SUPREME COURT OF NOVA SCOTIA
Citation: *Cochrane v. HFX Broadcasting, et al.*, 2021 NSSC 341

Date: 20211214
Docket: *Halifax*, No. 499586
Registry: Halifax

Between:

Lindsay Cochrane

v.

HFX Broadcasting Inc. and Evanov Radio Group Inc. Groupe Radio Evanov Inc.

DECISION ON MOTION FOR SUMMARY JUDGMENT

Judge:	The Honourable Justice Joshua Arnold
Corrected decision:	The text of the original decision has been corrected according to the attached erratum dated December 21, 2021.
Heard:	August 10, 2021, in Halifax, Nova Scotia
Final Written Submissions:	August 5, 2021
Counsel:	Augustus Richardson, Q.C., and Laura Neilan, for the Plaintiff (responding party) David Coles, Q.C., for the Defendants (moving party)

Overview

[1] HFX Broadcasting Inc. and Evanov Radio Group Inc. Groupe Radio Evanov Inc., have applied for summary judgment regarding a claim of constructive dismissal brought by Lindsay Cochrane. Ms. Cochrane alleges that a toxic work environment existed while she was employed to host radio shows by the applicants. She says that she was subject to sexual and non-sexual harassment prior to July 26, 2018, and then was subject to non-sexual harassment, including ostracism, between July 26 and August 8, 2018. There is no dispute that Ms. Cochrane gave two weeks' notice of her resignation on July 26, 2018, that she was escorted out of the office on August 8, 2018, and that she continued to be paid until August 9, 2018, at which time her employment terminated. Her Statement of Claim was filed July 30, 2020.

[2] The applicants have made a motion for partial summary judgment on evidence and pleadings. They say that in relation to any allegation of sexual harassment, the limitation period commenced running on July 26, 2018. Accordingly, they say, more than two years passed before she filed her Statement of Claim, and she is therefore out of time and her claim is, to that extent, barred by the *Limitation of Actions Act*. The applicants say that any remaining aspect of the claim can proceed.

[3] The respondent says the sexual harassment allegations comprise part of a cumulative and ongoing breach of contract that led to the alleged constructive dismissal and cannot be hived off from the rest of the claim. She says her employment terminated on August 8 or 9, 2018, and by filing her Statement of Claim on July 30, 2020, she is within the two-year limitation period.

[4] The issue boils down to whether the date she gave her notice (July 26, 2018), the date she was walked out of the workplace (August 8, 2018) or the last date she was paid to work (August 9, 2018) is the date of Ms. Cochrane's resignation. If resignation occurred on July 26 then her claim is barred by the *Limitation of Actions Act*. If resignation occurred on August 8 or 9, then her claim is not statute-barred.

Facts

[5] The affidavits of David Collins (Articled Clerk for David Coles, Q.C., counsel for the applicant), Laura Neilan (original counsel for the respondent) and Lindsay Cochrane (the respondent) were filed on this motion.

[6] According to her affidavit, Lindsay Cochrane was hired by the applicants on January 16, 2017. She initially co-hosted "The Morning Radio Show" on an FM rock radio station. Jason Desrosiers, the Program Director, was her supervisor. Ms. Cochrane alleges that shortly after she was hired, Mr. Desrosiers began making comments about her appearance: for instance, he said she could get away with making mistakes on the air because she was attractive; he started an on-air promotion titled "She's hot, he's not" (referring to her male co-host); and, when she wore a body suit to work one day, questioned her about her underwear, and joined in with another male co-worker who made the comment "I bet the snaps are going to rust", referring to the snaps on the suit.

[7] In August 2017, Ms. Cochrane brought her mother to a work function. She alleges that in their presence Mr. Desrosiers made comments about her mother's appearance, asked her about her sex life, and talked about his own sex life. When Ms. Cochrane asked Mr. Desrosiers to stop talking this way he laughed at her.

[8] In the Fall of 2017, Ms. Cochrane alleges, Mr. Desrosiers made a comment about her shirt and then said "don't report me #MeToo". He also questioned her about her sex life and asked her if she engaged in threesomes.

[9] All of these comments upset Ms. Cochrane, and on occasion she left his presence when Mr. Desrosiers made such comments.

[10] The Morning Show, where Ms. Cochrane worked between January and November 2017, had the most listeners of any of the station's shows. In November 2017, "The Afternoon Show" host resigned and Ms. Cochrane was moved to that time slot, on what she understood to be a temporary basis, to fill the vacancy. She hoped to return to The Morning Show. Mr. Desrosiers told her to "push the envelope" when hosting. When Ms. Cochrane raised two of her personal boundaries for on-air discussion (pornography and excrement), he became upset and told her that she would have to talk about whatever he wanted. He also told her that The Morning Show co-host did not like her. Mr. Desrosiers then stood directly in her face and shouted at her. As a result, Ms. Cochrane told him that she would stay with The Afternoon Show.

[11] In March 2018, an employee from the IT department propositioned Ms. Cochrane and repeatedly asked her to go to his hotel room with him, despite her objections.

[12] In April 2018, after Ms. Cochrane complained about a scheduling issue, Mr. Desrosiers said "You're miserable. You hate it here". Ms. Cochrane denied this and asked if there were any issues with her on-air performance. Mr. Desrosiers had no complaints about her on-air performance, but said she had a bad attitude and was cranky.

[13] Later in April 2018, Mr. Desrosiers scheduled a meeting with Ms. Cochrane and told her she was being formally disciplined because of her "poor attitude". He said the complaint arose in part from a comment by an IT department employee. When Ms. Cochrane explained about the IT employee propositioning her, Mr. Desrosiers apologized and tore up the disciplinary form. The next day he complimented Ms. Cochrane on her looks and her hair and told her she should book a vacation because she needed a break. Around this time, Ms. Cochrane became aware that another female employee had filed a sexual harassment complaint against Mr. Desrosiers. She also became aware that Mr. Desrosiers incorrectly believed that the complaint came from her. She said he yelled in the workplace, "This is rock radio, you have to put up with attitudes like this", "If you flex with me I'll flex with you", and said that he felt Ms. Cochrane had filed a complaint "for spite". Ms. Cochrane had not filed a complaint at that time.

