Letter of the Law

L&M Payment Bonds: You May Have New Obligations

Labour and material (L&M) payment bonds are a common feature of construction projects. They provide a surety for a contractor's contractual payment obligations to its labour and material subcontractors. But an upcoming Supreme Court of Canada case may hand contractors new obligations to tell their subcontractors such a bond exists.

To start, here's how an L&M payment bond works: A surety agrees to pay qualified subcontractors if a contractor defaults in payment. The subcontractor's claim to the surety must be made with the specified formality, including within the time and monetary limits of the bond.

The existence of an L&M payment bond is usually well known to subcontractors through the tender process, the contractor's form of subcontract, or through direct communication by the contractor.

In British Columbia, if a subcontractor doesn't know if a bond exists, or what its terms are, it may seek to acquire a copy of the bond by exercising its rights under the *Builders Lien Act*.

But what if the subcontractor doesn't ask or is not told about the existence of an L&M payment bond? Does anyone have to tell the subcontractor?

In the 2016 case, *Valard Construction Ltd. v. Bird Construction Company*, a majority of the Alberta Court of Appeal held that, in law, no one is under an obligation to tell potential claimants about the bond. But this may not be the final word because in March, 2017, the Supreme Court of Canada granted leave to appeal.

To briefly summarize, Bird Construction was the general contractor on an Alberta oil sands project. Bird hired Langford Electric as a subcontractor; Langford then hired Valard Construction as its subcontractor. As required by Bird, Langford obtained a particular kind of L&M payment bond—a CCDC 222-2002 form.

Eventually, Langford defaulted in payment to Valard, which obtained a $660,000 default judgment against Langford. Valard then asked Bird if there was a bond, but by then its claim was already out of time under the bond's terms. Valard then sued

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SINGLETON LEGAL COUNSEL URQUHART

LETTER OF THE LAW

THE SINGLETON URQUHART NEWSLETTER

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Settling disputes in a fast, efficient, more informal way

A California insurer of architects and engineers that promotes the use of mediation to settle design and construction claims has seen more than 200 cases resolved in less than three years — with an estimated savings of $10 million in legal fees.

The Insurance Corporation of British Columbia has completed 51 mediations of personal-injury claims arising out of motor-vehicle accidents. The four-hour hearings at the British Columbia International Commercial Arbitration Centre have resulted in 45 settlements — for a success rate of nearly 90 per cent.

And 62 companies that recently used alternative dispute resolution in the U.S. to settle their employee-employer, commercial, construction and transnational disputes have reported legal savings of $49 million — or $800,000 per participant.

These impressive results prompt an obvious question: why aren't legal firms in B.C. promoting the use of alternative dispute resolution (ADR) to their clients?

Well, in fact, some are — among them, Singleton Urquhart. Both senior partners are chartered arbitrators, accredited with the Arbitrators Institute of Canada. And Bonita Thompson, Q.C. has just joined us with an expert background in the development of ADR procedures from her role as Executive Director of the B.C. International Commercial Arbitration Centre, the first such centre in Canada.

This firm now has all the necessary skills in place to act as advisors on instituting alternative dispute resolution procedures, as counsel in hearings, and as arbitrators and mediators.

There's a growing recognition across this country that the orderly processes of ADR, conducted outside the courtroom, can be viable alternatives to the often costly and time-consuming judicial system. Past Presidents of the Canadian Bar Association have been strong and vocal advo-

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Glenn Urquhart (left) and John Singleton

"Practising law means personal service — making sure the client is satisfied. We're problem-solvers." — John Singleton

The Singleton Urquhart philosophy: Progressive, efficient case management

"We're well-organized and expert at case management. We use the most capable person with the most appropriate level of knowledge to handle a case at the most economical rate." — Glenn Urquhart

Singleton Urquhart, with offices in Vancouver, Calgary and Edmonton, is a unique law firm.

We have a carefully built reputation as one of the foremost construction law firms in Western Canada, particularly in legal issues involving architects and engineers.

And we are recognized Canadian specialists in the field of professional liability, where our firm's philosophy can be simply stated: We have the utmost respect and concern for the integrity of the professionals we represent and take special care to ensure their cases are handled efficiently and economically.

But Singleton Urquhart's areas of proven expertise and active practice extend well beyond these fields. They encompass a broad range of insurance and financial-services work and commercial and general litigation, including personal-injury and wrongful-dismissal cases. And the firm is progressive in using such innovative and flexible approaches as alternative dispute resolution (see separate story on this page).

