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CANADA UPDATE MAY 2010 THROUGH JULY 2010 HIGHLIGHTS OF MAJOR LEGAL NEWS & SIGNIFICANT COURT CASES

*Soji John**

I. SUMMARY OF LEGAL NEWS

A. PRIVACY COMMISSIONER BEGINS INVESTIGATION ON GOOGLE'S STREETVIEW SCANNING

FOLLOWING Google's acknowledgement that it has been scanning wireless local area networks ("LANs"), the Privacy Commissioner of Canada began an investigation to determine if this action raised any imposition on Canadians' privacy rights.¹ In particular, the investigation is to focus on whether Google violated "Canada's private-sector privacy law, the Personal Information Protection and Electronics Documents Act (PIPEDA)."²

Mining for private consumer information is becoming more commonplace and is one of the fastest-growing internet businesses.³ In this particular situation, Google's vehicles, which it uses to create its ubiquitous StreetView on Google Maps, were scanning wireless networks to gather publicly broadcast SSID [Service Set Identification] information used to identify the WiFi network and the MAC [Medium Access Control] address and correlate a router with a location.⁴ Google initially reported that it did not collect private, payload-data information sent over the net-

* This is Mr. John's first update as Canada Reporter for the Law and Business Review of the Americas. He would like to thank Mr. Andrew Brown, the past reporter, and the graduating staff of the International Law Review Association and wish them well in their endeavors. He also hopes that he can meet the high bar that Mr. Brown has set in his prior updates and the expectations of this year's staff.

1. Press Release, Office of the Privacy Commissioner of Canada, *Privacy Commissioner Investigates Google Wi-Fi Data Collection* (June 1, 2010), available at http://www.priv.gc.ca/media/nr-c/2010/nr-c_100601_e.cfm.
2. *Id.*
3. Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J., July 30, 2010, http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703940904575395073512989404.html.
4. Posting of Alan Eustace, Senior VP, Engineering & Research, to The Official Google Blog, <http://googleblog.blogspot.com/2010/05/wifi-data-collection-update.html> (May 14, 2010, 01:44:00 PM).

works.⁵ When analyzing its collection at the request of an audit from German officials, however, Google discovered that it was gathering user information from open non-password protected networks, apparently inadvertently and with no further commercial purpose.⁶ A Google-sponsored, third-party investigation conducted by Stroz Friedberg, a technical consulting firm, confirmed that Google retained the bodies of data packets from unencrypted networks pulled by vehicles that traveled close to the network.⁷

Despite Google's assertions that it has not done anything illegal, Google's action may have not only violated people's expectations of privacy, but also the law of several of the thirty countries where these intrusions occurred.⁸ While some countries have asked Google to dispose of the information, as Google has professed a desire to do, others including the United Kingdom, France, Germany, and in particular, Canada, have asked that it forward the gathered data to local authorities to allow them to independently assess the cause of the breach and violation of their laws.⁹

With respect to Canada, Google's actions may implicate PIPEDA § 7, regarding the collection, use, and disclosure of information without the knowledge and consent of the owners.¹⁰ In particular, collection without knowledge or consent is limited to specific instances in which it would be either beneficial to the owner, beneficial to society, or otherwise legalized.¹¹ Thus, in addition to considering reasons behind accessing the data and Google's use of the information, presumably the Privacy Commissioner will also investigate whether Google's collection would fit into any of these permissible categories.

B. CANADA UNVEILS NEW COPYRIGHT BILL

In the works for some time, Canada introduced a new bill to bring its copyright laws further in compliance with international requirements such as the Berne Convention on Literary and Artistic Works, the World Intellectual Property Organization ("WIPO") Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Rome Convention, to all of which Canada is a signatory.¹² Bill C-32, to be named the Copy-

5. *Id.*

6. *Id.*

7. STROZ FRIEDBERG, SOURCE CODE ANALYSIS OF GSTUMBLER (2010), available at www.google.com/googleblogs/pdfs/friedberg_sourcecode_analysis_060910.pdf.

