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Canadian Law

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I. Canadian Communications Law—Developments in 2002

A. Broadcasting

1. *New Regulatory Framework for the Transition to Over-The-Air Digital Television Services*

In June, the CRTC established a new policy framework intended to guide broadcasters, distributors, and producers through the transition to digital broadcasting, with the aim of ensuring that Canadians will benefit from these technological advances to the fullest extent.[1]

The CRTC did not impose deadlines for the transition, choosing instead to let broadcaster investment and consumer demands dictate the rate at which the upgrade to digital broadcasting will occur. Existing broadcasters are thus allowed to make the transition to digital voluntarily and are given the first opportunity to apply for licenses to broadcast

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1. Canadian Radio-television and Telecommunications Commission, ***Broadcasting Public Notice CRTC 2002-31*** (Jan. 12, 2002), ***available at*** http://www.crtc.gc.ca/archive/ENG/Notices/2002/pb2002-31.htm.

digitally, but if they fail to do so in a reasonable amount of time, other applicants for the relevant frequencies will be considered. Broadcasters have been encouraged to construct new digital transmitters that will provide full off-air coverage to match their existing analog coverage and are expected to maintain their existing analog coverage in full throughout the transition period. Viewers will continue to have access to all of their over-the-air analog services throughout the transition period and will be able to upgrade their equipment at their own pace and convenience.

2. *CRTC Report on Interactive Television Services*

The CRTC's October report[2] provides a snapshot of the current state of interactive television (ITV) in Canada and forms the basis of further proceedings, seeking input from the broadcasting industry, interested stakeholders, and the public with respect to a number of questions on ITV and broadcasting generally.[3] The CRTC seeks to guide broadcasters, distributors, and creators in making the transition to ITV, while fostering the continued growth and strength of the Canadian broadcasting system and maintaining cultural objectives that benefit both consumers and industry members. Some of the matters raised in the CRTC's process deal with ITV services and its effects on the traditional concepts of ownership, copyright, accessibility, and consumer acceptance. One of the key issues is whether elements of ITV that must be distributed as an integral part of a service are being broadcasted.

B. Telecommunications

1. *New Rules for Local Phone Service Rates*

The CRTC issued new rules to determine the rates charged to residential and business customers for local telephone services by five incumbent Canadian local telephone companies.[4] The new rules were developed after an extensive review of the first four-year regime known as Price Cap Regulation.[5] Based on the relatively low level of local competition and the dominance of the incumbent telephone companies, the CRTC concluded that pricing rules were still needed to protect customers.[6]

As part of its determination, the CRTC denied a request by the incumbent telephone companies for the flexibility to raise rates for residential customers. No increases for basic services are permitted unless inflation exceeds 3.5 percent. The CRTC also restricted local service rate increases for business customers to the average rate of inflation.[7] The rates that the incumbent telephone companies charge their competitors for certain services were reduced, and the CRTC directed the incumbent telephone companies to provide a new competitor access service.[8]

2. Canadian Radio-television and Telecommunications Commission, *Report on Interactive Television Services*, *available at* http://www.crtc.gc.ca/eng/publications/reports/interactive_tv.htm (last visited Mar. 19, 2003).

3. Canadian Radio-television and Telecommunications Commission, *Broadcasting Public Notice CRTC 2002-63* (Oct. 22, 2002), *available at* http://www.crtc.gc.ca/archive/ENG/Notices/2002/pb2002-63.htm.

4. Canadian Radio-television and Telecommunications Commission, *Telecom Decision CRTC 2002-34* (May 30, 2002), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2002/dt2002-34.htm; Canadian Radio-television and Telecommunications Commission, *Telecom Decision CRTC 2002-33* (May 30, 2002), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2002/dt2002-33.htm.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

The CRTC has approved service-improvement plans for the incumbent telephone companies.[9] The plans will bring service to persons without service and upgrade service to others. Customers and competitors will be entitled to rebates if the incumbent telephone companies do not meet the CRTC mandated service standards.

2. *New Framework for Extending Local Calling Areas*

Under the CRTC new framework criteria, an elected local, municipal, or regional government can start the process of expanding its local calling area by passing a motion and making a request to the local incumbent telephone company. The CRTC will accept a request from the appropriate level of government as evidence that there is a community of interest for the purpose of expanding a local calling area. Upon such request, the local telephone company is to determine the estimated cost increases, lost toll revenue, and cost of any required plebiscite. Based on that information, the requesting government would decide whether to proceed or not. If it decided to go forward, the local telephone company would take the next step and file an application with the CRTC. Interested parties would then have an opportunity to comment.

Both incumbent telephone companies and competitors would be compensated for a portion of lost long-distance revenues caused by expanding the local calling area through a temporary surcharge. The CRTC has suggested that this amount be equal to three year's worth of long-distance revenue.[10] It also has sought comments from parties interested in this issue.

3. *New Telecom Safeguards to Permit Fair Competition*

The CRTC issued a decision setting out new criteria to be applied in circumstances where a telephone company's affiliate provides services in the telephone company's operating territory.[11] When a reseller affiliate of a telephone company wishes to resell a tariffed service of the telephone company, the telephone company will be required to obtain the CRTC's approval of a tariff setting out the rates, terms, and conditions under which the service can be resold by the affiliate.[12]

As part of its decision, the CRTC found that Bell Canada breached the CRTC's bundling rules by providing certain services through Bell Nexxia without obtaining CRTC approval. The CRTC directed Bell Canada to file tariffs in respect to those arrangements and to provide the CRTC with additional information about other bundling plans involving Bell Canada, Bell Nexxia, or other Bell Canada affiliates.[13]

II. Canadian Transportation and Customs Regulations

A. Truck Transportation Deregulation

Over the past several years, there has been a continuous trend towards the reduction of economic regulation of Canada's truck transportation industry in favor of increased regu-

9. *Id.*
10. *Id.*
11. Canadian Radio-television and Telecommunications Commission, *Telecom Decision CRTC 2002-76* (Dec. 12, 2002), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2002/dt2002-76.htm.
12. *Id.*
13. *Id.*

lation of the industry's safety operating practices. By 2002, the provinces of Ontario and Manitoba remained the only provincial jurisdictions that continued the licensing requirement for common-carrier truck transportation services operating within, to, from, or through the two provinces.

On November 26, 2002, Royal Assent was given to the Government Efficiency Act, which provides for the subsequent amendment of the Highway Traffic Act and the repeal of the Ontario Truck Transportation Act.[14] Therefore, in 2003 the Truck Transportation Act will be repealed and the requirement for any form of operating license for truck transportation services within, to, from, or through the Province of Ontario will disappear. Regulations dealing with a truck transportation bill of lading and related matters that have fallen within the legislative purview of the Truck Transportation Act will be moved to the Highway Traffic Act virtually without apparent change.[15] There is, however, a legislative jurisdiction question which may affect truck transportation contracts in the future by fixing in place "deemed terms and conditions" in every contract. The Province of Manitoba is moving in the same direction, and, consequently, during the course of 2003, the requirement for an operating license to conduct truck transportation services in Canada will have, with very minor exceptions, disappeared entirely.

