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CANADA UPDATE—HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM AUGUST 2008 THROUGH OCTOBER 2008

Romit S. Cheema

I. SUMMARY OF LEGAL NEWS

A. CANADIAN ELECTIONS LEAD TO STRONGER CONSERVATIVE PARTY MINORITY GOVERNMENT

THE October 14th, 2008 Canadian elections resulted in a stronger Conservative Party minority government, with the Conservative party picking up 143 ridings, up from 127 in 2006.¹ Stephen Harper, as head of the Conservative Party, remained Prime Minister of Canada.² The Liberal Party of Canada secured seventy-six ridings, the Bloc Québécois secured fifty ridings, the New Democratic Party of Canada secured thirty-seven ridings, the Green Party of Canada secured zero ridings, and two ridings were won by independent candidates.³ This year's election resulted in a record low for voter turnout, with an estimated 59.1 percent of Canadians voting in the election.⁴

B. GOVERNMENT OF VANADA TO EXTEND JURISDICTION OVER ARCTIC WATERS

The Government of Canada announced that it will seek to “extend its jurisdiction in the Arctic by doubling the range at which Canadian environmental laws and shipping regulations will be enforced.”⁵ Canadian Prime Minister Stephen Harper stated that “as an environmental matter, as a security matter and as an economic matter we are making it perfectly clear that not only do we claim jurisdiction over the Canadian Arctic, we are also going to put the full resources of the Government of Canada

1. *Harper 'very pleased' with stronger minority*, CBC NEWS, Oct. 15, 2008, <http://www.cbc.ca/news/canadavotes/story/2008/10/15/elexn-wednesday.html>.

2. *Id.*

3. *Id.*

4. *Voter Turnout Drops to Record Low*, CBC NEWS, Oct. 15, 2008, <http://www.cbc.ca/news/canadavotes/story/2008/10/15/voter-turnout.html>. The previous record low was in 2004 when 60.9 percent of voters turned out. *Id.*

5. *PM Announces Government of Canada Will Extend Jurisdiction over Arctic Waters*, OFFICE OF THE PRIME MINISTER, Aug. 27, 2008, <http://www.pm.gc.ca/eng/media.asp?category=1&id=2248>.

behind enforcing that jurisdiction.”⁶ Harper later acknowledged that such a plan might run into opposition from other countries, especially the United States, which has yet to recognize Canada’s claim to the North-west Passage.⁷

C. PRIME MINISTER ANNOUNCES JUSTICE THOMAS CROMWELL AS NOMINEE FOR SUPREME COURT APPOINTMENT

Prime Minister Stephen Harper nominated Justice Thomas Cromwell,⁸ currently a Nova Scotia Court of Appeal judge, to sit on the Supreme Court of Canada.⁹ The vacancy in the Supreme Court was created by the resignation of Justice Michel Bastarache, who has not given a reason for his decision to resign.¹⁰ The move bypassed a Supreme Court Selection Panel, which had “failed to arrive at a short list of recommended candidates.”¹¹ Harper called Cromwell’s candidacy one which was “highly recommended by judges, lawyers and other Atlantic Canadians,” and stated that Cromwell was “well qualified to serve on the country’s highest court.”¹² The judicial appointment will not be made until after an ad-hoc all-party committee of the House of Commons is able to ask questions of Justice Cromwell.¹³

II. RECENT SIGNIFICANT COURT DECISIONS

A. JURISDICTION: CANADA OR U.S.

In a British Columbia Supreme Court case, “the defendants, Wyeth, Wyeth Canada Inc., Wyeth Pharmaceuticals, and Wyeth-Ayerst International (the ‘US defendants’)” applied to dismiss “the plaintiff’s action against them on the basis that the court did not have jurisdiction over them regarding the claim made” pursuant to the Court Jurisdiction and

6. *Id.*

7. Andrew Mayeda, *New Arctic protection rules could be tough sell abroad: Harper*, CANWEST NEWS SERVICE, Aug. 27, 2008, <http://www.canada.com/topics/news/story.html?id=f0020a51-434f-44f6-8408-8c1d18a67c59>.

8. The “Frequently Asked Questions” portion of the Supreme Court of Canada website lists that a Supreme Court of Canada Judge must be “appointed by the Governor in Council from among superior court judges or from among barristers of at least ten years’ standing at the Bar of a province or territory.” *Frequently Asked Questions (FAQ): Questions and Answers*, SUPREME COURT OF CANADA, <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp#f12> (last visited Oct. 31, 2008). Of the nine Supreme Court Justices, three must be appointed from Quebec. *Id.* “A Judge holds office during good behaviour, until he or she retires or attains the age of 75 years, but is removable for incapacity or misconduct in office before that time by the Governor General on address of the Senate and House of Commons.” *Id.*

9. *PM announces nominee for Supreme Court appointment*, OFFICE OF THE PRIME MINISTER, Sept. 5, 2008, <http://pm.gc.ca/eng/media.asp?category=1&id=2265>.