8. Everton Bailey Jr., *Google in the Hot Seat Over Wi-Fi Privacy Breach*, HUFFINGTON POST, June 8, 2010, http://www.huffingtonpost.com/2010/06/08/google-privacy-slammed-ov_n_604084.html.

9. Sarah Miley, *Canada Launches Legal Probe into Google Privacy Violations*, JURIST, June 2, 2010, <http://jurist.org/paperchase/2010/06/google-launches-legal-probe-into-google-privacy-violations.php>.

10. Personal Information Protection and Electronic Documents Act, 2000 S.C., ch. 5, § 7 (Can.).

11. *Id.* § 7(1)(a)-(d).

12. *Canada Announces New Copyright Law for Digital Age*, AGENCE FR. PRESSE, June 2, 2010, available at 6/2/10 AGFRP 22:34:51 (Westlaw); *Canada to Try a Third*

right Modernization Act, was introduced by the Minister of Industry, Tony Clement, and the Minister of Heritage, James Moore, on June 2, 2010.¹³

Although Bill C-32 does not ratify any of the mentioned treaties, it does implement some of the substantive requirements of those international agreements.¹⁴ In particular, C-32 considers the effect of the information revolution of the past twenty years and the proliferation of the internet, communication technology, and digital media.¹⁵ These changes have resulted in particular ease with which copyright materials can be illegally copied or illegally distributed.¹⁶ Thus, “copyright-intensive industries [are] vulnerable to large-scale infringements through file sharing.”¹⁷ And as a result, internet service providers have been subject to liability and the requirement to police the content available through their services in order to prevent copyright violation.¹⁸ Bill C-32 seeks to alleviate some of these burdens on both the providers of information sharing technology and on the copyright owners who rely upon the copy-prevention technology.¹⁹

First, C-32 revises the definition of direct infringement to include:

provid[ing], by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of that service.²⁰

Section 27(2.4) presents factors that a court may consider in determining whether an action has infringed copyright protection.²¹ These changes to the present Copyright Act would bring it in line with the Digital Millennium Copyright Act (DMCA) and cases such as *MGM v. Grokster*, finding the acts of owners of peer-to-peer file-sharing networks liable for infringement for promoting its use to illegally access copyrighted

Time to Tweak Copyright Laws, AGENCE FR. PRESSE, May 19, 2010, available at 51/19/10 AGFRP 21:38:11 (Westlaw); Ken McFarlan, Editorial, *A Made-in-Canada Solution to Copyright Welcome News on Piracy Law*, TORONTO STAR, May 20, 2010, available at 2010 WLNR 10389972 (Westlaw).

13. Andrew Bernstein et. al., *Canada Proposes Major Changes to Copyright Law*, MONDAQ, June 25, 2010, available at 2010 WLNR 12856430 (Westlaw); Cory Doctorow, *Canada's Copyright Laws Show Britain's Digital Legislation is No Exception*, GUARDIAN.CO.UK, June 30, 2010, available at 2010 WLNR 13062043 (Westlaw); *New Copyright Law May be Enough To Remove Canada From Watch List*, 28 INSIDE U.S. TRADE, June, 4, 2010, available at 2010 WLNR 11450146 (Westlaw).

14. *New Copyright Law May be Enough*, *supra* note 13.

15. Bernstein, *supra* note 13.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. An Act to Amend the Copyright Act, 2010, C-32 § 27(2.3) (Can.).

21. *Id.* § 27(2.4).

materials.²²

At the same time, C-32 “makes clear that merely providing the means for telecommunication or reproduction of the work” by itself does not infringe.²³ This ensures a measure of safety for service providers from indirect infringement.²⁴ But, if the service provider learns that infringement is occurring, possibly through notice, he is obligated by the proposed modification to inform the direct infringer of the possible violation and keep records as to the identification and actions of those possible infringers for a given period.²⁵ Thus, while protecting providers that are unaware of infringement, the proposed legislation requires them to act when they do become aware.

