Risk Management, Communication with Clients and Documentation

Special Lecture Series 2007 - Employment Law: From Resume to Pink Slip

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Koskie Minsky LLP

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Article I. Introduction

Section 1.01 Overview

Employment law, like most areas of practice, is a potential minefield for the unwary practitioner. This paper summarizes topics which pose the greatest potential liabilities to practitioners in this area.

Section 1.02 Topics to be Addressed

- 2.01 Limitation periods
- 2.02 Not asking the right questions
  - (a) Is there a collective agreement?
  - (b) Are there any other agreements the client has in some capacity other than as an employee?
  - (c) Do you understand the settlement and the terms of the release?
- 2.03 Failing to advise of potential liabilities
  - (a) Disability policy coverage exposures
  - (b) Impact of Employment Insurance hearings
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- 2.04 Failing to follow instructions
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- 2.05 Lack of expertise
  - (a) Non-competition agreements which are unenforceable
  - (b) Implementation of employment contracts
  - (c) Advising on employment contracts
    - (i) Form over function
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    - (iii) Compliance with Employment Standards
    - (iv) Continuity
  - (d) Drafting releases
  - (e) Structure of Settlements

(i) Repayment of EI Benefits
(ii) Tax Structuring
(iii) Transfer to RSP and RRSP

Each of the foregoing topics is addressed in the context of legislation and common law in the Province of Ontario. The importance of knowing one's client, managing client expectations, dealing with difficult clients and using strategies to protect oneself will be evident throughout.

Article II. Potential Pitfalls in the Area of Employment

Section 2.01 Limitation periods

On December 9, 2002, Bill 213, which contained "Schedule B – Limitations Act, 2002" received Royal Assent. It came into force January 1, 2004[1]. The most significant impact of the **Limitations Act, 2002** was to implement a general limitation period effective two years from the date of discovery of a claim.[2]

This two year limitation period replaced the former six year limitation period. The *Limitations Act* also preserved limitation periods set out in certain other individual statutes.

Claims discovered after January 1, 2004 are subject to the general two year limitation period[3] which runs from the date of discoverability of the claim. Absent evidence to the contrary, discoverability is presumed to take place on the day of the act or omission which forms the basis of the claim.[4]

In employment situations discoverability is rarely a factor, It will, however, play a role in circumstances such as discovery of breaches of restrictive covenants and other breaches of contracts or settlement agreements such as the obligation to report that alternate employment has been secured.

There is now an ultimate limitation period of fifteen years, independent of discoverability, commencing on the day following the act or omission on which the claim is based. There are exceptions. Few have application for employment considerations, except perhaps willful concealment (such as in the case of a breach of contract or fiduciary duty by an employee).[5]

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[1] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the " *Limitations Act*")

[2] *ibid*, section 4.

[3] *ibid*, section 24.

[4] *ibid*, section 5(2).

[5] *ibid,* section 15(4)(c) provides:

The *Limitations Act* does not operate to extend the time for filing of **Human Rights Code**[6] complaints which remains six months. This six month limitation is not a true "limitation period" as there remains discretion to deal with the complaint; instead, the passage of six months is defined as a legitimate ground upon which to base a decision not to deal with the complaint.[7]

The **Employment Standards Act, 2000**[8] (the "*ESA 2000*") contains a two year limitation period respecting complaints thereunder.[9] However, it contains a more important limitation period; after filing a complaint, a complainant has only two weeks within which to withdraw a complaint.[10] Unlike the *Human Rights Code*, the *ESA 2000* does not permit both a civil action and a complaint to proceed in tandem. There is express provision in the *ESA 2000* prohibiting civil proceedings if a complaint has been filed. This is the circumstance even if the amount alleged to be owing is greater than the amount which an employment standards officer is permitted to award under the *ESA 2000*.[11]

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s.15(4) The limitation period established by subsection (2) does not run during any time in which…
(c) The person against whom the claim is made,
(i) willfully conceals from the person with the claim the fact that injury, loss or damage has occurred, 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
(ii) willfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[6] *Human Rights Code*, R.S.O. 1990, c.H.19, as amended.

[7] *ibid*, section 34(1) provides:
34. (1) Where it appears to the Commission that,
(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
(c) the complaint is not within the jurisdiction of the Commission; or
(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
the Commission may, in its discretion, decide to not deal with the complaint.

[8] *Employment Standards Act*, 2000, S.O. 2000, s.41, as amended.

[9] *ibid*, section 96(3) provides:
"A complaint regarding a contravention that occurred more than two years before the day on which the complaint was filed shall be deemed not to have been filed."

[10] *ibid*, section 97(4).

[11] This is an issue which no longer exits in view of the enactment of section 97 of the *ESA 2000.*which provides:
"s.97(1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

Accordingly, when retained to act for an employee, it is important to inquire as to whether the employee has already taken any steps, in particular, the filing of a complaint under the *ESA 2000*. If so, it will be important to quickly asses the claim and discuss with the client, if timely, the desirability of withdrawing the complaint and pursuing the issues by way of a civil proceeding instead.

Phantom Clients

Another potential problem in the area of limitation periods is "phantom clients". They appear in a lawyer's office or telephone with a "quick question". They offer a handful of facts, take some tidbits of information, and disappear. Unless pressed, they may not provide a last name, a contact telephone number, or mailing address before ending the call. Refuse to provide advise to those seeking answers to "quick questions". Not taking time to fully understand the circumstances of the case can easily give rise to problems with the very limited information provided.

Requiring a proper meeting or consultation with all clients will avoid the pitfalls of providing advice with limited knowledge of the facts. Ensure that you have the opportunity to fully explore all relevant facts prior to offering an opinion. Feel free to charge for the consultation which will operate as a further assurance that appropriate time will be given to explore the issues and facts. Do not provide advice of any kind to the "phantom client".

Following the consultation, take the few moments needed to confirm in writing to the potential client that you have not been retained to act and to contact you should any further assistance be required. Limitation period concerns must also be addressed in such a letter.

