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Canada Update-Highlights of Major Legal News and Significant Court Cases from January 2010 through April 2010

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CANADA UPDATE—HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM JANUARY 2010 THROUGH APRIL 2010

*Andrew C. Brown**

I. SUMMARY OF LEGAL NEWS

A. CANADIAN GOVERNMENT TO FAST-TRACK HAITIAN IMMIGRATION

IN response to the devastating earthquake that hit Haiti on January 12, 2010, Citizenship and Immigration Canada (CIC) announced new measures relating to the immigration of Haitian nationals to the country. The new measures also addressed the status of Haitians already residing in Canada on a temporary basis.

Effective as of January 16, 2010, CIC will give priority to “new and existing sponsorship applications from Canadian citizens, permanent residents and protected persons who have close family members in Haiti.”¹ In order to benefit from this program, however, those applying for special priority must identify themselves as having been “directly and significantly affected” by the earthquake and its aftermath.² The procedures for priority immigration status will also extend to pending adoptions of Haitian children.³ Interested persons filing new sponsorship applications should prominently and clearly write “Haiti” on the mailing envelope.⁴

In addition to the fast-tracking of new and existing immigration applications from Haiti, the CIC is allowing Haitian nationals who are in Canada on a temporary basis to extend their visas.⁵ According to the CIC, extensions will be processed according to normal procedures, but the process for Haitian nationals will be expedited and any filing fees will be

* This will be Mr. Brown’s final update as the Canada Reporter for the Law and Business Review of the Americas. He will be graduating on May 15, 2010 from the SMU Dedman School of Law and hopes to pursue a career in international adoption. Mr. Brown would like to thank the staff of the International Law Review Association and wish the best of luck to the new Canada Reporter, Soji John.

1. Press Release, Citizenship and Immigration Canada (CIC), Government of Canada Introduces Special Immigration Measures in Response to the Earthquake in Haiti (Jan. 16, 2010), <http://www.cic.gc.ca/english/departement/media/releases/2010/2010-01-16.asp>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

waived.⁶

While the announcement of the new expedited immigration procedures was welcomed by Haitian nationals in Canada, some expressed concern about the difficulty of processing the requests. A Haitian community organizer in Montreal, Chantal Barratteau, told the CBC news service that deciding which requests to honor and which to deny will likely prove to be a difficult task for immigration officials.⁷

B. MONTREAL FINANCIER SENTENCED FOR PONZI SCHEME

On February 15, 2010, Earl Jones, a Montreal financial advisor, was sentenced to eleven years in prison after pleading guilty in January to two counts of fraud related to a \$50 million Ponzi scheme he had orchestrated.⁸ Jones' scheme spanned more than twenty years and victimized nearly 160 people, including many of his own friends and family.⁹

Since both Jones and the financial-services company that he operated have been declared bankrupt, many of his victims applied with the court for leave to file a lawsuit against the Royal Bank of Canada to recover the money Jones stole.¹⁰ The Court granted the victims leave in early February and they subsequently filed a \$40 million class action lawsuit.¹¹ Jones operated his business through a personal account he had with the bank—an account that he misrepresented to his investors as “in-trust.”¹² Recent documents uncovered by the investigation revealed that RBC knew of suspicious activity related to Jones' account and had previously warned him that he could possibly get into trouble for misrepresenting the account as “in-trust.”¹³ RBC, however, did nothing to stop Jones from continuing to use his account as usual.¹⁴ Many of Jones' investors were duped because Jones had used RBC's letterhead and logo when corresponding with them, which gave an appearance of legitimacy to his scheme.¹⁵ According to the class action lawsuit, if not for “the negligence and willful blindness of the Royal Bank of Canada,” Jones would not have been able to successfully carry out his scheme for so long.¹⁶ As of the date of this update, the class-action lawsuit against RBC has not yet

6. *Id.*

7. *Canada May Fast-Track Haitian Immigration*, CBC NEWS, Jan. 16, 2010, <http://www.cbc.ca/canada/story/2010/01/15/haiti-canada-immigration.html>.

8. *Earl Jones Gets 11 Years for \$50M Fraud*, CBC NEWS, Feb. 15, 2009, <http://www.cbc.ca/canada/montreal/story/2010/02/15/earl-jones-sentenced-ponzi.html>.

9. *Id.*; see also *RBC Knew of Jones Account Oddity, Memo Shows*, CBC NEWS, Feb. 5, 2010, <http://www.cbc.ca/canada/story/2010/02/04/earl-jones-bank-memo769.html#ixzz0ehFypsWY>.

