian courts have been equipped with four methods to assume jurisdiction in cases concerning

19. *See generally* Kaynes v. BP, 2013 ONSC 5802 (Can. Ont. Sup. Ct. J.).
20. Ontario Securities Act, R.S.O. 1990, c. S-5, XXIII.1 (Can). This part of the Ontario Securities Act equips investors with a civil liability regime for market misrepresentation by responsible issuers in the secondary market.
21. *See generally* Abdula v. Canadian Solar Inc., 2012 ONCA 211 (Can. Ont. CA).
22. R.S.O. 1990, c. S-5, s. 138.1. "'Responsible issuer' means (a) a reporting issuer, or (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded." *Id.*
23. *Abdula*, 2012 ONCA 211, para. 39.
24. *Kaynes*, 2013 ONSC 5802.
25. *Id.*

torts.[26] Per *Van Breda*, a Canadian court may assume jurisdiction if (1) the defendant is domiciled in the jurisdiction, (2) the defendant is carrying on business in the jurisdiction, (3) the tort was committed in Ontario (or relevant province), or (4) a contract connected with the dispute was made in Ontario.[27] This presumptive list of connecting factors is not exhaustive.

The OSA section 138.3 civil liability provision specifies that investors in the secondary market must rely on the representations made by listed corporations.[28] BP argued that the section 138.3 statutory misrepresentation claim is a noticeable deviation from the common law tort of misrepresentation, as it does not require a showing of reliance. Therefore, absent reliance, the tort should be "committed" in the jurisdiction from where the representation emanated (i.e., where BP published the representation). The plaintiff argued that section 138.3 was enacted with recognition of the high hurdle aggrieved investors commencing a class action faced in being forced to plead and prove individual reliance of each class member. The court held that section 138.3 was designed to "deem" reliance in a secondary market misrepresentation claim and not dismantle it.[29] As such, Judge Conway opined that "this [jurisdiction] motion can be disposed of on the basis that the plaintiff's statutory claim under s.138.3 is tantamount to 'a tort committed in Ontario' or sufficiently analogous to one that it qualifies as 'a new connecting factor.'"[30]

B. Cooperative Capital Markets Regulator

The Canadian securities regulatory landscape is fragmented. Each province has enacted a securities act delegating power to a securities commission. The securities commission of each respective province administers and enforces the applicable provincial securities act.[31]

In *Reference re Securities Act*,[32] the Supreme Court of Canada produced an advisory opinion in which it opined that the federal approach of attempting to harmonize regulation of the securities law industry through the proposed Canadian Securities Act was unconstitutional pursuant to section 92 of the Constitution Act. The justices opined that the national regulation of the capital markets should be regulated through a coordinated effort between the provinces and federal government, not by a wholesale takeover by the federal government. Further, the justices opined that issues of systemic risks in the capital markets were a national concern that could be captured in federal regulation.

In September 2013, the federal government announced a memorandum of understanding between the federal government, Ontario, and British Columbia forming a Coordi-

26. Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 R.C.S. 572, para. 90 (Can.).

27. *Id.*

28. R.S.O. 1990, c. S-5, s. 138.3. The issue regarding where the tort occurred is particularly important because it is well-settled Canadian law that the tort of misrepresentation is actually committed where the plaintiff relied on representations by the defendant.

29. Kaynes v. BP, 2013 ONSC 5802, para. 34 (Can. Ont. Sup. Ct. J.).

30. *Id.* at para. 27.

31. For discussion purposes, this is an oversimplification of the Canadian securities landscape as there are multilateral instruments, national instruments, and the Canadian securities administrators.

32. *See generally*, Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837.

nated Capital Markets Regulator (CCMR).[33] The CCMR is intended to be up and running by 2015.[34]

The purposes of the cooperative system are to (1) foster more efficient and globally competitive capital markets, (2) provide increased investor protection, (3) manage systemic risks, and (4) provide Canada with a single voice at the international level.[35]

The principal components of the cooperative system include: (1) a uniform provincial and territorial legislation; (2) complementary federal legislation that addresses criminal matters relating to systemic risk; (3) a unified and singular regulator composed of an expert board of directors, a regulatory division, and an adjudicative tribunal; (4) a council of Ministers that is responsible for capital markets regulation in each participating jurisdiction and the Minister of Finance of Canada; (5) regulatory offices in every participating province; (6) a self-funding fee structure that is intended to avoid unnecessary or disproportionate costs on market participants; and (7) an outreach initiative to encourage other provinces to join.[36]

The CCMR marks an important and optimistic step forward for Canadian securities regulation. With competing regulatory landscapes offering more predictable and harmonized regulatory climates, the need for unified Canadian securities regulation is particularly important to attract investors, issuers, and market participants.

