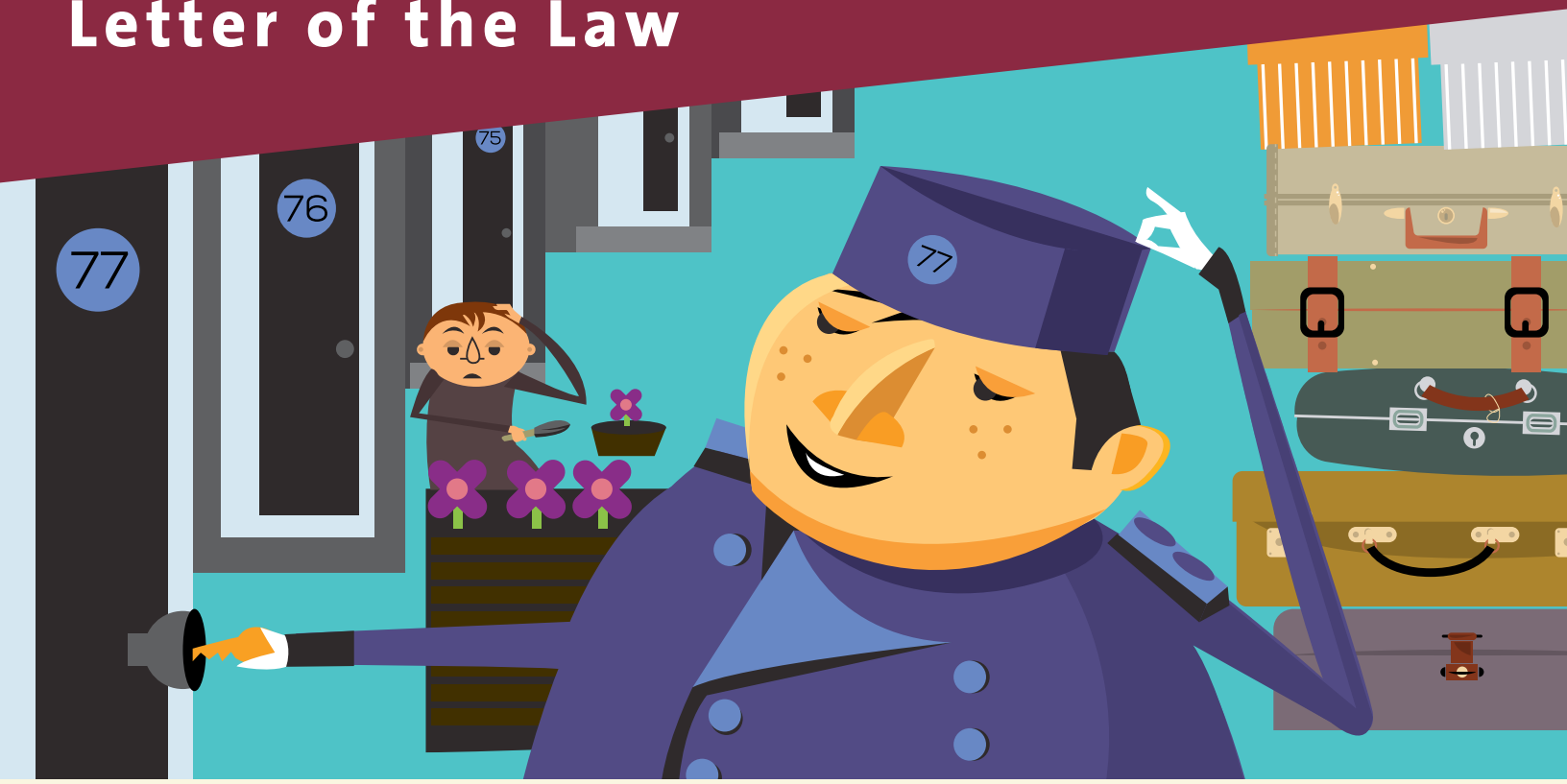
Letter of the Law



Considering Renting Your Home as a Vacation Property? Understand the Risks

Web-based home-sharing rental programs like Airbnb.com, HomeAway.ca and VRBO.com are changing the way people take vacations around the world. At the same time, property owners and longer-term tenants gain income opportunities simply by leaving their home for a weekend. In popular tourist locations, such as Vancouver, a downtown condo can be rented for $300 a night while beachfront luxury homes are listed at $600 and up per night.

Using Airbnb might seem like an easy way to offset Vancouver's high housing costs, but what are the risks that potential hosts should consider?

