



Give and Take

Risks and Opportunities
of the Trans-Pacific Partnership
for Canada's Building Trades Unions

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Executive Summary

The twelve-country Trans-Pacific Partnership (TPP) trade agreement is one of the largest and most ambitious trade agreements to date and, if ratified, would create the largest free trade zone in the world. The TPP addresses areas included in most modern free trade agreements (e.g. trade in goods, investment, and government procurement) and provides disciplines to new areas such as anti-corruption, electronic commerce, and cyber security.

The Government of Canada has signed the TPP and is undertaking nation-wide consultations as part of the ratification process. The consultations reveal that many important questions remain unanswered with respect to how the TPP will affect key sectors of the Canadian economy and the day-to-day lives of Canadians.

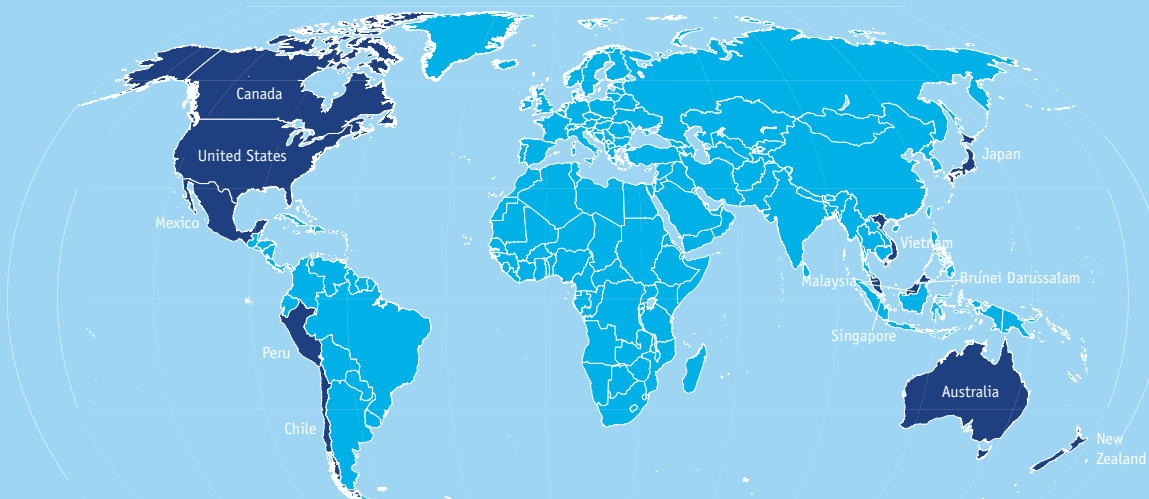
This report examines the risks and opportunities presented by a potential TPP for Canada's Building Trades

Unions (CBTU). The analysis focuses on the government procurement and labour sections of the agreement as these areas most directly affect Canada's labour market. In each case, the analysis reveals both opportunities, such as new markets to export Canadian construction services, and risks, such as increased foreign competition for regulated occupations within the construction sector.

The economic gains for Canada as a whole from a ratified TPP are expected to be modest but while the immediate impact may not be significant, some of the precedents established in the agreement have important future implications for the construction sector. Given the current anti-trade sentiment in the United States a ratified TPP may be a distant possibility, but nonetheless it is a critical development in Canadian trade policy and warrants close scrutiny as ratification advances in individual member countries.

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Give and Take: *Risks and Opportunities of the Trans-Pacific Partnership for Canada's Building Trades Unions*

By Laura Dawson and Jeffrey Phillips

Introduction¹

The Trans-Pacific Partnership (TPP) has been touted as “the biggest trade agreement in a generation”² and, if ratified, would create the largest free trade zone in the world. For Canada, the TPP is unlike any agreement that has been signed to date, going well beyond the provisions of the 1994 North American Free Trade Agreement (NAFTA), signed with the United States and Mexico. The 12 TPP party countries comprise a wide range of economies and include: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.³

The agreement is an ambitious text that covers a combined market of 800 million people with a gross domestic product (GDP) of USD\$28.5 trillion, or roughly 40 percent of global GDP.⁴ Consequently, the TPP has become a lightning rod for controversy around the world and in Canada. Domestically, while certain sectors such as agriculture have pushed hard to promote the TPP on the basis of perceived economic gains, others such as the dairy and automotive have been vocal critics, citing predicted economic losses. As with most trade agreements, the impact of the TPP on the Canadian economy will likely rest somewhere in the middle. A recent study by the C.D. Howe Institute finds that the TPP is expected to have only a “modest impact” on Canada.⁵

So, while the immediate impact of a ratified TPP may not be large, some of the precedents established in the agreement – expanding the scope of commercial activities covered by new trade rules and deepening ties to new trade partners – have important implications for Canada's major economic sectors, including the construction sector. For example, the TPP could open the door to economic

visitors from certain TPP countries who would otherwise not have access to Canada's labour market. At the same time, Canadian workers may find new opportunities in markets abroad.

This report examines the key sections of the TPP Agreement that most directly impact organized labour in Canada's construction sector, namely procurement and labour, though there are other sections of the agreement with implications for the broader construction sector, such as goods, services, and investment.

The Effects of Trade Agreements on the Construction Sector

When most people consider the mechanics of a trade agreement, they imagine reduced tariffs on imports that generate lower prices for consumers of foreign products but also new competition for domestic firms producing similar products. One does not immediately associate the construction sector with the cross-border supply of manufactured goods. In fact, however, trade agreements have broadened in scope over the past half-century and now routinely cover the movement of services, investment and labour (service suppliers).