B. New Hours of Service Regulations

On September 20, 2002, Canada's Federal and Provincial Transportation Ministers collectively approved a new hours-of-service proposal for commercial vehicle drivers.[16] The changes that are now in the process of being adopted, federally and in each of the Canadian provinces and territories will:

1. reduce the maximum work day from sixteen hours to fourteen hours, which is a reduction of 12.5 percent;
2. increase the current minimum off-duty period from eight hours to ten hours over a twenty-four hour period, while at the same time requiring that the ten-hour minimum off-duty time be comprised of eight consecutive hours, with the remaining time being divided into off-duty periods of not less than one-half hour;
3. be a new national standard, which is easier to understood and enforce.[17]

The new Hours-of-Service Regulations have now been published in the Canada Gazette and should be in place and operative during the first half of 2003.[18]

Recognizing the tremendous importance of cross-border truck transportation between Canada and the United States, both carriers and shippers are awaiting the introduction of a new proposed hours-of-service regime for commercial vehicle operators in the United States.

14. Government Efficiency Act, R.S.O. (2002) (Can.).
15. Highway Traffic Act, R.S.O., ch. H.8 (1990) (Can.) [hereinafter HTA].
16. Canada Gazette, *Commercial Vehicle Drivers Hours of Service Regulations* (Feb. 21, 2003), *available at* http://canadagazette.gc.ca/partI/2003/20030215/html/regle1-e.html.
17. *Id.*
18. *Id.*

C. The Load Broker—A Trustee For The Carrier

In January 2002, TCT Logistics, Inc., a major trucking company that operated a freight brokerage business, was placed into receivership and subsequently petitioned into bankruptcy.[19] A number of carriers who had been retained by the TCT freight-brokerage operation to provide transportation services for the customers of TCT were left unpaid as of the date of receivership. TCT had collected fees from customers to cover the transportation services provided by the unpaid carriers, but had not paid those fees over to the carriers themselves. At the time of receivership, GMAC Commercial Credit Canada (GMAC), a major secured creditor of TCT, claimed priority through its security over the fees that had been collected by TCT for the service provided by the carriers. The carriers countered with a claim for priority pursuant to the Ontario Truck Transportation Act, arguing that the fees collected by the TCT freight brokerage operation constituted a trust fund over which they had priority against the secured creditor's general security agreement.

The Truck Transportation Act provides that every load broker shall hold in trust for the benefit of the carriers to whom the load broker is liable to pay carriage charges, all the money the load broker receives from consignors and consignees for the carriage of goods by carriers, except money in excess of the carriage charges and interest in money that is held by the load broker for less than thirty days.[20] The Court concluded that the monies received by TCT representing carrier's fees were indeed received by TCT as trustee for the carriers, and as such, those fees received were not part of TCT property, which a general security agreement would attach.[21] The decision has been appealed by GMAC and by TCT's Interim Receiver to the Ontario Court of Appeal.

With the proposed repeal of the Truck Transportation Act, the Highway Traffic Act will be amended to provide that "a person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator until the money is paid to the operator."[22]

The new legislation appears to cast a wider net, in terms of the trust account obligation, beyond a load broker to any person. This may include a licensed carrier who subcontracts or interlines freight with another licensed carrier, unless the new regulations, which are not yet published, exempt these specific operations.

D. The Aftermath of 9/11: Customs, Immigration, and Security

During 2001, Canada Customs moved aggressively forward with the introduction of its new Customs Self-Assessment Program (CSA), designed to speed the movement of specified low value goods being imported from the United States into Canada.[23] The program was premised upon a certification approach, which would require that the specified goods

19. Noam Goodman & Dan Awrey, Comment, *GMAC Commercial Credit Corporation—Canada v. TCT Logistics Inc. et al.*, *available at* http://www.heenanblaikie.com/newsletter/112_fr.pdf (last visited Sept. 14, 2003).

20. Truck Transportation Act, R.S.O., ch. T.22 (1990) (Can.).

21. GMAC Commercial Credit Corporation—Canada v. TCT Logistics Inc. et al., [2002] O.R.3d 85.

22. HTA, *supra* note 15.

23. Canada Business Service Center, *Customs Self Assessment Program (CSA)* (Mar. 19, 2003), *available at* http://www.cbsc.org/ns/english/display.cfm?code=3075&coll=FE_FEDSBIS_E.

would move quickly across the border for post-delivery Customs clearance when the importer, the carrier, and the driver had each been certified under the CSA program. The focus of the CSA program was to accelerate the movement of low-value goods from the United States into Canada, while securing compliance with the Customs Tariff Act, the Customs Act, the collection of Customs duties, and GST, rather than to focus on public safety and security, which have arisen from the events of September 11, 2001.

The September 2002 Canada-U.S. Thirty-Point Action Plan for a Secure and Trade Efficient Border has resulted in an implementation effort that began to have its impact in 2002. The Plan has effectively augmented the CSA driver certification program, which dealt only with commercial vehicle drivers entering Canada from the United States, with the bi-national NEXUS Joint Customs and Immigration Program for frequent travelers.[24] The NEXUS program is designed to simplify border crossings for pre-approved, low-risk travelers who will be able to use designated lanes at various border crossings and who may not be regularly subjected to the usual Customs and Immigration questioning.[25] The NEXUS program is available to citizens and permanent residents in Canada and the United States who can meet the qualification requirements imposed by each of the two governments.

In addition to NEXUS, a U.S.-Canada border highway carriers/Free and Secure Trade (FAST) program has been established.[26] In order to apply for FAST highway carrier membership into the United States and Canada, separate applications must be submitted to each country's respective FAST processing centers. The U.S. Customs-Trade Partnership against Terrorism (C-TPAT) has also been established.[27] Application and approval into the U.S. FAST program is a pre-condition to membership in C-TPAT.

Once again, these programs focus upon importer registration, carrier registration, and commercial driver applications. Approval on both sides of the border is necessary for a successful application. The full impact of all of these security-driven plans on cross-border transportation has not and cannot be fully assessed yet. It is clear, however, that both road and rail carriers, operating cross-border, will have significantly increased costs arising from compliance with these new security programs, and those costs likely will be passed on to the shipping public.

Furthermore, to the extent that some enterprises or individuals based in Canada and the United States cannot, or elect not to, register or apply for these security programs, they are likely to find themselves non-competitive in Canada-U.S. cross-border trade. Such a result may impact their business operations, employment, or livelihood.

