Letter of the Law

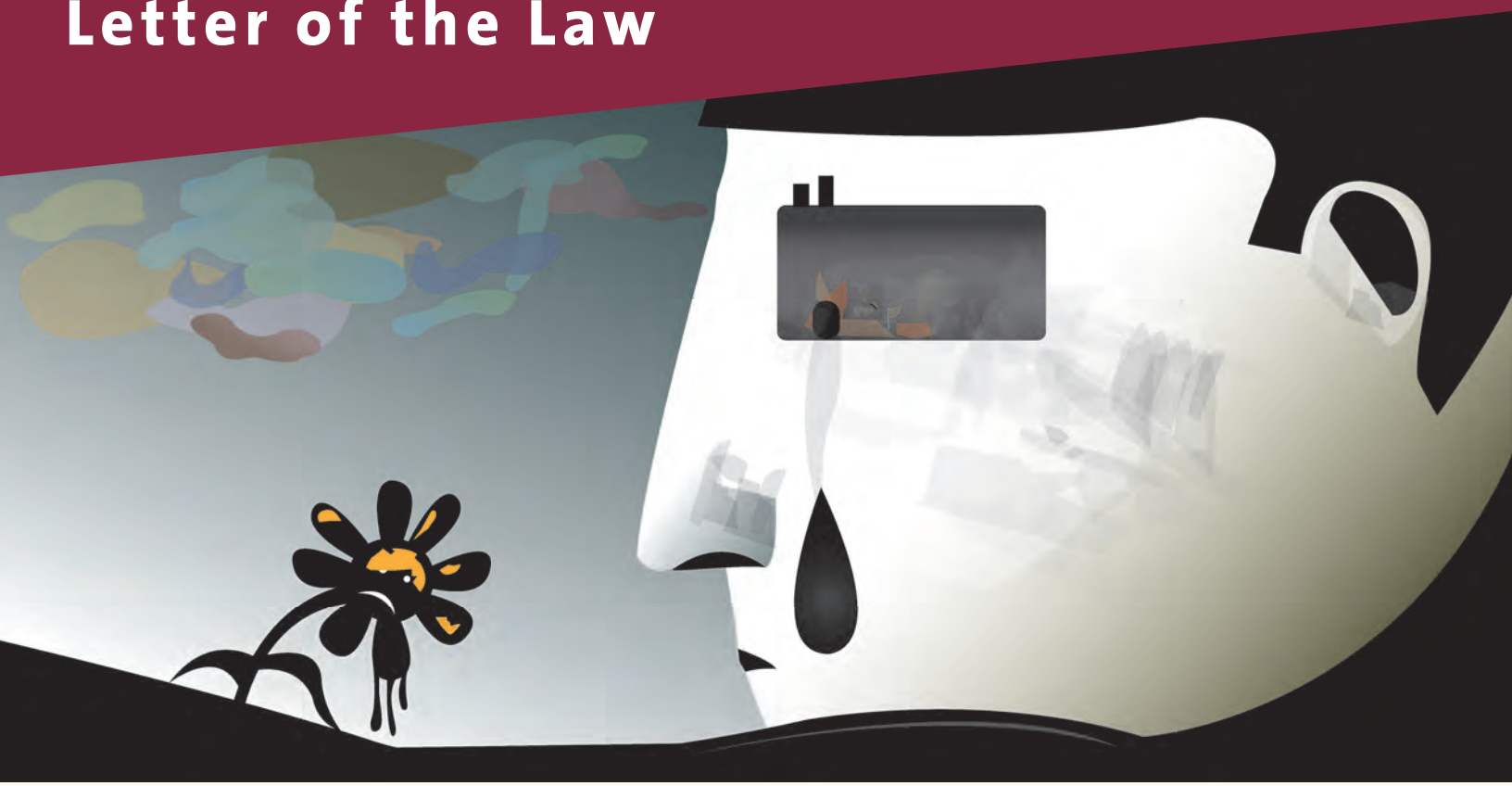

ILLUSTRATION *John Belisle, Signals*

Homeowners' Insurance Policies and Environmental Remediation

Homeowners who discover that they have a flowerbed polluted by a decades-old disintegrating underground oil tank will probably look in vain to their insurers for help with paying the cost of remediation.