Section 2.02 Not asking the right questions

What you do not know can hurt you. There are many pieces of information to collect in order to properly assess the client's needs. This section highlights only three such areas of appropriate inquiry by counsel: Is there a collective agreement? Are there any other agreements the client has with a party in some other capacity other than as an employee? Do you understand the settlement and the terms of the release?

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(3) Subsections (1) and (2) apply even if,
(a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or,
(b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this Act.
(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed."
This amount is capped at $10,000 pursuant to section 103(4) of the *ESA 2000*, S.O. 2000, as amended.

(a) Is there a collective agreement?

The Supreme Court of Canada decided in *Weber v. Ontario Hydro*[12] that matters which form the subject matter of collective agreements cannot be litigated by way of civil action; an arbitrator has exclusive jurisdiction to deal with disputes in relation to a collective agreement, subject only to applications to the Court for judicial review.

The Plaintiff, Weber, had commenced legal proceedings in both tort and for breach of his *Charter* rights, resulting from surveillance conducted by his employer while he was in receipt of sick leave benefits payable pursuant to a collective agreement between his union and Ontario Hydro. He had also filed a grievance alleging violations of the collective agreement by these same actions. The issue litigated was the extent to which the Courts had jurisdiction generally and with respect to *Charter* claims, there being no dispute that civil actions based solely on the collective agreement were prevented by the *Labour Relations Act*[13].

The Court considered various models of dealing with the issue: the concurrent model, the overlapping jurisdiction model and the exclusive jurisdiction model. It was the exclusive jurisdiction model which the Court accepted. McLachlin J. writing for the majority framed the issue in the following terms:

> "On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centers on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreements.
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> "In considering the dispute, the decision-maker must attempt to define its 'essential character', to use the phrase of La Forest J.A. in *E.C.W.U. , Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B. C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace, and conversely, not everything that happens on the workplace may arise from the collective agreement: *E.C.W.U.* supra per La Forest J.A. Sometimes the time when the claim originated may be important, as in *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the Court had jurisdiction over

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[12] (1995), 125 D.L.R. (4th) 583.

[13] *Labour Relations Act*, R.S.O. 1990, c.L.2, former s.45(1) now s.48(1) provides:

> 48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable

> contracts pre-dating the collective agreement. See also *Roberts v. Dresser Industries Canada Ltd.* (1990), (sub nom. *Johnson v. Dresser Industries Canada Ltd.)* 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration, or violation of the collective agreement."[14] [emphasis added]

The Supreme Court of Canada concluded that neither the tort claim nor the action for *Charter* claims could stand. Both were found to be precluded by the Ontario *Labour Relations Act*[15] and the terms of the collective agreement.

Claims for wrongful dismissal, bad faith on the part of the union, conspiracy, constructive dismissal and damage to reputation were all referred to by the Supreme Court of Canada as matters outside the jurisdiction of the Courts.[16]

Subsequent to *Weber*, the Court has dismissed workers' civil actions against the lawyers retained by the workers' respective unions to represent the workers at grievance arbitrations. The Court has held that exclusive jurisdiction lay with the appointed tribunals/arbitrators.[17]

However, a unionized employee will not always be disentitled from commencing civil proceedings. The Court has permitted an action against an employee for malicious prosecution in a case where another employee was fired when fraud and criminal charges were laid that were subsequently withdrawn by the Crown[18]; an action against an employer for failure to provide the employee with information necessary in order for the employee to assess whether or not to commence an action against a newspaper for libel[19]; defamation where the complaints were personal and not involving

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[14] *Weber v. Ontario Hydro, supra* note 14, per McLaughlin J. at par. 56 and 57.

[15] i*bid* note 14.

[16] *ibid*, per McLaughlin J. at par. 58.

[17] *Scarponi v. Hadwen* [1997] O.J. No. 804 (Ont.Gen.Div.) per Pitt J. and *French v. Johnston* [1996] O.J. No. 5414 (Ont.Gen.Div.) per. Brockenshire J., aff'd 1997 Carswell Ont 4543 (Ont.C.A.) per. Abella J.A., and *Dwyer v. Cavalluzzo, Hayes, Shilton, McIntryre & Cornish* 2000 Carswell Ont 2299 (Ont. C.A.) aff'd 2001 Carswell Ont 863 (S.C.C.).

[18] *Piko v. Hudson's Bay Company* [1998] O.J. No. 4714 (Ont.C.A.).

[19] *Kotlarz. v. The Attorney General of Canada* [2004] O.J. No. 666 (Ont.S.C.J.) per. Paisley J.

employment issues[20]; and, conflicts arising prior to the existence of the collective agreement[21].

(b) Are there any other agreements the client has in some capacity other than as an employee?

It is important to ask whether the employee is also a shareholder, officer or director of the employer. Shareholders' agreements or corporate bylaws may provide for certain binding rights and obligations of the parties.

The decision of Kiteley J. in *Towers, Perrin, Forster & Crosby Inc. v. Cantin*[22] considered the impact of a non-competition and non-solicitation covenant contained in the corporate by-laws of the employer. The defendant, Cantin, had been with Towers about ten years when she voluntarily left to join KPMG. She was at the time of her departure a shareholder of Towers. The By-Laws of Towers contained both non-solicitation and non-competition covenants which Towers sough to enforce by way of injunction.

When Cantin was made a principal of Towers she was offered the opportunity to purchase shares of common stock. Included in the information provided to her prior to the purchase was a copy of the By-Laws. The covenant not to compete was subsequently amended, with the requisite two-thirds majority vote, to include a covenant restricting a departing principal from engaging, or assisting others to engage other Towers employees, or from competing with Towers for two years.

The Court first considered whether the restriction was "reasonable" as required by the test established in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*[23] Having concluded that it would only restrict competition with clients with whom Cantin had had some professional connection in the period immediately prior to her departure, the restriction was found to be reasonable.[24]

Kiteley J. concluded:

> "I accept that Cantin wanted to become a principal in Towers Perrin and that she understood that if she did, she would be expected to purchase shares and therefore be subject to the covenant in the By-law against competition. Once she became a principal, there was a certain obligation

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[20] *Santamaria v. James* [2003] O.J. No. 472 per Snowie J.

