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CANADA UPDATE – HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM NOVEMBER 2006 TO JANUARY 2007

*Kimberly Fields**

I. SUMMARY OF LEGAL NEWS AND DEVELOPMENTS

A. CONCERN OVER PROPOSED AGRICULTURE INSPECTIONS

THE Canadian Council of Chief Executives wrote a letter to U.S. government agencies expressing its concerns over the proposed interim rule known as “Agriculture Inspection and AQI User Fees Along the U.S./Canada Border.”¹ The rule was published in the United States Federal Register on August 25, 2006 soliciting comment.² In response, the Council argued that the rule is too costly and a disproportionate method when considering the risks. It strongly asserted that “the Interim Rule reflects a heavy-handed and disruptive approach to border management.”³

B. SHELL CANADA APPLIES TO EXPAND OIL SANDS PROJECT

Shell Canada Ltd. seeks to expand its oil sands project in the Peace River area of Alberta from its current 12,000 barrels per day to 100,000 barrels per day.⁴ Filing a regulatory application in December was “an important step” toward its goal of developing in-situ oil sands production of 150,000 barrels per day.⁵ Shell intends to boost spending 50 percent, much of which will be allocated to the oil sands projects.⁶

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1. Eugene Meehan, *Proposed Agriculture Inspections and User Fees*, L@WLETTER FROM CANADA (Dec. 1, 2006) http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/dec0106.asp.

2. *Id.*

3. *Id.*

4. Eugene Meehan, *Shell Canada applies to expand oil sands project*, L@WLETTER FROM CANADA (Jan. 2, 2007), http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/jan07.asp.

5. *Shell Canada applies to expand oil sands project*, GLOBE AND MAIL: BUSINESS (Dec. 13, 2006), available at <http://www.theglobeandmail.com/servlet/story/RT-GAM.20061213.wshell1213/BNStory/Business/home>.

6. *Id.*

Conventional means prove ineffective in recovering the billions of barrels of bitumen currently in this area's oil sands because the deposits are too deep and too thick.⁷ Shell uses a special process of heating and cooling to recover the bitumen, which is a more expensive process of extraction.⁸ The plan cost has rapidly increased recently and is currently \$12.8 billion, but the company remains committed to the expansion project.⁹

C. CANADA ANNOUNCES A NEW INTERNATIONAL AIR POLICY

Transport Canada announced the adoption of a new international air transportation policy, *Blue Sky*, in November.¹⁰ The new policy is intended to create more Open Skies Agreements with some of Canada's "key aviation markets."¹¹ Both travelers and airlines in these countries are expected to benefit just as Air Canada has seen such benefits from the Canada-U.S. Agreement.¹² Lawrence Cannon, Minister of Transport, Infrastructure, and Communities, believes the new policy will "encourage the development of new markets, new services, and greater competition by reflecting the evolving nature of the global aviation market."¹³

II. RECENT SIGNIFICANT COURT DECISIONS

A. U.S. COMPANY'S CLAIM NOT UNDER CANADA'S JURISDICTION

1. *Purple Echo Productions, Inc. v. KCTS Television*

On November 8, 2006, the British Columbia Supreme Court found lack of jurisdiction for an action brought against KCTS Television, a Washington State broadcasting company, by Purple Echo Productions in British Columbia.¹⁴ In July and August of 2001, the two executed a co-production agreement, in which KCTS agreed to produce and broadcast thirteen episodes of a television series.¹⁵ Purple Echo claimed that KCTS did not make reasonable efforts to promote and market the series.¹⁶ The essential issue the Court had to decide was whether KCTS is "ordinarily resident" in British Columbia or whether "there is a real and substantial connection between British Columbia and the facts on which the pro-

7. *Id.*

8. *Id.*

9. *Id.*

10. Eugene Meehan, *Canada Announced a New International Air Policy*, L@WLETTER FROM CANADA (Jan. 2, 2007), http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/jan07.asp [hereinafter *Canada Announced*].

11. *Air Canada welcomes federal government plan to negotiate more Open Skies Agreements*, EXCHANGE MAGAZINE: TRANSPORTATION (Dec. 1, 2006), <http://www.exchangemagazine.com/XQuarterly/Archive-transportation-01-Dec06.html>.

12. *Id.*

13. *Canada Announced*, *supra* note 10.

14. Eugene Meehan, *Is a U.S. company Subject to the Laws of Canada*, L@WLETTER FROM CANADA (Dec. 1, 2006), http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/dec0106.asp.