[14] Ms. Cochrane did subsequently file a complaint with her employer about Mr. Desrosiers, as well as the IT employee, on April 30, 2018. On June 5, 2018, she went on stress leave. On June 13, 2018, she received the investigative report about her complaint, which indicated that Mr. Desrosiers had been provided an opportunity to reply to the complaint at an earlier stage, without anyone notifying her. She says she was not asked for specific dates and times in her initial complaint, but her complaint was criticized by the investigator for failing to provide specific dates and times. Mr. Desrosiers was reprimanded, but Ms. Cochrane's complaint was dismissed by the employer and he remained her supervisor.

[15] On June 14, 2018, Ms. Cochrane filed a complaint with the Nova Scotia Human Rights Commission. On July 26, 2018, she sent her employer a resignation letter giving two weeks' notice. Her final day of work was scheduled to be August 9, 2018. As noted in her affidavit, Ms. Cochrane says:

> 56. Eventually I decided that I could no longer tolerate working for the Defendants, giving how bad I was feeling at work every day. After consulting my lawyer, I decided to give my employer two (2) weeks' notice of my resignation. My reason for doing so was to "take the high road" (so to speak). As much as I

> felt I should leave right away for my own wellbeing, I knew of my obligations under labour legislation to provide written notice to my employer, to give them an opportunity to find a replacement for me. I was worried that if I left without notice, this would be held against me in a future legal proceeding, such as the Human Rights complaint I had filed. [as appears in original]

[16] After July 26, 2018, Ms. Cochrane was excluded from office meetings. Mr. Desrosiers had little interaction with her. On August 8, 2018, during The Afternoon Show, while on a break, Ms. Cochrane was advised by her employer that it was her last day of work. She was required to turn over her key, and was escorted out of the building. She was paid up to and including August 9, 2018.

[17] The employer filed a response to Ms. Cochrane's Human Rights Complaint on April 29, 2019.

[18] According to the affidavit of Laura H. Neilan, Ms. Cochrane's lawyer, she was retained on July 17, 2018. Ms. Neilan was on parental leave between October 2019 and June 2020. Her colleague, Alanah Josey, had carriage of the file during the leave period. Ms. Neilan explains the reasoning behind the filing of Ms. Cochrane's claim in her affidavit:

> 8. After consulting my client, it was decided that we would file the herein action against the Defendants, and withdraw the Human Rights complaint. The Plaintiff and I were not happy with how much time had passed, and how little had been done on her file.
>
> 9. The Notice of Action and Statement of Claim was filed on July 30, 2020. It is attached hereto as **Exhibit "B"**. I was at the time and remain of the opinion that Lindsay's cause of action arose on August 9, 2018, the date of her constructive dismissal.

[19] Ms. Cochrane filed this civil action on July 30, 2020. She withdrew her complaint to the Human Rights Commission in August 2020.

[20] The applicants' motion for partial summary judgment on evidence and pleadings was filed on July 15, 2021.

Summary Judgment on Evidence

[21] Civil Procedure Rules 13.02 and 13.04 state:

> **13.02 Interpretation**

In this Rule 13, “statement of claim” includes all or part of a statement of claim, statement of claim against third or subsequent party, statement of counterclaim, and statement of crossclaim, and the grounds in a notice of application and in a notice of respondent's claim, and “statement of defence” includes all or part of a statement of defence and the grounds in a notice of contest in answer to a statement of claim.

13.04 Summary judgment on evidence in an action

(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party’s claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[22] The *Limitation of Actions Act*, S.N.S. 2014, c.35, *(“LAA”)* states:

8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred;

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

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

(3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is

(a) in the case of a continuous act or omission, the day on which the act or omission ceases; and

(b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

Position of the Applicants

[23] The applicants seek partial summary judgment in relation to paragraphs 7, 8 and 14(a) of the Statement of Claim, arguing that this aspect of the respondent's claim is statute-barred. Paragraphs 7, 8, and 14(a) of the Statement of Claim state:

7. The Plaintiff states that during the course of her employment, she was subjected to repeated sexual harassment by Desrosiers. Desrosiers's sexually inappropriate conduct towards the Plaintiff included, but is in no way limited to, the following:

a. Asking what kind of underwear she was wearing/asking if she was wearing any underwear, and speculating with other male colleagues in the Plaintiff's presence about her underwear;

b. Telling the Plaintiff that she can get away with making mistakes on the air because she is "hot";

c. Frequently airing a station promo which stated "She's hot, he's not" ("she" referring to the Plaintiff);

> d. Approaching the Plaintiff's mother at a work function, remarking on her mother's looks and asking her mother about her sex life (in front of the Plaintiff);
>
> e. Giving false compliments to the Plaintiff in an effort to ridicule sexual misconduct complainants, such as saying "Nice shirt, oh wait, don't report me, #MeToo right?"; and
>
> f. Asking the Plaintiff about her sex life (particularly, whether she has engaged in group sex).
>
> 8. The Plaintiff also says that she was subjected to harassment in a non-sexual manner by Desrosiers, including, but in no way limited to the following:
>
> a. Raising his voice with the Plaintiff because she refused to discuss pornography or excrement while on the air;
>
> b. Threatening to formally discipline the Plaintiff due to her "poor attitude: (when any change in the Plaintiff's attitude arose directly as a result of the aforementioned sexual harassment);
>
> c. Falsely accusing the Plaintiff, in front of colleagues, of filing a sexual harassment complaint against him, stating that "This is rock radio, you have to put up with attitudes like this!"
>
> …
>
> 14. The Plaintiff states that the Defendants breached their respective duties to the Plaintiff of good faith and fair dealings in the employment relationship with her. Particulars of such bad faith include, but are not limited to:
>
> a. Harassment (both sexual and non-sexual) specifically perpetrated by the Defendants' agent, Desrosiers;
>
> …

[24] Following a Request for Admission, the respondent formally admitted the following:

> The Plaintiff says that Jason Desrosiers's sexual misconduct occurred prior to July 26, 2018.
>
> The Plaintiff says that Jason Desrosiers's non-sexual harassment (referred to at paragraph 8 of the Statement of Claim) continued in the form of ostracism up until the Plaintiff's departure on August 8, 2020. The Plaintiff was subjected to a toxic work environment until August 8, 2020.
>
> The Plaintiff states that the Defendants' refusal to meaningfully address Mr. Desrosiers's misconduct continued up until August 8, 2020, at which time the employment relationship between the parties ended.

[25] In Ms. Cochrane's affidavit it is clear that her last day of paid employment was August 9, 2018, not August 8, 2020, so the admission contains a typographical error.

