Spring / Summer 2018 Vol. 30 | No. 1

Letter of the Law

Last Print Edition!
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See page 3.

Does Liability Insurance Cover Demolition Costs to Repair Faulty Workmanship?

Commercial general liability policies are carried by most contractors and trades in the construction industry. Additionally, it is also not unusual for major projects to be covered by what's known as wrap-liability insurance—insurance which includes coverage for liability for compensatory damages because of "property damage".

The term "property damage" is generally defined in these policies as "physical injury to or destruction of tangible property". So the basic insurance coverage afforded by these policies—in addition to defence coverage—is to compensate the insured against any liability for damages arising from physical injury to, or destruction of, tangible property.

Of course, as with all policies of insurance, there are exclusions from coverage. One of the ones that most often surfaces is the work product exclusion, which generally reads as follows:

> **"This policy does not apply to any liability for injury to, or destruction of, or loss of use of that particular part of any property out of which any injury or destruction arises, or the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the Insured."**

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SINGLETON REYNOLDS

Does Liability Insurance Cover Demolition Costs to Repair Faulty Workmanship?

(continued from page 1)

In other words, this insurance does not provide indemnity coverage to repair or replace work product that has been physically damaged or causes physical damage to other property when the work product is inherently defective. To the extent clarity is possible in interpreting insurance policies, at least this much is clear.

One of the main issues arising in interpreting this exclusion is whether there is indemnity coverage for costs incurred in repairing the faulty work product when the costs are attributable to demolishing other parts of the project in order to get at and repair the faulty part.

The argument that such costs are covered is frequently raised on behalf of contractors who are faced with the work product exclusion. For the reasons outlined below, the argument is frequently found to be without merit.

Perhaps the strongest and most logical opposing argument to this interpretation is that if the insured was afforded indemnity coverage for such costs, it would turn the liability policy into a performance bond, something clearly not within the reasonable expectations of either the insurer or the insured.

If it was otherwise, for example, if an insured installed the wrong windows in a high-rise building and in replacing them had, as a matter of necessity to replace the windows, damaged the window openings, it would amount to a commercial absurdity that the insured would be entitled to the cost of rebuilding the window openings which, logically, would be part and parcel of the cost of repairing, replacing or making good the faulty installation. In short, it would be a windfall for an insured to be able to recover the cost of repairing property damage necessarily caused by the insured itself in carrying out repairs to a faulty work product.

This rationale for rejecting the indemnity for demolition costs has been adopted by the courts in Canada in a number of cases, including *Alie v. Bertrand & Frere Construction Co. Ltd.* and *AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc.* In both cases, the Court observed it is commonly understood that commercial general liability policies are intended to cover tort liability for injury to other persons or damage to their property, not the costs of repairing or replacing the insured's defective work or product.

Similar reasoning has also been applied in the case of interpreting the faulty workmanship exclusion found in the course of construction or builders risk policies. By way of example in the *Sayers* case, below, damage caused to concrete slabs and electrical conduits in order to repair physical damage caused by freezing water in the conduit was all deemed to be part of the cost of making good faulty workmanship and, therefore, was excluded by the faulty workmanship exclusion. (See: *Sayers and Associates Ltd. v. Insurance Corp. of Ireland*; *Poole-Pritchard Canadian Ltd. v. Underwriting Members of Lloyds*; and *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada*.)

Notwithstanding what appears to be a clear argument reflecting the reasonable expectations of both insured and insurer, exceptions to the work product exclusion will continue to be argued with the possibility that one day a contrary novel argument will be accepted, followed by attempts to amend policy wordings to foreclose such a result.

For more information on work product exclusions and your insurance policy, please contact:

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Editor's Note

Longtime readers of *Letter of the Law* know that I often write about the evolution of the law and how it adapts to changes in society and new technologies. Similarly, I mention the continual growth of our firm—the addition of new lawyers, practice areas and, most recently, a new presence in Toronto.

These changes are always made in response to the needs of our clients and as part of our desire to provide the very best of legal services in an ever-changing world. We cannot stand still.

So, too, *Letter of the Law*, after some 30 years in print, must evolve and respond to new technologies and changes. This issue marks the end of the print edition of *Letter of the Law* as we move to an entirely digital format. We hope you will join us in welcoming this new era for LoL.