IV. Anti-Corruption Law and Enforcement

During 2013, there were a number of developments under the Corruption of Foreign Public Officials Act (CFPOA),[37] including new investigations and charges, convictions, legislative amendments, and related regulatory initiatives. Currently, the Royal Canadian Mounted Police (RCMP) advises there are over thirty-five ongoing CFPOA investigations.[38] Summarized below are some of the most significant of this past year's CFPOA developments.

A. Conviction of Griffiths Energy

The year 2013 started off with a major conviction under the CFPOA. On January 25, 2013, the Alberta Court of Queen's Bench approved a $10.35 million penalty against Griffiths Energy International Inc. (Griffiths), a Calgary-based junior oil and gas exploration and production firm, for a violation of paragraph 3(1)(b) of the CFPOA in connection

33. *Ministers of Finance of British Columbia, Ontario and Canada Agree to Establish a Cooperative Capital Markets Regulator*, Dep't of Fin. Can. (Sept. 19, 2013), http://www.fin.gc.ca/n13/13-119-eng.asp [hereinafter *Ministers of Finance*].

34. Matthew McClearn, *Credibility Might Entice Alberta to Join National Securities Regulator*, Can. Bus. (Oct. 16, 2013), http://www.canadianbusiness.com/investing/next-up-alberta/.

35. *Ministers of Finance*, *supra* note 33.

36. *Backgrounder: Agreed Elements of a Cooperative Capital Markets Regulatory System*, Dep't of Fin. Can. (Aug. 19, 2013), http://www.fin.gc.ca/n13/data/13-119_1-eng.asp.

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

38. *See* PricewaterhouseCoopers, Cleaning Up Corruption: Twelve Questions Your Organization Should Ask About Bribery and Corruption (2013), http://www.pwc.com/ca/en/doing-business-in-alberta/publications/pwc-cleaning-up-corruption-twelve-questions-2013-10-en.pdf.

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with the actions of the company's previous management and representatives in pursuing production sharing contracts (PSCs) in Chad.[39]

Although the CFPOA has been in force since 1999, the Griffiths conviction joined the conviction of Niko Resources in June of 2011[40] as only the second significant conviction rendered under Canada's foreign anti-corruption legislation up to that time.[41]

1. *Background*

As noted in the Agreed Statement of Facts, sometime around the company's formation in August 2009, Griffiths and several of its founding shareholders began a campaign to develop contacts and arrange meetings with senior Chadian political figures, including the Chadian Ambassador to Canada (Ambassador) and the country's Minister of Petroleum and Energy. This led to a consulting agreement on August 30, 2009, between Griffiths and Ambassade du Tchad LLC (Tchad), a U.S.-registered entity wholly owned by the Ambassador. The agreement pertained to oil and gas advisory services to be provided by Tchad to Griffiths and provided for a $2 million fee payable to Tchad in the event Griffiths was awarded the desired PSCs before the end of 2009 or such other date mutually agreed by the parties.[42]

Griffiths terminated the Tchad consulting agreement in early September 2009 after being advised by legal counsel that it constituted an unlawful offer of a benefit to a foreign public official. But on September 15, 2009, Griffiths entered into a second consulting agreement on terms identical to the Tchad agreement with another entity, Chad Oil Consulting LLC (COCL), this time wholly owned by the wife of the Ambassador. Griffiths simultaneously granted four million founders shares in the company to the Ambassador's wife and two of her nominees, including the wife of the then Deputy Chief of the Chadian Embassy in Washington, D.C.[43]

Griffiths acknowledged that, by entering into the Tchad and COCL consulting agreements and by issuing seed shares to the Ambassador's wife and her nominees, it had violated paragraph 3(1)(b) of the CFPOA by providing direct or indirect benefits to the Ambassador in an attempt to induce the Ambassador to use his position to influence decisions of Chad in respect of the desired PSCs.[44]

2. *Key Factors For the Guilty Plea and Penalty*

The Agreed Statement of Facts contained five important acknowledgements by the Crown that informed its agreement to limit the penalty imposed on Griffiths and, ultimately, the court's approval. Two of these five acknowledgements are:

39. Transcript of Proceedings, Her Majesty the Queen v. Griffiths Energy Int'l (2013), E-File No.:CCQ13GRIFFITHSENER, Action No.130057425Q1, Jan. 25, 2013 (Can. Alta. QB).
40. Transcript of Proceedings, Her Majesty the Queen v. Niko Resources Ltd. (2011), E-File No.: CCQ11NIKORESOURCES, June 24, 2011 (Can. Alta. QB).
41. *See generally* John W. Boscariol, *A Deeper Dive into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd.*, McCarthy Tetrault (Nov. 21, 2011), http://www.mccarthy.ca/article_detail.aspx?id=5640.
42. Agreed Statement of Facts, Her Majesty the Queen v. Griffiths Energy Int'l Inc. (2013), E-File No.: CCQ13GRIFFITHSENER, Jan. 14, 2013 (Can. Alta. QB).
43. *Id.*
44. *Id.*

(i) Griffiths voluntarily self-disclosed the matter to the RCMP and representatives of the Public Prosecution Service of Canada and Alberta Justice on November 15, 2011, as well as to U.S. authorities; Griffiths shared all details of the investigation and waived legal privilege over communications with its former legal counsel, pled guilty prior to charges being formally laid by the Crown, and continued to assist the Crown in other processes and legal remedies related to its past activities; and

(ii) Griffiths had not been previously convicted for a similar offense, and it had undertaken numerous actions to reduce the likelihood of it engaging in further corrupt practices, including implementing robust anti-corruption policies and procedures.

Significantly, and in contrast to the *Niko* case, the court confirmed that a probation order was not necessary in the circumstances considering the "effective, comprehensive and robust anti-corruption program" instituted by Griffiths.[45]

B. Significant Amendments to the CFPOA

On February 5, 2013, Bill S-14, the Fighting Foreign Corruption Act, was introduced into Canada's Senate.[46] It proposed the most significant amendments to the CFPOA since it came into effect in 1999. On June 19, 2013, after passing through both the Senate and House of Commons without any changes, the amendments, three of which are detailed below, came into force.

1. *Existing Exception for Facilitation Payments to Be Repealed*

The amendments provide for the eventual elimination of the exception for "facilitation payments."[47] The existing exception in the CFPOA covers payments made to expedite or to secure the performance of acts of a routine nature that are part of the foreign public official's duties or functions, such as small payments for the processing of official documents. Though the facilitation payment exception continues to be recognized in the United States under its Foreign Corrupt Practices Act (FCPA),[48] individuals and entities subject to the CFPOA will now need to amend their policies and procedures accordingly.

The repeal of the exception will become effective at future date to be determined by the federal Cabinet, allowing time for companies to adjust their policies and being cognizant of the competitive disadvantage this may create vis-à-vis other countries (such as the United States) that continue to allow their companies to make such payments.[49]

45. Lauren Krugel, *Judge Approves Griffiths Energy Fine*, METRO NEWS (Jan. 25, 2013, 5:28 PM), http://metronews.ca/news/calgary/524496/judge-approves-griffiths-energy-fine/.

46. Clifford Sosnow & Marisa E. Victor, *Bill S-14: Updating the Corruption of Foreign Public Officials Act (CFPOA)*, FASKEN MARTINEAU LLP (June, 2013), http://www.fasken.com/en/bill-s-14-updating-the-corruption-of-foreign-public-officials-act/.

47. *Id.*

48. *Id.*

49. *Id.*

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2. *New Books and Records Offence*

The amendments create a separate offense for engaging in the following when undertaken for the purpose of bribing a foreign public official or for the purpose of disguising such bribery:

(i) establishing or maintaining accounts that do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
(ii) making transactions that are not recorded in those books and records or that are inadequately identified in them;
(iii) recording non-existent expenditures in those books and records;
(iv) entering liabilities with incorrect identification of their object in those books and records;
(v) knowingly using false documents; or
(vi) intentionally destroying accounting books and records earlier than permitted by law.[50]

In further contrast to the FCPA, the CFPOA requires that the impugned activity be undertaken for the purpose of bribing a foreign public official or for the purpose of disguising such bribery.[51] Nonetheless, the amendment is anticipated to have a very significant impact because parties who were not involved in the initial act of bribery can now be brought into the purview of the CFPOA as a result of their actions after the fact.