Our lawyers, legal assistants and support staff are the strength of Singleton Urquhart, our foundation of high quality professionalism blended with cost-effective efficiency.

Members of our medium-sized firm — who are licensed to practise law in all Canadian jurisdictions west of Manitoba — have long been providing legal services for design professionals, contractors, owners, developers, chartered accountants, health professionals, municipal and other public-sector corporations, and various insurers in the fields of construction and professional and product liability.

A central thrust of our firm's mandate is to communicate effectively to our clients — which is the rationale behind this newsletter — and to involve ourselves in the professional and educational arenas of those fields where we specialize.

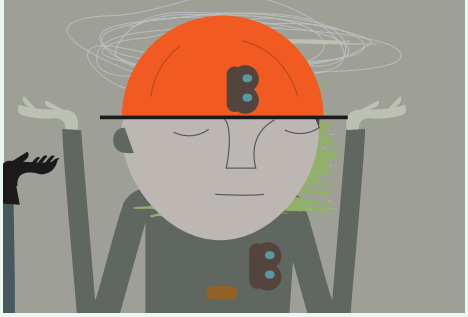
Glenn Urquhart (who has both a Bachelor

(Continued on page two)

SINGLETON URQUHART BARRISTERS AND SOLICITORS

Looking Back

Letter of the Law, or LOL as it's affectionately become known, will soon be getting a new look and feel when we launch our new brand and website January 2018. As you can see from the image of the first cover, above, we've come a long way since starting LOL in 1988. More than 1,200 issues and 7,500 articles later, we're still going strong and our new brand and website will reflect that. Next issue, we'll share more memories from nearly 30 years in print. For now, sit back and enjoy the kinds of interesting, informative articles you've come to expect in *Letter of the Law*.



(Continued from cover)

Bird, claiming Bird was obliged to tell Valard the bond existed so it could have made a timely claim.

Importantly, the form of bond was a "trustee form," which is used to permit claimants to sue as beneficiaries of a trust even though they are not party to the bond. This is necessary in jurisdictions, including Alberta, that don't have statutory provisions permitting potential claimants to sue the surety directly, as is the case in B.C. The bond explicitly stated that as the named trustee, Bird was not obliged to take any act, action or proceeding against the surety on behalf of the claimants.

The majority of the Alberta Court of Appeal held that the bond created "a limited trust" which did not impose any positive obligations on Bird. They also held that Bird was not in a fiduciary relationship with Valard because Valard could have compelled Bird under Alberta's *Builders Lien Act* to provide information about the bond.

But the dissenting judge took a different view. He held that notwithstanding the bond's explicit wording, Bird had fiduciary duties to take reasonable steps to tell potential claimants about the bond. This, he felt, would serve the bond's commercial purpose of permitting unpaid claimants to make claims under the bond.

He suggested Bird could have posted a copy of the bond at the site office the contractors regularly attended; or directly identified or notified Langford's subcontractors about the bond; or required Langford to do so. Since Bird had taken no steps at all, in the judge's view it failed to discharge its obligations and would have been liable to Valard for the amount Valard could have recovered under the bond.

A Supreme Court of Canada decision upholding the dissenting judge's view that trustees under "trustee form" bonds have fiduciary duties to potential claimants will affect the law in Alberta and other "trustee form" bond provinces. It may also affect the law in B.C.

In any case, reviewing the bonding practices on your construction projects may be critical to avoid the risks of default by others.

For more information on labour and material payment bonds, please contact

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

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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

This issue of *Letter of the Law* reflects the exciting growth and evolution of SU. The diverse topics of the articles showcase some of our many practice areas—construction, employment, business law and technology—and it allows us to introduce our readers to the new faces we have around the firm.

Be sure to check out the prelude to our new branding initiative, above, which we'll roll out in full in the New Year. This also gives you a taste of what's to come.

Our next issue of *Letter of the Law* will feature a nostalgic look back at how our publication and our firm have evolved over the past 30 years—something definitely worth celebrating.

JEFFREY HAND
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Dispute Review Boards: Fast, Effective Dispute Resolution

Dispute Review Boards, or DRBs, are used by public agencies and private owners involved with major construction projects worldwide to resolve disputes in a timely way during the project, avoiding costly arbitration or litigation after completion.