[21] *Johnston v. Dresser Industries Canada Ltd.* 75 O.R. (2d) 609 (Ont.C.A.).; Goudie v. Ottawa (City), [2003] 1 S.C.R. 141.

[22] (1999), 46 O.R. (3d) 80 (Ont.S.C.J.).

[23] [1984] A.C. 535 (U.K. H.L.).

[24] *supra* note 22, at par. 54.

> to acquire the shares when they were offered. But Cantin was not compelled to become a principal…
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> "I find that Cantin voluntarily accepted both the privileges and the obligations entailed in becoming a shareholder which distinguishes this case from most others. In the employee cases, the Court readily assumed that there was an imbalance of bargaining power. Where an imbalance exists, the Court is mindful of the possibility that it leads to oppression and a denial of the right of the employee to exploit the knowledge and skills obtained during employment. In the case of *Ernst & Young v. Stuart, supra*[25] the Court considered the circumstances of the partner and found that an imbalance of bargaining power existed, then judged the reasonableness of the covenant from that perspective. That is not a consideration here. Cantin had been employed at Towers Perrin for seven years when her status changed from employee to principal. Her status as a shareholder was a benefit of her promotion as principal. She chose to acquire shares. In this situation, I find there is no imbalance of bargaining power."[26]

The injunction was granted.

Rights and obligations may similarly arise, in profit sharing, deferred profit sharing, options and pension plan agreements. It is prudent when advising employees concerning their rights in accepting alternate employment, that inquiries are made as to whether there are any other agreements in place between themselves and the employer. Provisions in such agreements may be binding, and affect the parties' rights. They should be examined as carefully as employment contracts when providing advice.

(c) Do you understand the settlement and the terms of the release?

Allegations of improvident settlements pose a potential threat of liability to counsel in many areas of practice.[27]

Be certain, whomever the client, and whatever their level of sophistication, education or grasp of the English language, to take time to explain the business terms of the settlement and to review the release with them. Each paragraph of every document should be individually reviewed and explained in "plain language". The client should

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[25] (1994), 92 B.C.L.R. (2d) 335 (B.C.C.A.).

[26] *supra* note 22, at par. 59 & 60.

[27] See for example: *Ristimaki v. Cooper* [2006] O.J. No. 1559 (Ont. C.A.) (in which advise on settlement of an interim motion was determined to potentially attract liability) and *Rivait v. Monforton* 2005 Carswell Ont 5898 (Ont.S.C.J.).

be encouraged to ask questions throughout the review and be directly asked at the end to confirm that they understand the terms of both the settlement and of the release.

In the event a settlement is reached, which the other party insists is binding, but which a client refuses to complete based upon the client's understanding of the settlement terms, counsel are advised to immediately contact LawPro. Salvage efforts to extricate the client from the settlement can be undertaken to avoid potential exposure to a negligence claim. Success of course depends upon the individual facts of the case.[28] Failing to report such an event can lead to disastrous results for counsel and risks the denial of coverage by LawPro.[29]

Section 2.03 Failing to advise of potential liabilities

Exposure for the lawyer can flow from a failure to recognize potential liabilities to the client and advise accordingly. Some are obvious. Terminate without reasonable notice or incorrectly assessing whether "cause" exists, and become potentially liable for payment of an amount equivalent to the employee's entitlements at common law. Others however, are not so obvious. There can be potential exposure for disability payments of the employee during the notice period, termination of health and dental benefits; or, other employment benefits of value to the employee. Further, exposure can arise from incorrect advice respecting participation in hearings at the Employment Insurance Tribunal. These issues require counsel's attention in order to adequately advise clients of the potential risks.

(a) Disability policy coverage exposures

Advising on issues concerning employee disability is always a task to be undertaken with meticulous attention to detail.

The *ESA 2000* requires that benefits be maintained during the statutory notice period.[30] This requirement is typically mirrored in the group benefit packages provided by third party insurers with short term and long term disability coverage terminating at the end of any statutory notice period. Most disability policies do not permit the extension of coverage beyond the end of the statutory notice period. This creates an issue respecting the treatment of a claim for this benefit during the common law notice period.

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[28] An example of a recent such success is: *Stauffer v. Kominar and Stauffer* (unreported decision released Feb 28, 2005, docket 02-Bn-5774 (Ont.S.C.J.) in which the client refusing settlement was found to have properly consented to it understanding her case was weak greatly diminished the chance of a later successful action against her counsel.

[29] The case of *Zhuppa v. Porporino*, [2006] O.J. NO. 2016 (Ont.C.A.) lead to disastrous finding of fact and had not been reported to LawPro by the time the decision was released by the court of appeal upholding the settlement.

[30] S.O. 2000 c. 41, ss. 60(1)(c) & 61(1)(b).

However, the stakes were raised recently by the Court of Appeal decision in *Egan v. Alcatel Canada Inc.*[31] This case dealt with liability of an employer for disability of the employee during the common-law notice period.

The issue of liability of the employer for disability after the expiry of the statutory period but prior to expiry of the common law notice period had not previously been directly addressed by the Court. Previous findings had been of an absence of liability where the employer could not have provided working notice instead of payment in lieu of notice as the place of employment closed; therefore, the employee would not have had disability coverage at the date of disability in any event.[32] The Court had historically found an employer liable for disability benefits where the employer was also the insurer on the basis that the policy, which stated that the benefits were cancelled "upon termination", should be interpreted to mean, lawful termination (i.e. with appropriate notice)[33].

However, in *Egan v. Alcatel* the Court did not consider whether the employee could have been provided with working notice as opposed to payment in lieu of notice; but noted that Alcatel itself determined when coverage was terminated. Labrosse J.A., on behalf of the Court, wrote:

> "The policies for both STD and LTD benefits provided that Alcatel and not the insurer "determines" when the coverage is terminated. The trial judge held that given that Ms. Egan's period of disability originated within the notice period awarded and that she was denied disability benefits during this time because Alcatel wrongfully discontinued her coverage prior to the onset of disability, Alcatel is liable for any resulting loss. I agree with the trial judge. Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable. Ms. Egan was entitled to the continuation of all forms of compensation, including employee benefits, during the reasonable notice period." [emphasis added][34]

A failure to continue disability coverage is a violation of the obligation to provide continuation of all forms of compensation during the common law notice period.