First, hosts should check whether they are allowed to rent their places at all. Many strata corporations, co-ops and leases outright prohibit such rentals. Breaching the terms of strata bylaws or a lease can have serious consequences, which are likely not worth the income to be gained through a rental.

At the present time, accommodation rentals shorter than 30 days are prohibited by Vancouver's zoning and development bylaws, except in licensed hotels and bed and breakfasts. Other municipalities have similar bylaws.

The vast majority of Vancouver's Airbnb rentals are not licensed as hotels or B&Bs—and are therefore technically illegal. Also, most hosts do not hold business licences. The City of Vancouver appears to be still pondering how to respond to the growing popularity of sites such as Airbnb and, currently, is not doing much to crack down on unlicensed short-term rentals. However, hosts could still be exposed to fines or penalties from City Hall.

Hosts should also ensure that their property is safe and all reasonable steps to ensure the safety of guests and third parties are taken. This includes having adequate locks and security devices, checking smoke and carbon monoxide detectors, and having adequate fire protection. Other risks to safety must be attended to, including clearing and salting walkways in winter.

Potential hosts should also ensure they have adequate insurance coverage. All manner of risks arise from the use of property by short-term renters, including property damage and occupiers' liability claims. Potential hosts in multi-unit developments should be particularly

(Continues on page 5)

SINGLETON LEGAL COUNSEL URQUHART

Knowing a Designer's Responsibilities

CONSTRUCTION LAW

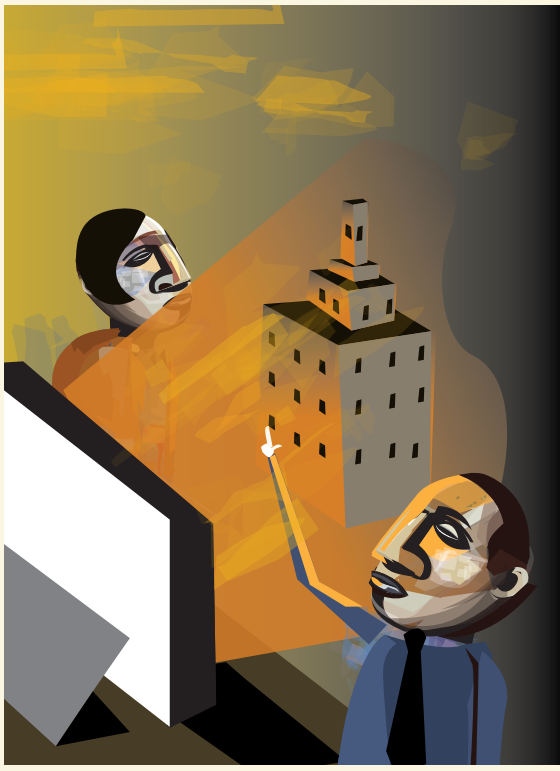
In any large-scale construction project, designers are imperative. They bring the project to life, essentially developing the roadmap that brings the project to fruition. As a designer, sometimes there is uncertainty about to whom you owe a duty and what that duty is. The following should assist you in understanding what a designer's responsibilities are in providing services.

First, a designer owes a duty of care to the owners since they are likely the ones who have hired the designer as well the ones who have a beneficial and legal interest in the property. Designers must show reasonable care in developing their design, which includes meeting applicable codes and standards. Of course, a significant issue in any construction project will be costs. The owners will most likely have a budget, and designing the project while considering the overall budget is a significant responsibility for the designer.

When bids are tendered for construction, the designer will be required to assess the bids. Prior to construction of the project, the designer will also need to ensure that site inspections are completed, and throughout the construction the designer should prepare progress reports.

Designers on construction projects also have a responsibility to the tradespeople involved. They must ensure full disclosure is provided to the tradespeople so the work can be completed accurately. If the tradespeople perform substandard work due to lack of disclosure, that liability could fall on the shoulders of designers.

The last group of people owed a responsibility by designers are third parties. These are the people who may not be directly involved but who may be affected by the construction. As is the case with owners, designers owe third parties reasonable care when performing their services, ensuring that applicable codes and standards are also met for these individuals. For example, if a designer designs a large high-rise building that is not up to applicable standards when purchasers (in this case, third parties) move in, these third parties can rightfully also make a claim against the designers.



Knowing your responsibilities as a designer on a construction team will help you understand your professional and legal obligations as well as avoid potential pitfalls before they occur.

For more information on legal ramifications in the construction industry, please contact

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The electronic version of this article at ***www.singleton.com***

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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.

EDITOR'S NOTE

One of the satisfying things about being the Editor of *Letter of the Law* is the opportunity, from time to time, to let our readers know what's going on at SU. As we approach year end, I pause to reflect on all that has been accomplished this past year.