Two recent court decisions, in British Columbia and Quebec, illustrate the uneasy relationship between insurance coverage and pollution that has developed for both commercial and residential insureds. In both these cases the property owners ended up having to pay the clean-up bills themselves since their policies specifically excluded liability. One policy relied on an explicit pollution exclusion while another found that the presence of a long-abandoned heating oil tank was not an "occurrence [meaning] a loss or accident to which this insurance applies . . . ."

The rationale for such clauses is to avoid unknown and immeasurable claims. As awareness of the environment grew in the 1960s and 1970s, it became clear that large numbers of properties had become contaminated by historic industrial and storage operations. It also became apparent that the potential costs arising from remediation of this pollution were enormous.

As a result, insurers amended their standard commercial general liability policies to exclude liability for damages caused by pollution. In the first round of pollution liability exclusion clauses, there was an exception for any pollution that occurred as a result of a "sudden and accidental" dispersal of pollutants. That would include accidental spillages of chemicals.

A second generation of exclusions went considerably further. Known as the absolute pollution exclusion, they provided that there would be no insurance against "loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants."

Although the driver for the creation of these exclusions was the enormous liability arising from industrial sites, it has also had a severe impact on a wider range of property owners. Any owner of commercial property where there is a service station or dry cleaner, for example, will probably find that the land has become contaminated by underground storage of gasoline and chemicals.

Another hidden cause of pollution has created major difficulties for homeowners. Prior to the widespread use of natural gas or electricity for heating homes, oil-fired furnaces were popular. Because the holding tanks for heating oil were large and unsightly, they tended to be buried in the back yard. In many cases,

(Continues on page 2)

SINGLETON LEGAL COUNSEL URQUHART 25 YEARS

(Continued from cover)

when homes made the transition from furnaces fired by heating oil to natural gas, the pipes linked to the underground tanks were simply cut. Over time, subsequent owners could be wholly unaware that a decades-old heating tank was slowly eroding beneath their property, allowing the introduction of heating oil into the environment.

Although this form of heating has become much less common in urban areas, it is still common in remote locations where natural gas is not available. Such was the circumstance that created the difficulties of Brian Corbould in his dispute with the BCAA Insurance Corporation (*Corbould v. BCAA Insurance Corporation*). Mr. Corbould owns a recreational property in Anglemont beside Shuswap Lake in British Columbia. In 2006, he installed an above-ground tank to store heating oil and also purchased an all-risks insurance policy from BCAA Insurance. For reasons unknown, following a fill-up of the tank two years later, there was a leak that resulted in most of the tank's contents soaking into the ground.

When Mr. Corbould made a claim for the roughly $200,000 that it cost him to remediate his property, the insurance company relied upon the pollution exclusion clause (an "absolute" exclusion) and denied coverage.

In reasons given in November 2010, the B.C. Supreme Court provided a comprehensive review of the consideration of pollution exclusion clauses. Mr. Corbould argued that the damage to the property was caused from failure of the heating system, rather than a commercial or industrial operation

which introduced pollutants into the environment. As a result, he argued, the pollution exclusion clause did not apply.

The Court rejected those arguments and said that heating oil is obviously a contaminant once it is introduced into the environment. The exclusion of coverage for any dispersal of contaminants covered "ordinary environmental pollution such as oil spills." In the result, Mr. Corbould's claim failed.

The other recent decision from Quebec also held against a property owner who had been victimized by pollution. But in that case there was no reliance on a pollution exclusion clause. Philip Johnston owned an expensive home in Westmount, Quebec which, unbeknownst to him, had a defunct underground heating oil tank. In 2004, he sold the property to François Bérubé and Sophie Marcil who decided that they wanted to build an extension into the rear yard. In the course of excavation for the extension they discovered the old heating oil tank and incurred costs in the $110,000 range for removal of the tank and remediation of the property.

