Letter of the Law

British Columbia's Pioneering Civil Resolution Tribunal

In 2015, British Columbia will introduce a Civil Resolution Tribunal (CRT), the first on-line dispute resolution and adjudicative body in Canada. The CRT is designed to transform civil and administrative dispute resolution in B.C. from the current system to, as the provincial government's *White Paper on Justice Reform* describes them, "simplified, user-friendly administrative processes that will focus on providing early resolution services, including on-line services."

The government's rationale for establishing the CRT is to modernize and reform the justice system. The changes will provide lay litigants with an alternative to the courts for disputes that currently fall within the jurisdiction of the Small Claims Court, as well as most strata property disagreements. The premise is that, by removing these cases from the courts, the CRT will resolve them more quickly and cheaply by utilizing on-line dispute resolution services through e-mails, telephone communications, and video conferencing. In-person meetings and hearings will be used only when necessary.

If disputing parties fail to resolve their differences by utilizing the early resolution services, the parties will proceed to a formal adjudicative process, which is the tribunal proceeding. This proceeding will have two phases: case management and tribunal hearing. In the case management phase, resolution by agreement between the parties will be facilitated by a third party. If this should fail, the dispute will progress to a hearing by a tribunal, which will make a final settlement ruling.

Once a tribunal hearing starts, no party to that proceeding may begin any other court or legally binding processes against another party concerning an issue that is to be addressed in a tribunal proceeding. Any prior proceeding that was commenced must be adjourned or suspended while a tribunal proceeding is ongoing.

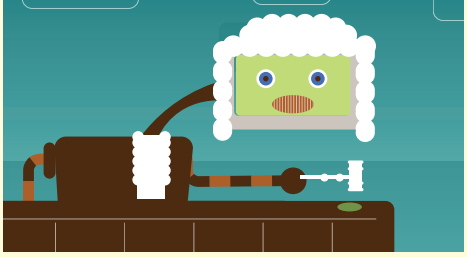
Additionally, if a tribunal makes a final decision, a party to that proceeding cannot seek redress elsewhere and must discontinue any prior court or legally binding processes that it had started before the tribunal process.

While the government's efforts to improve access to justice are praiseworthy, we will not know for some time if it has succeeded in its aims. The resolution of disputes may be less expensive through the CRT, and the process itself more user-friendly for lay litigants, but a question immediately arises: will the CRT really provide access to justice for everyone or will it only work for a certain segment of the population?

The premise of the CRT is that users of this simplified adjudicative process must have access to a computer and be somewhat computer literate. However, those users—such as low-income individuals, the elderly, or the disabled—who may most require the CRT's processes may be excluded if they cannot readily access a computer or do not have the skills to use one.

(Continues on page 2)

SINGLETON LEGAL COUNSEL URQUHART



(Continued from cover)

Another significant issue with the CRT is whether its processes will be able to consistently provide just resolutions, considering the breadth of the disputes that it has jurisdiction to handle. Other tribunals, such as the B.C. Human Rights Tribunal, Employment Standards Tribunal and the Residential Tenancy Branch, are effective precisely because they were created to deal with disputes involving specialized areas of the law.

In contrast, the CRT is not dealing with one area of law but many areas. Not only will the CRT have jurisdiction to hear a broad range of small claims disputes but it will also hear a myriad of strata property matters. These can include (and this list is far from exhaustive):

- non-payment of monthly strata fees or fines
- unfair actions by a strata corporation or by people owning more than half of the strata lots in a complex
- arbitrary or non-enforcement of strata bylaws
- issues of financial responsibility for repairs
- irregularities in the conduct of meetings, voting, or minutes
- interpretation of the legislation or bylaws
- issues regarding common property.

Importantly, the CRT will not have jurisdiction to hear matters involving fundamental property rights, such as ordering the sale of a strata lot, issues involving developers and phased strata plans, and other more complex matters.

Those users . . . who may most require the CRT's processes may be excluded if they cannot readily access a computer or do not have the skills to use one.

The CRT's on-line dispute resolution services may well be able to effectively resolve some of the strata property matters that it can deal with, such as non-payment of monthly strata fees. However, there are concerns that on-line dispute resolution services may not be conducive to more complex issues, such as those involving numerous council members and owners in cases where there are allegations that a strata corporation has acted unfairly. Can such proceedings conducted by videoconferencing, for example, be as effective and credible as hearings held face-to-face in a courtroom?

