

**IN THIS ISSUE**

**SECURITIES**

**SECURITIES**

*Proposed filing of private placement documents on SEDAR*

Page 57

**EMPLOYMENT LAW**

*Lessons on use of fixed-term employment contracts*

Page 57

**BUSINESS IMMIGRATION**

*Express Entry Application Management System introduced*

Page 60

**CHARTER ISSUES**

*Employee accommodation must be individualized*

Page 62

**BRIEFLY SPEAKING**

*Ground-breaking decisions, statutory amendments, and legislative initiatives*

Page 64

*In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so.*

~ Immanuel Kant  
(1724 – 1804)

**Proposed filing of private placement documents on SEDAR**

Paul Franco, *Doris Law Office*

**Proposed amendments would facilitate private placement filings for reporting issuers but be burdensome for non-reporting issuers.**

On June 30, 2015, the members of the Canadian Securities Administrators (the “CSA”), other than the Ontario Securities Commission and the British Columbia Securities Commission (the “Participating Jurisdictions”), published for comment proposed amendments to National Instrument 13-101 *System for Electronic Document*

*Analysis and Retrieval (SEDAR)* (“NI 13-101”) and Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (the “Proposed Amendments”).

**Proposed requirement**

The Proposed Amendments would require that the following documents, used in connection with a private placement, be filed electronically on SEDAR in the Participating Jurisdictions:

- Form 45-106F1 *Report of Exempt Distribution* (“Form 45-106F1”);
- The offering memorandum and any other document, such as financial statements or marketing material, that may be required in the future to be filed or delivered under s. 2.9 (the

*See Securities, page 58*

**EMPLOYMENT LAW**

**Lessons on use of fixed-term employment contracts**

Andy Pushalik, *Dentons Canada LLP*

**Employers notifying fixed-term employees that their employment contracts will not be renewed should not implement any employment changes that could be construed as a constructive dismissal.**

Employers will often try to give themselves greater flexibility with their workforce by using fixed-term employment contracts. While fixed-term employment contracts can be helpful in planning a company’s labour supply, two recent cases show the issues that can arise on termination if employers do not properly implement these contracts.

**Facts**

The primary benefit to a fixed-term employment contract is that it allows an

*See Employment Law, page 59*

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## Securities *continued from page 58*

agents include law firms, financial printers, trust companies that act as transfer agents and registrars, and other service providers.

### Subscriber requirements

To become a SEDAR subscriber, a non-reporting issuer would need to:

- Download and become familiar with the SEDAR Information Package;
- Complete and sign SEDAR Form 1 – *Application for SEDAR Filing Services*;
- Sign SEDAR Form 2 – *Filing Service Subscriber's Agreement*;
- Return SEDAR Form 1 and Form 2 to the SEDAR Filing Service Contractor; and
- Download and install the SEDAR desktop client software.

### Fee

In addition, since most private placement filings require the issuer to pay a fee in each jurisdiction for the securities sold in that jurisdiction, the fee would have to be paid electronically through SEDAR using an electronic data interchange account (an “EDI Account”). A non-reporting issuer would need to either retain a filing agent to pay the fee on its behalf or it would need to open an EDI Account.

### Education

A non-reporting issuer who chooses to become a SEDAR subscriber and make its own filings would need to invest the time to learn how to use the SEDAR system. For non-reporting issuers that anticipate making only a limited number of SEDAR filings, it will likely be more efficient to hire a filing agent. So, if adopted, the Proposed Amendments would impose a significant burden on non-reporting issuers.

### Access levels

Form 45-106F1 is divided into two sections: the body of the report, which is generally public information, and Schedule 1, which includes personal information about each investor in the private placement, which is generally confidential information. To ensure that the information in Schedule 1 is generally kept confidential, the issuer will need to detach Schedule 1 from the body of Form 45-106F1 and file it with a separate access level that allows it to remain private.

SEDAR documents can be set to one of the following access levels:

- Auto-public – becomes automatically public within 15 minutes of filing on SEDAR;

- Private – initially private, but if or when the securities commission marks it public, it will display on SEDAR; and
- Private non-public – will remain private and will never display on SEDAR.

### Proposed access levels

Under the Proposed Amendments, private placement filings will have the following access levels on SEDAR:

- Form 45-106F1, excluding Schedule 1 – Auto-public;
- Schedule 1 to Form 45-106F1 – Private non-public;
- Offering memorandum – Auto-public;
- Disclosure document (s. 37.2 of Québec *Securities Regulation*) – Private; and
- Offering document, distribution materials, financial statements and notices (crowdfunding exemptions) – Private.

### Significance

If adopted, the Proposed Amendments will generally make private placement filings easier for reporting issuers. However, they will represent a significant new requirement and burden for non-reporting issuers.

