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Litigation Update

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## 1.Reinforcing the Implied Undertaking Rule: SCC

In the recent case of *Juman v. Doucette*, 2008 SCC 8, the court considered the scope of the implied undertaking rule in the context of an application by the appellant to prevent the parties from providing the transcripts of her discovery to the police and a cross-application by the Crown to vary the undertaking to permit access to those transcripts by the authorities. The court allowed the appeal, restoring the lower court's refusal to vary the undertaking. The decision contains a detailed discussion of the purpose and effect of the implied undertaking rule and also comments on the circumstances in which variation of the rule might be appropriate. Further commentary on the decision can be found in the article *SCC Reiterates Discovery Protections* by Robert Todd, published in the March 17, 2008 issue of *Law Times*.

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## 2. Reviewing the Standards of Review: SCC

The Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 considered the dismissal of a public service employee with contractual employment and found that:

> The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

The court in reaching its decision also addressed the standards of review of administrative decisions and determined that there are really only two standards - correctness and reasonableness - and then described how these are to be applied. The March 21, 2008 article *SCC overhauls judicial review* by Cristin Schmitz, published in *The Lawyers Weekly* includes comments from counsel on the case.

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## 3. Withdrawal of Irrevocable Offer to Settle: ON C.A.

The Ontario Court of Appeal in *363066 Ontario Ltd. v. Gullo*, 2007 ONCA 785 (CanLII) considered the application of Ontario's Rule 49.04(1) (which is identical to Manitoba's Queen's Bench Rule 49.04(1)) and found that the Rule is to be plainly construed, such that "... an offer to settle may be withdrawn at any time before acceptance provided that written notice of the

withdrawal is served." The court determined that even an irrevocable offer to settle could be withdrawn pursuant to this Rule.

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**4. Jurisdiction to Consider Workplace Harassment Claims: MB C.A.**

In *Giesbrecht v. McNeilly et al.*, 2008 MBCA 22 (CanLII), the court considered whether the appellant's claim should be litigated through the court or determined by a labour arbitrator pursuant to the provisions of the collective agreement. The court found that it did not have jurisdiction, holding that:

> In summary, the collective agreement provides the necessary scope to found a grievance for the complaints of the appellant. Thus, having in mind the essential nature of the dispute and the ambit of the collective agreement, I conclude that the dispute arises "expressly or inferentially" out of the agreement and, so long as the appellant would have, under that agreement, an effective remedy, the court has no jurisdiction to consider his claim.

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**5. Motions Brief Reminder**

The Court of Queen's Bench posted a Notice on February 29, 2008 reminding counsel to comply with the provisions of Queen's Bench Rule 37.08 in filing briefs on contested motions.

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