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[31] (2006), 47 C.C.E.L. (3d) 87 (Ont.C.A.).

[32] *Pioro v. Calian Technology Services Ltd.* (2000), 48 O.R. (3d) 275 (Ont.C.A.) and *Held v. Stelco Inc.* (July 13, 2005 decision of Claims Officer of the Ontario Superior Court of Justice, (Commercial List) appointed by Farley J. under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c.C-36, as amended.

[33] Prince v. T. Eaton co. (1992), 41 C.C.E.L. 72 (B.C.C.A.).

[34] *Ibid* note 31 at para. 26.

Accordingly, there could be liability to employers for not purchasing replacement disability insurance during the common law notice period even where their ordinary group policy cannot be extended.

Employers must be cautioned about the risks associated with termination of disability and other coverage. Working notice should be discussed as an alternative to mitigate this risk.

(b) Impact of Employment Insurance hearings

Another area for a potential error concerns participation in hearings before the Employment Insurance Tribunal. This unfortunately is not always something discussed and therefore occasionally clients will participate without counsel's knowledge. A hearing to determine whether the employee was terminated without cause to be entitled to Employment Insurance benefits may be binding in a civil action.

As a precondition to the application of the doctrine of issue estoppel, the Court must consider whether the prior decision can be considered to have been a "judicial" decision. This requires a review of whether the decision maker was an institution that is capable of receiving and exercising adjudicative authority; whether the decision maker was to act in a judicial manner; and whether the decision was in fact made in a judicial manner.[35]

The Court of Appeal considered the application of issue estoppel in relation to the findings of an Employment Standards officer[36] in the case of *Rasanen v. Rosemount Instruments Ltd.*[37] Abella J.A. writing the decision for the majority adopted the following description of the test for determination of issue estoppel:

> "1) that the same question has been decided; 2) that the judicial decision which is said to create the estoppel was final; and, 3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."[38]

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[35] *Rasanen v. Rosemount Instruments Ltd.* (1993) 17 OR (3d) 267 (Ont.C.A.) at par. 35.

[36] Refer also to note 11 above.

[37] s*upra note 35*

[38] *ibid*, para. 28.adopting the reasoning of the House of Lords in *Carl-Zeis-Stiftung v. Rayner & Keeler Ltd. (No.2),* [1967] 1A.C. 853 (H.L)., also adopted by the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) at p. 255 and most recently in *Danyluk v. Ainesworth Technologies Inc.* [2001] 2 S.C.R. 460 at par. 25.

However, even if these three criteria are met, the Court maintains discretion as to whether or not issue estoppel ought to be applied.[39] The Supreme Court listed factors for consideration in the exercise of discretion in the application of issue estoppel:

(a) the wording of the statute from which the power to issue the Order comes;
(b) the purpose of the legislation;
(c) the availability of an appeal;
(d) the nature of the collateral attack and taking into account the expertise and *raison d'être* of the tribunal;
(e) the penalty for failing to comply with the Order;
(f) procedural safeguards;
(g) circumstances giving rise to the prior proceeding; and
(h) potential for injustice.[40]

The Court has applied the doctrine of issue estoppel in relation to claims for termination pay under the *ESA* in respect of future civil claims,[41] as well claims for Employment Insurance benefits made under the *Employment Insurance Act*[42] [43].

Whether or not the doctrine of issue estoppel will be applied turns upon whether or not the three requirements referred to above are met. In the context of Employment Insurance benefits, the Court considers whether the issue was the same issue, and whether or not the employer made itself a party to that proceeding.

If the employer did not participate in the Employment Insurance hearing it cannot be said to be a party, and will not be bound respecting whether or not the employee's termination was justified in a later civil proceeding (it also cannot take advantage of a favorable result[44]).

It has been noted by the Court of Appeal in *Minott v. O'Shanter Development Co.* that employers do not typically participate on applications for Employment Insurance benefits or appeals therefrom, because the stakes are small and they do not have any direct financial interest in the outcome.[45] It was further noted by the Supreme Court of Canada in *Danyluk v. Ainesworth Technologies Inc.* that it is unlikely that the

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[39] *Danyluk v. Ainesworth Technologies Int.* [2001] 2 S.C.R. 460 at par. 62.

[40] *ibid* 39, par. 62-80.

[41] *supra* note 39.

[42] S.C. 1996, c.23.

[43] *inter alia: Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 21(Ont.C.A.) & more recently in: *Korenberg v. Global Wood Concepts Ltd.* (2006), C.L.L.C. 210-017 (Ont.S.C.J.) per. Young J.

[44] *Ibid* at par 48.

[45] *Ibid* at par 47

legislature intended a summary procedure for smaller claims to become a barrier to a closer consideration of more substantial claims.[46]

This issue was again recently considered by the Court in *Korenberg v. Global Wood Concepts Ltd.*[47] The employee's initial application for benefits was denied; he successfully appealed to the board of referees. The employer then appealed to the Umpire who dismissed the appeal. The facts alleged to constitute cause in the civil action were the same ones raised and rejected by the Umpire. The employer, appealed and thus became a party.

The Court found that the three constituent elements of issue estoppel were present and went on to consider the list of factors set out by Binnie J.A. in the *Danyluk* case to determine whether or not it was an appropriate situation for the Court to decline to apply the issue estoppel doctrine.[48]

The Court recognized that the employment insurance regime is not identical to that of a civil action, and that the scope of compensation and amounts in issue may be greater in a civil action. However, the legal and factual issues at stake in particular cases may be sufficiently similar that the doctrine of issue estoppel is appropriately applied in the interests of achieving finality and ensuring that justice is done. The Court commented in relation to the first consideration of the wording of the statue and the purpose of the legislative scheme:

> "The mere fact that the purposes are not identical does not necessarily mean that the discretion not to apply issue estoppel should be applied. In this case, the fact that the legal and factual issues are so similar is a factor tending in favor of its application."[49]

In relation to the consideration of the existence of availability of an appeal, the Court noted that there was an appeal both available and exercised, clearly a factor supporting the application of issue estoppel. There were held to be appropriate safeguards available to the parties within the administrative process, notwithstanding the absence of the right of cross-examination. In order to avoid the impact of issue estoppel it would have been "unjust to give effect to that finding in subsequent civil litigation".[50] The expertise of the decision-maker was similarly not found to be lacking.[51]

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[46] *supra* note *39 at* par.78.