[26] The applicants say that any aspect of the claim involving sexual harassment is statute-barred because the events allegedly constituting sexual harassment took place more than two years prior to the Statement of Claim being filed. In their brief, the applicants state:

> 9. The Defendants submit that by virtue of the Plaintiff's admission, read as a whole, the Defendants should be granted summary judgment in respect to that part of the claim for constructive dismissal made in the Statement of Claim, based upon facts occurring on or before July 26, 2018, with the exception of the extent to which the constructive dismissal claim is based upon:
>
> > Mr. Desrosiers alleged "ostracism" of her, and her allegation that she was subject to a "toxic work environment", (to the extent that such did not involve any sexual harassment/sexual misconduct by Mr. Desrosiers).

[27] While the applicants argue in their brief and argued in oral argument that they should receive partial summary judgment in relation to the sexual component of the claim, their Notice of Motion essentially asks for all aspects of the claim, sexual and non-sexual, to be struck pursuant to the *LAA*. In an effort to have applicants' counsel clarify the perceived discrepancy, the following exchanges occurred during the hearing:

> The Court: Would you just clarify for the benefit of your friend what you're asking for here today?
>
> Mr. Coles: I'm asking that the sexual stuff…
>
> The Court: Right.
>
> Mr. Coles: …be struck. Now, my friend, when he just referred to paragraph 7…paragraph 7 begins with "Oh, there's other stuff too," in other words, there's a separate ground, but then he proceeds to…she proceeds to list by way of example, sexual stuff. It doesn't list anything that isn't the sexual harassment stuff, from our perspective.
>
> The Court: Right, but you're not asking for this entire claim to be dismissed?
>
> Mr. Coles: Absolutely not. I'm not asking that anything having to do with Mr. Desrosiers…
>
> The Court: Oppressive nature, otherwise aside…
>
> Mr. Coles: Ostracization, all of that, no.

…

Mr. Coles: I am asking the Court to strike the sexual harassment allegations as being out of time. My intention was not…

…

Mr. Coles: Well, let me try to respond this way. I have, certainly in the arguments orally today and in writing, I have restricted myself to sexual harassment.

The Court: I get that.

Mr. Coles: Okay. If, in including 8 in that list there, in my Notice of Motion paragraph 8 is included, I was in error in…in so doing, that somehow it…it seemed to expand beyond sexual harassment, that was not my intention. That thing can be struck. I don't…I don't want to strike anything that is not sexual harassment. So, if my friend, on this application, says these aren't, these three things aren't sexual harassment, well he's free…he's free to argue that. I mean, I…I…I read them as sexual harassment but forget what I read them. I mean, if they're not sexual harassment then they're fair game. That's it, that's the intention.

The Court: Okay, I understand what you're saying.

Mr. Coles: Okay. The…the evidence of sexual harassment ends on July 26. My friend says the operative date is her last day of work, but what evidence is there that any of the toxic environment or ostracism continued beyond July 26? And that's important, of course, because it's the Statute of Limitations that governs and if all of that ended on July 26 then my friend, my learned friend, won't have a case to present at trial. It's not for you to decide, but it's for him to think about if he…if he's going to take this matter on to trial.

…

Mr. Coles: Well, whatever that wasn't, my friend, you have my position. I don't need to restate that we disagree with that factual interpretation and disagree with the law that somehow a sexual harassment complaint can be reinvigorated or survive a *Limitation of Actions Act* striking application because there's some other ground that…that has some factual basis after the date. The *Limitation of Actions Act* is very clear as to when you have the discretion and you don't have the discretion based upon another ground occurring after that.

[28] The applicants also say that if the limitation period applies, the limitations defence cannot be disallowed under s. 12 of the *LAA*. Section 12 permits a disallowance of the limitation period for personal injury claims. According to the applicants, because sexual harassment is not pleaded as a stand-alone actionable wrong by the respondent, there is no statutory authority to disallow the limitation period. They say sexual harassment is not a personal injury as contemplated by s.

12. The applicants concede that this question has not been clearly determined, and may raise a question of law. Civil Procedure Rule 12.02 states:

> A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination.

[29] The applicants say I should decide this legal question now (whether the claim is partially barred by the *LAA)*, submitting in their brief:

> 19. …It is respectfully submitted that deciding this legal question at this stage will save considerable expense and time as the issues, relevant documents and witnesses, will be significantly reduced if the alleged sexual harassment element of the case is eliminated. Indeed, the Plaintiff may decide not to proceed with the claim based upon significantly narrow grounds. Whether "sexual harassment" is a "personal injury" is a legal question not turning on any evidence that would be adduced at trial.

[30] Finally, if sexual harassment is a personal injury, thereby giving the court discretion to disallow the limitation period, the applicants say that no such discretion should be exercised.

Position of the Respondent

[31] The respondent says she was constructively dismissed due to a toxic work environment and that she filed her claim within the applicable limitation period. She also submits, in the alternative, that she suffered a personal injury and, as a result, s. 12 of the *LAA* applies, thereby allowing the court to disallow the limitations defence. As she states in her brief:

> [2] The plaintiff's action is for constructive dismissal based on a toxic work environment. She alleges that the toxic work environment was composed of sexual and non-sexual harassment that was created, fostered or condoned over time by the defendants. On July 27th, 2018 she gave notice to the defendants of her pending resignation as of August 9th, 2018 due to the toxic workplace she was being forced to endure. The defendants accepted that notice and that her last day

of employment would be August 9th, 2018. The plaintiff commenced her action on July 30th, 2020 and so within the two-year time limit created by s.8(1)(a) of the *Limitation of Actions Act ("LAA")*.

…

[5] The plaintiff resists the defendants' motion. She submits that the motion should be dismissed because

a. …

b. with respect to that part of the motion based on *LAA*,

i. what the defendants seek to strike are simply allegations of fact, which are not subject to limitation periods;

ii. there is in law no tort of sexual harassment and hence nothing to which the *LAA* can apply;

iii. if the allegations do represent a cause of action, then the court should exercise its discretion pursuant to s.12 of the *LAA* to relieve against the lapse of any limitation period.

Analysis

[32] The framework for determining whether a motion of summary judgment on evidence pursuant to Civil Procedure Rule 13.04 should be allowed is set out in *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89, where Fichaud J.A., expanding on the analysis previously developed *in Burton Canada Company v. Coady*, 2013 NSCA 95, said, for the court:

[34] I interpret the amended Rule 13.04 to pose five sequential questions:

- **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all

the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- **Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

> This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 77, [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.
>
> …
>
> • **Fifth Question:** If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?
>
> [Bolding in original.]