In *Bérubé c. Johnston*, the Quebec Superior Court determined that Mr. Johnston should reimburse the purchasers of his old property and in turn he made a claim against his insurer, Chubb Insurance Company of Canada. Nowhere in the reasons for judgment is there mention of a pollution exclusion clause. The case turned on the issue of whether the damage that had been caused to the property was caused by "property damage which [took] place anytime during the policy period and [is] caused by an occurrence."

The trial judge determined that there was no specific event or occurrence which caused the property damage. Rather, the presence of the heating oil tank was an inherent defect of the property for which there was no coverage. The Quebec Court of Appeal upheld this judgment in 2010 stating forthrightly: "This conclusion is the only one to be drawn from a correct interpretation of the policy, as it was decided in numerous cases." Leave to appeal this decision to the Supreme Court of Canada was denied.

Both of these decisions illustrate the risk to property owners arising from pollution. The fact that claims in British Columbia can also be made for cost recovery actions against ***any*** former owner of a property needing remediation means that the potential class of persons who could be held liable is very large. Given this, insurers understandably exclude these costs from their policies. As these two cases illustrate, if such a claim is brought, it is unlikely that there will be insurance coverage for the unfortunate owner or former owner. **SU**

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EDITOR'S NOTE

In our Spring 2011 issue we published an "e-version" of *Letter of the Law* for the first time. We were elated by its reception from our readers. There was a very high "open rate" and much interest shown in our website's other features.

We don't have the e-mail addresses of many long-standing readers. If you want the convenience of having our newsletter brought to your computer, in addition to the glossy hardcopy that arrives by mail, please send us your particulars.

We intend to continue producing *Letter of the Law* in both formats. Electronic distribution allows us to send you more frequent updates and to target specialized articles at subsets of our entire readership.

However, we recognize that a paper copy is easy to read and keep handy for future reference. If you'd like a customized SU binder to keep your copies, we'll be happy to send you one.

Our Marketing Manager Rebecca Cheung and Managing Editor Mark Budgen were instrumental in developing our electronic newsletter, together with the creative talent at Signals Design. Thanks for helping us go turbo on the information highway.

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A Lot of Discretion under the *Property Law Act*

PROPERTY LAW | *Gainer v. Widsten*

On April 17, 2011, the Supreme Court of Canada dismissed an application for leave to appeal in the remarkable case of *Gainer v. Widsten* which involved the encroachment of a building on a neighbouring property. The original 2005 British Columbia Supreme Court decision in this matter (later upheld by the BC Court of Appeal) may seem a bit counterintuitive as the party at fault could be seen as achieving a favourable result.

A couple, Charles and Patti-Jo Gainer, that own a rural property were one of the parties in the dispute. They built a workshop on their property without ascertaining the position of the lot line. Their new building encroached onto 1750 square feet of the adjacent 2.7 acre property which Mr. Widsten purchased for $12,500 one year later.

The matter between the neighbours eventually became contentious and the Gainers petitioned the Supreme Court in Quesnel for a resolution. The initial Supreme Court decision turned upon the application of Section 36(2) of the *Property Law Act* which reads:

> If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
>
> (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
>
> (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
>
> (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

ILLUSTRATION *Geoff Kehrig, Signals*

Rather than order an easement under Subsection (a), a subdivision and transfer of a portion of Mr. Widsten's property under Subsection (b), or the removal of the workshop under Subsection (c), the judge ordered, somewhat surprisingly, that Mr. Widsten's ***entire property*** be conveyed to the Gainers in exchange for the property's fair market value.

It is important to note that a decision made by a judge first hearing the petition under Section 36 is discretionary in nature. Generally, appeal courts review discretionary decisions with a greater level of deference, as the judge of "first instance" is expected to be the decision-maker with the best understanding of the facts.

