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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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## **PENDING CHANGES TO LIMITATIONS ACT WILL IMPACT EMPLOYMENT LAW**

On December 9, 2002, Bill 213, which contains "Schedule B - Limitations Act, 2002" (the "Act") received Royal Assent and is unofficially scheduled to come into force January 1, 2004. In order to prepare for the sweeping changes in the Act, intimate knowledge of its contents will be essential. (It can be reviewed at <http://www.canlii.org/on/sta/cson/20030205/s.o.2002c.24sch.b/whole.html>)

### **New General Limitation Period**

The Act provides for a general limitation period of two years from the date of discovery of a claim (section 4). This is the new limitation period which will apply to claims for torts, wrongful dismissal, breach of contract, etc. This change represents a significant reduction from the existing 6 year limitation period.

This general 2 year limitation period replaces the 6 year period under current legislation, and also the limitation periods found in numerous individual statutes and preserves other limitation periods in the statutes listed in the schedules at the end of the Act (none of which are relevant for our purposes). This will simplify to a large extent the search for applicable limitation periods.

### **Transition Provisions**

Following proclamation, and during transition, claims discovered prior to proclamation which were subject to the 6 year limitation period, will still be subject to that limitation period. Those discovered after proclamation will be subject to the general 2 year limitation period (section 24).

### **The Role of "Discovery"**

The other significant change to the calculation of the limitation period, is that the general limitation period is based upon the concept of "discovery" formerly only embodied in the caselaw.

Discovery is presumed to take place on the day the act or omission on which the claim took place, unless the contrary is proven (section 5(2)).

The Act deems a claim to have been discovered on the earlier of:

5(1)(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and,

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim, first ought to have known of the matters referred to in (a) (section 5).

In employment situations, discoverability is rarely a factor. However, in cases of breach of contract, such as violation of a non-competition agreement, clearly discoverability will play a role. Accordingly, while in ordinary circumstances of employment matters, counsel will be dealing with a two year limitation period from the time the act or omission took place; however, there will be occasion to consider the portions of the Act respecting discoverability.

### **Knowledge of Agent Imputed to Principal**

Further, the Act provides special rules respecting the commencement of the limitation period in a principal-agent relationship. Where the agent had a duty to communicate knowledge of the matters constituting discovery of a claim, the principal is deemed to have that knowledge on the earlier of (1) the day the agent gained the knowledge, or (2) the day the principal first knew or ought to have known of the matters constituting discovery of the claim (section 12).

While there is no definition of the principal-agent relationship, it is not too far a stretch to think that it would apply to knowledge of a claim by an employee being imputed to the employer and triggering the running of the limitation period for the employer's claim. This will therefore be a consideration for counsel in determining the commencement of the limitation period. It may not be when the President discovered the claim, but rather, when one of the employees did.

### **Suspension During Attempts at Resolution**

The Act makes provision for a suspension of the limitation period where the parties are attempting to resolve the matter. It provides that if a person with a claim, and the person against whom the claim is made, agree to have an independent third party resolve the claim, or assist them in resolving the claim, the limitation period does not run from the date the agreement is made until the date the claim is resolved, the date the attempted resolution process is terminated, or the date a party terminates or withdraws from the resolution process (section 11).

It is important to note that the wording of this provision requires that an independent third party be involved in the process. There is no provision for such suspension where the parties, with or without counsel, attempt to resolve the matter, or through the use of an "in-house" dispute resolution process by an employer, such as the Human Resource Manager. The involvement of a third party is required. Further, it is not possible to agree that the limitation period does not apply (section 22).

### **Ultimate Limitation Period**

The Act also establishes an ultimate limitation period of 15 years, independent of discoverability, commencing on the day following the act or omission on which the claim is based.

There are a few exceptions, notably for our purposes, where the person against whom the claim is made willfully conceals:

- 1) the fact that the injury, loss or damage has occurred;
- 2) that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or,
- 3) willfully misleads the person with the claim as to the appropriateness of proceeding as a means of remedying the injury, loss or damage.

This may apply in circumstances such as where an employer has an employee execute a release in a dismissal context, advising the employee incorrectly as to the employee's entitlements a pattern which has received recent consideration by the Court already in extending limitation periods.

### **Generally**

There are a few exceptions to the application of the Act (sections 2, 16 and 17), and special rules are set out for minors (section 6), those under incapacity (section 7), litigation guardians (sections 8 & 9) and certain instances involving sexual assault (section 10). Further, a set of rules govern the effect of acknowledgments (section 13), and successors (section 12). While none of these matters have any general application to the area of employment, they are however, worth reviewing in order to gain an understanding of the operation of the Act as a whole.

Further, there is a novel development referred to as "Notice of Possible Claim" which a defendant may give to a plaintiff to put them on notice of his/her claim. That Notice may later be relied upon by the defendant in asserting the expiry of a limitation period (section 14).

There are also general rules set forth in sections 18 through 23 of the Act which merit consideration.

We recommend a review of the Act to assess its impact upon your clients, and your business, and that everyone ensure that steps are taken upon proclamation to always correctly diarize limitation periods. The profession may see a number of negligence claims flowing from the Act.