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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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## **SYSTEMIC DISCRIMINATION IRRELEVANT TO INDIVIDUAL ALLEGATION**

The Court, in a judgment released on October 3, 2003 by the Honourable Mr. Justice Somers, refused to acknowledge the potential relevance of an employer's past discriminatory conduct to a lawsuit in which the employee alleged constructive dismissal as a result of discriminatory actions.

The plaintiff asserted that as a result of her race and colour, she was passed over for advancement in favour of other less qualified candidates. She alleged that this conduct constituted a repudiation of the fundamental terms of the employment contract and constituted a constructive dismissal.

The plaintiff also alleged that historically the employer had systemically discriminated against employees of colour by invoking a slow track for promotion, that the employer promoted Caucasian employees notwithstanding the existence of applicants of colour with superior qualifications and that employees of colour were historically denied access to company seminars and leadership conferences.

The defendant moved under R.21.01 to strike these allegations.

The Court held that while there was no question that an allegation of a breach of an implied non-discrimination term in a contract of employment was a viable pleading, allegations of racist actions, the failure to take action or activities of the sort committed against nonparties to the action were not relevant, and ought not be subject matter in the litigation.

Somers J. stated:

"What is envisaged by the plea as it stands would be a wholesale investigation of all of the personnel files of the defendant to determine their progress or lack of it through the terms of their employment, a process which is far too vast to be allowed to continue."

Accordingly, the paragraphs containing these allegations were struck from the Statement of Claim.

### **CCRA's NEW POSITION ON PREJUDGMENT INTEREST**

At the 2003 Canadian Tax Foundation Conference, CCRA announced a change with respect to the taxation of prejudgment interest.

CCRA's longstanding administrative position has been not to tax prejudgment interest on wrongful dismissal, personal injury and workers' compensation awards. However, CCRA has announced that the taxation of prejudgment interest will follow the tax treatment of the award.

As a result, prejudgment interest on wrongful dismissal awards will now be treated as taxable, but will remain tax-free on personal injury and workers' compensation awards.

### **LACK OF REASONABLENESS OF RESTRICTIVE COVENANT AGAIN RESULTS IN FINDING OF NON-ENFORCEABILITY**

In what has become a not uncommon scenario, the Court refused to enforce a restrictive covenant contained in the employment contract of a seasonal employee on the grounds of reasonableness, or in this case, the lack thereof.

The defendants were longtime employees of the plaintiff, a franchisee; however, they were hired annually as temporary employees on seasonal contracts as preparers of income tax filings. At the time of their annual hire in their last year of employment, they executed employment contracts which contained a covenant against competition, and specifically against performing services for customers of the franchise, for a period of two years within the city, or within a 25 mile radius of the city limits. Further, it contained a covenant against solicitation of customers, clients or employees for a two year term.

The defendants thereafter opened a business in direct competition with that of the plaintiff next door to the plaintiff's business. The plaintiff commenced legal proceedings and brought a motion to enforce the covenants.

The Court held that the covenant against competition was too broad in the geographic region affected, duration and the fact that it purported to apply to all clients of the franchise not only of that franchisee, and therefore to persons whom the employees would never have met. Accordingly, the Court held that the covenant was incapable of enforcement.

Further, the Court refused to sever portions of the covenants finding that the legal parts of the covenants were so closely intertwined with the illegal parts that enforcement would tend to subvert the policies underlying the rule of illegality.

The Honourable Mr. Justice Clarke J. held, "this is not an **exceptional** case where the nature of the employment justified a broad restrictive covenant." The covenant against competition would have adequately served the employer's interests and that covenant may have been enforceable; however, the Court held that covenant had not been breached in any event.

The frequency with which the Court refuses to enforce such covenants sends a clear message that employers and their counsel must give consideration to the reasonableness of such covenants or face the likelihood that they will not be enforced by the Court.

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