In 2015 we welcomed two new partners and a new Chief Operating Officer to SU as well as new associates and paralegals. We expanded into the remainder of the 13th floor at 925 West Georgia Street and completely renovated the space, and we launched Resolutions, our new state-of-the-art Alternative Dispute Resolution and Business Centre to allow us to service our growing mediation and arbitration practice group.

This growth would not be possible without the ongoing support of our clients so I want to take this opportunity to thank all of you, and to wish you all the best in 2016.

JEFFREY HAND
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The Blurred Line—Off-Duty Conduct and Employee Sanctions

WORKPLACE LAW

In May, Shawn Simoes was terminated from his six-figure position with Ontario's Hydro One after he shouted a sexist slur at a female City TV reporter who was covering a Toronto FC soccer match. The incident, caught on camera during a live broadcast, was widely shared over social media. Nothing about Mr. Simoes' appearance or demeanour at the time of the incident identified him as a Hydro One employee. Notwithstanding, the incident came to the attention of Hydro One's management and the company took steps to terminate Mr. Simoes for cause: violating its code of conduct.

In early November, Mr. Simoes was reinstated following a successful grievance and arbitration made by his union. While the arbitration proceedings are not publicly available, it has been reported that Hydro One found that Mr. Simoes had shown remorse for his actions and demonstrated regret for what he had done.

On October 24, 2014, Canadians were shocked to learn, via his social media accounts, that popular CBC radio and television host Jian Gomeshi was taking a leave from the CBC. The story was complicated when, on the following Sunday, CBC, again through social media, announced that its relationship with Mr. Gomeshi had been terminated summarily by the CBC because of certain information which the corporation felt "precludes us from continuing our relationship with Jian."

By now the salacious details of the allegations against Mr. Gomeshi are well known. Again, his actions and activities, while criminal if convicted, took place away from the workplace, out of sight of the public eye and, at least in part, on his own personal time. The Gomeshi story is, however, complicated by the fact that certain of his colleagues and former colleagues came forward with allegations against him.

The Blurring Line

What the Simoes and Gomeshi examples demonstrate is that—concomitant with the exponential increase of social media, the near ubiquity of video recording equipment, and the ease with which individuals can anonymously deliver information—the line between the public and private spheres has blurred.

Further, and more importantly for employers, that means the line between on- and off-duty conduct has also blurred.

The Employer's Interest

The employer's interest in these regards is largely driven by a desire to manage risk to reputation and employee morale. Reputation management and maintenance, ensuring a high level of morale in the workplace, and protecting the workplace and its environment from toxic employees and/or events is paramount to employers wishing to maintain an engaged and fulfilled workforce in today's culture of viral communications.

While sanctions for certain off-duty conduct are certainly reasonable, employers must be careful not to misuse information with respect to off-duty conduct in such a manner as to either offend an employee's human rights and privacy rights, or to enact what could plausibly be seen as double punishment for an employee.

The Employee's Interest

The employee's interest will always be his or her privacy when acting outside of the scope of his or her employment in off-duty environments. The Supreme Court of Canada has recently confirmed that employees in the workplace have a reasonable expectation of privacy. It would be completely counterintuitive to suggest that when employees have a reasonable expectation of privacy in the workplace no such expectation extends to off-duty time.

Further, an employer risks contravening the *Personal Information Protection Act* if the information used does not fall within an exemption under that *Act*.

Employers can attempt to shield themselves from the embarrassing or potentially damaging actions of employees while off-duty by enacting policies that cover certain off-duty conduct. Not all off-duty conduct can be captured in an employment policy. There may, however, be incidents where codes of conduct can include certain off-duty conduct in order to effect reputational and damage control.

For more information on employees' off-duty conduct or enacting policies with expanded scope into the off-duty sphere, please contact