The revisions resulting from C-32 also provide expanded user rights for copyrighted material.²⁶ Bill C-32 allows users of modern technology, such as social networking sites, to use public information for non-commercial purposes if they reasonably believe that the source does not infringe a copyright, attribute it to the source, and use it in a way that does not have a substantially adverse effect on the source.²⁷ Also, section 31.1(3) allows for time-shifting, the caching of copyrighted material for the technological purposes of content delivery.²⁸ Furthermore, the bill legitimizes the creation of backup copies—copies of materials for which a user has a legal version—and allows for format shifting, *e.g.*, CD format to MP3 format.²⁹ Finally, the modifications proposed by Bill C-32 would expand the exemptions to copyright infringement “if a copyrighted work is used for the purpose of education, parody or satire.”³⁰ Thus, in “modernizing Canada’s Copyright Act to better address the challenges and opportunities presented by the digital age,” the bill expands both the rights of copyright owners and of legitimate users of copyrighted material.³¹

But, the new bill is not without opposition.³² “One of the most controversial elements of the bill is a general prohibition on circumventing or breaking ‘digital locks’ or ‘technological protection measures.’”³³ Section 47 of the bill deals with anti-circumvention measures and copy controls, and it restricts, with a few exemptions, the rights of users to bypass

22. Drew Wilson, *A Detailed Look at Bill C-32—Canada’s Copyright Reform Bill (Part I)*, ZERO PAID, June 3, 2010, <http://www.zeropaid.com/news/89303/a-detailed-look-at-bill-c-32-canadas-copyright-reform-bill-part-1/>.

23. Bernstein, *supra* note 13.

24. Copyright Modernization Act, Bill C-32, First Reading, June 2, 2010 (Canada, 40th Parl., 3rd sess.) s. 35.

25. Bernstein, *supra* note 13.

26. *Id.*

27. *Id.*

28. Copyright Modernization Act, s. 31.

29. Bernstein, *supra* note 13.

30. *Id.*

31. *Questions and Answers: Copyright Modernization*, BALANCED COPYRIGHT: GOV’T OF CANADA, June 22, 2010, http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html.

32. *See, e.g.*, Doctorow, *supra* note 13.

33. Bernstein, *supra* note 13.

protection measures that are put in place to prevent purchasers of copyrighted works from making copies or from accessing the underlying source code.³⁴ It also renders illegal the creation, importation, and distribution of technology for this purpose.³⁵ One aspect of the resulting controversy is that this part of the bill may prevent a legitimate user from copying works for the sole purpose of backing up or format shifting if a digital lock is present that the user cannot legally bypass.³⁶ Another aspect is that with Bill C-32, Canada seems to be capitulating to the demands of the international community, especially the United States, without properly considering the desires of its citizens.³⁷ The digital locking amendment is at the center of this argument because in government consultations, Canadians overwhelmingly disapproved of it prior to Bill C-32's proposal, while international forces pushed Canada to adopt these modifications to its Copyright Act.³⁸ These criticisms regarding technological protections have merit, as even the U.S. Copyright Office has recently expanded exemptions, allowing greater bypassing of technological protection, e.g., for cellular handsets and e-books.³⁹ In light of this controversy and changes occurring internationally, the legislature may reform Bill C-32 to expand exemptions concerning the bypassing of digital locks.⁴⁰

C. QUEBEC PROPOSES NEW BILL TO LIMIT ENGLISH EDUCATION

In response to the Supreme Court of Canada declaring Quebec's Bill 104 unconstitutional, the Charest government has proposed a new amendment to Bill 101, the Charter of the French Language (Charter).⁴¹ The proposed law raises the threshold requirement for a student to acquire public schooling in an English medium in lieu of French-language schooling.⁴²

This bill is the most recent in a series of measures to preserve French "as the normal everyday language of . . . work, instruction, communication, commerce, and business" in Quebec, that originated with the Charter.⁴³ Because the Charter left an oft-used loophole—children who attended private English education for a short period could qualify to transfer to English-medium, public schools and be educated in these schools rather than the default French-medium schools—pro-French factions have been

34. Copyright Modernization Act, s. 47.

35. *Id.* (modifying 41.1(1)(c) of the Copyright Act).