In these types of cases credibility of the parties is key. If such matters proceed to a tribunal hearing, and the governing principle is expediency, will the tribunal be able to effectively assess the credibility of the parties and come to a just resolution of the dispute?

In addition to these issues, if the CRT is required to interpret legislation, how effective will the process be in enabling an adjudicator to make an informed decision?

These are only a few of many questions that will be raised about the CRT's effectiveness. Whether the CRT will transform civil and administrative dispute resolution will not be known for some time. Its success or failure may well be dependent on how transparent, just, and accessible the process appears to users. That may be difficult to achieve given that this is the first attempt in Canada to settle these kinds of common disputes on-line rather than in a courtroom or a live, face-to-face, arbitration or mediation hearing.

For more information on the Civil Resolution Tribunal and alternative dispute resolution in general, please contact

BARBARA MURRAY
bmurray@singleton.com

TALYA NEMETZ-SINCHEIN
tnemetz-sinchein@singleton.com

SU The electronic version of this article at ***www.singleton.com*** contains links to sources cited above.

SINGLETON LEGAL COUNSEL URQUHART

EDITOR'S NOTE

Our cover article describes the bold step towards justice reform that will be taking place in British Columbia beginning next year. The launch of the Civil Resolution Tribunal will be the first of its kind in Canada.

It is modelled, at least in part, on justice reform that is taking place worldwide to varying degrees. Importantly, the impetus for the CRT, and for similar systems in other jurisdictions, is the widely held belief that our legal system is not meeting the needs of many of its users.

The current system is often said to be too costly, too slow, and too complicated. The CRT is intended to increase access to justice—and it will no doubt have challenges as it evolves—but British Columbians should welcome this important step, which will take access to justice in a new direction.

JEFFREY HAND
jhand@singleton.com

Singleton Urquhart LLP
1200-925 West Georgia Street
Vancouver, BC V6C 3L2
www.singleton.com

TEL: 604.682.7474
FAX: 604.682.1283
su@singleton.com

EDITOR *Jeffrey Hand* PROJECT MANAGEMENT & EDITING *Mark Budgen*
DESIGN *Signals Design Group Inc*
IMAGES *John Belisle, Defne Corbacioglu, Signals*

Letter of the Law is the quarterly newsletter of the law firm of Singleton Urquhart LLP. The articles are summaries of legal trends and may not be applicable in specific circumstances: for further information about any subject or for legal advice about specific situations, contact members of the firm. Articles and back issues are available at *www.singleton.com*.

Joint Venture, Disjointed Liability

CONSTRUCTION LAW

Joint ventures are commonly used in the construction industry to undertake large projects. The joint-venture structure can be appealing for a variety of reasons. Primarily, it allows two or more separate companies to combine their expertise and resources. It also enables parties to share the financial burden and risk of a large project.

Notwithstanding regular use of joint ventures in the construction industry, uncertainty persists about the precise nature of this organizational structure and its formal legal status.

In legal terms, a joint venture is not as strictly defined as other commonly used business entities like partnerships and corporations. This is reflected in the uncertainty faced by courts when assigning liability to a joint venture and its members.

In fact, the following passage from *Williston on Contracts* has been cited by a number of different courts across Canada to show the inconsistent judicial treatment of joint ventures:

> The cases show that there has been a complete lack of terminological uniformity or exactitude in the judicial expressions attempting to formulate a definition of joint ventures; and many courts have declared that the particular circumstances and agreement as well as the object of the undertaking must determine the legal nature of the association.

Legal terminology aside, a joint venture, broadly defined, is an agreement or alliance between two or more people or companies to contribute goods, services, capital, and/or other resources to a common development project. The terms of the arrangement should be, and typically are, set out in a joint-venture agreement.

While this might sound like a partnership, there are some important differences. Parties to a joint venture team up for a particular purpose or project while members of a partnership join together to run a business in common. As well, in a joint venture, each participant retains separate ownership of its property and shares only the expenses and revenue of the particular project or venture.

Another important difference between, on the one hand, a joint venture and, on the other, partnerships and corporations is the manner in which courts assign liability when problems arise on a project.

For partnerships, the law is quite clear—each partner is generally responsible for the entirety of all debts and liabilities of the partnership. There are exceptions to this general rule as some partnerships are designed specifically to limit the liability of individual partners. Nonetheless, full liability for each partner is the default rule.

