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In [*Robertson v. Manitoba Keewatinowee Okimakanak Inc.*](#), 2011 MBCA 4, the Court of Appeal upholds the motion judge's ruling striking a statement of claim seeking damages from an employer for a workplace related sexual assault. The assault (involving co-workers in a supervisor/subordinate relationship) took place in non-work premises and outside of work hours. The employer terminated the co-defendant's employment following an independent investigation of the incident. The court rejects the plaintiff's arguments that the statement of claim disclosed a reasonable cause of action against the employer based on vicarious liability, negligence or breach of fiduciary duty. The court summarizes the test for vicarious liability at para. 36 and concludes that "to find vicarious liability, one must find material or significant facts or circumstances that relate to the employment, otherwise the employer becomes an involuntary insurer." (para. 44) In this case, the employment provided only a bare opportunity to commit the tort, and did not materially enhance the risk of a sexual assault. On the issue of fiduciary duty, the court found that there is nothing inherent in the employment relationship that makes it a fiduciary relationship. Since the employer had not undertaken to act in the plaintiff's best interests, and there were no other facts differentiating their relationship from an ordinary employment relationship, the claim must fail.

The court also considers the side issue under Rule 25.06 of what constitutes a material fact (as opposed to evidence) and what constitutes a conclusion of law. (paras. 20-25)

No Appeal From Refusal to Reinstate: MBCA

The court quashed a disbarred lawyer's appeal from a Discipline Committee hearing panel decision refusing to reinstate him as a practising lawyer in [*Gutkin v. Law Society of Manitoba*](#), 2011 MBCA 2. The court found it had no jurisdiction to entertain such an appeal under *The Legal Profession Act* and no inherent power to create a right of appeal.

Extension for Late Filers Denied: MBQB

In [Gray v. Great-West Lifeco Inc.](#), 2011 MBQB 13 the court declined to make an order permitting late filed claims to be considered for entitlement to benefits pursuant to a settlement agreement and approval order in a class action involving the rights of shareholders on an acquisition. The late filers were class member shareholders who had failed, for various reasons, to meet the deadline set out in the agreement. The court found that

once settlement was reached and the parties concluded the Settlement Agreement, no provision in the Settlement Agreement and the Approval Order should be changed unless all parties agree or, if for some reason, a provision is invalid. It was inevitable that the deadline that was agreed upon for the filing of claims would result in unfairness to some claimants. But that does not mean that the deadline is invalid. (para. 42)

The court emphasized the fact that the parties negotiated the agreement with full knowledge that potential claimants might lose their rights and that concessions were likely made to facilitate the setting of an agreeable deadline.

SCC Refuses Leave in Franchisee Class Action

Quizno's franchisees and other potential class action participants will be pleased with the Supreme Court of Canada's refusal to grant leave to appeal in [Quizno's Canada Restaurant Corporation et al. v. 2038724 Ontario Ltd. et al.](#) 2011 CanLII 4632 (S.C.C.). Quizno's was appealing from the Court of Appeal [decision](#) refusing to stay the conditional certification of the class action. Quizno's franchisees claim damages under the *Competition Act* for price gouging on food and restaurant supplies. These articles discuss the implications of the case:

- [Lunchtime Price Gouging: A Possible Sandwich Conspiracy? Ont. CA Upholds Class Certification in Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.](#), posted October 22, 2010 on The Court;
- [Class Actions and the Competition Act - Will the SCC Take a Bite Out of Quizno's?](#), posted February 2, 2011 on Slaw; and
- [SCC doesn't bite on Quizno's leave appeal](#), posted February 3, 2011 on Legal Feeds.

Recent Publications

These publications may be of interest to litigators:

- [Labour and Employment Law Perspective](#) - this February 2011 CBA section newsletter focuses on progressive discipline. It contains articles on adequate warnings, compensation in lieu of reinstatement, dismissal for incompetence without warning, and implementing effective discipline.
- [Possibilities](#) - is the January 2011 CBA National Alternative Dispute Resolution section newsletter. It contains an article reviewing the new UNCITRAL arbitration rules and a chart summarizing the ADR processes in the court systems in each province.

Upcoming Continuing Professional Development Programs: LSM

Register soon for these upcoming CPD programs offered by the Law Society:

- [Accommodation in the Workplace](#) - Presenters will examine such current issues as family/marital status, gender identity and disability in this dynamic area of law. The program will take place May 17, 2011, from 1:00 to 4:00 p.m. at the Law Society classroom.
- [Time Mastery for Support Staff](#) and [Time Mastery for Lawyers](#) - Don't miss this opportunity to learn how to increase the organization and efficiency of your office and improve the job satisfaction of you and your employees. Frank Sanitate has taught this popular program since 1977 and receives enthusiastic reviews. Register by March 31, 2011 to take advantage of the early bird discount.

Online Education: CBA

The CBA [Skilled Lawyer Series - Litigation Stream](#) is presenting two online programs for litigators in March:

- [Excelling at Motion Argument](#) on March 1, 2011, will teach the do's and don'ts of motion planning, strategy and argument.
- [Evidence and Objections at Trial](#) on March 23, 2011, will cover the proper grounds for objection and how to effectively argue and respond to them.

Both programs start at 11:00 a.m. and run until 12:30 p.m.

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