3. *Increased Sentences for Individuals*

The maximum term of imprisonment for violating the CFPOA, including the new books and records provisions, was increased from five to fourteen years.[52] Given the recent increased focus by U.S. anti-corruption authorities on prosecuting individuals as well as companies, this amendment should serve as a stark warning to the business community to conduct affairs in accordance with the legislation.

C. Canada Announces New Initiative for Disclosure of Payments to Governments

On June 12, 2013, Canadian Prime Minister Stephen Harper announced the introduction of a new transparency initiative that will require Canadian companies in the extractive industries—including mining, oil, and gas—to disclose payments made to domestic and foreign governments.[53] This disclosure initiative is closely linked to the CFPOA; in addition to imposing substantial compliance burdens, it is also expected to increase scrutiny and thereby significantly impact anti-corruption enforcement in Canada.

50. *Id.*
51. *Id.*
52. *Id.*
53. *Harper Announces New Transparency Rules for Energy, Mining*, CBC News (June 12, 2013, 7:33 AM), http://www.cbc.ca/news/politics/harper-announces-new-transparency-rules-for-energy-mining-1.1305236.

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This Canadian initiative follows similar measures being adopted in the United States[54] and the EU,[55] both of which are already implementing mandatory payment reporting requirements for their mining, oil, and gas companies.

The Canadian government has indicated that it intends to consult with the provinces and territories, aboriginal groups, and industry and civil organizations as it begins to formulate and implement its reporting regime. Specific details as to how and by whom the reporting regime will be enforced, as well as potential penalties for non-compliance, still need to be addressed.[56] It will be important to ensure that the new Canadian regime is sufficiently similar to those of other jurisdictions, including the United States and the EU, so that Canadian companies do not face inconsistent reporting requirements.

Non-governmental Organizations and industry organizations have already been formulating possible rules for a disclosure regime. For example, the Canadian Extractive Resource Revenue Transparency Working Group—comprised of the Prospectors and Developers Association of Canada, the Mining Association of Canada, Publish What You Pay–Canada, and the Revenue Watch Institute—has been working on developing a draft-reporting framework since September 2012.[57]

D. First Trial Under the CFPOA Results in Conviction

On August 15, 2013, following the first trial under the CFPOA, the Ontario Superior Court of Justice convicted former business executive Nazir Karigar for agreeing with others to offer bribes to foreign public officials.[58] Karigar, the first individual prosecuted under the CFPOA, was convicted for his leading role in a conspiracy to bribe India's Minister of Civil Aviation and certain Air India officials in connection with the bid of an Ottawa-based security company, Cryptometrics Canada, for the supply of facial recognition software.

In June 2005, Karigar contacted Cryptometrics Canada, stating that he had good connections with Air India and was aware that the airline was planning to acquire technology to deal with airline security issues. A few months later, Karigar and Cryptometrics Ca-

54. On August 22, 2012, the SEC issued its Final Rule implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act requirement for oil, gas, and mining companies to disclose payments made to governments. This, however, has recently come under attack in a challenge brought before the U.S. Court of Appeals. *See generally* Am. Petroleum Inst. v. Sec. & Exch. Comm'n, 953 F. Supp. 2d 5 (D.C. Cir. 2013). The SEC recently released additional guidance on this rule. *See Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Disclosure of Payments by Resource Extraction Issuers*, Sec. & Exchange Commission (May 30, 2013), http://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

55. On June 12, 2013, the EU Parliament voted in favor of legislation compelling forestry, oil, gas, and mining companies to publish their payments made to governments and to release information on their earnings in each country. *See* Press Release, Eur. Parliament, Oil, Gas, Mineral and Logging Firms Obliged to Disclose Payments to Governments (June 12, 2013), *available at* http://www.europarl.europa.eu/news/en/news-room/content/20130607IPR11387/html/Oil-gas-mineral-and-logging-firms-obliged-to-disclose-payments-to-governments.

56. *Harper Announces New Transparency Rules for Energy, Mining*, CBC News (June 12, 2013, 7:33 AM), http://www.cbc.ca/news/politics/harper-announces-new-transparency-rules-for-energy-mining-1.1305236.

57. *See Background Q&A: Canadian Extractive Resource Revenue Transparency Working Group*, Revenue Watch Inst. (Sept. 6, 2012), http://www.revenuewatch.org/news/background-qa-canadian-extractive-resource-revenue-transparency-working-group.

