THE OTTAWA REGION CHARITY LAW SEMINAR

Ottawa – February 11, 2009

Employment Law Update for Charities, including New Procedures under the *Ontario Human Rights Act* and Wrongful Dismissal Considerations

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INTRODUCTION

- **On June 30, 2008 the new human rights regime came into force, in Ontario, pursuant to the *Human Rights Code Amendment Act 2006***
- **This new model introduces significant changes in the manner in which human rights complaints are processed in Ontario**
- **As well, the new model provides significant changes to the substantive law relating to remedies potentially available to human rights complainants**

2

RESOURCE MATERIALS

For more information see

- **Charity Law Bulletin No. 153 available at http://www.carters.ca/pub/bulletin/charity/2009/chylb153.pdf**
- **Charity Law Bulletin No. 148 available at http://www.carters.ca/pub/bulletin/charity/2008/chylb148.pdf**
- **Charity Law Bulletin No. 144 available at http://www.carters.ca/pub/bulletin/charity/2008/chylb144.pdf**
- **Church Law Bulletin No. 22 available at http://www.carters.ca/pub/bulletin/church/2008/chchlb22.pdf**

3

PART A—HUMAN RIGHTS CODE AMENDMENTS &AFFECTS ON WRONGFUL DISMISSAL CLAIMS

1. Complaints Now Filed Directly with Tribunal

- **Under the old model, the Ontario Human Rights Commission ("the Commission") acted as a "gate-keeper" of all complaints filed under the *Human Rights Code* (Ontario) ("Code")**
- **As "gate-keeper", the Commission reviewed and investigated complaints and decided which cases would proceed to the Ontario Human Rights Tribunal ("the Tribunal")**

4

- **Only a small percentage of complaints were ever litigated, and the Commission had carriage of the cases during the litigation**
- **Under the new model, complaints must be filed directly with the Tribunal**
- **Complainants can no longer depend on the Commission to advocate on their behalf**

2. New Role for Commission

- **Although the Commission will no-longer be playing the role of "gate-keeper", it will be developing policies, initiating public inquiries on human rights issues, and expanding its work in promoting a culture of human rights in Ontario**

5

- **The Commission now has the right to intervene in applications before the Tribunal and may initiate its own applications to the Tribunal in the public interest**

3. Restructured Tribunal

- **The Tribunal has been restructured as part of the Government's stated goal of providing "a more open, accessible and faster complaint resolution process" "to resolve individual disputes fairly, quickly and effectively"**
- **Appointments to the Tribunal are made through a competitive process based on criteria, such as experience or knowledge in human rights**

6

- **Despite applicants' ability to proceed directly to a hearing before the Tribunal, it may still require parties to participate in alternative dispute resolution methods, such as mediation**
- **Importantly, the Tribunal will not strike claims without giving applicants an opportunity to provide oral submissions, even if the claim is or can be described as trivial, frivolous or vexatious**
- **Nevertheless, the Tribunal may also dismiss proceedings, if it is of the opinion that another forum has appropriately dealt with the substance of the application**

7

- **Therefore, the Tribunal will retain a supervisory role as to the cases that proceed to a full hearing**

4. Time Limits for Filing Applications

- **The time limits for filing applications is extended from six months under the old regime to one year after the incident to which the application relates or, if there were a series of related incidents, within one year after the last incident in the series**
- **A person may also make application after this time limit if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay**

8

- **In addition to individuals, a new provision permits a person or organization, other than the Commission, to make an application on behalf of another person if that person consents**
- **Under this provision, unions will be permitted to make applications to enforce a member or member's rights under the Code**
- **Similarly, public interest groups will now be allowed to file complaints on behalf of individuals who are vulnerable to reprisals if they bring applications in their own names**

9

5. Remedies

- **Section 45.2 of the Code sets out the following remedies that may be sought by individual applicants or groups who have brought complaints under section 34 of the Code:**
  - **Monetary compensation or non-monetary restitution for loss arising out of the infringement, including: injury to dignity, feelings and self-respect**
  - **Discretionary remedies that promote compliance with the Code, both in respect of the infringement that was the subject of the application and in respect of future practices**

10

- **In addition, the ten thousand dollar cap on mental anguish is eliminated, as is the requirement for the applicant to show that the respondent "wilfully or recklessly" engaged in conduct to successfully claim damages for mental anguish**
- **Another significant addition to the Code is the enactment of section 46.1, whereby a court in a *civil action* may order compensation for an infringement of a right in the Code**
  - **However a civil claim *cannot be solely based on an infringement of the Code***

11

  - **For example an action for wrongful dismissal may now include a claim for additional damages arising from a breach of the Code if the dismissal was tainted by wrongful discrimination**
  - **An applicant is barred from bringing an application to the Tribunal for the same infringement where a civil action is also commenced**
  - **Therefore, the applicant needs to make a choice between a civil claim and an application to the Tribunal**

