



**ERIN L. BROOK**  
CRIMINAL LITIGATION

**WELCOME TO OUR NEWEST ASSOCIATE**

Erin L. Brook received her Bachelor of Arts degree, with distinction, from Malaspina University-College in Nanaimo. She then attended the University of Calgary, receiving her Bachelor of Laws degree in June 2007. In addition to her studies, Ms. Brook participated on the Student Legal Assistance Executive as a Legal Information Coordinator, case-worker and mentor.

While attending law school at the University of Calgary, Ms. Brook was an active member of Student Legal Assistance where she had the opportunity to provide free legal assistance and representation to qualifying individuals in Provincial Court for criminal, traffic, family and civil matters. In addition to her yearlong participation, Ms. Brook was also one of a two-person team who operated a full time Student Legal Assistance Satellite office in Banff, Alberta from May 2006-August 2006.

Upon being called to Alberta Bar Ms. Brook joined Kabane Law Office as an associate where she maintained a general practice with a focus on civil litigation.

Ms. Brook transferred to British Columbia to join the firm of Baker Newby LLP as an ad hoc prosecutor for the Public Prosecution Service of Canada and was admitted to the British Columbia Bar in December 2008. ■

KUDOS



**JOHN LEE**

DESIGNATION OF QUEEN'S COUNSEL

The lawyers and staff of Baker Newby LLP would like to congratulate John C. Lee on his appointment as Queen's Counsel. Announced by Attorney General Wally Oppal on February 2, 2009, the Queen's Counsel designation is an honor conferred on members of the legal profession to recognize exceptional merit and contribution.



**KATE BLOKMANIS**

APPOINTED TO THE BOARD OF THE CHILLIWACK CHAMBER OF COMMERCE

The Chilliwack Chamber of Commerce is a non-profit organization, which consists of businesses, professionals, residents and other community groups. The Chamber is a combined effort to benefit the community through a healthy economic and social-economic base.



**TIM WURTZ**

A kudos to Tim Wurtz, our Administrator, who has joined the Member Recruitment and Retention Committee of the Chilliwack Chamber of Commerce.



# BAILIWICK

bail-i-wick (ba'lewik). n. area of interest, skill, knowledge or expertise

SPRING 2009

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*Baker Newby LLP is committed to being the leading Fraser Valley law firm, providing a full range of quality, practical and effective legal services. Our team of lawyers and staff will continuously strive to serve with excellence, earning the respect, loyalty and trust of our clients, our community and our peers.*



**BY ADNAN HABIB**  
commercial and construction litigation

## LIEN CLAIMANTS DEFEAT CANADA REVENUE AGENCY

On February 2, 2009 the British Columbia Supreme Court in the decision of PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc., dealt with the ability of Canada Revenue Agency (formerly known as Revenue Canada) ("CRA") to use a Requirement to Pay to seize holdback funds under the *Builders Lien Act* (the "BLA").

This case involved an application to determine whether CRA is entitled to its super priority to various funds that certain general contractors held back from two subcontractors, Condura Forming Ltd. ("Condura") and Norex Civil Contractors Inc. ("Norex"), who defaulted on a number of subcontracts on various projects and at the same time owed CRA money.

The funds at issue represented the 10% holdback maintained under s.4 of the BLA. The position of the general contractors who held back the monies was that the funds were not due and owing to Condura or Norex because they defaulted in their subcontract obligations. In addition, by virtue of the right of set-off no money is or ever will be owed by them to Condura or Norex. The position of the lien claimants was that as no money was owed or could be owing to Condura or Norex, CRA could not claim the holdback monies. The position of CRA was that at the time the

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**EMPLOYMENT ISSUES**  
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## DEATH IS NOT THE END PART 1



**BY JASON FILEK**  
civil litigation, insurance litigation, property disputes and estate litigation

In 1988, Bob Dylan released a song entitled "Death Is Not the End". While I do not hold myself out to be an expert in the interpretation of Bob Dylan's lyrics, my impression is that Mr. Dylan was trying to convey a positive message in this song. For example, consider the first verse:

"When you're sad and when you're lonely and you haven't got a friend  
Just remember that death is not the end  
And all that you've held sacred, falls down and does not mend  
Just remember that death is not the end  
Not the end, not the end  
Just remember that death is not the end"  
©1988 Special Rider Music

This optimism shown by Mr. Dylan is clearly in contrast with the cynicism of the 19th century American editor Ambrose Bierce, who is credited as saying the following:

"Death is not the end. There remains the litigation over the estate."

