



# SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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## Time is Limited

*The most highly skilled and knowledgeable lawyer can be of no assistance to the client who has not called him or her until after the limitation period has expired.*

**Daniel Simmons**

Truer words were never spoken, particularly since the release of the Ontario Court of Appeal's decision in *Joseph v. Paramount Canada's Wonderland*. In that case the appellate court has made it clear that when a limitation period has expired there will be no reprieve.

### An Overview

Limitation periods exist to allow for the introduction of certainty and finality to legal matters. Without limitation periods the preservation and gathering of evidence, both documents and memories, becomes much more difficult. In addition, potential defendants are left in a state of flux.

In 2004, a revamped limitations law came into force in Ontario. The key feature of the *Limitations Act, 2002* is the introduction of a standard two year limitation period. Generally speaking, the two years begins to run the day the injury, loss or damage occurs, although it can be extended if the loss is not discovered by the injured party until a later date.

### The Facts

The plaintiff, Joseph, was injured at the defendant's theme park on September 5, 2004. Based on the limitation period, any lawsuit would have to be commenced not later than September 5, 2006.

Less than three weeks after the accident, the defendant was notified that the plaintiff intended to sue for damages. The defendant proceeded to obtain a written statement from the plaintiff on November 29, 2004. In addition, substantial medical documentation concerning the plaintiff's injuries were forwarded to the defendant.

Prior to the expiration of the limitation, the plaintiff's lawyer dictated a statement of claim and instructed his assistant to have it issued before September 5, 2006. Unfortunately the assistant was under the mistaken impression that the old limitation period of six years was still the rule. She was away on vacation the week of September 4, 2006 and never had the claim issued.

A claim was eventually issued on October 31, 2006, when the lawyer became aware of the situation. A copy of a draft statement of claim was sent to the defendant. The lawyer also informed the defendant that through inadvertence, the claim was issued after the due date and that he had always under the impression that it had been issued on time.

The defendant unsuccessfully brought a motion for an order that the claim was statute barred since it was served out of time. The motion judge concluded that special circumstances existed since there was inadvertence on the part of the plaintiff's lawyer and the defendant had suffered no prejudice. He therefore exercised his discretion to extend the limitation period thus allowing the litigation to continue.

### The Court of Appeal

The Court of Appeal disagreed with the judgment of the motion judge and declared that the plaintiff's case could not proceed since the claim was commenced outside the legal time limit.

The appellate court concluded that when the legislature passed the *Limitations Act, 2002*, it had not intended to preserve this notion of special circumstances in relation to the extension of limitation periods. The court further stated that:

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*The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

# CPP Survivor Benefits

If you are employed then you will be aware of the contributions you make to the Canada Pension Plan. These contributions will eventually provide you with a small pension for your retirement. However, what you may not know is that your contributions to CPP will also provide you and your dependants with certain benefits if you become disabled or die. This article outlines the basics of the CPP survivor benefits.

When a contributor to CPP dies, benefits are available to:

- the deceased's estate,
- the surviving spouse, and
- the dependent children.

## The CPP Death Benefit

- The CPP death benefit is a one-time payment made to the estate of the deceased contributor.
- If there is no estate, then the person responsible for the funeral expenses, the surviving spouse or partner or the next of kin may be eligible, in that order, to apply for the benefit.
- The amount of the CPP death benefit depends on how much and for how long the deceased paid into the CPP. However, the maximum allowable death benefit is \$2,500.
- The CPP Death Benefit is usually paid within 6 to 12 weeks of applying for it.

## The Survivor's Pension

- The Survivor's Pension is a monthly pension paid to the surviving spouse of the deceased contributor.
- If applied for immediately, the Survivor's Pension will be-

gin the month after the deceased contributor's death, although the first payment may not arrive for 6 to 12 weeks.

- Remarriage does not put an end to the Survivor's Pension.
- In 2009, the maximum monthly Survivor's Pension is \$506.38 for those under 65 and \$545.25 for those over 65.
- If the surviving spouse is receiving either a CPP disability or CPP retirement pension at the time of the deceased contributor's death, the Survivor's Pension will be combined with this other benefit into a single payment.

## The CPP Children's Benefit

- The CPP Children's Benefit is a monthly pension for the dependent children of a deceased contributor.
- Children under the age of 18 are considered dependent children. The surviving parent or guardian must apply for the benefit on behalf of the child and the payment will be made to the parent or guardian.
- Children between the ages of 18 and 25, who are in school full-time, are also considered dependent children. A child in this age bracket must apply directly for this benefit. The payment will be made to the child.
- If applied for immediately, the Children's Benefit will begin the month after the deceased contributor's death, although the first payment may not arrive for 6 to 12 weeks.
- In 2009 the CPP Children's Benefit was a flat monthly rate of \$213.99.

For these three benefits to be paid, the deceased must have made contributions to CPP for a minimum of three years. Funeral homes will generally have the necessary forms. 

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# New Client Identification Rules

As of January 1, 2009, lawyers in Ontario must comply with new client identification and verification requirements. The requirements are intended to assist lawyers in identifying potential fraudulent client activities. There is concern that since most lawyers have trust accounts they could become targets of those wishing to launder money.

The Law Society's Rules require that lawyers identify any individual who retains them to provide legal services. Lawyers are required to obtain a full name, business address and phone number, if any, home address and phone number as well as the occupation(s) of the client. In a similar way, lawyers must generally identify any third party beneficiary or principal for whom the client acts or represents.

