BUSINESS FUNDAMENTALS I

In this section of the course you will be introduced to some of the most fundamental legal aspects of running your own business. These are things you **must know** if you are running your own business, or managing your employer's business.

In the following pages and in the handout material you will find summaries and introductions to some important topics:

- Business structure (proprietorship / partnership / incorporation)
- Employment Standards
- WCB
- Business Licenses
- PST and GST
- Builders Liens
- Bid, Performance & Payment Bonds
- Industry Associations

We do our best to update this information for every course, **but please do not rely on this information alone to make your business decisions!** We are not lawyers or tax specialist, but we do speak from our own experience, and some of that has been extremely unpleasant.

The handouts and web links will be an excellent resource to you, and so will be your **industry associations**.

We are hoping that this information will help you to prevent a lot of costly mistakes, which inevitably happen when you "learn on the job".

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BUSINESS STRUCTURE

As landscapers you are most likely to be involved in one of three business structures:

- **Sole Proprietorship**
- **Partnership**
- **Corporation / Limited Company**

There are advantages and disadvantages to all of them. Here are some that I find relevant from my experience.

Sole Proprietorship

You **don't** need to register your business name with the Corporate Registry to be a proprietor. You can just operate any business under your own personal name or any other name for that matter. But you cannot use a business name that someone else has registered, or the name of an incorporated company.

To enjoy at least **limited protection of your business name** it has to be registered, but anybody who wants to incorporate a company under that name is free to steal it, and then you have to change your name.

If you are using a name other than your personal name, and you expect to receive cheques in the business name, you will need to register it in order to open a bank account.

You do have to keep a separate income and expense statement for your business, but the net income (or loss) gets added to (deducted from) your other personal income (such as employment income) on your personal year end tax return. There is no need to file a separate tax return, or hire expensive accountants.

As proprietor you are personally liable for all debts incurred by the business. But that is somewhat of a smokescreen, because no matter what type of business you are running, no bank is going to give you money without your personal guarantee, and your wife's and your father-in-laws….

As proprietor you are also personally liable for all work related claims, third party liability suits, etc. Liability insurance may be expensive, but in this day and age it is only prudent. **As a member of the BCLNA you save enough on liability insurance premiums through them to pay for your membership a couple of times over!** (Plus there are a lot of other benefits). **SOUL** does not at this time provide those types of benefits.

As proprietor you are in the **only** worker category **exempt from mandatory WCB coverage** (see section on WCB for more details, because there are some circumstances

where this might not apply)**.** In fact, as proprietor you have to especially apply to be covered. This is something you will want to consider carefully. If your business falls into the landscape installation category it may be a lot cheaper for you to buy independent disability insurance, which covers you for all disabilities, not only work related ones. **BUT** be sure you understand the coverage fully. Most of the disability plans require that you are **totally** unable to do **any kind of work**. This means if you have a broken spine and operate your business from a wheelchair you are disqualified from collecting benefits. This is not to say that the WCB is easy to get along with either, just be sure you know the pitfalls.

Partnership

A partnership is basically a **proprietorship shared by two or more individuals.** Consequently all the above points apply, plus a few added ones:

As a partner you are responsible not only for the expenses you personally incur on behalf of the business, but also all the debts **your partner** incurs, **even if he / she does so without your knowledge or approval!**

Disagreement between partners can be devastating in other ways too. How do you agree on a price if your partner wants to be bought out? If your partner dies, you may suddenly find yourself with a new partner: his widow(er). Worse, if your partner gets divorced, his/her share of the partnership will be affected by the property division, and you may find yourself hit with all kinds of injunctions and other problems. That's why it is basically **mandatory** to enter into a **partnership agreement**. Standard partnership agreements can be purchased at a stationery store, but I don't know how good they are. Having one drawn up by a lawyer will cost several hundred dollars.

Corporation / Limited Company

This is the most expensive form of business in many ways.

It costs $500.00 - $600.00 to incorporate a company, even if you use a standard form that's available in stationery stores. I've used them and found them quite satisfactory. A lawyer will charge you probably 3 times that much. You have to file a yearly corporate return (under $50.00). You have to keep a "Minute Book". If your lawyer keeps it, he will charge you several hundred dollars a year for the privilege.

Incorporation protects your business name (part of the incorporation process is a name search which guarantees that your name is unique and available. This costs about $60.00). But if you find someone using your name you still have to sue them at your expense to stop them from using it.

As a corporation you have to file a corporate tax return, which you can't do by yourself. Even if all your records are in perfect order and your accountant has nothing to do except file the return, he will still charge you a minimum of $400.00 to do that.

Any losses you incur in the corporation **are not** deductible from your personal income. You may carry them forward indefinitely, but you can only use them against future profits in the corporation.

Even though you may own 100% of the company, you are an **employee** of the company. Consequently if you take any money out of the company you have to make proper payroll deductions (unless it's a short term loan, but that gets complicated, and **definitely** requires the advice of an accountant. You **must** believe me on that, I've witnessed too many tax tragedies.)

Since you are now an employee of the company, you also fall under mandatory WCB coverage. All money you take out of the company by way of salary, management fees or any other benefits including stock options is assessable, even if you don't write yourself a T4.

As director or officer of the company you have many legal liabilities. For instance, you are personally liable for unpaid wages of up to $2000.00 per employee (even if you don't own the company!) You may be personally fined for safety infractions resulting in employee injury. If you own any part of the company, you will most likely have to guarantee for all loans. If you have partners (other shareholders), many of the drawbacks of a partnership apply here also (disagreement/buyout/death/divorce etc., even possible joint liability!)

Finally, no matter which form of business you decide to use: **take a basic business accounting course!** The money and time spent will pay for itself many times over.

Lawyers - Notaries Public Attorneys

BUSINESS LAW

Partnership Agreements: Who Needs One?

By
Michael J. Velletta, Barrister & Solicitor
Disclaimer

Contents of this Article

Responsibilities Capital Contributions
Buy, Sell & New Partners Dispute Resolution

If you have a partnership, you need a Partnership Agreement. Successful entrepreneurs agree that good planning is a fundamental ingredient of any business venture. With partners you need a means by which to clarify the parameters of your relationship, and resolve disputes that will likely occur. Every partnership, from time to time, will involve disagreements, misunderstandings and, perhaps, outright warfare. A properly prepared Partnership Agreement will reduce or eliminate the risk of these difficulties threatening an otherwise efficient business relationship.

The best time to work out compromise and achieve a Partnership Agreement is when harmony and goodwill are in abundance, not after difficulties have arisen. Then, it may be too late.

A good Partnership Agreement clearly establishes the fundamental rules under which the partnership operates. Your Partnership Agreement should settle the following issues:

Responsibilities, Performance, and Remuneration:
The role of each partner, their responsibilities and level of performance should be established. The agreement must clearly set out the income of the partners, capital reserves and a formula for distribution of profits.

Capital Contributions:
The initial capital contribution of each partner may vary, resulting in different levels of investment. Capital may also come through partner loans and, in such instances, the terms of repayment and security are essential to any agreement. If, from time to time, the partners will be expected to make additional capital investment, this too would be dealt with in your agreement.

Buy/Sell and New Partners:
For a partnership to be successful, the partners must be committed. On the other hand, this commitment need not be either lifelong or absolute. From the outset, partners should agree on the minimum length of commitment and on how the partnership will treat retiring partners and those partners who wish to sell their interests. Is yours a partnership requiring the full-time commitment of the partners or, are other business activities of the partners permitted? Surviving partners may wish to have a say in the admittance of new partners or the sale of

partnership interests; after all, a close working relationship usually exists between partners.

Dispute Resolution:

Most partnerships operate on the basis of consensus management. However, there may be a time when you are unable to achieve a compromise that all partners can live with. This can spell disaster for the business unless some mechanism exists for resolving disputes. Such a mechanism should be formalised in the Partnership Agreement. Occasionally, irreconcilable differences that cannot be resolved by any means lead to the termination of the partnership. A properly drafted Partnership Agreement will provide for dispute resolution, and prevent destruction of the business in such instances. For those disagreements where no resolution exists, your Partnership Agreement will provide a mechanism for the dissolution of the partnership that is fair and allows for the continuation of the business by some of the partners.

Depending on the level of complexity, a solid, carefully prepared Partnership Agreement can be negotiated and prepared for about $750. The exercise of negotiating the agreement will resolve many potential disputes before they arise. The agreement will provide the partners with a strong tool by which to administer the partnership, enhancing its viability and success.

Michael Velletta
Gordon & Velletta Victoria, B.C.
250-383-9104
mailto:velletta@victorialaw.bc.ca

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EMPLOYMENT STANDARDS

The **Employment Standards Act** and **Regulations** can be obtained from
Crown Publication, 521 Fort St., Victoria, V8W 1E7, (250) 386-4636

They are also available on-line at:
http://www.labour.gov.bc.ca/esb/igm/igm-toc.htm

The Employment Standards Act of B.C. sets out the minimum standards regulating employment in B.C. in the following areas:

- Wage Protection
- Hours of Work, Overtime and Special Apparel
- Annual Vacation
- Termination of Employment
- Group Termination
- Child Employment
- Maternity and Parental Leave
- Employee Protection
- Farm Labour Contractors
- Employment Agencies
- Complaints & Appeals
- Miscellaneous

Any agreement between an employer and his employees to waive or alter any part of the requirements set out in the Employment Standards Act is illegal, EXCEPT in the case of a collective agreement, which may make provision for different

- Hours of Work
- Annual vacation or vacation pay
- Termination of employment or layoff
- Maternity & parental leave

In some circumstances, an employer and his employees or their representatives may make an application to the Director of Employment Standards for variation from a specific requirement, which may, or may not, be granted.

WAGE PROTECTION

PAYMENT OF WAGES

- Wages must be paid at least semi-monthly (*twice a month = no more than 16 calendar days can elapse between paydays*) and not later than 8 days after each pay period, except on termination:

    - **by the employer**: wages must be paid within 48 hours of termination
    - **by the employee**: wages must be paid within 6 days of termination

- Payment may be made by cash, cheque, money order or, with the employee's agreement, by bank transfer.

DEDUCTIONS

The employer may not make any deductions from the employee's wage, EXCEPT

- Statutory deductions like Income Tax, EI, CPP
- Lawful garnishees
- The following deductions **if the employee agrees to them in writing**

    - Union dues
    - Medical/dental/life insurance
    - Pensions Plans
    - Maintenance payments under the Family Maintenance Enforcement Act
    - Charitable donations
    - Debt service agreements

Note: **Deductions made for breakages, damages and shortages are illegal and recoverable as wages, <u>even if the employee agreed to them in writing!</u>**

Also, nothing in the act obligates an employer to pay an employee for time he took off because he was sick

RECORD KEEPING

The employer must keep the following records during, and for **7 years after termination of employment:**

- Wages earned
- Wages paid
- Wage rate
- Hours worked each day (**this includes salaried employees!)**
- Each deduction made and the reason for it

- Details regarding vacation entitlement / pay and vacations taken
- Employee's name, occupation, date of birth and residential address

STATEMENT OF WAGES

Each payday, the employee must be given a statement of wages, giving a complete breakdown of:

- Hours worked / wage rate / or any other calculation of wages
- Hours of overtime and O/T wage rate
- Bonus, living allowance, or other payment
- Amount and purpose of each deduction
- Net Pay

NON-PAYMENT OF WAGES AND OTHER CONTRAVENTIONS

- The Employment Standards Branch **requires** a person to use a *Self-Help Kit* to attempt to resolve a dispute before the Branch will accept a complaint under the **Employment Standards Act.**
- If the employee cannot resolve the dispute the information can be presented to the Employment Standards Branch, where an officer, and finally the Attorney General's Office will act on the employee's behalf (and at no cost to the employee!) against the employer, unless the employer can prove that the complaint is unjustified. The procedure is set out in the <u>Employment Standards Act.</u>

Of importance here is:

- Unpaid wages constitute a lien against the employer's property, ranking in priority directly after secured mortgages on land, and even before WCB.

