RiskEd

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A Risk Management Newsletter for the Schools Protection Program's Members

The SPP website is unavailable as we work to remediate a security risk identified through routine maintenance. We anticipate the website will be operational mid-February 2019. In the meantime, we have provided online access to a select number of frequently requested documents **.** Your patience is appreciated during remediation. If you have specific concerns, please contact SPP at Protection.Program@bcspp.org.

Article Summary

Please send us your feedback! We love to hear your comments and article ideas. If you would like to be on our distribution list, please contact us at Protection.Program@bcspp.org, and, feel free to distribute the newsletter.

Managing a Property Loss

Reporting

Report your loss to the Schools Protection Program (SPP) early - as early as possible. The sooner you advise us the sooner we can provide the support required to get repairs underway. The online claims reporting form is the preferred method for the claim submissions, but for a serious water or fire damage event please call the SPP office at 250-356-1794 immediately. If the incident has occurred after business hours, the message on the phone line will include instructions to reach an on call claims person.

Once your loss is reported to SPP our first responsibility will be to determine if there is coverage for the loss. Your property coverage agreement is intended to be at least as broad as a comparable commercial coverage agreement and our policy is to interpret coverage as broadly as possible and exclusions narrowly. This means we will look for ways to provide coverage to your organization within the terms of the coverage agreement.

Information required

The more information you have available, the more efficiently the SPP team can help you to bring your claim to completion. Here are examples of the type of information that you should include in your claim report (if available) or be prepared to collect:

- What was damaged? Is this property owned/ P3/ leased by the School District (SD)?
- How did the damage occur?
- When did it occur?
- What is the extent of the damage?
- Photographs of the damage?
- Police or fire departments file number and contact information for the investigating officer.
- Confirm that steps have been taken to preserve any evidence (e.g.,: retention of any failed parts or equipment).

Coverage

Generally speaking SPP provides coverage for buildings owned by a SD, all of the contents and equipment which are owned or leased by the SD and tenants improvements on any leased property (where the lease agreement holds the tenant responsible).

Coverage is all risk, meaning that every type of sudden and accidental loss is covered unless otherwise excluded. Common exclusions include: wear and tear, gradual deterioration, faulty workmanship, faulty design and manufacturers defect. However, damage which results from one of these exclusions may still be covered. As an example, this means that while SPP would not pay to replace a hot water tank which ruptures due to age, the costs to repair the resulting water damage would be covered.

SPP covers property losses where the damage exceeds $10,000.00. It may not always be obvious at the outset whether the costs will exceed the deductible. Therefore, report early to ensure that you do not inadvertently prejudice SPP's ability to investigate cause of the loss and/or to effectively control costs.

Emergency work

SDs must initiate emergency clean up upon discovery of the loss. Do not wait for SPP approval before bringing in an accredited restoration service if the size of the loss warrants additional resources. Emergency work is always costed out on a time and materials basis with a requirement for the restoration contractor to provide full supporting documentation including time sheets and materials invoices. There is no risk that reasonable costs for a covered loss would be denied by SPP simply because they were incurred before the loss was reported to us.

Mould and other contaminants can set in after 72 hours, so it is imperative that efforts be made to extract water and begin drying affected areas as soon as possible.

As soon as possible a scope of work which specifies the extent of the damage and describes what is required to stabilize the structure must be developed. The scope should be created with input from the site, restoration contractor and adjuster (if assigned). Where work is being conducted solely by the SD, a detailed description of the work involved and a time line for completion should be provided to your SPP examiner. The scope of work / description of work must include dimensions of affected rooms as well as a diagram/floor plan.

Repairs

The emergency phase is complete once the structure has been returned to a stable condition and the extent of the damage is known. A scope of work which specifies the extent of the damage and describes what is required to repair the structure must be developed. The scope should be created with input from the site, restoration contractor and adjuster (if assigned). Where the repair costs are expected to exceed $10,000 two estimates are required. As with the emergency scope the document must include dimensions of affected rooms. If competitive estimates are obtained for the repair work, based on a specified scope of damage there is no need to obtain any backup documentation with the invoice. The bid price and the invoice should match.