The nature of this decision, however, begs the question of why the judge granted such seemingly draconian relief rather than one of the other available options. This is even more remarkable when one considers the finding that it was "through their neglect in failing to ascertain the position of the lot line" that the Gainers encroached on their neighbour's property. There was no suggestion that Mr. Widsten was in any way blameworthy.

Mr. Widsten appealed the decision, making the argument that the Gainers' neglect should bar them from the remedy provided. In deciding against him, the Court of Appeal found that neglect and an "honest belief" (arguably required for a party seeking equitable relief under the Act) are not mutually exclusive. The Court of Appeal stated, rather, that the overriding concern in such situations is the established but amorphous concept of the "balance of convenience [which favoured] the vesting of Mr. Widsten's property in the Gainers upon Mr. Widsten being properly compensated."

The judge of first instance had ruled that, considering the equities between the parties, the balance of convenience suggested this course of action. One suspects that he reached this decision because the cost to remove the workshop or subdivide the Widsten property was higher than the fair market value of the property; however, granting an easement would have been a far less costly remedy. There was, however, animosity between the parties that was likely to continue if an easement was granted.

The result, now that the Supreme Court of Canada has dismissed the application for leave, leads to two considerations for potential litigants:

- In situations where the commercial reality is that it would be more cost-efficient to do so, courts may exercise their discretion in such a way that may seem to go beyond the obvious notions of equitable relief.
- The decision demonstrates the danger of having courts determine matters in which decision-makers ***can*** exercise their discretion. In such instances, a court's notion of what is fair may not be the same as the parties' notion. **SU**

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SU The electronic version of this article at ***www.singleton.com*** contains links to the *Property Law Act* and the BC Court of Appeal's decision.

Thinking of Contracting in the United States?

CONSTRUCTION LAW

As the economic recovery in the United States continues, one might expect accelerated activity in the construction industry, particularly in the public sector. The Obama administration has stated that a key part of its economic recovery plan is to rebuild and renew various aspects of America's infrastructure, including transportation, energy, communication, government buildings and facilities, and various other civil projects. The 2009 *American Recovery and Reinvestment Act* dedicated a total of $105.3 billion to infrastructure investments.

Many participants in the Canadian construction industry have historically engaged in both private and public sector projects south of the border. There is no reason to think this involvement will not continue, particularly under this ambitious economic recovery plan. But those that do so should be aware that there are marked differences between Canadian and United States construction laws especially in the two countries' private sectors. A Canadian construction company or design consultant considering entering into business south of the border should be aware of these differences to avoid any rude awakenings.

Regarding the area of procurement, for example, Canadian law has been fairly well established since the 1981 decision of the Supreme Court of Canada, *Her Majesty the Queen* (*Ontario*) *v. Ron Engineering & Construction* (*Eastern*) *Ltd*. That decision, and the many cases which have adopted its reasoning, established the principles of fairness and transparency as governing all levels of the procurement process, both in the private and public sectors. So consultants and builders in the Canadian construction industry have the luxury of relative certainty in this area of the law.

In the United States there is also relative certainty in the law of procurement in the public sector. At the federal level, the Fairness and Acquisition Regulation largely governs the procurement process for public projects and adopts many of the same principles espoused by the Supreme Court of Canada in *Ron Engineering*. A similar result has been achieved at the state level through wide adoption of a model procurement code.

The differences between the codified approach to procurement in the United States and the Canadian common law approach are minor. Overall therefore one can expect to be subjected to the same general law of procurement in public construction projects on both sides of the border.

There is one significant exception, however. In the United States, notwithstanding the recognition of a "firm bid" rule (equivalent to the irrevocable bid rule in Canada), a contractor has the ability to avoid a mistaken bid if it can establish, among other considerations, that the bid was in error and, if accepted, would cause economic hardship.

A comparison of the approaches in the two countries' private sectors reveals stark and contrasting differences. In Canada *Ron Engineering* governs both the public and private sectors but the situation in the United States' private sector is more like the wild west. The law of procurement is simply not recognized. Free enterprise and freedom to negotiate in their rawest forms are customary. The lowest compliant bid is not recognized as being preferred, at least in the eyes of the law.