58. R. v. Karigar, 2013 ONSC 5199 (Can. Ont. Sup. Ct. J.).

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nada agreed that Karigar and his associate would help Cryptometrics Canada secure the contract from Air India in return for 30 percent of the revenue stream. Karigar then began introducing Cryptometrics Canada executives to senior Air India officials and also provided them with information about Air India's requirements and inside information about the bid.[59]

In February 2006, Air India released its official Request for Proposal (RFP) for the supply of a facial recognition security system. Karigar and Cryptometrics Canada worked together on a proposal for the RFP and, during a meeting between the parties, Karigar's associate advised that Indian officials would need to be bribed to secure the contract. Karigar then provided Cryptometrics Canada with a spreadsheet that listed the officials and the amounts of each bribe. As the proposal was being developed by Cryptometrics Canada, Karigar continued providing the company's executives with inside information. He also advised the company to develop a second proposal that was to be presented under the name of a different company at a much higher price to create a false sense of competition.[60]

In June 2006, Cryptometrics U.S.A., the parent of Cryptometrics Canada, transferred U.S. $200,000 to Karigar, which was likely to be used to bribe a senior Air India official. In March 2007, an additional U.S. $250,000 was transferred to Karigar to obtain the Air India contract.[61]

Ultimately, Cryptometrics Canada's bid for the supply contract was unsuccessful. The court found that there was no evidence of what became of the U.S. $450,000 that was transferred to Karigar and therefore no evidence that any bribe was actually offered or paid to a foreign public official. But the court ruled that Karigar agreed with others to offer bribes to foreign public officials and therefore was guilty of an indictable offense pursuant to paragraph 3(1)(b) of the CFPOA.[62]

V. Canada–EU Trade Deal Signed

After more than four long years of negotiation, Canada and the EU have concluded the Comprehensive Economic Trade Agreement (CETA), with Prime Minister Stephen Harper and European Commission President José Manuel Barroso signing the political declaration in principle in Brussels on October 18, 2013.[63] This agreement will significantly liberalize trade between the parties. Tariffs will be reduced to zero on 98 percent of goods currently traded between Canada and the EU (99 percent for industrial goods).[64] Most remaining tariffs will be phased out in stages after three, five, or seven years, depending on the product.

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Laura Payton, *CETA: Canada-EU Free Trade Deal Lauded by Harper, Barroso*, CBC NEWS (Oct. 18, 2013, 9:16 PM), http://www.cbc.ca/news/politics/ceta-canada-eu-free-trade-deal-lauded-by-harper-barroso-1.2125122.
64. GOV'T OF CAN., TECHNICAL SUMMARY OF FINAL NEGOTIATED OUTCOMES: CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (2013) [hereinafter TECHNICAL SUMMARY], *available at* http://s3.documentcloud.org/documents/812782/ceta-final-negotiated-outcomes.pdf.

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CETA will not go into effect immediately. The Technical Summary published by the Government of Canada and other published reports, however, reveal the following information about the expected scope of CETA:[65]

- most issues had been addressed by the end of November 2011, as negotiators had dealt with the "low hanging fruit;"
- at that time, agreements to reduce most tariffs and for CETA's administrative institutional arrangements were easily reached; but
- since November 2011, there has been hard slogging as both sides fought on the more politically sensitive issues.

The resolution of these issues is discussed below.

A. Agriculture

Perhaps the most sensitive issue for negotiators was agriculture, though there was little concern for agricultural support programs generally. The battle was fought over requests for increased access of specific products. Canada wanted increased access to the EU market for beef and pork. The EU sought unlimited access to the Canadian cheese market. This was a "deal breaker" for both sides and was resolved through last minute quota concessions.[66] While quota may not be the preferred approach in free trade negotiations, it would seem that this was the only way to permit the already agreed-upon extensive trade liberalization.[67]

Canada received a significant increase in quota for hormone-free beef and pork exports to the EU, with planned tariff-free access for 50 thousand tonnes of beef and 81 thousand tonnes of pork. The value of these concessions has been reported to be in the range of $1 billion to $1.3 billion per year. In return, the EU will more than double its cheese import quota for sales to Canada from about 13 thousand tonnes per year under existing arrangements, to a reported 29 thousand tonnes.[68] The no-tariff rate quotas (TRQ) for cheese from the EU will comprise 16,000 tonnes of new market access, 800 tonnes from the existing World Trade Organization TRQ to address new member State accession to the EU and 1,700 tonnes for industrial-use cheese.[69] While the numbers seem big, it should be understood that the Canadian cheese market is estimated to be in the range of 500 thousand tonnes per year.[70] As a result, the concessions mean the total annual import share of the market will increase from about four percent to 8 percent of annual Canadian consumption.