Unfortunately, there is much truth to that comment by Mr. Bierce. It is not uncommon for there to be litigation over an estate, and typically, that litigation arises in four main areas. Those areas are:

1. A wills variation action;
2. A joint tenancy dispute;
3. An intestate deceased (when there is no will); and
4. Validity of a will.

In this article, I will discuss a wills variation action. In British Columbia, the law places an obligation on an individual to provide for his or her spouse and children. The definition of spouse

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## BUILDERS LIENS...

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general contractors made the 10% holdback deductions from the progress draws of Condura and Norex, these monies were beneficially owned by or owed to Condura or Norex. CRA further argued that any right of set-off would be a potential debt and would not have priority over the RTP.

The Court reviewed the nature of the holdback under the BLA and the deemed trust claimed by CRA. The Court recognized that CRA had a strong claim to the property of the tax debtor regardless of when it was acquired or what security interest was charged against it. The Court did not view the holdback fund established by the BLA as an ordinary trust in which the beneficiary has an unrestricted beneficial interest. Madam Justice Arnold-Bailey stated "It creates a fund to which the Subcontractor from whom it is held "in trust", may eventually become entitled. The entitlement arises when, generally speaking, the project is finished or discontinued, the subsequent holdback period has expired and any claimed set-off has been resolved." The Court further stated that until that entitlement arises, the subcontractor's interest in the fund is a conditional right and no more. If the subcontractor was never entitled to the holdback fund and CRA was allowed to claim it then it would be taking money out of the hands of the contractor, not the tax debtor.

The Court indicated that a claim to set-off is involved as part of the determination of what money, if any, the subcontractor is entitled to. This question must first be resolved before CRA can assert its interest in the holdback fund. If the amount of the set-off is greater than the holdback then the subcontractor would not receive any money and the sub-subcontractor's lien claims will be satisfied from the holdback funds. If the set off is less than the holdback then the subcontractor's entitlement is equal to the amount of the holdback minus the set-off. CRA would then be able to seize this entitlement to these funds ahead of the lien claimants. ■

*To learn more about Adnan Habib, his areas of practice and view other articles written by lawyers at our firm, visit us online at [www.bakernewby.com](http://www.bakernewby.com)*



## EMPLOYMENT ISSUES IN A FALTERING ECONOMY

BY CHRIS GODWIN

*commercial and civil litigation, employment law*

In most businesses, wages and benefits dominate the expenses that must be covered every month. In times of economic weakness those and other expenses must be controlled in an effort to ensure the viability of the business. Unfortunately, wage and benefit expenses are more difficult to deal with than many others. A business cannot simply decide not to pay its employees, and letting staff go can lead to very significant severance and legal expenses.

An employer can terminate the employment of any employee at any time for any reason or no reason, as long as reasonable notice is provided of the termination, or the equivalent severance is paid to the employee. The law of severance in Canada can be generous to employees, and the amount of notice or severance that must be provided can sometimes be shocking to employers.

The *Employment Standards Act* (the "Act") is a provincial law that provides the statutory *minimum* notice or severance that must be provided to an employee on the termination of their employment. The Act provides that after one year of service an employee



is entitled to one week of severance for every year of service, up to a maximum of eight weeks. This statutory minimum is not, however, the end of the story! Many, if not most, employees are entitled to more severance, and in some cases considerably more severance, than the Act requires.