Canada's service industry accounts for roughly 70 percent of the GDP, making it by far the largest sector in Canada. With respect to construction services, construction is a service that can be imported and exported and the vast majority of our exports go to the United States. In 2014, Canada exported over \$600 billion in construction services to the United States and \$125 billion to the rest of the world. Overall exports of construction services grew 52 percent between 2010 and 2014.⁶

1 This report benefited greatly from the research and drafting assistance of Anna Barrera.

2 Jessica Glenza, “TPP Deal: US and 11 other countries reach landmark Pacific trade pact,” *The Guardian*, October 5, 2015.

3 The TPP did not start out as the 12-economy dynamo we know today. It began as the Trans-Pacific Strategic Economic Partnership (P4) between Brunei, Chile, Singapore, and New Zealand, coming into force in 2005. In 2008, the United States agreed to enter into talks with the P4, followed by Australia, Peru, and Vietnam in 2009; Malaysia in 2010; Canada and Mexico in 2012; and Japan in 2013. In 2011 the P4 was renamed the Trans-Pacific Partnership (TPP). Negotiations concluded in 2015 and the agreement was signed by all parties in February of 2016. However, at the time of writing, significant work remains before it can be fully implemented.

4 “Trans-Pacific Partnership (TPP) - Opening Markets for Industrial Goods and Consumer Products,” October 7, 2015, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/benefits-avantages/sectors-secteurs/05-IndustrialSector.aspx?lang=eng>.

5 Ciuriak, Dadkhah, and Xiao (2016) argue that the agreement provides limited gains for consumers because tariff liberalization is minimal for most sectors and producers are protected by very long phase-in times.

6 Data retrieved from UN Comtrade (<http://comtrade.un.org/data/>)

In 2014, the industrial goods sector, which includes all manufacturing products, as well as oil, gas, and mining activities, contributed more than \$312.3 billion to the Canadian economy.⁷ With the TPP, both goods and services are expected to grow, especially considering that from 2012 to 2014, Canadian exports of industrial goods to TPP countries were already worth, on average, \$311.4 billion per year.⁸ The TPP is expected to generate opportunities for Canadian service and goods suppliers.⁹

Changes to goods tariffs can affect the cost of supplies used by manufacturers and service suppliers. For the Canadian construction sector, however, the benefits of lower-cost imported supplies as a result of the TPP are not expected to be significant and domestic firms may have concerns about the quality of foreign materials.

Trade agreements operate according to the principal of reciprocity. Thus, Canada agrees to open its market in a certain sector in order to benefit from access to the same sector, or others, in markets abroad. But this reciprocity also affects the conditions of competition. Foreign service suppliers who can offer the same service at a lower cost can push out Canadian competitors. In the construction sector, one of the major cost components is labour. Thus a new trade agreement, such as the TPP, raises concerns about whether or not foreign construction companies will be able to utilize lower-cost foreign labour on Canadian job sites and displace Canadian workers.

Rules for government procurement are also covered by trade agreements. Historically, governments have not been obligated to utilize foreign contractors unless the sector has been explicitly agreed to by all negotiating parties. But, government construction contracts, especially those in excess of \$7 million,¹⁰ are increasingly being opened to foreign bidders. This is good news if your country's construction service providers are internationally competitive, but worrisome if they are not.

We normally consider trade agreements in terms of exporters gaining new markets and domestic suppliers grappling with new competition, but trade agreements also have broader effects on the economy. Cheaper imports help to raise

economic welfare by lowering the cost of consumer goods as well as supplies for manufacturers and service suppliers. These income effects help to increase consumption across the board. Theoretically, if Canada exports more widgets, the wealthier widget producers will build more factories and their workers will build better homes, generating expansionary effects on the construction sector.

Exposure to new markets also helps raise domestic competitiveness. Competitive domestic firms “up their game” to become world-class exporters as a result of the new market opportunities that trade agreements generate. Meanwhile, the assets of non-competitive firms are re-allocated to uses that yield a higher return on investment. (It is noteworthy, however, that the sanitized language of economics does not adequately convey the devastating effects of job loss on individuals and communities nor the difficulties of retraining to workers to move from declining sectors to rising ones.)

In Canada, the federal government negotiates and signs free trade agreements, though many key aspects of trade agreements, such as government procurement, have strong provincial and municipal dimensions. While provincial consent is not required for ratification of the TPP, the federal government has a policy of consulting with the provinces before signing treaties that touch on matters of provincial jurisdiction, since it cannot enforce compliance in areas beyond its jurisdiction.¹¹ Whenever a treaty concerns an area of provincial jurisdiction, only the provincial legislative assemblies may implement the relevant provisions. As more and more areas of policy cross multiple levels of jurisdiction, broad provincial support will be essential for Canada to successfully ratify the TPP.¹²

Underpinning the analysis in this report is the critical question of whether we are likely to see a ratified TPP in the near future. Article 30.5 of the TPP Agreement precludes the possibility of its entry into force without both the United States and Japan ratifying the deal. Given the current political climate in both Japan and the United States, the finish line for the TPP looks like a distant possibility.¹³ (We will return to this issue later in the report.)

7 “Trans-Pacific Partnership (TPP) - Opening Markets for Industrial Goods and Consumer Products”.

8 “Trans-Pacific Partnership (TPP) - Opening Markets for Industrial Goods and Consumer Products”.

9 “Trans-Pacific Partnership (TPP) - Opening Markets for Services and Financial Services,” June 16, 2016, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/benefits-avantages/sectors-secteurs/04-FinancialSector.aspx?lang=eng>.