- The Director of Employment Standards may seize any assets owned by the employer, <u>or in his possession</u>, or used in – or incidental to – his business.

- A person who was director or officer of a corporation at the time wages of an employee should have been paid is personally liable for up to 2 month's wages for each employee affected, EXCEPT in case of a bankruptcy or receivership.

HOURS OF WORK, OVERTIME AND SPECIAL APPAREL

HOURS OF WORK / RATE OF PAY

Hours at regular pay	Hours at 1.5 x regular pay	Hours at double regular pay
• 8/day or 40/week	• Any hours worked in excess of 8/day and 40/week (including 8 hours / statutory holiday) • Any hours worked during the mandatory 32 consecutive hours of free time	• Any hours worked in excess of 12/day (including 8 hours / statutory holiday)

STATUTORY HOLIDAYS

The following are Statutory Holidays in B.C.

- **New Year's Day**
- **Good Friday**
- **Victoria Day**
- **Canada Day**
- **B.C. Day**
- **Labour Day**
- **Thanksgiving Day**
- **Remembrance Day**
- **Christmas Day**

(Easter Sunday, Easter Monday and Boxing Day are **not** Statutory Holidays)

Employees who have been employed at least 1 month, AND have worked at least 15 days during the 30 days preceding the statutory holiday, must be given **a day off with pay equivalent to an average day's pay**.

Employees required to work on a statutory holiday must be paid overtime (time and a half) **and** be given an **additional day off with pay** (or be paid an additional average day's pay)**.**

BREAKS / TIME OFF

- **½ hour** of (**unpaid**) eating period must be provided which will result in no employee working longer than 5 consecutive hours without eating period. Eating periods are not counted as hours of work

Note: there is no requirement for coffee breaks, either paid or unpaid.

- Except for an emergency, each employee shall have at least 8 consecutive free hours between shifts

- Each employee shall have at least 32 consecutive hours free from work each week, and any work done during that time must be paid at double time

- An employee who reports for work as required but is sent home

  - **without working**: shall be paid 2 hours
  - **after starting his work**: shall be at least 2 hours or the actual # of hours worked

SPECIAL APPAREL

Uniforms must be supplied, cleaned and repaired by the employer

ANNUAL VACATION

VACATION DUE

An employee is entitled to a vacation no later than 12 months after the anniversary of employment. The employer has the right to authorize the actual timing of vacations as long as the time off is taken within 12 months of the applicable anniversary date.

Year 1-4……………………………………………….2 weeks
After 5 years continuous employment…..……………..3 weeks

- The employer shall not require the employee to take his holiday in periods of less than 1 week

- Annual vacation is exclusive of general holidays to which to employee is entitled.

VACATION PAY

Vacation pay must be paid to all employees who have worked more than 5 calendar days, regardless of the number of hours worked during that time. Payment must be in one lump sum at least 7 days **prior** to commencement of the vacation or with his final pay upon termination

- Employees entitled to 2 weeks of vacation shall receive 4% of their gross pay during the previous year or the time since they last received vacation pay

- Employees entitled to 3 weeks of vacation shall receive 6% of their gross pay (as above)

TERMINATION OF EMPLOYMENT BY THE EMPLOYER

NOTICE REQUIRED

Notice of termination must be in writing

The employee is entitled to the following notice of termination, **or severance pay in lieu of notice:**

Months of Employment	Notice Required
Less than 3 months	None
After 3 consecutive months	1 weeks
After 12 consecutive months	2 weeks
After 3 consecutive years	3 weeks, plus and additional week for each year of employment up to 8 years (maximum 8 weeks notice)

The time of notice must not coincide with the employee's vacation.

There are some exceptions to the above:

- An employee is discharged for just cause (**very hard to prove**!)

- An employee is employed under an agreement whereby the employer may request the employee to come to work at any time for a temporary period and by which the employee has the option of accepting or rejecting one or more of the temporary jobs

- An employee is employed for a definite term, or for a specific work to be completed in a period not exceeding 12 months

- An employee who has been offered by his employer and has refused reasonable alternative employment

- An employee employed under a contract of employment that is impossible to perform due to an unforeseeable event or circumstance

- An employee laid off temporarily. HOWEVER, where the temporary layoff exceeds 13 weeks of layoff in a period of 20 weeks, it is deemed to be a termination which commenced at the temporary layoff, and severance pay is payable immediately.

"CONSTRUCTIVE DISMISSAL"

When an employer substantially alters a condition of employment with the purpose of discouraging the employee from continuing in the employment, the employee may be determined to have been "constructively" dismissed, and he is entitled to normal severance pay.

CALCULATION OF SEVERANCE PAY

The weekly wage entitlement is determined as the average of the last 8 weeks in which wages (exclusive of overtime) were earned, or the normal weekly earnings, multiplied by the weeks of entitlement.

(Special rules apply to the termination of 50 or more employees, which are contained in the Employment Standards Act and Employment Standards Information Bulletins.)

CHILD EMPLOYMENT

- No person shall employ a child under the age of 15 years without the permission of the child's parent or guardian.
- No person shall employ a child under 12 years of age without the permission of the Director of Employment Standards (the parent's permission is not enough!).

MATERNITY AND PARENTAL LEAVE

There are several conditions attached to maternity and parental leaves, which are explained in detail in section 51 of the Employment Standards Act (as amended effective December 31, 2000)

However, in essence, the birth mother is entitled to 17 weeks of **unpaid** pregnancy leave, plus a further 35 weeks of **unpaid** parental leave.

Birth fathers and adopting parents can take up to 37 weeks of **unpaid** parental leave.

Pregnancy leave can begin up to 11 weeks before the expected birth date. Parental leave can be taken any time within one year of the birth or adoption, but must be taken all at once.

An employer may also require a pregnant employee to take maternity leave, if she cannot reasonably perform her duties because of the pregnancy.

NOTE: In spite of the leave of absence from work, maternity and parental leave is counted as continuous employment for purposes of:

- Vacation entitlement
- Notice of termination and severance pay
- Wage increments and benefits the employee would have been entitled to had the leave not taken place

Also, the employer **must continue to make payments** to any pension, medical, dental or other plans beneficial to the employee in the same manner as if the employee were not absent.

Upon return to work, the employee must be reinstated in his/her previous position, or in a comparable position.

It is also important to note that the employer shall not terminate an employee because of pregnancy, or maternal/ parental leave of absences, nor change a condition of employment during this time without the employee's written consent.

EMPLOYEE PROTECTION

An employer shall not influence a person to become his employee through misrepresentation of

- The availability of the position
- The nature of work to be done
- Wages to be paid
- Conditions of employment

If the employee registers a complaint against the employer, or provided information to the Employment Standards Branch, the employer shall not:

- Terminate or threaten to terminate the employee
- Discipline or suspend the employee
- Impose a penalty on the employee
- Intimidate of coerce the employee

GENERAL

SALE OF BUSINESS

Where a business or part of it, or a substantial part of its entire assets is disposed of, the employment of an employee or the business shall be deemed to be continuous and uninterrupted by the disposition. This means that the new purchaser automatically carries over all liabilities with respect to vacation entitlement / pay, notice of termination, maternity / parental leave, etc.

INSPECTION OF RECORDS

An officer of the Employment Standards Branch may inspect an employer's payroll records at any time, remove records, or conduct any kind of investigation which he feels is necessary to ascertain himself that the employer complies with all aspects of the Employment Standards Act.

LIABILITY FOR OFFENCES

Employers or their representatives who contravene any or various provisions of the Employment Standards Act are personally liable for fines ranging from $500.00 to $10,000. In case of a corporation, this includes officers, directors, employees or agents who directed, authorized, assented to, acquiesced in or participated in the commission of the offence.

The Skills Most Wanted by Yukon Employers

Source: Interviews with 40 Yukon recruiters from a variety of Yukon businesses, First Nations, and non-profit organizations

SKILL SET	SPECIFIC SKILLS AND QUALITIES
Behaving appropriately	Be productive, cooperative, accountable, responsible, flexible and positive (especially about change). This skill set was identified as the first priority with Yukon employers seeking new employees. Employers said their greatest concern was to have workers with a good attitude
Knowing the business	As with "common sense" in the work context. This means in a way that is sensitive and responsive to customer expectations and needs, dealing effectively with customers, and using knowledge of the business to talk and write in a way that is relevant. Manage time use and plan activities. Small Yukon businesses need employees to identify with the company and to be able to work at anything.
Speaking and listing with sensitivity	Receive, comprehend and interpret complex instruction; talk with, seek and clarify information from co-workers, customers, clients, and those inn authority, in person and by telephone.
Being culturally aware	Understand and value all cultures. Use communication techniques that are effective in a cross-cultural workplace, including speaking to customers, co-workers, employers, and suppliers in their language of choice, if possible.
Responding to problems and resolving them	Be alert to what is happening and be able to identify, investigate, evaluate and report problems (concisely and with clarity) orally or in writing.
Maintaining personal standards	Be concerned with personal well-being, maintain standards of hygiene and dress which conform with an organization's expectation.
Continually learning / demonstrating lifelong commitment to self-improvement	Take responsibility for your own learning, learn through working with others, from manuals and from mistakes. Realize that not all learning is site-based. With so many small businesses, each employee needs to be willing to learn all about the business as quickly as possible. Commit to lifelong learning.
Working in teams	Work within and contribute to the effectiveness of a team, respecting differences; take responsibility and be willing to make decisions. Understand the dynamics of cross-cultural teams.
Making the most of information technology	Be willing to learn new uses of information technology
Using equipment	Set up and operate equipment. Use equipment safely. Be able to use equipment in difficult climates. Realize it may be difficult to replace or repair equipment.
Handling numbers	Extract and record numerical data and carry out calculations involving addition, subtraction, multiplication, division and the use of percentages with high levels of accuracy. Being able to calculate rates of monetary exchange is particularly important. This is a basic skill for all workers.
Reading and writing skills	Read to extract information and to interpret instructions from short notes and prose; read and comprehend written directions for the health and safety of oneself and others. Write clearly, concisely and to the point, consistently conforming to spelling and grammatical conventions. This is a basic skill for all workers.

EMPLOYMENT INSURANCE PITFALLS FOR THE RELATED EMPLOYEE

LANDSCAPE TRADES June 1997

When most people think of the benefits and the possiblilities associated with starting their own business, they may not consider the effects of the new employment insurance legislation as it pertains to employed family members.

Alexander Markham practises law in association with the Toronto-based firm of Gomes Santram. His practice includes debt collection, contract and lease disputes and the defense of criminal charges. He can be reached at 416- 955-1312.