Until the 1974 decision of the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Ironworks*, the law in Canada did not permit the recovery of economic loss if it was a consequence of negligence on the part of a consultant, manufacturer or builder. The duty owed by participants in the design or construction of a product, whether a building or otherwise, for the cost of repairing defects in workmanship, material or design was limited to the participants' contractual responsibility.

Rivtow Marine extended this responsibility to third parties who had suffered economic loss because of a consultant's or builder's failure to warn ultimate users of inherently dangerous defects in the product designed or manufactured by them. The consultant's and builder's responsibility was extended further by the Supreme Court of Canada

ILLUSTRATION *John Belisle, Signals*

in the 1995 case, *Winnipeg Condominium No. 36 v. Bird Construction*. In its decision, the Court determined that consultants and builders would be responsible for the cost of remedying inherent defects in design or construction when those defects presented a substantial danger to human health or safety. That remains the law in Canada today.

In the United States, like Canada, it has long been accepted that one can recover for bodily injury or physical damage to property from the tort of negligence. But in the United States there has historically been resistance to allowing tort recovery for the cost of repairing inherent defects in the design or construction of a building. More recently there have been distinct indications of relaxation in this area, particularly in the case of design consultants.

The general law, though, remains that U.S. builders in particular are not exposed to liability for the cost of remedying workmanship or materials defects that have not caused other property damage. In the case of consultants, however, the law in the United States is much the same as in Canada.

Consultants are typically exposed to liability for the cost of remedying inherent design defects, particularly where they present a substantial danger to human health and safety.

As with procurement, there are multiple statutory provisions in many states that deal with and modify the law on recovery for economic loss. Familiarity with these provisions would be critical for members of the Canadian construction industry participating in projects south of the border.

In the United States there is . . . relative certainty in the law of procurement in the public sector.

In broad terms, one can see significant differences between the ways the U.S. private and public sectors structure construction projects. The "design-bid-build" model is popular in the United States for private construction projects but, in the public sector, there has been a long-held preference for "design-build" projects. This has not led, as it has in Canada, to widespread acceptance of public private partnerships (P3's) but, as economic recovery in the United States gains momentum, there is more recognition that P3's can play a large role in the rebuilding of American infrastructure. P3 has recently been recognized by the Obama administration as a model that should gain favour as part of the economic recovery plan.

Insurance law in the United States has long influenced the development of Canadian insurance law. Canadian participants in American projects should take comfort that the policy coverage they can obtain for construction or builder's risk, general or wrap-up liability on projects, and professional liability would be much the same as they have received in Canada. There are exceptions in some state jurisdictions but, broadly speaking, the principles and coverages are the same.

While there are huge opportunities in the United States for the Canadian design and construction industry, there are equally huge risks. Moving into the U.S. construction industry should be done carefully and cautiously. The legal environment south of the border is in some respects quite different from Canada's and this could result in significant adverse consequences if the appropriate precautionary steps and legal advice are not taken in advance. SU

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SU Go to the electronic version of this article at *www. singleton.com* to find the links to the cases referred to in this article.

US@SU

On April 14, the Federated Press hosted Minimizing Construction Risks. John Singleton, Q.C. addressed the conference on "Managing Procurement Risk in the Construction Industry" and Derek Brindle, Q.C. presented a paper on "Minimizing Damages—Lessons Learned from Construction Claims."

Derek Brindle, Q.C. chaired a panel on "Construction Claims and Disputes and Liability" hosted by the Pacific Business Law Institute on April 14. John Singleton, Q.C. spoke at the conference on "Professional Liability Claims."

In May Michael Hewitt gave a presentation on "Accountants' Negligence and Litigation" to a risk management conference hosted by the Institute of Chartered Accountants of British Columbia. Also in May, Mark Stacey and Michael Hewitt gave a joint presentation on "Civil Fraud Litigation - Strategies and Pitfalls of Civil Recovery Claims" at a conference hosted by the Vancouver chapter of the Association of Certified Fraud Examiners.