10 5,000,000 SDRs. Procurement thresholds are measured in Special Drawing Rights, the international reserve asset created by the International Monetary Fund.

11 Barnette, Laura. “Current Publications: Law, Justice and Rights.” : Canada’s Approach to the Treaty-Making Process. November 6, 2012. <http://www.lop.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm#a5>.

12 Barnett 2012.

13 Kawase, Tsuyoshi. “The Trans-Pacific Partnership as a Set of International Economic Rules.” May 2016. <http://e15initiative.org/blogs/trans-pacific-partnership-as-a-set-of-international-economic-rules/>.

TPP Overview

The TPP covers all of the topics included in most modern FTAs, including trade in goods, services, technical barriers to trade, investment, government procurement, and intellectual property. The TPP also goes beyond these traditional areas, providing disciplines to new areas such as anti-corruption, electronic commerce, and cybersecurity. In this sense, the TPP increases the scope of the NAFTA, which previously served as a template and benchmark for most of Canada's international trade commitments.

In Canada, the government is presently holding consultations across the country to gain input on the TPP from individuals, companies, and provinces. Since the consultative process began in November 2015, Minister Chrystia Freeland has met with Canadian stakeholders, as well as her counterparts from each of the TPP member countries.¹⁴

Regardless of the input received through the consultation process, the TPP is an all-or-nothing agreement in the sense that the whole text needs to be ratified by Parliament or the agreement will not come into force (see box 1). There is no room to make adjustments to the text based on feedback received.

Many view the TPP as an opportunity to update the NAFTA between Canada, the United States, and Mexico. When the NAFTA came into force in 1994, Mosaic was the dominant system for navigating the worldwide web and Facebook would not be invented for another 11 years. In other words, the world has changed. Many of the components of the contemporary economy that we now take for granted, such as digital delivery of services and third-party logistics, received no coverage in the NAFTA.

Many hoped that through the TPP, Canada and the United States would have the opportunity to expand the scope of the NAFTA.¹⁵ However, perhaps because of the complexity of the agreement or the diversity of the trading partners involved, the initial results have not yielded the level of ambition promised at the outset. Nevertheless, the addition of initial language that attempts to curb currency manipulation, promote cross-border digital services, and ensure transparency from state-owned enterprises sets down markers for strengthened future commitments.

BOX 1: Canada's process for ratification of an FTA

1. The signed agreement is tabled in Parliament for 21 sitting days (the text of the agreement is considered to be in the public domain).
2. Once the agreement is tabled, implementing legislation is introduced in Parliament (First Reading).
3. During Second Reading, parliamentarians are able to debate the general scope and principle of the legislation.
4. The Bill is referred to the Standing Committee on International Trade (CIIT). Following the committee report, non-committee members may propose amendments.
5. The Third Reading debate is followed by a vote on the passage of the Bill in the House of Commons.
6. A similar process is required in the Senate. Once completed, the legislation can be granted Royal Assent.
7. A final Order in Council is necessary for ratification.

Source: Barnett 2012.

It is important to remember that Canada already has FTAs with many of the larger economies in the TPP (the United States, Mexico, Chile, and Peru) so significant new market access gains are not likely. However, none of these FTAs have a well-developed labour mobility chapter. The only large economy in the TPP with which Canada does not have an FTA is Japan.

The major attractions of the TPP are the size and dynamism of the Asian market together with the avoidance of the sort of preference erosion that would occur if Canada's trading partners were to complete a deal that Canada was not a part of. The emerging economies in the TPP have growth rates that are roughly double those of Canada's traditional trading partners, the United States and Western Europe. The APEC¹⁶ countries – of which the TPP members

14 "TPP Consultations," June 16, 2016, accessed July 8, 2016, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/consulting-corner_coin-consultations.aspx?lang=eng.

15 Because all three NAFTA parties are also negotiating parties in the TPP, any TPP provisions that expand or deepen the NAFTA will take precedence.

16 The Asia-Pacific Economic Cooperation (APEC) is a regional economic forum established in 1989 to leverage the growing interdependence of the Asia-Pacific. APEC's 21 members aim to create greater prosperity for the people of the region by promoting balanced, inclusive, sustainable, innovative, and secure growth and by accelerating regional economic integration. APEC's 21 member economies are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; the Russian Federation; Singapore; Chinese Taipei; Thailand; the United States of America; Vietnam (Asia-Pacific Economic Cooperation 2016).

are a subset – account for 44 percent of world trade and 55 percent of global GDP.¹⁷ As emerging market consumers become relatively better off, their demand for imported goods and services increases.

Government Procurement

The World Trade Organization (WTO) and the Organisation for Economic Co-operation and Development (OECD) estimate government purchasing to be valued at roughly 15 percent of a country's GDP.¹⁸ This is an area of the TPP that matters for the Canadian construction sector.

Government procurement rules in trade agreements are intended to level the playing field between foreign and domestic suppliers of goods and services to governments. The basic provisions set out measures for transparency and dispute settlement in government contracting and more advanced agreements obligate signatories to open up certain sectors of government purchasing to foreign bidders. The government procurement provisions contained in Chapter 15 of the TPP are consistent with those sought in other international trade agreements, such as the WTO Government Procurement Agreement, to promote non-discrimination, transparency, impartiality, and accountability in procurement processes.