65. *Id.*
66. *See* Joe Rosario, *Is Canada's Agricultural Sector up to the CETA Challenge?*, Troy Media (Nov. 4, 2013), http://www.troymedia.com/2013/11/04/is-canadas-agriculture-sector-up-to-the-ceta-challenge/.
67. *See* Carmen Paun & Kitty So, *Meat Traders Celebrate EU/Canadian Trade Deal*, Global Meat News (Oct. 21, 2013), http://www.globalmeatnews.com/Industry-Markets/Meat-traders-celebrate-EU-Canadian-trade-deal.
68. *CETA: Canada-EU Trade Deal by the Numbers*, CBC News (Oct. 18, 2013, 12:47 PM), http://www.cbc.ca/news/politics/ceta-canada-eu-trade-deal-by-the-numbers-1.2125473.
69. Technical Summary, *supra* note 64, at 10.
70. Michael Grant, *Time for Dairy to Go on the Offensive*, The Conf. Board of Can. (Nov. 1, 2013), http://www.conferenceboard.ca/economics/hot_eco_topics/default/13-11-01/time_for_dairy_to_go_on_the_offensive.aspx.

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B. Pharmaceuticals

Intellectual property rights for pharmaceutical production was another difficult issue. Canada rejected the EU request to provide ten years of data protection, but agreed to the current Canadian practice of providing eight years of market exclusivity.[71] The EU had sought an extension of patent protection for five years, to match the length of EU rights.[72] The EU also sought to have time in product approval not counted against the length of the patent. Canada ultimately agreed to grant additional pharmaceutical patent protection for up to two years to account for the approval process, but the cap on the period of protection in the EU remains at five years.[73] Any cost impacts are unlikely to be felt until 2023, assuming CETA is ratified in 2015.

C. Trade in Services

On trade in services, Canada was seeking temporary access to the EU market for a range of Canadian workers (similar to NAFTA). The EU balked at this request on the ground that individual member States of the EU maintain sovereignty over immigration from non-EU sources. Canada was successful in negotiating preferential access for a number of employment categories, including information technology workers, professionals (e.g., accountants and engineers), investors, environmental services, scientific/technical personnel, and workers in the energy distribution sector. This preferential treatment will be reciprocal.[74]

Government procurement concessions have extended far beyond those in NAFTA. EU companies will be able to bid on federal government contracts, and because the Provinces have also agreed to attorn to the terms of the agreement, access will be extended to both provincial and municipal government contracts.[75] Canadian companies will have reciprocal rights to bid on contracts tendered by all EU institutions as well as with each of the twenty-eight member countries and their regional and local governments.[76] It is expected that provincial and municipal governments will need to adopt some form of procurement dispute resolution, though the extent and form of such a mechanism is not yet known.[77]

71. Technical Summary, *supra* note 64, at 19.

72. *See* Riyaz Dattu, Daniel Fombonne & Sonja Pavic, *Analysis of the Canada-EU Comprehensive Economic and Trade Agreement: A Call for Revising Strategic Business Plans*, Osler (Nov. 2013), http://www.osler.com/NewsResources/Default.aspx?id=6614.

73. *Accord Libre-échange Canada-Europe: plus de détails sur les clauses de propriété intellectuelle* [*Free Trade Agreement Canada-Europe: More Details on Intellectual Property Clauses*], "C'est e-p@tent!" (Oct. 30, 2013, 5:45 AM), http://cestepatent.wordpress.com/2013/10/30/accord-libre-echange-canada-europe-plus-de-details-sur-les-clauses-de-propriete-intellectuelle/.

74. *See* Gov't of Can., How CETA Will Benefit Newfoundland and Labrador (Feb. 6, 2013), http://www.releases.gov.nl.ca/releases/2013/exec/CETA_AIP_NL.pdf.

75. *See* Campbell Clark, Paul Waldie & Adrian Morrow, *EU-Canada Deal Will Restrict Access to Public-Sector Contracts, Sources Say*, The Globe & Mail (Oct. 19, 2013, 12:40 AM), http://www.theglobeandmail.com/news/politics/eu-canada-deal-will-include-access-to-lucrative-public-sector-contracts-sources-say/article14946244/.

