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## Canada Update - Highlights of Major Legal News and Significant Court Cases from November 2008 through January 2009

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# CANADA UPDATE—HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM NOVEMBER 2008 THROUGH JANUARY 2009

*Romit S. Cheema\**

## I. SUMMARY OF LEGAL NEWS

### A. PRIME MINISTER ANNOUNCES APPOINTMENT TO COURT OF QUEEN'S BENCH FOR MANITOBA

**T**HE Honorable Glenn D. Joyal was appointed to the Court of Queen's Bench for Manitoba in January of 2009, replacing the Honorable Jeffrey J. Oliphant.<sup>1</sup> The Honorable Oliphant had elected to become a supernumerary judge.<sup>2</sup> Justice Joyal was a judge of the Provincial Court of Manitoba for nine years and had been on the Manitoba Court of Appeal from March 2007 to July 2007.<sup>3</sup> He also served as a judge of the Court of the Queen's Bench from July 2007 until his appointment in January of 2009.

### B. PRIME MINISTER OFFICIALLY ANNOUNCES APPOINTMENT OF JUSTICE THOMAS CROMWELL TO THE SUPREME COURT OF CANADA

Justice Thomas Cromwell's nomination to the Supreme Court of Canada was confirmed December 22, 2008 by Prime Minister Stephen

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1. Office of the Prime Minister, *Prime Minister Harper Announces an Appointment to the Court of Queen's Bench for Manitoba*, Jan. 23, 2009, <http://pm.gc.ca/eng/media.asp?category=1&id=2396>.
2. "Under the federal *Judges Act*, federally appointed judges may, after being in judicial office for at least 15 years and whose combined age and number of years of judicial service is not less than 80 or after the age of 70 years and at least 10 years judicial service, elect to give up their regular judicial duties and hold judicial office as a supernumerary judge." Manitoba Courts, *Court of Queen's Bench—Judges*, Jan. 29, 2009, [http://www.manitobacourts.mb.ca/qb/qb\\_judges.html](http://www.manitobacourts.mb.ca/qb/qb_judges.html).
3. *Supra* note 1.

Harper.<sup>4</sup> Prime Minister Harper had planned to hold a public hearing on the process to bring more transparency to the process, but decided to bypass those plans.<sup>5</sup> Under the Constitution, the Prime Minister retains the final say on Supreme Court of Canada appointments.<sup>6</sup>

## II. RECENT SIGNIFICANT COURT DECISIONS

### A. SENTENCING AND HYBRID OFFENCES—*R. v. SOLOWAN*

Solowan, the accused, pled guilty to three offences, two of which were hybrid offences.<sup>7</sup> The Crown elected to proceed summarily on the two hybrid offences.<sup>8</sup> The court sentenced Solowan to fifteen months' imprisonment, to which Solowan appealed and argued that the trial judge had imposed "the maximum custodial sentence of six months for each offence without first finding that he was the worst offender who had committed the worse offence."<sup>9</sup> The appeal was rejected and the court of appeal stated that the "'maximum sentence. . . was not imposed here. It is available only where the Crown elects to proceed by indictment.'"<sup>10</sup>

The Supreme Court held that the Criminal code<sup>11</sup> applies to both indictable and summary conviction offences.<sup>12</sup> The court stated that: (1) "a fit sentence for a hybrid offence is neither a function nor a fraction of the sentence that might have been imposed had the Crown elected to proceed otherwise than it did;" (2) "the sentence for a hybrid offence prosecuted summarily should not be 'scaled down' from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment;" and (3) "likewise, on indictment, the sentence should not be 'scaled up' from the sentence that the accused might well have received if prosecuted by summary conviction."<sup>13</sup>

### B. CRIMINAL LAW—ISSUE ESTOPPEL—*R. v. MAHALINGAN*

Two issues were before the court in *R. v. Mahalingan*. The first was whether a new trial should be ordered because the trial judge's instructions to the jury on the theory of defense were inadequate, and, more importantly, whether the doctrine of issue estoppel should be retained in criminal law.<sup>14</sup> The majority held that the court of appeal was correct in

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4. Janice Tibbetts, *PM names Thomas Cromwell to Supreme Court*, NATIONAL POST, Dec. 22, 2008, <http://www.nationalpost.com/news/story.html?id=1105047>.

5. *Id.*

6. *Id.*

7. *R. v. Solowan*, [2008] 299 D.L.R. (4th) 577, 2008 SCC 62 (Can.).

8. *Id.*

9. *Id.* ¶ 2.

10. *Id.* ¶ 6 (quoting *R. v. Solowan*, [2007] B.C.J. No. 1658, ¶ 9, 2007 BCCA 388.).

11. Criminal Code, R.S.C., ch. C-46, Part XXIII, §§ 716, 718.1, 718.2(d), (e), 787(1) (1985).

12. *R. v. Solowan*, [2008] 299 D.L.R. (4th) 577, ¶ 16, 2008 SCC 62 (Can.).

13. *Id.* ¶ 15.