36. Bernstein, *supra* note 13.

37. *See* Doctorow, *supra* note 13.

38. *Id.*

39. *See* Exemption to Prohibition Against Circumvention, 37 C.F.R. § 201 (2010).

40. Peter Nowak, *Copyright Reform Bill to Get Review*, CBC NEWS, July 26, 2010, <http://www.cbc.ca/technology/story/2010/07/26/copyright-ruling-regulators.html>.

41. *Bill 103 Generates Criticism*, CTV NEWS MONTREAL, June 4, 2010, http://montreal.ctv.ca/servlet/an/local/CTVNews/20100604/mtl_bill103_100604?hub=MontrealHome.

42. *Id.*

43. Charter of the French Language, R.S.Q., ch. C-11 (2010) (Can.).

in a struggle with Anglophones to reform the Charter.⁴⁴ Bill 104 amended the Charter by removing private English schooling as a consideration in determining whether children were eligible to attend English public or subsidized, private-tuition schools instead of the promoted French public schools.⁴⁵ By closing this option of “bridging schools,” the Quebec National Assembly dramatically reduced the quantity of students in the English public school system.⁴⁶

The Canadian Supreme Court, in declaring the amendments of Bill 104 to the Charter unconstitutional, found that the law unreasonably infringed on section 23(2) of the Canadian Charter of Rights and Freedom.⁴⁷ In particular, in interpreting section 23(2), the Court recognized that one of the framers’ key objectives was to protect the region’s official language and culture.⁴⁸ The Court placed emphasis on considering the language dynamics in the region.⁴⁹ The Court found that rather than determining educational language primarily by lineage and residency, the student’s education pathway should be considered based on a set of factors.⁵⁰ As a result, the Court determined it was unreasonable to completely close access of English public education to students who did not meet the lineage and residency requirements but desired to pursue post-secondary education in English medium universities.⁵¹

Bill 103 differs from Bill 104 in that it does not close the loophole present in the Charter but rather, raises the barrier for entry to public English education.⁵² “Under the proposed law, children in private English schools accumulate points to help them qualify for a public English education.”⁵³ In effect, this may increase the amount of time that the student would have to enroll in private tuition before being eligible for public English schools.⁵⁴ Because the requirements of the transfer are unclear and “the point system combines with more subjective criteria, in which parents would also have to explain to the ministry why their child should be admitted to the English public system,” proponents of English public education feel that the new bill will do little to increase enrollment.⁵⁵ But the opposition, in particular Parti Québécois, accuses the Charest government of “selling out the French language with Bill 103,” because it eases

44. *Bill 103—For French Language Militants and Premier Charest, Manna From Heaven!*, NO DOGS OR ANGLOPHONES, <http://nodogsoranglophones.blogspot.com/2010/06/bill-103-for-french-language-militants.html> (June 4, 2010, 12:06 EST).

45. *Nguyen v. Quebec*, [2009] 3 S.C.R. 208, 2009 SCC 47 (Can.).

46. *Id.*; *Bill 103 Generates Criticism*, *supra* note 41.

47. *Nguyen*, 3 S.C.R. 208 ¶ 50.

48. *Id.* ¶ 26.

49. *Id.*

50. *Id.* ¶ 29. The court also stated that “bridging schools” alone do not result in a genuine educational pathway. *Id.* ¶ 36.

51. *See id.* ¶ 42.