If competitive estimates are not obtained for the repair work, then an estimate on costs is still obtained at the outset, but the final invoice must be supported by full back up documentation (time sheets, materials and sub-trade invoices).

Any changes to the scope of repair which will impact costs must be documented and approved by SPP and/or the adjuster (if one is assigned) prior to the additional work commencing.

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Claims Resolution

Final invoicing should be provided to the site and the adjuster/SPP. We strongly recommend that you do not pay the invoices until such time as your adjuster or SPP has audited the documents and approved them for payment. Often errors are found in the invoice submissions which require correction before payment can be rendered. It is much more difficult to seek a credit back from a contractor than it is to simply pay the correct amount initially.

Any charges for SD labour to respond directly to the loss must be documented and provided to the adjuster/SPP at this time. Ensure that employee (either via name or employee number), labour rate, trade and the type of work done are clearly indicated. Any materials consumed must be documented and costed out.

Once the approved costs are finalized, SPP will forward a Statement of Damage which details the total costs (SD and any contractors) less the $10,000.00 deductible and the GST rebate of 83%. The Statement of Damage must be signed and witnessed by an appropriate signing authority and then returned to SPP in exchange for settlement funds.

Subrogation

Where there is the potential to recover from a party responsible for the damage SPP will likely require additional assistance from the SD. An investigation will be required in order to determine the cause of the loss and to identify the appropriate parties to pursue. This may require such outside expertise as engineers, architects, fire investigators etc. The SD will have a key role in providing documentation such as construction details, floors plans, contracts, maintenance records etc.

Subrogation recoveries are often lengthy and drawn out processes. There may be ongoing requests for additional information from a SD as the subrogation claim progresses.

Any funds recovered are shared between SPP and the SD on a pro-rata basis, taking into account the costs of recovery.

Cooperation

Our mandate is to work collaboratively with you to meet our common goal of returning your site to full operations efficiently, effectively and economically. Our claims examiners are readily available to answer your questions. We understand the timelines and urgency of your needs, and will endeavor to assist you accordingly. ❐

Written by SPP Claims Department
2018

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What They Wish They Knew Before Publishing

NEVER UNDERESTIMATE THE RISKS

I have defended various kinds of professionals who have found themselves on the wrong side of a defamation action. So often, my clients had a genuine need to voice criticisms of a person or company. Other times, it was just too darn easy for them to publish their own piece on social media, or to endorse and hyperlink to the defamatory words of others.

My clients often express to me that they wish they had known at the time of the publishing what would be involved in proving fair comment or truth, and the technicalities of these defences. Others wished that they had limited the scope of their publication so that they could better rely on the defence of qualified privilege, or even absolute privilege.

Often, my clients express to me that they wish they appreciated at the time of publishing how relentless the potential plaintiff would be in pursuing his or her claim. A tenacious plaintiff often believes that the publisher acted maliciously and ruined his or her life or business and believes, even where the objective facts suggest otherwise, that there is no truth to what has been said. This mindset can hamper resolution attempts and increase the likelihood of the matter going to trial.

Fortunately, this technical area of the law has an ever expanding set of cards to play to successfully defend or dismiss a defamation claim. For instance, in recent years the jurisprudence has opened the door to certain kinds of defamation claims being dismissed by way of summary trial. There are also strict pleadings rules which can greatly assist a defendant in striking part or all of a defamation claim.

However, why not stop for a moment and talk about how such claims can be avoided in the first place. Although I enjoy developing a relationship with my clients, advocating for their free speech, and defending them through the fight, I appreciate that all in all they would be happier if they had never required my litigation services. This discussion demonstrates that much can be gained by obtaining risk management legal advice, prior to publishing, regarding the words and appropriate forum to use. Such advice can save you from the time, expense and energy required to defend a defamation claim.