10. See *Earl Jones Gets 11 Years for \$50M Fraud*, *supra* note 4.

11. Paul Delean, *Earl Jones Victim Sues Royal Bank*, MONTREAL GAZETTE, Feb. 6, 2010, <http://www.montrealgazette.com/Earl+Jones+victim+sues+Royal+Bank/2530581/story.html>.

12. See *RBC Knew of Jones Account Oddity, Memo Shows*, *supra* note 9.

13. *Id.*

14. *Id.*

15. *Id.*

16. See Paul Delean, *supra* note 11.

been tried, however, some of Jones' victims have managed to recover their investments via other outside procedures.¹⁷

C. PROPOSED LEGISLATION WOULD INCREASE NUMBER OF
REFUGEES ACCEPTED BY CANADA

In March, the Canadian government proposed sweeping reforms to the country's refugee program that, if passed by Parliament, would increase the number of United Nations approved refugees that it accepts each year.¹⁸ The proposal would expand the Government-Assisted Refugees Program by up to 500 places over time and the Private Sponsorship of Refugees Program by 2,000 places, for a total of 2,500 new refugees admitted annually.¹⁹

Under the Government-Assisted Refugees Program, the Canadian government (through CIC-supported non-governmental organizations) provides full support for refugees admitted into Canada for up to one year or until the refugee is able to support herself, whichever is sooner.²⁰ The support covers expenses related to relocation as well as necessities for everyday life, including food, shelter, and clothing.²¹ The Private Sponsorship of Refugees Program is funded by Canadian citizens and permanent residents who wish to get help bring refugees to Canada.²² As opposed to the Government-Assisted Refugees Program, all the funding for the refugees under Private Sponsorship comes from individuals or groups.²³ The sponsors commit to providing financial assistance that covers the same necessities as the Government-Assisted program covers, but coverage under Private Sponsorship may be extended for up to thirty-six months rather than the year allowed under the government program.²⁴ In order to qualify under both programs, refugees must qualify as refugees under the United Nations *1951 Convention Relating to the Status of Refugees* and meet the requirements for entry into Canada under *Canada's Immigration and Refugee Protection Act*.²⁵

It is estimated that the program, once fully implemented, will help as

17. Anne Sutherland, *Earl Jones' Victims Start to Recover Funds*, MONTREAL GAZETTE, Apr. 20, 2010, <http://www.montrealgazette.com/business/Earl+Jones+vic-tims+start+recover+funds/2927795/story.html>.

18. Elizabeth Thompson, *Kenney Launches Refugee Reform*, TORONTO SUN, Mar. 30, 2010, <http://www.torontosun.com/news/canada/2010/03/29/13394081-qmi.html>.

19. Press Release, CIC, Expanding Canada's Refugee Resettlement Programs (Mar. 29, 2010), <http://www.cic.gc.ca/english/departement/media/releases/2010/2010-03-29.asp>.

20. *Government-Assisted Refugee Program*, CIC, Sept. 1, 2005, <http://www.cic.gc.ca/english/refugees/outside/resettle-gov.asp>.

21. *Id.*

22. *Sponsoring Refugees: Private Sponsorship of Refugees Program*, CIC, Mar. 11, 2010, <http://www.cic.gc.ca/english/refugees/sponsor/private.asp>.

23. *See id.*

24. *Id.*

25. *See Government-Assisted Refugee Program*, *supra* note 20; *see also Sponsoring Refugees: Private Sponsorship of Refugees Program*, *supra* note 22.

many as 14,500 refugees resettle in Canada.²⁶ Additionally, the cost of the expansion over the next five years is will be approximately \$90 million with another \$21 million increase in ongoing funding.²⁷

II. RECENT SIGNIFICANT COURT DECISIONS

A. *TECHRON CONTRACTORS LTD. V. BRITISH COLUMBIA*²⁸—EXCLUSION CLAUSES

Techron Contractors Ltd. V. British Columbia concerned an exclusion clause included in a contract for the design and construction of a highway. The Province of British Columbia (B.C.) wanted to build a new highway and issued a “request for expression of interest” for its design and construction.²⁹ Six companies responded to the initial request. Following this response, B.C. decided that it wanted to handle the design portion of the project and contract out the construction. B.C. informed the six companies of this change and asked them each to submit a proposal for the construction. According to the terms of the contract, only the six original companies would be eligible to submit a proposal for construction. Also included in the contract was the following exclusion of liability clause:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP [“Request for Proposals”], and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.³⁰

Brentwood, one of the original six companies that expressed interest in the original design and construction plan, entered into a “pre-bidding agreement” with another company that was not a part of the six companies authorized to bid on the project. Under the terms of this agreement, Brentwood would be the primary contractor on the job and the new company would be subcontracted the drilling and blasting work. Ultimately, Brentwood won the project and the second-place company, Tercon, filed suit against B.C. for accepting the bid from Brentwood’s joint venture alleging that it violated the terms of the agreement by limiting bidding to the original six companies.