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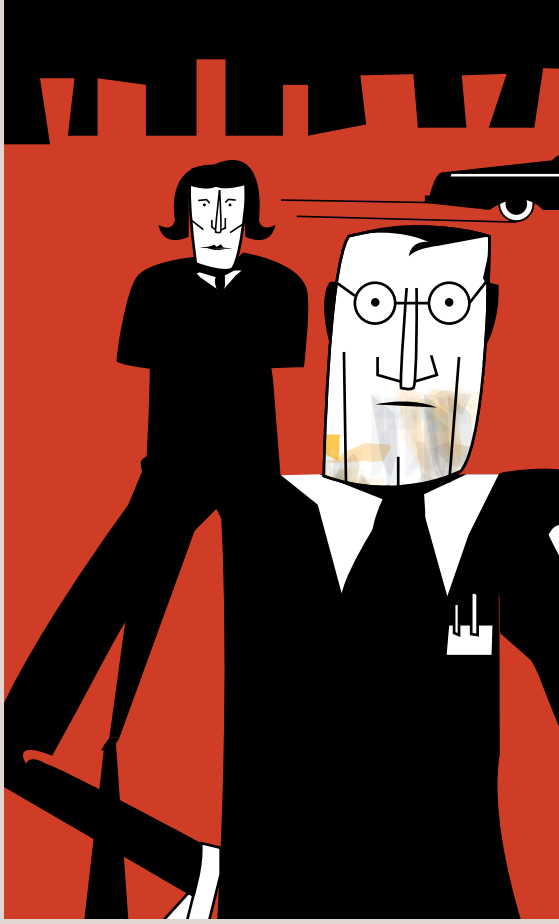
SU PRESENTS:

A seminar on workplace law March 3. See details, Pg. 7.

Taxing Changes: Evolution of the CRA's Powers



TAX PROFESSIONALS | *Guindon v. Canada; Canada (MNR) v. BP Energy Co.*

Recent court decisions have advanced the ability of the Canada Revenue Agency to investigate and pursue tax cases. The impacts on tax professionals can be seen both in the penalties that can be imposed on accountants and lawyers directly and in the CRA's ability to access client documents.

Since the advent of the *Charter of Rights*, the courts have sorted through modern legal issues involving the CRA's powers of audit, investigation and prosecution. Many aspects of those powers to investigate crime, such as tax evasion, have been curtailed. In the meantime, the courts have enabled the CRA to retain important powers to conduct audits and assess taxes.

As a consequence, Canadian tax regulators have shied away from the rigours of the criminal law process and focussed their enforcement strategies on administrative powers to impose substantial financial and other penalties with less procedural quagmire. This shift means more focus on substantive allegations of unpaid tax but less control on the exercise of state power. It is an effective enforcement strategy, and therefore it has established new areas of legal conflict.

Two recent high-level court decisions reflect the next steps in that evolution. They address specific powers and procedures of the CRA with respect to tax practitioners.

The Supreme Court of Canada's decision in *Guindon v. Canada* addressed the provisions of the *Income Tax Act* aimed at tax preparers, which have received surprisingly little attention since their inception. The decision in *Guindon* confirmed that the CRA's power to levy hefty fines for misrepresentations made by tax professionals is not restricted by the procedural protections that are afforded under the *Charter* in respect of criminal investigations.

In *Guindon*, a lawyer with limited expertise in tax law assisted with a transaction that involved the purchase and sale of offshore timeshare properties. It was said that the timeshares would be gifted to a charity in exchange for a charitable donation receipt. They would then be sold, and the charity would receive a portion of the proceeds.

The lawyer drafted and signed an opinion on the tax consequences of the plan, using a precedent created and provided by the fraudsters, who stood to benefit from the proceeds of the transactions. The lawyer did not review the documentation and arranged to have a charity, of which she was the president, accept the gifted timeshares and issue donation receipts.

Unbeknownst to the lawyer, the entire scheme was a fraud. As a result, the Minister of National Revenue disallowed the charitable tax donations and assessed penalties against the lawyer on the grounds that she knew that the tax receipts were false, or was willfully blind to that fact. The lawyer was assessed with a fine of $546,747 under Section 163.2(4) of the *Income Tax Act*.

The lawyer defended against the imposition of penalties by attacking the procedures used to detect the fraud. She argued that the penalty imposed was criminal in nature and thus required the CRA to give effect to *Charter* protections—such as the presumption of innocence—that are afforded to those charged with criminal offences. This was not a surprising argument, as the *Charter* had been used to cut back many CRA powers in the past.

Notwithstanding the magnitude of the penalty imposed, the Court rejected the lawyer's argument, finding that the penalty was administrative in nature. It reasoned that the process of imposing penalties was primarily intended to regulate conduct within a limited sphere of activity. Its purpose was to promote honesty and deter gross negligence.

