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Canada Update - Highlights of Major Legal News and Significant Court Cases from May 2008 to July 2008

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CANADA UPDATE— HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM MAY 2008 TO JULY 2008.

Romit S. Cheema

I. SUMMARY OF LEGAL NEWS

A. CANADA, PERU SIGNS FREE TRADE, LABOUR COOPERATION, AND ENVIRONMENT AGREEMENTS

CANADA has signed its second Free Trade Agreement of 2008 with Peru.¹ The Canadian government stated that the “FTA will benefit exporters, service providers and investors in several sectors, including mining, manufacturing and agriculture.”² The Labour Cooperation agreement will set “a new global standard in regard to the labour provisions of free trade agreements through strong protections for workers in both Canada and Peru.”³ Finally, the Agreement on the Environment will include “key environmental obligations which require both parties to enforce their domestic environmental laws effectively and to refrain from relaxing those laws in order to encourage trade or investment.”⁴ Last year, in 2007, Canada and Peru had two-way merchandise trade totaling \$2.45 billion, with the estimated Canadian investment in Peru being “estimated at almost \$1.8 billion.”⁵

B. CANADIAN WIRELESS INDUSTRY OPENS UP FOR MORE COMPETITION

After Industry Canada announced the opening of the Advanced Wireless Services (AWS) Spectrum bidding process on May 27, 2008, more than 282 licenses have been conditionally assigned as of July 21, 2008.⁶

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1. *Canada Signs Free Trade, Labour Cooperation and Environment Agreement with Peru*, http://www.supremecourtlaw.ca/english/library_arch2.asp (June 3, 2008, 11:04 EST).
 2. *Canada Signs Free Trade, Labour Cooperation and Environment Agreements with Peru*, Government of Canada, May 29, 2008, <http://news.gc.ca/web/view/en/index.jsp?articleid=401879>.
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *15 Companies Bid Almost \$4.3 Billion for Licenses for New Wireless Services*, Industry Canada, July 21, 2008, <http://www.ic.gc.ca/cmb/welcomeic.nsf/261ce500dfcd7259852564820068dc6d/85256a5d006b97208525748d005fa34e!OpenDocument>.

The AWS, as reported on the Industry Canada website, promises “access to a growing range of innovative wireless applications.”⁷ **“It enables next-generation technologies such as high-speed Internet and video, and it provides faster access for mobile phones and other hand-held devices.”**⁸ 105 Megahertz (MHz) of spectrum were made available via the auction, with forty MHz set aside for new entrants, and the other sixty-five MHz available to all bidders.⁹

C. AMERICAN IMMIGRATION TO CANADA GROWING

More than 39,000 Americans immigrated to Canada between the 2001 and 2006 census periods.¹⁰ The executive director of the Association for Canadian Studies stated that the “increase appears to stem from Canada’s stronger economic performance in recent years relative to the U.S.”¹¹ This number was still small compared to the 68,900 Canadians who moved to the United States each year between 2000 and 2004—maintaining a large net loss for Canada.¹²

II. RECENT SIGNIFICANT COURT DECISIONS

A. LABOR LAW AND BUSINESS CLOSURE—GAÉTAN PLOURDE V. WAL-MART CANADA CORP., ET AL.¹³

At a Wal-Mart store in Jonquière, the United Food and Commercial Workers Union was certified to represent employees of Wal-Mart.¹⁴ The same day the Minister of Labour referred a union dispute to arbitration and notified the parties of the referral, the Wal-Mart store “informed the employees of its decision to close the store.”¹⁵ The applicant, who was terminated along with approximately 190 other employees, “contested the loss of his employment by filing a complaint under ss. 15 et seq. of the Labour Code.”¹⁶ Wal-Mart objected to the claim and the Commission dismissed the claim “on the basis that the permanent nature of the closure” of the Wal-Mart was a “good and sufficient reason for the loss of employment within the meaning of s. 17 of the Labour Code.”¹⁷ The argument that “a loss of employment in violation of freedom of association cannot constitute a loss of employment” was rejected by the

7. *Id.*

8. *Id.*

9. *Id.*

10. Randy Boswell, *Number of American Immigrants Surging*, VANCOUVER SUN, July 4, 2008, <http://www.canada.com/vancouversun/news/story.html?id=b48dde56-2208-47e8-af8f-4d60b57d43aa>.