The Trial Court ruled in favor of Tercon, finding that B.C.’s breach was fundamental and not barred by the exclusion clause contained the contract. The Court of Appeal, however, reversed the Trial Court and found that the exclusion clause “was clear and unambiguous and barred compensation for all defaults.”³¹

The Supreme Court of Canada reversed the Trial Court’s decision by a 5-4 decision and held that B.C. had breached the contract by accepting

26. See Elizabeth Thompson, *supra* note 18.

27. *Id.*

28. *Tercon Contractors Ltd. v. British Columbia*, [2010] SCC 4, at 3 (Can.).

29. *Id.*

30. *Id.*

31. *Id.* at 4.

bids from, and ultimately awarding the contract to, companies that were not eligible to bid on the project (the company that Brentwood contracted with).³² Additionally, the SCC held that the existence of the exclusion clause in the contract did not bar Tercon's suit for damages against B.C.³³

Although the Court was divided on the question of whether the exclusion clause applied, it was unanimous on the standard of interpretation that should be applied in analyzing such clauses. When a plaintiff wishes to challenge an exclusion clause or other contractual term that it had previously agreed to, the Court will follow a three-step framework for determining whether the plaintiff should be allowed to escape the challenged term. First, the Court will consider whether the exclusion clause even applies to "the circumstances established in evidence."³⁴ If the clause applies, the Court will then determine if the clause was unconscionable, which would render the entire contract invalid from the time of formation and end the inquiry. But if the clause both applies and is valid, the Court will consider whether it "should nevertheless refuse to enforce the exclusion clause because of an overriding public policy."³⁵ In all cases, the Court noted that the burden lies on the party challenging the clause to "demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement."³⁶

In applying the framework to the exclusion clause at issue, the majority found that the specific breach alleged by Tercon, that B.C. had accepted bids from ineligible bidders and thus violated the contract, was not covered by the terms of the exclusion clause.³⁷ Specifically, the Court cites the language in the exclusion clause applying it to claims "arising as a result of participating in [the] RFP."³⁸ According to the express terms of the contract, the bidding process would be limited to the original six companies that responded to the initial request.³⁹ Thus, the Court held that the participation of "other ineligible parties" was a claim that, by its nature, lay outside of the coverage of the exclusion clause.⁴⁰

The dissent noted that the primary conflict in this case was between "the public policy that favors a fair, open and transparent bidding process, and the freedom of contract of sophisticated parties and experienced parties in a commercial environment to craft their own contractual relations."⁴¹ Although the dissent agreed that B.C. had breached the terms of the agreement by contracting with Brentwood while knowing that the work would actually be carried out by a joint venture of Brentwood and

32. *Id.* at 5.

33. *Id.*

34. *Tercon*, [2010] SCC 4, at 5.

35. *Id.*

36. *Id.*

37. *Id.* at 37-38.

38. *Id.* at 38.

39. *Id.* at 43.

40. *Tercon*, [2010] SCC 4, at 38.

41. *Id.* at 49.

an ineligible bidder, it found that B.C.'s breach was not fundamental to the overall contract and that any conflict should be resolved in favor of freedom of contract since all the parties involved were sophisticated in the subject matter.⁴² Ultimately, however, B.C. was found to have breached the agreement and Tercon was awarded damages.⁴³

B. *R v. NASOGALUAK*⁴⁴—MINIMUM SENTENCES CAN BE LOWERED

The Supreme Court of Canada ruled that, in exceptional circumstances where a person's rights under the Canadian Charter of Rights and Freedoms (hereinafter "Charter"), judges are empowered to reduce the sentence below the mandatory minimum prescribed by statute.⁴⁵ The case centered on the 2004 arrest of Lyle Nasogaluak for drunk driving and fleeing police.⁴⁶ During the arrest, members of the Royal Canadian Mounted Police (RCMP) knocked Nasogaluak to the ground and struck him twice in the ribs resulting in several broken ribs and a punctured lung.⁴⁷

Nasogaluak pled guilty to the drunk driving charge, but the judge found that police had used excessive force, thus violating Nasogaluak's rights under the Charter, and reduced his sentence below what otherwise would have been imposed in accordance with Section 24(1) of the Charter.⁴⁸ According to the terms of Sec. 24(1), "any whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain SUCH REMEDY AS THE COURT CONSIDERS APPROPRIATE AND JUST IN THE CIRCUMSTANCES."⁴⁹ The Supreme Court of Canada's decision focused on what would constitute an "appropriate" remedy within the meaning of Sec. 24(1).⁵⁰

