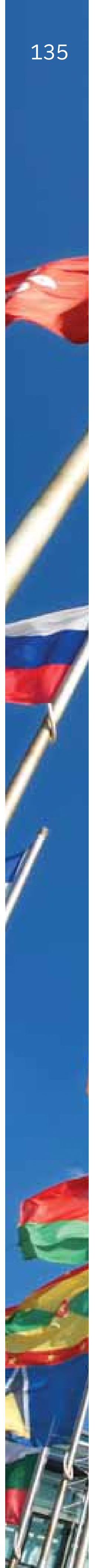
INTERNATIONAL TRADE AND INVESTMENT

The World Trade Organization	135
The *North American Free Trade Agreement*	136
The *Canada-European Union Comprehensive Economic and Trade Agreement*	137
The *Trans-Pacific Partnership Agreement*	138
Other Free Trade Agreements	139
Bilateral Investment Treaties	139
Canada's Agreement on Internal Trade	140
Economic Sanctions	141
Export and Import Controls on Goods and Technology	141
Controlled Goods Program	142
Anti-Corruption Legislation	143
Duties and Taxes on the Importation of Goods	144
Other Requirements for Imported Goods	145
Trade Remedies	146
Government Procurement of Goods and Services	147

By John W. Boscariol and Robert Glasgow



INTERNATIONAL TRADE AND INVESTMENT

Canada is a member of the World Trade Organization (WTO) and a party to the *North American Free Trade Agreement* (NAFTA), the *Canada-Korea Free Trade Agreement* (CKFTA), and numerous other regional trade and investment protection agreements. Recently, Canada has signed the *Comprehensive Economic and Trade Agreement* (CETA), a free trade agreement with the European Union. The implementing legislation for CETA has passed through two readings in the House of Commons. It is expected that CETA will come into force in 2017, with several exceptions largely related to the investor-state dispute settlement mechanism. In addition, Canada has signed the *Trans-Pacific Partnership* (TPP), which, together with CETA, will vastly expand Canada's free trade coverage. As such, Canada has rights and obligations in a wide range of areas addressed under these treaties.

Due of the broad scope of these trade and investment agreements and their binding dispute settlement mechanisms, foreign investors establishing a business in Canada should be cognizant of Canada's obligations and the remedies available to them, particularly where they are facing discriminatory or otherwise harmful government measures.

The World Trade Organization

As a member of the WTO, Canada is subject to a broad range of obligations that impact all sectors of the Canadian economy. These obligations govern Canadian measures concerning market access for foreign goods and services, foreign investment, the procurement of goods and services by government, the protection of intellectual property rights, the implementation of sanitary and phytosanitary measures and technical standards (including environmental measures), customs procedures, the use of trade remedies, such as anti-dumping and countervailing duties, and the subsidization of industry.

These WTO obligations apply to Canadian government policies, administrative and legislative measures, and even judicial action. They apply to the federal government and also in many cases to provincial and other sub-federal governments.

Canada is an active participant in the WTO's dispute settlement system, both as complainant and respondent. As a result of WTO cases brought

against Canada by other countries, Canada has had to terminate or amend offending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products, green energy, and aircraft. On the other hand, Canadian successes under the WTO dispute settlement system have increased access for Canadian companies to markets around the world.

The *North American Free Trade Agreement*

NAFTA came into effect on January 1, 1994, and provided for the elimination of trade barriers among Canada, the United States and Mexico. Between Canada and the United States, the process of tariff elimination initiated pursuant to the *Canada-United States Free Trade Agreement* that came into effect on January 1, 1989 was continued under NAFTA. On January 1, 1998, customs duties were completely eliminated with respect to U.S.-origin products imported into Canada, with the exception of certain supply managed goods (including dairy and poultry products). Effective January 1, 2003, virtually all customs tariffs were eliminated on trade in originating goods between Canada and Mexico.

While NAFTA eliminates tariff barriers among Canada, Mexico, and the United States, each country continues to maintain its own tariff system for non-NAFTA countries. In this respect, NAFTA differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the rest of the world. A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under NAFTA. Goods wholly produced or obtained in Canada, Mexico or the United States, or all three countries, will qualify for preferential tariff treatment, as will goods incorporating non-NAFTA components that undergo a prescribed change in tariff classification, and that in some cases satisfy prescribed value-added tests. Provided the NAFTA rules of origin are satisfied, investors from non-NAFTA countries may establish manufacturing plants in Canada through which non-NAFTA products and components

GOODS WHOLLY PRODUCED OR OBTAINED IN CANADA, MEXICO OR THE UNITED STATES, OR ALL THREE COUNTRIES, WILL QUALIFY FOR PREFERENTIAL TARIFF TREATMENT.

may be further processed and exported duty-free to the United States or Mexico.

