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CANADA UPDATE—HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM FEBRUARY 2009 THROUGH APRIL 2009

*Andrew C. Brown**

I. SUMMARY OF LEGAL NEWS

A. PROPOSED TAX HARMONIZATION WOULD MAKE LEGAL FEES SUBJECT TO PROVINCIAL SALES TAX

THE government of Ontario has recently proposed a tax harmonization plan that would combine the provincial and federal sales taxes on products and services in an effort to make the sales tax system more efficient.¹ According to the Ontario Finance Ministry, the harmonization would also help make Ontario more competitive in the slumping economy by reducing the cost of goods that the province exports.² Under the current system, Canada has a nationwide general sales tax (GST) of five percent with individual provinces imposing their own sales tax rates.³ Ontario's provincial sales tax rate (PST) stood at eight percent at the time of this writing.⁴ Under harmonization, the dual sales tax will be done away with and Ontarians will pay a single, federally administered sales tax of thirteen percent.⁵ While the tax harmonization will not change the price of most items, some items that had previously been exempt from the provincial sales tax, such as electricity and professional services, will now be subject to the harmonized tax rate.⁶ Ontario legal professionals are especially concerned about the new harmonization plan because legal fees, which were already subject to the five percent GST, will be taxed an additional eight percent.⁷ The Ontario Bar Associ-

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1. *Tax Harmonization: Frequently Asked Questions*, CBC News, Apr. 1, 2009, <http://www.cbc.ca/money/story/2009/03/27/f-tax-faq.html>.

2. *Id.*

3. Tracey Tyler, *New Levy Will Boost Cost of Day in Court: Bar Association Plans to Push for Alternatives*, TORONTO STAR, Mar. 27, 2009, at A11, available at <http://www.thestar.com/article/609211>.

4. Ontario Ministry of Finance, Ontario Budget 2009: Reforming Ontario's Tax and Pension Systems, http://www.fin.gov.on.ca/english/budget/ontariobudgets/2009/chpt3.html#c3_salestax.

5. *Id.*

6. See *Frequently Asked Questions*, *supra* note 1.

7. See Tyler, *supra* note 3.

ation plans on opposing the measure, arguing that the increased cost for legal services will result in many middle and lower income citizens being denied access to the justice system.⁸ If approved, the new harmonized sales tax will go into effect on July 1, 2010.⁹

B. FEDERAL GOVERNMENT CONSIDERS ENDING DOUBLE-CREDIT FOR PRE-TRIAL DETENTION

In March, Conservative members of Parliament introduced legislation that would put an end to the “two-for-one” credit system for time served prior to trial.¹⁰ Currently, Canadian judges have the power to grant convicted criminals credit for double, or even triple, the time that they spent in jail prior to trial. Put simply, each day spent in pretrial detention would be counted as two and credited to the individual as time already served on their ultimate sentence.¹¹ The “two-for-one” policy, while not officially on the books, has come to be a standard rule of thumb followed by most judges in sentencing. Judges have considerable discretion in applying credits, and sometimes refuse to grant a particular criminal credit for time served depending on the severity of the crime. The government, along with law enforcement officials and victims’ rights groups, argue that a repeal of the policy is necessary because many criminals are using it as a way to serve as much of their sentences as possible prior to trial.¹² In doing so, criminals abuse the system by purposefully delaying the start date of trial through various means.¹³ The Canadian Association of Chiefs of Police has also praised the bill as a significant step towards bringing “greater clarity, transparency and accountability to the sentencing process.”¹⁴ Opponents of the provision, including many criminal attorneys throughout Canada, argue that a shortage of judges, not criminals attempting to accumulate so-called “dead time,” is the reason for the slow progress of cases through the Canadian court system.¹⁵ Additionally, criminal attorneys argue that the legislation, if passed, will result in fewer guilty pleas as well as promote harsher punishments.¹⁶ Those opposed to the bill cite the harsh conditions of many Canadian prisons as another reason for the need to continue the “two-for-one” policy because it helps

8. *Id.*

9. See Ontario Ministry of Finance, *supra* note 4.

10. *Ontario AG Welcomes Plan to End Credit for Pre-Trial Custody*, CBC NEWS, Mar. 26, 2009, <http://www.cbc.ca/canada/toronto/story/2009/03/26/pretrial-custody.html>.

11. *Id.*; Sun Media, “*Hard Time*” Should be Exactly That, MERIDIAN BOOSTER, Apr. 6, 2009, <http://www.meridianbooster.com/ArticleDisplay.aspx?e=1512446>.

12. *Ontario AG*, *supra* note 10.