76. *See* Brenda C. Swick, *Impact of the Canada-EU Comprehensive Economic and Trade Agreement on Government Contracting*, Lexology (Dec. 20, 2013), http://www.mccarthy.ca/article_detail.aspx?id=6579.

77. *See* Robert Finbow, CETA and Multi-Level Governance: Implications for Provincial and Municipal Governments (Oct. 2013), *available at* http://labs.carleton.ca/canadaeurope/wp-content/

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D. Rules of Origin

Rules of origin proved to be a thorny issue for Canadian negotiators. For certain products, tariff concessions conferred no benefits where non-Canadian inputs were employed, even if those inputs represented only a small portion of the value of the goods.[78] Some examples included American fish processed in Canada and textiles made from imported thread. This issue was resolved through a process known by the acronym TPL (trade preference level) that will allow derogation for products with a higher proportion of imported inputs (such as automobiles, fish, textiles, and processed foods) from normal EU rules of origin, though phase-in of these rights may occur over three, five, or seven years.[79]

E. Geographical Indications

Geographical indications (GIs) arise where products from a specific place or region are accorded certain intellectual property protection.[80] The EU began negotiations with an extensive list of hundreds of product names that it wished to see protected.[81] Many of these are considered generic product names in Canada.[82] In addition, some of the requested designations had existing Canadian trademarks. Because taking away these rights would likely be considered an expropriation of an asset under NAFTA, there was a concern that yielding on this issue would give rise to NAFTA Chapter 11 proceedings by Mexican or American investors in Canadian enterprises holding these trademarks.[83] Canada agreed to varying ways of addressing EU requests regarding 179 terms covering foods and beer, with a preserved space for Canadian trademark holders and for users of commonly-used English and French names for food products, like Valencia Oranges, Black Forest Ham, and Parmesan.[84] Limited GI rights were provided to the EU on asiago, feta, fontina, gorgonzola, and munster where current users are not affected, but future users can use these names only in expressions such as "kind" or "type." Canada preserved the right to use the customary name of a plant variety or an animal breed, such

uploads/sites/9/FINBOW_CETD_CETA-and-Multi-Level-governance.pdf (implying that such a dispute resolution system is not yet in place).

78. *See* John D. Tennant, *What Businesses Need to Know About the Canada-EU Comprehensive Economic & Trade Agreement*, W2N2 (Nov. 6, 2013), http://www.w2n2.ca/what-businesses-need-to-know-about-the-canada-eu-comprehensive-economic-trade-agreement.

79. Technical Summary, *supra* note 64, at 4.

80. *See Office of Policy and International Affairs: Geographical Indicators*, U.S. Pat. & Trademark Off. (Oct. 1, 2013, 2:12 PM), http://www.uspto.gov/ip/global/geographical/.

81. *See Canada EU Discuss Geographic Indications*, i.e. Now, http://www.iecanada.com/ienow/2010/mar_10/inside_1.html (last visited Mar. 20, 2014).

82. Crina Viju, CETA and Geographical Indicators: Why a Sensitive Issue? (Oct. 2013), *available at* http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/CETD_CETA-policy-brief_GIs_Viju.pdf.

83. *See* Kip Keen, *Landmark Canada/EU Trade Agreement Could Have Major Implications for Miners*, Mineweb (Oct. 23, 2013), http://www.mineweb.com/mineweb/content/en/mineweb-political-economy?oid=209783&sn=Detail.

84. John Norman, Monique M. Couture & James Holtom, *CETA: Impact on Canada's IP Regime*, Gowlings (Nov. 2013), http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=3075.

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as kalamata, as well as the ability to use components of multi-part terms, such as "brie," whereas "Brie de Meaux" is protected.[85]

VI. Conclusion

The Canada-EU negotiations were complex. Each party had extensive consultation with both industry and political interests. Canada had representatives from all provinces in its delegation, and the EU shared its progress with all member nations. There were some contentious points of particular political sensitivity where the outcome may not have satisfied all stakeholders, but Canada and the EU understood that the substantial agreement reached on most issues could not be summarily discarded and certain accommodations were required. The result is an important treaty that extends to five countries in the G8 and beyond.

85. TECHNICAL SUMMARY, *supra* note 64, at 20.

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