Given their limited use in Canada, though, many people are not familiar with the cost, benefits and effective use of these boards.

The DRB process is governed by a contract and is generally informal, especially compared to arbitration and litigation. In the DRB process independent experts review evidence in accordance with the process established by the contract, and then provide their recommendation or decision. Accordingly, the contract must address things such as the qualifications, experience and roles and responsibilities of board members, as well as whether their decisions are for guidance only or are binding.

A separate retainer agreement with the DRB addresses matters such as the retainer itself, and the responsibilities, replacement, immunity, compensation and termination of board members. Examples are available from several sources, but care must be taken to ensure these are appropriate for, or are modified to properly account for, the particular project and parties involved.

You can learn more about this effective approach for resolving disputes and whether it may be suitable for your project at the Dispute Review Board Foundation's Western Canada Regional Conference on October 26 at Vancouver's Four Seasons Hotel. A separate DRB workshop will be held the following day. Topics will include:

- Differences between DRBs and other forms of dispute resolution (e.g. mediation and arbitration);
- Advantages and disadvantages of DRBs for different types of projects;
- Drafting workable DRB provisions; and
- Perspectives on what has and has not worked, lessons learned, and best practices.

This is an excellent opportunity to learn from leading international DRB experts. SU's Helmut Johannsen, Derek Brindle Q.C. and John Singleton Q.C. are also speaking at the conference.

For more information on the upcoming DRB conference and workshop October 26–27, including registration details, please go to www.drb.org, or email Ann McGough at amcough@drb.org or Helmut Johannsen at hjohannsen@singleton.com.

New Associates

LYSANDRA BUMSTEAD

FRED TROEN

SAMSON CHAN

VERONICA STEPHEN

SARAH DONALD

ERNEST SOARES

WELCOMING NEW FACES!

We are pleased to announce that LYSANDRA BUMSTEAD and FRED TROEN were recently called to the bar and have joined SU as associates. Fred's practice will focus on civil litigation, and he has a particular interest in entertainment law and wills and estates. Lysandra currently practices in civil litigation with a focus on commercial disputes.

SAMSON CHAN also joined SU recently as an associate in our Commercial Property Group to assist on the B.C. HOME Partnership Project. Samson joins us from a regional firm in Richmond.

Newly articled students MATTHEW MILNE and IAN DAVIS joined us over the summer, and summer student ALLISON MORRELL returned to article in September.

IN SUPPORTING ROLES...

We are pleased to announce that VERONICA STEPHEN and SARAH DONALD, both previously legal administrative assistants at the firm, recently joined our paralegal group. Both Veronica and Sarah will continue to work alongside the corporate commercial group.

In August, ERNEST SOARES also joined our paralegal team when he and his family moved from South Africa. Ernest was admitted to the South African Bar in 2007. He joins SU as a paralegal before he transitions to articled student and then registered lawyer once he's completed the process of getting licensed in Canada. We're very pleased to welcome Ernest to the team.

Recouping Losses: Who Has Rights When the Rent Isn't Paid?

PROPERTY LAW

It's a phone call no landlord wants to receive: Your tenant has pulled a "midnight move" and abandoned the property you leased to them, saddling you with months of unpaid rent and the unhappy task of finding a new tenant.

Your first instinct may be to keep or sell anything the tenant has left behind in an effort to recoup some of your losses. However, landlords should be aware that other parties might have priority claims over the tenant's property, significantly impeding your rights to it.

Frequently, a commercial tenant will grant a security interest over its personal property to a creditor as collateral for loans or financing, for instance, to pay for the acquisition of equipment or inventory. This means that a landlord may not have first rights to the tenant's personal property, even if it is on the landlord's premises.

Provincial and federal legislation, including the *Personal Property Security Act* (PPSA), *Rent Distress Act* and *Bank Act*, furnishes detailed priority rules when multiple parties stake a claim over the personal property of a debtor in default. The legislation provides clarity in such circumstances, but the determination of priority can sometimes turn on minute and unexpected details. For example, the priority of an interest in property may be decided by the difference of a day in registering that interest.

The outcome of a dispute between a landlord and a secured creditor can depend on a variety of factors, including whether the items in dispute are fixtures, and whether the secured creditor has what is known as a purchase money security interest or PMSI (referred to in legal circles, somewhat affectionately, as "pimzee").