[33] Where the ground for summary judgment is an allegedly expired limitation period, the Court of Appeal's decision in *Milbury v. Nova Scotia (Attorney General)*, 2007 NSCA 52, [2007] N.S.J. No. 187, provides a filter for applying the *Shannex* analysis. In *Milbury*, Roscoe J.A. said, for the court:

> 23 When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule....
>
> 24 In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[34] This court has repeatedly applied *Milbury* to the *Shannex* framework when determining whether a motion for summary judgment should be granted on the basis of an expired limitation period. For instance, in *Jesty v. Vincent A. Gillis Inc.*, 2019 NSSC 320, where the claim arose from allegedly negligent and fraudulent legal services, Gogan J. concluded that there were no material facts in dispute, and that the summary judgment motion would require a determination of whether the limitation period barred the claim, on the undisputed facts. After referring to *Milbury*, she said:

> [25] Returning to the present motion, there are no material acts in dispute. On this basis, I am of the view that there is no genuine issue of fact requiring trial. There remains then the following questions: (a) Was the Jesty claim limitation barred when it was commenced on March 20, 2018? (b) Have the Jestys presented evidence that the limitation defence does not bar their action on the basis of discoverability or incapacity? (c) Does the evidence support a real chance of establishing that the limitation period not expire before they commenced their claim?

[35] Justice Gogan concluded that the evidence on the motion indicated that the plaintiff had discovered the claim before the limitation period began to run, and that the evidence did not support a finding of incapacity at the relevant time. Justice Gogan concluded:

> [44] There are no facts in dispute on this motion. The defendant seeks summary judgment on evidence and relies upon the limitation period in the *Limitations of Actions Act*. The defendant established that a limitation period applied to the claims advanced and that the present action was commenced outside that period. I conclude that the Jestys have no real chance of advancing their claims in the face of the limitation defence. Summary judgment is appropriate.

[36] In this case there are no material facts in dispute for the purpose of whether the proceeding was commenced after the limitation period had expired. The parties agree on the date the plaintiff gave notice and the date she finished work. Nor is it disputed that there is evidence going to the allegations in the Statement of Claim spanning the entire period up to the last day the plaintiff worked. The defendants dispute the substance of the allegations, but that is not relevant to whether the limitation period had passed when the proceeding was commenced. As in *Jesty*, the question is whether the limitation period bars the proceeding. If the answer is yes, it will be for the plaintiff to show why the limitation period should not apply, for instance, due to discoverability issues.

[37] Determining whether the plaintiff's claim was limitation barred in this case requires a determination of when the limitation period starts running in a claim for constructive dismissal. In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, Gonthier J., writing for the court, considered the nature of constructive dismissal:

> 33 In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination… Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice…
>
> 34 In an article entitled "Constructive Dismissal", in B. D. Bruce, ed., *Work, Unemployment and Justice* (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
>
> > A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[38] For the purpose of this motion, the issue is not the general background to the relationship between the parties, or the truth of the substantive allegations underlying the claim of constructive dismissal, but when the alleged dismissal was complete for limitations purposes. In *Canadian Pacific v. Dick*, 2000 NBCA 10, [2000] N.B.J. No. 373, Drapeau J.A., for the court, discussed the factual nature of determining when an employee has been constructively dismissed, in the context of a cumulative series of actions that ended with the employee's resignation, and the relationship of that analysis to the relevant limitation period:

> 35 It is commonplace that whether an employee has been constructively dismissed is essentially a question of fact. The court must determine whether on a reasonable interpretation of the facts, the employee has established that he was

> constructively dismissed as a result of conduct by the employer that breaches a fundamental or essential term of the employment contract…
>
> …
>
> 38 It is axiomatic that each constructive dismissal case must be decided by applying the relevant principles of law to its own particular facts. Whether a given change to an employment contract is a fundamental alteration will depend on all the circumstances of the particular case, including the specific features of the employment contract in issue...
>
> 39 In the case at bar, any consideration of Canadian Pacific's possible liability for constructive dismissal must take into account the cumulative effect of the various actions it undertook over the course of the last few years of Mr. Dick's employment and which, certainly from his perspective, made his job intolerable. Canadian Pacific's mid-December 1988 decision to cut deeply into his department's staff looms large when viewed against the backdrop of Mr. Dick's longstanding pent-up frustration with other actions by his employer and the fragility of his mental health, the latter being a fact well-known to his employer from as early as the spring of 1988.
>
> …
>
> 49 Mr. Dick's action was commenced on December 30, 1988. Section 9 of the Limitation of Actions Act bars Mr. Dick's action if, and only if, it was not commenced "within six years after the cause of action arose". As Stratton, C.J.N.B., underscored in *Saint John Shipbuilding Ltd. v. Snyders*, at para. 14, an employer's breach of a fundamental term "gives rise to liability should the employee choose to treat that breach as a repudiation of the contract of employment". The common law rule as articulated by Justice Sherstobitoff in the passage reproduced *in Farber v. Royal Trust Co.*, at p. 865 views the employee's resignation as the event giving "rise to an obligation on the employer's part to provide damages in lieu of reasonable notice". England and Christie, in *Employment Law in Canada*, emphasize in para. 13.24 that the constructive dismissal is deemed to occur upon the employee's resignation:
>
> > The acts of the employer may entitle the employee to quit, with or without notice, and to recover damages, with the resignation being treated in all respects as if it were a wrongful dismissal by the employer. This is known as "constructive dismissal". ...
>
> 50 It follows that Mr. Dick's cause of action only arose once he resigned in early January 1989. Accordingly, his action is not barred by s. 9 of the *Limitation of Actions Act*.

[39] On the undisputed facts relevant to this motion, the date of resignation will determine the commencement of the limitation period running. The plaintiff says the dismissal took effect on her last scheduled day of work, August 9, 2018. The

defendants say the limitation period should run from the date the plaintiff gave her notice, that being July 26, 2018. As noted earlier, the plaintiff made a formal admission that the alleged sexual misconduct occurred prior to July 26, 2018. The Statement of Claim was filed on July 30, 2020. Accordingly, the defendants submit that any factual allegations pre-dating July 30, 2018, including all of the alleged sexual harassment, should be struck from her claim. They concede, however, that facts allegedly occurring after that date – specifically her allegations of "ostracism" and being subject to a "toxic work environment" – can stand. In effect, they ask the court to extract the factual allegations of sexual harassment from the constructive dismissal claim.