The Courts have decided that a departing employee is entitled to "reasonable" notice of the termination of

**"THE LAW OF SEVERANCE IN CANADA CAN BE GENEROUS TO EMPLOYEES, AND THE AMOUNT OF NOTICE OR SEVERANCE THAT MUST BE PROVIDED CAN SOMETIMES BE SHOCKING TO EMPLOYERS."**

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their employment, or severance pay in lieu of such notice. What is reasonable will depend on all of the circumstances. Basically, the Courts will try to determine the approximate length of time that the particular employee, in his or her personal circumstances, should take to find a reasonably equivalent position. Various factors will be considered, including the length of service, the importance of the employee's job to the business of the employer, the age of the employee, the state of the job market for their particular skills, and other factors. An older employee with a significant management position and several years of service can be entitled to up to two years' notice or severance! "Reasonable notice" will depend on the individual facts of each case.

Employees dismissed for cause are not entitled to notice or severance. It is, however, very difficult to establish cause for the termination of an employee. Employers who allege cause inappropriately can be subject to punitive or exemplary damages, or to the payment of additional severance as punishment for their "bad faith" behaviour.

It is important for employers to obtain skilled legal advice on the appropriate notice period or severance in the case of the proposed termination of any employee before terminating such employee, and not to simply rely on the provisions of the Act! Likewise, it is important for terminated employees to ensure that their rights are protected and that they receive the notice or severance to which they are entitled. The employment lawyers of Baker Newby LLP will be pleased to provide that advice to either employers or employees upon request. ■

*To learn more about Chris Godwin, his areas of practice and view other articles written by lawyers at our firm, visit us online at [www.bakernewby.com](http://www.bakernewby.com)*

## DEATH IS NOT THE END

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includes a common law spouse, as well as a common law spouse of the same gender. If an individual has failed to provide for their spouse or children by the terms of their will, then the court may vary the terms of the will. On the other hand, if a spouse or child is disinherited, the court may not interfere if there is a good reason for the disinheritance.

Essentially, a wills variation action is commenced when a spouse or child of a deceased person commences a law suit alleging they were not adequately provided for in the will. Such a law suit needs to be commenced within six months from the date of issue of the probate of the will.

The leading authority in this area of law is the Supreme Court of Canada decision of *Tataryn v Tataryn Estate*. In that case, Mr. and Mrs. Tataryn were married for 43 years. Through the efforts of both of them, they amassed an estate valued at approximately \$315,000. However, all of the assets were held in Mr. Tataryn's name at the time of his death. They had two sons together, one of which Mr. Tataryn disliked. He did not want to leave any of his estate to the disliked son. Mr. Tataryn feared that if he left Mrs. Tataryn any of his estate in her own right, that she would pass it on to the disliked son. As a result, in Mr. Tataryn's will, he set up a trust for his

wife, and upon her death, everything would pass to the son with whom Mr. Tataryn had a good relationship.

The Supreme Court of Canada ruled that Mr. Tataryn's will did not adequately provide for his wife. Since the marriage was a long one, and Mrs. Tataryn worked hard and contributed much to the assets they acquired, she would have been entitled to maintenance and a share in the family assets had they separated before Mr. Tataryn's death. The court varied the terms of Mr. Tataryn's will, and gave title of the matrimonial home to Mrs. Tataryn, a life interest in a rental property, and the entire residue of the estate (after payment of \$10,000 to each of their sons).

The *Tataryn* case is an example of circumstances that could potentially lead to a wills variation action. As another example of a situation that could lead to litigation over an estate, please consider the will of Henry Budd. In 1862, he left £200,000 in trust for his two sons on the condition that neither of them grew a moustache.

In a future issue of the *Bailiwick*, I will discuss joint tenancy disputes, which is the second main area where estate litigation arises. ■

*To learn more about Jason Filek, his areas of practice and view other articles written by lawyers at our firm, visit us online at [www.bakernewby.com](http://www.bakernewby.com)*

## NEW PERSONAL INJURY WEBSITE

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Baker Newby LLP is proud to announce the launch of its new Personal Injury website. The site provides useful information regarding all types of personal injury claims and their litigation processes. We hope the site will be of specific benefit to those who have

unfortunately suffered serious injuries through motor vehicle or other accidents. Check out the site to request our free *Litigation - Navigating the Maze* booklet or fill out our online claim assessment form at [www.fraservalleyinjurylawyers.com](http://www.fraservalleyinjurylawyers.com).