A PMSI is typically a security interest taken in collateral, including leased collateral, where the secured creditor provided financing to the debtor to acquire the collateral. For instance, a company that sells a debtor inventory on a conditional sales agreement will have a PMSI in that inventory.

In the world of secured transactions, not all PMSIs are created equal. Perfected PMSIs, which usually come about if the security interest has been registered in the Personal Property Registry, will generally take priority over the claims of others, including landlords.

However, a landlord may have a higher-ranking claim if the personal property in dispute is a "fixture." A fixture is something that has been fixed or attached in a relatively permanent way to a building or land, depending on the degree and intent of annexation. Whether or not something is a fixture will depend on the circumstances.

Let's take the example of abandoned equipment. A tenant rents premises for its business, and acquires certain machinery through a financing company. The tenant affixes the machinery to the premises by bolting it to the floor and attaching it to the electrical, water and air systems. The financing company takes a secured interest in the machinery as collateral for the loan, and registers this interest in the Registry. Since the financing company provided the financing that allowed the tenant to acquire the machinery, it has a PMSI. So who gets the machinery when the tenant defaults against both the landlord and the financing company?

While a landlord typically has a right under the *Rent Distress Act* to seize a tenant's property when rent is owing, she can only confiscate property that actually belongs to the tenant. In this scenario, the tenant does not own the machinery since it is being financed. Furthermore, the financing company has a PMSI and thus takes priority.

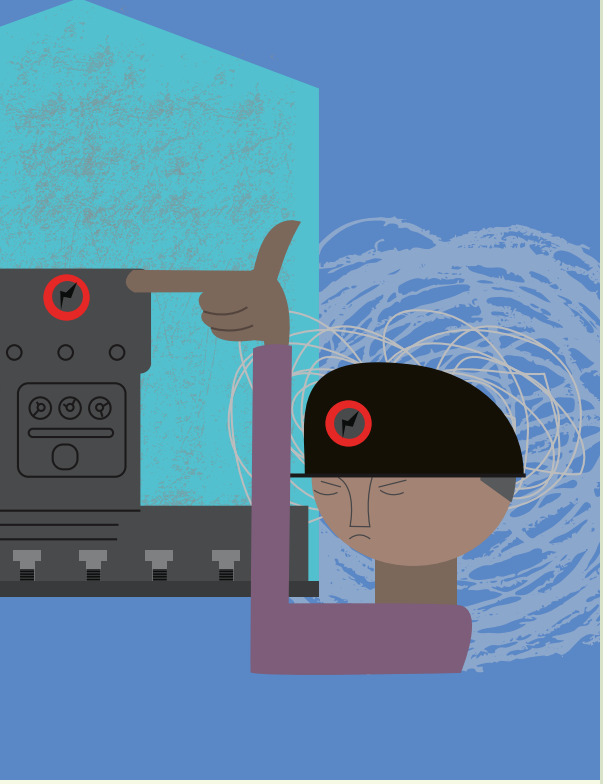
The landlord may not, however, be completely out of luck. The PPSA may still grant her priority over the financing company, depending on the facts of the case. If the machinery is indeed a fixture, priority depends on whether the financing company registered its PMSI before or after the machinery became affixed to the premises. If the machinery was affixed before the financing company perfected its security interest, then the landlord takes priority subject to certain exceptions, such as if she consented to the security interest.

There is a further wrinkle. A party with a secured interest in fixtures can, but is not obligated to, register a "fixtures notice" on title with the Land Title Office.

To continue our example, if the financing company did not register a fixtures notice—or did so outside the timelines provided for in the PPSA—and the landlord purchased the premises after the affixture of the machinery, the new landlord takes priority even if the PMSI was perfected before or at the time the machinery became a fixture. From a policy perspective, this makes sense because the new landlord could not have otherwise known when buying the premises that the fixture did not come with the purchase.

If the financing company has priority, the landlord is entitled to reimbursement for any damage to the premises caused during the removal of the fixture, but not for any loss in property value caused by the removal.

The landlord may refuse to grant the financing company access to the premises until she has received adequate security for this reimbursement. In addition, she has the right to keep the fixture by paying the financing company the lesser of: the amount owed by the tenant to the financing company that was secured by the security interest in the fixture; or the mar-



ket value of the fixture if it were removed from the premises.

Priorities between landlords and secured parties can vary considerably depending on the specific facts of the case. When multiple parties are in dispute over personal property—especially if banks are involved—determining the order of priority can quickly become complicated.