Although the Court of Appeal agreed that there was sufficient evidence to show that the police had used excessive force and violated Nasogaluak's rights under the Charter, they found that the judge did not have the discretion to reduce the sentence below the statutory mandated minimum.⁵¹ The Supreme Court of Canada reversed the Court of Appeal holding that judges have broad discretion in sentencing and, in certain exceptional cases, may reduce a sentence below the statutorily mandated minimums.⁵² According to the Court, these exceptional cases generally

42. *Id.* at 49-53.

43. *Id.* at 46.

44. *R. v. Nasogaluak*, [2010] SCC 6, at 4.

45. *Minimum Sentences Can Be Lowered: Top Court*, CBC News, Feb. 19, 2010, <http://www.cbc.ca/canada/story/2010/02/19/nasogaluak-court.html#ixzz0g0DxtQZq>.

46. *Id.*

47. *Id.*

48. *Nasogaluak*, [2010] SCC 6, at 4.

49. Constitution Act Part I, Canadian Charter of Rights and Freedoms, 1982, Sec. 24(1) (U.K.) (emphasis added).

50. *Nasogaluak*, [2010] SCC 6, at 3.

51. *Id.* at 4.

52. *Id.* at 7.

arise when the constitutionality of the limit itself is challenged.⁵³

Ultimately, while the Court recognized that a judge may reduce a sentence below the mandatory minimum, it declined to apply such power in this case.⁵⁴ While the Court affirmed the trial judge's holding that the police had used excessive force and recognized that the judge may take this into account when issuing a sentence, it also found that this case was not one of the "exceptional" cases in which a judge may reduce a sentence below the statutory minimum.⁵⁵ Accordingly, it upheld the Court of Appeal's substitution of conditional discharge with the minimum fine mandated by the statute.⁵⁶

C. *R. v. CUNNINGHAM*⁵⁷—ATTORNEY COMPELLED TO
REPRESENT CLIENT

R. v. Cunningham concerned whether a court can compel criminal defense attorneys to represent a client who cannot pay the legal fees owed. Cunningham was a defense lawyer employed by Yukon Legal Aid who was assigned to represent a defendant charged with sexual offenses against a child.⁵⁸ As a condition of obtaining legal aid, the defendant was required to update his financial records or risk having his representation suspended.⁵⁹ The defendant failed to meet this obligation and Yukon Legal Aid suspended his funding. Cunningham subsequently petitioned the Territorial Court to allow her to withdraw as counsel on the sole basis of the suspension of the defendant's funding.⁶⁰ Her request was denied by both the Territorial Court and the Supreme Court of the Yukon Territory, but was ultimately allowed by the Court of Appeal, which found that the Territorial Court did not have the discretion to refuse Cunningham's application to withdraw.⁶¹

The Court of Appeal held that courts should not compel attorneys to continue to represent clients who cannot pay for legal services.⁶² It based its decision on three primary factors. First, that court oversight of withdrawal petitions could cause an unreasonable conflict between the court's decision and any disciplinary action taken by law societies, which hold the primary interest in the regulation and oversight of attorneys.⁶³ Second, the Court of Appeal held that judicial oversight of attorney withdrawal could jeopardize the solicitor-client privilege when the attorney may be

53. *Id.* at 12.

54. *Id.* at 12-13.

55. *Id.* at 13.

56. *Nasogaluak*, [2010] SCC 6, at 13.

57. *R. v. Cunningham*, [2010] SCC 10, at 3.

58. *Id.* at 3.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Supreme Court Hears Yukon Legal Aid Case*, CBC NEWS NORTH, Nov. 17, 2010, <http://www.cbc.ca/canada/north/story/2009/11/17/yukon-legal-scoc.html>.