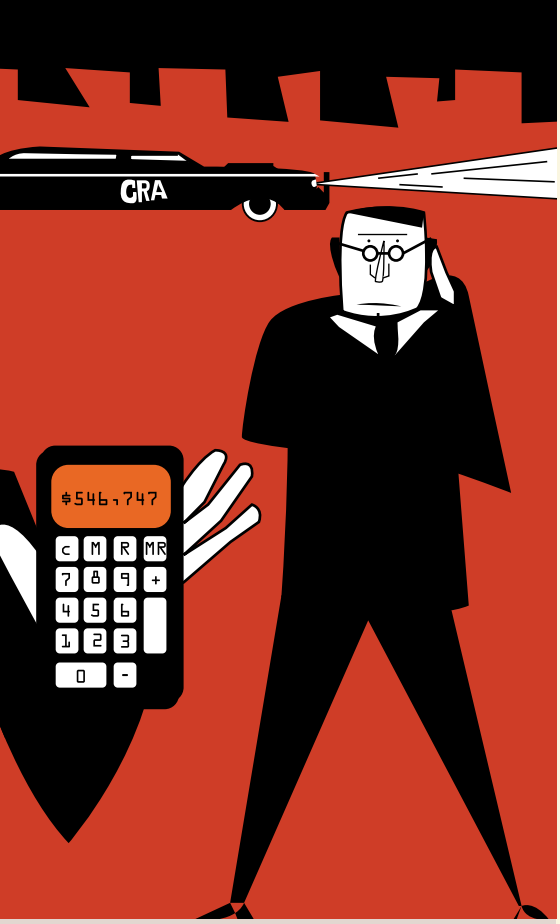
This very significant finding may mean that *Charter* protections will not be applied to any CRA investigations leading to administrative penalties. That aspect of the decision will provide an important legal touchstone in this category of investigation going forward.

The issues in the second recent case were quite different, and the facts more mundane.

Canada (MNR) v. BP Canada Energy Co. is a 2015 Federal Court decision dealing with the ability of the CRA to compel document production within an audit. The taxpayer, as a public company, was subject to mandatory financial reporting. In the course of preparing financial statements, it had created working papers that included "issues lists" which set out issues the taxpayer had determined might result in adjustment if challenged by the CRA.

Needless to say, the taxpayer did not want the CRA to see those documents. However, it had not used legal advisors in the creation of the lists, and therefore had no ability to argue that its documents were protected by solicitor-client privilege.

The Minister sought production of these issues lists not for the purpose of the audits in the years to which the lists related. In fact, the statutory limitation period had passed for audits in respect to those years. Rather, the Minister pursued access to the



lists for the purpose of future audits.

The Minister issued a demand pursuant to Section 231.1(1) of the *Income Tax Act* requiring the taxpayer to provide the records. The taxpayer objected to the request, and the Minister applied for a compliance order pursuant to Section 231.7(1) of the *Income Tax Act*.

The taxpayer presented a number of arguments opposing production of the lists. It argued that the request constituted a bad faith "fishing expedition", and that the production of its working records would fundamentally offend the principles of a self-reporting tax system. Further, it said that the issues lists would not aid the CRA's audits as they contained only subjective opinions of the taxpayer.

The Court did not accept the taxpayer's arguments, finding instead that the Minister was within her purview to request and receive the issues lists. The essence of the Court's reasoning was that the request was properly relevant to the audit function and no improper purpose had been established.

These two decisions affect different aspects of tax practice, but do point in a similar direction. They reflect a willingness of the courts to enable the CRA to perform audits with wide access to taxpayer documents, and to firmly reinforce those powers with administrative penalties where transgressions are noted. The decisions also reinforce the effectiveness of the CRA strategy to shift away from criminal investigation and to focus on audit and administrative penalties. Therefore, there should be little doubt that the CRA's strategic direction will continue in the short term.

The extent to which tax preparer penalties will be pursued in the future is unknown. The *Guindon* case is not particular cause for alarm, as most tax preparers will not duplicate the lack of care that occurred in that case. However, those penalties now may be pursued in less egregious cases. The *BP Canada Energy Co.* case illustrates the thought that must go into the creation of accounting records related to tax strategy, and potential consequences of their existence. In both examples, the trends reinforce the need for strategic planning in the execution of tax engagements and care in their performance, with full knowledge of the legal context.

For more information on professional liability of tax professionals or CPAs, contact

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

(Continued from cover)

Understanding the Risks of Short-term Rentals

mindful of consequential damages to adjoining properties arising from fires or floods—a single incident in a strata building can cause hundreds of thousands of dollars in damage. Many homeowners' and tenants' insurance policies will not provide coverage for damages or liability incurred during a short-term rental, leaving hosts potentially exposed to large claims.

Airbnb provides a $1-million hosting guarantee to cover property damage in excess of a security deposit. However, we understand that the guarantee does not provide liability coverage for negligence or occupiers' liability claims arising from injuries suffered by guests or others during a short-term rental. It also does not cover losses involving common property, pets, cash or securities. Airbnb's hosting agreement also includes a limitation of liability clause that limits a wide variety of claims against it. In the event of an uncovered claim, the host may be left having to personally pay the claim.