It should be noted that some aspects of the Canada-U.S. Thirty-Point Action Plan will take years rather than months to implement. From a Canadian perspective, the movement towards full implementation of the plan has already raised the argument of the increasing loss of Canadian sovereignty over its own customs, immigration, and security policies.

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24. Customs & Border Protection, *United States—Canada NEXUS Program*, *available at* http://www.customs.ustreas.gov/xp/cgov/travel/inspections/nexus.xml (last visited Sept. 14, 2003).

25. *Id.*

26. Customs and Border Protection, *Free and Secure Trade (FAST) Highway Carrier Application Process*, *at* http://www.customs.ustreas.gov/ImageCache/cgov/content/import/commericial_5fenforcement/ctpat/fast/fast_5fregister_2epdf/v2/fast_5fregister.pdf (last visited Sept. 14, 2003).

27. Customs and Border Protection, *Customs-Trade Partnership Against Terrorism (C-TPAT)*, *available at* http://www.customs.ustreas.gov/xp/cgov/import/commercial_enforcement/ctpat/ (last visited Sept. 14, 2003).

E. CTA Decisions of Interest

In September 2002, the Agency denied an application by the Ferroequus Railway Company (Ferroequus) for running rights over specific lines of CN.[28] The Agency decided that the grant of statutory running rights is an exceptional remedy that requires actual evidence of market abuse before an application will be granted. The Agency stated in its decision that an application will not be granted simply for the sake of increasing competition.[29]

In May 2001, the Agency dismissed applications made by both Ferroequus and the Hudson's Bay Railway Company for running rights over CN lines, as both applicants sought the right to solicit traffic on the respective lines of CN.[30] The Agency determined that the applications for "open access" were beyond the relief that could be granted under section 138 of the CTA.

III. Principal Tax Developments in Canada in 2002

Two events stand out in the Canadian income-tax landscape for 2002: (1) the introduction by the Department of Finance of another set of substantial revisions to its proposed foreign investment entity (FIE) legislation, and (2) the restriction by the Supreme Court of the judicial "reasonable expectation of profit" doctrine.

A. New Foreign Investment Entity Rules

On October 11, 2002, the Department of Finance released extensive draft legislation that included, among other things, new rules dealing with interests of Canadian taxpayers in FIEs.[31] Previous revisions to the existing FIE rules were first proposed in the 1999 Federal Budget and have been introduced and reintroduced in draft form several times.[32] Although they have not yet been enacted by Parliament, these rules became effective on January 1, 2003.

As was the case with previous draft legislation in this area, the new FIE rules are potentially very broad in their application. In general terms, a FIE is a non-resident entity whose principal activity is an "investment activity."[33] The new rules also contain several specific rules that exempt interests in certain types of non-resident entities.[34] However, under these rules, the onus is generally on the taxpayer to establish, on an annual basis, that a particular

28. Canadian Transportation Agency, *Decision No. 505-R-2002* (Sept. 10, 2002), *available at* http://www.cta-otc.gc.ca/rulings-decisions/decisions/2002/R/505-R-2002_e.html.

29. *Id.*

30. Canadian Transportation Agency, *Decision No. 213-R-2001*, *available at* http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/R/213-R-2001_e.html; Canadian Transportation Agency, *Decision No. 212-R-2001*, *available* at http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/R/212-R-2001_e.html.

31. This draft legislation also included further technical revisions to the proposed rules dealing with the taxation of interests in non-resident trusts. However, these changes do not represent a significant policy change from the last version of the draft legislation released in 2001, which was discussed in the 2001 Canadian Tax Law Review. *See* Gilles M. Daigle et al., *Canadian Law*, 36 Int'l Law. 753 (2002).

32. *See id.* (providing more details).

33. KPMG, *Canada Tax News Flash* (Dec. 12, 2002), *available at* http://www.kpmg.ca/english/services/docs/tax/newsflash/tnfc0216.pdf.

34. The new FIE rules rely on a series of complex definitions and exclusions to determine if and how a particular interest in a non-resident entity is subject to their application. It is beyond the scope of this review to describe all of the particular exceptions to the new FIE rules.

investment is *not* subject to FIE rules. This is an important departure from the current legislation, where specific conditions related to tax-avoidance motives and the composition of the non-resident entity's asset base had to be satisfied.

If the new FIE rules apply, the taxpayer generally will be subject to Canadian income tax under a prescribed rate-of-return regime. In certain circumstances, however, a mark-to-market regime or the existing foreign-accrual property income (FAPI) system could apply. Where the prescribed rate of return regime applies, the taxpayer will be deemed to earn a rate of return on the "designated cost" of the investment, which is based on Canadian T-Bill rate plus 2 percent. In general terms, the designated cost of a FIE interest is its acquisition cost plus amounts included previously in the taxpayer's income as covered by the particular FIE interest under the new draft legislation or the FIE rules that are currently enacted. FIE interests that are governed by the new system but were not subject to the previous FIE regime essentially will have, as their starting point, a designated cost equal to the fair market value of the FIE as of January 1, 2003.

Taxpayers who hold interests in FIEs will be able to deduct from their income an amount equal to the lesser of the amount previously included under the regime with respect to a particular FIE, or the amount of the income inclusion resulting from the actual distribution of income by that particular FIE. However, taxpayers may not receive full income-tax relief in Canada for foreign withholding taxes with respect to distributions made by their respective FIEs. While the new FIE rules represent a departure from previous rounds of draft legislation, ironically these proposed amendments appear to be little more than a significantly more complex version of the existing FIE legislation.

B. The Supreme Court of Canada & The "REOP" Doctrine

In the decisions of *Stewart v. Canada*[35] and *Walls v. Canada*,[36] the Supreme Court of Canada severely restricted the use of the "reasonable expectation of profit" (REOP) test in Canadian tax jurisprudence. Prior to these decisions, the Canada Customs and Revenue Agency (CCRA) regularly denied the deduction of certain losses if the taxpayer could not establish that he or she had a REOP in connection with the venture giving rise to the losses.

The application of the REOP test has been criticized for years for its unfairness. Once REOP was found to apply, the losses that were not deductible would be lost forever—they could not be carried forward and applied in subsequent years even if the venture giving rise to the losses became profitable in subsequent years. In addition, the losses could not be applied to offset any future capital gain that might be realized on a sale of the underlying assets used in the venture.