Seizing the personal property of tenants over which other parties have priority may open up landlords to legal action. Landlords and creditors would do well to note there may be competing claims over the personal property, and to clarify their rights in that personal property before taking any steps to recoup their losses.

For more information on your rights as a landlord to tenants' personal property when they default, please contact

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

Who Has Your Confidential Business Information?

BUSINESS LAW

This is the second installment in a series of articles providing practical information about all things business.

Confidentiality and non-disclosure agreements (NDAs) are important when selling your business. A company's most valuable assets are often its confidential information, intellectual property and trade secrets (for the purposes of this article, called "confidential information").

NDAs are often produced at the beginning of negotiations when a purchaser is assessing your business. At that time, you must ensure that the NDA is specific enough to protect your confidential information. An NDA can be negotiated and amended before execution, and should be discussed and reviewed with your legal counsel.

You might think that your business doesn't really have any valuable confidential information. But everyone has confidential information to protect, from manuals and programs to unique processes for managing services and marketing flows, and customer/client lists.

There are a number of ways to control the use of your confidential information:

1. All confidential information you produce should be marked "confidential." Consider the NDA: Is it your responsibility to indicate what is confidential, or is all the information being exchanged considered confidential?
2. Consider password protecting your confidential documents.
3. Ensure limited access to your confidential information. On a shared electronic site (e.g. Dropbox), limit who has editing rights. You can also control who has access to the site. An NDA should contemplate electronic sharing and disallow downloading except in limited circumstances.
4. Often initial discussions with a purchaser do not lead anywhere. To prevent disclosure of your confidential information, consider limiting who knows about your intent (i.e. your legal and financial advisors, and board of directors) until you have a more assured transaction in place.
5. Consider scaling the access granted during due diligence. A customer list, for example, is very valuable to certain businesses. Full disclosure of information like this may be delayed until a final agreement is in place, especially if the purchaser is a competitor of your business and is potentially entering into negotiations to gain access to your customer list.
6. Specify the process for the return and/or destruction of your confidential information in the NDA, and ensure the NDA covers various formats, such as electronic, paper-based and verbal information.

Using these points, you might ask yourself, how can I control what a person does with my confidential information? There are remedies that can be set out in an NDA, such as a right to an injunction or monetary consequences, to deter misuse. By being aware of the terms of your NDA and ensuring a well-crafted NDA is in place, you can focus on negotiating the sale of your business.

In our next article, we will discuss the management and organization of data in an electronic data room during a purchase and sale transaction.

For more information about NDAs, please contact

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BACK TO SCHOOL

For this term's fall semester, **JOHN SINGLETON Q.C.** and **HELMUT JOHANNSEN** recently commenced teaching a course on construction law at the University of British Columbia's School of Law. John has been teaching construction law at UBC for more than 20 years.

In September, **VERONICA ROSSOS** presented to a full house on the topic Liability and the Holiday Party. Attendees were keen to learn what steps they should take to ensure everyone has a great time and stays safe at annual holiday events.

On December 14, Veronica will present the final session in her quarterly workplace law series. The seminar will be focused on recent privacy law updates. If you are interested in attending, please email **JOANNE MAGUIRE** at *jmaguire@singleton.com*.

LAWYERS IN THE RANKS

DAN BARBER recently joined the Canadian Bar Association B.C. Insurance Law Section's Executive for the 2017-18 year as Secretary.

SU GIVES BACK

For the annual Hoop-Law Charity Basketball Tournament held September 9 at the Richmond Olympic Oval, **SU** put together a great team of lawyers. This one-day tournament pits firm against firm, barristers against solicitors, and youth against experience. This year the event supported four charities: Night Hoops, Children's Hearing and Speech Centre of B.C., Contributing to Lives of Inner City Kids (CLICK) and S.U.C.C.E.S.S. Since 1995, the event has raised more than $1 million for local charities focused on helping children in need living in our communities.

SU's Hoop-Law Team. Top row (L to R): David Edinger, Mark Stacey, Jarett Stacey, Bob Hodgins, Hugh Coyle, Peter Mennie, Megan Coyle and Kelly Ann Maw. Bottom row (L to R): Brendan Dawes, Melissa Killion, Kyle Thompson, Angie Banh and Samson Chan.

