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Canada

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I. Overview

2014 saw a number of significant legislative, treaty, and policy developments for Canada in the areas of trade controls, trade and investment agreements, security and economic issues, measures to address the Canada-US price gap, securities law, corporate immigration, and scientific research and experimental development.

In case law, the Supreme Court of Canada issued two decisions heralded as "landmark" in their respective areas of the law. In the first presented here, the court recognizes aboriginal title in British Columbia, raising important questions for resource and other economic development activities. In the second, the court borrows from the civil law tradition, among other things, in recognizing a duty of good faith as an organizing principle of the common law, requiring honesty in the performance of contractual duties.

II. Trade Controls*

A. Economic Sanctions

Beginning in March and continuing throughout 2014, Canada implemented aggressive list-based sanctions in response to the Russian invasion of Ukraine and annexation of the Crimea. Under the Special Economic Measures (Russia) Regulations (Russia Regulations), persons in Canada and Canadians outside Canada are prohibited from engaging in a range of dealings with listed Russian individuals and entities,[1] broadly referred to as "Designated Persons" under Canadian sanctions law. The Special Economic Measures (Ukraine) Regulations applies similar restrictions in respect of listed Designated Persons in Ukraine.[2] The Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations prohibits dealings involving listed persons associated with the former Yanukovych re-

* Edited by Angela E. Weaver. Individual authors will be identified by section.
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1. Special Economic Measures (Russia) Regulations, SOR/2014-58, s. 3 (Can.).
2. Special Economic Measures (Ukraine) Regulations, SOR/2014-60, s. 3 (Can.).

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gime.[3] Currently, Canada has listed more individuals and entities than either the United States (US) or the European Union (EU) under their respective Russia/Ukraine sanctions.

Under the Russia Regulations, Canada also prohibits dealing in new financing of longer than thirty or ninety days' maturity in relation to certain listed entities, their property, or any interests or rights in their property.[4] Dealing in new capital funding through the transaction of shares in exchange for an ownership interest in relation to certain listed entities, their property, or any interests or rights in their property is also prohibited.[5]

Unlike the US and the EU, Canada has yet to impose any restrictions on the supply of items to be used in Russia's oil exploration and extraction sector, despite an August 6, 2014, statement from the Prime Minister indicating that such measures would be implemented in parallel with those adopted by Canada's allies.[6]

Canada imposed new economic sanctions measures under its Special Economic Measures Act[7] against South Sudan,[8] and under its United Nations Act[9] against Yemen[10] and the Central African Republic.[11] These are all list-based measures targeting identified Designated Persons. Canada also intensified its sanctions measures against Syria by prohibiting various activities relating to chemicals that can be used as precursors to chemical weapons agents, and dual-use equipment that can be used in a chemical weapons program.[12]

At the present time, Canada imposes trade controls of varying degrees on activities involving the following countries, in addition to those mentioned above, and over 2,000 listed entities and individuals associated with them: Belarus, Burma (Myanmar), Côte d'Ivoire, the Democratic Republic of the Congo, Cuba, Egypt, Eritrea, Guinea, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Somalia, Sudan, Tunisia, and Zimbabwe.

B. Export and Technology Transfer Controls

Canada made significant amendments to its controls governing the export and transfer of goods and technology twice during 2014—on April 10 and October 23.[13] In both instances, the changes were intended to bring Canada's Export Control List into conformity with its commitments under international export control regimes, including the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group.

3. Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44, s. 2 (Can.).
4. *See* SOR/2014-58, s. 3.1 (Can.).
5. *See id.* s. 3.2.
6. Statement, Prime Minister Stephen Harper, Statement by the Prime Minister of Canada Announcing Additional Sanctions (Aug. 6, 2014), http://www.pm.gc.ca/eng/news/2014/08/06/statement-prime-minister-canada-announcing-additional-sanctions.
7. S.C. 1992, c. 17 (Can.).
8. *See* Special Economic Measures (South Sudan) Regulations, SOR/2014-235 (Can.).
9. R.S.C. 1985, c. U-2 (Can.).
10. *See* Regulations Implementing the United Nations Resolution on Yemen, SOR/2014-213 (Can.).
11. *See* Regulations Implementing the United Nations Resolutions on the Central African Republic, SOR/2014-163 (Can.).
12. *See* Regulations Amending the Special Economic Measures (Syria) Regulations, SOR/2014-11 (Can.).
13. *See* Order Amending the Export Control List, SOR/2014-90 (Can.); Order Amending the Export Control List, SOR/2014-239 (Can.).

C. Defense Trade Controls

On May 15, 2014, significant changes were made to the scope of goods and technology subject to Canada's domestic security regime for listed defense, satellite and aerospace goods, and technology (Controlled Goods Program).[14] The Schedule to the Defence Production Act[15] was amended to create two streams of goods and technology subject to the rigorous security and screening controls of the Controlled Goods Program. These now apply to (i) all US-origin goods and technology that are subject to the US International Traffic in Arms Regulations[16] and (ii) certain specified goods and technology, regardless of origin, considered by Canada to have strategic significance or pose national security concerns.