63. *Cunningham*, [2010] SCC 10, at 11.

compelled to disclose the reasons for wishing to withdraw.⁶⁴ Finally, a compelled representation could create a conflict between the client's best interests and the attorney's desire to reach a swift resolution.⁶⁵ Accordingly, the Court of Appeal advocated a hands-off approach in which it would assume that attorneys will generally not try to avoid their duties to their clients.⁶⁶ If they do, however, the Court of Appeal thought it best to leave the discipline of such attorneys to the discretion of the law societies.⁶⁷

In its ruling, the Supreme Court of Canada reversed the Court of Appeal and reinstated the determination made by the Supreme Court of the Yukon Territory that the Territorial Court did, in fact, have the discretion to compel Cunningham to continue the representation despite the removal of legal aid funding.⁶⁸ The SCC was careful to note that while a judge does have the authority to compel an attorney to continue to represent an accused, such authority must only be exercised "only when necessary to prevent serious harm to the administration of justice."⁶⁹ This decision answered a question that had divided courts across Canada.⁷⁰ Justice Marshall Rothstein, writing for the majority, based his decision primarily on the "inherent jurisdiction" of courts.⁷¹ According to Rothstein, "inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner."⁷² Since attorneys are a vital component of this "machinery of the court," a court may "exercise some control over counsel when necessary to protect its process."⁷³

The predominant standard for a court's refusal of an attorney's request for withdrawal, as articulated by the SCC in this case, is "whether allowing the withdrawal would cause serious harm to the administration of justice."⁷⁴ The Court then laid out several factors for judges to consider when answering this question including the feasibility of the accused representing himself or herself; other means for the client to obtain representation; the impact of the resulting delay in the proceedings on the accused, especially if the accused is incarcerated during the pendency of

64. *Id.*

65. *Id.*

66. *Id.* at 11-12.

67. *Id.*

68. *Id.* at 5.

69. *Cunningham*, [2010] SCC 10, at 9.

70. *Id.* at 13-16 (Noting the divergent lines of authority on the issue among provincial and territorial courts. The British Columbia and Yukon Territory Courts of Appeal have held that a judge does not have the authority to prevent a defense attorney from withdrawing representation based on non-payment of legal fees, while the Courts of Appeal of Alberta, Saskatchewan, Manitoba, Ontario, and Quebec have all held that the judge may refuse counsel's petition for withdrawal).

71. *Id.* at 16.

72. *Id.*

73. *Id.*

74. *Id.* at 30.

the proceeding; the conduct of counsel in seeking withdrawal; the impact of granting the withdrawal on the Crown and any other co-defendants; the impact on complainants, witnesses, and jurors; fairness to the defense counsel, taking into account the length and complexity of the case; and the history of the matter.⁷⁵ These standards, like many others designed to guide judicial decision making, are not exhaustive, but provide a basic framework for the exercise of the judicial discretion to refuse counsel's request for withdrawal.

D. *MININGWATCH CANADA v. CANADA*⁷⁶ (FISHERIES AND OCEANS)

In a case testing the extent of the federal government's obligations under the Canadian Environmental Assessment Act, the Supreme Court of Canada ruled that future development projects must go through full environmental screening before moving forward.⁷⁷ The case focused on a mining company's petition to the British Columbia Environmental Assessment Office (the Office) for the establishment of an open pit copper and gold mine.⁷⁸ Following the submission of the project, the Office sought public comment on the project and conducted an initial environmental screening of the plan, but determined that a full study would not be required because it was unlikely that the project would cause "significant adverse, environmental, heritage, social, economic or health effects."⁷⁹ The project was approved and MiningWatch Canada, a mining industry watchdog, brought suit challenging the decision by the Office to conduct a screening rather than a comprehensive review.⁸⁰

The Federal Court ruled in favor of MiningWatch and held that the Office had breached its duty to conduct a comprehensive review under the Canadian Environmental Assessment Act and prohibited further action on the mine until the review could be completed.⁸¹ The Court of Appeal, however, reversed the Federal Court's decision and the case was appealed to the Supreme Court of Canada.

The SCC's decision in this case was mixed. Although the Supreme Court agreed with MiningWatch that the Office had breached its duty under the CEAA, it also held that because MiningWatch had "no proprietary or pecuniary interest in outcome of the proceedings" the mining operation could move forward despite the failure of the Office to conduct the necessary assessments.⁸² Although the SCC allowed the mining project to continue, its decision ultimately stands for the proposition that the

75. *Cunningham*, [2010] SCC 10, at 30.

76. *MiningWatch Canada v. Canada* (Fisheries and Oceans), [2010] SCC 2, at 1.

77. *See, e.g., Ottawa Erred on B.C. Mine Review: Court*, CBC NEWS, Jan. 21, 2010, <http://www.cbc.ca/canada/british-columbia/story/2010/01/21/bc-red-chris-mine-supreme-court.html>.

78. *MiningWatch*, [2010] SCC 2, at 4.

79. *Id.*

80. *Id.* at 5.

81. *Id.*

82. *Id.* at 5-7; *Ottawa Erred on B.C. Mine Review: Court*, *supra* note 77.

procedures outlined in the CEAA for the approval of projects that may be harmful to the environment are mandatory and must be followed in all instances by federal authorities.