It may not sound fair, but if your business employs a family member, whether it is a spouse, sibling or offspring, there is a good chance that the family member will not be eligible to collect employment insurance. Not only is that family member not eligible for unemployment benefits, but they may be liable to pay back any they have received. This is not a new law, but it is one that is catching many people off guard. There are, however, certain steps you can take to safeguard your peace of mind. I will briefly outline the law, describe who is affected by it, give an overview of the evolution of the law, and provide some practical examples of how you might avoid its pitfalls.

The Legislation

This article concerns subsection 5(2) of the Employment Insurance Act and its predecessor, subsection 3 (2) of the Unemployment Insurance Act. This section describes "accepted employment." If your job fits one of the descriptions in this section, then it is accepted and employment insurance is not payable.

Paragraph (c) of this subsection is the offending paragraph, as it excepts "employment where the employer or employee are not dealing with each other at arm's length." According to subparagraph (i), the Income Tax Act determines whether or not you are "at arm's length." Subparagraph (ii) describes the Minister of National Revenue's role in determining your case.

Who is affected?

The definition of "arm's length" found in the Income Tax Act is very broad; just about everyone that could, in theory, be affected is affected. Many lawyers are paid many hundreds of thousands of dollars a year trying to find loopholes in the Act; the result is amendments to the Act that make it convoluted and complex. Suffice it to say, without reproducing the sections (Ss. 251 $ 252), if you are in any way related to the owner of a business, there is probably a non-arm's length relationship. For example, if your spouse is the sole proprietor of the business you work for, you are a non-arm's length person. In a more complex example, consider the situation where your spouse's children from another marriage are working for your company; they are deemed non-arm's length. As a final example, consider the corporation whose shares are held entirely and equally by your natural parents: you have a non-arm's length relationship with the corporation.

Evolution of the law

Previously the Unemployment Insurance Act ("the Act") deemed an employee to be non-arm's length and therefore - non-insurable - if he or she were related to the employer. As soon as the federal human rights legislation was passed, however, this section was found to be discriminatory. The legislation was subsequently changed to deem an employee in that situation to be at arm's length if the Minister of National Revenue is satisfied, taking into account several criteria, that it is reasonable to conclude that the employer and employee would have entered into substantially the same contract of employment if they had been dealing with each other at arm's length.

This means that the relationship is deemed to be arm's length unless the Minister says that it is not. It is this ministerial discretion that removes the offending discriminatory nature of the Act.

This exercise of discretion by the Minister causes some difficulty. Due to the manner in which our law has evolved, it is not enough simply to argue chat the Minister came to the wrong decision. One first has to argue chat the Minister somehow improperly exercised his or her discretion. Proving this involves willful or arbitrary conduce by the Minister or chat the Minister's decision is so patently wrong as to be without basis in reason. Both of these arguments are significant impediments toward overturning the Minister's decision.

Solutions

The Employment Insurance Ace and its predecessor were enacted to avoid the situation where a fictitious employment relationship is sec up - perhaps as a tax write-off- and the employee then tries to claim UIC when he or she is laid off. For instance, if your 12-year-old niece is employed by the wholesale nursery, but her pay cheques are regularly cashed at the nursery and she is given an allowance from the money, should she then be allowed to collect UIC from the public coffers when she is "laid off" during the winter months? However, if your sister is employed by the store as a bookkeeper and it is -a necessary position chat has been filled in the past by non-related people, should she be penalized by not being eligible for unemployment benefits just because she is your sister?

One solution to avoid having to pay back an "overpayment" of unemployment benefits is not to claim them in the first place. If you have been advised of a tax lessening income-splitting scheme that is, in all other respects, legal, why tempt face by having the employee attempt to collect benefits?

Another solution is to make a concise record of job responsibilities, wage/salary ranges, hours worked and other important criteria. Courts will cake into account the real situation, if there are enough documented facts. For instance, in one case a husband was employed by a corporation whose majority shareholder was the wife. The Minister alleged chat this was a non-arm's length relationship and demanded repayment of unemployment benefits. One of the arguments in the Minister's favour was the extreme amount of overtime the husband was expected to work for a flat amount per week; the Minister argued that a non-related employee would not have worked for those terms. However, the employee's husband was able to show that he was only one of several people, the others not being related, who worked the long hours for little pay. Other factors in the husband's favour were that the employer supplied the tools and set the hours he worked.

Essentially, the test comes down to whether someone who is not related would do the same job for the same wage. So, if you can prove that someone else kept the books at the store before you hired your sister, and for the same wage, then all the better. However, if this is the first time chat you have employed a bookkeeper and it coincidentally happens to be your sister, then you might consider contacting the proper government office and ask for a preliminary determination as to status. If your sister, in this example, is entering into a contract of employment that another unrelated person would, there should be no difficulty. Having a written letter from the government will enable her to claim unemployment benefits, should the need arise, with a certain peace of mind that she will not have to subsequently pay them back.

Another thing to keep in mind is that many of the decisions made by the government are done so according to policy guidelines. Sometimes the policy changes. It is conceivable for the government to change its policy about whether or not a type of employment is insurable, and then go back and claim for all the years that its old policy was in place. I have heard of such a situation and in that case, a letter from the government helped the employee avoid having to make the onerous repayments that the Minister demanded.

In conclusion, this may just seem like another administrative hassle chat you and your small business could do without. However, ignoring the problem could lead to greater problems down

the road. If you end up owing money through an "overpayment" of unemployment benefits, you owe that money to Revenue Canada. Revenue Canada has six years to collect monies owed and will even take it out of any income tax refunds. Spending a little time now addressing the problem may negate the need for much more time being spent down the road. If you think your situation may involve one of the issues discussed in this article, remember that this article is written for informational purposes and is not meant to replace the legal advice your specific circumstances may require.

THE WORKERS' COMPENSATION BOARD OF B.C.

The Worker's Compensation Act of B.C. and **Amendments** can be purchased from Crown Publications, 521 Fort St., Victoria, B.C. V8W 1E7, (250) 386-4636

It is also available on-line at
http://www.qp.gov.bc.ca/statreg/stat/W/96492_00.htm

The authority of the WCB is defined in section 96 of the Workers' Compensation Act, which states in essence that the Board "has exclusive jurisdiction to inquire into, hear and determine":

- The industries or persons covered by or exempted from the Act
- Assessments payable – who pays for them – and when
- Whether somebody has been injured in the course of employment
- The extent of compensation payable for the injury
- Regulations with respect to workplace health and safety issues
- Penalties for non-compliance with any regulations or directives

This also means that:

1. **Any decision of the Board that falls within its jurisdiction <u>cannot be appealed to the courts,</u> even if it is obviously wrong or unfair**
2. **Employees cannot sue their employer for damages or compensation due to work related injury or disease.**

Registration and Coverage

All workers in the horticulture and landscape design / architecture industries are covered by the Workers' Compensation Act, and their employers **must** register with the WCB. The only exemptions from mandatory coverage are:

- A **proprietor** and the **proprietor's spouse** or common-law spouse
- An **independent operator** who is neither an employer nor an employee (<u>i.e. a proprietor without any employees</u>), **unless deemed by the Board to be an employee.** (see below)

- **Partners in a partnership**

If the above would like to be covered by WCB, they must apply for Personal Optional Protection.

In an incorporated company, all the shareholders or officers who receive any taxable remuneration are regarded as workers.

A worker includes "a person who has entered into works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and also a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry within the scope of the Workers' Compensation Act for the purpose of undergoing training or probationary work, specified or stipulated by the employer as a preliminary to employment " (section 1)

(Sub)-contractors will be **deemed to be workers / employees of the general contractor** if:

  - They are **not registered** with the WCB and are **not exempted** from mandatory coverage as per above
  - They are **registered** with the WCB but **have not paid their assessments**
  - They are **independent operators who provide essentially only labour**. If they supply their own chainsaw, motor vehicle or heavy equipment, an equipment allowance can be deducted from the assessments payable.

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If in doubt as to the classification of a (sub)-contractor, the employer / general contractor should clarify the situation **before** employing the person or entering into a contract with him, because

- It is illegal to deduct WCB premiums from a worker's pay
- The WCB has the power to place a lien against a person's or company's property for unpaid assessments. This lien takes precedence over all other liens or charges (except those of the Employment Standards Branch for unpaid wages).

Failure to register with the WCB when required renders the employers liable to be charged with the full amount of the compensation payable in respect to any injury or industrial disease to a worker in his employ in addition to the regular assessments he should have paid.

Homeowners who hire contractors to landscape their property are deemed to be general contractors, and they must register with the WCB if it takes more than 24 man-hours in total or 8 hours / week to complete the work, unless the contractor provides **ALL** the materials and labour **AND** is either exempted from mandatory coverage as above or is registered with the WCB.

Assessments

The landscape industry is divided into 6 classifications. (Descriptions for the first 3 categories in this list are included with this material.)

CLASSIFICATION	ASSESSMENT RATE (year 2004)
Landscaping or Installation of Lawn Irrigation Systems	$3.07 per $100 Payroll
Lawn Maintenance, Garden Maintenance or Weed Control	$3.07 per $100 Payroll
Tree Services not directly related to the forestry industry	$10.63 per $100 Payroll
Ornamental Nursery	$2.17 per $100 Payroll
Greenhouse	$2.17 per $100 Payroll
Garden or Landscaping Supply	$2.29 per $100 Payroll
Ornamental Plant Rental or Office Plant Services	$1.21 per $100 Payroll

Affiliated classifications re:

- Deck, railing or fence installation
- Masonry

Assessment rates are based on industry classification, **NOT** job description: i.e. the rate is the same for a clerk/typist as for a heavy equipment operator. Firms with poor safety / claims records will be charged higher rates.

Assessments are payable on **gross wages**. Gross wages include "salaries, commissions, bonuses, holiday pay or any other remuneration paid to workers before deductions *except* non-cash taxable benefits." They also include a "fair wage evaluation of time spent on company business by officers, principals, or shareholders of an incorporated company where those persons did not receive remuneration or more than a nominal wage".

As mentioned above, an equipment allowance can be deducted from gross wages / gross contract amount as follows:

- Chain saws 15%
- Single-axle motor vehicles.. 40%

- Logging trucks, skidders, bulldozers, dual-axle vehicles 75%

Minimum assessment in 20004 is $35.00. There is a maximum wage limit for all workers, which changes every year. In 2004 it is $60,700.00.

When applying for Personal Optional Protection (proprietors), monthly coverage must not be less than $1000 nor more than 5,058.00. Where the applicant is applying for an amount which exceeds $2,500.00 a month, proof of earnings must be provided, or otherwise the Board will automatically reduce coverage to $2,500.00 / month.

Wage loss compensations benefits will usually be 90% of average NET earnings at the time of injury. HOWEVER, where the injury is attributable solely to the serious and willful misconduct of the worker, no compensation shall be payable unless the injury results in death or serious or permanent disablement (section 5.3).

Assessments are payable quarterly or yearly (depending on total assessments for the year). If an employer fails to meet the due dates required, a penalty of 8% of the last assessment is applied. This is a penalty for non-compliance as follows for the following infractions:

- Not including payment with the Employer's Remittance Form

- Having more than one WCB classification and not returning the Employer's Remittance Form or provide payroll information for each classification

- Not returning the Employer Payroll and Contract Labour Report by the due date,

- Not including payment with the Employer Payroll and Contract Labour Report.