III. Trade and Investment Agreements*

In 2014, Canada signed its first Free Trade Agreement (FTA) in the Asia-Pacific region with South Korea after nine years of negotiation.[17] The FTA is significant given the level of two-way trade between the countries[18] and the fact that South Korea is the fourth largest economy in the region.[19] The agreement is also important from a competitiveness perspective because Canada's trading partners in the EU and US already enjoy preferential access to the South Korean market.[20] Canadian sectors that are expected to benefit from the agreement include the agricultural, seafood, and forestry sectors.[21] Canadian auto producers, including Ford Canada, voiced opposition to the agreement, and in particular were critical of the lack of a "snap back" clause similar to that in the US-Korea FTA that would allow Canada to impose a retaliatory tariff on automobile imports in the event that access to the South Korean automobile market were to be blocked by non-tariff barriers.[22] Canada did, however, negotiate expedited dispute resolution for the automo-

14. *See* Regulations Amending the Schedule to the Defence Production Act, SOR/2014-126 (Can.).

15. R.S.C. 1985, c. D-1 (Can.).

16. 22 C.F.R. §§ 120–130.

* Wendy J. Wagner and Anca M. Sattler.

17. Canada-Korea Free Trade Agreement, Can.-S. Kor., Sept. 22, 2014, http://sice.oas.org/TPD/CAN_KOR/CAN_KOR_Final_FTA/ENG/ckfta-tofa-eng.pdf (entered into force Jan. 1, 2015).

18. In 2013, Canadian exports to South Korea exceeded $3.5 billion and Canadian imports from South Korea were over $7 billion. *Factsheet: Republic of Korea*, Gov't Can. (Feb. 2015), http://www.canadainternational.gc.ca/ci-ci/assets/pdfs/fact_sheet-fiche_documentaire/RepublicKorea-FS-en.pdf.

19. *Canada-Korea Free Trade Agreement (CKFTA)*, Foreign Aff. Trade & Dev. Can., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/index.aspx?lang=eng (last modified Feb. 2, 2015).

20. *See* Free Trade Agreement between the United States of America and the Republic of Korea, U.S.-S. Kor., June 30, 2007, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; Council Decision 2011/265/EU, 2011 O.J. (L 127).

21. *See Canada-Korea Free Trade Agreement (CKFTA) – Overview: Appendix – Technical Summary of Final Negotiated Outcomes*, Foreign Aff. Trade & Dev. Can., http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/overview-apercu.aspx?lang=eng#appendix.

22. *See* Scott Deveau, *Ford Canada, Ontario Blast South Korean Trade Deal, Saying Ottawa's Pact Will Flood Country with Foreign Cars*, Fin. Post (Mar. 11, 2014, 9:19 AM), http://business.financialpost.com/2014/03/11/ford-canada-blasts-south-korean-trade-deal-saying-ottawas-pact-will-flood-country-with-foreign-cars/.

tive sector, and also will be entitled to apply safeguard measures in the event of a flood of imports in any sector.[23]

The bilateral agreement also contains an investor-state dispute settlement chapter that is similar to that found in Chapter 11 of the North American Free Trade Agreement (NAFTA). The chapter includes interpretative annexes that presumably are intended to confine the scope of certain obligations, for example, by adopting a narrow interpretation of "customary international law" in the context of minimum standard of treatment, and by preserving the ability of a party to pursue certain non-discriminatory regulatory actions to protect public health, safety, and the environment.[24] Curiously, while the investment chapter provides investors with protections that are equivalent to those offered within the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) and the Canada-EU Comprehensive Economic and Trade Agreement (CETA), inclusion of the chapter did not garner the controversy generated by those agreements.

In 2014, the Canadian government also heralded the conclusion of the seven-year-long CETA negotiations between Canada and the EU, an agreement that it promotes as "broader in scope and deeper in ambition than the historic [NAFTA]."[25] Unprecedented in Canada—but likely to be a continued feature of FTA negotiations, given the reach of FTA into sub-national areas of jurisdiction such as procurement—the provinces and territories directly participated in the negotiations.

The agreement between Canada and the EU is not signed at this time and a number of steps must be undertaken prior to the agreement coming into force, including: finalization of the text through technical and legal review; translation into multiple European languages; and submission of the agreement for ratification. In Europe, this final step requires the support of a qualified majority of EU member states as well as an affirmative vote from the European Parliament.[26] In addition, certain laws and regulations of Canada, the provinces, and the member countries of the EU will need to be amended prior to the coming into force of the agreement. Assuming the agreement ultimately gains approval, it will not be in force for several years.

In other developments, Canada added an FTA with Honduras[27] to its existing FTAs with countries in the Central and Southern Americas, including Panama, Colombia, Peru, Costa Rica, and Chile. The Chile FTA was updated in 2014 to add a chapter on technical barriers to trade.[28] Canada continues trade agreement negotiations in the Americas, with

23. *See* Canada-Korea Free Trade Agreement, *supra* note 17, ch. 7, 21.

24. *Id.* ch. 8.