NAFTA Chapter 11 imposes obligations on Canada concerning its treatment of investors of other NAFTA countries. It also contains an investor-state dispute settlement (ISDS) mechanism, which permits a private investor of one NAFTA country to sue the government of another NAFTA country for loss or damage arising out of that government's breach of its investment obligations. Under NAFTA Chapter 11, the federal government can be sued for damages arising out of provincial government measures that are inconsistent with NAFTA's investment obligations.

While NAFTA contains many obligations similar to those found in WTO agreements, it is sometimes referred to as "WTO-plus," because of enhanced commitments in certain areas, including foreign investment, intellectual property protection, energy goods (such as oil and gas), financial services, telecommunications, and rules of origin. NAFTA also establishes special arrangements for automotive trade, trade in textile and apparel goods, and agriculture.

The *Canada-European Union Comprehensive Economic and Trade Agreement*

On October 30, 2016, Canada and the European Union signed the final legal text of the EU-Canada CETA. With a final legal text in hand, Canada and the EU have begun the ratification and implementation process. In Canada, this process is well underway with the implementing legislation having been taken through two readings in the House of Commons in 2016, and Royal Assent is expected in the first quarter of 2017. Certain aspects of CETA will need to be implemented by the various provincial legislatures.

Because the European Commission has designated CETA as a "mixed agreement" it will need ratification by the individual member states. The EU has indicated that most of CETA, with the exception of the novel approach to investor-state dispute settlement and a few ancillary portions of the agreement, will go into force immediately upon ratification.

As Canada's broadest and most significant trade agreement to date, CETA significantly liberalizes trade and investment rules applicable to

economic relations between the two regions. CETA addresses trade in services (including financial services), movement of professionals, government procurement (including at the provincial and municipal levels), technical barriers to trade, investment protection and ISDS, and intellectual property protections (including for geographical indications and pharmaceuticals).

On the day CETA enters into force, 98% of all EU tariff lines will be duty-free for Canada. Canadian exporters will also benefit from clear rules of origin that take into consideration Canada's supply chains to determine which goods are considered "made in Canada" and eligible for preferential tariff treatment. Similar to NAFTA, CETA also aims to foster regulatory unification, co-operation, and information sharing between Canadian and EU authorities in order to put in place more compatible regulatory regimes. This will include co-operation on sanitary and phytosanitary measures for food safety, animal and plant life, and health. CETA also includes some sector-targeted provisions that recognize specific interests related to wines and spirits, biotechnology, forestry, raw materials, science, technology, and innovation. Underscoring the agreement's co-operative objectives, CETA also promises to implement greater transparency and information sharing with respect to subsidies and trade remedies provided by governments to their respective countries' industries.

Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the ISDS arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states, and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state, and the third selected from a list of neutral members). CETA also establishes an appellate tribunal that may uphold, reverse, or modify a tribunal's award based on errors of law, manifest errors of fact, or on the basis that it has exceeded its jurisdiction. Because of objections of the Wallonia region of Belgium, this portion of CETA will not be in force until it has gone through further analysis.

The *Trans-Pacific Partnership Agreement*

The TPP is a trade agreement among 12 Pacific Rim countries, representing a market of 792 million people and a combined GDP of

C$28.1 trillion, which is approximately 40% of the global economy. The agreement promises to provide significantly enhanced access to Pacific markets for Canadian business.

The agreement has been finalized, and was signed by ministers of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam on February 4, 2016. It has not yet come into force. In Canada, enactment will require ratification by Parliament and the Canadian government appears to be waiting to see whether the United States Congress will pass TPP before proceeding further. Recent development in the United States suggest this is unlikely in the near future.

If it comes into force, the TPP will reduce trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The TPP addresses new trade issues and other contemporary challenges, such as labour and environmental issues. It reflects both tariff and non-tariff barriers to trade and investment, with the goal of facilitating the movement of people, goods, services, capital, and data across borders. The agreement also includes ISDS provisions to resolve disputes between parties and investors.

Other Free Trade Agreements

In addition to CETA, NAFTA, and the agreements of the WTO, Canada has also negotiated free trade agreements with Colombia, Chile, Costa Rica, Honduras, Jordan, Korea, Israel, Panama, Peru, Ukraine and the European Free Trade Association (Iceland, Liechtenstein, Norway, and Switzerland).