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## Employment Law *continued from page 57*

employer to employ an individual for a specific period of time and avoid any liability when the contract expires. This was certainly the goal in the case of *Thompson v. Cardel Homes Limited Partnership*.

Cardel Homes Limited Partnership (“Cardel”) entered into a 12-month contract with one of its executives. Under the terms of the contract, Cardel could terminate the executive’s employment at any time without cause by providing the executive with a lump

sum payment equal to 12 months of the executive’s salary.

### Notice

One month before the end of the contract’s term, Cardel advised the executive in writing that it would not be renewing the contract. The letter went on to state that the executive would not be required to report for work for the remainder of the term, although Cardel would continue to pay the executive’s salary.

The letter also demanded that the executive immediately return his office keys and his computer password. In addition, the company took steps to immediately revoke the executive’s email access and transfer all of the executive’s duties to the President & CEO.

### Termination claim

The executive disagreed with the company’s position that his contract had expired and, instead, argued that his employment had been terminated. As a

*See Employment Law, page 60*

## Employment Law *continued from page 59*

result, the executive sued for the 12-month severance payment contemplated by the contract.

At trial, the judge concluded that the company had not simply notified the executive that his contract would not be renewed; rather, it had terminated the executive's employment without cause by way of constructive dismissal.

### *Court of Appeal*

The Court of Appeal agreed. In a unanimous decision, the Court of Appeal stated that "...the employer's letter and its actions, viewed objectively, constituted a termination." If the employer simply wanted to notify the executive that the fixed-term contract was not going to be renewed, the letter should have been limited to that message.

However, by instructing the executive to return all company property and advising him that his duties would be assumed by the company's President & CEO, the employer had constructively dismissed the executive. As a result, the executive was entitled to the 12-month severance payment.

### **Additional case law**

The issue of an employee's entitlements on termination was also the issue in the case of *Howard v. Benson Group*. In that case, the employer terminated the employment of a manager during the second year of a five-year, fixed-term contract. In so doing, the employer relied on a termination provision.

That provision purported to allow the employer to terminate the employee's employment at any time "...and any amounts paid to the employee shall be paid in accordance with the Employment Standards Act of Ontario." The employee commenced a wrongful dismissal action, arguing that the termination clause was ambiguous.

### *Motion for summary judgment*

The employee also claimed that the clause in question violated the employment standards legislation since it did not provide for the continuation of the employee's benefits during the statutory notice period. On a motion for summary judgment, the judge agreed that the termination provision was not enforceable.

Accordingly, the employee was entitled to a greater amount of notice. However, in a departure from the case law to date, the judge disagreed with the employee's contention that he was entitled to be paid his salary for the remainder of the fixed term.

In the judge's view, the parties had clearly contemplated the early termination of the contract. As such, the appropriate measure of damages was to provide the employee with reasonable notice of termination based on the traditional factors.

### **Lessons for employers**

These cases provide some important guidance to employers regarding the

termination of fixed-term employment contracts. First and foremost, employers should ensure that the termination provision of any employment contract is carefully reviewed so as to eliminate the risk of an unenforceable provision which triggers an unanticipated increase in damages.

Second, when notifying an employee that his/her employment contract will not be renewed, employers should avoid implementing any changes to the employee's employment that could be construed as a constructive dismissal. To minimize the risk of so doing, the employee should be permitted to work through to the end of his/her employment contract (unless the employee consents otherwise).

Lastly, the court's approach to assessing damages for fixed-term employment contracts based on an assessment of the reasonable notice period, rather than on the unexpired portion of the contract, is welcome news for employers; however, given the novelty of this approach in *Howard v. Benson Group*, employers should closely monitor the case law for subsequent interpretations of this case.

REFERENCES: *Thompson v. Cardel Homes Limited Partnership*, 2014 ABCA 242, 2014 CarswellAlta 1240 (*sub nom.* *Thompson v. Cardel Homes LP*) (Alta. C.A.) at para. 15; *Howard v. Benson Group*, 2015 ONSC 2638, 2015 CarswellOnt 5699 (Ont. S.C.J.) at para. 9.

## BUSINESS IMMIGRATION

# Express Entry Application Management System introduced

Kevin Beigel, *Barrister and Solicitor*

**The introduction of the Express Entry Application Management System marks the dawn of a new era in the processing of permanent residence in Canada.**

### **Express entry system**

The arrival of the Express Entry Application Management System ("Express Entry") in 2015 marked the dawning of a new era in the processing of permanent residence in Canada. The bases for the Express Entry are the *Ministerial Instructions Respecting the Express Entry System* that were implemented on

November 28, 2014 and the corresponding amendments to the *Immigration and Refugee Protection Act* and accompanying *Regulations*.

Gone are the days when an applicant who met the basic eligibility criteria for the Federal Skilled Worker ("FSWP"), Canadian Experience Class ("CEC") or Federal Skilled

*See Business Immigration, page 61*