25. *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*, FOREIGN AFF. TRADE & DEV. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng (last modified Nov. 28, 2014).

26. *See Trade Negotiations Step by Step*, EUR. COMMISSION (Sept. 2013), http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf. *See generally* Press Release, European Commissioner for Trade, Statement on CETA (Sept. 16, 2014), http://europa.eu/rapid/press-release_SPEECH-14-603_en.pdf; *Countries and Regions: Canada*, EUR. COMMISSION, http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada (last updated Oct. 9, 2014).

27. Canada-Honduras Free Trade Agreement, Can.-Hond., Nov. 5, 2013, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx?lang=eng.

28. *See Canada and Chile Conclude New Chapter in Free Trade Agreement*, FOREIGN AFF. TRADE & DEV. CAN., http://www.international.gc.ca/media/comm/news-communiques/2014/11/10a.aspx?lang=eng (last modified Nov. 10, 2014).

the Dominican Republic, the Caribbean Community (CARICOM), and with Guatemala, Nicaragua, and El Salvador.[29]

The controversial FIPA with China was ratified in September and came into force on October 1, 2014, in spite of an ongoing court challenge from the Hupacasath First Nation on grounds that Canada had a duty to consult prior to ratification.[30] The Hupacasath claimed that the impending Canada-China FIPA would bring about changes to their asserted aboriginal rights and to the achievable scope of self-government. This argument was rejected by the Federal Court of Canada, which held that ratifying the Canada-China FIPA without first engaging in consultation with first nations peoples is not in contravention of Canada's duty to consult native bands, and that any adverse impacts claimed by the Hupacasath from Canada's failure to consult with the band were "non-appreciable and entirely speculative in nature."[31] The Federal Court of Appeal heard Hupacasath's appeal, and a decision is pending at the time of writing.

FIPAs with Benin and Kuwait came into force in 2014.[32] Canada also signed FIPAs with Cameroon, Nigeria, and Serbia; concluded FIPA negotiations with Burkina Faso; and began negotiations with Kenya, Kosovo, and the United Arab Emirates.[33]

IV. Developments in Security and Economic Issues*

2014 saw the "renewal" of the US-Canada Regulatory Cooperation Council (RCC), established in 2011 in connection with the Canada-US declaration on *A Shared Vision for Perimeter Security and Economic Competitiveness*.[34] In August of 2014 the two governments issued the *Joint Forward Plan*, eschewing detailing specific action items and instead targeting three broad areas:

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(A) Department-Level Regulatory Partnerships: Public documents that will outline RCC strategies and the framework for how the activities will be managed between regulatory partners.
(B) Department-to-Department Commitments and Work Plans: A first set of commitments to cooperate in specific areas of regulatory activity, for which technical work plans will be developed annually [and]
(C) Cross-Cutting Issues: Identifying current laws, policies and practices in both governments that can present challenges/opportunities to international regulatory co-

29. *See Canada's Free Trade Agreements*, FOREIGN AFF. TRADE & DEV. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng (last modified Dec. 18, 2013).

30. *See Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations*, FOREIGN AFF. TRADE & DEV. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng (last modified Oct. 1, 2014).

31. Hupacasath First Nation v. Can., 2013 F.C. 900, para. 147 (Fed. Ct. Can.).

32. *See Canada's Foreign Investment Promotion and Protection (FIPAs)*, FOREIGN AFF. TRADE & DEV. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng (last modified Dec. 18, 2013).

33. *See id.*

* Daniel D. Ujczo.

34. Press Release, President Obama & Prime Minister Harper of Canada, Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness (Feb. 4, 2011), http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord.

operation, regardless of sector, and considering new tools and approaches to support regulators in achieving their cooperation objectives where possible.[35]

The most significant evolution between the RCC's initial work and the *Joint Forward Plan* is the governments' focus on institutionalizing the cooperative mechanisms. The *Joint Forward Plan* appears open to examining ways for regulatory agencies to cost-share testing and inspection services across jurisdictions and agencies, and explore the mechanism for identifying a proposed regulation's impact on the bilateral relationship.[36] Each of these issues requires careful analysis under domestic law (particularly the notice and rulemaking regulations, e.g., Administrative Procedures Act in the US); but it is noteworthy that the governments appear willing to address these issues.

The *Joint Forward Plan* prescribes that regulatory partnership statements and the first group of work plans will be published by February 27, 2015. Public reporting will be managed through regular RCC newsletters, as well as department-led vehicles that can be tailored as required. Information regarding the RCC may be accessed at http://www.trade.gov/rcc/ and http://actionplan.gc.ca/en/content/regulatory-cooperation-council.

V. Measures to Address the Canada-US Price Gap*

In the 2014 Federal Budget,[37] the Government of Canada took aim at "unjustified geographic price discrimination" suffered by Canadian consumers in comparison to their US counterparts. The Canadian government has proposed provisions that give the Competition Bureau new powers to regulate prices; this signals a major change in Canadian competition policy and also raises very real practical concerns.