In allowing the taxpayers' appeals in *Stewart* and *Walls*, the Supreme Court rejected the REOP test as the primary means of determining whether a taxpayer could deduct losses from a particular venture against other sources of income, such as employment income or income from other investments. Instead, the Supreme Court set out a two-stage analysis for approaching cases involving the deductibility of business and property losses. First, a court should determine whether the taxpayer's activities giving rise to the losses were undertaken in pursuit of profit or as a personal endeavour. If a court concludes that the

35. Stewart v. Canada, [2002] S.C.R. 645.
36. Walls v. Canada, [2002] S.C.R. 684.

taxpayer's loss-creating venture did not include a personal or hobby element, the venture will be considered a source of income, and no further analysis is required. Second, in the event that there is a personal element to the activity, the court would then need to determine whether the venture possessed a "sufficient commercial manner" so as to constitute a source of business or property income. In order to demonstrate the commercial nature of the endeavour, the taxpayer must establish that his or her subjective intention was to make a profit and that the activity had been carried on in accordance with objective standards of "businesslike" behaviour. Accordingly, if there is a personal element to the venture, the existence of a REOP will be one factor, but not the only factor, in evaluating the commercial nature of the activity.

As a result of these two decisions, the CCRA will no longer be able to use the REOP test in circumstances where losses are incurred in connection with an activity having no personal element. The REOP test will remain relevant only in circumstances where a personal element exists. It is important to note, however, that the Income Tax Act does contain specific provisions, which restrict the deductibility of particular business expenses as well as a general overriding requirement that all business expenses be "reasonable in the circumstances."[37] With the elimination of the REOP test, the CCRA will be forced to focus its efforts on reviewing the reasonableness of individual expenditures should it wish to deny business losses to taxpayers involved in commercial activities.

IV. Canadian Competition Law—2002 Developments

A. Judicial Developments

1. *Mergers—The Efficiency Defense*

Canada's merger-review regime is unique in that it mandates a trade-off between the anti-competitive effects of a merger and the efficiency gains likely to result there from. Under section 96 of the Competition Act, the Competition Tribunal is precluded from making an order, with respect to a merger, that would likely result in a substantial lessening of competition, where the merger is likely to bring about gains in efficiency that will be greater than, and will offset, its anti-competitive effects.[38]

The Commissioner of Competition v. Superior Propane is the first Canadian merger case to interpret this so-called efficiency defense.[39] While the central issue and focus of this case has revolved around the appropriate standard for the section 96 efficiencies/effects trade-off, the redetermination decision of the Competition Tribunal, rendered in April 2002,[40] raised a far more fundamental issue, namely the purpose of Canadian Competition Law.

According to the Competition Tribunal in *Superior Propane*, consumer protection is neither the main goal of the Competition Act, nor of the merger provisions in particular. Rather, the paramount objective of Canadian merger law is the efficient allocation of economic resources. In balancing efficiencies against anti-competitive effects in merger review,

37. Income Tax Act, R.S.C., ch. 1 (1985) (Can.).

38. *Id.* § 96.

39. Canada (Commissioner of Competition) v. Superior Propane Inc., [2003] F.C. 53; *see also* Gilles M. Daigle et al., *Canadian Law*, 36 Int'l Law. 753 (Fall 2002).

40. Commissioner of Competition v. Superior Propane Inc., 2000 Comp. Trib. 15 (File No. CT1998002) (2002).

there is not a policy choice which favors consumers. Only those effects that are socially adverse should be considered.

On January 31, 2003, the Federal Court of Appeal dismissed the Commissioner's appeal from the Competition Tribunal's redetermination decision.[41] In doing so, the Court neither explicitly accepted nor rejected the Competition Tribunal's views regarding the purpose and objectives of Canadian merger law. As a result, unless this issue is addressed on appeal or as a result of a legislative amendment, the purpose and objectives of Canadian merger law will remain unclear.

2. *Mergers—Interdependence*

In July 2002, the Competition Tribunal issued a consent order requiring Bayer AG to divest certain assets to resolve competition concerns arising from its acquisition of Aventis CropScience Holding S.A.[42] *Bayer* is noteworthy because the Commissioner asserted that the acquisition would facilitate interdependent behavior among the largest remaining competitors in the market.[43] Although interdependence has been raised as a factor by the Commissioner in a number of prior cases, this is the first case in which a Competition Tribunal order has been granted based solely on concerns regarding the likely interdependent exercise of market power.

B. Legislative Developments

In June 2002, amendments to the Competition Act contained in Bill C-23 came into force.[44] Among other things, Bill C-23 established a new right for private parties to bring applications to the Competition Tribunal where they have been injured by tied selling, exclusive dealing, market restrictions, or a refusal to deal.[45]

Bill C-23 also introduced provisions designed to facilitate co-operation between the Competition Bureau and foreign regulatory authorities in civil (non-criminal) competition law matters.

C. Administrative Developments

On August 19, 2002, the Competition Bureau announced proposed changes to its Fee and Service Standards Policy.[46] The changes, which came into force on April 1, 2003, included an increase in the fees for pre-merger notification filings to C$50,000 (from C$25,000) and an increase in the transaction-size threshold for merger pre-notification to C$50 million (from C$35 million).[47]

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41. *Id.*

42. Commissioner of Competition v. Bayer AG, [2002] Comp. Trib. 25 (File No. CT2002003), *available at* http://www.canlii.org/ca/cas/cact/2002/2002cact25.html.

43. *Id.*

44. An Act to Amend the Competition Act and the Competition Tribunal Act, R.S.C., ch.16 (2002) (Can.).

45. Previously, only the Commissioner could apply to the Competition Tribunal for relief in respect to these practices.

46. Government of Canada Competition Bureau, *Discussion Paper on the Proposal to Increase Fees and Revise its Fee and Service Standards Policy* (Aug. 19, 2002), *available at* http://strategis.ic.gc.ca/SSG/ct01250e.html.

47. *Id.* at 2–6.

D. Looking Ahead

Even before the most recent legislative amendments to the Competition Act were proclaimed in force, new legislative initiatives were being discussed.[48] These include proposed changes to conspiracy provisions of legislation that would establish a two-track enforcement approach to agreements among competitors—the adoption of *per se* rules to deal with hard-core cartel activity, and the enactment of a new civil provision to deal with other horizontal business arrangements, such as joint ventures.

Other proposed legislative initiatives include expanding private access to the Tribunal to include abuse of dominant position proceedings and conferring on the Competition Tribunal the ability to impose administrative penalties and damage awards with respect to reviewable matters.

Looking ahead, the most important developments in Canadian competition policy will be in the area of merger review, following *Superior Propane*. This will have significant implications not only for Canadian companies seeking to achieve the economies of scale necessary to compete effectively in Canada and abroad, but also for non-Canadians pursuing business opportunities in Canada.

Initiatives are already underway to amend the Competition Act to repeal the efficiency defence. But, careful consideration should be given to any amendments that would significantly alter the existing legislative scheme for merger review in Canada. This regime, which was implemented in 1986 following a broad public consultation, reflects not only modern economic thinking but also the unique circumstances of the Canadian economy. A change in the regime to de-emphasize economic efficiency, which ultimately benefits all Canadians, as a cornerstone of Canadian merger policy, would be an arguably negative development.