It gets worse. After 30 days, these overdue amounts are subject to another 8% penalty, and an additional 1% for each subsequent month overdue. Additionally, the entire cost of compensation claims paid while the account is delinquent may be charged to the employer.

WCB auditors may audit the complete financial records of the company (not just payroll records) at any time. They often concentrate their audits on specific industries.

There is a complicated and lengthy appeals process. However, an appeal at any level is not a stay of proceedings, and a decision by the Assessment Department will be in effect and enforced until reversed at a higher level. This means, for instance, if you were audited and assessed an improper amount, which you are disputing, you must pay the amount, or incur all those penalties. These penalties are not refundable even if you should win your appeal, so you might as well avoid them in the first place.

INDUSTRIAL HEALTH AND SAFETY

The WCB's first priority is to prevent occupational injury and disease. In addition to promoting prevention through education and research, the Occupational Safety and Health division enforces Industrial Health and Safety Regulation, the Industrial First Aid Regulations, and the Occupational Environment Regulations.

Many sections of the Industrial Health and Safety Regulations directly affect the landscape professions, specifically, but not exclusively:

- Part 5 – Chemical and Biological Substances
- Part 6 – Substance, specific Requirement
- Part 7 – Noise, Vibration, Radiation and Temperature
- Part 8 – Personal Protective Clothing and Equipment
- Part 9 – Confined Spaces (Greenhouse / Warehousing Industry)
- Part 11 – Fall Protection
- Part 12 – Tools, Machinery & Equipment
- Part 13 – Ladder, Scaffold and Temporary Work Platform
- Part 14 – Cranes & Hoists
- Part 15 – Rigging
- Part 16 – Mobile Equipment
- Part 17 – Transportation of Workers
- Part 20 – Construction, Excavation and demolition
- Part 28 – Agriculture
- Part 33 – Occupational First Aid

WCB officers may inspect work sites at any time for compliance with the Industrial Health and Safety Regulations. They have the power to impose a 24 hour closure of any work site that immediately threatens the health and safety of workers, and this closure may be extended if the problem isn't rectified within 24 hours. Other sanctions may include:

- Penalties
- Additional assessments
- Prosecution under the WCB Act.

As part of the new WCB Occupational Health and Safety Regulations, WHMIS training is compulsory for all workers. Companies with 20 or more workers must have an Occupational Health and Safety Committee, and employers are required to provide OHS Committee member with an annual 8 hour education leave.

Finally, the WCB has a huge list of publications, videos, posters and other educational materials, most of which are available at no charge, or at nominal cost. It is very worthwhile to order a publications catalogue from the (free).

WCB CLAIMS

A very strict and detailed procedure must be followed by both employers and workers to report injuries or death. This procedure is outlined in the Information for Employers, the Workers' Compensation Act, the Industrial Health and Safety Regulations, and many other publications. Employers who try to prevent a worker from making a claim are subject to severe penalties. Both employers and workers have the right to appeal a WCB decision regarding the validity or nature of a claim, which again is a long and detailed process.

Workers who have been injured on the job will be reimbursed for medical expenses, and/or a % of lost wages. They may also receive long term rehabilitation, retraining, or, in the worst case, lump sum settlements or pensions for life.

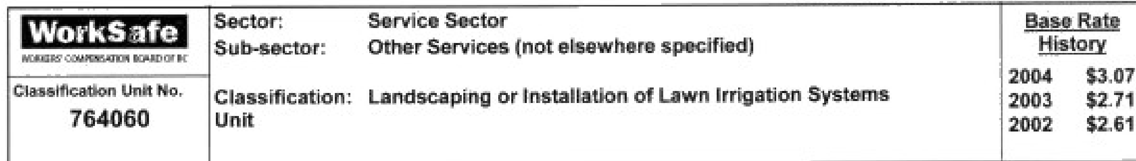
CONCLUSION

Don't mess with the WCB!

On the following pages you will find the classification unit descriptions for the following categories:

- Landscaping or Installation of Lawn and Sprinkler Systems
- Lawn Maintenance, Garden Maintenance, or Weed Control
- Tree Services

CLASSIFICATION UNIT DESCRIPTION



WorkSafe WORKERS' COMPENSATION BOARD OF BC	Sector: Service Sector Sub-sector: Other Services (not elsewhere specified)	Base Rate History
Classification Unit No. **764060**	Classification Unit: Landscaping or Installation of Lawn Irrigation Systems	2004 $3.07 2003 $2.71 2002 $2.61

PLEASE NOTE: This document provides information about business activities covered by this classification. Items listed are EXAMPLES only and do not apply to every employer.

INSTALL

The following are examples of the types of goods installed by employers in this classification unit:

Decks
Interlocking bricks
Retaining walls
Garden ponds
Lawn irrigation systems

SERVICES

The following are examples of the types of services provided by employers in this classification unit:

Landscaping
Remove stumps
Move trees

MATERIALS

The following are examples of the types of inputs or materials used by employers in this classification unit:

Fence materials
Gravel
Insecticides
Paving stones
Sod
Fertilizers
Herbicides
Irrigation systems
Sand
Soil

SUPPORTIVE ACTIVITIES

All employers require finance and administrative support. Employers in this classification unit may engage in these additional activities in support of their main business operations:

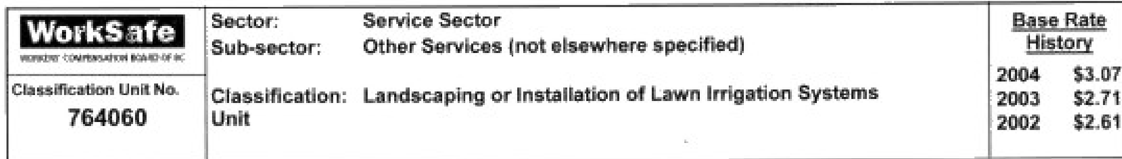
Prune trees
Repair lawn irrigation systems

EQUIPMENT

The following are examples of the types of equipment used by employers in this classification unit:

Auger
Bobcat
Cutter
Lawnmower
Stump grinder
Wheelbarrow
Backhoe
Compactor
Hand tools
Rototiller
Tree dolly

CLASSIFICATION UNIT DESCRIPTION



WorkSafe WORKERS' COMPENSATION BOARD OF BC	Sector:	Service Sector	Base Rate History	
	Sub-sector:	Other Services (not elsewhere specified)		
Classification Unit No. **764060**	Classification: Unit	Landscaping or Installation of Lawn Irrigation Systems	2004	$3.07
			2003	$2.71
			2002	$2.61

OCCUPATIONS

The following are examples of the core job descriptions required by employers in this classification unit:

Landscape designer
Landscape labourer
Sod layer
Landscape gardener
Landscaper

CLASSIFICATION SPECIFICS

The following information is directly relevant to employers in this classification unit:

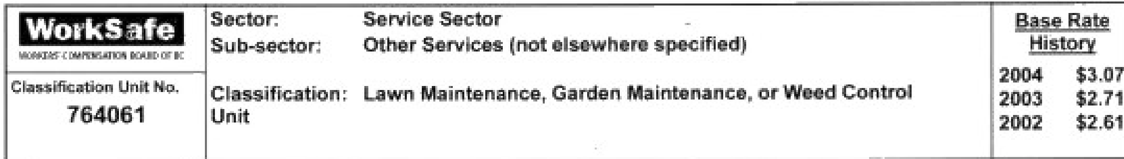
Included in this classification unit are employers primarily engaged in the construction of landscape and related structures such as retaining walls, lawn irrigation systems, decks, or fences. These employers also engage in such gardening activities as preparing garden beds, rototilling, and planting. Also included in this classification unit are employers that only remove tree stumps. These employers do not perform other tree services such as the falling, delimbing or removal of entire trees; firms that remove entire trees are classified elsewhere.

EXCLUSIONS

Employers in this classification unit may occasionally engage in some of the business activities listed below. However:

Excluded from this classification unit are employers PRIMARILY engaged in:
1) lawn maintenance, garden maintenance, or weed control;
2) masonry or stonework;
3) deck, railing, or fence installation;
4) large scale land clearing or excavation work;
5) pool, spa or hot tub installation; or
6) tree services.

CLASSIFICATION UNIT DESCRIPTION



WorkSafe WORKERS' COMPENSATION BOARD OF BC	Sector:	Service Sector	Base Rate History	
	Sub-sector:	Other Services (not elsewhere specified)		
Classification Unit No. 764061	Classification: Unit	Lawn Maintenance, Garden Maintenance, or Weed Control	2004	$3.07
			2003	$2.71
			2002	$2.61

PLEASE NOTE: This document provides information about business activities covered by this classification. Items listed are EXAMPLES only and do not apply to every employer.

SERVICES The following are examples of the types of services provided by employers in this classification unit:

Aerate lawns
De-moss roofs
Fertilize trees & shrubs
Fetilize lawns
Gardening
Lawn maintenance
Maintain yards
Moss control
Mow lawns
Plant flowers
Plant shrubs
Rake leaves
Weed control

MATERIALS The following are examples of the types of inputs or materials used by employers in this classification unit:

Fertilizers
Herbicides
Insecticides
Plants
Seedlings
Sod
Soil

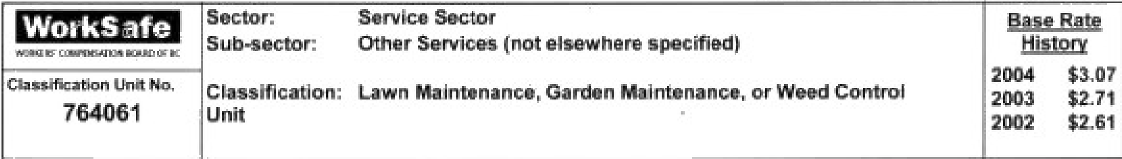
EQUIPMENT The following are examples of the types of equipment used by employers in this classification unit:

Blower
Fertilizer spreader
Gardening tools
Lawnmower
Rake
Trimmer
Weed-eater
Wheelbarrow

OCCUPATIONS The following are examples of the core job descriptions required by employers in this classification unit:

Equipment operator
Gardener
Grass cutter
Grounds keeper
Grounds maintenance worker
Labourer
Lawn care worker
Lawn cutter

CLASSIFICATION UNIT DESCRIPTION



WorkSafe WORKERS' COMPENSATION BOARD OF BC	Sector: Sub-sector:	Service Sector Other Services (not elsewhere specified)	Base Rate History
Classification Unit No. 764061	Classification: Unit	Lawn Maintenance, Garden Maintenance, or Weed Control	2004 $3.07 2003 $2.71 2002 $2.61

CLASSIFICATION SPECIFICS

The following information is directly relevant to employers in this classification unit:

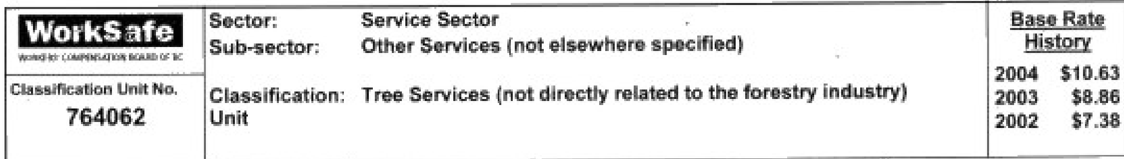
Included in this classification unit are employers solely engaged in lawn maintenance activities such as mowing, aerating, moss control, weeding, or fertilizing lawns. Also included are employers engaged in de-mossing and preserving roofs without pressure washing.