Chapter 15 is designed to grant Canadian suppliers predictable and secure access to government contracts in countries where Canada did not have a prior agreement, namely Australia, Brunei, Malaysia, and Vietnam.¹⁹ Vietnam specifically could be an interesting place for investment in the construction sector, since, according to Vietnam's Foreign Investment Agency, the property market attracted \$1.7 billion in foreign direct investment (FDI) in the first seven months of 2015, accounting for 19.3 percent of total FDI.²⁰

Government procurement rules are crafted in trade agreements using a positive list approach. This means that only those purchasing entities, and only certain sectors utilized by those entities, are covered by the agreement and these covered entities and sectors must be itemized in the agreement.²¹

Across the board, the minimum threshold for construction projects covered by TPP is 5 million SDRs (approximately CAD 7 million). Projects below the threshold level may be reserved for national bidders. Most of the entities covered by the agreement tend to be at the federal level; however Canada provides a more extensive list of sub-national (provincial and municipal) commitments than the other countries.²² Canada's construction-specific commitments cover a broad range of federal authorities, however, Chapter 15 will not cover the procurement of dredging services, and construction services procured by the federal Department of Transport.²³

The types of construction services covered by the TPP procurement chapter are those itemized in Division 51 of the United Nations Provisional Central Product Classification:²⁴

- pre-erection work at construction sites;
- construction work for buildings;
- construction work for civil engineering;
- assembly and erection of prefabricated constructions;
- special trade construction work;
- installation work;
- building completion and finishing work; and
- renting services related to equipment for construction or demolition of buildings or civil engineering works, with operator.

For Canadians, the greatest new construction sector procurement opportunity is broadened access to the U.S. market. For the first time, Canadian industry will be provided with access to the procurement of some major U.S. regional power authorities. (Canada has traditionally been excluded from the majority of U.S. sub-federal contracts.) In total, Canada will have new access to six major U.S. regional power authorities:

- Tennessee Valley Authority;
- Bonneville Power Authority;
- Western Area Power Administration;
- Southeastern Power Administration;
- Southwestern Power Administration; and
- St. Lawrence Seaway Development Corporation.

17 Office of the United States Trade Representative, "U.S.-APEC Trade Facts."

18 "Trans-Pacific Partnership (TPP) - Government Procurement Chapter," October 4, 2015, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/14-GovProcurement.aspx?lang=eng>.

19 "Trans-Pacific Partnership (TPP) - Government Procurement Chapter".

20 "Vietnam's Building Industry Gains Momentum," Oxford Business Group, September 15, 2015, <http://www.oxfordbusinessgroup.com/news/vietnam's-building-industry-gains-momentum>.

21 A full list of commitments can be found on the Global Affairs Canada website at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

22 See Annex 15-A – Schedule of Canada.

23 "Annex 15-A Schedule of Canada," Trans-Pacific Partnership, 2015, https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/annexes/15-a.-canada-government-procurement-annex.pdf.

24 "Detailed Structure and Explanatory Notes," 2016, <http://unstats.un.org/unsd/CR/Registry/regcs.asp?Cl=9&Lg=1&Co=51>.

In addition, Canada and the United States have agreed to apply the TPP procurement thresholds to the government procurement activities covered by the NAFTA. This will streamline procurement functions by reducing the number of procurement thresholds applicable to international agreements.²⁵

Construction companies will be able to bid on government procurement projects in the United States more easily under TPP than under NAFTA. Canadian suppliers will now have access to procurements by major U.S. federal power authorities that operate hydroelectric power, fossil fuel plants, nuclear power plants, wind turbines, solar panels, and transmission systems. Collectively, the newly-covered power authorities build over \$4 billion in construction projects per year. The Tennessee Valley Authority alone is the second largest generator of electricity in the United States.²⁶

However, the new opportunity with the U.S. is tempered by the fact that national security and defence contracts are excluded from Chapter 15, as are state and local government procurement opportunities and goods covered by the Buy American Act.²⁷ When applied, Buy American requires that U.S. government supplies be produced in the United States, and from U.S. materials.²⁸

While there are new opportunities for Canada in the United States market, it is important to remember that Canada has access to all of the TPP countries in the form of government procurement, and Canada did not give full access to all the other agreement members. Specifically, Malaysia, Mexico, the United States, and Vietnam do not have access to Section B, which describes the provincial governmental entities. Canada, however, is prepared to extend coverage of Section B upon the negotiation of mutually acceptable concessions.²⁹

Labour

The labour components of the TPP are found in Chapter 12 – Temporary Entry for Business Persons and Chapter 19 – Labour. We will look at the latter chapter first and these provisions have a less direct impact on Canada's Building Trades Unions (CBTU) member interests since Canada already maintains and enforces high labour standards.

Chapter 19 – Labour

The labour provisions of the TPP are built around the model set out in the NAFTA. The basic NAFTA principles are that

member states will have rules governing labour standards and that they will enforce these standards. However, the commitments are very basic and the agreement does not specify what these rules should be nor does it apply commercial penalties for non-compliance. Subsequent trade agreements have attempted to codify a core set of labour standards that all parties could agree to (hours of work, minimum wage, etc.) but it has been difficult to get broad consensus on core principles.

The TPP provides improvements to the NAFTA labour chapter in key areas. Using the International Labour Organization's 1998 Declaration on Fundamental Principles and Rights at Work, the TPP defines a set of core labour standards including the right to free association and collective bargaining and the elimination of child or forced labour. The agreement calls for national rules to ensure "acceptable" conditions of work with respect to minimum wages, hours of work, and occupational health and safety but stops short of defining the meaning of "acceptable" for TPP parties. Finally, it allows claims of non-compliance with labour commitments to be adjudicated under the TPP dispute settlement mechanism, allowing for the possibility of commercial penalties (lost market access) to be invoked.