[40] The *LAA* sets out two distinct limitation periods. Section 8 of the *Act* establishes the general limitation periods that apply to actions. Two limitation periods are created under s. 8: 1) the "basic" limitation period; 2) the "ultimate" limitation period. Section 8(1) provides:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

[41] Section 8(1)(a), the "basic" limitation period, creates an obligation on a plaintiff to bring their action within two years of their discovery of the claim. Section 8(1)(b), the "ultimate" limitation period, creates an additional obligation on a plaintiff: they must bring their claim within 15 years of the occurrence of the act or omission that forms the basis of their claim. A plaintiff's claim must be brought by the earlier of the two dates.

[42] Section 8(3) clarifies the application of the "ultimate" limitation period in the case of a continuous act, such as the alleged ongoing harassment alleged by the Plaintiff :

> 8(3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

[43] On the second reading of the *Act*, then Minister of Justice Lena Diab confirmed that: a) the *Act* creates two limitation periods, the ultimate period and the basic period, and b) the ultimate, 15-year period refers to the period of time a plaintiff has to bring a claim once an act or omission occurs. Minister Diab stated:

> Madam Speaker, the new bill proposes standard limitation periods for all claims. Specifically, it establishes a two-year, basic limitation period for most civil claims, such as those that involve personal injury, breach of contract, et cetera. What that means is you have got two years to start an action from the date a person discovers that they have a legal action. It also creates an ultimate limitation period of 15 years for legal claims which may not be discovered right away. What that means is, 15 years from the day on which the act or the omission, which the act is based upon, has occurred. That is the ultimate limitation period.[1]

[44] Despite the Justice Minister's comment that the ultimate limitation period establishes a 15-year period "for legal claims which may not be discovered right away", the ultimate limitation period applies even where there is no issue of discoverability. A plaintiff has 15 years to bring their case after the acts on which the claim is based occurred, regardless of when they discovered the claim (subject to them bringing the claim within two years of discovery, as established by section 8(1)(a)). In *Gem Health Care Group Limited v Amherst (Town)*, 2021 NSSC 194, Moir J. said:

> 37 The legislature created two standardized limits. The uniformity commissioners referred to one of these as "basic" and the other as "ultimate": Uniform Law Conference of Canada Uniform Limitations Act (2005) p. 3-5. The basic limit incorporates the judicial concept of discoverability formulated under the old limitations legislation. A claim may not be brought after "two years from the day on which the claim is discovered": s.8(1)(a). The ultimate limit applies no matter whether the claim is discovered, "fifteen years from the day on which the act or omission on which the claim is based occurred": s.8(1)(b). (There are, of course, exceptions for children, incapacity, taxes and fines, sexual assault, and dependency: s.18, 19, 10 and 11. And, provision is made for special circumstances sometimes recognized in the old law: s.12, 13, 14, 15, 16, 17, 20, and 21.)

[45] Therefore, the ultimate limitation period exists to ensure that defendants are not "held to account for ancient obligations".

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[1] *Sears v Top O' the Mountain Apartments Limited*, 2021 NSSC 80, at para 24.

[46] Should the sexual harassment component of the claim be hived off from the non-sexual harassment, when the constructive dismissal involves an alleged toxic workplace caused by cumulative behaviour and treatment by the applicants? The applicants in the instant case argue, in essence, that the alleged facts of sexual harassment are "too ancient" to be included in the respondent's claim for constructive dismissal. The *Act* establishes that the applicable time period is 15 years: because the respondent's claim was filed well within the 15-year period following the alleged acts, the applicant's argument that the sexual component of the constructive dismissal complaint must be hived off must fail.

[47] Similar to the decision in *Dick*, for the purpose of this application, the applicants' actions constituted one continuous course of conduct rather than distinct or discrete acts. The sexual harassment cannot be hived off and treated as a separate compartment in the overall claim of ongoing mistreatment by the applicants.

[48] [paragraph deleted per erratum dated December 21, 2021]

[49] When there is continuous and ongoing behaviour on the part of an employer that eventually leads to a repudiation of the employment contract, what is the bright line date for the limitation period to commence? When is the claim actually discoverable? On the issue of discoverability, the applicants rely on *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, where the court had to consider when discoverability occurs, in the context of a negligence claim. Justice Moldaver explained, for the court:

> [3] This case turns on the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2), thereby triggering the two-year limitation period in s. 5(1)(a). Respectfully, the Court of Appeal adopted too high a standard. In my view, a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim.
>
> …
>
> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be

drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.

[43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise…

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]

Since the term prima facie can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference".

[47] In my respectful view, endorsing the Court of Appeal's approach that to discover a claim, a plaintiff needs knowledge of facts that confer a legally enforceable right to a judicial remedy, including knowledge of the constituent elements of a claim, would move the needle too close to certainty. A plausible

> inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve.
>
> [48] It follows that in a claim alleging negligence, a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care. Finding otherwise could have the unintended consequence of indefinitely postponing the limitation period. After all, knowledge that the defendant breached the standard of care is often only discernable through the document discovery process or the exchange of expert reports, both of which typically occur after the plaintiff has commenced a claim. As the Court stated in *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 55:
>
> > Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. [Emphasis added.]
>
> Although the Court in K.L.B. was dealing with discoverability in a different context, the basic principle is relevant here. The standard cannot be so high as to make it possible for a plaintiff to acquire the requisite knowledge only through discovery or experts. And yet, that is precisely the standard endorsed by the Court of Appeal in the instant case. With respect, that standard sets the bar too high. By the same token, the standard is not as low as the standard needed to ward off an application to strike a claim. What is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently.

[50] The Supreme Court of Canada did not limit this analysis for discoverability to negligence claims. Because Ms. Cochrane gave notice on July 26, 2018, that she would end her employment with the applicants on August 9, 2018, the applicants say that July 26 is when she would have had knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the applicants' part could be drawn. However, she continued to work until August 8, 2018, and she was paid until August 9, 2018. The non-sexual harassment allegedly continued until August 8, when the applicants marched her out of the workplace.