52. *See Quebec Language Law ‘A Mess’: Opposition*, CBC NEWS, June 2, 2010, <http://www.cbc.ca/canada/montreal/story/2010/06/02/new-quebec-language-law.html> [hereinafter *Quebec Language Law*].

53. *Id.*

54. *Bill 103 Generates Criticism*, *supra* note 41.

55. *Id.*; *Quebec Language Law*, *supra* note 52.

restrictions on English public education.⁵⁶ One group that seems to have little to complain of is the private English schools that theoretically should retain students for a longer period of time.⁵⁷ It is clear that Bill 103 does not end the struggles Quebec will have in preserving French language and culture while at the same time providing for the ambitions of its populace.

II. RECENT SIGNIFICANT COURT DECISIONS

A. *QUEBEC V. MOSES*⁵⁸—THE SCC'S FIRST ANALYSIS OF THE JAMES BAY NORTHERN QUEBEC AGREEMENT

The Supreme Court of Canada has, for the first time, interpreted the James Bay Northern Quebec Agreement (“Treaty”), a land claims treaty between the federal government, the government of Quebec, and the aboriginal community of the James Bay Cree and Inuit.⁵⁹ The issue in *Quebec v. Moses* concerns procedures required to construct a proposed vanadium mine near Chibougamau, Quebec, which would result in modifications to the lakes and waterways and possible harm to the fish habitat.⁶⁰ In its analysis, the Supreme Court considered that although the area of the mine fell under the authority of the Quebec provincial government per the Treaty, the resulting impact on the fish habitat called for a permit application to the Federal Minister of Fisheries.⁶¹ The Court ruled that this permit could only be obtained once a study was conducted under the Canadian Environmental Assessment Act (CEAA).⁶² Thus, although the Treaty provided for the Quebec provincial government to assess environmental impact to the area, and these requirements had been met, a federal permit could not be obtained based strictly upon the Quebec government’s analysis; the Minister of Fisheries must follow the process required of all applications, *i.e.*, a CEAA study and approval.⁶³

The 1975 James Bay Northern Quebec Agreement, between the Cree and Inuit communities, and the Quebec provincial and Canadian federal governments, resulted from negotiations during litigation over a hydroelectric generation facility that would result in extensive flooding of the aboriginal lands.⁶⁴ In consideration for settling the claims on the land,

56. Philip Authier, *We'd Kill Bill 103, PQ Warns*, THE MONTREAL GAZETTE, June 8, 2010, <http://www.montrealgazette.com/life/kill+Bill+warns/3124660/story.html>; see *Quebec Language Law*, *supra* note 52.

57. *Bill 103 Generates Criticism*, *supra* note 41.

58. *Quebec v. Moses*, [2010] SCC 17 (Can.).

59. Posting of Christine Kellowan to THE COURT, *Quebec (Attorney General) v. Moses: A Lesson in Treaty (Mis) Interpretation?*, <http://www.thecourt.ca/2010/05/17/quebec-attorney-general-v-moses-a-lesson-in-treaty-misinterpretation/> (May 17, 2010); Roy Millen & Katia Opalka, *Quebec v. Moses: Canadian Environmental Assessment Act Applies on James Bay Treaty Land*, BLAKE, CASSELLS & GRAYDON LLP, May 2010, http://www.blakes.com/english/view_bulletin.asp?ID=3975.

60. Millen & Opalka, *supra* note 59.

61. *Moses*, [2010] SCC 17 ¶ 53.

62. *Id.*

63. *Id.* ¶¶ 53-54.