Canada is currently in talks regarding free trade deals with China, India, Japan, Turkey, Morocco, the Caribbean Community (CARICOM), the Dominican Republic, Singapore, the Andean Community (MERCOSUR), Philippines, Thailand, El Salvador, Guatemala and Nicaragua.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) between Canada and 33 countries are currently in force. Like NAFTA Chapter 11, these BITs govern a range of foreign investment issues, including the treatment of foreign investors and their investments, performance requirements, expropriation and compensation, and government-to-government dispute settlement mechanisms.

To investors, perhaps the most important feature of these BITs is that they also contain private investor-state dispute settlement mechanisms that enable foreign investors to sue host governments, including Canada, for damages arising out of breaches of their investment treaty obligations. Foreign investors intending to establish a business in Canada are advised to determine whether their home state has a bilateral investment treaty with Canada. If so, their rights as an investor may be enhanced. Canadian-based businesses will also benefit from the BIT protections available for their foreign direct investment in developing countries.

Canada recently concluded negotiations of BITs with Bahrain, Guinea, Mongolia, Albania, Moldova, Madagascar, Nigeria, Zambia, and Cameroon. Canada is currently in the process of negotiating BITs with India, Kosovo, Pakistan, Ghana, Kazakhstan, Kenya, Macedonia, Tunisia, the United Arab Emirates, and a number of other countries.

Canada's Agreement on Internal Trade

The federal government of Canada has negotiated the *Agreement on Internal Trade* (AIT) with each of the governments of Canada's provinces and territories. The AIT contains obligations pertaining to: restricting or preventing the movement of goods, services and investment across provincial boundaries; investors of a province; the government procurement of goods and services; consumer-related measures and standards; labour mobility; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection. The AIT also provides for government-to-government and person-to-government dispute resolution.

The AIT came into force in 1995, and has been updated since that time through 14 protocols of amendment. Talks are currently underway between the provinces and the federal government to overhaul and renew the AIT to bring it into line with Canada's international commitments and expectations of a modern free trade agreement.

A March 2016 deadline to modernize the AIT was established under the previous government. Regulatory and procurement co-operation have been recently reported as key points of discussion between ministers. This deadline has passed and further attempts by Canada's provincial Premiers to finalize the modernization efforts have been unsuccessful to date.

Economic Sanctions

A number of nations, entities and individuals are subject to Canadian trade embargoes under the *United Nations Act*, the *Special Economic Measures Act*, the *Freezing Assets of Corrupt Foreign Officials Act*, and the *Criminal Code of Canada*. Canadian sanctions of varying scope apply to activities involving the following countries or regions: Burma (Myanmar), Central African Republic, Côte d'Ivoire, the Crimea Region of Ukraine, the Democratic Republic of the Congo, Egypt, Eritrea, Guinea Bissau, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Russia, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, Yemen, and Zimbabwe. Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups.

In a number of areas, these Canadian economic sanctions measures can be more onerous than those imposed by the United States and Europe.

Unlike the United States, Canada does not maintain a general trade embargo against Cuba. Indeed, an order issued under the *Foreign Extraterritorial Measures Act* makes it a criminal offence to comply with the U.S. trade embargo of Cuba, and requires that the Attorney General of Canada be notified of communications received in respect of these U.S. embargo measures.

CANADA, FOR REASONS OF BOTH DOMESTIC POLICY AND INTERNATIONAL TREATY COMMITMENTS, MAINTAINS CONTROLS ON IMPORTS, EXPORTS AND TRANSFERS OF CERTAIN GOODS AND TECHNOLOGY.

Export and Import Controls on Goods and Technology

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of three lists: the Import Control List (ICL), the Export Control List (ECL) and the Area Control List (ACL).

Goods identified on the ICL require an import permit, subject to exemptions (including for goods from certain countries of origin). These include steel products, weapons and munitions, and agricultural and

food products such as turkey, beef and veal products, wheat and barley products, dairy products, and eggs.

The ECL identifies those goods and technology that may not be exported or transferred from Canada without obtaining an export permit, subject to exemptions for certain destination countries. Controlled goods and technology are categorized into the following groups: dual-use items, munitions, nuclear non-proliferation items, nuclear-related dual use goods, miscellaneous goods (including all U.S.-origin goods and technology, and certain medical products, forest items, agricultural and food products, prohibited weapons, nuclear-related and strategic items), missile equipment and technology, and chemical and biological weapons and related technology.