WHAT THEY WISH THEY KNEW: THE MEANING DEFENDED IS NOT THE MEANING INTENDED BY THE AUTHOR

A publisher rarely appreciates that the meanings and innuendoes which will have to be defended are not the meanings and innuendoes that he or she intended to convey or believed were being conveyed. If a defamation action is commenced, counsel will fight over the meanings of the words published. Plaintiff's counsel will plead and argue throughout that the most ghastly and horrendous meanings were conveyed, whilst defence counsel will seek to minimize or deny any defamatory meaning. Advocacy can be compelling in this regard given the subjectivity in determining meanings. This subjectivity is evident in determining meanings. This subjectivity is evident by the fact that our trial court and appellate court often disagree on what the words conveyed in their context.

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When considering meaning, the Court will not consider what you meant to say, but rather will look at the words conveyed, consider the context, and then arrive at a meaning which the Court believes a reasonable and ordinary reader or listener would take from the statement. Although you may testify on what you intended to convey to answer to allegations that you published with malice, the Court will not consider your own intended meaning when ruling on the meaning in fact conveyed.

The Court's determination of meaning and innuendoes will set the stage for the success or failure of the truth and fair comment defences.

WHAT THEY WISH THEY KNEW: THE LIMITS OF TRUTH

The defence of truth (formerly referred to as "justification") can provide a full defence to a claim in defamation. To succeed, the truth of every injurious imputation which the trier of fact finds to be conveyed by the publication must be proven on a balance of probabilities to be true. The Court will focus on the sting of the defamatory imputations, and whether the various stings are substantially true.

There are great risks in pleading truth where there is no evidence to support it. The failure to successfully prove facts pled to be true in a defamation action could encourage a finding of malice, which would defeat the fair comment and qualified privilege defences, and could result in aggravated and punitive damages being awarded to the plaintiff.

WHAT THEY WISH THEY KNEW: "FAIR COMMENT" IS NOT AS EASY AS IT SOUNDS

So often I hear my clients insist when first retaining me that what was said was "fair comment", without appreciating what is involved in successfully relying on this defence. To defend a statement as fair comment, one must meet the following stringent requirements: the comment must be on a matter of public interest; it must be a comment based on provable facts that are either stated with the publication or are otherwise known to the reader (such as being notorious); the comment, though it can include inferences of fact, must be recognizable as comment as opposed to a statement of fact; the comment must satisfy the following objective test: could any man honestly express that opinion on the proven facts; and, the defendant must not have acted with malice.[i]

Hence, the defamatory words must be recognizable to the ordinary reader as comment upon true facts, and not a bare declaration of facts. A comment contains an element of subjectivity and is capable of proof, whereas a statement of fact is capable of being determined to be accurate or not. An inference or deduction from facts may properly be regarded as comment, but an implication is regarded as a statement of facts.[ii] The difficulty is that the point at which criticism ends and accusation begins is not always easy to distinguish and the line between them can be, and frequently is, very tenuous.[iii] If the statement of fact and comment cannot be distinguished, the defence of fair comment is not available. The trial and appellate court often struggle and disagree with whether a statement is a statement of fact or a comment.

In most cases where the defence of fair comment is successful, the facts on which the comment is based are clearly stated in the publication, and the opinion is expressed in a way that makes it clear that the opinion is an inference or a deduction based on the stated facts.

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There must be sufficient facts that were either stated with the publication or known to the reader, which can be proven as true to support the comment. A defendant only has to prove sufficient facts to convince the Court that anyone could have honestly expressed the defamatory comment, regardless of whether the inference or conclusion was fair and whether he or she had an honest belief in the comments.[iv] It at times is difficult to establish that the facts relied upon to support the comment were notorious or otherwise known to the reader.

One could write a whole paper on the various challenges to the fair comment defence, and as such I set out above the more common challenges.

