SMHI LEGAL NOTES
STEINBERG MORTON HOPE & ISRAEL LLP
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New Year, New Laws

Welcome to 2013! It is a new year and with a new year comes a slate of changes to various laws. In this article, we will provide you with an overview of some of those changes that we think you should know about. So in no particular order...

Landlord Tenant Law

Each year the Ministry of Municipal Affairs and Housing sets down a guideline according to which a residential landlord can legally increase rents. This year's guideline amount is **2.5%.**

It is important to remember that in order to legally increase residential rents, a landlord must provide a tenant with notice in writing at least 90 days before the increase is to take effect. In addition, the rent can only be increased once every 12 months. To download the Notice of Rent Increase form as well as other landlord and tenant forms visit www.ltb.gov.on.ca

Estate Law

In 2011, the Ontario Government introduced changes to the procedure for probating a will. The changes were to take effect on January 1, 2013 however the regulations, which provide the details of how the new process is to operate, have not yet been released. In the short term, this means business as usual. But the changes are coming and therefore it is important that you be aware of them.

First some background. When a person dies, their estate must be administered and distributed. Although this is the case whether or not there is a will, the balance of this article will assume there is a will in place.

A will generally names the person who will oversee the deceased's estate. That person is the estate trustee, or executor as he/she is more commonly referred to. The estate trustee derives his/her authority from the will and therefore can begin performing his/her duties immediately. Having said this, there are often instances when a third party, e.g. a financial institution, requires that a will be probated. In other words, these third parties want to be reassured by the court of the will's validity and the estate trustee's authority.

Currently, when a will is probated, the estate trustee applies to the Ontario Superior Court for a Certificate of Appointment of Estate Trustee. As part of the application, the estate trustee will swear an affidavit confirming basic information about the deceased, the total value of personal property and the net value of real estate held by the estate. The amount of the application fee, referred to as the probate fee or more properly the estate administration tax, is based on the value of the estate that must pass through the will. For instance, an estate valued at $500,000 will pay $7,000 as the estate administration tax ($250 on the first $50,000 and $15 per $1,000 on the balance).

Under the new regime, it is expected that the estate trustee will now have to file a complete inventory of the estate assets, including a professional valuation, neither of which is currently required when applying for a Certificate of Appointment. The estate trustee may also have to provide information about assets that pass outside the estate.

Another significant change is the audit and verification powers that have been given to the Minister of National Revenue. The Minister of Revenue can assess or reassess an estate in respect of the estate administration tax within four years after the day the tax becomes payable. In addition, the Minister may, at any time, assess or reassess an estate's tax payable if the estate trustee or one of the advisors (lawyer, accountant, financial, etc...) made a negligent or fraudulent misrepresentation. Offences under the Act could result in a fine equal to an amount that is at least $1,000, or double the tax payable.

These changes mean that estate trustees will have to be extra vigilant about their record keeping. Also, the

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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.*

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administration of the estate may be delayed significantly while valuations are sought. Since the Act does not make provision for a clearance certificate this MAY also cause delays because the estate trustee will want to minimize his/her potential liability by being methodical.

Minimizing the amount of estate administration tax has always been one of the reasons for estate planning. These changes that are coming reinforce the need for proper estate planning.

We will continue to keep you apprised of the status of the regulations as well as the exact nature of the changes.

Workers Compensation

If you work in the construction industry, then assume you are probably required to have WSIB coverage. The new rules, which came into effect on January 1, 2013, extend mandatory coverage in the construction industry to include:

- Employers with workers
- Independent operators
- Sole proprietors
- Partners in partnerships
- Executive officers in corporations

The WSIB considers you an independent operator if you:

a) are an individual who:

- does not employ any workers,
- works as a contractor or subcontractor for more than one person during an eighteen (18) month period, and
- reports as self-employed to a government agency, or

b) are an executive officer of a corporation that:

- does not employ any workers other than the individual, and
- works as a contractor or subcontractor for more than one person during an eighteen (18) month period.