The SU ski team "Better Off-Sled" finished 21 out of 36 firms at the Law Firm Ski Challenge on March 26 at Whistler. The team had four rookies and two returning veterans. From left to right: Stephen Berezowsky, Michael Peraya, Lana Piovesan, Robert Hodgins, Daniel Barber, Mitch Dermer. ▶

On April 17 SU's Sun Run team finished tenth among all law and accounting firms. Three of the participants were: (l. to r.) Daniel Barber, Debra Rusnak, Ryan Gilmore. ▲

Illness and Injury at the Construction Workplace

EMPLOYMENT LAW

ILLUSTRATION *John Belisle, Signals*

Standards for workplace Occupational Health and Safety (OHS) have been regulated in British Columbia for nearly a hundred years through the *Workers Compensation Act* and its Regulations. The main aim of OHS legislation is to minimize workplace injury and illness to workers and other persons present on the worksite.

Over time the scope and influence of OHS legislation has increased. The legislation is administered and enforced by WorkSafeBC, an independent agency funded by employers, which has extensive authority including the power to create and administer Regulations, undertake investigations and administer fines. These substantial powers allow WorkSafeBC to exercise significant influence over a workplace.

In the province's construction sector, WorkSafeBC can affect the workplace in many ways, three of which we summarize here to show the extent and weight of the agency's powers. To minimize risk and protect against potential liabilities, employers and owners must have a clear understanding of the responsibilities imposed on them by the Act.

Asbestos Exposure

A substantial regulatory framework applies to workplaces where a worker may be exposed to potentially hazardous levels of asbestos fibers. WorkSafeBC has identified asbestos exposure as a serious cause of workplace injury and disease. According to the agency's statistics, during 2000-2009 30 per cent of deaths from workplace injury or industrial disease were related to asbestos exposure.

Employers working with asbestos must have an exposure control plan in place which includes:

- identification of the risks associated with asbestos
- education and training
- if necessary, provision of written procedures, health monitoring and decontamination methods.

There are numerous other requirements for employers whose businesses expose workers and others to asbestos.

As a result of heightened concern over asbestos exposure, WorkSafeBC is exercising many of their powers under the legislation. A new group of inspectors has been created to focus on asbestos exposure in the workplace. Additionally, in the first quarter of 2011 WorkSafeBC has shut down approximately thirty job sites for violations relating to asbestos and levied thousands of dollars in fines against employers.

More drastically, in 2010 the agency brought a court action against an employer in the asbestos abatement business for repeatedly breaching regulations related to asbestos. It was successful in obtaining an injunction against that employer, preventing it from carrying out any further work. WorkSafeBC later sought to have the owner of the business jailed for 120 days for continuing to carry out business despite the injunction. While this attempt was unsuccessful, WorkSafeBC's actions provide a clear indication of the extent of its powers.

Fall Protection

Employers, particularly those in the construction industry, should be aware of regulations dealing with fall protection for employees. Part 11 of the Occupational Heath and Safety Regulation requires all employers to ensure that a fall protection system is used when work is being done where a fall of three metres or more could occur or where a fall of less then three metres involves a risk of injury that is greater then the risk of injury from the impact on a flat surface. "Fall protection system" is a defined term under the Regulation which includes a system that will prevent workers from falling or stop them before they hit the surface below.

Failure to have any or proper fall protection results in many of the fines levied against construction employers. For the months of December 2010 and January 2011, the vast majority of fines that WorkSafeBC levied within the construction industry (ranging from $2,500 to over $14,000) were for failure to use adequate fall protection. Many of these fines were the result of repeated violations by employers.

Excavation

Part 20 of the OHS Regulation sets out the regulatory requirements for workplace excavations. These requirements include having written instructions from a registered professional if the excavation is more than 6 metres deep and having proper sloping and shoring requirements if the excavation is more than 1.2 metres deep. In December 2010 three construction firms that failed to follow these requirements were fined $11,229.40, $42,236.80 and $68,714.73 respectively by WorkSafeBC.