In joint ventures, by contrast, the liability of individual members is less certain. There is no simple default rule for liability. A clearly worded joint-venture agreement can, however, help to determine how a court will apportion any liability between the members of the joint venture.

For corporations, the law is also quite clear: the corporation has a distinct legal personality and it alone is liable for its debts, rather than its shareholders and officers.

Courts, however, have not determined if a joint venture has a distinct legal personality and they have wavered when presented with this issue. This means that an aggrieved outside party may not always be able to sue the joint venture itself rather than its individual members.

This uncertainty concerning the legal status and liability of joint ventures can lead to risk, both for the participants in a joint venture and for project owners that enter into contracts with a joint venture. In both instances, a party needs to be aware that, if a project fails and results in a lawsuit, it may be difficult to predict how liability will be distributed within the joint-venture structure.

This is not to suggest that joint ventures should be avoided. However, careful consideration to these issues should be given prior to participating in or doing business with a joint venture.

For more information on joint ventures in construction projects and on construction law in general, please contact

STEPHEN BEREZOWSKYJ
sjb@singleton.com

MARCEL DAIGLE, Articled Student, assisted with the writing and research of this article.

Security for Appeal Costs

CIVIL LITIGATION | *Morbank Financial Inc. v. 0476779 B.C. Ltd.*

When a judge makes a final order after a court application or trial, unsuccessful parties have the right to appeal the decision. While the right to appeal is a fundamental part of our justice system, vexatious appeals, or those with limited prospects of success, are typically frustrating and costly for responding parties.

The financial risk to respondents can sometimes be reduced by seeking security for the costs of the appeal. British Columbia's *Court of Appeal Act* authorizes the Court to "order that an appellant pay to or deposit with the registrar security for costs in an amount and in a form determined by the justice" and "make an interim order to prevent prejudice to any person . . . ."

Furthermore, when security for costs is ordered, the appeal is generally stayed pending the posting of that security. This alone can be a powerful tool to dissuade vexatious appellants from proceeding.

In seeking security for costs of an appeal, the onus is on the appellant to establish that the interests of justice require that security not be ordered. Where there is a serious question as to whether recovery of costs may be difficult, there is almost a presumption in favour of granting security of costs.

The Court of Appeal has identified the following as relevant considerations in such cases:

(1) the appellant's financial means;

(2) the merits of the appeal;

(3) the timeliness of the application (such applications should generally be brought at an early stage);

(4) whether the costs will otherwise be readily recoverable; and

(5) whether the responding party's conduct has resulted in a plaintiff being unable to post security for costs.

The typical reason that security for costs is ordered (or declined to be ordered) is the appellant's financial situation. An order for security for costs should not deprive an appellant of the opportunity to pursue a meritorious appeal. But a court may make an order when the appeal is found to be so lacking in merit as to be virtually hopeless or bound to fail. Such an order would not create an injustice.

An illustrative example of a successful application for security for appeal costs is the recent decision, *Morbank Financial Inc. v. 0476779 B.C. Ltd.* The Court described the background to the application as "complicated [involving] a series of proceedings, allegations of fraud, and confusion over who controls the appellant company, 0476779 B.C. Ltd." (Hereafter, 0476779 B.C. Ltd. is referred to as "779".)

Before October 2010, 779 was owned by Eric Burton, its sole shareholder and voting director, who was a judgment debtor to the plaintiff company, Morbank Financial Inc. (Morbank). His shares in 779, which owned four properties in Fort St. John, constituted his only asset of any significance. In that same month, he resigned as director.

The individual appellants took control of the company by issuing 50,000 shares (thus removing control from Mr. Burton) and transferred three of 779's properties to Doris Giesbrecht, one of the appellants; $2.1 million of the $2.5 million cost of the transaction was paid through a promissory note from Ms. Giesbrecht.

Ms. Giesbrecht then mortgaged the properties for about $1.6 million, most of which was funded by First West Credit Union. Ms. Giesbrecht defaulted on this mortgage, prompting the credit union to start foreclosure proceedings.

Morbank sued on the basis of allegations that the transfer of the properties and the dilution of Mr. Burton's shares was fraudulent. Even though Mr. Burton was a defendant in this action, he sided with Morbank.