While the specifics have yet to be announced, the 2014 Federal Budget announced that measures will be introduced to regulate price discrimination, and that the Competition Bureau will be charged with the enforcement of same. Currently, Canada's Competition Act empowers the Competition Bureau to review pricing practices only where there is evidence of anti-competitive conduct.[38] By amending the Competition Act to prevent retailers from charging unjustifiably higher prices in Canada than in the US, the government will add "price regulator" to the role of the Competition Bureau. Traditionally, the role of the Bureau has been to ensure businesses are engaging in fair practices; high prices that are not attributable to anti-competitive conduct are not the Bureau's purview.[39]

Regulating unjustifiably high prices is exceptionally difficult. How does one determine when a higher price for a good sold in Canada is unjustifiable? Enforcing the government's proposal may also be challenging. If retailers face a small fine for breaking the law, they may just chalk it up to the cost of doing business in Canada; if penalties are too severe, businesses may simply choose not to sell their products in Canada. From a policy

35. UNITED STATES–CANADA REGULATORY COOPERATION COUNCIL, JOINT FORWARD PLAN 13 (2014).

36. *See RCC Regulator and Stakeholder Event*, CANADA'S ECON. ACTION PLAN, http://actionplan.gc.ca/en/page/rcc-ccr/rcc-regulator-and-stakeholder-event (last visited Mar. 3, 2015).

* Martin Masse and Monica Podgorny. Special thanks to Timothy Cullen, Student-at-Law.

37. *See Minister of Finance Confirms Return to Balanced Budgets in 2015*, DEP'T FIN. CAN. (Feb. 11, 2014), http://www.budget.gc.ca/2014/docs/nrc/pdf/EN.pdf.

38. Competition Act, R.S.C. 1985, c. C-34, pt. VIII (Can.).

39. *See* STANDING SENATE COMMITTEE ON NATIONAL FINANCE, 41ST PARL., 1ST SESS., THE CANADA-USA PRICE GAP 56 (2013) (Chair: Hon Joseph A. Day).

perspective, Canada will be placed in the odd position of having a law regulating local prices while it commits itself to maintaining NAFTA and other trade agreements that are aimed at creating open markets.

While voters had been complaining about higher Canadian prices, the price discrimination measures still came somewhat as a surprise after a number of studies examined the issue and found that US-Canada pricing differences result from differing market conditions.[40]

The Senate Report did uncover evidence of country pricing strategies.[41] The Retail Council of Canada testified before the Senate Committee that manufacturers primarily engage in country pricing because of the expectations of Canadian consumers vis-à-vis prices, higher Canadian operating costs, and market demand for certain goods. That said, the Senate Report also concluded that Canadians pay more because of other factors, namely: the relatively small size of the Canadian market; import tariffs; the higher underlying cost of doing business in Canada; insufficient competition in the Canadian retail market; and differences in government regulations, such as product safety standards.[42]

Despite reports that a bill would be introduced in the autumn of 2014,[43] the federal government has yet to do so.[44] This coincides with a waning of the political imperative for the initial initiative. The value of the Canadian dollar has tumbled relative to the US dollar. As a result, Canadian voters are unlikely to be as sensitive to comparative pricing differences, which are more obvious when the two currencies are at par.

That said, given the 2014 Budget announcement, the proposal remains "on the books." Competition law lawyers and their clients will continue to await the release of the legislation to determine the specifics of the contravention and the definition of the Competition Bureau's role as price regulator.

VI. The Supreme Court of Canada Recognizes Aboriginal Title in British Columbia*

In June of 2014 the Supreme Court of Canada rendered judgment in *Tsilhqot'in Nation v. British Columbia*.[45] The court upheld the trial decision of the British Columbia Supreme Court, which had declared that the Tsilhqot'in Nation of Indian peoples held aboriginal title in a defined area of central British Columbia, and that the province had breached the duty of consultation that it owned to the Tsilhqot'in through its land use planning and forestry authorizations within the claimed area prior to the recognition of title. The decision marks the first, conclusive recognition of title by aboriginal peoples[46]

40. *See, e.g., id.*

41. *Id.* at 6–10.

42. *See id.*, ch. 3.

43. *See* Chris Hall, *Canada-U.S. Price Gap Measures Coming in the Fall*, CBC NEWS (Aug. 14, 2014, 5:00 AM), http://www.cbc.ca/1.2735703.

44. Bill C-43, Economic Action Plan 2014 Act, No. 2, S.C. 2014, c. 39, was introduced in the House of Commons on October 23, 2014. Provisions to amend the Competition Act on the price gap issue were not included.

* Kirk N. Lambrecht, Q.C.

45. Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 (Can.).

46. By section 35(2) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), the "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

in Canada.[47] Because rights associated with aboriginal title have constitutional protection,[48] the court's reasons describe both the correct legal test for proof of aboriginal title and also the legal implications arising from proof of title. The latter is the focus of this essay.