[51] In the text, *Wrongful Dismissal* (Thomson Reuters), the authors discuss the established law for the commencement of limitation periods for "outright" wrongful dismissal claims, that is, claims where the employer has terminated the employment relationship without cause and without notice. Outright wrongful dismissal claims are in contrast to constructive dismissal claims, where it is the employee who terminates the employment relationship. In the case of outright

wrongful dismissal, the limitation period begins when the employer gives the employee notice of dismissal. In *Wrongful Dismissal*, the authors write:

> In the case of outright dismissal, the limitation clock begins ticking when the employer gives the employee notice of dismissal. This is so even if the actual termination date is in the future.[2]
>
> …
>
> As noted in the previous subsection, the limitations clock in cases of wrongful dismissal is considered to run from the moment that the dismissal is communicated to the plaintiff.[3]

[52] However, the authors go on to distinguish the commencement of the limitation period in cases of constructive dismissal from those in outright dismissal cases:

> In contrast, in cases of constructive dismissal, the clock does not commence to run until the employee accepts the employer's deemed repudiation of the employment contract. This point was stated as follows by Swinton, J. in *Saltsov v. Rolnick*, 2009 CarswellOnt 2472 (Ont. S.C.J.):
>
> > It is well established that repudiation of a contract does not give rise to a claim for breach of contract until the repudiation is accepted. Similarly, there can be no claim for a breach of contract based on constructive dismissal until there is a deemed termination of the employee's contract. Such a claim arises when there has been a substantial or fundamental change to the terms of employment, without reasonable notice, which the employee has refused to accept…

[53] Therefore, discoverability, or the chain of events ultimately leading to the employee's election to accept that he or she has been constructively dismissed, is not always a straightforward determination in the case of an alleged constructive dismissal. While the authors indicate that it is the employee's acceptance of the employer's repudiation of the employment contract (i.e. the employee's resignation) that begins the running of the limitation period in constructive dismissal cases, they do not comment on whether the acceptance date is the date an employee gives notice of their resignation or the final day of work itself. The authors note that when dealing with outright wrongful dismissal, as opposed to

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[2] *Wrongful Dismissal,* Chapter 14, 14:11 – Limitation Period.
[3] *Ibid* at 14:12 – Discoverability.

constructive dismissal, the issue of discoverability is complex and state at section 14:12:

> It is worthy of note that the issue of discoverability, as it specifically relates to a claim of wrongful dismissal, has been held to be an issue so complex as to be unsuitable for resolution on summary judgment: *Barrie v. Quickwrap Canada Ltd*., 2018 ABPC 205, 2018 CarswellAlta 1875 (Alta. Prov. Ct.).

[54] In *Saltsov v. Rolnick*, 2010 ONSC 914, where the limitations issue related to alleged constructive dismissal, Murray J. did not specifically address whether a resignation occurs on the employee's date of notice as opposed to the employee's final day of work. Justice Murray set out the relevant facts on this issue:

> 9 On May 14, 2004, Saltsov caused a Notice of Action to be issued in which he claimed inter alia, damages against Rolnick for breach of fiduciary duty and trust, inducing breach of contract and interference with economic relations. Rolnick has pleaded that issuance of the Notice of Action was "the culminating event" leading to his alleged constructive dismissal. On May 18, 2004, Rolnick demanded that certain conditions had to be satisfied by the end of the business day on May 19, 2004, failing which he would quit as president of CashCode and "commence an action for constructive dismissal". The conditions were not satisfied and, on May 20, 2004, Rolnick left his employment at CashCode. Rolnick's salary was continued by CashCode until June 26, 2004.

[55] While Murray J. did not specifically identify the critical date issue, he did conclude that the injury, loss, or damage relating to constructive dismissal was discoverable by the plaintiff on the date that he actually left his employment (May 20, 2004), but not before that. Justice Murray said:

> 31 As Swinton J. noted in her endorsement granting leave to appeal, the limitation period begins to run from the time when a claim is discovered within the meaning of the Act. For there to be a "claim" and for the claim to be discovered, there must, by definition and by the words of s. 5(1) be an injury, loss or damage. In the case at bar, there was no injury, loss or damage arising from any of Rolnick's claims before May 20, 2004.

[56] What is really in dispute between the parties is what date the constructive dismissal actually occurred. Does the resignation occur when the employee gives notice that they are resigning or the actual last day of work? In *Saltsov*, Murray J. discussed when a constructive dismissal occurs and pinpointed it as the date of resignation. However, when the date of resignation occurs was not clarified:

[27] In *Dick*, the New Brunswick Court of Appeal also decided when the cause of action of constructive dismissal arises for purposes of a limitation period. Under the applicable legislation, Mr. Dick's action was statute-barred if it was not commenced within six years after the cause of action arose. Therefore, the issue before the New Brunswick Court of Appeal was: when did the cause of action for constructive dismissal arise? In answering this question, the court relied on the Supreme Court of Canada decision in *Farber* and concluded as follows, at paras. 49-50:

> Mr. Dick's action was commenced on December 30, 1988. Section 9 of the *Limitation of Actions Act* bars Mr. Dick's action if, and only if, it was not commenced "within six years after the cause of action arose". As Stratton, C.J.N.B., underscored in *Saint John Shipbuilding Ltd. v. Snyders*, at para. 14, an employer's breach of a fundamental term "gives rise to liability should the employee choose to treat that breach as a repudiation of the contract of employment". The common law rule as articulated by Justice Sherstobitoff in the passage reproduced in *Farber v. Royal Trust Co*., at p. 865 views the employee's resignation as the event giving "rise to an obligation on the employer's part to provide damages in lieu of reasonable notice". England and Christie, in *Employment Law in Canada*, emphasize in para. 13.24 that the constructive dismissal is deemed to occur upon the employee's resignation:
>
> > The acts of the employer may entitle the employee to quit, with or without notice, and to recover damages, with the resignation being treated in all respects as if it were a wrongful dismissal by the employer. This is known as "constructive dismissal". . . .
>
> It follows that Mr. Dick's cause of action only arose once he resigned in early January 1989. Accordingly, his action is not barred by s. 9 of the Limitation of Actions Act. See, also, the Alberta Court of Appeal decision in *Oseen v. Chinook's Edge School Division No. 73*, [2006] A.J. No. 1291, 2006 ABCA 286, in which that court stated as follows [at para. 14]:
>
> > It is settled law that repudiation of a contract does not terminate the contract unless the repudiation is accepted. Until the repudiation is accepted, the contract continues. In the employment context, acceptance is often communicated by resignation but it can take other forms: S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Books Inc., 2005) at 448 and Randall S. Echlin & Jennifer M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (Ontario: Canada Law Book Inc., 2001) at 48. Therefore, the Board erred in law in concluding the contract was terminated on the date of the alleged repudiation and not on the date the appellant communicated her acceptance of the alleged repudiation.