Export permits must also be obtained for the export or transfer of any goods or technology, regardless of their nature, to countries listed on the ACL. Until recently, there have been only two countries on the ACL, Belarus and North Korea. However, in May of 2016, Canada indicated it will remove Belarus from the ACL. Administrative provisions have been implemented for the issuance of permits for transfers to Belarus, and it is expected Belarus will be removed from the ACL entirely in 2017.

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, nuclear-related goods and technology, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items.

Controlled Goods Program

The Canadian government has established the Controlled Goods Program under the authority of the *Defence Production Act*. This program is a domestic industrial security regime for certain goods and technology that have a military application, including but not limited to items subject to the *U.S. International Traffic in Arms Regulations*. It provides for defence trade controls to regulate and control the examination, possession and transfer in Canada of controlled goods and technology.

Anyone who deals with controlled goods and technology in Canada must register with the Controlled Goods Directorate and comply with numerous employee screening, security and other requirements.

Anti-Corruption Legislation

The federal *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence for any person to offer or pay a bribe to a foreign public official. The CFPOA prohibits Canadians from directly or indirectly (i.e., through an agent or other representative) giving, offering, or agreeing to give or offer a loan, reward, advantage, or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business. Canadian companies must therefore carefully scrutinize their activities abroad, including the actions of their agents and other business partners in other countries to ensure compliance with the CFPOA.

In recent years, Canadian corporate culture has been undergoing significant change in response to new and vigorous enforcement of the CFPOA by the RCMP and Crown prosecutors. The widely publicized criminal penalties against Niko Resources Ltd. in 2011 and Griffiths Energy in 2013, and ongoing RCMP investigations into the activities of a number of other Canadian companies, serve as stark warnings of the very significant costs of non-compliance. With an additional 35 or so RCMP investigations underway, many Canadian companies are moving quickly to design and implement anti-corruption policies and procedures as well as transactional risk mitigation strategies.

In addition, Canada has enacted sector-specific legislation to increase transparency and deter corruption for Canadian companies operating outside of its borders. The *Extractive Sector Transparency Measures Act* (ESTMA) was brought into force on June 1, 2015. ESTMA requires extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.

Similarly, the federal government has also put in place a series of integrity policies (collectively referred to as the “Integrity Regime”) to ensure that the government itself conducts its business with ethical suppliers both in Canada and abroad. The Integrity Regime ranks among the world’s most aggressive debarment programs for the disqualification of companies seeking to do business with the federal government. It aims to promote and enforce ethical business practices in government, ensure due process for the government’s suppliers and service providers, and to uphold trust in the public procurement process.

Under its Criminal Code, Canada also prohibits bribery and related

activities in respect of domestic officials and bribery in the context on non-government parties (i.e., secret commissions).

It is important to note that unlike the United States, Canada does not have a formal program or process for remediation by companies facing allegations of anti-corruption violations. In the United States, there is a well-established process that allows companies to voluntarily disclose *Foreign Corrupt Practices Act* violations and negotiate deferred or non-prosecution agreements with the U.S. authorities that provide for the payment of fines and the imposition of monitors who oversee remediation, all without there having to be a criminal conviction of the company. The U.K. has also adopted a similar process.

Canada currently has no such process. Accordingly, if the RCMP and Crown are of the view that a Canadian company should be punished for a CFPOA or *Criminal Code of Canada* violation in terms of a fine and/or probation order, they have no choice but to pursue a conviction, either through a guilty plea or a trial. This is the case even if the company has voluntarily disclosed the CFPOA violation.

Duties and Taxes on the Importation of Goods

Importers are required to declare imported goods upon entry into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin. As a member of NAFTA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin; in most cases, these goods may be imported duty-free.

The amount of customs duties payable is a function of the rate of duty (determined by the tariff classification and the origin of the goods, and as set out in the Schedule to Canada's Customs Tariff) and the value for duty. Canada has adopted the World Customs Organization's Harmonized System of tariff classification, as have all of Canada's major trading partners.

In accordance with Canada's obligations under the WTO's agreement regarding customs valuation, the value for duty of goods imported into Canada is, if possible, to be based on the price paid or payable for the imported goods, subject to certain statutory adjustments. This primary

basis of valuation is called the "transaction value method:"

- An example of an adjustment that would increase the value for duty of the goods is a royalty payment, if the royalty is required to be paid by the purchaser of the imported goods as a condition of the sale of the goods for export to Canada.
- An example of an adjustment that would allow for a deduction from the price paid or payable is the transportation cost incurred in shipping the goods to Canada from the place of direct shipment, if such costs are included in the price paid or payable by the importer.