The appellants gave varying explanations of where the mortgage funds went. They also failed to comply with orders for disclosure about this money. In B.C. Supreme Court, Mr. Justice Gordon Funt struck their pleadings, ordered the return of the properties to 779, and cancelled Mr. Burton's resignation. It was this decision that Ms. Giesbrecht and her co-defendants appealed.

(Continues on opposite page)

Carrying on Business as a Sole Proprietorship

BUSINESS LAW

In the first of this three-part series of articles (see *Letter of the Law,* Summer 2014), we discussed one of the key benefits of incorporating a company—the immunity from personal liability that incorporation generally affords to the people who direct a company. While there are many advantages to incorporation, it is not always necessary or desirable to incorporate. This article explores the advantages and disadvantages of a simpler form of business organization—the sole proprietorship.

A sole proprietorship is created whenever an individual starts to carry on a business without taking any steps to structure the business in a more formal manner such as incorporation. In a sole proprietorship there is a single equity investor who may carry on business under his or her own legal name or under another name.

The primary advantage of operating a business as a sole proprietorship is the ease with which it can be created and dissolved. As outlined above, it comes into existence when the sole proprietor starts to do business and it ceases to exist when he or she decides to dissolve it or dies. This is much different from a corporation, which exists separate and apart from its shareholders.

In addition, sole proprietorships are less costly to create and continue than corporations. There are no documents to be filed with the Registrar of Companies, although name registration documents may be necessary. Furthermore, a sole proprietorship is not required to file annual reports with the Registrar of Companies in order to maintain its existence.

There are some disadvantages to a sole proprietorship. Since it is not a separate legally recognized entity, the law does not distinguish between the business and the sole proprietor. The sole proprietor owns the assets of the business and contracts personally with third parties. As a result, the sole proprietor is responsible for performing all obligations entered into during the course of business.

If an act or omission in connection with the business causes damage to a third party, the sole proprietor may be personally liable for those damages. While some business arrangements limit the liability of equity investors to the amount they have invested in the business, that is not the case with sole proprietorships. If a sole proprietor is found personally liable, execution against the sole proprietor's personal assets to satisfy a claim or judgment is possible.

It is important to assess the needs of your business before deciding how it will be structured. The sole proprietorship is an ideal business organization for small businesses with few liabilities. However, as the size of the business and its associated liabilities grow, a sole proprietor should consider incorporation.

For more information on sole proprietorships and other ways of structuring businesses, please contact

ALLISON GODEY
agodey@singleton.com

This is the second in a three-part series about the advantages and disadvantages of different business arrangements and associations.

(Continued from page 4)

At the Court of Appeal, Morbank sought orders that the individual appellants post security for costs of the appeal and that the appeal be stayed pending the posting of this security. Morbank argued there was serious risk that it would be unable to collect the costs of the appeal, referring to the appellants' failure to pay three previous costs orders, their repeated refusal to comply with disclosure orders, and their shifting testimony under oath.

The Court of Appeal decided that the subject appeal lacked merit and ruled that the unlikelihood of collecting costs, coupled with the prospect of having to answer a meritless appeal, would result in serious prejudice to Morbank.

This was an extreme case—the appeal was found to be unlikely to succeed, the appellants were found to have demonstrated a persistent pattern of failing to comply with court orders, they provided limited evidence of their financial circumstances, demonstrated little credibility in past proceedings, and had no assets in British Columbia to attach.

While applications for security for appeal costs are not always successful, insurers, governments, and other institutional bodies should seek the advice of their legal counsel to determine if such an application is appropriate for a particular appeal. When dealing with vexatious or impecunious litigants, such orders can be one of the few ways to curtail these parties and reduce some of the financial risk.

For more information on the cases cited above and applications for appeal costs, please contact