V. International Trade Disputes—Canada

A. World Trade Organization

The Canada-U.S. softwood lumber dispute strained U.S.-Canadian relations in 2002, sparking a round of NAFTA and WTO challenges by Canada even prior to the completion of the U.S. Department of Commerce investigation. In September, a WTO panel concluded that the U.S. Department of Commerce (Commerce) had erred in its affirmative preliminary determination in the lumber countervailing duty investigation.[49] Among other things, the panel concluded that Commerce had acted wrongly in measuring the size of the subsidy provided by Canadian stumpage practices against a benchmark set with reference to U.S. stumpage prices, rather than market conditions in Canada.[50] The panel decision

48. On April 23, 2002, the House of Commons Standing Committee on Industry, Science, and Technology (Committee), tabled a report on the future of Canada's competition law. The report, entitled *A Plan to Modernize Canada's Competition Regime* (Committee Report), makes twenty-nine recommendations to reform the Act and is the product of consultations with competition law experts, representatives of the Bureau, and members of the Tribunal. *See* House of Commons, *A Plan to Modernize Canada's Competition Regime* (Apr. 23, 2002), *available at* http://strategis.ic.gc.ca/SSG/ct02357З.html.

49. Department of Foreign Affairs and International Trade (Canada), *Canada Wins Key WTO Lumber Decision* (Sept. 27, 2002), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105481.htm&Language=E.

50. WTO Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2003), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/217_234r_a_e.pdf.

was adopted by the WTO Dispute Settlement Body in November, precluding any appeal of the decision.[51]

Also in 2002, Canada brought new WTO challenges to the Department's final rulings in both the lumber countervailing duty and antidumping investigations.[52] Both matters were pending by year's end. Meanwhile, at the very beginning of 2003, Canada launched a WTO challenge of the International Trade Commission's injury holding, urging that the Commission had erred in concluding that the U.S. industry was threatened with injury by Canadian softwood lumber exports.[53]

During 2002, WTO panels reached decisions on three other trade disagreements between Canada and the United States. In August, a WTO panel issued a ruling in a Canadian challenge to section 129(c)(1) of the U.S. Uruguay Round Agreements Act.[54] Under section 129(c)(1), WTO rulings take effect at a time directed by the United States Trade Representative (USTR).[55] Canada complained that this provision prevents the United States from refunding duty deposits collected from foreign companies prior to the USTR directive, even if the USTR acts passed the compliance deadline set by the WTO. In March, the panel dismissed the matter, concluding that the United States was not obliged to apply section 129(c)(1) in this manner.

Canada was more successful in its challenge of the U.S. Continued Dumping and Subsidy Offset Act of 2000.[56] The Act, also known as the Byrd Amendment, requires U.S. Customs authorities to distribute annually countervailing and anti-dumping duties, collected on imported goods, to domestic producers for a series of "qualifying expenses."[57] The United States has made two annual duty distributions under the law. Canada, along with other countries, urged that under the WTO, the only action a member may take to offset dumping or subsidization is the imposition of dumping or countervailing duties, and that distribution of duties to members of the domestic industry violated this principle. The WTO agreed, suggesting that the United States repeal the Byrd Amendment.[58] The Appellate Body, in an appeal decided in early 2003, ultimately affirmed the panel's decision.[59]

Canada suffered defeat, however, in a long-standing case brought against Canadian dairy practices by the United States and New Zealand. Focusing on how Canada's dairy system is bifurcated between a domestic, supply-managed system and a de-regulated commercial export market, a WTO panel, interpreting an earlier Appellate Body determination in the same case, found in July that Canada was providing an impermissible export subsidy under

51. WTO Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada- Action by the Dispute Settlement Body*, WT/DS236/4 (Nov. 1, 2002).

52. *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada—Request for Consultations by Canada*, WT/DS257/1 (May 13, 2002); *United States—Final Dumping Determination on Softwood Lumber from Canada—Request for Consultations by Canada*, WT/DS264/1 (Sept. 19, 2002).

53. *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Request for Consultations by Canada*, G/ADP/D45/1, G/L/598, G/SCM/D51/1, WT/DS277/1 (Jan. 7, 2003).

54. U.S. Department of State, *WTO Panel Rejects Canadian Challenge to U.S. Law* (June 12, 2002), *available at* http://usinfo.state.gov/topical/econ/wto/02061209.htm [hereinafter Canadian Challenge].

55. *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002).

56. Report of the Panel, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R (Sept. 16, 2002) [hereinafter *Offset Act*].

57. *United States—Continued Dumping and Subsidy Offset Act of 2000*, AB-2002-7 (Oct. 28, 2002).

58. *Offset Act*, *supra* note 56.

59. Report of the Appellate Body, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

the WTO Agreement on Agriculture.[60] The Appellate Body upheld the decision on appeal in December.[61]

Meanwhile, a new Canada-U.S. agricultural dispute reached the WTO in late 2002 when the United States filed a challenge to the Canadian Wheat Board, alleging that the Board acts inconsistently with WTO rules on state enterprises.[62]

B. NAFTA

Several NAFTA decisions relating to Canada-U.S. trade disputes were handed down in 2002. In January and April, a NAFTA panel upheld injury decisions by the Canadian International Trade Tribunal, and the dumping determination of the Canadian Commissioner of Customs and Revenue, in a case involving refrigerators from the United States.[63] A NAFTA panel did, however, issue remand orders in a challenge of U.S. Department of Commerce dumping and countervailing duty determinations relating to pure magnesium. Mounted by the Government of Quebec and, in the countervailing duty case, by a member of the U.S. industry, the challenges questioned different aspects of the Department's methodology in declining to "sunset" existing duty orders. The NAFTA panel agreed in part with the objections to the Department's decision in both cases and twice remanded the matters for reconsideration.[64] Nevertheless, by the end of the year, both the dumping and countervailing duty orders remained in place.

Of somewhat higher profile, two NAFTA challenges were mounted in April and May by the Canadian government and the Canadian industry against the Department of Commerce's dumping and countervailing duty determinations in the softwood lumber dispute.[65] By year's end, no decision in the cases had been issued.

60. Report of the Panel, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (July 26, 2002).

61. Report of the Appellate Body, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 20, 2002).

62. *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain—Request for Consultations by the United States*, G/L/597, G/TRIMS/D/20, WT/DS276/1 (Dec. 19, 2002).

63. *See* SICE, *In the matter of: Certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers, originated in or exported from the United States of America and produced by, or on behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, their respective affiliates, successors, and assigns* (Apr. 15, 2002), CDA-USA-2000-1904-03, *available at* http://www.sice.oas.org/DISPUTE/nafta/English/CU0093ea.asp; SICE, *In the matter of: Certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers, originated in or exported from the United States of America and produced by, or on behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, their respective affiliates, successors, and assigns* (Apr. 15, 2002), CDA-USA-2000-1904-04, *available at* http://www.sice.oas.org/DISPUTE/nafta/English/CA00044ce.asp.