If for one reason or another (e.g., where there has been no sale of the goods) the transaction value of the goods may not be used as a basis for the declared customs value, Canadian legislation provides alternative methods for valuation. These methods must be applied sequentially. In addition to customs duties, Goods and Services Tax (GST) in the amount of 5% is also payable upon the importation of goods. This GST rate is applied to the duty-paid value of the goods. Provided that they have acquired the goods for use in commercial activity, importers registered under the *Excise Tax Act* will be able to recover GST paid upon importation by claiming an input tax credit. See Sales and Other Taxes — Federal Goods and Services Tax.

Other Requirements for Imported Goods

Certain imported goods are required to be marked with their country of origin. These generally fall within the following product categories: goods for personal or household use; hardware, novelties and sporting goods; paper products; wearing apparel; and horticultural products. Certain types of goods, or goods imported under specific conditions, are exempt from the country-of-origin-marking requirement.

Pre-packaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*. Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

There are also significant legislative requirements relating to the importation of foods, agricultural commodities, aquatic commodities,

and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency (CFIA).

Counterfeit trade-mark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trade-marks Act*, the owner of a valid Canadian copyright or a Canadian trade-mark holder registered with the Canadian Intellectual Property Office (CIPO) is eligible to file a Request for Assistance (RFA) application with the CBSA. This RFA provides an important enforcement tool for intellectual property rights. Using the RFA, the CBSA can identify and detain commercial shipments suspected of containing counterfeit trade-mark or pirated copyright goods. When the CBSA detects such goods, the CBSA can use the information contained in the RFA to contact the rights-holder. The rights-holder may then pursue a court action if necessary. The Royal Canadian Mounted Police (RCMP) is responsible for undertaking any criminal investigations related to commercial scale counterfeiting and piracy.

Certain goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under the *Criminal Code of Canada*; base or counterfeit coins; certain used or second-hand aircraft; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorous matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

Trade Remedies

Canada maintains a trade remedy regime that provides for the application of additional duties and/or quotas to imported products, where such products have injured or threaten to injure the production of like goods in Canada.

The federal *Special Import Measures Act* provides for the levying of additional duties on “dumped” products (i.e., products imported into Canada at prices lower than the comparable selling price in the exporting country) if they have caused or threaten to cause injury to Canadian industry.

Duties may also be levied in instances of countervailable subsidies being provided by the government in the country of export, and if such subsidized products injure or threaten to injure Canadian industry. Further, Canada may apply safeguard surtaxes or quantitative restrictions on imports where it is determined that Canadian producers are being seriously injured or threatened by increased imports of goods into Canada. These measures may be applied regardless of whether the goods have been dumped or subsidized.

Government Procurement of Goods and Services

Given recent increases in government spending and the passage of stimulus legislation in Canada, the United States and other countries around the world, the disciplines imposed by trade agreements on government procurement have become particularly relevant. Among other things, these agreements restrict the extent to which governments may favour domestic goods and services in their procurement processes.

NAFTA (Chapter 10), the *WTO Agreement on Government Procurement* and the AIT (Chapter Five) all set out numerous requirements for procurement of goods and services that must be satisfied by the parties to those agreements, including Canada. These requirements include provisions that address technical specifications; the qualification of suppliers; the design and issuance of requests for proposals; selective tendering procedures; tender documentation; negotiations that may occur during the tender; the process of submitting, receiving and opening tenders and awarding contracts; limited tendering procedures; and bid challenges. They apply to federal government departments and entities, as well as to various government enterprises and Crown corporations. In certain circumstances, they also apply to provincial government entities, including municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities.

PURSUANT TO ITS NAFTA, WTO AND AIT OBLIGATIONS, CANADA'S BID CHALLENGE AUTHORITY FOR FEDERAL PROCUREMENT IS THE CANADIAN INTERNATIONAL TRADE TRIBUNAL.

Pursuant to its NAFTA, WTO, and AIT obligations, Canada's bid challenge authority for federal procurement is the Canadian International Trade Tribunal (CITT). Where the CITT finds that a procurement complaint is valid, it may recommend that a

new solicitation be issued, the bids re-evaluated, the existing contract terminated and the contract awarded to the complainant or the complainant compensated for its loss of the contract. The CITT may also award costs incurred by the complainant in preparing a response to the solicitation.

As noted above, CETA contains significant government procurement obligations that apply not only at the federal level, but also at the provincial and municipal levels of government. See Government Procurement.

FOR MORE INFORMATION, PLEASE CONTACT:

John Boscariol
416-601-7835
jboscariol@mccarthy.ca