15. *Id.*

16. *Id.*

ceeding against [KCTS] is based.”¹⁷

The Court found that KCTS is not an ordinary resident of British Columbia. Also, the facts underlying the action against KCTS were not substantially connected to British Columbia. The Court held, “Absent a specific reference to promotion of the series in Canada or in British Columbia, I find that the Agreement imposed no contractual obligation on KCTS to promote the series . . . in British Columbia.”¹⁸ The communication between the two parties is certainly integral to the claim, but “such communication would be incidental to performing all the contractual obligations of the parties under the Agreement, and so would not itself represent a ‘substantial extent’ of all those obligations to be performed,” as the Court found.¹⁹ KCTS’s contractual obligations were not to be substantially performed in British Columbia, and the only aspects KCTS carried on in British Columbia are not related to this proceeding.²⁰ Therefore, the Court could not presume a real and substantial connection. The Court concluded that Washington State had jurisdiction, not British Columbia, and that “any judgment obtained in Washington would be directly enforceable against KCTS there.”²¹

B. INTERNATIONAL MARITIME LAW

1. *Gearbulk Pool Ltd. v. Seaboard Shipping Co.*

On December 6, 2006, the British Columbia Court of Appeal affirmed the trial court’s judgment. An ocean carrier sought indemnification from its shipping agent for cargo damage caused by the carrier’s negligence.²² The carrier claimed the agent was responsible for protecting the carrier “from fault liability through an effective exemption clause for cargo carried on deck.”²³ The carrier’s exemption clause defense failed in the underlying action against it. The trial judge found that the cargo on deck was not adequately identified and that the shipping agent did not breach a duty to the carrier.²⁴

The carrier opted to transport some of the cargo—lumber—on deck and stated, ‘All cargo carried on deck, carried at Shipper/Cargo Owner’s sole risk and expense.’²⁵ The on deck lumber was damaged when the ship later loaded a cargo of soda ash.²⁶ The carrier’s exemption clause defense failed because there was a failure in distinguishing the on deck cargo from the goods stowed below deck, and the exemption clause did

17. *Id.*

18. *Id.*

19. *Id.*

20. Meehan, *supra* note 14.

21. *Id.*

22. Eugene Meehan, *International Maritime Law*, L@WLETTER FROM CANADA, Jan. 2, 2007, http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/jan07.asp.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

not protect against liability for the crew's negligence.²⁷

The Court of Appeal decided that the inadequate cargo description made the carrier liable, not the shipping agent. The shipping agent had not breached any duty to the carrier and in no way contributed to the liability in the underlying action.²⁸

III. SUPREME COURT CASES

A. JUDGE CANNOT DIRECT A JURY'S VERDICT

1. *R. v. Krieger*

On October 26, 2006, the Supreme Court of Canada ruled that the right to a trial by jury is absolute and restricts a judge from directing a jury to reach a specific verdict.²⁹ In this case, the judge directed the jury to reach a verdict of guilty, yet the appellate court found insufficient evidence for a directed verdict.³⁰ R. had a right to be tried by a jury of his peers, and even though the jury sat and listened to the trial, the jury was not left to judge R. but simply render the verdict given it by the judge. The Supreme Court remanded the case for a retrial.³¹

B. POST-HYPNOSIS EVIDENCE AND SIMILAR FACT EVIDENCE ARE NOT ADMISSIBLE

1. *R. v. Trochym*

On February 1, 2007, the Supreme Court decided on that post-hypnosis evidence and similar fact evidence are not admissible for evidentiary purposes.³² In *R. v. Trochym*, T. was convicted based upon similar fact evidence and testimony that the jury was not aware was post-hypnosis.³³ The lower court admitted this evidence because it met the Clark guidelines, which have been accepted by many lower courts.³⁴ Justice Deschamps, writing for the majority, criticized the Clark guidelines because the test assumes "that the underlying science of hypnosis is itself reliable in the context of judicial proceedings."³⁵ The Court emphasized the importance of scrutinizing evidence for reliability and prejudicial effect to minimize the possibility of a wrongful conviction.³⁶ The Court found

27. *Id.*

28. *Id.*

29. Eugene Meehan, *Charter of Rights: Right to Trial by Jury*, L@WLETTER FROM CANADA (Nov. 3, 2006), http://www.eugenemeehan.com/lawletters/uslawletters_pdfs/nov2006.asp.

30. *R. v. Krieger*, 2006 S.C.C. 47, 30950, [2006] 2 S.C.R. 501, <http://scc.lexum.umontreal.ca/en/2006/2006scc47/2006scc47.html>.

31. *Id.*

32. Eugene Meehan, *Criminal Law: Post-Hypnosis Evidence – Similar Fact Evidence*, SUPREME COURT OF CANADA L@WLETTER (Feb. 1, 2007), http://www.eugene-meehan.com/lawletters/canadalawletters_pdfs/feb07/english/feb01_07_e.asp.

33. *R. v. Trochym*, 2007 S.C.C. 6 ¶ 27, 30717, <http://scc.lexum.umontreal.ca/en/2007/2007scc6/2007scc6.html>.

34. *Id.*

35. *Id.*

36. *Id.*

post-hypnosis evidence and similar fact evidence are not scientifically reliable; therefore, they should not be admissible for evidentiary purposes when the outcome is completely reliant on their admission.