[47] 2006 C.L.L.C. 210-017 (Ont.S.C.J.) per Young J.

[48] i*bid* par. 15.

[49] i*bid* par. 19.

[50] *ibid*. par. 24.

The Court then considered the final matter of potential injustice which is to be assessed as stated by Mr. Justice Binnie in *Danyluk*, as being a consideration of the entirety of the circumstances and considering whether application of the doctrine of issue estoppel would work an injustice. In that regard the Court held:

> "One of the policy concerns about the application of the doctrine of issue estoppel is that it could encourage employers to become involved in and fight the award of EI, thus lengthening the process and undermining the purpose of the legislation. While this is indeed a concern, this present case is one in which the defendant chose to be involved in the hearing to begin with. It is not a situation where the defendant had no involvement at all with the EI process and then finds itself bound by that decision. In *Danyluk,* as Rosenberg J.A. had noted in the Court of Appeal, the appellant plaintiff had received neither notice of the defendant's allegation nor an opportunity to respond. In this case, the defendant had both. To allow it do so would allow it to relitigate a matter that it had participated in and lost at both the Board and on appeal, and would be unjust to the plaintiff."[52]

The Court concluded there to be no reason for it to exercise its discretion in refusing to apply the issue estoppel where the employer had made itself a party to the proceeding.

As should be apparent, there is certainly risk to parties to participate in determinations such as those in the nature of employment insurance entitlements. Failure to advise of this could be a source of liability to counsel for either employers or employees.

(c) Acceptance of New Employment

When contacted by the employee client and advised that a new job offer has been received or a job accepted, it is important to take a moment and consider whether this employee is contractually bound in any manner which impedes the employee's ability to accept this position. If bound by a non-competition or non-solicitation covenant it will be important to address with the client the potential consequences of any breach. It will be necessary to fully consider and research whether or not the covenant may be binding. Failure to advise the client of consequences of acceptance of such a position could lead to liability for the lawyer.

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[51] *ibid*. par. 27.

[52] *ibid* par. 31.

Section 2.04 Failing to follow instructions

This is the area reported by LawPro to be the source of the greatest percentage of claims.[53] There can be many facets to these problems: communications, difficult clients, creation of unrealistic expectations. Each of these issues in the solicitor's negligence context can be expressed by the client as a failure by their counsel to follow instructions.

(a) The importance of clear communication throughout

The means of communication to be used with the client can be a more unique problem in the area of employment law. While a client may provide you with telephone numbers, email addresses and fax numbers, it will be important to always expressly confirm where the person may be contacted and whether messages can be left. Has the employee told their spouse of their dismissal? Is it acceptable to send communications to the employer at its regular fax number, or may they be viewed by people who ought not to be aware of the communications? Employment matters are often very confidential. Terminations or breakdowns in the employer/employee relationship, may not yet have progressed to termination. Who knows what, and when, can be of the utmost importance. A leak of information can have potentially devastating effects.

It is therefore important to immediately establish the permissible means of communication. This will often lead clients to establish confidential communication methods, such as new email addresses, cellular telephone numbers or voice message capabilities.

Where the client is a corporation, it will be important to know with whom you are to communicate, report to and take instruction from. Where the delegate is someone other than the president, a signed retainer containing a direction respecting communications and directions is advisable.

It is also important when embarking upon a new solicitor client relationship to establish expectations with the client and explain how the communication will impact efficiency and even fees. Confirming to the client such important information should be in writing at the time of delivery of the formal retainer letter.

Many lawyers advise their clients of the hours during which they are most likely to be reached without leaving a message; the usual time during which messages left are returned, provide their assistant's contact information and tell the client the types of inquiries which can be made directly of their assistant.

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[53] "The most common malpractice error: Failure to follow client's instructions", LAWPRO Magazine "2003 Insurance Program", October 2002 reported as forming 22% of all claims handled by LawPro since mid-1982; and "Failure to know or apply the law – Only 6 per cent of malpractice errors", LAWPRO Magazine "Helping Your Practice Soar", Summer 2003.

Rule 2.02(1)(d) of the *Rules of Professional Conduct* requires that the lawyer communicate at all stages in a "timely and effective manner that is appropriate to the age and abilities of the client." This is the bare minimum. Timely communication will ensure the client does not feel neglected, which is often a significant source of complaint.

In addition to the recommended practice of ensuring that all advice is confirmed to the client in writing (be it by letter, fax or email), it is equally important to keep notes of all conversations with the client, nature of the discussions, advice provided and client instructions. Paper the file throughout the retainer with notes and confirming letters. For example, was the client advised that they had an obligation to mitigate their damages at the first meeting? There should be a note, letter or memorandum of that meeting in case it should ever become an issue.

The use of clear and plain language can be invaluable to ensuring clear communication with the client.

In furtherance of clear communication, the client must both be, and feel to be, heard throughout. The lawyer should be certain to take time to discuss the case with the client, and the client should be able to contact their lawyer and speak with the lawyer within a reasonable period of time. The client should be kept informed of the process and progress of their case and be an active participant. Lawyers are to take instruction from their clients after all and help the client understand their choices, not make the choices for them.[54]

(b) Getting Paid

It is easy to see how timely, effective client communication will affect being paid. The best way to communicate with the client respecting fees is to set the expectations out at the outset and in writing, and bill frequently and with sufficient detail that the client understands and appreciates what the bill relates to.

(c) Strategies for dealing with difficult clients

The identification of a "difficult client" is often possible from the first meeting It is important that the lawyer and client be able to work well together and trust each other. If it appears from the beginning that the potential client may be a "difficult" one, it is important to take time to consider whether or not to accept the client retainer. This is a luxury which is available at the outset but may not be later. This is referred to as "client screening" or "case screening"[55]. Instincts should often not be ignored.