Hosts should also consider the tax consequences of short-term rentals. Income from short-term rentals is taxable, and should be declared on a host's income tax return. Furthermore, short-term rentals may be subject to PST, which is 8% on short-term accommodation, and a Municipal and Regional District Tax of 2% (3% in the City of Vancouver). Some short-term rental services assist property owners with the collection and remittance of PST and MRDT, but others do not. Before looking to short-term rentals as an income source, potential hosts should check to ensure that they are in compliance with all relevant tax requirements.

Internet-based vacation rental programs are connecting people with exciting accommodations in great locations, and allowing people to open their homes to the world while making extra income. No matter how exciting the opportunity, however, potential hosts should ensure that they are not exposed to unreasonable—but foreseeable—risks.

For more information on insurance, leases or strata corporations, and on protecting yourself from rental risks, please contact

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The electronic version of this article is at ***www.singleton.com***

Lifting the curtain on bitcoins and other virtual currencies

BUSINESS LAW

Bitcoins have become real since they were first theorized in a paper published online in 2008 by the mysterious (and likely pseudonymous) Satoshi Nakamoto. In 2013, Canada's first bitcoin ATM opened here in Vancouver. Today, Canada's bitcoin sector is second only to that of the United States in venture capital raised, and bitcoin prices are rising again.

Even the Winklevoss twins, the Internet entrepreneurs portrayed in the movie, *The Social Network*, have gotten involved and recently been approved to operate a bitcoin exchange. Yet despite their prior notoriety and newfound investor interest, bitcoins and other virtual currencies are not well understood.

The money we usually use today consists of bills, coins and other physical manifestations. It is issued and supported by central governments and the banking system. But even though we all make daily electronic transactions with money, it does not exist solely in the virtual or digital world.

By contrast, bitcoins and other virtual currencies do exist solely in the digital world. Bitcoins exist in a decentralized database using technology called the blockchain. No central government or bank is required.

With blockchain technology, the essential aspects of managing a currency are distributed among peers on a network. Collectively, they track holdings, transactions and the currency's overall supply. The technology permits individuals or businesses on the network to send money to and receive it from each other. The number of businesses that accept bitcoins is relatively small but slowly rising.

The vitally important part of any monetary system is a level of trust. We all need to know that we will get value for our currency, which has no intrinsic value, and will be able to verify our currency holdings. For bitcoins, anyone on the network has the information necessary to verify the transactions and holdings of any other individual who has ever made a bitcoin transaction. Each network peer has a full copy of this entire database and can independently verify the ownership and history of each currency unit. As well, each peer on the network is offered possible rewards for participating: for example, by way of issuing new bitcoins.

Bitcoin and its ilk are colloquially called money, but Section 13 of the *Currency Act* still defines money as being either Canadian currency, the currency of another country, or a unit of account based on the currencies of two or more countries. While virtual currencies do not have legal tender status in any jurisdiction, they have one or more of the following three functions: as (1) a medium of exchange; (2) a unit of account; or (3) a store of value.

The federal government's Standing Senate Committee on Banking, Trade and Commerce researched digital currencies and released its report in June of this year. The report examined the details of various virtual currencies and made policy recommendations such as forming a roundtable with stakeholders, including banks, to address the lack of banking services for virtual currency businesses, and raising awareness among Canadians of the tax obligations attached to virtual currency received as income. Chief among the recommendations was that any future regulation be developed within a "light touch" framework to encourage Canada's further development as a digital currency hub. Other jurisdictions, like Jersey, have the same concerns and appear to be following Canada's "light touch" lead.

The first step toward recognition and regulation were the 2014 amendments to the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*. It imposes mandatory reporting requirements on businesses engaged in "dealing in virtual currencies." This accords with the Committee's recommendation that the primary targets of regulatory scrutiny should be the exchanges that allow conventional and digital currencies to be exchanged. The Committee called these exchanges the on- and off-ramps for virtual currencies.

The Committee made a number of other findings as well. According to provincial regulators, digital currencies are not currently regulated as securities or derivatives, although they could be if they were to be packaged as investment products. Since it appears investor interest is rising, securities regulation may follow soon. The Committee also considered risks such as money laundering, criminal financing, tax evasion and cyberattacks. It recommended the federal government raise public awareness about these risks, but stopped short of making any policy recommendations. The Committee also noted that several banks are currently studying developing their own digital currencies and other uses of blockchain technology.

Virtual currencies will likely not displace the Canadian dollar any time soon, but the underlying technology may have a significant impact in the coming years.

For more information on e-commerce, please contact

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KYLE THOMPSON, articling student, assisted with the research and writing of this article.