> [28] The established jurisprudence makes it clear that a cause of action for constructive dismissal arises when the employee elects to resign from his employment. A cause of action for constructive dismissal does not arise when an employer acts unilaterally in a manner which gives rise to the right of an employee to resign but where the employee does not resign.
>
> [29] There would be some very significant practical problems if the courts accepted that a cause of action of constructive dismissal can be discovered before acceptance by the employee of the repudiation of the contract by the employer, that is, before the employee resigns. When an employee suffers interference in the performance of his/her job duties and a concomitant diminution of responsibilities, there may be multiple opportunities for such an employee to resign on the basis that he or she has been constructively dismissed. However, in many circumstances the employee, for perfectly valid reasons, may elect to carry on and see if he/she can work it out. If the respondent is correct about when the limitation period is triggered, it is possible that a plaintiff/employee could resign after being interfered with for two years, having finally had enough (the straw that broke the plaintiff's back), only to be told that the limitation period has expired because she/he could have "accepted the repudiation" of the contract more than two years ago, i.e., the claim was discoverable. This is neither workable nor fair. Neither is such an approach consistent with the jurisprudence.

[57] Based on the principles outlined in *Saltsov*, while Mr. Desrosiers' sexual harassment of Ms. Cochrane may have concluded on July 26, 2018, she elected to give her two weeks' notice and continued working for the applicants. When her employer marched her out of the workplace on August 8, 2018, they openly repudiated the employment contract.

[58] Similar to the decision in *Saltsov*, in *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73, Archibald J. stated:

> [135] Mr. McKechnie argued that the extraordinary damages that the Plaintiff seeks are statute-barred. He acknowledged that the Plaintiff's claim for constructive dismissal would not be statute-barred since, in the case of constructive dismissal, the limitation period does not run until the employee elects to resign. He also did not argue that the Plaintiff acquiesced in his constructive dismissal by remaining employed with Canac. The Notice of Action was filed January 7, 2008; however, Mr. McKechnie argued that any award of moral or punitive damages founded on actions that occurred more than two years prior to that date would be statute-barred.
>
> [138] In response, Mr. Fletcher cited *Saltsov v. Rolnick*, 2010 ONSC 914, [2010] O.J. No. 1632 (Div. Ct.) [*Saltsov*]. The Divisional Court panel in *Saltsov*, at paras. 28-29, held that the cause of action for constructive dismissal arises when the employee elects to treat the contract of employment as at an end:…

…

[139] The Plaintiff's claim for constructive dismissal as of April of 2005 is not statute-barred. Mr. McKechnie does not disagree with this point. The Plaintiff never accepted the changes to his employment duties and reporting structure upon his return to work in April of 2005. I agree with the policy rationale behind the Divisional Court's reasoning in *Saltsov***.** Furthermore, the facts in this case as they pertain to constructive dismissal are distinguishable from those in *Bagnulo*. In that case, the plaintiff had been given notice as of November 1, 2006, that her employment with the defendant would be changing. She signed a letter on January 16, 2007, indicating her knowledge and acceptance of her new work conditions. The trial judge found that "[i]t was quite clear that she was reverting to a fixed time employment contract. It was spelled out in the letter signed by her on January 16, 2007": *Bagnulo* at para. 47. There are sound policy reasons for enforcing limitation periods where an employee has accepted or acquiesced in his or her altered employment conditions. However, the Plaintiff never accepted the changes to his position upon his return to work, and *Bagnulo* is therefore distinguishable.

[140] Since I have not awarded any additional damages, I need not decide the issue of whether the Plaintiff's claims for extraordinary damages are statute-barred. However, in the event that I am wrong, I would add that the claim for the intentional infliction of mental suffering was not statute-barred, as the visible and provable illness was not diagnosed until March of 2006. With respect to the claim for intentional infliction of mental suffering, the full cause of action would not have been discovered or discoverable until the visible and provable illness was known to the Plaintiff: *Boucher* at para. 41. This did not occur until Dr. Baker's diagnosis on March 27, 2006. **Furthermore, had I agreed with the version of events presented by the Plaintiff, the employer's actions would have constituted one continuous course of conduct rather than a discrete act. The limitation period would not have begun until the final act in that course of conduct**. [Emphasis added]

[59] In *Bambury v. Royal Bank of Canada*, 2011 ONSC 2840, Grace J. detailed the facts pertaining to a limitation period issue raised in defence of a constructive dismissal claim where similar issues were raised, and said:

[1] In the evening hours of Sunday November 4, 2007 Ms Bambury delivered a short, handwritten note to the Royal Bank of Canada ("RBC"). **Dated November 5, 2007, it signaled the end of Ms Bambury's more than twenty year career at RBC. The note said simply:**

Please be advised effective November 16, 2007 I resign from the Royal Bank.

[2] On November 10, 2009 she commenced this action against RBC. Ms Bambury alleges that she was terminated by RBC and seeks compensation she says was due but withheld.

> …
>
> [10] On October 26, 2007 a "return to work facilitation meeting" was convened. According to the memorandum prepared at the time, differences were aired. Ms Bambury was advised that her wish to relocate to a different branch could not be accommodated. The memorandum indicated that Jeff Boyd, Regional Vice-President, advised Ms Bambury that she would:
>
> > …be first required to return to work at the branch she is currently positioned at, demonstrate performance within her role and get behind (sic) the personality conflict with Ms. Papaevangelou.
>
> [11] Ms Papaevangelou was reported to have been apologetic for "how things turned out" and "supportive of having Ms. Bambury ease back into work."
>
> [12] Ms Bambury received but did not celebrate the message that a return to work was expected. She said she would consult with her physician before committing to a date for the resumption of active service.
>
> [13] It appears silence reigned, on both sides, until broken momentarily by the November 5, 2007 letter. On November 16, 2007, RBC issued a record of employment ("ROE"). The code used on the form indicated that Ms Bambury had quit. In the comments section a single word appeared. The ROE simply said "Opportunities". **It also stated that Ms Bambury had been paid to November 5, 2007**. [Emphasis added]

[60] In concluding that the effective date for calculating the limitation period commenced on November 5, 2007, when Ms. Bambury dated the resignation note to her employer, and which (unlike the instant case) also turned out to be her last paid day of work, Grace J. stated:

> [41] Mr. Fox argued that it was only on November 21, 2007 that Ms Bambury knew her resignation had been accepted. **A constructive dismissal claim arises when the employee accepts the employer's repudiation of the employment contract. The authorities do not support the proposition that the employee's election must, itself, be accepted by the employer.** That is particularly so here. On its face Ms Bambury's note was unconditional, definitive and irrevocable.
>
> [42] In my view Ms Bambury's claim was discovered on November 5, 2007. The two year period set forth in section 4 of the *Limitations Act, 2002* started to run on that date. Regrettably, commencement of these proceedings on November 10, 2009 was too late.