It is clear that failing to comply with OHS legislation and WorkSafeBC Regulations can leave employers and owners at risk of significant penalties including fines, workplace shutdowns and potentially jail time. To minimize and avoid such risks it is necessary that obligations and responsibilities imposed on employers and owners by the legislation be understood and followed. SU

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SU Go to the electronic version of this article at *www.singleton.com* to find links to the legislation and cases mentioned in this article.

Waiving Your Claim Goodbye

INSURANCE LAW | *Loychuk v. Cougar Mountain Adventures Ltd.*

Anyone who has ever gone rafting, rented a bicycle, or registered for a sporting activity has probably been required to sign a long document filled with fine print and confusing legal jargon. Likely, you signed this piece of paper, commonly referred to as a waiver, without bothering to read it. You may not have realized that your signature gave away your right to sue or, if you'd thought about it, assumed that no court would uphold such an "unfair" waiver.

However, the Supreme Court of British Columbia recently did just that. In *Loychuk v. Cougar Mountain Adventures Ltd.*, two women who were injured after colliding on a zipline adventure tour in Whistler had their claims thrown out ***even though the zipline operator admitted fault for the accident***.

Waivers, also known as releases or exclusion clauses, are an acknowledgement by an individual that they are giving up certain legal rights. Typically, an operator of a business that involves customer risk will draft a waiver as broadly as possible to attempt to protect itself from all liability in the event of an accident.

Courts will uphold a waiver depending on a number of factors and have denied an operator's attempt to rely on one when:

- the waiver was in small and illegible type
- the importance of the waiver was not brought to the attention of the signatory
- the person was told to "sign here" without being told what they were signing and were not asked if they read and understood the document.

In *Loychuk*, the plaintiffs were both told they could not participate in the zipline tour unless they signed a release that protected the operator from all liability, even if it was negligent. The release described the risks associated with ziplining, including the potential for a collision with another participant as happened in this instance.

During their final run on the zipline tour, the plaintiffs were injured when one of them was sent down the line before the woman in front had cleared the course. The accident was caused by miscommunication between the tour guides.

The operator did not deny liability but relied on the releases signed by the plaintiffs.

The operator did not deny liability but relied on the releases signed by the plaintiffs. The Court upheld the validity of the releases and dismissed the plaintiffs' claims, finding that:

- It should have been apparent to the plaintiffs that the release was a legal document that impacted their legal rights.
- The release was brought to the attention of the plaintiffs by large, bold print at the top of the page.
- The plaintiffs were given an opportunity to read the release.
- The plaintiffs asked no questions about the release.
- The plaintiffs did not tell the company they would not sign the release.
- The plaintiffs had previously visited the company's website which stated they were required to sign the release.

In addition, both plaintiffs had previously signed waivers for other activities. In fact, one plaintiff used waivers in her own business and the other plaintiff was a recent law school graduate familiar with legal terminology.

ILLUSTRATION *Geoff Kehrig, Signals*

Whether or not a court will uphold a waiver and allow an operator to escape liability for its own negligence will turn on the individual circumstances of each case. Nonetheless, as this decision demonstrates, a waiver that is clear, easy-to-read and has been explained to the signatory is likely to stand up in court. The message is clear for adventure seekers—those waivers you sign may leave you without a legal leg to stand on. **SU**

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SU The electronic version of this article on the firm's website, ***www.singleton.com***, contains a link to the above judgment.

Overbuilt Quarry Avoids Environmental Assessment

ENVIRONMENTAL LAW | *Friends of Davie Bay v. Province of British Columbia*

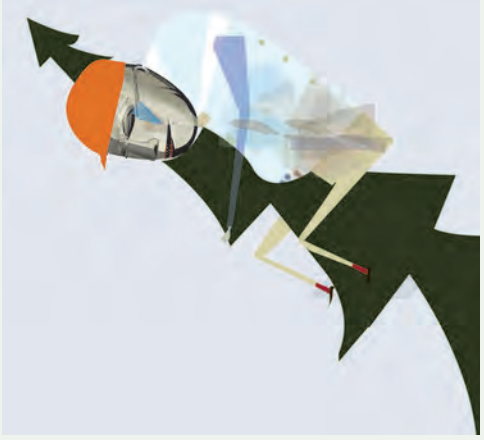
British Columbia, like most jurisdictions in Canada, has adopted an environmental assessment system, intended to determine whether or not the untoward side effects of an industrial or commercial project on the environment justify creating it. An environmental assessment must balance ecological and economic factors so that destruction of habitat and wildlife is minimized.