STEVEN LESIUK
slesiuk@singleton.com

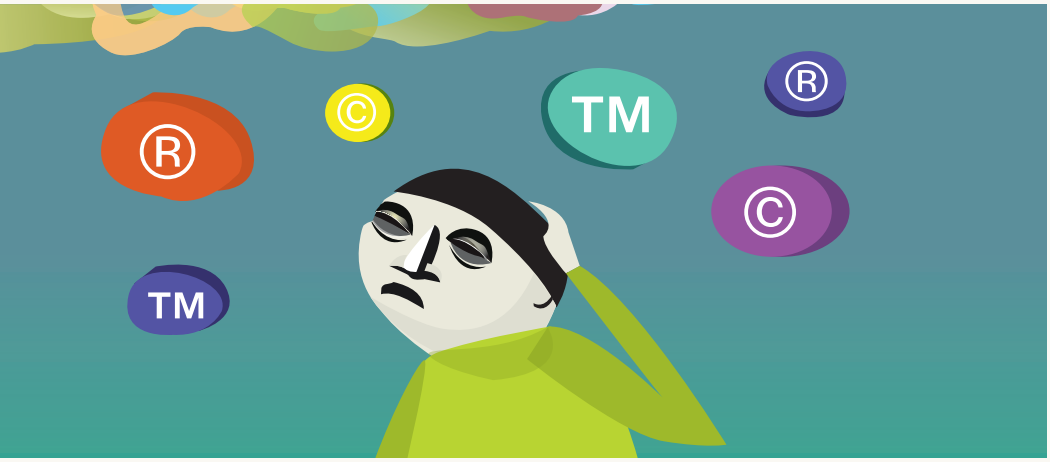
MITCH DERMER
mdermer@singleton.com

The electronic version of this article at ***www.singleton.com*** contains links to the cases discussed above.

Why a "Lord of the Wings" Trademark Could Confuse Consumers

TRADEMARK LAW | *Al Moudabber Food Concepts SAL (Re)*

The three volumes of J.R.R. Tolkien's *The Lord of the Rings* were published in 1954-55. Thirteen years later the author sold the film, stage, and merchandising rights to United Artists Corporation and, in turn, that company sold them in 1976 to The Saul Zaentz Company, another movie production company. It took a further 25 years before the three live-action films were released in 2001-03; they earned over US$1 billion at the box office in North America and almost $3 billion worldwide.



Not surprisingly the owner of such a valuable franchise sought protections for its intellectual property. In Canada, a number of *The Lord of the Rings* trademark applications have been registered, just some of the 1.2 million trademarks protected by the *Trade-marks Act* (Act) (the Government of Canada prefers to hyphenate "trade-marks") and registered with the Canadian Intellectual Property Office (CIPO). These trademarks included one related to merchandise such as DVDs, CDs, chess sets, and figurines. But one of those applications, filed in 2005, may strike some as anomalous since it pertained to beverages, including soft drinks, fruit juices, and smoothies. It was subsequently abandoned three years later.

In July 2008, another corporation, Al Moudabber Food Concepts SAL, applied to CIPO for registration of a trademark, "Lord of the Wings", in association with bar and restaurant services (including, presumably, chicken wings) and temporary accommodation. Al Moudabber had previously registered this trademark in Lebanon; it was not written in Elvish or runes or J.R.R. Tolkien's distinctive spidery handwriting but, instead, in thick block capitals between a pair of feathered wings.

Despite the scarcity of chickens in *The Lord of the Rings* films, The Saul Zaentz Company was not amused. It opposed Al Moudabber's registration of the "Lord of the Wings" trademark before the Trade-marks Opposition Board (TMOB), which rendered an interesting and entertaining decision in January 2013.

The TMOB decision demonstrates both the limits of trademark rights and the challenges to creating a unique and powerful trademark. Many of the Zaentz Company's opposition arguments were built on sections of the *Trade-marks Act,* including Section 12(1)(d) which can prevent the registration of a trademark if it is "confusing with a registered trade-mark".

"Confusion" in this context has a specific meaning. Under Section 6(2) of the Act, a proposed trademark is "confusing" with an existing trademark where "the use of both trademarks in the same area [would likely lead a casual consumer] to the inference that the wares or services associated with those trademarks were manufactured, sold, leased, hired or performed by the same person . . . ."

Three recent Supreme Court of Canada trademark cases discussing the meaning of "confusion" led the TMOB to ask whether the casual consumer would likely associate the use of the "Lord of the Wings" trademark with the Zaentz Company's *The Lord of the Rings* trademarks.

The TMOB carefully considered all the circumstances and the factors surrounding the two trademarks under Section 6(5) of the Act, which contains the following stipulations:

(a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;

(b) the length of time the trade-marks or trade-names have been in use;

(c) the nature of the wares, services or business;

(d) the nature of the trade; and

(e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

The Zaentz Company's affidavits contained serious defects because they essentially explained only how famous they believed their registered trademarks were—rather than how and to what extent they were used for wares and services in Canada. This could have been strategic since there may have been no good evidence available that their trademarks were used with bars and restaurants.