WHAT THEY WISH THEY KNEW: LIMITATIONS OF QUALIFIED PRIVILEGE

As noted above, there is often a real need to share a concern. There are certain occasions in which a person can publish, in good faith, defamatory statements which turn out to be potentially untrue. Such an occasion of qualified privilege arises where: (i) persons of ordinary intelligence and moral principle would have felt a duty to communicate the information in the circumstances; and (ii) the information was conveyed only to the recipients who had an interest in receiving the communication. This reciprocity of interest is essential as this defence will fail where some of the recipients did not have an interest in receiving the communications.

A beautiful characteristic of this defence is that it protects all kinds of personalities. The Court is required to take the defendant as it finds them, "according to their temperament, their training, their intelligence," and to recognize that some people "rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of conclusions that they reach."[v] If an occasion of qualified privilege arises "he will be protected, even though his language should be violent or excessively strong, if, having regards to all the circumstances of the case, [h]e might have honestly and on reasonable grounds believed that what [h]e wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."[vi]

This defence does not mix well with the Internet. When publishing on a website, you are publishing to the world.[vii] It does not matter if you believe that the website on which you publish would only attract readers who would have an interest in the matter. Unless you are publishing to a website which requires you to log in, and your post can only be seen by members who would have an interest in the matter, you should assume unless advised otherwise by a lawyer experienced in the area that an occasion of qualified privilege does not arise.

Before publishing on the assumption that you have an occasion of qualified privilege, you should also consider the potential need to demonstrate that you did not publish with malice. A finding of malice defeats the qualified privilege defence. Examples of circumstances where the Court will find that a publisher acted with malice include: where the publisher had a reckless indifference to whether what was being published was true or false; where the dominant purpose of publishing was to cause injury because of spite or animosity; or where the dominant purpose in publishing was another improper motive.

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Allegations of malice lead to extensive discovery on all prior dealings with the plaintiff. Even dealings with the plaintiff that occurred subsequent to the publication can be offered into evidence and potentially relied upon as extrinsic evidence of malice. Often, organizations can choose who delivers the message. If such choices are available, it is beneficial to have the messenger be the one who had the least dealings with the potential plaintiff so as to avoid extensive discovery on the malice issue.

Qualified privilege can be a vital defence when one is responding to attack. Care must be taken to, among other things, ensure that you are responding to the same audience who heard the attack and that your response is limited to what is germane and appropriate to the occasion.[viii]

WHAT THEY WISH THEY KNEW: RESPONSIBLE COMMUNCATION

In 2009, the Supreme Court of Canada recognized that the threshold for meeting the qualified privilege defence when publishing to the general public remained very high and that the criteria for reciprocal duty and interest remained unclear.[ix] Rather than working within the constraints of the qualified privilege duty and interest analysis, Supreme Court of Canada instead formulated a new defence of responsible communication. This defence focuses on the concept of public interest and responsibility for mass media communications. Responsible communications is a type of privilege which involves close scrutiny of the facts of the particular case. With this defence, it is not so much an occasion that is privileged, but the publication itself.

The defence applies where a defamatory statement, first, relates to a subject of public interest, and second, meets various requirements concerning whether the defamatory statements have been responsibly verified before a publication. This defence is primarily available to journalists but can be used by bloggers and other publishers if they meet the requirements of responsible verification.

Whether the defence will succeed will depend upon the Court's analysis of several factors, including: the seriousness of the allegation; the public importance of the matter; the urgency in getting the message out; the status and reliability of the sources; whether the plaintiff's side of the story was sought and accurately reported; whether the inclusion of the defamatory statement was justifiable; and whether the defamatory statement's public interest lay in the fact that it was made rather than its truth.

Hence, to rely on this defence, one really needs to show that he or she diligently investigated the matter and if possible sought the plaintiff's side of the story before publishing.