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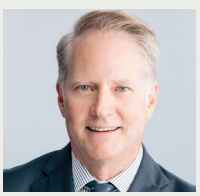

SINGLETON REYNOLDS

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A Building Reputation

We are now Singleton Urquhart Reynolds Vogel LLP (formerly Singleton Urquhart LLP), operating as SINGLETON REYNOLDS, and we welcome Sharon Vogel and Bruce Reynolds—two of Canada's leading construction lawyers—along with Peter Wardle, one of Canada's pre-eminent civil litigators, in our newly-opened Toronto office.

This new partnership adds considerable bench strength to our construction, infrastructure and commercial litigation practices.

It also adds a new dimension to the exceptional personalized advice and flexibility we have been known for the past 40+ years with our wide range of legal services in:

- **commercial real estate**
- **corporate commercial**
- **insurance defense**
- **professional liability**
- **product liability**
- **workplace law**
- **business immigration.**

We look forward to serving you with our new expanded strength.

John Singleton, Q.C. *Managing partner* | Peter Wardle *Associate counsel* | Sharon Vogel, FCIArb *Partner* | Bruce Reynolds, FCIArb *Partner*

Off to a Great Start

Since rebranding and expanding into the Toronto market this past January, SINGLETON REYNOLDS has been repeatedly recognized as a leader in Construction and Infrastructure Law. In February, just a month after opening, we were named Construction Law Firm of the Year for 2018 by Benchmark Canada. Shortly thereafter, BRUCE REYNOLDS was named Global Construction Lawyer of the Year by Who's Who Legal and STEPHEN BEREZOWSKYJ was inducted into the Canadian College of Construction Lawyers. SHARON VOGEL was recently named one of Canada's Top 25 Female Litigators by Benchmark Canada.

SR lawyers have also been recognized by Chambers and Partners, Who's Who Legal and Lexpert Leading Lawyers across a variety of practice areas.

US@SR

What We've Been Up To...

We've been busy since January and have welcomed several new faces including two new partners:

JANE INGMAN BAKER

MICHAEL PERAYA

SR's Workplace Law Group held their annual seminar at the Morris J. Wosk Centre for Dialogue on April 11. MELANIE SAMUELS, VERONICA ROSSOS, DAVID EDINGER and TALYA NEMETZ-SINCHEIN presented on Sex, Drugs, Responsibilities and Roles. If you are interested in attending future workplace law seminars, please email marketing@singleton.com.

In light of the tax proposals in the Federal Budget 2018, SINGLETON REYNOLDS and the accounting firm Crowe MacKay LLP hosted a breakfast-and-learn event on May 17 to discuss two significant changes to the taxation of private corporations and their shareholders—the tax on split income rules and the new passive investment income rules. The event was well attended.

STEPHEN BEREZOWSKYJ recently presented in the Continuing Legal Education of BC's annual Construction Law course. He also presented a course on Builders Liens for intern architects at the Architectural Institute of B.C.

Our Toronto team hosted the Society of Construction Law for their North American launch on June 12.

To sign up for our annual golf tournament September 18, and learn more about upcoming seminars and events, please visit www.singleton.com.

Letter of the Law is Going Digital!

This will be the last print edition of our newsletter. To keep receiving *Letter of the Law* via email please contact marketing@singleton.com to ensure you are on our email list.

The Google Memo: Addressing Overt Workplace Discrimination

WORKPLACE LAW

Issues related to the treatment of women, people of colour, religious and ethnic minorities, the LGBTQ2+ community and other historically marginalised groups in the workplace are currently at the forefront of both the news and the court of public opinion.

What, then, is an employer to do when an employee publically takes a position which flies in the face of policies and efforts to redress current and/or historical inequalities? Let's look to Google's termination of James Damore for guidance.

In August 2017, Mr. Damore's employment with Google—a U.S.-based company with headquarters in California, a state with at-will employment—was terminated after he wrote and distributed a memo titled Google's Ideological Echo Chamber.

The Google memo, as it is now notoriously known, criticized Google's affirmative action efforts to hire and promote women and "minorities". Mr. Damore impugned Google's "politically correct culture" and what he perceived to be Google's "failure" to acknowledge those manifest biological differences between men and woman which serve to explain, in part, the "[un-] equal representation of women in tech and leadership."

By way of example, the memo, which was distributed via an internal email list and later picked up by media, states: "Women, on average, have more: Neuroticism (higher anxiety, lower stress tolerance). This may contribute to the higher levels of anxiety women report on Googlegeist and to the lower number of women in high stress jobs." Googlegeist is an annual survey where Google employees are asked to rate their managers and life at Google. It is also worth noting that there is no scientific evidence or basis for Mr. Damore's claims.