10. *Top court’s Bastarache to retire after spring session*, CBC NEWS, Apr. 9, 2008, <http://www.cbc.ca/canada/story/2008/04/09/scoc-bastarache.html>.

11. *PM announces nominee for Supreme Court appointment*, *supra* note 9.

12. *Id.*

13. *Id.*

Proceedings Transfer Act¹⁴ (CJPTA).¹⁵ The plaintiff's position was that there was "a real and substantial connection between British Columbia and the subject matter of the litigation, and therefore the court ha[d] territorial jurisdiction over the US defendants."¹⁶ The plaintiff alleged she contracted ductal and lobular 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.¹⁷ The B.C. Supreme Court dismissed the application.¹⁸ The court found that

the US defendants' admitted engagement in activities in relation to the Canadian companies and to consumers in Canada [was] sufficient to establish a real and substantial connection. In particular, these activities consist[ed] of "harmonization" and "coordination" of matters involving core monograph and labeling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information. The US defendants [had] failed to rebut the presumption in s. 10¹⁹ of the CJPTA.²⁰

B. CRIMINAL LAW: EFFECT OF PARDONS; POLICE AS EMPLOYERS

In a case involving a candidate for employment as a police officer whose application was rejected because of a prior conviction, despite the conviction having been pardoned, the Supreme Court of Canada held (6:2 - Bastarache not taking any part in the judgment) that the appeal was dismissed. The Supreme Court of Canada thus upheld the Human Rights Tribunals' decision that the Service de police de la Communauté urbaine de Montréal (SPCUM) had infringed s. 18.2 of the Charter of Human Rights and Freedoms,²¹ and an award of moral damages stood.²² The Court of Appeals had affirmed the decision as well. The Supreme Court of Canada stated the facts as follows:

In 1991, N pleaded guilty to a charge of theft in summary conviction proceedings and was conditionally discharged pursuant to s. 730 (then 736) of the *Criminal Code*. In 1995, she applied for employment as a police officer with the Service de police de la Communauté urbaine de Montréal ('SPCUM'), but her application was rejected because she did not satisfy the criterion of 'good moral character' imposed by the *Police Act* and the by-law respecting hiring standards

14. Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28.

15. *Stanway v. Wyeth Canada Inc.*, [2008] B.C.J. No. 1212, available at 2008 BC.C. LEXIS 1377 (Can.).

16. *Id.* at paras. 1-3.

17. *Id.* at para. 5.

18. *Id.* at para. 94.

19. Section 10 of the CJPTA contains a list of circumstances in which it is presumed that a real and substantial connection exists. *Id.* at para. 67.

20. *Id.* at para. 91.

21. Charter of human rights and freedoms, R.S.Q., c. C-12, s. 18.2 (2008) (Can.).

22. *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, File 31551, 2008 S.C.C. 48 (Aug. 1, 2008), available at <http://scc.lexum.umontreal.ca/en/2008/2008scc48/2008scc48.html>.

adopted pursuant to it. N informed the personnel officer that she had been pardoned. Section 6.1 of the *Criminal Records Act* grants an automatic pardon once three years have elapsed since a conditional discharge. The SPCUM stood by its decision. N complained to the Commission *des droits de la personne et des droits de la jeunesse*. She alleged that the SPCUM had, contrary to s. 18.2 of the *Charter of human rights and freedoms*, refused to hire her owing to the mere fact that she had been found guilty of a criminal offence even though she had been pardoned.²³

C. COMMERCIAL LAW: ABCP (ASSET BACKED COMMERCIAL PAPER)

During a liquidity crisis which threatened the Canadian markets in asset backed commercial paper (ABCP), the major Canadian participants agreed to freeze the thirty-two billion dollar Canadian market on August 13, 2007.²⁴ The parties attempted to restructure the ABCP by forming the Pan-Canadian Investors Committee and putting forward a creditor-initiated Plan of Compromise and Arrangement (Plan).²⁵ The Plan was “sanctioned by Campbell J on June 5, 2008” and was appealed by certain creditors who opposed the Plan.²⁶ The issue in this case “was whether the court [could] sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company.”²⁷ The court held that the Companies’ Creditors Arrangement Act (CCAA) “permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring.”²⁸ Furthermore, the court held that “[t]he wording of the CCAA, construed in light of the purpose, objects and scheme of the *Act*, supported the application judge’s jurisdiction and authority to sanction the Plan in this case, including the contested third-party releases contained in it,” and that the “Plan was fair and reasonable in all the circumstances.”²⁹ Leave for appeal was dismissed.³⁰

23. *Id.* (italics added).

24. Eugene Meehan, *L@wletter from Canada*, LANG MICHENER, Oct. 2008, available at http://www.eugenemeehan.com/default_e.asp?id=113&lid=276 (quoting Jean Coutu Group (PJC) Inc. et al v. Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule “B” Hereto, Metcalfe & Mansfield Alternative Investments II Corp. et al. (Ont. C.A., Aug. 18, 2008) (32765) (Can.)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*