British Columbia is unique amongst the provinces of Canada, in that it has evolved to have many aboriginal land claims but few modern treaties addressing the issue of title. The challenges of protecting asserted aboriginal rights prior to proof of their existence in law was addressed by the Supreme Court in its 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*.[49] Here the court recognized the constitutional obligation of governments, before undertaking conduct which may adversely affect an asserted aboriginal right, to consult and, where necessary, accommodate aboriginal peoples in an effort to effect reconciliation.

The importance of consultation and accommodation prior to proof of title was re-emphasized by the court in *Tsilhqot'in Nation*, and is evident from an examination of the legal consequence of proof of aboriginal title. Once proven, the aboriginal title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land.[50] Important to note is that the interest is communal; because of this, present use of the interest cannot deprive future generations of the benefits of the land. Once title is proven to exist in law, use of such lands must either enjoy the consent of the aboriginal title holders or be justified by a public interest which has a compelling and substantial objective and that also furthers both the aboriginal interest and the broader public objective.[51] Consultation and accommodation are one of the justification criteria.

The immediate practical impact of *Tsilhqot'in Nation*, then, is continued emphasis upon reconciliation through consultation and accommodation, and renewed emphasis on the importance of consultation and accommodation prior to and after proof of aboriginal title. Land use prior to proof of aboriginal title requires consultation and accommodation but not, in every case, aboriginal consent. Continuing land uses that have not been reconciled with aboriginal interests may, after proof of aboriginal title, unjustifiably infringe these constitutionally protected interests and may require cancellation.

The word *may* is especially important. The court opines that uses which could justify infringement of aboriginal title include "development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[52] This is ultimately a question of fact that will be examined on a case-by-case basis.

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47. The potential for judicial recognition of Aboriginal title in British Columbia, and elsewhere in Canada, was recognized in the court's 1973 decision in *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

48. *See* Constitution Act, 1982, § 35, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

49. Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, para. 25 (Can.).

50. *Tsilhqot'in Nation*, 2014 SCC 44, paras. 67, 73–74.

51. *See id.* paras. 77, 82.

52. *Id.* para. 83 (citing Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 165).

VII. *Bhasin v. Hrynew*: An Engine for Civil Law/Common Law Harmony*

Canada's separate legal traditions (the common law regime in the country's nine provinces and three territories, and the civil law tradition in Quebec) can result in disparate outcomes regarding identical contractual issues considered in different jurisdictions.[53] With its judges representing both legal traditions,[54] Canada's Supreme Court adroitly seeks greater harmony between systems, reducing each tradition's internal inconsistencies without jeopardizing their individuality.

In *Bhasin v. Hrynew*,[55] the Supreme Court recognized a duty of good faith, as "a general organizing principle of the common law" requiring that parties perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, bringing Canada's common law in line with commercial expectations elsewhere in North America,[56] while producing a subtle shift towards a "civilian" approach to legal analysis.[57]

The court left undisturbed the trial judge's finding that in the period preceding termination of Mr. Bhasin's "commercial dealership agreement," the respondents were neither candid nor forthright, indeed misleading him on critical details, all of which led, at the expiry of the contract term, to his losing "the value in his business in his assembled workforce."[58]

The case turned on whether Canadian common law required the respondents to perform their contractual obligations "honestly" and with due regard for Mr. Bhasin's legitimate interests. The court wrote that

> Finding that there is a duty to perform contracts honestly will make the law more certain, *more just and more in tune with reasonable commercial expectations*. It will also bring a measure of justice to the appellant, Mr. Bhasin, *who was misled and lost the value of his business as a result*.[59]

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* Theodore Goloff.

53. Section 92(13) of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), assigns "property and civil rights" exclusively to provincial competence. Different legal precepts might therefore apply to the termination of employees of employers such as banks, whose labor relations are otherwise federally regulated because of industry-specific federal competence, depending on where within Canada the termination took place. *See* Breeze v. Federal Business Development Bank, 1984 CarswellQue 1061 (Can. Que.) (WL).

54. A third of the Supreme Court judges, pursuant to the Supreme Court Act, R.S.C. 1985, c. S-26, §§ 5–6, are drawn from advocates of more than ten years at the Bar of Quebec or from the superior or appellate courts in Quebec, recognizing "Quebec's civil-law system [as] an essential ingredient of its distinctive culture" and making them custodians of a legal system integral to its culture. *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, para. 49 (Can.)

55. 2014 SCC 71 (Can.) (decision rendered November 13, 2014).

56. *Id.* paras. 33, 41.

57. Adherents sometimes boast that the civil law methodology of identifying the appropriate "codal" principle and applying it contextually provides decisions made by "authority of reason" and not, as in "common law," "by reason of authority." While Quebec's Civil Code is enacted legislation, it constitutes its *jus commune*. Unlike legislation in common law consisting of a "particular rule[ ] intended to control certain fact situations with considerable detail," codification, such as the Civil Code of Quebec, "purports to be comprehensive and encompass the entire subject matter, not in the details but in the principles [calling] for a liberal interpretation in order that it may serve as the basis of decision for new situations." Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. Comp. L. 419, 424–5 (1967). *See also* LOUIS P. PIGEON, RÉDACTION ET INTERPRÉTATION DES LOIS 6–7 (1978).

