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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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**Poisoned Atmosphere leads to Constructive Dismissal**

The Ontario Superior Court recently issued a decision in *Colwell v. Cornerstone Properties Inc.* which sets a good example of what employers should NOT do when dealing with their employees.

The Plaintiff Colleen Colwell was employed by Cornerstone Properties Inc. for over seven years, starting off originally as an assistant to the commercial manager of the Oxbury Mall located in London, Ontario. In 2002, Colwell was promoted to commercial manager. In 2004, Colwell learned for the first time that a secret camera had been installed in the ceiling of her private office and that it had been there for at least one year. Colwell had the camera removed immediately but the shock of learning that she had been secretly videotaped for over a year by her employer caused her considerable stress which necessitated medical attention and the need for medically prescribed sedative drugs. After seeking legal advice, Colwell treated the incident as a breach of her employment contract amounting to constructive dismissal. Colwell terminated her employment and immediately commenced an action against her employer for constructive dismissal.

In assessing the merits of Colwell's claims, the Court found that Colwell's contract of employment contained an implied term that each party would treat the other in good faith and fairly and that the installation of a secret camera breach this implied term. The Court also found that the employer's conduct and inability to provide a rational explanation for the installation of the camera created a poisoned atmosphere that gave rise to a constructive dismissal. The Court further found that Colwell's duty to mitigate her losses did not obligate Colwell to return to work for her employer while she looked for another job. In the result, the Court awarded Colwell seven months pay as notice for her constructive dismissal, but refused to award any aggravated and/or punitive damages, finding that the employer's conduct was not "sufficiently egregious so as to warrant punitive damages."

The employer's behaviour which gave rise to Colwell's claim for constructive dismissal in this case would also likely meet the definition of workplace harassment set out in the new amendments to the *Occupational Health and Safety Act* ("OHSA") which are set out in Bill 168 and scheduled to come into force on June 15, 2010. Generally speaking, these changes to OHSA focus on workplace

harassment and workplace violence and an employer's obligations to put policies in place to prevent and deal with both. It is important that all employers are aware of these significant legislative changes that affect all workplaces. Failure to comply with the legislative changes to OHSAA set out in Bill 168 could result in serious fines and penalties for an employer that are issued by the Ministry of Labour in addition to any wrongful or constructive dismissal claims made by individual employees that are decided by the courts.

*Colwell v. Cornerstone Properties Inc.* 2008 CanLII 66139 (ON S.C.)

### **A Conflict of Interest Amounts to Termination for Cause**

After seven years of unblemished service as a Director of Sales and Marketing for an accounting software company, Max Corso was terminated for cause by his employer. In the three years leading up to the termination Corso secretly worked on the development of a software product that would allow a company to pay its accounts payable online instead of using cheques. Cheques were a significant part of the employer's business. Corso enlisted the help of a junior colleague, who he repeatedly and falsely assured that the project was properly disclosed to the employer. Management ultimately learned of Corso's product initiative and launched an internal investigation.

Corso initially denied any involvement, but eventually admitted to his role in the development of the project once he learned that his junior colleague had provided full details to management. He asserted that he was under no obligation to disclose the project because he pursued it outside of work.

The Court found that Corso's employment for cause was justified. Corso deliberately engaged in a clandestine plan to develop a product that was competitive with his employer's business. The employer had a conflict of interest policy, which Corso was aware of. He not only breached the conflict of interest policy, but co-opted a junior colleague whose assistance was necessary to the venture, and induced him to breach his duties to the employer. In addition, Corso's conduct amounted to a breach of the implied duty of loyalty and good faith owed to his employer, recognized at common law. The company's conclusion that Corso could not be trusted was reasonable, and it was entitled to terminate Corso's employment without notice or pay in lieu of reasonable notice.

*Corso v. NEBS Business Products Ltd* (2009) 176 A.C.W.S. (3d) 146 (Ont. S.C.J.)

### **Are Reduced Big Bank Bonuses Considered an Inducement to Resign?**

Some employees at big banks have seen their bonuses shrink in the last few years as a result of the mortgage crisis and/or the current era of controversy and scrutiny of big bank bonuses in the U.S. *Mathieson v Scotia Capital Inc.* is a prime example of the effects of reductions in bonuses on employees in Ontario.

In *Mathieson*, a 58 year old investment banker was terminated from his senior position as Industry Head for Forest Products after over 30 years of service. Although he earned a significant salary, as with most investment bankers, Mr. Mathieson's compensation was largely made up of discretionary year-end bonuses. For example, in 2005 Mathieson's salary was \$140,000 and his bonus was \$1.25 million. Over the previous five years his bonuses fluctuated from a low of \$500,000 up to \$1.1 million. Give the previous bonuses, Mathieson's 2006 bonus of \$360,000 caused significant concern. Mathieson repeatedly grieved his bonus payment to his superiors to a point where his employer

eventually terminated his employment providing him with 24 months of salary continuance, but no bonus payments over that period. Mathieson claimed that his 2006 bonus was exceptionally low due to his group's poor overall performance and was a product of bad faith which was meant to induce him to resign.

Even though Scotia's bonus policy was discretionary, the court confirmed that it is an implied term of the employment contract that there must be a fair and reasonable process in determining discretionary bonuses. After hearing evidence of Scotia's financial performance, Mathieson's group's poor financial performance in 2006, and the method and criteria of determining bonuses, the court held that the 2006 bonus was determined on a reasonable basis. Although Scotia gave greater bonuses to those employees it could not afford to lose, and lesser bonuses to those who it could afford to lose via resignation, the court found that Scotia did not set Mathieson's low bonus as an inducement to resign. The court set a notice period of 24 months and, based on previous years' bonuses and applying a discount for Mathieson's performance and the poor economic climate post 2006, set his bonus entitlement to \$460,000 per year over the notice period.

The court did not specifically discuss "constructive dismissal" in its decision, but it did hold that so long as the bonus is reasonably determined in accordance with the bonus policy, reductions in bonuses, even exceptional ones, will be upheld given the fluctuating nature of the investment banking industry. This case confirms an employee's entitlement to discretionary bonuses over the notice period. However, without evidence that a bonus determination was made unreasonably given the discretionary bonus policy criteria in effect, an employee will be bound by an employer's discretionary bonus award.

*Mathieson v Scotia Capital Inc.*, [2009] O.J. No. 4879

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