EXCLUSIONS

Employers in this classification unit may occasionally engage in some of the business activities listed below. However:

Excluded from this classification unit are employers PRIMARILY engaged in:
1) landscaping;
2) providing tree services such as topping, delimbing, or removing trees;
3) park maintenance;
4) highway maintenance;or
5) pressure washing roofs.

CLASSIFICATION UNIT DESCRIPTION



WorkSafe	Sector: Service Sector Sub-sector: Other Services (not elsewhere specified)	Base Rate History
Classification Unit No. 764062	Classification Unit: Tree Services (not directly related to the forestry industry)	2004 $10.63 2003 $8.86 2002 $7.38

PLEASE NOTE: **This document provides information about business activities covered by this classification. Items listed are EXAMPLES only and do not apply to every employer.**

SERVICES

The following are examples of the types of services provided by employers in this classification unit:

Chip trees
Fall trees
Prune trees
Top trees
Delimb trees
Fell trees
Remove trees
Utility arborist services

SUPPORTIVE ACTIVITIES

All employers require finance and administrative support. Employers in this classification unit may engage in these additional activities in support of their main business operations:

Apply tree pesticides
Repair own mechanical equipment

EQUIPMENT

The following are examples of the types of equipment used by employers in this classification unit:

Aerial manlift
Chainsaw
Brush mower
Portable brush chipper

OCCUPATIONS

The following are examples of the core job descriptions required by employers in this classification unit:

Arborist
Landscaper
Chainsaw operator
Utility arborists

CLASSIFICATION SPECIFICS

The following information is directly relevant to employers in this classification unit:

Excluded from this classification unit are employers primarily engaged in only the removal of tree stumps and do not engage in any other tree services such as the falling, delimbing or removal of entire trees.

EXCLUSIONS

Employers in this classification unit may occasionally engage in some of the business activities listed below. However:

Excluded from this classification unit are employers PRIMARILY engaged in:
1) manual tree falling related to tree harvesting;
2) brushing and weeding or tree thinning or spacing related to forestry;
3) tree topping related to forestry; or
4) landscaping or gardening.

Due diligence: the crown's perspective

By Mark Alchuk

In spite of high profile prosecutions and fines, many employers still don't understand the concept of due diligence. They continue to routinely use a due diligence defence in the courts to stave off prosecutions. That's somewhat understandable given that due diligence is the principal legal defense available under the Occupational Health and Safety Act. But most employers use the due diligence defense incorrectly. They don't understand what the term means or what it entails, and because of that, most due diligence defenses fail.

Having prosecuted quite a number of occupational health and safety cases. I have been able to identify, over time, the common misconceptions about due diligence. This article will explore those misconceptions with a view to clarifying for employers the true meaning of due diligence and its proper use in the courts.

Understand duties

Quite simply, due diligence means taking care. In the workplace, that means taking all reasonable care in the circumstances to protect the health and safety of all workers. Due diligence must be part of the behavioural attitudes in the workplace and cannot be made up after the fact.

Unfortunately, it has been my experience and observation in the courtroom that accused employers often do make up due diligence when presenting their side of the story to the court. What is striking about these instances of due diligence after-the-fact is that corporate witnesses (from supervisors to presidents) display a profound lack of understanding about the statutory duties of the employer with respect to the circumstances of the case before the court.

The duties of employers are spelled out in the Act and include:

- providing equipment, materials and protective devices as prescribed by the regulations;
- seeing that this equipment is maintained in good condition;
- seeing that the equipment, materials and protective devices that are provided are used as prescribed;
- providing information, instruction and supervision to workers to protect their health and safety;
- appointing a competent supervisor;
- acquainting the worker with any hazards in the workplace;
- carrying out the measures and procedures required by the Act and regulations;
- providing assistance and cooperation to a joint health and safety committee; and
- taking every precaution reasonable in the circumstances to protect workers.

Many witnesses called to give due diligence evidence for the employer either do not understand these duties or don't know how to ensure that they are discharged effectively. Yet, this understanding is essential to establishing due diligence in both the workplace and the courts. If an employer and its managers don't understand their duties under the Act, attempts at being duly diligent will simply be hit or miss. And attempts to use due diligence as a defense will surely fail.

Along with the lack of understanding of the duties imposed by the Act, employers often do a poor job of assessing potential hazards in the workplace. The various regulations to the Act specify the risks or hazards in the workplace that should be guarded against. In addition, the list of duties outlined above points to other dangerous circumstances in the workplace, including: incompetence of supervisors, ignorance of workplace dangers, poorly maintained equipment and inadequate instructions and supervision.

The key to understanding the concept of due diligence is understanding the words duty and risk.

In any prosecution under the Act, the Crown must show a breach of duty by the employer. Once that has been accomplished, the Crown should be able to show that the employer failed to guard against the risk. For its part, the defense must show that despite the occurrence of a contravention of the Act all due care was taken in the circumstances.

Show all due care

How does one show all due care? I would argue that you must go back to the concepts of duty and risk to demonstrate due diligence. Just as duty and risk can be used to establish negligent conduct, so too can they be used to demonstrate that all reasonable care was taken to prevent the alleged prohibited act.

Understanding not only how the prohibited act occurred, but also why it occurred, is pivotal to the defense. That's because when you answer the question "why did this omission occur.'", you will automatically know whether the duty was breached. The duty is tied directly co the prohibited risk.

Take, for example, a case in which an employer is charged after a worker in an industrial establishment loses his hand in a punch press. The Crown alleges that the machine the worker was using was not guarded. What are the elements of a due diligence defense? The prohibited risk is operating a machine that may endanger a worker. The duties relevant to the defense of due diligence would include: a) the provision of a guard on the machine; b) instruction on how and when the guard was to be used; c) supervision of the worker by a competent person; d) steps taken co see the guard was used; and e) acquainting the worker with the risk of using the machine without a guard.

It is not uncommon to see a due diligence defense presented on the basis chat the worker was well-experienced in the operation of the machine and was acquainted with the risk of running it without a guard. A long paper trail of company rules and training sessions may also be presented to the court to show chat due care has been taken. However, with just a little probing, it can be discovered that no steps were taken to reasonably verify that this experienced worker was, in fact. using the guard as required. The company relied solely on the worker's skill and experience with respect to the guarding of the machine and had no systems in place co see chat the guarding regulations were being followed. By showing that the company failed to carry out one relevant duty, the Crown can show that there is no due diligence defense.

In this example, even if the worker was very experienced, it is not open co the defendant to argue that he does not have to provide information, instruction and supervision. That is a standard of care expected of the employer. What can be argued is the extent or quality or the training that was given or its relevance to the cause of the incident.

Likewise, it is still open to the Crown to argue that despite the worker's experience, the extent or quality of the training or supervision he received was inadequate. The law does not stipulate a certain standard for training or supervision; it's up to the employer to set these standards. Often in a prosecution, however, employers have no standards to show the court. They seem to prefer to argue that. because the worker was experienced they don't have a duty to supervise. This argument is doomed to failure. To successfully maintain a defense of due diligence, an employer must have performed all of its duties with respect co the specified risk set out in the charge before the court.

Perhaps the greatest misconception about due diligence is the belief among employers that being duly diligent in the workplace, generally-speaking, is enough to establish a defense against specific charges in the court. That's not the case. The court is not interested in what you did generally to be safety conscious. Due diligence as a defence requires evidence that specific steps were taken to prevent the alleged contravention.

For instance, going back to the machine guarding example used earlier, due diligence could be

established by relating the employer's duties under the law to the guard on the machine. If the guard was provided and maintained in good condition, and the worker was acquainted with the hazards, trained on the use of the machine guard and supervised, then due diligence has been achieved.

Due diligence docs not mean that accidents will not happen. Due diligence means doing reasonable things to try to prevent harm to workers. If an employer cannot demonstrate that it has fulfilled all of its statutory duties, then it can never establish due diligence.

Foreseen risks

Another aspect of due diligence that employers generally have difficulty with is the idea of foreseeability. Foreseeability simply means determining risks in advance. With the passage of time, many dangers in the workplace have become so "foreseeable" that they have been incorporated into the Act.

The requirement of the guard on the punch press is a good example. Experience has shown that workers receive injuries on such machines. It is now foreseeable that even trained workers can inadvertently place a hand in the way of the stamping die during a momentary lapse of attention. Therefore, a regulation was developed that requires employers to provide equipment to try to prevent this from happening. The regulation itself foresees the danger.

But there are many other risks which are not covered by regulations. Instead, it's up to the employer to foresee them and guard against them. The employer's actions against foreseeable risks can form the basis of a due diligence defense in court, if an accident does occur. Unfortunately, employers tend co cake the opposite tack in court, arguing chat the incident before the court was not foreseeable.

For example, employers still argue that the failure of an experienced and trained worker to use a guard on a punch press is not foreseeable. In a way, that's understandable. We expect a skilled worker who understands the operation of the press to use a guard.

However, that argument doesn't take into consideration the fact that people may take short cuts and run risks. These things are foreseeable and the employer is responsible for ensuring through adequate supervision and enforcement that they do not take such risks.

In a recent case. a young worker being paid on piece work was injured after removing the guard from a machine to speed up his work. Even though the employer had provided guards and trained its workers, the court found that inadequate supervision had led to the accident. The employer had allowed the worker to come into the shop early and begin work unsupervised.

Address risks

Due diligence in the workplace is not what you make up for in the courtroom; it is a way of conducting business on the shop floor. Due diligence occurs when: an employer knows its statutory duties, has assessed the risks and hazards in the workplace, carried out its duties with respect to those risks and maintains a quality standard with respect to its duties in the workplace.

An employer cannot properly carry out its duties without assessing the potential risks or dangers that occur and evolve in the workplace. An employer may have addressed all the problems associated with the guarding of its machines, for instance, but failed to assess whether the way in which it stores materials endangers workers.

Once an accurate assessment of the risks and dangers in the workplace has been done, a decision can be made with respect to the employer's duties. For example, is there competent supervision? Have the workers been trained with respect to both the operation of the machinery and the hazards that exist? Is there a procedure in place to monitor and enforce the training given to the workers? Have the protective devices required by the regulations been installed and

maintained? If an employer can answer yes to these types of questions, then due diligence has likely been achieved.

The assessment or risks must be an ongoing process. Due diligence is dependent on the present conditions in the workplace, not those that existed last year. Employers must consider the impact of such things as changes to machinery, employees and procedures when determining whether it is carrying out its duties.

Advice on due diligence tends to centre on policies, practices and procedures. And there's no doubt that these are essential. But without adequate follow-through, due diligence won't be achieved. When I see a huge volume entered into evidence by the defense, it is usually a sign that a lot of thought went into developing safety policies, but little was done to implement them.