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[54] "Dealing with difficult clients", LAWPRO Magazine "Taking the Guesswork out of Client Communications", Spring 2004, taking from a full text paper of article by Carole Curtis, "Dealing with the difficult client".

"Difficult" clients are more likely to not pay the lawyer, report the lawyer to the Law Society and sue the lawyer for negligence.[56] Therefore, there are good reasons to take time to consider this issue prior to being retained.

If the lawyer decides not to act, this must always be promptly confirmed to the potential client in writing so there can be no misunderstanding as to whether or not the lawyer was retained. Such a letter should: state that counsel is not representing the prospective client; refrain from commenting on the merits of the case, identify generally the fact that time limits might apply to bar recovery; and, return any materials provided by the client during consultation.[57]

If the client proves to be a "difficult" client, Carole Curtis, in an article for LawPro advises:

> "Document everything you possibly can, including telephone calls, voice mail messages and email messages. The verb "document" means "to record in a document; to provide with citations or references to support statements made.[58] Confirm the client's instructions to you in writing, and confirm your instructions to the client in writing. It is also necessary to include, in writing, the possible consequences of various courses of action the client may be contemplating.
>
> "If you deal with this client or their work electronically, save messages and instructions in your usual way as part of the permanent record of the file (which may be electronic or on paper). The difficult client has a way of turning on the lawyer more often and with more damaging consequences than other clients."[59]

If all else fails, get off the file. A lawyer may withdraw representation, provided there will be no serious prejudice as a result of such withdrawal. This arises where there has been a serious loss of confidence between the lawyer and the client or where the client has failed to provide funds on account of disbursements and fees as required by the retainer.[60]

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[55] "Managing the Lawyer/Client relationship", Practice Pro Series, 1998. It contains a checklist as Appendix "A" for such screening.

[56] "Dealing with the Difficult Client", Carole Curtis, Barristers and Solicitors, Toronto, October 2003 at pg. 3.

[57] i*bid*, pg. 6.

[58] Katherine Baber, ed., The Canadian Oxford Dictionary, Toronto: Oxford University Press. 1998 p.409.

[59] "Dealing with difficult clients", *supra* note 56 at pg. 7.

[60] Rule 2.09 of the *Rules of Professional Conduct*, Law Society of Upper Canada

(d) Managing client expectations

The most frequently reported unrealistic expectations of clients are: expectations about service, expectations about time to conclude; expectations about cost; and, expectations about result.[61] Any expectations, once ascertained as unrealistic, should be clarified and corrected by counsel immediately in writing.

Many expectations can be addressed with adequate communication strategies. Clients should also be apprised of the realistic timing of the anticipated process. A frank discussion of fees is necessary to ensure that client expectations are managed adequately.

Lawyers themselves may create early unrealistic expectations about results by referring to cases too liberally; opinions should be kept conservative. Reference to the cases of *Wallace v. United Grain Growers Ltd.*[62] as a source of increased damages, or *Whitten v. Pilot Insurance Co.* [63] and *Keayes v. Honda Canada Inc.*[64] as sources of recovery of punitive damages, should be used cautiously and with appropriate caveats (i.e. dependant upon the discretion of the trial judge and unable to be presently assessed as it will be entirely dependant upon how the evidence comes out at trial). Certainly, under no circumstance should a client be led to believe that they <u>will</u> recover these types of damages. Client expectations should be kept realistic throughout and if such damages are awarded, they should be only a pleasant surprise.

Section 2.05 Lack of expertise

Dabbling is dangerous. There are a plethora of drafting errors which can be made and lead to potentially devastating consequences. It is not enough in the area of employment law to know how to draft contracts or releases. It is necessary to understand the treatment which contractual provisions typically receive by the Court to advise the client that what they believe they are contracting for, will actually be enforceable. This is a significant obstacle in the case of employment contracts because the Courts are willing, in the appropriate case, to find there to be an inequality in bargaining power and therefore consider provisions which are unfair or unduly restrictive as unenforceable.

(a) Non-competition agreements which are unenforceable

Overly-broad and wide-reaching non-competition agreements are frequently encountered. The suggestion that a sales person will be placed in a position in which

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[61] "Dealing with difficult clients", *supra* note 56 at pg. 8.

[62] *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701.

[63] *Whitten v. Pilot Insurance* (2002), 209 D.L.R. (4th) 257 (S.C.C.).

[64] *Keays v. Honda Canada Inc. (2006), 52 C.C.E.L. (3d) 165 (Ont. C.A.).*

they are not entitled to work for any competitor for ten (10) years, will not generally be enforceable. The Court will not enforce contracts which are too broad and unreasonable.[65] If too broad the Court may sever the "illegal" portion of the contract. The Court will not, however, re-write an unduly wide restriction in order to confine it to the proper ambit.[66]

Such covenants are *prima facie* in restraint of trade, contrary to public policy and therefore void.[67] In order to be enforced, it is necessary that they be justifiable as reasonable.[68] Assessing what is reasonable will require counsel to become familiar with the types of classes of employees, the typical restrictions which are sustainable and those which the Courts will decline to enforce. A covenant which is broader in geographic scope, longer in duration, or more restrictive in prescribed activities than can reasonably be justified in the particular circumstances of the case will not be enforced. While a detailed review of the case law in this area is beyond the scope of this paper, the Supreme Court of Canada in *Elsley v. J.G. Collins Insurance Agencies Limited*[69] set out three general requirements in order to consider enforcement which merit inclusion here:

1. where the employer has a legitimate propriety interest entitled to protection;
2. where the duration, breadth of activities and geographic scope of the restraint are not too broad; and,
3. where the covenant does not create a general prohibition against competition.

In general terms, the covenant should be as least restrictive as is necessary to accomplish the legitimate business objectives of the employer. This will require an individualized assessment based upon the nature of the business, the type of position held and the potential harm which the employee is capable of inflicting by virtue of any breach.