64. *Id.* ¶ 60.

the Cree and Inuit peoples obtained a “form of self government.”⁶⁵ The Treaty provides for the development of this territory, but only in a manner that protects the hunting, fishing, and trapping rights of the aboriginal population and with minimum environmental and social impact on their communities.⁶⁶ It also defines categories of lands within the territory, which in turn specifies the decision-making authority for projects on the land; the vanadium project was destined for Category III land under the ultimate jurisdiction of the Quebec Cabinet, albeit with *advisory* input from the Cree Nation.⁶⁷

The entire Court agreed that the Treaty “had constitutional status and is . . . covered by [section]. . . 35(1) of the Constitution Act of 1982.”⁶⁸ In analyzing the issue of whether the federal government has the ability to independently review the project to determine the environmental impact via the CEAA or if the Federal Minister of Fisheries must supply a permit based on provincial government authority, the majority turned to the language of the Treaty.⁶⁹ The court determined that “under. . . [section] 22.2.3 of the Treaty, all federal laws of general application respecting environmental protections apply insofar as they are not inconsistent with the Treaty.”⁷⁰ The Court determined that once the provincial government had approved of the mine, the proponents properly applied for the fisheries permit.⁷¹ But, the “CEAA assessment is obligatory” prior to receiving a federal permit.⁷² That is, the Treaty does not alter the methodology that the Federal Minister is required to follow to determine whether he should grant a permit; he must still meet the federal requirements for a CEAA assessment.⁷³ The Court looked primarily at the Treaty, as drafted by the parties, using modern contract interpretation principles, as opposed to “‘honour of the Crown’ and other general principles derived from previously decided aboriginal and treaty cases.”⁷⁴ As “the first Supreme Court decision interpreting the Agreement as a treaty under s. 35 of the Constitution Act,. . . [Quebec v. Moses] will have a lasting impact on the interpretation of modern treaties with [a]boriginal people in Quebec and elsewhere in Canada.”⁷⁵

65. *Id.* ¶ 61.

66. *Id.* ¶ 16.

67. *Id.* ¶¶ 17-19.

68. *Attorney General of Quebec v. Moses: Supreme Court of Canada Decision on Environmental Assessments in Northern Quebec*, FASKEN MARTINEAU ABORIGINAL LAW BULLETIN, May 2010, <http://www.fasken.com/attorney-general-of-quebec-v-moses—scc-05-25-2010/> [hereinafter *Attorney General of Quebec v. Moses*].

69. *Moses*, [2010] SCC 17 ¶¶ 36-37.

70. *Id.* ¶ 37.

71. *Id.* ¶ 38.

72. *Id.*

73. *Id.* ¶¶ 51-52.

74. Millen & Opalka, *supra* note 59; *Attorney General of Quebec v. Moses*, *supra* note 68.

75. Millen & Opalka, *supra* note 59.

B. *YUGRANEFT CORP. v. REXX MANAGEMENT CORP.*⁷⁶—PROVINCIAL LIMITATIONS LAW APPLIES TO INTERNATIONAL ARBITRATION AGREEMENTS

On May 20, 2010, the Supreme Court of Canada decided that where the decision of an international arbitration proceeding is sought to be locally recognized and enforced, courts should apply the provincial statute of limitations.⁷⁷ Because of this decision, successful parties in an arbitration decision “with awards in hand” must understand where they will seek enforcement and familiarize themselves and take action according to the “provincial limitation period legislation that may be applicable when the award is presented to the court.”⁷⁸

When Rexx Management Corporation refused to deliver equipment for which Yugraneft Corporation, a Russian operator of Russian oil fields, had paid, Yugraneft brought a proceeding in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.⁷⁹ The court made an arbitration award to Yugraneft on September 6, 2002 for about one million U.S. dollars.⁸⁰ Over three years later, in January of 2006, Yugraneft brought an action in Alberta seeking the recognition and enforcement of the award pursuant to the International Commercial Arbitration Act (ICAA).⁸¹ The trial court found that under the Limitations Act, the claim was time barred, as the applicable provision, section 3(1)(a), limited bringing action to within two years after the date on which the claimant first knew or in the circumstances ought to have known “that the injury, assuming liability on the part of the defendant, warrants bringing the action.”⁸² Both the Court of Appeals and the Supreme Court affirmed the lower court decision.⁸³

In coming to its decision, the Supreme Court found that the ICAA controls the recognition and enforcement of foreign arbitration awards and “incorporates both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (New York Convention), the United Nations Commission on International Trade Law (UNCITRAL), and the Model Law on International Commercial Arbitration (Model Law) into

76. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, [2010] SCC 19 (Can.).

