

## The existence of concurrent criminal charges does not stop the statutory limitation period from running

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A recent decision of the Ontario Superior Court of Justice will prove to be very useful for employers as it reduces the potential for lingering liability in respect of wrongful dismissal claims. In *Sosnowski v MacEwen Petroleum Inc.* (April 2019), the court dismissed a wrongful dismissal action because it was commenced more than two years after the date of termination. The decision confirms that there must be “exceptional factual circumstances” in order to extend the deadline for commencing a wrongful dismissal action. Emond Harnden’s Porter Heffernan and Joël Rocque successfully argued this point on a motion for summary judgment on behalf of MacEwen Petroleum Inc.

In November 2009, the plaintiff’s employment was terminated for cause after an investigation by the employer concluded that he had engaged in theft and fraud. A subsequent investigation by the Ontario Provincial Police resulted in the laying of charges and, ultimately, a conviction. In November of 2014, the plaintiff successfully appealed the conviction to the Court of Appeal for Ontario and was acquitted of all charges on the basis of errors of law. The plaintiff then commenced an action for wrongful dismissal against his former employer in July of 2015, more than five years after the termination for cause and more than three years after the limitation period had expired.

The Ontario *Limitations Act, 2002* (the “*Act*”) speaks to the timing for civil actions and generally requires a claim to be commenced in court within two years of the date that the claim is “discovered.” The *Act* creates a presumption that a claim is discovered on the day the act or omission occurred. The result is that, generally, a plaintiff would have to commence a civil action for wrongful dismissal within two years of the date of the termination.

There are, however, exceptions to the general rules in the *Act*. For example, in several recent cases involving claims against the police, arising from the same incident in which the state is pursuing criminal proceedings, plaintiffs have been allowed to await the outcome of the criminal proceedings before commencing their civil action even though the general two-year limitation period has expired. These cases are considered to be exceptional and generally involve criminal and civil proceedings that are the “mirror image” of one another.

In *Sosnowski*, the employee argued that this narrow exception should apply to his circumstances. He submitted that the statutory limitation period in the *Act* began to run when the criminal charges against him were resolved (with his acquittal in November of 2014) and, therefore, his wrongful dismissal action was in time, since it was commenced in July of 2015. The employer argued that the statutory limitation period commenced on the date of termination. The plaintiff’s wrongful dismissal action was therefore statute-barred as it was commenced well after the expiry of the two-

year limitation period.

The motion judge's analysis noted the general presumption that the limitation period starts to run on the day the act or omission occurs. Her decision also noted the evidentiary record which showed that the employee had retained counsel on the day of the termination and had discussed his claim of wrongful dismissal with his lawyer. The motion judge concluded that the employee knew or ought to have known of his wrongful dismissal claim on November 9, 2009, the day of his termination.

The decision went on to acknowledge that although there were exceptions to the general two-year limitation period, these exceptions were extremely narrow and turned on the specific facts of the particular case. The mere fact that a case may involve both civil and criminal matters is not sufficient on its own to justify extending the limitation period. In this case, the motion judge was not persuaded that there was anything exceptional or special to justify extending the limitation period. She also rejected the notion that the employee could tactically delay his civil action to await the outcome of the criminal proceedings to better assess his probability of success.

The motion judge ultimately concluded that the employee's claim was discoverable on the date of the termination of employment and that there were no exceptional facts or circumstances that could justify an extension of the general two-year limitation period. The employee's wrongful dismissal claim was found to be statute-barred under the *Act* and, accordingly, was dismissed.

## **In Our View**

The decision in *Sosnowski v MacEwen Petroleum Inc.* is positive in that it confirms the general applicability of the two-year statutory limitation period to wrongful dismissal claims. Special or exceptional circumstances are required in order to extend the limitation period. The mere presence of concurrent criminal proceedings arising out of the termination of employment is not sufficient to automatically extend the two-year period.

For further information please contact [Porter Heffernan](#) at 613-940-2764 or [Joël Rocque](#) at 613-563-7660.