13. *Id.*

14. Press Release, Canadian Association of Chiefs of Police, Bill C-25: An Act to Amend the Criminal Code (Limiting Credit for Time Spent in Pre-Sentencing Custody) (Apr. 3, 2009), available at <http://www.cacp.ca/media/news/download/702/Twoforonepretrial.pdf>.

15. *Ontario AG*, *supra* note 10; Tonda MacCharles & Betsy Powell, “*2-for-1*’ Jail Credit in Jeopardy,” TORONTO STAR, March 26, 2009, <http://www.thestar.com/printArticle/608602>.

16. MacCharles & Powell, *supra* note 15.

ease the problems created by overcrowding. Specifically, opponents point to conditions in Toronto's Don Jail, which has been censured by Amnesty International for harsh conditions caused mainly by overcrowding.¹⁷

C. NEW TRADEMARK OPPOSITION PRACTICE

On March 31, 2009, changes to Canadian trademark opposition practices went into effect that bring Canadian practice more in line with standard European opposition practice.¹⁸ The changes apply to situations in which a third party opposes an application for a trademark or where there is a request for the removal of a trademark from the register.¹⁹ Significant among the changes is the establishment of a so-called "cooling off" period designed to encourage the parties to reach a settlement.²⁰ This cooling off period is effectuated by entitling each party (the original applicant and the opposition party) to one extension of time up to nine months with the consent of the other party.²¹ If the parties fail to reach a negotiated agreement during this time, they may be entitled to another extension of up to three months in which to reach a settlement.²² The new policy will hopefully reduce the caseload on the Trade-Marks Opposition Board.

In addition to allowing for a cooling off period, the new practice clarifies the manner in which the Opposition Board grants the extensions. The previous Practice Notice, which took effect on October 1, 2007, was heavily criticized for not providing sufficient clarity as to how the Board grants or denies requests for extensions.²³ Now, the Opposition Board will grant requested extensions up to the maximum benchmark of nine months if provided with "sufficient reasons" to do so.²⁴ While this new Practice Notice provides a basic framework, the Opposition Board still retains considerable discretion in its ability to grant extensions.

A final area in which the new Practice Notice changes existing policy is in the granting of extensions for "exceptional circumstances."²⁵ As a general rule, the Trademark Opposition Board will not grant an extension beyond the nine month benchmark.²⁶ However, if a party is able to show

17. *Id.*

18. Cynthia Mason & Jordana Sanft, *Canada: New Canadian Trademark Opposition Practice*, Ogilvy Renault, Mar. 30, 2009, <http://www.mondaq.com/article.asp?articleid=77086>.

19. CANADIAN INTELLECTUAL PROPERTY OFFICE: SUMMARY EXPUNGEMENT (SECTION 45) PROCEEDINGS (2009), http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr01843.html.

20. See Mason & Sanft, *supra* note 18; Practice in Trade-mark Opposition Proceedings, ch. V.1.1 (2009) (Can.), available at <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr01558.html>.

21. Practice in Trade-mark Opposition Proceedings, ch. V.1.1 (2009) (Can.).

22. See Mason & Sanft, *supra* note 18.

23. *Id.*

24. Practice in Trade-mark Opposition Proceedings, ch. V.1.2 (2009) (Can.).

25. See Mason & Sanft, *supra* note 18.

26. Practice in Trade-mark Opposition Proceedings, ch. V.3 (2009) (Can.).

“exceptional circumstances,” the Board may grant an extension.²⁷ Any party claiming exceptional circumstances must provide a “full and frank disclosure of all of the relevant facts,” which cannot be substantially similar to the set of facts used to request an earlier extension of time.²⁸ The consent of the other party is not required for the Board to grant an extension based on exceptional circumstances.²⁹

II. RECENT SIGNIFICANT COURT DECISIONS

A. ABORIGINAL LAW—FIDUCIARY DUTY OF THE CROWN WITH RESPECT TO OIL AND GAS ROYALTIES: *ERMINESKIN INDIAN BAND AND NATION V. CANADA*³⁰

The Ermineskin Nation and Samson Nation, two Indian bands, filed suit against the Crown alleging that the Government of Canada failed to meet its fiduciary duty to invest royalties arising from the development of oil and gas reserves located beneath the bands’ tribal lands, thereby depriving the tribes of hundreds of millions of dollars since the 1970s.³¹ Both tribes brought suit under the terms of the *Indian Act* and Treaty No. 6, the terms of which required the tribes to surrender their interests in the oil and gas reserves located beneath their lands so that the Crown could develop these reserves. In exchange, the Crown agreed to keep the royalties in separate revenue and capital accounts for each of the bands and pay out the interest on those royalties to the tribes.³² The tribes alleged that the Crown, under the terms of the agreement, was obligated to invest the royalties that it was holding on behalf of the bands, but failed to do so, thus breaching its fiduciary duty. However, the Supreme Court of Canada held that no such obligation existed because the terms of the agreement established a conditional transfer of land, not a common law trust, which would have obligated the Crown to invest the royalties. Furthermore, the Court found that the terms of the *Indian Act* actually prohibited the government from investing moneys that it held in accounts for native tribes.³³ The Court found that the Canadian government’s fiduciary duties as embodied in the language of Treaty No. 6, that it would “put away to increase” the royalties owed the bands, was satisfied by the placing of the funds in accounts that would earn interest.³⁴ All that the government was obligated to do, then, was to “guarantee that the funds would be preserved and would increase.”³⁵