WHAT THEY WISH THEY KNEW: ABSOLUTE PRIVILEGE WHEN REPORTING OTHERS

When someone makes a complaint to the police, or makes a complaint about a professional to a professional regulatory body, or files pleadings or provides testimony, he or she can do so within the sanctity of absolute privilege, provided that certain safeguards are taken.

The defence of absolute privilege exists to protect the functioning of the judicial and quasi-judicial process and to encourage individuals to participate in the judicial or quasi-judicial process without fear of exposing themselves to civil action.

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An occasion of absolute privilege exists if the purpose of the communication is sufficiently related to, or necessary for, the judicial or quasi-judicial proceedings. Hence, a letter initiating a complaint, correspondence to and from, or testimony given in relation to the proceeding, would be protected. However, the protection of absolute privilege does not extend outside of the proceedings, and as such, discussing or republishing the complaint, submissions or evidence outside of the proceeding, will not be protected by this defence.

The privileged occasion of absolute privilege exists even if the complaint is found to be without merit and is dismissed at an early stage; this is because the purpose of the immunity would be undermined if absolute privilege only applied where the complaint leads to a successful proceeding.[x]

An occasion of absolute privilege only exists where the body or society to whom the complaint is made is quasi-judicial in nature as opposed to merely administrative. Hence, in *Sussman v. Ealesxi*, the Court found that the manager of a nursing home was protected by an occasion of absolute privilege when making a complaint about a dentist to the Royal College of Dental Surgeons, but was not protected by an occasion of absolute privilege when forwarding a copy of the complaint to the Waterloo-Wellington Dental Society.

Publications that are not necessary to further the judicial or quasi-judicial process may in some cases be protected by an alternative defence of qualified privilege.

It is therefore essential when making a complaint to the police or to a regulatory body, or providing evidence to further a complaint, that one ensures that the communication is made only to the appropriate judicial or quasi-judicial body, and that is not copied to disinterested parties. When in doubt, before bringing your complaint seek risk management legal advice to ensure that you can report within the protection provided by absolute privilege.

WHAT THEY WISH THEY KNEW RE: IT DOES NOT MATTER THAT THE WORDS WERE NOT YOUR OWN

There is a general rule that a publisher is not liable for their words being republished by a third party if the publisher did not authorize or intend for the republication to be made. There are exceptions to this general rule of which to be aware. Such exceptions include where the publisher implicitly or explicitly authorizes someone to communicate the defamatory remark to another, or where the republication was the natural and probable consequence. These exceptions only apply and result in liability for the republication of your words by another person where the substance of the defamatory statement is the same, or substantially similar to your original publication.

Most recognize that if they speak to a journalist, or send a message with an invitation that it can be shared with others, that they are liable for the resulting publication by the journalist or words republished in accordance with their invitation.

The Internet also opens up a whole new area of potential liability, namely the potential for Facebook page operators, website operators and Internet service providers to be liable for postings made by third parties on their Facebook page or website. Taking into account the basic principles of libel law in Canada, and recent decisions involving Internet defamation,[xii] one can be liable

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for defamatory statements posted by third parties if the provider knew of the publication or ought to have known of the publication by the third party but failed to remove it. At issue in such cases is whether the Facebook owner or website operator was an innocent disseminator.

Hence, if you have a website or a social media account, beware that you are also liable for the publications of others which appear on your site once you have knowledge of the defamatory publication but fail to remove it.

Be careful what you hyperlink to. While the simple act of hyperlinking to a website that contains defamatory material is insufficient for liability to arise for any defamatory publication at the hyperlink, liability will arise if the hyperlinking is done in a way that includes an adoption or endorsement of the defamatory content of the hyperlink. The Court will consider the words published with the hyperlink, as well as whether the hyperlink was to a "deep link" directly to the defamatory words, or to a shallow link to the home page of the website hosting the defamatory statement deep within its site.[xiii]

MANAGING YOUR RISK

As evident above, the defences to defamation claims each have their own technicalities and limits.