The TMOB held that, notwithstanding the notoriety of the films, *The Lord of the Rings* trademarks were not used in association with bars, restaurants or temporary accommodation. It further held that it was unlikely consumers would consider a movie studio to be the source of such wares or services. The natures of the parties' respective trades were too different.

In other words, the TMOB held it unlikely that a casual customer would mistake a

restaurant in Canada using the "Lord of the Wings" trademark as being affiliated with *The Lord of the Rings* films or The Saul Zaentz Company.

However, The Saul Zaentz Company had filed its beverage trademark application in August 2005 and the "Lord of the Wings" application was based on the Lebanese trademark. This permitted the argument under Section 16(2)(b) of the Act that the "Lord of the Wings" was confusing with the Zaentz's beverage trademark application—even though it had been abandoned after July 2008.

The TMOB held that the abandonment was irrelevant under the *Trade-marks Act*. It also held that there was some resemblance between the marks and potential for overlap in the "nature of trade" since most bars and restaurants would serve the beverages listed in the beverage application. The onus was thus on the applicant to show there was no confusion—which Al Moudabber could not do.

The TMOB rejected the "Lord of the Wings" application with respect to bar and restaurant services but allowed it for temporary accommodation. The applicant was thus left with a potentially weak trademark registration, given the narrow scope of the services for which it would be protected.

Failure or inability to register a trademark may mean that a business can lose much of the time, cost and effort involved in building a strong name and brand. The TMOB may disallow the registration of a potential trademark. In other instances, a business's registered trademark may not prevent registration of very similar trademarks. Companies can avoid such problems by creating distinctive business names, product names and branding, potentially with the assistance of a trademark agent's or lawyer's opinion concerning the scope of existing and pending trademark registrations. Most importantly, if a common-law or registered trademark holder believes it has suffered infringement by another person or business, or it wants to oppose an advertised registration by CIPO, it should consult a lawyer as soon as possible.

For more information on the case cited above and trademark law in general, please contact

H. DAVID EDINGER
dedinger@singleton.com

RAYLENE SMITH
rsmith@singleton.com

The electronic version of this article at ***www.singleton.com*** contains a link to the case that is the subject of this article.

US@SU

Join us in congratulating four of our senior lawyers who were identified in the international publication, *Who's Who Legal,* as being among the world's leading lawyers in their practice areas:

- **DEREK BRINDLE, Q.C.**—Canada 2014 (Construction)
- **BARBARA CORNISH**—Canada 2014 (Mediation)
- **JEFFREY HAND**—Canada 2014 (Mediation)
- **JOHN SINGLETON, Q.C.**—Canada 2014 (Construction, Insurance & Reinsurance, Product Liability Defense)

DEREK BRINDLE, Q.C. was named by *The Best Lawyers in Canada 2014* for his expertise in Construction Law. He was also selected by Peer recognition as one of the "Best Attorneys in British Columbia" for 2015.

Derek has also been listed in the 2014 *Construction and Real Estate Expert Guide*. More recently, in Toronto, he lectured on "Delay and Impact Claims" before Osgoode Hall Law School's Certificate in Construction Course.

BARBARA CORNISH was the winner in the category of "Mediation Lawyer of the Year: Canada" in the *Lawyer Monthly* Legal Awards 2014.

NEW ASSOCIATE JOINS SINGLETON URQUHART

We welcome **EDMUNDO GUEVARA** to our team of associates. Before immigrating to Canada in 2008, Mr. Guevara worked in leading legal and accounting firms in the Philippines where he practised tax, corporate, and commercial law. As a former Deputy Commissioner of the Philippines' tax agency in charge of legal affairs, his responsibilities included negotiating tax treaties on behalf of the Philippine Government.

Mr. Guevara has also worked as a consultant for the Asian Development Bank and the United States Agency for International Development. Due to his extensive education, including earning his LL.B. in the Philippines, he is qualified to practise law in both British Columbia and the Philippines.

Prior to joining our firm, Mr. Guevara worked in a boutique corporate and commercial law firm in Vancouver. Mr. Guevara currently practises Construction and Insurance Law at **SU** and may be contacted at *eguevara@singleton.com*.

SU GIVES BACK

Giving to charities in our community has always been part of our firm's ethos. We try to apply the principles of our legal practice to our desire to give. Just as we focus on building bridges for our clients in legal matters so we try to do as much as we can to help and strengthen the less fortunate.