The TPP labour rights commitments are of moderate importance to Canada because they help to ensure that Canada's trading partners are not utilizing abusive practices against their workers as a trade advantage. The agreement even includes specific language that prohibits TPP parties from derogating from their domestic labour laws in order to encourage trade or investment. However, the enforcement of labour rights within trade agreements is still underdeveloped and much of the process will rely on voluntary reporting.

Chapter 12 – Temporary Entry

The Chapter 12 provisions covering Temporary Entry for Business Persons are very important for CBTU members since they appear to give workers from TPP parties permission to work in Canada. Only implementation will reveal the true extent of the utilization of these measures, but an initial reading suggests that there might be a number of factors limiting new market access grants that might mitigate against a flood of workers entering Canada. Nevertheless, since the TPP establishes a new benchmark upon which future agreements will be based, the utilization and expansion of Chapter 12 demands close and continued supervision by organized labour interests.

26 "Trans-Pacific Partnership (TPP) - Government Procurement Chapter".

27 "Government Contracts & International Trade," November 23, 2015, <http://www.bassberrygovcontrade.com/2015/11/the-trans-pacific-partnership-impact-on-trade-and-procurement/>.

28 "U.S. Government Procurement," January 19, 2015, accessed July 8, 2016, <http://www.international.gc.ca/sell2usgov-vendreaougouvusa/procurement-marches/buyamerica.aspx?lang=eng>.

29 "Annex 15-A Schedule of Canada".

The basic structure of the agreement sets out a number of general principles that apply to all TPP parties combined with national schedules that detail specific market access provided by (and received by) each party. These benefits are set on the basis of reciprocity, i.e., Canada only granted mobility access to countries that provided similar access in return. Within these commitments, a number of classes of workers are considered, including intra-company transferees, business visitors crossing borders to conduct meetings and research, and after-sales service providers.

Of the 11 other TPP parties, only Australia, Chile, Japan, Mexico, and Peru negotiated market access commitments with Canada that cover “technicians” and it is within this heading that construction and constructed related occupations fall (see table 1 below). Canada did not negotiate similar agreements with Malaysia, Singapore, the United States, Vietnam, or New Zealand. Note that in the case of the United States, NAFTA’s temporary labour commitments will continue to apply.³⁰ (Since the U.S. did not grant new labour mobility access under the TPP, Canada and Mexico maintain privileged access to the United States. However, the extent of this advantage depends on how effective one judges the current NAFTA mobility rules.)

TABLE 1: Canada’s labour mobility commitments

TPP country	Reciprocal access agreement with Canada	Technicians permitted
Australia	Yes	Yes
Brunei	Yes	No
Chile	Yes	Yes
Japan	Yes	Yes with conditions
Malaysia	Yes	No
Mexico	Yes	Yes
Peru	Yes	Yes
Singapore	No	No
United States	No	No
Vietnam	No	No
New Zealand	No	No

Source: “Canada’s Schedule of Commitments for Temporary Entry for Business Persons”.

The main countries of concern for CBTU are Australia, Chile, Japan, Mexico, and Peru, because they negotiated comprehensive bilateral arrangements with Canada on labour mobility. Canada also granted limited access to Australia, Chile, Japan, Mexico, and Peru for technical personnel.³¹

General Principles

The general principles of Chapter 12 of the TPP apply to all parties. They outline the scope and definitions for temporary movement and set out conditions for transparency, notification, management of the agreement, and dispute settlement. Persons covered by the chapter are those engaged in trade in goods, the supply of services, or the conduct of investment activities. The text specifies that entry must be temporary and not linked to the establishment of permanent residence or pursuit of citizenship.

A key distinction made in Chapter 12 is the difference between the right to access the workforce (as specified under the TPP) and the right to enter the country (as determined by immigration authorities). The latter, termed an “immigration formality” in the agreement, refers to visas and other proofs and documentation related to the admissibility of an individual to enter the country. The right to use the temporary entry benefits is contingent upon successful completion of required immigration formalities (see box 2 below). (A criminal record or links to a terrorist organization could be grounds to deny a visa.)

One area where Chapter 12 makes it easier for temporary workers to enter is the removal of labour certification tests (economic needs tests) or numerical quotas as a condition for temporary entry. Doing away with labour market tests means that employers will no longer need to prove that there is a shortage of domestic workers in a specified occupation in order to open the sector to foreign workers. The end of labour market tests is a departure from the requirements of Canada’s temporary foreign worker programs. Less impactful is the TPP prohibition against numerical quotas because these have not traditionally been used in Canada’s temporary foreign worker or NAFTA mobility regimes.

³⁰ The NAFTA does not provide specific coverage for construction sector technicians.

³¹ “Canada’s Schedule of Commitments for Temporary Entry for Business Persons,” Trans-Pacific Partnership, 2015, accessed July 8, 2016, https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/annexes/12-a.-canada-temporary-entry-for-business-persons.pdf.

BOX 2: Temporary entry: Who decides who gets in?

Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada) is the federal department responsible for the movement of immigrants and migrant workers into the country. When Canada implements an international treaty with temporary entry commitments, IRCC becomes bound by those provisions and is obligated to enforce and report on them.

The Canada Border Services Agency (CBSA) is responsible for “[screening] foreign workers at Canadian border crossings and airports to ensure that they meet admissibility requirements before issuing work permits and allowing their entry into Canada.” Both IRCC and CBSA can process work permit applications, but only CBSA can issue work permits at the border and make final decisions about temporary entry.