There does remain two groups that are exempted from mandatory coverage. The first is home renovators who work directly for and are paid directly by the homeowner.

The second exemption applies to one executive officer or partner. Businesses with this option are corporations and partnerships with workers, corporations without workers but with multiple executive officers or partnerships without workers.

The bottom line is that, with very limited exceptions, to work in the construction industry in Ontario you require WSIB insurance coverage.

Internet Law

Canada at last has an anti-spam law, sort of. The legislation, which was passed in 2010, will prohibit, with some exceptions, the sending of unsolicited commercial electronic messages, i.e. spam. Although it has been on the books for more than two years, the law has not yet come into force. The latest delay is a 30 day consultation period that began on January 5, 2013. Industry Canada published a revised version of its proposed regulations which provide the details of how the law will operate.

It is expected that the law may finally come into force later this year or early 2014. We will continue to keep you apprised of the status of this legislation. In the meantime, if you operate a business and you require assistance adjusting your practices to achieve compliance with the legislation please contact us.

Corporate Law

In 2010, the Ontario government introduced a law to set out how not-for-profit corporations, including charitable corporations, are created, governed and dissolved - the Not-for-Profit Corporations Act. The government is currently targeting July 1, 2013, as the date this new law will come into effect. The Act will apply to every corporation without share capital incorporated under an act of the Ontario legislature, including the current Corporations Act.

Among other things, the new Act will make the process of incorporating a not-for-profit simpler and more efficient. It also clarifies that not-for-profit corporations can engage in commercial activities that support their not-for-profit purposes. Members of a not-for-profit will have improved rights under this Act, including greater access to financial records and actions they can take if they believe directors and officers are not acting in the best interests of the corporation.

The new Act distinguishes between public benefit corporations and other not-for-profit corporations.

This new legislation will, in some cases, allow for a review engagement process rather than the more complicated audit. In addition, members of a public benefit corporation with annual revenue of $100,000 or less can waive both an audit and a review engagement by an extraordinary resolution. Members of a public benefit corporation with annual revenue of more than $100,000 but less than $500,000 can waive audit requirements and use the review engagement process by an extraordinary resolution.

If a public benefit corporation has annual revenue of $500,000 or more, an audit will still be mandatory.

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Low Skill ≠ Low Notice

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Dickson C.J.
Re Public Service Employee Relations Act (Alta.)

This quote by the former Chief Justice of the Supreme Court of Canada underscores the importance of employment in our society. As a result, it is not surprising that the law plays an important role in governing employment, particularly when an employee is dismissed. In fact, many of the employment cases that make it to the courts centre on this very topic.

As we have stated numerous times in the pages of this newsletter, no one is entitled to a job for life. However, if an employer wishes to put an end to an employee's employment, where no just cause is present, the employer is required to either provide reasonable working notice or payment in lieu of notice. Wrongful dismissal suits arise when the employer has failed, or has allegedly failed, to provide this adequate notice.

Despite the plethora of wrongful dismissal cases that have been decided over the years, the touchstone continues to be the test laid out in the 1960 case of *Bardal* v. *Globe & Mail Ltd*. The test is:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

This was made clear by the Ontario Court of Appeal in the case of Di Tomaso v. Crown Metal Packaging Canada LP.

Mr. Di Tomaso, who was 62 at the time of his termination, had worked for Crown Metal for more than 33 years as a two-piece mechanic and press maintainer. These jobs were unskilled, low level ones. Pursuant to the *Employment Standards Act, 2000*, Di Tomaso was given the statutory 26 weeks severance pay upon his termination. Although he spoke to and applied at 22 companies in the area, he was unsuccessful in his search for a new job.

At trial, Crown Metal argued that the maximum notice Di Tomaso would be entitled to was 12 months. The basis for its position was the character of the employment, that he was an unskilled low level worker. In dismissing this argument, the trial judge referred to the list of factors laid out in Bardal, considering each of them. She concluded that Di Tomaso was entiteld to 22 months notice observing that he was 62 years old on the termination date and had served for 33 years, and his efforts to find other employment in the market.