Given the time and energy that goes into defending a defamation claim, and the potential steep financial and reputational risks that losing a defamation lawsuit can bring, we recommend consulting a lawyer before publishing potentially defamatory materials. With proper risk management legal advice, you can limit your risks by more carefully conveying your message, ensuring that only those who have an interest in the matter hear your concerns and, depending on which defence you may be relying on, ensuring that the necessary factual foundation to support your statement is present.

Defending defamation claims can be very costly. Appropriate insurance coverage for your publications is vital.

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[i] *Simpson v. Mair*, 2008 SCC 40
[ii] *Kemsley v. Foot,* [1952] AC 345 (H.L.)
[iii] *Boland v. The Globe and Mail Ltd.,* [1961] 21 D.L.R. (2d) 401 (Ont. C.A.)
[iv] *Simpson v. Mair,* 2008 SCC 40
[v] *Horrocks v. Lowe*, [1974] 1 All E.R. 662 (H.L.)
[vi] *Adam v. Ward*, [1916-17] All E.R. 157 (H.L.)
[vii] See for example *Rubin v. Ross*, 2013 SKCA 21
[viii] See for example *Wooding v. Little*, (1982), 24 C.C.L.T. 37 (B.C.S.C.); *Ward v. Clark* 2001 BCCA 724; *Tucker*
[v] *Douglas*, [1952] 1 S.C.R. 275

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[vi] *Adam v. Ward*, [1916-17] All E.R. 157 (H.L.)
[vii] See for example *Rubin v. Ross*, 2013 SKCA 21
[viii] See for example *Wooding v. Little*, (1982), 24 C.C.L.T. 37 (B.C.S.C.); *Ward v. Clark* 2001 BCCA 724; *Tucker v. Douglas*, [1952] 1 S.C.R. 275
[ix] *Grant v. Torstar Corp*., 2009 SCC 275; *Quan v. Cusson*, 2009 SCC 62
[x] *Hung v. Gardiner*, 2003 BCCA 257
[xi] *Sussman v. Eales*, (1985) 33 CCLT 156; rev'd in (1986) 25 CPC (2d) 7 (Ont. C.A.)
[xii] *Weaver v.* Corcoran, 2015 BCSC 165; *Pritchard v. Van Nes, 2016 BCSC 686; Carter v. B.C. Federation of Foster Parents Assn.* (2003), 27 B.C.L.R. (4th) 123 (B.C.C.A.); 42 B.C.L.R. (4th) 1 (B.C.C.A.). The latter case was the first Canadian case addressing this issue in the internet realm. Our firm was counsel for the Defendant, B.C. Federation of Foster Parents Association.
[xiii] *Crookes v. Newton*, 2011 SCC 47

KAREN R. ZIMMER
Partner
ALEXANDER HOLBURN BEAUDIN + LANG LLP
Barristers + Solicitors

2700 - 700 West Georgia Street
Vancouver, BC Canada V7Y 1B8
Direct: 604.484.1762
http://www.ahbl.ca/people/lawyers/karen-zimmer/) / kzimmer@ahbl.ca

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Karen Zimmer is partner at Alexander Holburn Beaudin + Lang LLP who leads the firm's Defamation + Publication Risk Management Practice Group. Her libel and slander practice involves defending media, regulatory bodies, health authorities and professionals, school boards, colleges and universities, municipalities, non-profit associations, and other professionals. Ms. Zimmer also represents clients in a variety of director and officer liability matters, complex commercial litigation matters and society disputes.

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The Interplay Between BC's Statutory Tort of Privacy and the Tort of Defamation

Defamation law and breach of privacy law are separate and distinct, but the two torts are occasionally brought before the courts in the same matter. An attack on an individual's reputation can be done in a manner that also contravenes privacy rights. That said, the courts have little patience for litigants who confuse the two issues or who plead both causes of action when only one is appropriate. Accordingly, understanding the differences between these torts and the legal principles that inform them is paramount when dealing with an action in this area of the law.