Google's management found that in promoting harmful gender stereotypes, the memo and its author violated Google's Code of Conduct. In response, Mr. Damore cited his constitutional right to freely express his opinions, and in January of this year a class action lawsuit was issued in his name. According to an article in *The Wall Street Journal*, it alleges, among other things, that Google is a "hostile workplace for employees

with conservative views, and that the company unfairly favors women and certain minorities when hiring and promoting."

How might B.C. courts address a similar situation? And how might an employer take steps to protect itself, its interests and its employees from such potential liability?

In assessing whether an employee's misconduct is sufficient to warrant the ultimate sanction of dismissal, the Supreme Court of Canada has adopted a "contextual approach". Courts in British Columbia are directed to apply the following test in determining whether an employee's actions have given rise to a breakdown in the employment relationship:

- **are the impugned acts of the employee properly characterized as misconduct; and, if so,**
- **is the nature and degree of the misconduct sufficient to warrant dismissal?**

Generally, an employee is entitled to criticize her or his employer without fear of reprisal, up to and including a "for-cause" termination. However, in certain circumstances, criticism can be found to undermine the employment relationship such that it is impossible for employment to continue. In such instances, relevant considerations include, but are not necessarily limited to, the following factors:

- **The manner in which the employee voices her or his criticism.**
- **Whether the criticism itself flies in the face of the employee's professional duties and reasonable expectations of professionalism.**

As with any such case, Mr. Damore's conduct has to be viewed contextually. Google's Code of Conduct set out clear expectations regarding employee obligations to adhere to, and promote, a specific work environment which, in Google's case, was to be free of harassment, intimidation, bias and unlawful discrimination. Moreover, the code of conduct strictly prohibited unlawful discrimination or harassment on the basis of race or gender, while prohibiting harassment or bullying in any form. (Such expectations are notably codified in B.C.'s Human Rights Code and *Workers Compensation Act*.)

On its face, Google's management seems to have made an appropriate decision as the Google memo is likely to be in direct conflict with Google's Code of Conduct and to have a chilling effect on historically marginalised people in the company's employment, notwithstanding the policies Google implemented to address these inequalities.

As with all workplace-related concerns, it is the employer's obligation to be clear in communicating its expectations, including policies, culture, goals and direction. Ignoring the current political and cultural *Zeitgeist* is not an option—both for legal and business reasons. An employer's guidelines must be clear, concise, fair and properly communicated in order to maintain a workplace compliant with legislative minimums and social mores.

As we move through the 21st century, and as employees become more conversant with their rights and workplaces strive to maintain safe, harmonious environments, taking steps to communicate expectations which are consistent with the legal framework and the cultural *Zeitgeist* will, in the long run, save future costs and damage—both direct (legal) and indirect (loss of human capital).

For more information on managing fair and equitable workplace cultures, please contact:

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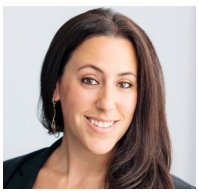

Winding Up Strata Corps—Get it Right the First Time

STRATA LAW

It's been almost two years since the *Strata Property Act* was amended to change the process for voluntarily winding up strata corporations. Now it's possible for owners in a strata development to voluntarily wind up their strata corporation—with or without a liquidator—once the owners pass a resolution with 80% approval.

Previously, unanimous approval was needed. With strata corporations of five or more strata lots, the approved winding-up resolution must be confirmed by a court order within 60 days.

Since the *Act* was amended, three court orders have been sought to approve a winding-up resolution to cancel a strata plan and appoint a liquidator, as required. In each case, a minority of owners opposed the resolution and sought a subsequent court order.

The first case heard by the B.C. Supreme Court was *The Owners, Strata Plan VR 1966, (Bel-Ayre Villa)*. While the majority of owners in this case passed a winding-up resolution, upon review by the Court the resolution was deemed invalid due to missing information in the interest schedule for registered charge holders, as required by the *Act*. The judge determined this deficiency could not be overlooked or rectified at a later date by adding the missing information after the winding-up resolution had been passed.

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Allocation of Risk: Purchase Price Adjustments

THIS IS THE FOURTH INSTALLMENT IN A SERIES OF ARTICLES PROVIDING PRACTICAL INFORMATION ABOUT ALL THINGS BUSINESS.