77. Mandy L. Seidenberg, *Canada: Case Law Update: Yugraneft Corp. v. Rexx Management Corp.*, MONDAQ, July 5, 2010, http://www.mondaq.com/canada/article.asp?article_id=103810.

78. John W. Boscarior et al., *Yugraneft Corp. v. Rexx Management Corp.: Victors in International Arbitration Proceedings Must Look Out for Local Limitation Periods*, MCCARTHY TETRAULT, Aug. 2, 2010, http://www.mccarthy.ca/article_detail.aspx?id=5023.

79. *See id.*; *see Foreign Arbitral Awards Subject to Provincial Limitation Periods, Supreme Court of Canada Rules: Yugraneft Corp. v. Rexx Management Corp.*, THE TRIAL WARRIOR BLOG, <http://thetrialwarrior.blogspot.com/2010/05/foreign-arbitral-wards-subject-to.html> (May 20, 2010) [hereinafter *Foreign Arbitral Awards Subject to Provincial Limitation Periods*].

80. *Foreign Arbitral Awards Subject to Provincial Limitation Periods*, *supra* note 79.

81. Boscarior, *supra* note 78; Seidenberg, *supra* note 77.

82. *Yugraneft Corp.*, [2010] SCC 19, ¶ 50.

83. *Id.* ¶¶ 5, 7.

Alberta law.⁸⁴ The Court recognized that, although neither the New York Convention nor the Model Law expressly sets a limitation period for enforcement, and the Model Law expressly does give a list of “grounds on which the recognition and enforcement of an award may be refused,” the New York Convention requires that “recognition and enforcement shall be ‘in accordance with the rules of *procedure* of the territory where the award is relied upon.’”⁸⁵ The Court found that because the statute of limitations in Alberta is regarded as a rule of procedure and the New York Convention permits a “jurisdiction to make enforcement of an award subject to a time limit,” Alberta may impose a limitation to bar enforcement of a foreign arbitration award.⁸⁶ In coming to this decision, the Court considered the purpose of the New York Convention, its application in other countries, as well as its legal scholarship—all of which supported the existence of time limits.⁸⁷

In applying Alberta’s limitation laws, the Court agreed that because the award was determined in the non-reciprocating jurisdiction of a Russian court, the proper law to apply is the Limitations Act.⁸⁸ The Court also found that the arbitration decision is a “remedial order” and not based on a judgment or a court order.⁸⁹ As a result, Yugraneft is subject to a two-year limitation rather than a longer period as allowed for judgments.⁹⁰ Finally, because the two-year limitation relies on a discoverability rule, *i.e.*, the time period starts when the party knows or should have known of the “non-performance of [the] . . . obligation,” the court had to determine the starting point.⁹¹ The Court concluded that a limitation period begins when the award becomes final, which in this case was when the time period for appeal ran out without Rexx Corporation having filed an appeal.⁹² The result, even with this extension in time, is that Yugraneft was time-barred because it brought the enforcement action after the two-year statute of limitation had expired.⁹³

Clearly, future parties who obtain foreign arbitration awards must recognize the limitation acts of the proper Canadian jurisdiction and apply for recognition and enforcement in a timely manner.

84. *Id.* ¶ 8.

85. *Id.* ¶¶ 14-15 (emphasis added).

86. *See id.* ¶ 18; Seidenberg, *supra* note 77.

87. *See Yugraneft Corp.*, [2010] SCC 19, ¶ 19-22.

88. *Id.* ¶ 35.

89. *Id.* ¶¶ 43-44.

90. *See id.* ¶¶ 42-44.

91. *Id.* ¶ 50.

92. *Id.* ¶ 54.

93. *Id.* ¶ 63.