(b) Implementation of employment contracts

The requirement of consideration, a first year law school principle, is surprisingly one which is overlooked all too frequently by employer counsel. Employers should be advised of the requirement that consideration be provided. Contracts must be signed prior to the commencement of employment; if they are signed during the course of

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[65] *947535 Ontario Ltd. v. Jex* (2004), 37 B.L.R. (3d) 152 (Ont.S.C.J.).

[66] *ibid* at par. 7-10.

[67] Canadian Encyclopedic Digest, Employment Law (Ontario), IV – Written Employment Contracts, 7 – Restrictive Covenants, (a) – General, sec. 662.

[68] Canadian Encyclopedic Digest, Employment Law (Ontario), IV – Written Employment Contracts, 7 – Restrictive Covenants, (b) – Justification for Restrictive Covenant, sec. 665; and *American Building Maintenance Co. v. Shadley* (1966), 58 D.L.R. (2d) 525 (B.C.C.A.).

[69] [1978] 2 S.C.R. 916 at par. 19.

employment, they must be accompanied by adequate consideration, which is conditional upon execution.[70] Continued employment will not constitute sufficient consideration. The Court of Appeal in *Techform Products Limited v. Wolda*[71] stated:

> "Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowed to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say, "sign or you'll be fired" and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter."[72]

During the existence of an employment contract, some additional sufficient consideration will be required in order to affect a modification or in exchange for the employee's agreement to non-competition or non-solicitation covenants.

(c) Advising on employment contracts

When preparing employment contracts, it is important to consider how such contracts will be utilized and advise accordingly. An employer who intends to hire an "independent contractor" should not expect to make small revisions to the employer's typical employment contract and use that. Similarly, fixed term contracts should not be used sequentially or they may lose their meaning and benefit entirely. Counsel should be fluent in these issues and be certain to communicate with their client respecting these matters as may be appropriate.

(i) Form over function

Counsel should either prepare employment contracts or review and advise on those drafted by others. Consider must be given to whether the form of contract is appropriate (i.e. is an independent contractor contract being used for one who is truly an employee). There will be consequences to the employee's rights particularly on termination if they accept work as an independent contractor. This may require a review of the realities of the relationship to advise as to whether or not a complete redrafting is required. This is not necessarily an easy exercise. There is "no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor."[73] The parties certainly need to be advised

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[70] *Stott v. Merit Investment Corp.* (1988), 48 D.L.R. (4th) 288 (Ont.C.A.).

[71] (2001), 56 O.R. (3d) 1 (Ont.C.A.).

[72] *ibid* at par 26.

[73] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 at par. 47. The Supreme Court of Canada did however offers a framework of factors for consideration:

that irrespective of how they classify the relationship it is subject to review by the Court at a later date, as well as by the Canada Revenue Agency.

(ii) Fixed term contracts

Consideration must also be given to whether or not an agreement is one of a series of employment contracts. Such a series may be deemed to be a hiring of indefinite duration notwithstanding the parties characterization to the contrary.[74] Accordingly, when preparing a fixed term employment contract it will be important to caution against the use of the contract over consecutive terms and to consider also whether the terms are enforceable in the case of an employee working pursuant to a prior fixed term contract.

(iii) Compliance with Employment Standards

It is well know that parties cannot contract out of the minimal standards prescribed and required by the *ESA 2000.*[75] The importance of this should not be overlooked. Contract provisions requiring the employer to only pay two weeks termination pay irrespective of the length of employment, or requiring non-managerial employees to work overtime without pay, for example will not be enforceable. This is further demonstrates how failing to know the substantive law may lead to liability.

(iv) Continuity

Changes in an employee's position at the company can operate to nullify the enforceability of an employment contract.[76] The parties to an employment contract should be advised of this possibility. Consideration must be given to the inclusion of a

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1. The level of control the employer has over the worker's activities;
2. Whether the worker provides his or her own equipment;
3. Whether the worker hires his or her own helpers;
4. The degree of financial risk taken by the worker;
5. The degree of responsibility for investment and management held by the worker; and,
6. The worker's opportunity for profit in the performance of his or her tasks.

[74] *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (Ont.C.A.). and *Congregation Beth-El v. Commission des Relations du Travail and Louise Cote-Desbiolles [2003] Q.J. 20718.*

[75] *supra* note 8, s 5(1) provides:

> "subject to subsection (2) no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.:

see also *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (SCC).

[76] *Wallace v. Toronto-Dominion Bank* (1983), 41 O.R. (2d) 161 (Ont.C.A.).

clause which specifically contemplates a change in positions, even a fundamental one, and provides for the continuity of the contract if that result is desired.

(d) Drafting releases

The "standard" form release is something which many counsel use frequently. But what if the facts necessitate changes which were missed? What if changes are required as a result of changes in the law? What if the employee is only being paid the legislated minimum under the *ESA 2000*?
General principles of drafting should be followed. The release must be clear, unambiguous and written in plain English. The doctrine of *non est factum* applies to the drafting of releases and if ambiguous will be construed against the employer (who is typically the drafter).[77] Releases will not be binding where they are unconscionable, or executed under duress, which is typically the case when a release is required to be signed for an employee to receive minimal statutory severance.[78]

Many "standard" releases should be updated. The Ontario Human Rights Commission released a "Guide to Releases with Respect to Human Rights Complaints."[79] The Guide provides the language which should be included in an employment release also intended to release actual or potential Human Rights Complaints.[80]

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[77] *Abundance Marketing Inc. v. Integrity Marketing Inc.* [2002] O.J. No. 3796 (Ont.S.C.J.), *"Please Release Me: Mistakes to Avoid in Employment Releases"*, Peter Israel and Emily Joyce, 2004, as presented at the LSUC program: "7th Annual Six-Minute Employment Lawyer

[78] *Howell v. Reitmans (Canada) Ltd.*, [2002] N.J. No. 194 (Nfld. & Lab.S.C.).

[79] Ontario Human Rights Commission, May 30, 2006.