In deciding whether to authorize migrant workers, IRCC and CBSA officials refer to the FW 1 (foreign worker manual). The document describes the eligibility criteria for workers covered by Canada’s FTAs who apply for a temporary work permit. It includes significant interpretive detail that does not appear in the legal texts of the treaties themselves. CBSA uses another operational manual, the ENF 4 (port of entry examinations), to determine which workers are let into Canada when they arrive at the border.

An employer who wishes to hire a migrant worker can apply for a work permit in advance through IRCC, and early approval streamlines the temporary entry process. However, for professionals and intra-company transferees covered by an FTA (visas T23 and T24 respectively), an advance work permit is not necessarily required.

Provided a worker meets the criteria laid out in the FTA and has the required documentation – i.e., identification, evidence of employment, and evidence of credentials – they can simply arrive at a border and be issued a work permit on the spot. In those cases, the decision to approve a work permit is not made by an IRCC immigration officer but by a CBSA officer alone.

Note that even once a worker has a clear lane to enter the workforce through the TPP and a completed immigration formality, he or she must meet all applicable licensing, testing, and other requirements necessary to practice a profession in the relevant jurisdiction. This is of particular importance to the construction sector, which includes a large number of regulated occupations (e.g. electrician, crane operator, etc.). The TPP may provide a potential opportunity to work in Canada temporarily but that opportunity cannot be operationalized until all licensing and related requirements are met for each jurisdiction where the worker might be bound for licenced occupation. It is also important to remember that each province has its own set of rules, regulations, and requirements for construction workers, and therefore any external worker that wishes to come to Canada will have to fulfill those specific provincial requirements. (Enforcement effectiveness related to certification is contested and difficult at best.) The TPP also contains language preventing the temporary entry provisions from being used to provide foreign workers as strike-breakers during a domestic labour dispute.

Article 12.2.3 covering domestic rule making may require further interpretation. It states: “nothing in this Agreement shall prevent a Party from applying measures to regulate the entry of natural persons³² of another Party into, or their temporary stay in, its territory, . . . provided that those measures are not applied in a manner as to nullify or impair the benefits accruing to any Party under this Chapter”.³³ This implies that Canada can continue to make rules to regulate the entry of temporary workers entering the country; however, this language will have to be tested through dispute settlement cases in order to determine the scope of permissible limitations that are deemed not to nullify or impair the benefit.

Chapter 28 of the TPP discusses the dispute settlement process that would take place between the members of the agreement. The chapter is modelled on the WTO dispute settlement system, which is well-known and understood. This process provides for alternative methods to settle a dispute in its early stages such as conciliation and mediation. The chapter also contains remedy provisions that provide options that a complaining party can use to encourage compliance. While complaining parties will have recourse to trade retaliation, the TPP also provides for a cooperative mechanism. This mechanism enables the creation of a monetary fund that is then jointly leveraged for initiatives that will improve compliance and eventually resolve the issue.³⁴

Source: Mertins-Kirkwood 2016.

32 In legal terms, a *natural person* is a human being, as distinct from a *legal person*, which may be a business or organization.

33 “Chapter 12 - Temporary Entry for Business Persons,” 2015, https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/text/12.-temporary-entry-for-business-persons.pdf.

34 “Trans-Pacific Partnership (TPP) – Dispute Settlement Chapter,” October 1, 2015, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/26-DisputeSettlement.aspx?lang=eng>.

Specific Access Measures

The TPP is much broader in scope than the NAFTA. Under the TPP, Canada will admit, without economic needs tests or numerical limitations, workers in all National Occupation Classification (NOC) skill level O, A, and B³⁵ jobs from Australia, Chile, Peru, Japan, and Mexico. The typical length of stay is up to one year. Extensions are possible. The agreement also provides spousal employment rights to workers admitted under the TPP.

NOC O and A cover management jobs and tend to require a university degree. NOC B jobs encompass many of those found in the construction sector. Qualifications include:

- two to three years of post-secondary education at community college, institute of technology, or CÉGEP,³⁶ or
- two to five years of apprenticeship training, or
- three to four years of secondary school and more than two years of on-the-job training, or
- occupation-specific training courses or specific work experience.

The NOC B description is closely aligned with the technician classification in the TPP. In the text, a technician is defined as a national engaged in a specialty occupation requiring:

- theoretical and practical application of a body of specialized knowledge, and
- a post-secondary or technical degree requiring two or more years of study as a minimum for entry into the occupation, as well as any other minimum requirements for entry defined in the National Occupation Classification, and
- four years of paid work experience in the sector of activity of the contract, and
- remuneration at a level commensurate with other similarly-qualified technicians within the industry in the region where the work is performed.

Within the NOC B skill classification, Category 7 has the greatest relevance to building trades and includes construction and mechanical trades, trades supervisors and contractors, and operators of transportation and heavy equipment.³⁷ Table 2 below sets out the Category 7 occupations covered by the TPP, indicating the TPP parties with which Canada has a reciprocal access agreement.

TABLE 2: Category 7 market access commitments

Code	Name	Australia	Chile	Japan*	Mexico	Peru
7201	Contractors and supervisors, machining, metal forming, shaping, and erecting trades and related occupations	X	X	X		X
7202	Contractors and supervisors, electrical trades, and telecommunications occupations	X	X	X	X	X
7203	Contractors and supervisors, pipefitting trades	X	X	X		X
7204	Contractors and supervisors, carpentry trades	X	X	X		X
7205	Contractors and supervisors, other construction trades, installers, repairers, and servicers	X	X	X	X	X
7241	Electricians (except industrial and power system)	X	X		X	X
7251	Plumbers	X	X			X
7301	Contractors and supervisors, mechanic trades	X	X	X		X
7303	Supervisors, printing, and related occupations	X	X	X		X

* A Japanese associate's degree, the equivalent of such a degree, or higher is required. Canada reserves the right to refuse temporary entry to a technician seeking to fulfill a contract which does not require significant application of theoretical knowledge in physical sciences, engineering, or other natural sciences, or human sciences, such as economics.