27. *Id.*

28. *Id.*

29. See Mason & Sanft, *supra* note 18.

30. *Ermineskin Indian Band and Nation v. Canada*, [2009] SCC 9 (Can.).

31. Alex Bailey, *No Fiduciary Obligation for Crown in Ermineskin Nation Case*, Centre for Constitutional Studies, Feb. 19, 2009, http://www.law.ualberta.ca/centres/ccs/rulings/crown_fiduciary_obligation.php.

32. *Ermineskin Indian Band and Nation v. Canada*, [2009] SCC 9 (Can.), ¶ 2.

33. See Bailey, *supra* note 31.

34. *Id.*

35. *Ermineskin Indian Band and Nation v. Canada*, [2009] SCC 9 (Can.), ¶ 67.

B. PRIVATE INTERNATIONAL LAW—CHOICE OF FORUM: *TECK COMINCO METALS LTD. v. LLOYD'S UNDERWRITERS*³⁶

Teck Cominco Metals Ltd., a Canadian mining company, was sued in U.S. district court for environmental damages that occurred in the U.S. related to pollutants released into the Columbia River from its smelter site located in British Columbia.³⁷ Teck sued its insurers in the same U.S. court for coverage of losses related to damages it was ordered to pay. At the same time, the insurer filed a parallel action in British Columbia seeking “declaratory orders regarding their obligation (or lack thereof) to defend or indemnify Teck” against the damages.³⁸ The insurer filed an application in the U.S. district court to dismiss Teck’s suit against them under the theory of *forum non conveniens*, which was denied. Similarly, Teck filed an application for the British Columbia Court to stay the proceedings that the insurer brought against it, which was also denied. Teck then appealed this denial of stay to the Canadian Supreme Court.³⁹

In rejecting Teck’s appeal, the Canadian Supreme Court said that British Columbia’s Court Jurisdiction and Proceedings Transfer Act (CJPTA) provides a clear and comprehensive standard that applies to all situations, including those in which the jurisdictional fight is between a Canadian and a foreign court, in which a stay of proceedings is requested on *forum non conveniens* grounds.⁴⁰ The Court stated that this regime is sufficient for deciding issues of parallel jurisdiction and should not be replaced with a “comity-based” test because such a test would likely result in a first-to-file system that would not take into account the most appropriate or convenient jurisdiction for the action.⁴¹ Rather, the regime put in place by the CJPTA provides a “holistic” approach applied on a case-by-case basis that takes into account various factors affecting the proper jurisdiction for a particular proceeding.⁴²

C. FAMILY LAW—UNCONSCIONABILITY IN DIVISION OF FAMILY ASSETS PURSUANT TO SEPARATION: *RICK v. BRANDSEMA*⁴³

In *Rick v. Brandsema*, the Canadian Supreme Court reinstated the findings of a trial judge that a separation agreement was unconscionable because the husband had exploited his wife’s known mental instability and thus, cheated her out of her entitlement under British Columbia’s *Family Relations Act*.⁴⁴ The trial court found that during the negotia-

36. *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters* [2009] SCC 11 (Can.).

37. *NPM Sets Precedent at the Supreme Court of Canada*, Nicholl Paskell-Mede, Feb. 26, 2009, <http://www.npm.ca/main.php?i=142&t=news&d=1&l=e&1> of.

38. *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, [2009] SCC 11 (Can.), ¶ 7.

39. *Id.* Both the British Columbia Supreme Court and the Court of Appeal denied Teck’s appeal from the original decision.

40. *Id.* ¶ 21.

41. *Id.* ¶ 29.

42. *Id.* ¶ 30.

43. *Rick v. Brandsema*, [2009] SCC 10 (Can.).