One case that stands out involved a large multinational company that had very effective policies and procedures to safeguard its workers. But the company had an Achilles heel. No one had bothered co enforce the health and safety policies on the night shift. With only one supervisor for the entire plant, workers had gotten into the habit of taking short cuts. It's troubling co see in court that many companies have the safety rules in place co prevent harm to workers, but render the rules ineffective by not adequately enforcing them.

Assess training
Training is another important element in carrying out due diligence. Often proof chat a worker attended a training session is submitted as evidence of due diligence in court. What the employer fails to prove however, is that the worker actually understood the training. It's easy for the prosecution to show that learning did not take place. In an industrial context, all the prosecution needs to show is that the worker did not appreciate the dangers of the machinery being used.

Supervisors must be able to accurately evaluate the abilities of workers to ensure training has been absorbed. As a recent case will demonstrate, this is critical to a due diligence defense . A worker was killed after the rigging in an elevator platform broke, hurling it to the ground. The worker who had rigged the elevator was training to become an elevator installer. Through expert witnesses, I was able to show that the apprentice worker did not appreciate the dangers connected to the rigging of the platform. Although the worker sincerely believed he had been trained, the mistakes he had made in the rigging were more than errors in judgment. The supervisors who gave evidence in this case could not show that the apprentice had the necessary experience to be left on his own. As a result, the court found that the worker did not yet have the ability to be left in charge and ruled against the company.

Recap
When assessing whether your company has achieved due diligence, start by understanding the duties imposed on employers. Assess the risks and hazards associated with your type of business. This assessment should be ongoing and exhaustive. Then look to see whether the risks in the workplace are being addressed by examining your list of statutory duties for each. Is there good supervision, training, and enforcement to deal with the risks? Due diligence means taking reasonable care. You can't take care if you don't know the risks around you.

Mark Alchuk. LL.B., is Crown Counsel with the Ministry of the Attorney General for the Ontario Ministry of Labour. This article first appeared, in the May/June 1994 issue of Accident Prevention.

A due diligence guide for corporations

It is critical that employers act to ensure that they are taking all reasonable steps in the circumstances before a charge under the Act is laid. These steps will include procedures to identify hazards as well as proving that these measures have been taken. In order to discipline effectively and prove due diligence, the following are some of the steps which should be taken:

1. Create a Written Health and Safety Program

A written health and safety program derailing the rules, policies and procedures which are in place to specifically address the types or hazards that may arise in the workplace can be an important means of demonstrating a company's commitment to health and safety to both the Ministry of Labour and its employees.

The written program should begin with a general policy statement that indicates the company's commitment co health and safety. The program should indicate that disciplinary action will be taken for not adhering co the program and the safety procedure should be set out in a manual and given to each employee. Employees should be familiarized with the details of the manual and should be asked, upon commencing employment with the company, to sign an acknowledgment of receipt and understanding to prove that they understand the procedures set out in the manual.

2. Appropriate Training

An important part of exercising due diligence with regard to health and safety in the workplace is the creation of educational programs to ensure char workers performing hazardous tasks are sufficiently trained and supervised. Training, instruction and orientation should be carried out on an ongoing basis to clearly warn workers of risks in a form that is understood by all workers.

3. Competent Supervision

Supervisors muse be trained and must be "competent." The company should ensure that supervision is at a level adequate for the task being performed. In addition, the distribution of supervisors throughout the plant should be assessed regularly so that the ratio of supervisors-to-workers remains low enough to ensure that safety rules are enforced. To ensure that supervisors are competent they must be trained on an ongoing basis, knowledgeable about health and safety and standards and legislation and well-versed in company health and safety procedures.

4. Discipline

One of the only ways to enforce established health and safety rules is through discipline. Employers must maintain a written record of disciplinary measures taken against employees for safety violations, both for their own personnel management as well as in the event of any subsequent legal proceedings. The form used for this record should incorporate the following information:

1. Dare and time of the infraction.
2. Number of previous warnings issued co the employee.
3. Type of infraction.
4. Action taken by management.
5. Name of the person initiating the discipline.
6. Safety comments

5. Safety Rules

Safety procedures and rules should be written in language that is easily understood by all workers and posted conspicuously in the workplace, in addition to being outlined in the health and safety manual. Such postings will serve as a regular reminder of the safety rules which apply co a worker's particular job or work station, and to all other jobs and work stations throughout the plane. The level of detail and specificity of rules should always correspond co the level of potential health and safety risk posed by the particular activity to which the rule relates.

6. Audits

The workplace should be audited prior co the creation of written health and safety rules and policies to ensure that these are appropriate. However, audits should also be conducted on an ongoing basis. In this way. foreseeable safety risks can be determined and guarded against appropriately.

7. Proving Due Diligence

In addition co establishing procedures co identify hazards, rules, training, disciplinary policies and other steps chat constitute taking all reasonable precautions, the company's health and safety program should include a means of proving that these precautions have been taken. This will involve keeping accurate records of each of the steps discussed above.

2004 Business License Fees

Saanich Peninsula

An **intermunicipal license** for a landscaper is $100.00, to be bought **in the municipality where the business is located.** The landscaper is then allowed to work in all other municipalities.

Greater Vancouver Area

	BURNABY		COQ.	NEW WEST.	N. VAN. CITY	N. VAN. DIST.	RICHMOND	VANC. add $50.00 first year	WEST VAN. (1999)
	First Year	**2nd Year +**							
Contractor	$237.00	$80.00	$160.00	1-2 employees $120.00	1-2 employees $96.00	1-2 employees $108.00	1-5 employees $108.00	$122.00	1-2 employees $105.00
Contractor Office / Shop / Yard	$426.00	$125.00	$210.00	1-2 employees $120.00	1-2 employees $96.00	1-2 employees $108.00	1-5 employees $108.00	$122.00	1-2 employees $105.00
Contractor / Home based business	$270.00	$92.00	$160.00	1-2 employees $120.00	1-2 employees $96.00	1-2 employees $108.00	1-5 employees $108.00	$122.00	1-2 employees $105.00

In all municipalities contacted, gardeners / landscapers are classified a contractors. All contractors must have a business license in the municipality in which they are performing the work, regardless of whether they are based / live in that municipality. There is no universal license covering **all municipalities** in the Lower Mainland., HOWEVER **residents** of West Vancouver, the City of North Vancouverandhe District of North Vancouver can, for an **additional** fee of $50.00 obtain an intermunicipal license that enables them to work in those three municipalities.

There may be special restrictions for home offices. They usually include: no employees working at the home, no outside storage, and possibly even no customers. **The office must also comply with zoning bylaws**. This is vital if you are thinking of buying a place and running a landscape business from your home.

Municipalities differ with respect to penalties if you are reported for working without a license.

Finally, you are not protected under the law if you are working without a license. For instance, you may not be able to collect a debt through the small claims court.

Working without a license does not affect your obligation to pay WCB premiums and Revenue Canada deductions for your employees.

CITY OF BURNABY
Home Based Businesses

Home based businesses are permitted in all approved residential locations in Burnaby with the exception of mobile home parks. Home based businesses are required to hold a business licence and comply with bylaw requirements detailed below.

Home based businesses are defined in the Burnaby Zoning Bylaw as follows:

"Home Occupation" means an occupation or profession that is incidental to the use of a dwelling unit for residential purposes, or to the residential use of a lot occupied by a dwelling and includes:

a. the office or studio of a person engaged in business, art, health, crafts or instruction
b. the keeping of not more than two boarders or lodgers in each dwelling unit,
c. the operation of a family child care centre (restricted in some residential locations)

Business Licence Applications

Business licence applications with fees are accepted at the Burnaby Licence Office. The business licence application process may be initiated by completing and forwarding THE business licence application to the Licence Office. Fees are payable by cash, cheque and interac.
The One Stop Business Registration (OSBR) also provides for business licence application in addition to other government registrations for business. This time saving service is available at www.onestopbc.ca . With OSBR applications and applications received by fax or mail, Licence Office staff will contact the applicant regarding the application information and licence fees.

To complete the application process, a City employee will arrange to meet you at the business residence to review the bylaw requirements and ensure compliance prior to issuance of the business licence.

For more information on the application and fees, please contact the Licence Office by telephone at 604.294.7320 or by e-mail at licence@city.burnaby.bc.ca

Home Based Business Licence Fees

	First Year	Annual Renewal
Home Based Business - Contractor	$270	$92
Home Based Business - Craft	$270	$53
Home Based Business - General	$270	$92

Home Based Business Regulations

1. A home occupation shall involve no internal or external structural alterations to the principal building (dwelling) and there shall be no exterior indication that the building is being utilized for any purpose other than that of a dwelling, and no building, structure, fence or enclosure other than those in conformity with permitted residential uses in the zoning district in which it is located, may be erected.

2. The premises shall not be used for manufacturing, welding or any other light industrial use, and the home occupation carried on therein shall not produce noise, vibration, smoke, dust, odour, litter or heat other than that normally associated with a dwelling unit nor shall it create or cause

any fire hazard, electrical interference, excessive pedestrian or vehicular traffic in the common areas or parking areas of a multi-family building or traffic congestion on the street. (B/L No. 10398-96-08-26)

3. There shall be no external display or advertisement other than a sign bearing only the name and occupation of the owners, which may be illuminated but not flashing and shall not exceed 1900 sq.cm. (2 sq.ft.) in area.

4. There shall be no external storage of materials, containers or finished product.

5. No stock in trade shall be kept or handled and no commodity sold upon the premises.

6. Such occupation shall not involve the use of mechanical equipment save as is ordinarily employed in purely private domestic and household use or for recreational hobbies, except for such equipment as may be used for a resident physician or dentist.

7. No person who is not a resident in the dwelling shall be employed in such an occupation.

Parking or Storage of Commercial Vehicles, Trucks or Equipment in Residential Locations

No commercial vehicle, truck, bus, contractors equipment, dismantled or wrecked automobile, trailer or any similar vehicle, conveyance, craft or equipment shall be parked or stored in the open in R1 to R12, or RM (residential) Districts, except the following which may be parked or stored in the rear yard only:

1. One truck or commercial vehicle not exceeding 4500 kg. GVW (9920 lbs. GVW).

2. Trucks, commercial vehicles or equipment required for the construction, repair, servicing or maintenance of the premises.

3. Any dismantled or wrecked vehicle for a period of not more than 30 successive days.

For specific information on the parking or storage of recreational vehicles and boats, please see the Burnaby Zoning Bylaw.

<u>PST & GST</u>

We will not be dealing with income taxes in this course.

SOCIAL SERVICES TAX (Provincial Sales Tax)

As landscapers we do not need to charges Sales Tax (which is currently 7.5%) either on our labour, or on the materials we provide, **as long as we install the materials.** However, if we just sold our clients some plants, this would be considered retail, and we would have to charge the tax.

Since we **don't charge sales tax**, we also **do not qualify for a sales tax refund** on the goods we purchase. That means, we **cannot** buy our materials "wholesale", i.e. pay no sales tax on it. If you really insist on paying no sales tax on your materials purchases you will have to register with the Sales Tax Office, **but** they will not register landscapers (since we are exempt). The only way around that would be to declare that a portion of your business will be retail, in which case they will give you a number. But then you have to charge sales tax on all the supplies which you bought tax exempt, which just becomes a bookkeeping nightmare. You also have to calculate and submit tax on all supplies used for personal or business purposes. I really see no advantage to it.