64. On March 27, 2002, Panel unanimously affirmed in part and remanded in part the agency's determination. On October 15, 2002, Panel unanimously remanded the agency's determination on remand. On April 28, 2003, Panel unanimously remanded the agency's second determination on remand. Final order affirming the third Determination on Remand issued on August 14, 2003. *See* NAFTA Secretariat, *In the Matter of: Pure Magnesium from Canada* (Decision of the Panel) (Mar. 27, 2002), (Oct. 15, 2002), (Apr. 28, 2003), USA-CDA-2000-1904-06, *available at* http://www.nafta-sec-alena.org/DefaultSite/dispute/index_e.aspx?articleid = 380# USA-00-1904-06.

65. *See* NAFTA Secretariat, *In the Matter of: Certain Softwood Lumber Products from Canada* (Decision of the Panel) (Aug. 13, 2003), USA-CDA-2002-1904-02, *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/Ua02020e.pdf; NAFTA Secretariat, *In the Matter of: Certain Softwood Lumber Products from Canada: Final Affirmitive Antidumping Determination* (Decision of the

Also in 2002, damages were awarded by two arbitral tribunals constituted under Chapter 11 of NAFTA, the investor-state investment dispute provision.[66] In *Pope & Talbot*, a panel held in 2001 that the company had been accorded unfair treatment under the now-defunct Canada-U.S. Softwood Lumber Agreement.[67] In 2002, the panel awarded C$461,566 in damages and interest, significantly less than the C$508 million sought by the company.[68] In *S.D. Myers*, a panel awarded C$6.05 million in damages and interest to compensate the company for a 1995 interim order of the Government of Canada, found to have breached Canada's NAFTA obligations.[69] That order had prevented polychlorinated biphenyl waste from being exported to the United States.[70] Canada has sought review of the holding by the Federal Court of Canada,[71] but no decision had been handed down by year's end.

C. Antidumping, Countervailing Duty, and Safeguard Disputes

High profile antidumping and countervailing duty disputes continued to impair Canada-U.S. trade relations in 2002. The Department of Commerce's 2001 countervailing duty and antidumping investigations into Canadian softwood lumber exports culminated in duties of 8.43 percent and 18.79 percent, respectively.[72] As noted above, these findings provoked a lengthy list of WTO and NAFTA challenges by Canada. In the meantime, in July and September, the Department of Commerce initiated a series of expedited reviews of the lumber countervailing duty order, allowing some companies an opportunity to ratchet down the application of the country-wide countervailing duty rate by fall 2002.[73] By year's end, the lumber dispute had not been resolved, though efforts to reach a negotiated settlement were underway by early 2003.

A second Canadian commodity export prompted trade friction in 2002, when, in February, the United States Trade Representative released the results of a Section 301 investigation critical of Canadian wheat trade policies and the practices of the Canadian Wheat Board.[74] Following hard on the heels of the report, a petition alleging both subsidization

Panel) (July 17, 2003), USA-CDA-2002-1904-03, *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02030e.pdf.

66. North American Free Trade Agreement, 32 I.L.M. 605, ch. 11.

67. Pope & Talbot, Inc. v. Canada, *available at* http://www.dfait-maeci.gc.ca/tna-nac/disp/pope_archive-en.asp (last visited Sept. 11, 2003).

68. *See* Department of Foreign Affairs and International Trade, *NAFTA Tribunal Awards Minimal Damages to Pope & Talbot* (May 31, 2002), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105252.htm&bPrint=False&Year=&Language=E.

69. S.D. Myers, Inc. v. Can. (U.S.-Can.), NAFTA/UNCITRAL Tribunal (Nov. 13, 2000), *available at* http://www.appleton.com/cases/Myer%20-%20Final%20Merits%20award.pdf.

70. *See* Department of Foreign Affairs and International Trade, *NAFTA Tribunal Awards Damages in S.D. Myers Case* (Oct. 21, 2002), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105564.htm&Language=E.

71. Department of Foreign Affairs and International Trade, *Canada Seeks Application to Set Aside NAFTA Tribunal Award in S.D. Myers Arbitration* (Feb. 8, 2001), *available* at http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/103908.htm.

72. *See Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,070 (May 22, 2002).

73. *See Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 46,955 (July 17, 2002); *Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 59,252 (Sept. 20, 2002).

74. Department of Foreign Affairs and International Trade, *USTR Affirmative Finding In Response To North Dakota Wheat Commission Petition* (Feb. 15, 2002), *available at* http://www.ustr.gov/releases/2002/02/02-22-finding.pdf.

and dumping of Canadian wheat exports was filed with the Department of Commerce in September, triggering countervailing duty and antidumping investigations into Canadian wheat that continued by year's end.[75]

Meanwhile, even though Canada was excluded from the steel safeguards measure announced by the Bush administration in March 2001, Canadian steel products attracted trade scrutiny in 2002. In August, the Department of Commerce concluded that carbon and certain alloy steel wire rod from Canada was being dumped and subsidized.[76] In October, following an International Trade Commission finding that these exports were causing injury to the U.S. industry, the Department of Commerce published countervailing duty and antidumping orders imposing average duties of 6.61 percent and 8.11 percent, respectively, on this product.[77] Finally, during 2002, three other simmering U.S. trade challenges to Canadian exports faded away. In January, the Department of Commerce terminated its dumping investigation into blue mussels from Canada, after the U.S. industry withdrew its petition.[78] The U.S. dumping challenge to Canadian greenhouse tomatoes also disappeared. While the Commerce Department determined that Canadian tomatoes were dumped,[79] the International Trade Commission held that the U.S. industry had suffered no injury, putting an end to the case.[80] Finally, a nascent Canadian-U.S. dispute over alleged dumping and subsidization of Canadian cold water shrimp failed to materialize when, in July, the U.S. industry withdrew its complaint with the Department of Commerce prior to initiation of a formal investigation.

VI. Canadian Environmental Law Update

There was little that was radically new or different in environmental law in Canada in 2002. Almost every jurisdiction has been dealing with drinking water in the wake of significant drinking water contamination issues in Ontario and Saskatchewan. Enforcement continues at a high level, both provincially and federally, and governments across the country continue to tinker with contaminated-sites legislation. The municipalities are significantly increasing their role in environmental regulation, and the federal government has been involved in two significant issues, climate change and species protection. Recovery of damages for contaminated property remains controversial, with difficulties in statutory cost-recovery actions and certification of class actions with respect to property losses or remediation.