[61] *Bambury* indicates that the limitation date runs from the date the employee accepts the employers repudiation of the contract, in that case the day the plaintiff gave notice, which coincided with her final day of work. *Saltsov* and *Ciskowski*

indicate that a constructive dismissal occurs on the date that an employee resigns. Again, those cases do not clarify whether a resignation occurs on the date the employee gives notice of resignation or, rather, on the employee's final day of work. This distinction is significant to the arguments made by the applicant. If the two-year basic limitation period for Ms. Cochrane's constructive dismissal claim began to run on the date that she gave notice of resignation, her entire claim is statute-barred – an assertion the applicant has not made. If the limitation period began to run on her final day of work, her claim is timely.

[62] In *The Law of Limitations*, 3rd ed (LexisNexis Canada, 2016), by Graeme Mew, Debra Rolph & Daniel Zacks, the authors state that the intention of the employee should be considered when determining the commencement of the limitation period where the employee has given notice of an intention to terminate their employment. At section 9.102, the authors state:

> Where the employee initiates the termination of the employment relationship by giving notice, the intention of the notifying party must be considered. In *Oxman v Dustbane Enterprises Ltd*., the plaintiff delivered a letter of resignation on the basis he would continue to hold office for six months to facilitate a smooth transition until his replacement was found. When the employer failed to convince the plaintiff to reverse his decision, it took the position the letter of resignation was immediately effective. **The Ontario Court of Appeal disagreed. It concluded that the offer of resignation was not effective for six months. The letter did not terminate the plaintiff's employment if its terms were not accepted as offered**.
>
> [Emphasis added]

[63] In *Oxman v Dustbane Enterprises Ltd.*, 1988 CarswellOnt 903, 32 OAC 154 (Ont. C.A.), the court held that the trial judge was wrong in treating the date a resignation letter is delivered as the marker for termination of employment:

> 5 The trial Judge treated Oxman's letter of resignation as terminating his employment as of the date of its delivery. His view of the legal consequences of Oxman's action is summed up in the following paragraph [13 C.C.E.L. 233]:
>
> > The resignation of an employee conceptually terminates the relationship with the employer and with it the basis of confidence and trust. Where the parting is amicable, as by mutual agreement, the employer and employee may be expected to negotiate the period of notice and severance terms. These cases are unlikely to come to Court. Where the circumstances of the resignation are in the nature of confrontation, dispute or acrimony, the parties stand on their legal rights. The resignation may take effect immediately and the employee departs at once; the employer may sue for

> lack of notice or may waive it and accept the employee's conduct. The employee, in these circumstances, cannot claim continued employment (or compensation in lieu thereof) merely because the law requires him to give notice; similarly, if he gives notice he is not entitled to further employment if the employer waives the notice. It is otherwise if the employer accepts the period of notice and in effect extends the contract of employment.
>
> 6 With great respect, I cannot agree with this proposition in the context of the facts of this case. Accepting, as I do, the established principle that an employee is obliged by law to give reasonable notice of the termination of his employment (see *Lazarowicz v. Orenda Engines Ltd*., [1961] O.R. 141, 26 D.L.R. (2d) 433 (C.A.)), it is clear that, read as a whole, the letter of resignation was notice to Dustbane that Oxman would be leaving his position in 6 months. It makes no sense to read it as an immediate resignation with an offer to remain on in some undefined capacity to ensure "a smooth transition". **If his offer to remain for 6 months had been accepted, surely this could only mean that he would continue on as an employee for another 6 months and that his employment would terminate at the end of that period.** [Emphasis added.]

[64] *Oxman* indicates that resignation occurs when employment is actually terminated, which in that case was the final day of work.

[65] The allegations made by the respondent describe a toxic work environment created by behaviours that were ongoing, and the toxicity cumulative. The respondent gave her notice on July 26 but continued working until August 8 (and was prepared to continue working until August 9). The toxic behaviours she describes allegedly continued until the end of her work day on August 8, 2018. While she admits the sexual harassment ended on July 26 when she gave her formal notice to resign, the non-sexual aspects of the toxicity continued. The applicant denies these facts, but says that the factual allegations after July 26 allow that aspect of the claim to proceed.

[66] The defendants have not established that the proceeding was commenced after the applicable limitation period had expired. For the purposes of this motion, the defendants have not disputed that there is evidence of the alleged conduct underlying the claim up to the last day the plaintiff worked.

[67] There is evidence of a continuous course of alleged conduct, or a series of related acts, which encompasses both the sexual harassment and the toxic work environment, up to and including August 8, 2018 (I emphasize that the truth of the allegations is not before the court on this motion). As such, the defendants have

not satisfied me that summary judgment (partial or total) on evidence should be ordered.

Conclusion

[68] The application for summary judgment (partial or total) is dismissed.

[69] If the parties cannot sort costs out between themselves within 30 days of the release of this decision, I will arrange for submissions on that issue.

Arnold, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Cochrane v. HFX Broadcasting, et al.*, 2021 NSSC 341

Date: 20211221
Docket: *Halifax*, No. 499586
Registry: Halifax

Between:

Lindsay Cochrane

v.

HFX Broadcasting Inc. and Evanov Radio Group Inc. Groupe Radio Evanov Inc.

DECISION ON MOTION FOR SUMMARY JUDGMENT

ERRATUM

Judge:	The Honourable Justice Joshua Arnold
Heard:	August 10, 2021, in Halifax, Nova Scotia
Counsel:	Augustus Richardson, Q.C., and Laura Neilan, for the Plaintiff (responding party) David Coles, Q.C., for the Defendants (moving party)
Erratum Date:	December 21, 2021
Erratum:	See below

[1] Paragraph 48 of the decision released December 14, 2021, should be deleted.

[2] The second sentence of Paragraph 64 of the decision released December 14, 2021, should be deleted. Paragraph 64, should read:

> [64] *Oxman* indicates that resignation occurs when employment is actually terminated, which in that case was the final day of work.

Arnold, J.