12

6. **Newly Established Legal Support Center**

- **A Legal Support Center ("the Center") has been established, with a mandate to provide legal services to applicants with bringing applications, Tribunal hearings, and the enforcement of Tribunal orders**
- **The Center will provide support only to those seeking to enforce human rights under the Code (i.e. applicants) rather than those responding to applications (i.e. respondents)**
- **Presently, the Center does not have any financial tests for eligibility**

13

- **Therefore, it appears that any person, regardless of income, may access the Center's services**
- **On January 30, 2008, the Commission approved a revised set of Guidelines on Developing Human Rights Policies and Procedures, which are posted on the its website**
- **It would be prudent for anyone involved in the human rights process in their organization to be familiar with these guidelines, as they represent the Commission's interpretation of the Code at the time of publication**

14

- **As a result of these amendments to the Code, it is likely that there will be an increased number of human rights hearings and higher monetary awards in Ontario**
- **In this regard, employers should prepare themselves for the changes, by doing such things as: reviewing their policies, practices and processes to ensure that they comply with the Code – and by readying themselves for an increase in Tribunal hearings and potential liabilities**
- **Generally, employers should take a proactive approach in trying to avoid wrongful dismissal claims to begin with**

15

PART B—GENERAL TERMS OF WRONGFUL DISMISSAL & HOW TO AVOID GETTING SUED

1. **Legal Relationship Between Employer and Employee—How a Wrongful Dismissal Claim May Arise**

- **The basic principle of wrongful dismissal law is that there is a contractual relationship between the employer and the employee**
- **The parties are therefore free to negotiate the terms and conditions that will govern the employment relationship, including the termination of the relationship**

16

- However, these terms and conditions cannot provide for less than what is set out in the relevant statutes in your jurisdiction, such as the *Employment Standards Act, 2000* (Ontario) ("ESA"), and the Code
- The majority of employment contracts are not written
- Whether the employment contract is written or oral, unless the parties otherwise agree, it is implied in all employment contracts that they are of indefinite duration and are subject to termination by the employer only for "just cause" or by giving reasonable notice of termination or pay in lieu of that notice

17

- Where an employer terminates an employment contract without just cause, or reasonable notice or pay in lieu thereof, the employer is considered to have breached the contract of employment and wrongfully dismissed the employee
- In those circumstances, the employer may be liable to the employee for monetary damages

2. Statutory Requirements

- In Canada, all provinces and territories have employment law statutes setting out the minimum level of entitlements that an employee must receive upon dismissal without just cause

18

- In Ontario, the ESA provides that employees are entitled to:
  - One week's notice if employed between three months and a year
  - Two week's notice if employed between one and three years
  - One week's notice per full year of service, up to a maximum of eight weeks, if employed more than three years
- Employers must also continue benefit plan contributions during the statutory notice period

19

- In addition, employers are also required to provide "severance pay" where the employer's payroll exceeds $2.5 million, and the employee has completed at least five years of employment
- The severance pay owing is one week's pay for each year of service, up to a maximum of twenty six weeks pay
- It is important to emphasize that these statutory payments are minimums to which an employee dismissed without cause is legally entitled

20

3. **Common Law Notice**

- **Over the years, Canadian courts have determined that an employee's reasonable common law notice must be determined by a number of factors**
- **The Ontario judgment most often cited with respect to these factors is *Bardal v. Globe and Mail Ltd.* ("Bardal"), a 1960 case of the Ontario High Court (as it was then called)**
- **In Bardal, the court set out the following factors that determine the applicable notice period:**
  - **The character of the employment (i.e. the position held by the employee)**

21

  - **The length of service**
  - **The age of the employee**
  - **The availability of similar employment, have regard to the experience, training and qualifications of the employee**
- **The purpose underlying these factors determining the length of notice is to provide sufficient opportunity for the dismissed employee to obtain alternative comparable employment**
- **Therefore, in many instances, the longer the length of service, and the older the employee, the longer the notice period will need to be**

22

- **Courts have imposed a rough upper limit on common law notice of twenty four months**
- **Formerly, some judges applied a so called "rule of thumb" that an employee is entitled to roughly one month pay in lieu of notice for each year of service to the employer**
- **While this rule of thumb has been rejected by the courts, it is still fairly regularly applied by employers in practice as a fair starting point to establish a reasonable notice period**

23

4. **Additional Common Law Damages for Wrongful Dismissal**

- **Unlike statutory notice, an employer who wrongfully dismisses an employee is required not only to pay the former employee's regular pay over the notice period, but also may be required to pay the following additional amounts:**
  - **Any bonuses or commissions that would have likely accrued during the notice period**
  - **The value of any benefits that the employee would have enjoyed during the notice period, such as car allowance, etc.**