<u>GOODS AND SERVICES TAX (GST)</u>

Every business, organization or individual engaged in a commercial activity in Canada whose **gross revenues** were **more than $30,000** in the **immediate preceding year**, is required to register for the GST (which is currently 7%)

This means if your total yearly revenue is less than $30,000 you don't have to charge GST, and you also don't get GST credit **on supplies and equipment you purchase for your business**, or materials and supplies for your jobs.

Once your **total revenue** reaches $30,000 (this is <u>gross sales</u>, **not** net income), and that can happen quickly in the installation business where you supply soil and plants etc., you **must** register for the GST for the following year and charge GST, even though in that year your total revenue may be below $30,000. Of course you can then de-register again for the following year, but be prepared for the big run-around, delays, audits and a whole bunch of unpleasantness. (I've been trying to de-register an inactive company for the last 3 years. Periodically I make a few phone calls, send a few faxes, and then I just get my new assessment notice, and I realize that once again nothing has happened).

In this industry I find that commercial customers certainly expect to be charged GST (they can also normally claim it as an input credit), but homeowners don't want to pay it.

You might be able price your services high enough to include the GST in the price, then that's okay as long you know how to figure out the GST portion on the total. Otherwise you are seriously cutting into your profit margin. If you want to give a customer a cash discount I suggest you discuss the pros and cons with your accountant.

Builders Liens in B.C.

The following has been compiled combining the information obtained from the website http://wwlia.org/cabcbuil.htm (which no longer exists) and an article written by Janice Mucalov, LL.B., outlining the changes in the act. This is given for informational purposes only and must not be considered legal advice or instruction. ***A copy of the Builders Lien Act can be ordered from Crown Publications, 521 Fort St., Victoria, V8W 1E7, (250) 386-4636.*** *One of the links listed on the Web Resources page has more technical information.*

In a typical construction project, the owner contracts with a general contractor to get the whole job done for a certain amount of money. The general contractor will then, typically subcontract out many of the small jobs. For instance, the general contractor may subcontract the landscape installation. In large projects, the subcontractors in turn may contract out part of their work, such as the landscape contractor hiring different contractors for the paving stone installation, the fencing, retaining wall installation, etc. These companies, in turn, may have independent subcontractors, rather than employees, working for them.

What we end up with is a pyramid with the owner on top. **But there is no contractual link between the owner and the subcontractors.** The subcontractors are working for (contracted to) the respective (sub)contractor that hired them. Only the general contractor is accountable to the owner.

The subcontractors would have great difficulty recovering their money owed if, for example, someone up the line, such as the general contractor or the owner, went bankrupt. In addition, credit is commonplace in the construction industry. To make matters more complicated, the materials advanced on credit are typically combined with the efforts and materials of others. **As it is ultimately the land that receives the benefit of the labour and materials**, the *Builders Lien Act* sets up a mechanism where subcontractors or providers can ensure payment by placing **a lien against the land**, enforceable against the owner.

If a supplier or subcontractor suspects that there may be a problem collecting his or her money, they have the legal right of filing an affidavit (lien) under the *Act.* The lien is filed against the owner of the property, and if there is a mortgage registered on title (this information is available from the Land Title Office), the mortgage company must be named as owner as well. The legal description of the property is available from City Hall.

To file the lien, you must use a prescribed form (which is available at the Land Title Office). It must be completed carefully and properly, otherwise you can lose your lien rights. The lien is filed in the Land Title Office. Once a lien is filed, the amount of claim of lien cannot be increased. There may be fees attached to filing a lien.

There are two important deadlines:

- You must file your lien no later than **45 days** after a certificate of completion has been issued, **or** the contract has been completed, abandoned or otherwise determined. In some cases it may not be clear whether a contract has been "abandoned or otherwise determined". If in doubt, contact a lawyer. **This deadline is unforgiving**.

- You must move to enforce the lien **within one year** from the date of the filing of the lien. This means you have to start legal action in the Supreme Court. This should not be done without the advice of a lawyer. There are critical steps to be followed, such as the filing of a certificate of pending litigation. The owner can force the issue by serving notice to the claimant **requiring legal action on the lien within 21 days**, failing which the lien expires.

For everyone's protection, including the owner's, **every contractor and subcontractor in the construction chain** (including the owner) **must** to hold back **10% of each progress payment** from the trade they hire, or 10% of the value of the work done, whichever is greater. But you can't hold back money from the company that supplies the materials.

On large jobs, holdbacks can be released as late as **55 days** after a certificate of completion has been issued (when the **complete project is finished**). If you complete your job before then, you can ask the architect or general contractor to issue a certificate and they have to give you one within 10 days.

If there is no certificate of completion, holdbacks must be released 55 days after the head contract is finished, or if there is no head contract, 55 days after you've substantially completed your job.

The simple act of filing your lien often results in a resolution of your claim, **but it may not!** In any case, so long as the lien shows up on title, the property cannot be sold or (re)mortgaged without first paying the lien.

Bid, Performance & Payment Bonds

Bid Bonds

A bid bond is used to guarantee to the owner that the contractor will honor his **BID** by entering into a contract with the owner to perform the service required in accordance with the terms of the contractor's bid, should it be accepted. The request for a bid bond is included with the Invitation to Tender. The amount of the bid bond may be a percentage of the estimated contract amount. The bid bond is released / returned upon signing of the contract, or rejection of the bid.

Bid bonds can be obtained from some banks or a bonding / insurance company. They are not expensive, maybe $25.00 to $50.00 for a processing fee.

Performance Bonds

A performance bond guarantees that the contractor will perform all the work defined by the terms and conditions of the contract. In the event of the contractor's failure to do so, the bonding company will protect the owner against loss up to the amount of the bond. The amount of the performance bond can be as high as 150% of the contract The Municipality of Whistler requires a **Letter of Credit** in the amount of 135% of the contract amount!. The performance bond is released / returned upon formal acceptance of the completed project.

Performance bonds can be obtained from some banks or a bonding / insurance company. They probably cost around $6.00 / $1,000.

Payment Bonds

A Labour and Material Payment Bond is usually required when a performance bond is required. It guarantees payment by the bonding company to all 3rd parties for labour and material furnished to the site. In effect this guarantees clear title / no builders liens against the property. Payment bonds are returned 55 days after completion and formal acceptance of the project, if no liens have been placed against the property, or after all liens have been released. The amount of the payment bond is usually 50% of the contract price.

Payment bonds can be obtained from some banks or a bonding / insurance company. The price ranges from $1.75 - $6.00 / $1,000.

Why Bid, Performance & Payment Bonds Are Required For Public Construction Projects

Surety Information Office
5225 Wisconsin Avenue NW, Suite 600
Washington, DC 20015-2014
(202) 686-7463 | Fax (202) 686-3656
www.sio.org | sio@sio.org

SIO is supported by The Surety Association of America
and the National Association of Surety Bond Producers.

Virtually all of the public construction work in America is accomplished by private sector firms. This work generally is awarded to the lowest responsive bidder through the open competitive sealed bid system. Surety bonds play a critical role in making the system work.

The Bid Bond is intended to keep frivolous bidders out of the bidding process by assuring that the successful bidder will enter into the contract and provide the required performance and payment bonds. If the lowest bidder fails to honor these commitments, the owner is protected, up to the amount of the bid bond, usually for the difference between the low bid and the next higher responsive bid.

The Performance Bond secures the contractor's promise to perform the contract in accordance with its terms and conditions, at the agreed upon price, and within the time allowed.

The Payment Bond protects certain laborers, material suppliers and subcontractors against nonpayment. Since mechanic's liens cannot be placed against public property, the payment bond may be the only protection these claimants have if they are not paid for the goods and services they provide to the project.

Protection By Law

In most cases, bid, performance and payment bonds are required by law on public construction projects. Since these laws have existed for several decades, few give much thought as to why such laws were enacted. Some contractors who cannot obtain the required bonds, complain that the laws are unfair because they, in effect, are denied access to public construction projects. Let's examine what gave rise to these laws that require contractors to post bonds when they perform public construction projects.

Slightly more than 100 years ago, the federal government became alarmed about the high failure rate among the private firms it was using to perform public construction projects. It discovered that the private contractor often was insolvent when the job was awarded, or became insolvent before the project was finished. Accordingly, the government was frequently left with unfinished projects, and the taxpayers were forced to cover the additional costs arising from the contractor's default.

Since government property is not subject to mechanic's liens, the laborers, material suppliers and subcontractors were without remedy if they were not paid for their services. To protect itself and those who worked on its projects, the government tried using individuals to serve as sureties. However, many of these individual sureties failed to honor their commitments, often because they did not have the financial resources to cover their obligations. So, in 1894, Congress passed the Heard Act to authorize the use of corporate surety bonds to secure privately performed federal construction contracts. In 1935, the Heard Act was replaced by the Miller Act, which is the current law requiring performance and payment bonds on federal construction projects.

It is important to note that bid, performance, and payment bonds are not intended to protect the contractors that have to post them. Instead, these bonds are intended to protect the owner of the construction project against contractor failure and to protect certain laborers, material suppliers, and subcontractors against nonpayment.

Assuming The Risk

There are only two alternative methods of performing public construction. The government may perform the contract with its own forces or retain a private contractor to perform the construction contract.

If the government uses private contractors, which ones should be chosen? Those who are solvent or those who are insolvent? Those who have the technical ability to perform the contract or those who don't? Those who will finish the contract on time and at the agreed upon price or those who won't? Those who will comply with the plans and specifications or those who will cheat? Those who follow safety procedures and operate a safe job site or those who cut corners?

The answers should be obvious. However, all contractors when seeking work will say that they are solvent, honorable, and qualified to perform the project. Of course, some may be stretching the truth.

Thus, the construction project owner would be foolish to hire any contractor that happens to walk in the door. Some prequalification screening of contractors obviously is necessary. The government elected to use the surety mechanism, so the surety assumes the prequalification responsibility and protects the government against loss when a bonded contractor defaults.

Why The System Works

Even though the taxpayers, laborers, material suppliers and subcontractors would be left without protection if there were no bonds, some people suggest that government employees should prequalify the contractors that perform government construction projects. For a number of reasons, contractor prequalification by government employees is an unattractive alternative.

For instance:

- Every contractor is unique and every construction project is different. Thus, it is impossible to use purely objective standards in making sound contractor prequalification decisions. A subjective decision made by government employees is difficult for the government to defend if it is challenged by a disappointed applicant.

  When the private surety industry is used as the prequalifier of the contractor applicant, this problem is eliminated for the government.

- Contractors that are rejected by a government official have no place to go in search of a different result except to court. Lawsuits are expensive and time-consuming. Of course, if the suit succeeds, the government is now forced to use a contractor it wanted to avoid.

  When a contractor is turned down by a surety, the contractor may seek a different result from a competitor.

- When a government prequalifier makes a mistake in judgment, the taxpayer pays for the loss, not the government official who made the bad decision.

  When the surety makes a mistake in judgment, it pays. This forces the surety to make prudent prequalification decisions, thus the government and the taxpayers are protected.

- Whenever government officials are responsible for deciding which private contractors will be allowed to perform public contracts, it is virtually impossible to prevent contractors from using political influence to obtain a favorable prequalification decision.