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

Proposed Amendments to Ease Strata Windups

STRATA PROPERTY LAW

Faced with the problem of aging strata developments exceeding their maintainable lifespans, the provincial government has put forward changes to British Columbia's *Strata Property Act* that propose a relaxation of the requirements for the windup of a strata corporation.

Currently, dissolution (or windup) requires a strata corporation to pass a unanimous resolution of all owners at an annual or special general meeting. Consent of all mortgagees and other charge holders on title to each unit must also be obtained. This threshold is so high as to be virtually unachievable, though there does exist provision for an application to the court to overcome minority intransigence.

Bill 40–2015 adopts recommendations of the British Columbia Law Institute and proposes to amend the *Strata Property Act* to reduce the threshold to 80 per cent of eligible voters. It also removes the ability of mortgagees to vote on such resolutions if voting rights have been assigned.

Once the winding-up resolution has been passed, strata corporations with at least five strata lots must, and those with less than five may, apply to the Supreme Court of British Columbia for an order confirming the resolution. The proposed amendments provide that when determining whether or not to confirm a resolution, the Court must consider three factors:

1. The best interests of owners;
2. Possible unfairness to owners or registered charge holders; and
3. Potential confusion and uncertainty in the affairs of the strata corporation or of the owners.

It is anticipated that the majority of strata corporation windups will proceed by the appointment of a liquidator.

Thus, in addition to lowering the practical barriers to winding up a strata corporation, the proposed amendments create new procedural protections for individual owners, provide guidance for the courts, and refine the process to permit and implement a winding up despite minority opposition.

Many strata buildings in our province have outlived their economically usable lifespans as well as the willingness of owners to fund their maintenance. Additionally, increases in allowable density and property values present substantial redevelopment opportunities for these properties, the realization of which may be a more practical reality under the proposed amendments.

The *Strata Property Act* amendments are on track to become law in 2016. Watch for more details in the next issue of *Letter of the Law*.

For more information on these proposed changes to the Strata Property Act *or strata property law in general, please contact*

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KYLE THOMPSON, articling student, assisted with the research and writing of this article.

The electronic version of this article at ***www.singleton.com*** contains links to *Bill 40–2015* and the *Strata Property Act* mentioned above.

US@SU

UPCOMING EVENT: WORKPLACE LAW GROUP SEMINAR

On March 3, 2016, SU's Workplace Law Group will be presenting a half-day seminar at Simon Fraser University's Centre for Dialogue. This seminar, which is accredited by the BC Human Resources Management Association, will focus on new and emerging issues in workplace law including privacy issues and employment sanctions for off-duty conduct. Whether you are a Certified Human Resources Professional; an employer with issues and questions associated with managing your employment relationships, privacy obligations and/or human rights issues; or an individual whose work touches on aspects of workplace law, we invite you to contact any member of SU's Workplace Law Group for more information on how SU can assist you and your business.

Our Workplace Law Group members include: **MELANIE SAMUELS**, Chair (Partner), msamuels@singleton.com; **H. DAVID EDINGER** (Partner), dedinger@singleton.com; **VERONICA ROSSOS** (Associate), vrossos@singleton.com; and **REUT AMIT** (Associate), ramit@singleton.com.

If you are interested in attending the Workplace Law Group Seminar, please contact SU's Marketing and Operations Coordinator, **TRACEY ONG**, tong@singleton.com. A continental breakfast and coffee and tea service will be provided. We look forward to seeing you on March 3.

GIVING BACK

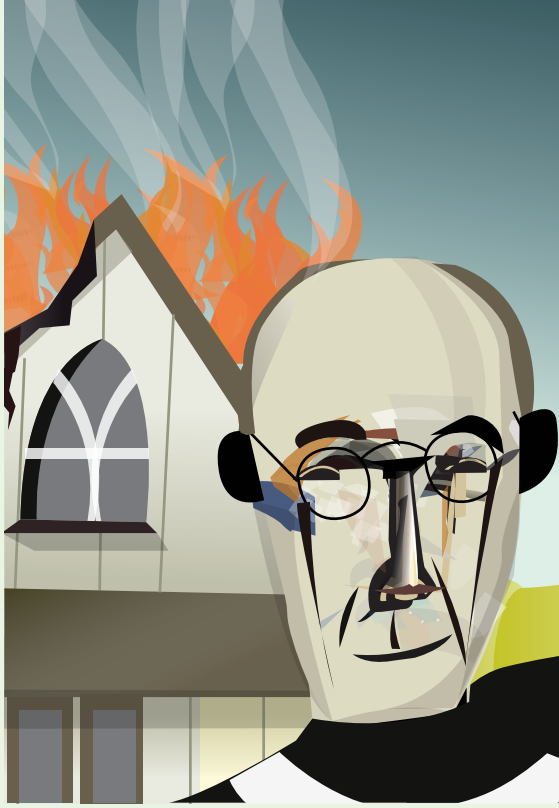
SINGLETON URQUHART's 19th Annual Charity Golf Tournament raised a total of just over $13,000. Proceeds were split evenly between Athletics for Kids and the BC Childhood Cancer Parents Association. A huge thank you goes out to our sponsors and donors for their generous contributions.