Source: "Canada's Schedule of Commitments for Temporary Entry for Business Persons".

35 Skill Type O – management jobs. Skill Level A – professional jobs. People usually need a degree from a university for these jobs.

Skill Level B – technical jobs and skilled trades. People usually need a college diploma or to train as an apprentice to do these jobs.

36 In Quebec, an educational institution that offers pre-university classes (two years) taken between secondary school and university, or technical career programs (three years) that prepare students to enter the job market (Government Of Canada 2016).

37 "National Occupational Classification (NOC)," 2011, <http://www.statcan.gc.ca/pub/12-583-x/12-583-x2011001-eng.pdf>.

Despite the new access opportunities opened up to foreign workers in the construction sector, there is some evidence to suggest there would be minimal impact to Canada's labour market. In a 2016 report on migrant workers and the TPP, Mertins-Kirkwood writes:

The main reason to expect a limited short term labour market impact from the TPP is the presently limited impact of Canadian FTAs on the Canadian workforce. There were 24,879 people working in Canada under the terms of an international trade treaty on December 31, 2014. Those workers accounted for approximately 0.14 percent of the Canadian labour force at the time.

Moreover, it is important to remember that the United States accounts for 90 percent of the migrant workers in Canada under the terms of any FTA and Canada did not make new temporary entry commitments with our neighbour to the south.³⁸

Though there is the possibility of an influx of international labour due to the TPP, it is important to keep in mind that, according to BuildForce Canada, in order to meet the overall labour requirements and market demand from 2016 to 2025, the construction industry will have to recruit 35,000 workers from other industries or from outside Canada.³⁹

TPP Movement of Persons Summary

Does the TPP make it easier for foreign workers to enter Canada?

Yes. The TPP provides transparency and facilitation benefits that will make it easier for workers from all TPP parties to enter Canada. Within the TPP, Canada has negotiated reciprocal market access rights with five other countries covering a number of occupations within the construction sector.

Does the TPP require that there be a labour shortage in a given sector before access is granted?

No. Unlike previous temporary foreign worker programs, no labour market test is required for TPP access and there are no numerical restrictions on the number of workers.

Does the TPP allow foreign workers to bypass the visa process and other immigration procedures?

No. A worker granted access under the TPP program is still subject to all admissibility requirements (health, security, etc.) administered by the Government of Canada.

Does the TPP allow foreign workers to bypass provincial and occupational licensing requirements?

Only in the case of unlicensed occupations. A worker must still be certified by all relevant licensing authorities before s/he can lawfully enter the job site.

Can workers admitted under the TPP seek permanent employment and/or residence in Canada?

No. The TPP entry rights are tied to temporary work only.

Looking Ahead

Since negotiations for the TPP are finished, Canada does not have the ability to change parts of the agreement – it must either ratify it or reject it in whole. While the Obama administration is committed to the deal, both the US Republican and Democratic nominees have expressed opposition to the TPP, but there is always a possibility that a new administration decides to go forward with the agreement, despite the current anti-trade sentiment on the campaign trail. Again, as stated previously, Article 30.5 of the TPP precludes the possibility of entry into force without both the United States and Japan.⁴⁰

In terms of final reflections for what the TPP means for Canada's building trades unions, the greatest risks posed by the TPP likely stem from the new precedents this agreement would set, which will shape future FTAs. The extent to which foreign workers will leverage procurement opportunities or send workers to Canada is yet to be seen. Similarly, the extent to which Canada's construction sector is able to leverage new market opportunities provided in the agreement will depend more on market decisions and the business environment than on the provisions in the agreement itself.

³⁸ Mertins-Kirkwood 2016.

³⁹ BuildForce Canada 2016.

⁴⁰ Stephenson 2016.