44. *Id.* ¶ 6.

tions, the husband exploited his wife's mental condition and deliberately concealed the existence of undervalued assets.⁴⁵ Because the couple had expressed a desire to divide their assets equally, the husband's concealment resulted in the wife receiving significantly less than she would have otherwise received had no concealment occurred.⁴⁶ As a result, the trial judge ordered the husband to pay the difference between the negotiated agreement and what the wife should have received under the *Family Relations Act*.⁴⁷

The court of appeal rejected the trial judge's decision and ruled that the wife had been adequately compensated.⁴⁸ However, the Canadian Supreme Court, in reinstating the decision of the trial court, held that due to the emotional nature of divorce, special care should be taken to avoid emotional and psychological exploitation by either party.⁴⁹ If it is found that emotional or psychological exploitation has occurred that "deviates substantially from the objectives of the governing legislation [the *Family Relations Act*]," then courts should find the resulting agreement unconscionable and unenforceable.⁵⁰

D. CRIMINAL LAW-JOINT TRIALS OF YOUTHS AND ADULTS: *R. v. S.J.L.*⁵¹

Two minors, aged sixteen and seventeen respectively, were arrested along with adults in connection with a drug trafficking ring.⁵² The young persons were charged with numerous offenses, including offenses related to criminal organization in the Court of Quebec.⁵³ The Court of Quebec dismissed a motion by the prosecution for a preliminary inquiry and the Crown sought a direct indictment against all the accused, including the minors, as it is permitted to do in serious criminal matters.⁵⁴ The minors sought to quash the direct indictment, which was granted by the superior court and upheld by the court of appeal.⁵⁵ The Canadian Supreme Court allowed the appeal from the decisions of the lower courts, saying that there "is no constitutional right to a preliminary inquiry," which is simply a "mechanism for determining whether the Crown has sufficient evidence to commit the accused to trial."⁵⁶ The fact that the Crown chose to dispense with the preliminary inquiry and exercise its right under section 577 of the Criminal Code to pursue a direct indictment "does not result in a deprivation of fundamental justice, since the young person continues to

45. *Id.* ¶ 2.

46. *Id.* ¶ 53.

47. *Id.* ¶ 37.

48. *Id.* ¶ 29.

49. *Id.* ¶ 1.

50. *Id.*

51. *R. v. S.J.L.*, [2009] SCC 14 (Can.).

52. *Id.* ¶ 2.

53. *Id.*

54. *Id.*; Criminal Code, R.S.C., ch. c-46 § 577 (1985) (Can.).

55. *R. v. S.J.L.*, [2009] SCC 14 (Can.), ¶ 4.

56. *Id.* at 5.

be presumed innocent and retains the right to make a full answer and defense.”⁵⁷ The Canadian Supreme Court further reiterated that joint trials of minors and adults are not allowed under Canadian law even though both the minors and adults may be charged with the same offense and the minors may be subject to adult punishment.⁵⁸

In a dissent, Justices Fish and Abella argued that the Youth Criminal Justice Act (YCJA) grants minors the right to a preliminary inquiry, and should not be interpreted to allow the Crown to pursue direct indictments against minors. The dissent stated that the majority, in allowing the Crown to pursue a direct indictment against minors charged with certain crimes, acted inconsistently “with the articulated principles and underlying philosophy of the YCJA,” which provides minors with “enhanced procedural protection.”⁵⁹

The ruling of the Court was moot with respect to the case at hand because the minors at issue received their preliminary inquiry in 2007 after the decisions of the lower courts. However, the Court decided the case for purposes of precedent.

E. TRIAL PROCEDURE-ADEQUACY OF JUDGE’S INSTRUCTIONS TO JURORS: *R. v. ROYZ*⁶⁰

In *R. v. Royz*, an appellant who had been convicted of extortion appealed the decision on the grounds that the judge had failed to adequately review the evidence in his instructions to the jury prior to deliberation.⁶¹ The Canadian Supreme Court, in rejecting the appeal, stood by its previous decision in *Azoulay v. The Queen* [1952] 2 S.C.R. 495 (Can.), which requires the judge to review “substantial parts of the evidence” and summarize the defense’s theory for the jury at the close of a proceeding.⁶² However, the Court noted that the judge has considerable discretion in determining “how much or how little evidence is to be reviewed in relation to elements of the charge.”⁶³ According to the Court, brevity is the most important quality of the judge’s instructions to the jury. . Thus, it is not necessary that the judge go over every detail of the evidence that was presented during the course of the trial, but that he summarizes both sides as succinctly as possible. . In this case, which lasted just three days, the Court found that the judge’s instructions to the jury were sufficient for the proper administration of justice.

57. *Id.* ¶ 21.

58. *Id.* ¶ 56.

59. *Id.* ¶ 80, 87-88.

60. *R. v. Royz*, [2009] SCC 13 (Can.).

61. *Id.* ¶ 1.

62. *Id.* ¶ 2.

63. *Id.* ¶ 3.