58. *Bhasin*, 2014 SCC 71, para. 13.

59. *Id.* para. 1 (emphasis added).

Determining Canadian common law to be: (i) uncertain, (ii) incoherent, and (iii) "out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States,"[60] the court felt obliged to develop the common law in step with societal/commercial expectations, but in an incremental fashion.[61] Good faith as an "organising principle" would not reverse pre-existing rules, but created an over-arching standard of conduct that "states in general terms a requirement of justice from which more specific legal doctrines may be derived [that] may be given different weight in different situations."[62] Applying it to particular situations would allow a coherent way forward "where the development may occur incrementally in a way that is consistent with the structure of the common law of contract [with] due weight [given] to the importance of private ordering and certainty in commercial affairs."[63]

Whether a good faith obligation is imposed as a matter of law, a matter of implied terms, or a matter of interpretation of existing terms became irrelevant, as the court recognized that (i) a basic level of honest conduct is "necessary to the proper functioning of commerce," particularly in longer term "relational contracts" and that (ii) even in transactional exchanges, misleading or deceitful conduct is anathema to the legitimate expectations of the parties.[64] In fact, while exercising rights and duties under the contract, one party must have "appropriate regard to the legitimate contractual interests" of the other.[65] The intensity of this obligation will vary depending on the context of the contractual relationship, and "does not require acting to serve those interests in all cases."[66] The duty does, however, require that a party not undermine those interests. Stated succinctly it provides "a simple requirement not to lie or mislead the other party about one's contractual performance."[67] The new duty operates irrespective and independent of the parties' intentions, analogous to equitable doctrines that the parties are not free to exclude completely.[68] While parties might modulate how in their particular contract the duty will resonate, they can do so only in express terms.[69]

Whether as the driving force for such change, or as a measure of reassurance that "this modest step would [not] create uncertainty [on] freedom of contract,"[70] the court's reference, *inter alia*, to the civil law of Quebec represents more than an incremental reconciliation of differing legal traditions. Comparative law as an engine for change is not new. In the areas of employment law and labor relations law, there has been fertilization of civil law precepts with dollops of common law.[71]

60. *Id.* para. 41.
61. *Id.* para. 40.
62. *Id.* para. 64.
63. *Id.* para. 66.
64. *Id.* para. 60.
65. *Id.* para. 65.
66. *Id.*
67. *Id.* para. 73.
68. *Id.* para. 74.
69. *Id.* para. 78.
70. *Id.* para. 82.
71. *See, e.g.*, Farber v. Royal Trust Co., [1997] 1 S.C.R. 846 (Can.) (defining "constructive dismissal" in Quebec); Ivanhoe, Inc. v. UFCW, Local 500, 2001 SCC 47, [2001] 2 S.C.R. 565 (Can.) (redefining "successor employer" rights and obligations in Quebec).

What is original in *Bhasin* is that the methodology used, i.e. recognizing an over-arching principle and modulating it *in situ*, represents the essence of the civil law tradition.[72] It also reflects a need that domestic law harmonize with the commercial imperatives of a global trading economy. Finally, it enhances the court's role as a unifying force between different legal systems that should influence each other, bringing to each certainty, coherence, dynamism, and basic justice while maintaining their distinctive character.

VIII. Securities Law*

Two particularly noteworthy developments in 2014 are the Cooperative Capital Markets Regulatory System, and the adoption of no contest settlements by the Ontario Securities Commission.

A. Canadian Cooperative Capital Markets

The Canadian securities regulatory landscape is fragmented, as the Canadian Constitution vests the powers to regulate securities law at the provincial level.[73] In *Reference re Securities Act*, the Supreme Court of Canada opined that the national regulation of the capital markets should be regulated through a coordinated effort between the provinces and federal government, rather than by a wholesale takeover by the federal government.[74] But the justices conceded that issues of systemic risks in the capital markets were a national concern that could be captured through federal regulation.

With the addition of New Brunswick, Saskatchewan, and Prince Edward Island to a September 2013 Memorandum of Understanding (MOU) between the federal government, Ontario, and British Columbia regarding the establishment of a capital markets regulator,[75] and the release of the proposed Capital Markets Act and Capital Markets Sustainability Act, this year witnessed important developments in the implementation of this cooperative structure.[76] The overall proposed structure of the regime is currently composed of: a Council of Ministers; a Capital Markets Regulatory Authority (CMRA); a Regulatory Division; a Tribunal; a CEO/Chief Regulator; a Deputy Chief Regulator for BC, ON, AB, and QC; and two Deputy Chief Regulators for all other provinces.[77]

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72. *Banque de Montréal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429 (Can.), and *Payette v. Guay, Inc.*, 2013 SCC 45, [2013] 3 S.C.R. 95 (Can.) offer further examples of civil law methodology both with respect to identifying the appropriate fundamental principle, and modulating it contextually in terms of its intensity and application. Judge Gonthier in *Banque de Montréal* found that Quebec law recognized twin obligations owed by an employee to an employer of (i) good faith and loyalty, and (ii) avoidance of conflict of interest. If *Payette* illustrates the Supreme Court's impacting Quebec's civil law by reference to the Anglo-Canadian common law, *Bhasin*'s originality is, in part, that it does the reverse quite directly and demonstratively.