14. *R. v. Mahalingan*, [2008] 300 D.L.R. (4th) 1, 2008 SCC 63 (Can.).

ruling that the “jury charge on the theory of the defence in the first trial was inadequate and a new trial should be ordered on that ground.”<sup>15</sup> With regard to issue estoppel, the majority held it should be retained as part of Canadian criminal law, but clarified that the “current Canadian approach. . . should be modified to limit its application to precluding the Crown’s relitigating an issue that has been in the accused’s favor in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt.”<sup>16</sup> The court further clarified that issue estoppel does not apply in every situation, but instead “only issues either necessarily resolved in favour of the accused as part of the acquittal or on which findings were made.”<sup>17</sup> The accused bears the burden of showing that particular issue was decided in their favor in a previous proceeding if they claim issue estoppel.<sup>18</sup>

C. EMPLOYMENT LAW, RESTRICTIVE COVENANTS & FIDUCIARY  
OBLIGATIONS—*SHAFRON V. KRG INS. BROKERS*  
(*WESTERN*) *INC.*

The Supreme Court of Canada found that the Court of Appeal of British Columbia erred by invoking blue-pencil severance and rectification in its interpretation of a restrictive covenant.<sup>19</sup> Shafron was employed by an insurance company pursuant to an employment contract which contained a restrictive covenant “in which S[hafron] agreed that for three years after leaving his employment for any reason other than termination without cause he [would] not be employed in the business of insurance brokerage within the ‘Metropolitan City of Vancouver.’”<sup>20</sup> Shafron began working for another agency in Richmond, B.C. and the insurance company brought action to enforce the restrictive covenant and also claimed a breach of fiduciary and equitable obligations.<sup>21</sup>

The court found that the court of appeal should not have substituted a phrase for the term “Metropolitan City of Vancouver” as the term was uncertain and ambiguous.<sup>22</sup> The court of appeal should not have re-written the covenant, and neither blue-pencil severance<sup>23</sup> nor rectification<sup>24</sup> could be applied to re-write the restrictive covenant.<sup>25</sup> Additionally, the court found that “the findings that S[hafron] was not a fiduciary and did not abuse confidential information belonging to KRG Western are not pure questions of law. These findings were based on evidence at trial and

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Shafron v. KRG Ins. Brokers (Western) Inc.*, 2009 SCC 6 (Can.).

20. *Id.*

21. *Id.*

22. *Id.*

23. The Court defines this as “removing part of a contractual provision.” *Id.*

24. The Court states that “rectification is used to restore what the parties’ agreement actually was, were it not for the error in the written agreement.” *Id.*

25. *Id.*

must stand in the absence of any palpable and overriding error by the trial judge.”<sup>26</sup>

#### D. TAX LAW—AVOIDANCE AND “GAAR”—*LIPSON V. CANADA*

In *Lipson v. Canada*, a narrow majority (4-3) held that the Appellant, the Lipsons, had engaged in an avoidance transaction that constituted a misuse or abuse of the attribution rules under the general anti-avoidance rule (GAAR).<sup>27</sup> The case was the first decision of 2009 and one which “may have broad implications on the tax planning of many Canadians.”<sup>28</sup>

The taxpayer Earl Wilson and his wife were a married couple with plans to purchase a home.<sup>29</sup> They engaged in the following set of transactions: (1) wife borrowed \$562,500 from a bank to finance purchase of shares in a family corporation; (2) wife paid the borrowed money directly to the taxpayer who transferred shares to her; (3) Earl and his wife obtained a mortgage from a bank for \$562,500 and then used the mortgage loan funds to repay the share loan; and (4) on his 1994, 1995 and 1996 tax returns, Earl “deducted the interest on the mortgage loan and reported the taxable dividends on the shares as income.”<sup>30</sup>

The GAAR rule was summarized by the court as follows:

“The GAAR denies a tax benefit where three criteria are met: the benefit arises from a transaction (ss. 245(1) and 245(2)); the transaction is an avoidance transaction as defined in ss. 245(3); and the transaction results in an abuse and misuse within the meaning of s. 245(4). The taxpayer bears the burden of proving that the first two of these criteria are not met, while the burden is on the Minister to prove, on the balance of probabilities, that the avoidance transaction results in abuse and misuse within the meaning of s. 245(4).”<sup>31</sup>

The part of the test at issue in this case was the third step, whether a transaction resulted in misuse and an abuse.<sup>32</sup> The court then set out the following two-part test: 1) “First, a court must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine their essential object, spirit and purpose”; 2) “a court must determine whether the avoidance transaction frustrates the object, spirit or purpose of the relevant provisions.”<sup>33</sup> Speaking for the majority, Justice Lebel concluded that:

“The attribution by operation of s. 74.1(1) that allowed the taxpayer to deduct the interest in order to reduce the tax payable on the divi-

26. *Id.*

27. *Lipson v. Canada*, 2009 SCC 1 (Can.).

28. Julian Ho, *Use of Income Tax Act's General Anti-Avoidance Rule No Clearer After Lipson*, The Court, Jan. 9, 2009, <http://www.thecourt.ca/2009/01/09/use-of-income-tax-act%E2%80%99s-general-anti-avoidance-rule-no-clearer-after-lipson/>.

29. *Lipson*, 2009 SCC 1 (Can.).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

dend income from the shares and other income, which he would not have been able to do were the wife dealing with him at arm's length, qualifies as abusive tax avoidance. It does not matter that s. 74.1(1) was triggered automatically when the taxpayer did not elect to opt out of s. 73(1). To allow s. 74.1(1) to be used to reduce the taxpayer's income tax from what it would have been without the transfer to his wife frustrates the purpose of the attribution rules."<sup>34</sup>

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34. *Id.*