Following the issuance of reports by the judicial inquiry into the contaminated water

75. *See Notice of Initiation of Antidumping Duty Investigations: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 67 Fed. Reg. 65,947 (Oct. 29, 2002); *Notice of Initiation of Countervailing Duty Investigations: Durum Wheat and Hard Red Spring Wheat From Canada*, 67 Fed. Reg. 65,951 (Oct. 29, 2002).

76. Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Canada, 67 Fed. Reg. 55,785 (Aug. 30, 2002).

77. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 65,944 (Oct. 29, 2002); *Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod From Brazil and Canada*, 67 Fed. Reg. 64,871 (Oct. 22, 2002).

78. *Live Processed Blue Mussels from Canada: Notice of Termination of Antidumping Investigation*, 67 Fed. Reg. 4392 (Jan. 30, 2002).

79. *Amended Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada*, 67 Fed. Reg. 15,528 (Apr. 2, 2002).

80. *Greenhouse Tomatoes From Canada*, 67 Fed. Reg. 18,634 (Apr. 16, 2002).

disaster in the Town of Walkerton, Ontario,[81] many provinces have passed drinking-water-protection legislation. This initiative has been led by Ontario, passing the Safe Drinking Water Act[82] and the Sustainable Water and Sewage Systems Act,[83] both at the end of 2002. These laws require significantly increased monitoring of drinking water, certification of laboratories checking water safety, and greatly increased reporting. As promised by the provincial government, Canadians are already seeing increased enforcement, primarily directed at reporting obligations under the legislation. Other provinces conducting drinking water initiatives include British Columbia (amendments to the Drinking Water Protection Act Saskatchewan, Saskatchewan Drinking Water Study, and the North Battleford Water Inquiry); and Quebec (Regulation on the Quality of Drinking Water). Newfoundland has introduced the Water Resources Act, providing authority for the protection of public water supplies and maintaining a prohibition on the export of water in bulk from the province.

The federal government has culminated its national Climate Change Process with the ratification of the Kyoto Protocol[84] in December 2002. This became the most controversial environmental issue in the country, as a result of significant provincial opposition to ratification, primarily from the province of Alberta, and opposition from industry and the natural resource sector. A number of oil companies announced restrictions in development of projects as a result of uncertainties arising from the ratification of Kyoto. Specific legal strategies for Kyoto implementation, such as, achieving the 6 percent reduction from the 1990 levels of greenhouse gas emissions, are still undeveloped. Government discussion papers suggest that strategies will include voluntary programs, incentives, and ultimately a national emissions trading program for greenhouse gas emission.

The federal government finally succeeded in passing the Species At Risk Act[85] after many prior attempts following the national elections. The Act includes prohibitions to protect listed, threatened, and endangered species, and critical habitat. It authorizes a mechanism for compensation, which ensures fairness to landowners, following the imposition of critical habitat prohibitions and supports programs for the recovery of endangered, threatened, and extirpated species. The new Act, while highly controversial during its passage, represents a compromise among stakeholders and is not expected to have the same level of impact as U.S. endangered species legislation.

Tinkering with contaminated sites legislation continues, most notably in Ontario and British Columbia. In Ontario, the Brownfields Statute Law Amendment Act[86] draft regulations were released, beginning the implementation process for a legislation initiative commenced in 2001. In British Columbia, the Contaminated Sites Regulation[87] was amended in February 2002. The amendments include an obligation to notify neighbors of offsite migration of contamination; changes to the definition of the size of property regulated; the

81. Ontario Ministry of the Environment, *Status of Part One Recommendations Report of the Walkerton Inquiry* (Aug. 2003), *available at* http://www.ene.gov.on.ca/envision/water/sdwa/status_part1.htm; Ontario Ministry of the Environment, *Status of Part Two Recommendations Report of the Walkerton Inquiry* (Aug. 2003), *available at* http://www.ene.gov.on.ca/envision/water/sdwa/status_part2.htm.

82. Safe Drinking Water Act, R.S.O., ch. 32 (2002) (Can.).

83. Sustainable Water and Sewage Systems Act, R.S.O., ch. 29 (2002) (Can.).

84. Kyoto Protocol to the United Nations Framework Convention on Climate Control, Conf. of the Parties, 3rd Sess., Agenda Item 5, U.N. Doc. FCCC//CP/1997/L.7/Add.1, *adopted* Dec. 10, 1997, *opened for signature* Mar.16, 1998, *available at* http://unfccc.int/resource/docs/convkp/kpeng.html.

85. Species At Risk Act, R.S.C., ch. 29 (2002) (Can.).

86. Brownfields Statute Law Amendment Act, R.S.O., ch. 17 (2001) (Can.).

87. Waste Management Act: Contaminated Sites Regulation, B.C. Reg. 375/96 (1997) (Can.).

extent of contamination based on real, rather than more arbitrary factors; and attempts to address the uncertainties related to actions to recover costs in remediating a contaminated site.[88]

As to the latter issue, a series of cases in British Columbia have raised significant questions as to the availability of the statutory cost-recovery action. The amendments are expected to clarify when such recovery actions may be brought. Recent British Columbia case law, *Lawson* v. *Deputy Director of Waste Management*,[89] upheld an Order made against an individual director of a company to remediate a site under the British Columbia Waste Management Act. Causation with respect to the contamination and the director's level of due diligence were found to be irrelevant, as was the degree of actual control exercised. Liability was based solely on the director's legal status as a director.

VII. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act of Canada: Impact for Lawyers

A. Introduction

The purpose of this section is to present and comment on certain aspects of the Proceeds of Crime and Terrorist Financing Act of Canada (Act)[90] and how it may have an impact on the professional practice of lawyers across Canada and upon foreign lawyers involved in cross-border transactions.

The Act was adopted in 2000 and amended in 2001. It has two sets of regulations: the Proceeds of Crime (Money Laundering) Suspicious Transactions Reporting Regulations (Suspicious Transactions Regulations), adopted in 2001; and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (Money Laundering Regulations), adopted in 2002.

Stated briefly, the objective behind the implementation of the Act is primarily to help detect money laundering and to facilitate the investigation and prosecution of money laundering offenses and the financing of terrorist activities.

In 2000, parallel with the implementation of the Act, the Government of Canada created the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC),[91] which is the equivalent of the U.S. Financial Crimes Enforcement Network (FinCEN).[92] The mandate of FINTRAC consists generally of receiving and collecting reports on "suspicious transactions" and other information relevant to money laundering and terrorist financing activities. FINTRAC also receives reports on the cross-border movement of large amounts of currency.