Imagine you are selling your business and negotiating the purchase price. You've either had a valuation prepared or are using your last set of financial statements to come up with a purchase price.

As a vendor, you're looking for as much cash as possible on closing, asking the purchaser to take on the risk of your business from the date the purchase price is determined. On the flip side, the purchaser wants to protect him- or herself from any negative changes to the purchase price between the date that the price is determined and the closing date.

This negotiation of risk is often resolved by the use of a price adjustment clause (PAC) in a purchase agreement. This is a mechanism used by the parties to confirm the value of the target company or business at closing.

The following are key components of a PAC:

- **identification of the metrics on which the adjustment is to be based;**
- **determining whether there will be any money held in escrow as security;**
- **identification of who will prepare the financial information and within what time frame;**
- **detailing a review process for the financial information once produced;**
- **the process for dispute resolution;**
- **allocation of the burden of costs of preparing the financial information; and**
- **the formula by which the purchase price will be adjusted.**

And what does this formula really involve? Most often in a private purchase and sale transaction, a working capital adjustment is used which, very generally, is current assets less current liabilities.

However, every business is different, with its own nuances, and the definition of "working capital" is almost always more complex, typically relying on the business's financial statements or EBITDA (earnings before interest, taxes, depreciation and amortization). Depending on the nature of the business, normalization of the working capital may also be an important aspect to negotiate.

It is, therefore, very important that the purchase agreement contain clear, detailed definitions. These include definitions of working capital, current assets and current liabilities as well as specifics such as cash on hand, excluded assets, etc.

When it comes to how the adjustment is made, often the PAC is a dollar-for-dollar adjustment or possibly a ratio, but it can also include specifications such as a cap on the total adjustment permissible; that funds be held in escrow; or that the PAC only kicks in when certain events do or don't happen.

In negotiating your agreement, you ultimately need to understand financial statements and have a good team of advisors who understand your business, whether as a vendor or purchaser, as well as what's required for any adjustment.

A PAC can provide flexibility and fairness in the allocation of risk; however, it needs to be prepared with knowledge and specificity. It can be used with some creativity, and highlights the value of having a good team around you from the beginning when you're thinking about selling—or buying—a business.

In our next article, we will discuss representation and warranty insurance in a purchase and sale transaction.

For more information about purchase agreements and all they contain, please contact:

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Sign up for our golf tournament!

Our golf tournament is fast approaching! We'll be golfing again at the beautiful Morgan Creek Golf Course September 18 in support of Athletics for Kids and BC Childhood Cancer Parents Association. We're sure this year will be another great event. If you'd like to attend, donate or sponsor, please email jmaguire@singleton.com.

Short-term Rentals: Legal but Limited

PROPERTY LAW

Despite Airbnb ads popping up all over the internet, short-term rentals (defined as rentals for less than 30 days) are not allowed in Vancouver except for hotels or bed and breakfasts (B&Bs) that have been properly zoned and licensed.

However, this has not stopped an estimated 6,000 illegal short-term rentals from operating around the city. Homeowners complain that a blanket ban on short-term rentals will deprive them of much-needed income, and there has been heavy resistance by many homeowners to any type of regulation.

In an effort to find a balanced approach, which aims to respect the rights of homeowners amidst Vancouver's housing crisis where rental rates are less than one percent, the City of Vancouver has introduced new regulations they believe are a fair solution to all parties concerned. Beginning April 2018, short-term rentals will finally be legal in Vancouver.

Does this mean it's time to move to France and list your Vancouver vacation home on Airbnb? Not so fast. Vancouver has placed several stringent limitations on short-term rentals:

1. **The rented property must be your principal residence.** This limitation is more complex than it first appears. The principal residence exemption means that you, as a homeowner, can only rent the property you are currently living in, as proven by the address on your mail, your bills and other similar items. Since the property must be your principal residence, you are not allowed to rent your second apartment or vacation home in Vancouver as a short-term rental. You are also not allowed to rent your laneway house, lock-off unit or basement suite as a short-term rental, even if it is within your property, unless you are actually living in that suite or laneway house (as a tenant, for instance). This means you are limited to either renting your entire house, if you're away, or individual rooms within your house if you are living there.

2. **You will need a short-term business licence.** Purchasing this new class of business licence will cost you $49 a year plus a one-time administration fee of $54. Each business licence will come with a unique number, which must be displayed on all online listings. If authorities find your property listed online without a licence number you can be fined $1,000 per violation. To enforce this new policy, the city plans to improve its enforcement mechanisms, including a dedicated enforcement coordinator and an additional inspector to support complaint-driven and auditing inspections. Platforms like Airbnb will also be required to charge and remit PST and a 3% transaction fee, which will go to administration and enforcement of the licensing regime.