This winter, **SINGLETON URQUHART** has decided to focus on giving back to our local community by supporting two well-deserving endeavours. The firm will match every donation with another donation of equivalent dollar value.

• Greater Vancouver Food Bank Society
We are collecting non-perishable food items for the food bank. For more information, please visit their website, *www.foodbank.bc.ca*.

• The Lipstick Brigade
SU is also collecting unused travel-size toiletries and other items such as socks, nylons, toothbrushes, etc. for distribution to various Downtown Eastside women's shelters and drop-in centres in Vancouver.

The Lipstick Brigade was founded by **SU** Partner **MELANIE SAMUELS.** Please contact her for more information on this deserving initiative at *msamuels@singleton.com*.

The *Wills, Estates and Succession Act's* Intestacy Rules

WILLS AND ESTATES

The *Wills, Estates and Succession Act* (WESA) has brought a number of changes to wills and estates in British Columbia. Among the more significant of them are changes to the rules affecting intestate estates. Put simply, an intestate estate arises when a person dies without a will. If the deceased has assets, the deceased's family must look to WESA to determine what happens to the deceased's estate. The distribution of an estate when a person dies intestate varies and depends on who in the family survives him or her.

Where a person dies without a will and leaves a spouse and children surviving

Under B.C.'s previous legislation, the surviving spouse would receive the first $65,000, plus half of the residue of the estate if they had one child or one-third of the residue if they had two or more children. The surviving spouse would also receive the household furnishings and a life interest in the matrimonial residence.

Under WESA, these rules have changed. The surviving spouse now receives the first $300,000 when their marriage has produced children (in other words, it is not a blended family); however, if the deceased had children from a previous relationship, the surviving spouse only receives the first $150,000.

In either scenario, the residue is split with one half going to the surviving spouse and the other half divided equally among the surviving children. The surviving spouse has an option to purchase the matrimonial residence; this option must be exercised within 180 days of the representation grant (formerly known as a grant of letters of administration).

Where a person dies leaving a spouse and no children

The application of the rules under the previous legislation and WESA have essentially the same results in that the surviving spouse will take the assets of the deceased. However, it is important to note that "spouse" is now a defined term under WESA: to be considered a spouse, he or she must meet the requirements of the definition. Under WESA, people are considered spouses when they are married or common law; the definition includes same-sex couples. WESA also sets out when people are not considered spouses. This occurs following an event that causes an interest in family property to arise pursuant to the B.C. *Family Law Act* or when a marriage-like relationship is terminated.

Where a person dies without a will and leaves no spouse and no surviving children

Under B.C.'s previous legislation, a deceased's estate passed by way of consanguinity, meaning "blood relation"; however, this method has now been changed to a parentelic distribution, which means that the nearest common ancestor will take before descendants of a more distant ancestor.

Ultimately, the distribution scheme remains the same at the level of children and their descendants and parents and their descendants, but it changes with more remote relatives. WESA also puts a limit on how far the distribution scheme goes—the maximum is four degrees of a relationship from the deceased. Should there be no relatives surviving the deceased within those four degrees, the estate of the deceased will escheat to the Province of British Columbia.

Intestate estates often arise but can be avoided by planning ahead. There is no time like the present to review your estate plans and draw up a will as well as other estate planning documentation such as powers of attorney, representation agreements, and advance directives. Failure to prepare a will and make a plan poses considerable complications for your family, who, in its absence, cannot be sure that your estate is handled and distributed the way you would have wanted it to be.

Indirectly related to the above, but an important aspect of intestate estates, is the care of your minor children. If you have minor children, it is certainly recommended that you consider whom you want your guardianship rights to pass to. When a minor child's parents die without nominating a guardian, the child may fall under the purview of the Ministry of Children and Family Development and a court will appoint a guardian based on those who step forward. In addition, your estate will be monitored and/or handled by the Public Guardian and Trustee—creating additional costs, complications, and concerns for those in your family who step in to care for your minor children.

For more information on the new Wills, Estates and Succession Act *and wills and estates in general, please contact*

ROGER HOLLAND
rholland@singleton.com

ALANA DALE-JOHNSON
adale-johnson@singleton.com

This is the second in a series of articles examining how changes to wills and estates legislation affect British Columbians and helping them to plan their estates accordingly.

The electronic version of this article at ***www.singleton.com*** contains links to the laws mentioned above.