LAWYERS IN THE RANKS

BARBARA CORNISH was named in the International and Canadian *Who's Who Legal 2015* in the category of Mediation.

Homeowner Insurance Covers Grow-op Arson

INSURANCE LAW | *Davidson v. Wawanesa Insurance Company*



Whether or not the insured was aware of a grow-op in the home was key to a recent provincial court case that found the house was still covered by insurance after an arson fire.

Let me set the scene in *Davidson v. Wawanesa Insurance Company*. The RCMP raid a house in Kamloops, B.C., and find a grow-op in the basement. Within 24 hours the house burns to the ground in a gasoline-fuelled arson. The insurance company denies the claim resulting from the fire. The owner of the home litigates the denial. And he wins.

The Facts

Steven Davidson owned the Kamloops home. Over the period of 2009 it appears that he; his wife, Tammy Boucher; their daughter; and her boyfriend all lived at the home.

On December 29, 2009, Mr. Davidson was charged with a number of offences stemming from an incident in which he drove his vehicle through a fence and struck Ms. Boucher. It was Mr. Davidson's evidence that he did not intend to hit Ms. Boucher. He would eventually be released on bail, one of the terms being that he would not attend at or be within 100 metres of any residence of his wife except for the purpose of retrieving his personal belongings. Notably, he did visit the residence between this incident and the arson.

In April 2010, Mr. Davidson was working in the area of 100 Mile House, northwest of Kamloops. On April 21, the RCMP executed a search warrant on the Kamloops house. They found 630 marijuana plants as well as various dried plant material. Mr. Davidson denied any knowledge of the activities at the house, and no charges would ever be laid relating to the grow operation.

In the early morning of April 22 the residence burned to the ground. It had been broken into and gasoline was used.

Madam Justice Fitzpatrick noted, "There is no mystery as to why it burned down; it was arson."

On June 28, 2010, the insurer of the home, Wawanesa, informed Mr. Davidson that the policy was voided and any claim would be rejected as (1) the claim was not covered under the policy, and (2) Mr. Davidson's misrepresentations voided the policy.

The Coverage

The policy included an exclusion that would not cover loss or damage resulting from illegal activity "arising directly or indirectly from the growing, cultivating, harvesting, processing, manufacture, distribution, or sale of any drug, including but not limited to cannabis...whether or not 'you' have any knowledge...."

Justice Fitzpatrick accepted that the marijuana grow operation belonged to either Mr. Davidson or his wife and that it was illegal. However, it was up to the insurer to *prove* that the fire was the result of the grow-op. It was found that, while the timing was suspicious, there was no evidence as to why the fire was set and so the exclusion did not apply.

The Case for Misrepresentation

Justice Fitzpatrick found the grow-op to be a material change. The central issue was whether Mr. Davidson was aware of the grow-op. Wawanesa's arguments were based on circumstantial evidence, and there was no evidence directly pointing toward Mr. Davidson's awareness. While acknowledging that Mr. Davidson had some credibility issues, Justice Fitzpatrick concluded that he was credible and that he was not aware of the illegal activities taking place at the home. As such, he could not have engaged in material misrepresentation or non-disclosure.

The Conclusion

In situations such as this, it will always be difficult to prove the exact reason for an arson. Despite a strong temporal link between the bust and the arson, it was found that Wawanesa failed to show the arson was resultant of the illegal activity. Proving such a link is now a far more difficult task as it would seem suspect timing is not sufficient.

Furthermore, proving an insured was aware of the activities when there is no direct evidence may be quite difficult, especially when it is simply the word of the insured that is being relied upon. Despite finding the grow operation belonged to either Mr. Davidson or his wife, Justice Fitzpatrick also found Mr. Davidson was not aware of the illegal activities taking place at the home.

In the future we may find more cases where insureds plead ignorance of illegal activities at their residences despite the concerning circumstances surrounding them. Insurers and their counsel will need to complete further investigation of arsons, specifically the motivation behind arsons which have suspicious timing.

For more information on insurance law, please contact

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