3. **You will need to be authorized.** In order to secure a business licence, you will need to be properly authorized either by your strata council, if you live in a strata unit, or by your landlord, if you're renting out your principal residence.

4. **You need to follow the new rules.** Your short-term rental property must comply with all applicable regulations including those relating to building codes and fire safety. You will also have new duties, such as posting a safety plan by all entrances and exits of the rented room and producing inspection, maintenance and construction records regarding the fire alarm system and fire separators.

The city projects that about 1,000 units will be freed for long-term rentals with these new regulations. It has also promised to reassess the ban on secondary suites if Vancouver's rental vacancy rate reaches four percent.

We will have to wait and see how the rules affect the rental market and whether the city will loosen the tight restrictions on short-term rentals in response. Until then, you may wish to rethink your move to France.

For more information on short-term rentals and your obligations as a landlord, please contact.

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Winding Up Strata Corps—Get it Right the First Time

(continued from page 5)

The second case was *The Owners, Strata Plan VR2122 v. Wake, (The Hampstead)*. Again, the majority of owners passed the necessary winding-up resolution. However, a minority of owners tried to argue, among other things, that the winding-up resolution was invalid due to the name and address of the liquidator not being included, as well as a missing charge in favour of the City of Vancouver. The judge in this case did not view either matter to be fatal or essential such that the missing information should result in the winding-up resolution being declared invalid.

The third and most recent case heard by the Supreme Court was *The Owners, Strata Plan VR2702 (Re), (Barclay Terrace)*. Five days before the special general meeting of owners where a winding-up resolution was to be considered, the decision in the *Bel-Ayre* case was released.

As a result of *Bel-Ayre*, the strata corporation in the *Barclay Terrace* case opted to amend the winding-up resolution to change, among other things, the name of the liquidator and add missing information in the interest schedule for registered charge holders. This is permitted by the *Act*, as long as the amendments do not substantially change the nature of the resolution and the amendments are approved by a three-quarters vote before the resolution is voted on.

The amendments and the amended winding-up resolution were both ultimately passed by the required number of owners but were opposed by a minority of owners when presented to the court for confirmation on the basis that the amendments were substantive changes. Unlike the *Bel-Ayre* case, however, the judge in the *Barclay Terrace* case (who was actually the same judge who heard *Bel-Ayre*) was not persuaded that the amendments made to the winding-up resolution were of such significance to change the resolution fundamentally.

As property values for aging strata developments continue to increase, the courts will undoubtedly hear more cases to confirm winding-up resolutions.

Before a vote is held for such a resolution, it is a good idea for strata corporations to review the *Act* with a lawyer to ensure all necessary information is included in the winding-up resolution from the outset. Otherwise, the door is open for a minority of owners to challenge the resolution, possibly with success, when the court is asked to confirm it.

For more information on the Strata Property Act or other real estate matters, please contact:

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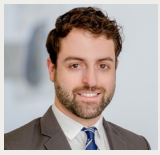
New Faces

With the launch of our Toronto office earlier this year, we have continued to add to our team nationally.

JAMES LITTLE

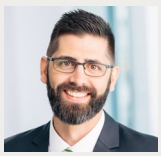
EMIRA BOUHAFNA

JESSE GARDNER



EVAN RANKIN

ERNEST SOARES



JAMES LITTLE, **EMIRA BOUHAFNA** and **JESSE GARDNER** have all joined our Construction and Infrastructure Group in Toronto, working closely with **BRUCE REYNOLDS** and **SHARON VOGEL**. **EVAN RANKIN** also joined our Commercial and Business Litigation Group alongside Jesse and associate counsel **PETER WARDLE**.

ERNEST SOARES joins as an associate in the Commercial Litigation Group. We also welcomed paralegal **WARREN SCROOBY** as part of our Construction and Infrastructure Practice Group.

CASEY DHEENSAW joins us as an articling student in Vancouver, and **MAKAELA PETERS** joins as a summer student. In Toronto, **SCOTT CLARK** and **NATASHA RODRIGUES** have also joined as summer students.

JASMINE LAM joined our Toronto team as a law clerk in January along with Toronto office manager **MARIA DI BARTOLOMEO**.