In B.C. there have been thresholds set for various types of projects to determine whether or not they need to be assessed. The theory is that small-scale operations are unlikely to have a significant disruptive effect on the environment. However, once projects reach a certain size, it is inevitable that there will be untoward effects on the environment so it is essential that a project's proponents design their facilities in such a way that these destructive side effects are minimized.

For quarries, the threshold under B.C.'s legislation is described as one having a "production capacity" of greater than 250,000 tonnes per year and one such project, a limestone quarry, has been proposed for Texada Island, a Gulf Island near Powell River. The company making the proposal is Lehigh Hanson Materials, part of a worldwide company that deals in cement and aggregate materials.

Among the necessary steps required to open a quarry is obtaining a mining permit. Lehigh applied for and obtained a permit allowing them to extract 240,000 tonnes per year, an amount just under the threshold for a mandatory environmental assessment.

However, the infrastructure that Lehigh proposes to install has a capacity that is many factors larger than those limits. For example, in addition to a wide access road, 85-hectare quarry area and barge-loading facilities, the project includes an overland conveyor capable of loading material on to a barge at a rate of 2,500 tonnes per hour. Simple arithmetic shows that, if the conveyor belt operated continuously for 24 hours a day, the proposed production limit for the quarry would be reached in considerably less than a week.



A group of Texada Island residents and concerned citizens formed a non-profit society called Friends of Davie Bay (Friends) in opposition to the proposed quarry. Friends argued that the unique geological features of Texada, which include a karst topography notable for multiple underground caverns formed by erosion of limestone, together with Davie Bay's important ecological features, made it imperative that an environmental assessment take place.

Despite this evidence, the Environmental Assessment Office (EAO) took the view that because the permitted level proposed by Lehigh was under the threshold as set out in the *Environmental Assessment Act*, an assessment was not required. In effect, the assessment office said that production capacity means what the proponents of a project say they will produce, not the infrastructure that is actually installed.

Friends launched a judicial review of the EAO decision, which was recently dismissed by the British Columbia Supreme Court. The Court first of all held that the standard of review was only reasonableness, which meant that they were more likely to defer to the EAO's interpretation. The Court also held that the purpose of the thresholds in the *Environmental Assessment Act* was to provide a "bright line" allowing proponents to know whether or not their projects were going to be subject to an environmental assessment.

Friends had argued that such an interpretation of the Act would have the effect of allowing proponents to make an end run around the legislation. Although there is no evidence that this was Lehigh's intention, there was the possibility a proponent could deliberately make an application just under the threshold set out in the Act, overbuild their project to allow for future expansion, and then make an application to amend their initial permit later.

Crucially, Friends pointed out that where there is an amendment to an existing quarry permit, the EAO would not consider the increase in tonnage produced for purposes of environmental assessment thresholds. Only if the ***actual area of the quarry expanded*** would an assessment be required. In other words, there is an incentive in the Act based on the EAO's interpretation to deliberately build a very large infrastructure with the knowledge that production could be ramped up at a later date with no assessment required.

The absurdity of such an interpretation is that it is the infrastructure and plant capacity which has the greatest impact on the environment, not the tonnage hauled. Friends have indicated that they intend to appeal this decision. SU

For more information on this case and on environmental law in British Columbia, please contact

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The authors were counsel for Friends of Davie Bay at the B.C. Supreme Court hearing.

SU To view links to the case and its interested parties, go to the e-version of the newsletter at ***www.singleton.com***.

ILLUSTRATION *John Belisle, Signals*