In September, **SU** was the hole-in-one sponsor at the annual Philippines Canada Trade Council golf tournament. A portion of proceeds went to ANCOP Canada, a Canadian non-profit organization, to fund home-building and community development programs in the Philippines. Both **EDMUNDO GUEVARA** and **MARK THOMPSON** attended from **SU**. Edmundo is the outgoing secretary for the trade council.

21 YEARS OF GOLF FUN-RAISING

SU was proud to host friends and clients at our 21st annual golf tournament at Morgan Creek Golf Course September 19. After a rainy start to the day the clouds cleared and the sun came out, making for a perfect day of golf. This year the coveted plaid jacket and fish tie went to Lyle Langlois of Langlois Brown.

Our tourney also raised just over $10,000 for Athletics for Kids and BC Childhood Cancer Parents Association. As Athletics for Kids were celebrating their 15th anniversary in 2017, we were delighted to be surprised at the tournament with a presentation recognizing our many years of fundraising with them. Over the years, **SU** has raised more than $100,000 for both organizations.

A huge "thank you" to everyone who took part and supported the charities! See you next year!

*Winners of the Texas scramble competition (L to R): Mark Withenshaw (Coast Claims), Tony Volpe (MDD Forensic Accountants), Chris Pauli (i3 Underwriting) and Ian Davis (**SU**) received their prizes from **SU**'s Bob Hodgins (rear).*

*Lyle Langlois (left), winner of the tourney and the coveted plaid jacket, congratulated by **SU**'s Bob Hodgins.*

Kelly Shannon from KDS Construction tries his hand at golf pong.

Drug Addiction in the Workplace: Human Rights vs. Drug Dependency

WORKPLACE LAW | *Stewart v. Elk Valley Coal Inc.*

What protections are afforded an employee by human rights legislation in a safety-sensitive workplace? What if that employee uses narcotics? And what if that employee doesn't know he or she is an addict?

These are some of the provocative questions addressed earlier this year in a controversial decision of the Supreme Court of Canada in *Stewart v. Elk Valley Coal Inc.*

The appellant in *Elk Valley* is Ian Stewart, a unionized employee who was continuously employed at the Elk Valley coal mine for 9 years with no disciplinary history. One night near the end of a 12-hour shift, the loader Mr. Stewart was driving was involved in a workplace accident.

No one was injured but as required under the employer's accident investigation policy, he was subjected to a mandatory drug test. Mr. Stewart tested positive for cocaine and was called into a meeting with his employer shortly thereafter.

In that meeting, Mr. Stewart told his employer that he thought he might suffer from substance dependency. Nine days later, his employment was terminated in accordance with his employer's drug and alcohol policy. As it turns out, Mr. Stewart had last used cocaine 21 hours before the incident, giving rise to his termination.

In terminating Mr. Stewart's employment, his employer relied on a self-reporting drugs and alcohol policy called "no free accident." Under this policy, employees were expected to disclose substance dependency issues before any workplace incident occurred. If someone self-reported his or her addiction, they would be offered treatment options and no disciplinary action would be taken against them.

On the other hand, if an employee raised substance dependency as a concern *post-incident*, disciplinary action was justified under the policy, up to and including termination of employment. Importantly, throughout the litigation, Mr. Stewart maintained he was unaware that he suffered from drug addiction until after the workplace incident that gave rise to his termination.

The denial of his addiction, it was argued, was a symptom of his disability and also prevented him from taking advantage of the treatment options made available to him by his employer.

Based on this scenario, the Court was asked to determine whether Mr. Stewart had been discriminated against as a result of his disability. To make a claim for discrimination under Canadian human rights legislation, an employee must demonstrate that:

1. They have a characteristic protected under the code—in this case, drug dependency;

2. They have experienced an adverse effect—here, termination from employment; and

3. The protected ground was a *factor* in the adverse impact. It was on this third point that Mr. Stewart lost his appeal.

Upholding the decision of the Alberta Human Rights Tribunal, Chief Justice Beverly McLachlin, writing for the majority, held that it was reasonable for the Tribunal to have concluded that the reason for Mr. Stewart's termination was not drug addiction, but that Mr. Stewart was fired for breaching the terms of the employer's policy.

While the Court recognized that drug dependency has the potential to impair an individual's ability to adhere to workplace disclosure policies, on these facts and considering Mr. Stewart's individualized substance abuse problem, it was held that he had the capacity to decide either:

- to not use illegal drugs; or

- to inform his employer of his dependency.

Simply put, the Court was satisfied that Mr. Stewart's addiction was not a factor in his termination.