[80] The recommended language is:

> "1. The parties agree that they have discussed or otherwise canvassed any and all human rights complaints, concerns, or issues, arising out of or in respect to the employee's employment at Company "A".
>
> "2. The parties agree that this agreement constitutes a full and final settlement of any existing, planned, or possible complaint or complaints against the employer under the *Human Rights Code* up to the date of this agreement, arising out of or in respect to the employee's employment at Company "A".
>
> "3. The parties agree that the employee has received a separate sum in the amount of $X as compensation for settling and resolving the outstanding human rights complaint, concern or issue.
>
> "3a. [Where the employee agrees that there are no human rights issues or concerns, the following can be included instead of paragraphs 2 & 3]: The employee agrees that he or she is aware of his or her rights under the *Human Rights Code*, and confirms that he or she is not asserting such rights or advancing a human rights complaint.
>
> "4. The parties further agree that signing this agreement is not a condition for the employee to first receiving money to which he would otherwise be entitled to by operation of law. Such monies

Even if the recommended language is not used, the Commission may dismiss a complaint when it appears that it has been brought in bad faith.[81] This will require not a simple consideration of whether a prior release was signed, but whether in fact, there was an intention to mislead.[82] Otherwise, the considerations will be whether the employee understood the significance of the release, whether any compensation was paid for the alleged infraction, whether there was duress caused by any economic pressure; and whether the employee was subject to other psychological or emotional pressure.[83]

(e) Structure of Settlements

When discussing settlement of any termination payment, there are also considerations about their payment which require consideration, the failure to do so may result in liability.

(i) Repayment of EI Benefits

If received, Employment Insurance benefits, may trigger repayment obligations. The liability for this repayment potentially lies with the employer if appropriate inquires are not made with Human Resource Development Canada ("HRDC"), and repayment made as required by HRDC. When advising an employer, it is necessary that the issue be expressly addressed. Where the employee has in fact received such benefits, HRDC must be contacted, the particulars of the settlement provided, and the amount of the required repayment determined. This repayment should be when settling the settlement proceeds.

(ii) Tax Structuring

There are few means of reducing the tax which is payable on termination settlements. The Employer is required to withhold taxes on all amounts paid as termination and severance pay under the *ESA 2000* or any other amounts payable in that respect as damages for wrongful dismissal paid as a result of common law entitlements.

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include the separate sum of $X for wages, $Y for statutory severance pay, and $Z for statutory termination pay.

"5.The employee agrees that he [or she] has been given sufficient time and opportunity to obtain independent legal advise before signing this settlement agreement and (a) he [or she] has done so, or (b) he [or she] has freely chosen not to do so."

[81] Section 34(1)(b) of the *Human Rights Code*, R.S.O. 1990, c.H-19, as amended.

[82] Guide to Releases Respecting Human Rights Complaints, Ontario Human Rights Commission, , pg. 2.

[83] *ibid*, pg. 8.

On the one hand, where a lump sum is paid by the employer, it may be classified as "retiring allowance"[84] and subject to flat tax withholdings, specifically:

10% on amounts less than $5,000
20% on amounts greater than $5000 and less than $15,000
30% on amounts great than $15,000

Such classification will only be permitted however if considered by the Minister of National Revenue to be "reasonable". Therefore counsel should be wary against providing bold assurances as to how the payment will be treated by the Minister unless an express opinion on the issue is first sought from the Minister in the context of the case with the provision of all relevant documents forwarded to the Minister for its review.

On the other hand, salary continuance is considered as income from employment and is subject to ordinary withholding rates and subject to all other statutory withholdings such as Canada Pension and Employment Insurance.

Amounts classified as a retiring allowance may be subject to further taxation later and are included as income attributed to the employee in the year received. However, receipt of a retiring allowance makes available transfer options to RSP/RRSP as set out below.

Reimbursement for legal fees is permitted and such amounts are not taxable in the hands of the employee; however, the employee also will not be permitted to then deduct the legal fees itself.

Attribution of monies to other types of damages should be permitted with great caution. Only when the claim or facts support an independent actionable wrong such as personal injury damages, compensation for defamation or so forth) should general damages be included in the settlement of an employment matter. To pay general damages which are reassessed as taxable income unnecessarily exposes the parties to tax liability (the employee for additional income and the employer for failure to withhold).

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[84] "retiring allowance" is defined by s.248(1) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) as:

> "an amount (other than a superannuation or pension benefit) received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv) received:
>
> (a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or
>
> (b) in respect of a loss of an office or employment of a taxpayer, whether or not receive as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,
>
> by the taxpayer or, after the taxpayer's death, by a dependant or relation of the taxpayer or by the legal representative of the taxpayer."

see also Interpretation Bulletin 337R4 Retiring Allowance.

(iii) Transfer to RSP or RRSP

The only means of protecting funds from taxation is for the employee to utilize available contributions in a registered pension plan ("RSP") or a registered retirement saving plan ("RRSP"). Allowable contribution space will be shown on the employee's statement from the prior tax year. Additional contribution room may be available if the employee was employed with the employer prior to 1996. In that case additional contributions are permitted within 60 days of the year in which the money is received as income, as follows:

> (a) $2000 multiplied by the number of years, or partial years, before 1996 which the employee or former employee in respect of whom the payment was made was employed by the employer or person related to the employer; and,
>
> (b) $1,500 multiplied by the number of years, or partial years, before 1989 in respect of which an employer, or a person related to the employer, was making contributions to a registered pension plan or deferred profit sharing plan which has not vested in the employee.[85]

Consideration should be given to these matters and, when appropriate, the client referred to an investment advisor or accountant for determination as to the appropriateness of such a contribution.

Article III. Conclusion

While LawPro can cite but a handful of claims relating to solicitor's negligence in the area of employment law, it should be evident that the area is a potential minefield for the unwary practitioner. There are issues to consider respecting limitation periods, forum selection, participation in tribunal hearings, termination of disability and benefit coverage, not to mention unique client communication issues and a wealth of law to understand in order to draft an enforceable employment contract or non-competition covenant. While this paper touched upon the areas which pose the greatest liability, it is be no means exhaustive. Counsel must keep their eyes and ears open and be wary of dabbling (our disclaimer).

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[85] *Income Tax Act*, s.60(j.1)(A)(B).