In the case of corporations, partnerships or trusts, lawyers must

obtain the organization's full name, business address and phone number, business identification number, type of business and the name, position and contact information of individuals who are authorized to provide instruction.

If a lawyer is receiving, paying or transferring funds on behalf of a client or third party, the lawyer is under an additional obligation to verify the identity of the client and third party by obtaining and reviewing original government issued identification.

The exceptions to the verification rule are if the other party is a financial institution, public body, public company, a trust account of another lawyer, is a court ordered sum, or if the payment is from a legal settlement. 

# Contracting in Cyberspace

How many times have you clicked the “I Agree” button when conducting transactions on the Internet? How many times have you actually read what you are agreeing to? If you are like most you probably pay scant attention to the details of these online contracts.

## The Basics

A contract is a formal agreement between two parties. To ensure that a contract is enforceable three elements are necessary:

- an offer,
- an acceptance, and
- consideration.

One party must intend to make an offer that is intended to be accepted by the other. In addition, something of value must be given in return for something else of value; this is the consideration.

Contracts can be made in writing or can be oral. Contracts can also be implied by the parties’ actions.

With electronic communication now a regular part of our everyday lives, it is equally important to understand how and when contracts are formed in this digital age. To help address this issue, the federal and provincial governments have, to varying degrees, adopted legislation to bring commercial certainty to e-contracts.

## E-Information & Documents

In the province of Ontario, online contracts are governed by the *Electronic Commerce Act* (“ECA”). In essence, this law legally recognizes electronic information and documents and sets out a number of general rules. Those rules include the following:

- Information or documents will not be invalid or unenforceable by reason only of it being in electronic form.
- A legal requirement that information or a document be in writing will now be satisfied by its being in an electronic form that is accessible for subsequent reference.
- A legal requirement that an original document be provided is satisfied by the provision of an electronic document, if there is a reliable assurance as to the integrity of the information contained in the electronic document from the time the document was first created in its final form, and that it is accessible so as to be usable for subsequent reference and retention by the person.
- A legal requirement that a document be signed will be satisfied by an electronic signature, which is defined as the electronic information that a person creates or adopts in

order to sign a document and that is in, attached to or associated with the document.

- If the use of electronic information or an electronic document is otherwise permitted, a legal requirement that one or more copies be provided to the same person at the same time will be satisfied by the provision of a single version of electronic information or of an electronic document.

## E-Contracts

The ECA also sets out a number of rules with respect to the validity of electronic contracts.

The ECA states that an offer, the acceptance of an offer or any other matter that is material to the formation of a contract may be expressed in electronic form, which includes clicking on an appropriate icon such as “I Agree”.

The ECA also recognizes that a contract may be formed by the interaction of an electronic agent and an individual or by the interaction of two electronic agents. An electronic agent is defined as a computer program used to respond to electronic documents. In other words you as an individual entering into a contract may not be dealing with another individual but instead with automated software.

However, an e-contract may not be enforceable if

- a) the individual makes a material error in the electronic information or electronic document;
- b) the individual is not given an opportunity to prevent or correct the error;
- c) on becoming aware of the error, the individual promptly notifies the other person; and
- d) in a case where consideration (e.g. the goods purchased) is received as a result of the error, the individual deals with the consideration in accordance with the other person’s instructions and does not benefit materially by receiving the consideration.

Electronic information or an electronic document is considered to be sent when it enters an information system outside the sender’s control. It will then be presumed to have been received by the intended recipient.

Despite the above rules, the parties to an electronic transaction can choose to put into place different rules that may better suit their needs.

## Consumer Protection

The *Consumer Protection Act* sets out rules to govern con-

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sumer electronic agreements. Whether you are a consumer or a supplier it is important to understand those rules.

The first thing to remember is that the legislation only applies when the value of the internet agreement is for more than \$50 and one of the parties is located in Ontario at the time the transaction takes place.

A supplier who is providing goods over the Internet must make certain information available to the consumer, including:

- The supplier's contact information.
- A fair and accurate description of the goods.
- An itemized list of all prices and charges.
- The date, location and manner of delivery.
- Any restrictions, limitations and conditions of the supplier.

A supplier must give the consumer an express opportunity to accept or decline the agreement and to correct any errors immediately before entering into it. In addition, the supplier must deliver to the consumer a copy of the agreement in writing by e-mail, fax, mail or delivery within 15 days. Failure to follow these rules may allow the consumer to cancel the agreement.

Although technology has impacted how we do business, the key to remember is that regardless of whether a contract is entered into face to face or in cyberspace, the main contract rules, as outlined above, remain the same. Therefore be sure to read the terms of a contract before entering into it and if necessary seek legal advice.

If you require assistance with your business practices please contact our firm. 

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"...if s. 20 were interpreted to include the extension of limitation periods generally by the common law doctrine of special circumstances under the Rules, the effect would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme. Instead, we would continue with the procedure that developed under the former Act..."

**The Bottom Line**

If you think you have a potential claim in any area of the law, it is essential to seek legal advice as soon as possible. Once the limitation period expires there is no going back.

Our firm works in many areas of litigation. If you would like to discuss your situation please contact us. 

**Our Lawyers & Staff wish all our clients  
the very best in 2009!**

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**PRACTICE AREAS**

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