The *Elk Valley* decision has important implications for employers crafting and implementing policies related to drugs and alcohol in the workplace. By making a failure to self-report a drug dependency a firing offence, many employers may view a drugs and alcohol policy like the one in *Elk Valley* as a useful tool for promoting health and safety in the workplace. While this is a laudable goal, we caution that the outcome in *Elk Valley* cannot be extrapolated to all work environments in all situations.

Employers should be aware of the fact that any policy like the one in *Elk Valley* must be crafted with a full understanding of the work environment in which it will be implemented, including the health and safety considerations unique to that workplace. Not only must careful attention be paid to the policy language, policy enforcement should be addressed on a case-by-case basis with particular consideration of the language used in any termination letter.

Seeking legal assistance from someone familiar with these issues at the policy development stage can help employers navigate the unique tensions that arise at this intersection of human rights legislation and workplace health and safety.

For more information on developing effective drugs and alcohol policies for the workplace, please contact

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

Not So "Independent"—Why Some Contractors are Entitled to Notice

EMPLOYMENT LAW | *Glimhagen v. GWR Resources Inc.*

In the recent decision of *Glimhagen v. GWR Resources Inc.*, Mr. Justice Rogers affirmed that there is a third "state" between employee and independent contractor: the dependent contractor. The most significant concern arising from this category of working relationships is what, if any, reasonable notice—or payment in lieu of notice—is owed when a contract is terminated.

It has been long established that employees are owed certain obligations not owed to independent contractors, especially that of reasonable notice. But somewhere between the employee and independent contractor is the "dependent contractor." In creating this third category, courts purport to recognize that sometimes the parties' relationship is neither that of employer/employee nor employer/independent contractor, and that rigid adherence to such labels may lead to inequities.

In *Glimhagen*, the Court held that the plaintiff was entitled to reasonable notice for the years worked for the defendant as a contractor. The plaintiff was in his late sixties; he had a Grade 12 education and a 23-year working relationship with the defendant. In 1988, the defendant and the plaintiff entered into a contractual relationship whereby the plaintiff provided accounting services. In 2010, the plaintiff was hired to be the defendant's Chief Financial Officer, but his actual employment lasted only two years.

The Court concluded that the plaintiff had, in fact, been a dependant contractor from 2000-10. It emphasized the integral role the plaintiff held in the defendant's operations from 2000 onwards, and determined that his years of service had accumulated from this time until his termination in 2012. Accordingly, the plaintiff was awarded damages in lieu of notice equal to 12 times his monthly salary given his 12 years of service. This resulted in an award of $78,000 as payment in lieu of notice.

By contrast, had the Court considered his entitlement to have started only when he became an employee in 2010, this much shorter notice period would likely have meant a settlement of approximately $13,000.

In coming to its conclusion, the Court provided the following indicators of a dependent contractorship:

1. **Exclusivity**: Whether the agent's services are generally limited exclusively to the principal;
2. **Control**: If the agent is subject to the control of the principal, regarding the product and when/where the agent sells it to the principal;
3. **Interest or Investment**: If the agent had an investment in or interest in the tools necessary to perform his or her service for the principal;
4. **Risk of Loss**: Whether, by performing his or her duties, the agent undertook risk of loss or possibility of profit apart from the fixed rate of remuneration;
5. **Essential Role**: Whether the agent's activity was part of the principal's business organization;
6. **Length of Relationship**: Whether the relationship was long standing (the more permanent the term of service, the more dependent the contractor); and
7. **Reliance**: Whether the parties relied on one another and closely coordinated their conduct.

Glimhagen v. GWR Resources Inc. is a reminder to employers to be aware that referring to workers as independent contractors does not necessarily mean they are one. Working relationships evolve over time, and while a worker may start out as an independent contractor he or she may be more accurately described as a dependent contractor after many years with the same employer. Similarly, workers are reminded

that, despite being a contractor, they may be entitled to notice or payment in lieu thereof upon termination.

The failure to spot a dependant contractor in advance of, or after terminating their contract, may have significant cost consequences. In long-standing working relationships, both workers and employers should regularly review their employment contracts.

Revising contracts to reflect changes in contractor and/or employee status with particular attention to notice of termination provisions can increase the certainty of obligations owed by employers and the entitlement of workers to notice of termination. With greater certainty, the likelihood of costly actions for wrongful termination will be reduced.

For more information on employment contracts, please contact

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