Bibliography

- Asia-Pacific Economic Cooperation. *About APEC*. 2016. <http://www.apec.org/about-us/about-apec.aspx> (accessed June 4, 2016).
- Barnett, Laura. *Canada's Approach to the Treaty-Making Process*. November 6, 2012. <http://www.lop.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm#a5> (accessed June 5, 2016).
- BuildForce Canada. "Construction and Maintenance Looking Forward 2016-2025 Key Highlights." *BuildForce Canada*. January 2016. https://www.constructionforecasts.ca/sites/forecast/files/highlights/2016/2016_National_Summary_Constr_Maint_Looking_Forward.pdf (accessed June 1, 2016).
- Canada's Building Trades Unions. *Industry Facts*. 2016. <http://www.buildingtrades.ca/where-we-stand/industry-facts> (accessed May 2, 2016).
- Ciuriak, Dan, Ali Dadkhah, and Jingliang Xiao. "Canada's Wins and Losses under the TPP." *C.D. Howe Institute*. April 21, 2016. <http://cdhowe.org/media-release/canada's-wins-and-losses-under-tpp> (accessed May 15, 2016).
- Curry, Bill. *TPP text raises concerns over regulation of temporary foreign workers*. November 7, 2015. <http://www.theglobeandmail.com/news/politics/tpp-text-raises-concerns-over-control-of-temporary-foreign-workers/article27165905/> (accessed May 6, 2016).
- Glenza, Jessica. *TPP deal: US and 11 other countries reach landmark Pacific trade pact*. October 5, 2015. <https://www.theguardian.com/business/2015/oct/05/trans-pacific-partnership-deal-reached-pacific-countries-international-trade> (accessed May 24, 2016).
- Global Affairs Canada. *Canada - U.S. Agreement on Government Procurement*. August 26, 2013. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng> (accessed May 23, 2016).
- . *Canada-Peru Free Trade Agreement*. May 19, 2016. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/index.aspx?lang=eng> (accessed May 24, 2016).
- . *Dispute Settlement Chapter*. October 1, 2015. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/26-DisputeSettlement.aspx?lang=eng> (accessed June 20, 2016).
- . *Government Procurement Chapter*. October 4, 2015. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/14-GovProcurement.aspx?lang=eng> (accessed May 8, 2016).
- . *Investment Chapter*. October 4, 2015. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/08-Investment.aspx?lang=eng> (accessed May 25, 2016).
- . *Opening markets for industrial goods and consumer goods*. October 7, 2015. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/benefits-avantages/sectors-secteurs/05-IndustrialSector.aspx?lang=eng> (accessed May 25, 2016).
- . *Opening markets for services and financial services*. October 7, 2015. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/benefits-avantages/sectors-secteurs/04-FinancialSector.aspx?lang=eng> (accessed May 19, 2016).
- GlobalEDGE. *TPP:History*. 2015. <http://globaledge.msu.edu/trade-blocs/tpp/history> (accessed May 10, 2016).
- Government Of Canada. *Glossary*. May 30, 2016. <http://www.cic.gc.ca/english/helpcentre/glossary.asp#c> (accessed June 7, 2016).
- Government of Canada. "National Occupation Classification." *Statistics Canada*. 2011. <http://www.statcan.gc.ca/pub/12-583-x/12-583-x2011001-eng.pdf> (accessed May 10, 2016).

- . *TPP Consultations*. May 3, 2016. http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/consulting-corner_coin-consultations.aspx?lang=eng (accessed May 25, 2016).
- Immigration, Refugees and Citizenship Canada. *Fact Sheet — Temporary Foreign Worker Program*. October 1, 2012. <http://www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp> (accessed May 12, 2016).
- Kawase, Tsuyoshi. *The Trans-Pacific Partnership as a set of international economic rules*. May 2016. <http://e15initiative.org/blogs/trans-pacific-partnership-as-a-set-of-international-economic-rules/> (accessed May 20, 2016).
- McBride, Thad, and Todd Overman. *The Trans-Pacific Partnership: Impact on Trade and Procurement*. November 23, 2015. <http://www.bassberrygovcontrade.com/2015/11/the-trans-pacific-partnership-impact-on-trade-and-procurement/> (accessed May 25, 2016).
- Mertins-Kirkwood, Hadrian. "Migrant Workers and the Trans-Pacific Partnership." *Canadian Centre for Policy Alternatives*. April 21, 2016. <https://www.policyalternatives.ca/publications/reports/migrant-workers-and-trans-pacific-partnership> (accessed June 1, 2016).
- New Zealand Foreign Affairs & Trade. *Trans-Pacific Strategic Economic Partnership (P4)*. 2015. <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/> (accessed May 16, 2016).
- Oxford Business Group. *Vietnam's building industry gains momentum*. September 15, 2015. <http://www.oxfordbusinessgroup.com/news/vietnam's-building-industry-gains-momentum> (accessed June 8, 2016).
- Smillie, Christopher. *Another TPP Loser? Canadian Trades Workers*. November 28, 2015. <http://thetyee.ca/Opinion/2015/11/28/Another-TPP-Loser/> (accessed May 4, 2016).
- . *Did Canada sell out its labour market in the TPP talks?* November 24, 2015. <http://ipolitics.ca/2015/11/24/did-canada-sell-out-its-labour-market-in-the-tpp-talks/> (accessed May 4, 2016).
- Stephenson, Amanda. *AFL warns of job losses as TPP hearings come to Calgary*. April 19, 2016. <http://calgaryherald.com/business/local-business/afl-warns-of-job-losses-as-tpp-hearings-come-to-calgary> (accessed May 7, 2016).
- The Canadian Trade Commissioners Service. *The Buy American Act and Buy America Provisions*. April 9, 2015. <http://www.international.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/buyamerica.aspx?lang=eng> (accessed May 25, 2016).
- Trans-Pacific Partnership Agreement. "Canada's Schedule of Commitments for Temporary Entry for Business Persons." January 26, 2016. https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/annexes/12-a.-canada-temporary-entry-for-business-persons.pdf (accessed May 5, 2016).
- . "Chapter 12 - Temporary Entry for Business Persons." January 26, 2016. https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/text/12.-temporary-entry-for-business-persons.pdf (accessed May 5, 2016).
- Trans-Pacific Partnership. "Annex 15-A Schedule of Canada - Government Procurement." *Trans-Pacific Partnership Agreement*. 2016. https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/annexes/15-a.-canada-government-procurement-annex.pdf (accessed June 2, 2016).
- . "Chapter 15 - Government Procurement." 2015. https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/text/15.-government-procurement.pdf (accessed May 17, 2016).
- United Nations Statistics Division. *CPCprov code 51*. 2016. <http://unstats.un.org/unsd/CR/Registry/regcs.asp?Cl=9&Lg=1&Co=51> (accessed May 19, 2016).

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