



International trade

In this issue we look at international trade, including the North American Free Trade Agreement between Canada, the United States, and Mexico. WeirFoulds LLP associate Catherine Powell, a civil litigator whose practice encompasses international law, insolvency and complex commercial matters, tests your knowledge of international trade.

1 Only the governments of Canada, the United States, and Mexico can take steps to pursue a claim with respect to the rights and obligations accruing under the North American Free Trade Agreement [NAFTA].

True or False?

2 You are in-house counsel to a Canadian company that wholly owns and controls a subsidiary incorporated and operating in Mexico. The Mexican government has just passed a law requiring all foreign-owned Mexican corporations to staff senior management positions with Mexican nationals. The law is valid under the Mexican constitution. You are asked for your opinion as to what the company can do and you advise that the company cannot challenge this law.

Right or Wrong?

3 You are counsel for a Vancouver-based company that specializes in the manufacture and preparation of organic peanut butter products. Business has been brisk and the president suspects there may be an international market for the company's peanut butter products. You tell the president the company does not need any permits from the Canadian government to sell its peanut butter products internationally.

Right or Wrong?

4 You are in-house counsel to a Canadian corporation, Concrete Inc., specializing in the manufacture and installation of exterior concrete finishes. An opportunity has arisen to refinish all government-owned buildings in the city of Buenos Aires, Argentina, with the company's products, with one caveat. The responsible public official has advised the company's president he would feel more comfortable awarding the contract to Concrete Inc. if he were to experience the benefits of the company's products firsthand at his personal residence, which he anticipates would be free of charge. Concrete Inc.'s president asks for your advice. You tell the president that: **A)** You do not see a problem with providing the public official with free concrete finishes products, as long as the gesture is expressed as a gift. **B)** Bribery is illegal in Canada and Concrete Inc. should follow the proper channels in obtaining the contract from the Argentinean government. **C)** You do not see a problem with providing the public official with free concrete finishes products, as long as no cash changes hands. **D)** Although illegal in Canada, this form of bribery is common and acceptable in some foreign countries, where public officials often earn small salaries.

5 You are counsel to a municipality that has been hit particularly hard by the financial downturn. The municipality's infrastructure is old and the provincial government has awarded the municipality a grant to build a new bridge. The municipality is in charge of the project and, in an effort to boost local employment and revenue, the mayor announces only local firms can bid on the project. An American company that would like to bid on the project complains. You advise the mayor that the municipality is not subject to any international laws with respect to the management of the project.

Right or wrong?

QUIZ ANSWERS

A 1. FALSE. A natural or legal person who is an investor of one of the states parties to NAFTA can pursue a claim under NAFTA against another state party for damages suffered by the investor and/or for damages suffered by the investment of the investor as a result of actions taken or omissions made by the state party. For example, the Canadian parent of an American subsidiary operating in the United States could pursue a claim against the American government for treatment to the subsidiary that is contrary to NAFTA. However, the Canadian parent could not pursue a claim against the Canadian government under NAFTA.

A 2. WRONG. Mexico, by virtue of Article 1107 of NAFTA, has agreed not to impose restrictions on senior management of enterprises that are the investment of an investor of Canada or the United States. The new law is therefore contrary to NAFTA and the Canadian company can take steps to require Mexico to comply with NAFTA without engaging the Canadian government. The Mexican subsidiary does not have standing under NAFTA vis-à-vis the Mexican government.

A 3. WRONG. Under the Export and Import Permits Act, Canada places import and export controls on several categories of goods, such as agricultural products, textile and clothing, and nuclear energy materials. Controlled agricultural goods include products containing peanut butter, refined sugar, as well as wheat and wheat products. Trade in controlled goods requires an export or import permit, which can be obtained from the Department of Foreign Affairs and International Trade.

A 4. (B). Both Canada and Argentina are signatories to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Canada has enacted the Corruption of Foreign Public Officials Act as a means of enforcing the convention. Any person who gains or attempts to gain a business advantage by giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official is guilty of an offence punishable by up to five years of imprisonment.



A 5. WRONG. Although enforcement is at the national level, NAFTA can affect all levels of government, including a municipality. Pursuant to Article 1106, no state party [which includes a province/state or municipality] may impose or enforce a requirement or a commitment to achieve a given level or percentage of domestic content or to purchase, use or accord a preference to goods produced or services provided in its territory. However, NAFTA contains a number of specialized rules with respect to procurement that exempt states parties from the requirements of Article 1106. These rules may be applicable in this case and the mayor's proposed requirement may not be objectionable under NAFTA. However, the municipality will want to ensure that it can safely rely on one of the procurement exceptions set out in NAFTA before opening the competition to local firms only.

YOUR RANKING?

- **One or fewer correct:** *Might be time to brush up*
- **Two or three correct:** *Not bad, but could do better.*
- **Four correct:** *Very well done, but not perfect.*
- **Five correct:** *Impressive.*



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