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73. For discussion purposes, this is an oversimplification of the Canadian securities landscape as there are Multilateral Instruments, National Instruments, and other various agreements.

74. Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837 (Can.).

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

76. *See* Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System (Sept. 30, 2014), http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf.

77. This is a very broad summary of noteworthy organs from top to bottom of the Cooperative Capital Markets Regulatory System.

The Council of Ministers would be responsible for appointing the CMRA's Board of Directors,[78] proposing legislative amendments to the cooperative system, and approving regulations made by the CMRA. The CMRA would be responsible for administering the proposed provincial Capital Markets Act and the federal Capital Markets Stability Act.

The cooperative agreement released on October 16, 2014, providing amendments to the September 2013 agreement. The amended provisions include:

- Provincial Capital Markets Act (PCMA), which is intended to: update provincial securities law, retain key comments, and make the current provincial legislation flexible to thrive within a robust regulatory framework. The PCMA must be adopted by each participating province and territory; and
- Capital Markets Stability Act (CMSA), which is intended to address issues pertaining to criminal activity and systemic risks at a national level to capital markets.[79]

B. No Contest Settlements

On March 11, 2014, the Ontario Securities Commission (OSC) released *Staff Notice 15-702 Revised Credit for Cooperation Program.*[80] The program, among other things, directs Staff to enter in to a settlement agreement that does not provide for any admission, finding of fact, or liability. This is not designed to be an exculpatory card for wrongdoers, rather there are certain factors that the OSC will consider in determining whether to enter into a settlement hearing or not. Those factors include:

- the degree and timeliness of the respondent's self-reporting in light of the misconduct;
- the degree of investor harm;
- the remedial steps taken by the respondent;
- the deterrent effect of the settlement on the respondent and the market; and
- any agreement to pay money at the time the settlement agreement is approved.[81]

Note, however, that even should all the aforementioned factors be present, a no contest settlement agreement would not be available in certain listed circumstances.

IX. Corporate Immigration*

On June 9, 2014, the federal government published Operational Bulletin (OB) 575,[82] which expands guidelines for immigration officers assessing Work Permit applications for Intra-Company Transferees with Specialized Knowledge. The OB makes it more difficult to use this exemption from the Labour Market Opinion (LMO) process:[83]

78. Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System, *supra* note 76, § 4.2.

79. *Backgrounder: Cooperative Capital Markets Regulatory System – Memorandum of Agreement on the Cooperative Capital Markets Regulatory System and Consultation on the Cooperative Legislation*, DEP'T FIN. CAN., http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Bkgrder-PEI-English.pdf (last modified Sept. 8, 2014).

80. Revised Credit for Cooperation Program, 37 O.S.C. Bull. 2583 (Mar. 13, 2014).

81. *Id.*

* Sergio R. Karas.

82. *Operational Bulletin 575*, GOV. CAN. (June 9, 2014) http://www.cic.gc.ca/english/resources/manuals/bulletins/2014/ob575.asp.

83. *See* Immigration and Refugee Protection Regulations, SOR/2002-227, § 203, as amended (Can.).

To have specialized knowledge and to meet the requirements of [the new policy], an [Intra-Company Transferee Specialized Knowledge][84] applicant would be required to demonstrate, on a balance of probabilities, a high degree of both proprietary knowledge and advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. The onus is on the applicant to provide evidence that [he or she] meet[s] this standard.[85]

The new criteria will require Specialized Knowledge to be "unique and uncommon," held by only a small number or small percentage of employees of a given enterprise. Note that where a treaty such as NAFTA,[86] the Canada-Chile Free Trade Agreement (CCFTA),[87] or the Canada-Peru Free Trade Agreement[88] provides a different definition of Specialized Knowledge, that definition will still apply.

In addition, the employee claiming to possess Specialized Knowledge must be remunerated at a level commensurate with the position. The foreign worker should receive, as a minimum, the prevailing wage for the specific occupation and region of work as listed in the Employment and Skills Development Canada (ESDC) "Working in Canada" website tool to determine prevailing Canadian Wage.[89]

Subsequent to making changes in the area of Specialized Knowledge, on June 20 the federal government announced major changes to the Temporary Foreign Worker Program. The changes announced are profound and make it more difficult for employers to hire foreign workers in many categories. The most significant policy changes can be summarized as follows:

- LMOs were replaced by Labour Market Impact Assessments (LMIAs),[90] which are based on enhanced labour market data rather than on occupation descriptions listed in the National Occupation Classification (NOC); and
- Temporary foreign workers are divided into "high-wage temporary foreign workers," being those in positions at or above the provincial/territorial median wage, and "low-wage temporary foreign workers," being those in positions earning below that median wage.[91]

For low-wage temporary foreign workers, Work Permit duration is now limited to a one-year maximum rather than the previous two-year maximum. For high-wage temporary foreign workers, employers are required to present Transition Plans in addition to other recruitment efforts to demonstrate how they intend to decrease their dependence on temporary foreign workers. Limited exceptions apply.