The scope of the Act and the mission of FINTRAC being broad, not to say ambitious, imposes several new obligations on, not surprisingly, numerous persons and entities. The Act applies, *inter alia*, to banks, including foreign banks with respect to their business in Canada, credit unions, life insurance companies, including foreign life insurance companies,

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88. *Id.*

89. British Columbia Environmental Appeal Board (Sept. 19, 2001), Appeal No. 98WAS-14(c), 030(a), 034(a), 99WAS-015(a), *available at* http://www.eab.gov.bc.ca/waste/98was14c.htm.

90. Proceeds of Crime (Money Laundering) and Terrorist Financing Act, R.S.C., ch. 17 (2000) (Can.).

91. FINTRAC, *Welcome to FINTRAC*, *available at* http://www.fintrac.gc.ca/intro_e.asp (last updated July 3, 2003).

92. FinCEN Network, *Financial Crimes Enforcement Network*, *available at* http://www.fincen.gov/fin_network.html (last visited Sept. 11, 2003).

trust companies, loan companies, securities dealers, foreign exchange dealers, casinos, accountants, and lawyers.

Lawyers must now face new, heavy obligations under the Act and the regulations. Among other obligations, the Act requires that lawyers report to FINTRAC certain types of transactions carried out or to be carried out by their clients, namely, "suspicious transactions" and "cash transactions." However, contrary to most of the other persons and entities targeted by the Act, lawyers are professionals whose conduct is highly regulated by ethical codes and even constitutional rules. In this respect, certain obligations imposed on lawyers under the Act will, under many circumstances, conflict with those rules, resulting in acrimonious problems, which are discussed below.

B. Reporting Issues

1. *Suspicious Transactions*

a. Issues

The Act and the Suspicious Transactions Regulations require every lawyer to report to FINTRAC every financial transaction that occurs in the course of his activities in which he has reasonable grounds to suspect that said transaction is related to the commission of a money laundering offence. Such transaction is called a "suspicious transaction." Lawyers are subject to the above reporting obligation with respect to the following activities: the receipt or payment of funds (other than professional fees and disbursements); the purchase or sale of securities, real property, business assets, or entities; and the transfer of funds or securities.

Since the reporting obligation is based on a subjective assessment made by the lawyer as to whether he "suspects" that a specific transaction is related to the commission of a money laundering offense, the obligation may be very complex to fulfill. This is especially true given that, *in abstracto*, any transaction could potentially be a "suspicious transaction," and thus a lawyer would have to gather a sufficient amount of information on each transaction in order to comply with the Act.

This vague, though heavy, obligation is also highly problematic from a professional standpoint. The Act requires, at least implicitly, that a lawyer "question" the foundations of the transactions that he encounters in the course of his professional practice and that he disclose certain types of information. Thus, instead of being restricted to the traditional role of providing legal advice and support to a client, the lawyer is required to judge the conduct of his client in order to determine whether such conduct is "suspicious" and should be reported to state representatives. The lawyer becomes acquainted with an investigator on behalf of the state that could, at any time, disclose confidential information, and thus break the necessary confidence relationship with his client.

Two problems naturally surface. First, the reporting obligation appears to violate the solicitor-client privilege, since it requires lawyers to go against their constitutional obligation to keep confidential any information obtained from their clients in the course of providing legal advice. By breaking the confidence relationship between a client and his attorney, the Act will definitely cause the practice of law to be more difficult, since a client likely would not have a totally independent attorney. From a global point of view, this obligation may also cause prejudice to a pillar of democratic societies, that is, the independence of the Bar *vis-à-vis* the state.

Second, the potential for violation of the solicitor-client privilege in application of the Act may become problematic at another level. Lawyers will likely wish, in most circumstances, to maintain their privilege, and the independence of the profession, despite the application of the Act. This position would enable them to maintain a high degree of professionalism toward their client. In this respect, a conflict of interests is inevitable: on the one hand, the obligation to maintain the solicitor-client privilege, and, on the other hand, the duties under the Act. Following the Act would, in most cases, involve a breach of the privilege, which would potentially lead to disciplinary measures or professional liability. At the other end of the spectrum, a refusal to report a suspicious transaction could lead to penalties imposed under the Act.

b. Litigation

Given the serious problems triggered by the Act, several court challenges have been launched by lawyers and professional organizations across Canada, arguing the constitutional inapplicability of the Act and seeking to exempt lawyers from the force of the legislation.

The most important court challenge is *Law Society of British Columbia v. Attorney General of Canada*.[93] In a well-articulated judgement rendered on November 20, 2001, Madam Justice Allan, of the B.C. Supreme Court, stated that the Suspicious Transactions Regulations authorized an unprecedented intrusion into the traditional solicitor-client relationship. Given the central place occupied by lawyers, as fundamental pillars of democracy, Madam Justice Allan granted a temporary exemption of the application of the reporting obligation under the Suspicious Transactions Regulations for B.C. lawyers, pending a full hearing of the case on its merits.

In the meantime, in May 2002, the Attorney General of Canada and the bars of the various provinces, grouped under the Federation of Law Societies of Canada, signed an agreement recognizing that the judgment rendered by the B.C. Supreme Court would be the test case that would resolve the constitutionality of the Act.[94]

2. *Cash Transactions*

In addition to the reporting of suspicious transactions (currently suspended), lawyers are also required, under the Money Laundering Regulations, to report to FINTRAC the reception of an amount in cash of C$10,000 (U.S. $6,600) or more in the course of a single transaction when they engage in any of the activities stated above in respect to suspicious transactions.

In addition to the above obligation, lawyers engaging in such activities are required to keep record of every amount in cash of C$10,000 or more that they receive in the course of a single transaction, unless the cash is received from a financial entity or a public body. When such cash amount is received by a financial entity or a public body, the reporting obligation imposed on lawyers becomes unnecessary since the required reporting would have already been done by the financial entity or public body because the reporting obligation equally applies.

93. Law Society of British Columbia v. Attorney General of Canada, [2002] B.C.C.A. 49.

94. The Law Society of Alberta, *Lawyers and federal Government Agree to have Test Case on Money Laundering Laws* (May 15, 2002), *available at* http://www.lawsocietyalberta.com/whats_new/moneyLaws.asp.

Under the Money Laundering Regulations, the rule might appear more severe since it applies on a systemic basis, regardless of the reasons why a transaction has been carried out.

Moreover, under the most recent regulations implemented under the Act in November 2002, the Cross-Border Currency and Monetary Instruments Reporting Regulations, lawyers, under certain circumstances, will be required to report certain importation or exportation of currency or monetary instruments of a value greater than C$10,000.

C. Conclusion

Given the clear conflict between the ethical and constitutional obligations of lawyers and the reporting obligations imposed on them under the Act, the practice of law may be harmed severely and become much more complex. The risks facing lawyers who will have to decide whether or not to report a transaction, the risk of disclosing confidential information, and the risk facing clients who will never be certain of the extent to which their expectations of privacy can and will be respected, could cause the practice of law to be impracticable in numerous cases.