  When private sector sureties are used, the potential for such corrupt activity is practically eliminated.

- Contractors may be reluctant to divulge business information to a government prequalifier who is, in effect, a representative of the potential owner of the construction project.

  With private sector sureties, contractors are submitting their applications and business information to a third party, the surety, and not the party they will be contracting.

Summary

The use of corporate surety bonds makes it possible for the government to use private contractors for public construction projects under a competitive sealed bid, open competition system where the work is awarded to the lowest responsive bidder. Political influence is not a factor, the government is protected against financial loss if the contractor defaults, and certain laborers, material suppliers and subcontractors have a remedy if they are not paid, all without consequence to the taxpayer.

Small Claims - British Columbia

This information, provided to you by Lloyd Duhaime, is for informational purposes only and should not be considered as legal advice or instruction. Consult a lawyer or other legal professional for advice relating to a legal problem. Laws and Court costs can be amended with little warning and change some of the information below so make sure, if you want to "do it yourself", that you consult official court or government publications such as the official statutes of B.C. or the Gazette.

In British Columbia, the Small Claims Court is actually the civil litigation arm of the Provincial Court of B.C. In a nutshell, it is highly deformalized but very much a court of law. Any claim of a value of $10,000 or less can be brought to this forum. A claimant can even bring a claim of a higher amount to the Small Claims Court, provided he truncates or "abandons part of the claim" to the limit of $10,000 (nor can a claimant split up a single cause of action into little parts all under the $10,000 threshold). The *Small Claims Act* also precludes any cases based on defamation or malicious prosecution. These latter claims, as those claims which exceed $10,000, must go to the Supreme Court. Note also that an appeal from the Small Claims Court is to the Supreme Court. Other cases, such as residential tenancy, are also precluded from the jurisdiction of the Small Claims Court.

The Supreme Court is "stuffier" and less "lay litigant"-friendly then the Provincial Court. In the Supreme Court, judges frown on claimants that try to represent themselves, especially in complex matters of law. This is actually cherished in the Small Claims. The procedures of the Supreme Court are more extensive and less forgiving than those of the Provincial Court. Costs are greater in the Supreme Court as well. For example, an appeal to the Supreme Court of a Small Claims decision costs $200 whereas the original application to the Provincial Court costs only $75 (or $150 if the claim is for more than $3,000). Proceedings in the Supreme Court are also saddled with complex pre-trial legal procedures that only a lawyer could adequately understand; procedures which are not part of the Small Claims system. Nor is personal service always required as it frequently is in the Supreme Court; Small Claims actions can typically be served by double-registered mail.

One of the wonderful things about the Small Claims court is that the judge can "admit as evidence ... any oral or written testimony, record or other thing that the court considers is credible or trustworthy and is relevant to the matter being heard, even though the testimony, record or other thing is not admissible as evidence in any other court under the laws of evidence." Also, "a judge may conduct a trial without complying with the formal rules of procedure and evidence." That means that hearsay or parole evidence may be acceptable.

In one fell swoop, this section of the *Small Claims Act* allows the judge to "cut to the chase" of the case by eliminating many of the technical objections that lawyers like to use to implement their case strategy.

The Small Claims Court is presided by a judge of the Provincial Court. Procedure is guided by the Small Claims Rules, an easy-to-read, must-have document for anyone who will be presenting, or defending, a case before the Small Claims Court.

The first step to filing a claim is to fill out Form 1, a **notice of claim** and file it in the Provincial Court registry nearest to where the defendant lives or carries on business, or where "the transaction or event that resulted in the claim took place." In other words, the plaintiff has a choice. Rule 18 sets out special rules for serving companies.

The defendant then has 14 days from receiving the notice of claim to **reply** (again using a special Form: #2) or 30 days if served in another Canadian province, and including a reply filing fee of $25. The registrar is responsible for serving (by mail) the reply on the other parties. The defendant is also allowed to counter-claim or to enjoin a third party, if he believes that this third-party "should pay all or part of the claim."

If the defendant does not file a reply, then you'd be well advised to move quickly for a default order using Form 5 and attaching a copy of the certificate of service (Form 4A or B). If the claim is for a debt, the registrar may make an order right away. If the claim is not for a debt, the registrar will set a date for a hearing before a Small Claims judge and the defendant is "not entitled to receive notice of a hearing under this rule". In fact, the right to reply is lost except with the special permission of a judge. The default hearing is to allow the judge to determine the amount of money, or other type of order which might be appropriate.

If the defendant does file a reply, a **settlement conference** is convened. All parties receive a 14-day notice of the conference from the registrar. All parties must be at settlement conferences, with or without their lawyers failing which the judge has the authority, under Rule 7(17) to dismiss the claim or enter a payment order against the absent party. There are some exceptions. For example, a defendant who does not dispute liability, just the amount of the claim, may be excused. You'd better be prepared for the conference: rule 7(6) allows the judge to order you to pay the expenses of the other party is "the settlement conference cannot be conducted properly because a party is not prepared for it." The parties must bring all the documents that they are relying on such as correspondence, medical reports or records of expenses or losses incurred.

At a settlement conference, the judge has a wide variety of powers, all aimed at settling the case and avoiding trial if possible. For example, the judge may mediate between the parties, make an order if agreed to between the parties, and even dismiss the claim if the judge decides that it is not reasonable or "discloses no triable issue." Another important fact related to the conference is that up to that time, amendments to claims or replies may be done without the permission of the judge. After the conference, they may only be done with the permission of the judge.

If it's off to trial you go, you'll need to **summons witnesses** using Form 8, which has to be served at least 7 days before the trial date. You can order that person to bring any records that may be required (ignoring a Small Claims summons can be serious; the rules say you can be jailed for it). Again, the consequences for not attending a trial when it has been set means that your claim or reply can be rejected.

The Small Claims courts are gentle with a defendant held liable for the payment of a money award. The judgment debtor can ask for a payment hearing at which time, the court may order a payment schedule.

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http://www.duhaime.org/Civil/cabcsmal.htm

MARKETING FOR LANDSCAPE MAINTENANCE COMPANIES

By Cindy Crawford McPherson

Cindy Craw ford McPherson is a BCIT marketing instructor. She has been involved with the business side of West CoastHorticultural Services since its establishment in 1983.

Three essential questions to ask when marketing are: **What** is my product or service? **Who** is my target audience? **Where** and how do I reach my customers?

What is my product or service?
For landscape maintenance companies, possible answers could be, "I want to focus on residential work" or "commercial properties" or "municipalities and public agencies that are starting to contract out their maintenance services."

The concept here is that you consider your strengths, weaknesses, desires and dreams. As an entrepreneur you have the opportunity to choose work that interests you and affirms your strengths. For example, if you detest the need for ear protection, you may decide to focus on consumers wanting a decreased use of power equipment. To achieve this you might choose to use only manual tools thus making your service quieter and less environmentally invasive. The primary direction for your company (even if you are a one-person operation) needs to be determined before you consider your marketing options.

There are two other considerations for your product. One, the branding, includes the company name and your logo and secondly, certifications and memberships (for example, BCLNA Member, Canadian Certified Horticultural Technician (CCHT), International Certified Arborist).

As far as your company name, make it easy to say, easy to remember and reflective of your product's benefits. The gardener who is averse to power tools might call her company, "Low Impact Gardening" referring to the low impact that her company has on the environment. To be consistent with this name, she must ensure that she doesn't make impacts in other areas, practices, DDT for weed control, modified grass seed, etc. Any of these would create dissonance with her original marketing strategy.

Memberships and certifications add quality assurance to the product, giving the customer a basis by which to compare your service and assuring them that you will provide a certain standard of quality. These standards aid the consumer in measuring the level of industry Expertise. Unfortunately consumer expectations for gardeners are low and this affects consumer expectations for price. Any attempts on the industry's part to raise standards and increase the perception of quality can positively influence your business.

Who is my target audience?
To continue the example of the manual tools gardener, aspiring to maintain Simon Fraser University would be unrealistic without power tools, but smaller properties might make competitive pricing feasible. Another target market for the manual gardener could be the environmentally aware consumer.

Where and how do I reach my customers?
There are two aspects that are of interest to the landscape maintenance service business. First, you as a business owner living in White Rock might not be interested in clients on the North Shore. So for efficiency's sake, you might determine a geographic focus for your business that is within a certain travel time.

The second aspect of where, is "where and how do I reach these customers." If your ideal customer is small residential properties, you could find the location of smaller lots by looking at city plot maps and then produce a well designed brochure to be delivered by a postal code sort. If

you were looking at the environmentally aware consumer, these consumers might not live in geographic clusters but could be reached at special interest seminars and conventions. Again, geographic focus could be suggested by using a tag line such as, "serving the needs of the environmentally aware consumer in White Rock".

So in marketing your landscape maintenance business, remember the What, Who and Where.

INDUSTRY ASSOCIATIONS

BCLNA
B.C. Landscape and Nursery Association
http://www.canadanursery.com/canadanursery/bclna/index.lasso
#101 – 5803 – 176A St.,
Cloverdale, B.C.
V3S 4H5
Ph.: (604) 4-7772

FARSHA
Farm and Ranch Safety and health Association
http://www.farsha.bc.ca
#102 – 5755 Glover Rd.,
Langley, B.C.
V3A 8H4
Ph.: (604) 532-1789
Fax: (604) 532-1785

IIABC
Irrigation Industry Association of B.C.
http://www.irrigationbc.com
2330 Woodstock Drive
Abbotsford, B.C.
V3G 2E5
Ph. and Fax: (604) 859-8222

ISA
International Society of Arboriculture
http://www.isa-arbor.com/
P.O. Box GG
Savoy, IL 61874-9902
U.S.A.
Ph.: (217) 355-9422
Fax: (217) 355-9516

SOUL
Society of Organic Urban Land Care Professionals
http://www.organiclandcare.org
3533 Salsbury Way
Victoria, B.C.
V8P 3K7
Ph.: (250) 386-7685

WCTA
Western Canada Turfgrass Association
http://www.wctaturf.com
22097 Isaac Crescent
Maple Ridge, B.C.
V2X 0V9
Ph.: (604) 467-2564
Fax: (250) 467-0500

WEB RESOURCES

How to Start Your Own Business
http://www.beyourownboss.org/index.html
LOTS of information, resources, links to free stuff etc. Definitely worth your time to explore if you are thinking of starting your own business.

Business Services British Columbia – Solutions for Small Business
http://smallbusinessbc.ca/
Everything from on-line workshops in how to register your business, obtain financing, market your ideas to comprehensive resource material. FABULOUS web site. A MUST if you are thinking of starting your own business.

One Stop Business Registration On-line
http://www.onestopbc.ca/
Register your company, apply for a business license, etc. etc. Saves you TONS of time!

Employment Standards Act
http://www.labour.gov.bc.ca/esb/igm/igm-toc.htm

Workers Compensation Board of B.C.
http://www.worksafebc.com/
Here you can register on-line, pay your premiums on-line and receive the answers to most questions.

Tax Tips
http://www.taxtips.ca/

Here you can also download or check the most current version of the Occupational Health and Safety Regulations:
http://regulation.healthandsafetycentre.org/s/Home.asp

The Builders Lien Act
http://www.cwilson.com/pubs/construction/dbg1/