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84. *See id.*

85. *Operational Bulletin 575*, *supra* note 82.

86. North American Free Trade Agreement, annex 1603, § C, Dec. 17, 1992, 32 I.L.M. 289.

87. Canada-Chile Free Trade Agreement, Can.-Chile, annex K-03, § III, Dec. 5, 1996, http://sice.oas.org/Trade/chican_e/chcatoc.asp.

88. Canada-Peru Free Trade Agreement, Can.-Peru, annex 1203, § C, May 29, 2008, http://sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp.

89. *Explore Careers by Wages*, JOB BANK, http://www.jobbank.gc.ca/wage-outlook_search-eng.do?reportOption=wage (last modified Nov. 10, 2013).

90. *See* CANADIAN CHAMBER OF COMMERCE, POLICY ALERT: CHANGES TO THE TEMPORARY FOREIGN WORKER PROGRAM ON JUNE 20, 2014 (2014).

91. *See* EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA, OVERHAULING THE TEMPORARY FOREIGN WORKER PROGRAM (2014), *available at* http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/overhauling_TFW.pdf.

The new LMIA requires employers to provide much more comprehensive information regarding their recruitment efforts and to demonstrate that Canadians cannot be found for a specific position. Employers also need to demonstrate that Canadians have not been laid-off or had their hours reduced at a worksite that employs temporary foreign workers. The authorities will rely on better sources of labor market information to determine if there are Canadians who could fill those positions, including a proposed new job matching service to allow Canadians to apply directly for positions, a quarterly job vacancy survey by Statistics Canada, an annual national wage survey, and better use of government data.

Another measure announced will result in the refusal of LMIA applications for employers in the accommodation, food services, and retail trade sectors for positions that require little or no education or training, in geographical areas where unemployment rates exceed 6 percent.

The government promised to increase the number and scope of inspections of employers hiring temporary foreign workers, including more site visits, interviews of temporary foreign workers and other employees, the production of documents, and the banning of employers who break the rules. The government will also expand its use of the Confidential Tip Line launched in April 2014.

The government proposed criminal prosecution of employers suspected of activities that are in breach of the Immigration and Refugee Protection Act (IRPA), such as employing foreign nationals that are not authorized to work in Canada, counselling misrepresentation, and actual misrepresentations, with fines of up to $100,000.00 and imprisonment of up to five years, or both.[92]

X. An Attractive Jurisdiction for Scientific Research and Experimental Development*

Canada continues to be an attractive country to conduct research and development. The Federal Budget of 2014 announced the creation of a Canada First Research Excellence Fund.[93] The purpose of the Fund is to support advanced research and innovation in order to help Canadian business become more competitive in Canada and around the world by investing $1.5 billion over the next decade to help Canadian post-secondary institutions excel globally in research areas that create long-term economic growth for Canada. The budget also promises to commit an additional $500 million over two years to the Automotive Innovation Fund,[94] to support significant new strategic research and development projects and long-term investments in the Canadian automotive sector.

The above funding is in addition to the generous $3.6 billion the federal government provides annually to claimants under the Scientific Research and Experimental Develop-

92. *Id.* at 20.

* Sunita D. Doobay.

93. Budget 2014, *Economic Action Plan 2014: Supporting Jobs and Growth*, GOV'T CAN., http://www.budget.gc.ca/2014/docs/themes/pdf/jobs-emplois-eng.pdf (last modified Feb. 11, 2014).

94. Industry Canada, *Automotive Innovation Fund—Program Summary*, GOV'T CAN., https://www.ic.gc.ca/eic/site/auto-auto.nsf/eng/am02257.html (last modified Feb. 20, 2013).

ment (SR&ED) tax incentive program.[95] The generous funding of the SR&ED program makes it attractive for foreign corporations to establish operations in Canada to carry out research and development. A foreign subsidiary generally will not qualify for the 35 percent investment tax credit Canadian Controlled Private Companies (CCPC) enjoy, but will generally qualify for the 20 percent investment tax credit. But the recent case of *Price Waterhouse Coopers Inc. Acting in the Capacity of Trustee in Bankruptcy of Bioartificial Gel Technologies (Bagtech) Inc. v. Her Majesty the Queen*[96] illustrates that the usage of a unanimous shareholder agreement may enable a majority foreign-owned Canadian corporation to still qualify for the beneficial CCPC rate.[97]

95. *See 2014 Federal Budget Continues to Support Canadian Innovation and Research*, CALGARY HERALD (Feb. 12, 2014, 5:49 PM), http://calgaryherald.com/technology/2014-federal-budget-continues-to-support-canadian-innovation-and-research.

96. 2012 TCC 120, *aff'd*, 2013 FCA 164.

97. Note that the general anti-avoidance (GAAR) rule of the Income Tax Act was not argued by the Minister of National Revenue, and must be considered should a unanimous shareholder agreement be considered for the purposes of obtaining the CCPC preferential SR&ED rate.

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