11. *Id.*

12. *Id.*

13. *Plourde v. Wal-Mart Can. Corp.*, [2007] C.A. 8612 (Can.).

14. *Labour Law: Business Closure*, http://www.supremecourtlaw.ca/english/library_arch2.asp (Aug. 7, 2008, 11:27 EST).

15. *Id.*

16. *Id.*

17. *Id.*

Commission.¹⁸

B. JURISDICTION—CANADA OR U.S.—*STANYWAY V. WYETH CANADA INC.*

In *Stanyway v. Wyeth Canada Inc.*¹⁹, the plaintiff alleged she had contracted breast cancer “as a result of taking the drug Premarin, that Premarin and Premplus were of limited efficacy and were unsafe, and that for most women the risks of using these drugs outweighed the benefits.”²⁰ The U.S. defendants, Wyeth, Wyeth Canada Inc., Wyeth Pharmaceuticals, and Wyeth-Ayerst International, a pharmaceutical company, tried to dismiss the action based on a lack of jurisdiction pursuant to the Court Jurisdiction and Proceedings Transfer Act (CJPTA).²¹ The application was dismissed by the B.C. (British Columbia) Supreme Court as the defendants had failed to rebut the presumption in section 10 of the CJPTA.²² The B.C. Supreme Court based its conclusion on the fact that “the US defendants’ admitted engagement in activities in relation to Canadian companies and to consumers in Canada was sufficient to establish a real and substantial connection; in particular, those activities consisted of ‘harmonization’ and ‘coordination’ of matters involving core monograph and labeling requirements, the efficacy of products, and the collecting and sharing of other clinical research or trial information.”²³

C. EMPLOYMENT LAW & DRUG TESTS—*DIRECTOR OF THE ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION, ET AL. V. KELLOGG BROWN & ROOT COMPANY*²⁴

Kellogg Brown & Root (KBR) required a “post-offer/pre-employment” drug test for all persons seeking non-unionized positions with the company as part of their hiring policy.²⁵ A recreational marijuana user was terminated shortly after he began work with KBR because of a positive result as part of the pre-employment drug test.²⁶ A complaint was filed with the “Alberta Human Rights and Citizenship Commission, alleging discrimination in employment practices on the grounds of physical and mental disability, contrary to s. 7(1) of the Human Rights, Citizen-

18. *Id.*

19. *Stanway v. Wyeth Canada Inc.*, [2008] B.C.S.C. 847.

20. Jurisdiction: Canada or U.S., http://www.supremecourtlaw.ca/english/library_arch2.asp (Aug. 1, 2008, 14:53 EST).

21. Court Jurisdiction and Proceedings Transfer Act, 2003 S.C., ch. 28 (Can.), available at http://www.qp.gov.bc.ca/statreg/stat/C/03028_01.htm#section10.

22. *Stanway*, *supra* note 19 at 848.

23. *Stanway*, *supra* note 19, at 856.

24. *Dir. of the Alberta Human Rights & Citizenship Comm'n. v. Kellogg Brown & RootCo.*, [2007] Alta. C.A. 1833 (Can.).

25. Employment Law: Drug Tests, http://www.supremecourtlaw.ca/english/library_arch2.asp (May 29, 2008, 10:02 EST).

26. *Id.*

ship and Multiculturalism Act”²⁷ which dismissed the complaint. On appeal, a chambers judge allowed the appeal, and the “C.A. allowed the appeal and restored the decision of the Human Rights Panel.”²⁸

27. *Director of the Alberta Human Rights and Citizenship Commission, et al. v. Kellogg Brown & Root (Canada) Company*, SUPREME COURT OF CANADA, May 8, 2006, http://cases-dossiers.scc-csc.gc.ca/information/cms/case_summary_e.asp?32505.

28. Employment Law: Drug Tests, *supra* note 25.