Crown Metal unsuccessfully appealed the decision to the Court of Appeal. While the appellate court recognized that the job had been a junior one, the Court noted that Di Tomaso scored highly on the other Bardal factors: age, length of service and efforts to find a new job, these three factors being the most relevant in the circumstances.

In addition to confirming the Bardal test, the appellate court also confirmed that "no one Bardal factor should be given disproportionate weight." The Court also threw cold water on the notion that a low level unskilled employee has an easier time finding a new job thus justifying a shorter notice period. The court quoted with approval Drapeau J.A.:

The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy. (Medis Health and Pharmaceutical Services Inc. v. Bramble 1999 CanLII 13124 (NB CA), (1999).

Over the years, there have been a few cases that have added additional factors to those outlined in Bardal. For instance, bad faith at the time of the termination may serve to extend the notice period. But when all is said and done, it is the factors outlined in Bardal that an employer must take into account when dismissing an employee and no one factor should be singled out as being more important.

There was a second issue in this case that is also worth noting. It involved the delivery of the actual notice of termination.

Di Tomaso was initially told on September 9, 2009, that his employment would be terminated on November 6, 2009. However, two days before that termination date, Crown Metal informed him that his employment would be extended to December 18, 2009. This same scenario was repeated three more times before Di Tomaso was finally terminated on February 26, 2010. Each time Crown Metal provided Di Tomaso with written notice. In those same letters, he was told that his employment was being extended for a temporary period only.

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By claiming that its September 9, 2009 notice of termination was the official notice and that Mr. Di Tomaso's entire subsequent temporary employment constituted an authorized period of "working notice", pursuant to the Employment Standards Act, Crown Metal was attempting to reduce the amount of serverance it had to pay Di Tomaso.

Crown Metal's position was that since each of the extensions was less than 13 weeks in length, the September 9, 2009 notice remained valid thus providing Mr. Di Tomaso with working notice from that date to February 26, 2010. For his part, Di Tomaso argued that the extensions should be viewed cumulatively, and that only the final letter of February 24, 2010 provided clear and unequivocal notice of termination as required by law.

The trial judge agreed with Di Tomaso's argument, a decision that was upheld on appeal. The Court of Appeal concluded:

To find, as Crown Metal suggests, that the Regulation allows employers to give notice of termination but then extend employment for multiple, serialized periods of less than 13 weeks would be inconsistent with the ESA's status as remedial, benefit-conferring legislation designed to protect the interests of employees: Rizzo v. Rizzo Shoes Limited, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 36.
I would add only that "clear and unambiguous" notice of termination must include the final termination date. In the present case, the September 9, 2009 notice of termination included a termination date that came and went, as did several others during the five-month period that followed. As the motion judge found, "the cumulative effect of the multiple extensions created uncertainty for [Mr. Di Tomaso] as to when he would no longer have his job." It was not until the February 24, 2010 letter that this uncertainty was cured. Mr. Di Tomaso's termination date was confirmed, and Crown Metal's notice to him was made good on that day.

Dismissing an employee, particularly when that employee has been with the employer for a good length of time, can be fraught with danger. For this reason, it is important to seek legal advice before delivering that notice of termination. Our firm works in the area of employment law and we would be pleased to assist you with your workplace matters.

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The members of all other not-for-profit corporations with an annual revenue of $500,000 or less can waive both an audit and a review engagement by an extraordinary resolution. If annual revenues are in excess of $500,000, its members can waive the audit requirement in favour of the review engagement process by an extraordinary resolution.

Although existing not-for-profit corporations will not be required to file articles of continuance for the new legislation to apply there are some exceptions. Finally, existing not-for-profit corporations will have a three-year transition period once the Act is in effect.

If you require assistance to prepare for and transition to Ontario's new regime for not-for-profit corporations, we encourage you to contact our firm. We have extensive experience in the area of corporate law and we would be pleased to help.

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