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CANADA UPDATE – HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM AUGUST 2007 TO OCTOBER 2007

*Brandon Wonnacott**

I. SUMMARY OF LEGAL NEWS

A. \$2 BILLION CLASS-ACTION LAWSUIT BROUGHT AGAINST AUTOMAKERS AND DEALERS

THE Toronto based law firm of Juroviesky and Ricci, L.L.P. has filed a class-action law suit against major automakers and dealers. The suit alleges that the major automakers and dealers have conspired to raise car prices and fix them 25 to 35 percent higher in Canada, violating consumer protection laws.¹ The suit is requesting \$2 billion in damages and \$100 million in punitive damages for Canadians who have planned to or have bought/leased cars from major automakers and dealers between 2005 and 2007.² The suit appears to be an attempt to capitalize on the surprising ascent of the Canadian dollar compared to the U.S. dollar. This lawsuit means that some automakers will face legal action in both countries. A similar U.S. lawsuit in Maine is dealing with the Canadian and U.S. price differential from 2003 when the Canadian dollar was trading at sixty-five cents on the U.S. dollar, and U.S. car buyers were flocking to Canada to buy cars.³ With Canadians currently pouring into the United States to capitalize on the price differential, some U.S. dealers have ordered their Canadian counterparts not to honor warranties from U.S. purchased cars, while others have even forced car buyers to sign “no export” agreements.⁴

But, auto industry analyst Dennis DesRosiers warned that Canadian buyers might suffer in the long run if this lawsuit succeeds. For nine of the past eleven years, Canadian consumers have benefited from a strong

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1. John Partridge & Greg Keenan, *Consumer groups welcome car price lawsuit*, REPORTONBUSINESS.COM, Sept. 26, 2007, available at <http://www.reportonbusiness.com/servlet/story/RTGAM.20070926.wcarsuit0926/BNStory/robNews/home>.

2. *Id.*

3. *Id.*

4. *Id.*

price advantage of \$5,000 to \$8,000.⁵ If the Canadian dollar falls back, Canadian car buyers should expect to face raised prices.

B. NEW U.S.-CANADA TAX TREATY

On September 21, 2007, Jim Flaherty, Minister of Finance for Canada, signed a tax agreement with Henry Paulson, Jr., U.S. Secretary of the Treasury, which concluded almost ten years of negotiations between the two countries.⁶ This is the fifth update of the U.S.-Canada Tax Treaty, and is intended to strengthen trade and investment between the countries. The new treaty:

eliminates withholding taxes on cross-border interest payments; extends treaty benefits to limited liability companies; allows taxpayers to require that certain key double tax issues, such as transfer pricing, be settled through arbitration; ensures that there is no double taxation on emigrants' gains; gives mutual tax recognition of pension contributions; and clarifies how stock options are taxed.⁷

First signed in 1980, the U.S.-Canada tax agreement is one of over eighty-five bilateral tax treaties that Canada has with other countries.

C. MATERIAL ADVERSE CHANGE CLAUSES

Kohlberg Kravis Roberts & Co. (KKR) and Goldman Sachs Group Inc. (Goldman) are attempting to back out of a planned \$8 billion acquisition of stereo maker Harman International.⁸ They are trying to do so by invoking the material adverse change or MAC provision. In the past, however, it has been very hard to win court acceptance on the basis that the target's business has materially deteriorated.⁹ Legal experts have even said that "a terrorist attack or earthquake at the company's Montreal head office would not qualify as a material adverse change."¹⁰ But the fact that two huge buyers such as KKR and Goldman are trying to escape a takeover deal shows the fears many have as global credit conditions continue their downward spiral. Many buyers are facing buyers' remorse in takeover deals, and are watching KKR and Goldman's actions with great interest.¹¹ Legal experts however fear that KKR and Goldman's action could entangle many sellers and buyers in litigation battles as other worried buyers try to use MAC clauses to escape their agreements.¹²

5. *Id.*

6. Chisholm Pothier, *Canada's New Government Signs Protocol to the Canada-U.S. Tax Treaty for the Benefit of Canadians*, CANADA NEWS CENTRE, Sept. 21, 2007, available at <http://news.gc.ca/web/view/en/index.jsp?articleid=350639>.

7. *Id.*

8. Jacquie McNish, *MAC attack*, REPORTONBUSINESS.COM, Sept. 26, 2007, available at <http://www.reportonbusiness.com/servlet/story/RTGAM.20070926.wlawcolumn0926/BNSStory/robLawPage/home>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

II. SIGNIFICANT COURT DECISIONS

A. INSURANCE FAULT AND INDEMNITY - *CITADEL GENERAL ASSURANCE CO. v. VYTLINGAM*

The V's were driving along a highway when a large rock, thrown from an overpass by F and R, injured and caused damage to the V's.¹³ F and R were both convicted and imprisoned.¹⁴ The V's were able to receive no-fault benefits from their Ontario insurer, but since F was not properly insured they also

sought to recover the civil damages F had caused from V's insurer pursuant to the inadequately insured motorist coverage found in s. 3 of the Ontario Policy Change Form 44R. Under this endorsement, 'the insurer shall indemnify an eligible claimant for the amount that he . . . is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to . . . an insured person arising directly or indirectly from the use or operation of an automobile'.¹⁵

The court looked at the accident as a whole, and coming to the same conclusion that the lower courts did, the Supreme Court found that since F's vehicle was transporting rocks to and from the scene of the crime, the insurer is liable and V's claims are allowed.¹⁶

B. *EBAY CANADA LTD. v. CANADA (MINISTER OF NATIONAL REVIEW)*

This case set a precedent for what Canadians can be asked to provide in regards to information the Canadians have access to but is located in another country. eBay Canada was required to provide the Respondent Minister of National Revenue information regarding "power sellers," which are eBay sellers who fall into five levels ranging from monthly sales of \$1000-\$150,000.¹⁷ eBay Canada claimed that they did not have actual storage of this information, as it is located mostly in San Jose, California. Even though the court held that they did not "own" the information in Canada, they did have access to it, and therefore the court found that the information is not foreign but within Canada and should be turned over.¹⁸

13. *Citadel General Assurance Co. v. Vytlingam*, File 31083, 2007 SCC 46, (Oct. 19, 2007), <http://scc.lexum.umontreal.ca/en/2007/2007scc46/2007scc46.html>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *eBay Canada Ltd v. Canada (Minister of National Review)*, 2007 F.C.J. 1202, (Sept. 13, 2007), http://www.supremecourtlaw.ca/lawletters/uslawletters_pdfs/october2007_e.asp.

18. *Id.*

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