24

- The replacement value of the employee's health benefit plan
- The value of any stock options the employee could have exercised during the notice period or
- Any increase in value during the notice period of shares that the employee owned, which he or she was required to redeem at the time of dismissal
- The increased value of the employee's pension during the notice period

- Also, an employer who dismisses an employee in an unnecessarily callous manner may be required to pay additional damages

25

- The Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.* and more recently, *Honda Canada v. Keays* support that:
  - If the employee can establish that the employer engaged in bad faith conduct, or unfair dealing during the course of dismissal, injuries such as humiliation, embarrassment and damage to one's self worth and self-esteem might well be deemed worthy of compensation
- This additional compensation to the employee flows from the manner in which the dismissal was carried out

26

- If the court finds that the employer's conduct was particularly egregious, an award of punitive damages may be made
- Although punitive damages are rarely awarded, it is not unheard of in employment situations

5. The Right to Reinstatement

- Common law claims for wrongful dismissal are for monetary damages only, and the law does not allow for reinstatement
- However, an employee who was dismissed in breach of the anti-discrimination provisions of the Code may proceed with an application to the Tribunal

27

- If there is a finding of unlawful discrimination, the Tribunal has powers under the Code to order reinstatement, with full back wages
- In addition, the Canada Labour Code ("CLC") provides a limited statutory right to reinstatement
- Note that the CLC applies only to federally regulated industries, such as banks, marine shipping, air transportation and railway and road transportation that involves crossing provincial or international borders

28

- **Under "Division XIV – Unjust Dismissal" of the CLC, employees meeting certain criteria can apply for an adjudicated determination of whether the employer had just cause to discharge them and, if the employer did not, to seek extensive monetary remedies, as well as reinstatement**
- **Those criteria are:**
  - **1. they are not managers (s.167(3));**
  - **2. they have completed twelve months of continuous employment (s.240(1)(a));**

29

  - **3. they are not subject to a collective agreement, which has its own procedures for addressing whether discipline and/or discharge were imposed without just cause (s.240(1)(b))**
  - **4. they were not terminated because of lack of work or the discontinuance of a function (s.242(1)(3.1))**

6. Termination for Cause

- **Although the employer is always entitled to dismiss an employee without notice or termination pay for just cause, the onus is on the employer to prove that cause exists**

30

- **In this regard, the employer must prove incompetence or misconduct and not just dissatisfaction with performance or concern about potential misconduct**
- **Many employers are reluctant to dismiss an employee for just cause unless the circumstances are clear and capable of being proven**
- **Therefore, dismissing an employee for just cause should not be taken lightly, as the organization may well be required to defend its actions in court or before a labour standards tribunal, or even possibly before a human rights tribunal**

31

7. Reducing the Risk of Wrongful Dismissal Claims

- **Defending a wrongful dismissal claim can be costly and time consuming for the organization**
- **The following steps may serve to reduce the risk of facing such claims:**
  - **Use written employment contracts**
    - **A well drafted employment contract may serve to limit the employer's liability in the event of employee termination**
    - **A contract will specify the notice periods that the employee would be entitled to in the event of termination without cause**

32

- **To avoid allegations that the contact was forced on the employee and is unjust, the employer should give the employee the opportunity to seek independent legal advice**
- **Further, a current employee should never be advised that he or she is required to sign an employment contract as a condition of continued employment with the organization, as a court will likely not enforce such an agreement**

33

– **Full and final release**

- **In the event that you are offering your dismissed employee a termination package which exceeds the statutory minimum payments, have the employee sign a Full and Final Release in favour of the organization as a condition of receiving any funds beyond the statutory minimums**
- **Such a release would protect an employer in the event that the employee has second thoughts about the severance package after he or she has been paid out**

34

– **Working notice**

- **Consider providing working notice instead of pay in lieu of notice**
- **If the organization believes that the employee will still be able to function effectively after receiving notice that the job will be terminated, it will have the benefit of having a working employee throughout the notice period**

– **Avoid acting callously**

- **Avoid acting callously during the course of the dismissal**

35

- **For example:**
  - **Do not withhold statutory amounts owing**
  - **Do not make unfounded allegations against the employee**
  - **Do not refuse a request for a fair and reasonable reference**
  - **Do not take steps that would make the employee's job search more difficult, such as disparaging the employee to customers or potential other employers**

36

– **Documenting**
  - **In dealing with a problem employee, make sure to document any warnings, suspensions or other disciplinary actions on the employee's file**
  - **Such documentary evidence will be invaluable in supporting the organization's position that just cause existed as of the time of dismissal**

37

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