For a successful defamation claim, a plaintiff has to establish three elements: that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; that the words referred to the plaintiff; and that the words were published.[1] This is a relatively low threshold and most defamation actions are decided on whether the defendant can make out one or more of the well-developed defences to a defamation action, such as truth, qualified privilege, fair comments or responsible communications.

In comparison to the law on defamation, the law on privacy in Canada is in its infancy.[2] There is currently no common law tort of invasion or breach of privacy in British Columbia.[3] Instead, we have a statutory tort of privacy through the *Privacy Act, R.S.B.C. 1996, c. 373* (the "Act"). Section 1 of the Act provides:

> 1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

The nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances and a court must consider the alleged breach of privacy contextually. Importantly, the scope of this right to privacy is fluid. As put by Justice Sharpe of the Ontario Court of Appeal, certain provincial legislatures, including BC's, have "proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right".[4] This leaves significant room for argument by parties bringing and defending these claims.

Manitoba, Saskatchewan, and Newfoundland have all enacted similar legislation that creates a statutory tort of privacy.[5] Under Quebec law, the right to privacy is protected under the *Civil Code of Quebec* and by Quebec's *Charter of Human Rights and* Freedoms.[6]

While Ontario lacks equivalent legislation to BC's, the Court of Appeal confirmed the existence of a common law tort of intrusion upon seclusion in Ontario in *Jones v. Tsige, 2012 ONCA 32*. The Court highlighted that allowing a cause of action for an invasion of privacy is particularly important with how significantly technology has impacted the ability to protect one's personal information.[7]

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Causes of action involving BC's tort of privacy are often brought under section 1(4) of the Act, which specifically addresses eavesdropping and surveillance.

For example, in *Wasserman v. Hall,* 2009 BCSC 1318 the defendant was awarded damages against the plaintiff, his neighbour, who installed surveillance cameras that overlooked the defendant's yard in connection with their heated residential fence dispute.[8] In *Watts v. Klaemt*, 2007 BCSC 662 the plaintiff was awarded $30,000 in damages after the defendant had monitored and recorded her phone line for over a year and then turned over information gathered during that time period to the plaintiff's employer, resulting in her termination.

Section 3(2) of the Act, which prohibits one from using the name or portrait of another for advertising without that person's consent, is at issue in the ongoing *Douez v. Facebook* class action. The plaintiffs in this case are asserting that Facebook used the name and picture of Ms. Douez and potentially of 1.8 million other British Columbians without consent. This case has attracted considerable attention as a result of the Supreme Court of Canada's June 2017 decision, *Douez v. Facebook, Inc., 2017 SCC 33*, in which Facebook was unsuccessful in ousting Ms. Douez's class action from the reach of our British Columbia Court.

Facebook attempted to do so by relying on the forum selection clause contained in its Terms of Use pursuant to which every user of Facebook agrees, by a click of the mouse, to submit to the California Court and California laws for any dispute that may arise. The Supreme Court of Canada's decision not to enforce this forum selection clause is discussed in a recent blog post. Ms. Douez's class action alleging the breach of section 3(2) of the Act will now be pursued through our British Columbia Court.

Matters brought under sections 1(4) and 3(2) generally do not involve defamation, since the disputes are over intrusions into the plaintiffs' lives rather than the dissemination of information. As noted by Chief Justice McLachlin of the Supreme Court of Canada in *Grant v. Torstar Corp., 2009 SCC 61*, privacy protection does not figure prominently in defamation jurisprudence in part because "defamation law is concerned with providing recourse against false injurious statements, while the protection of privacy typically focuses on keeping true information from the public gaze".[9]

However, cases involving both defamation and breach of privacy are coming up more and more. The courts take care to consider the two issues separately, so it is critical to make distinct, well-reasoned arguments.

In *Griffin v. Sullivan*, 2008 BCSC 827, the plaintiff successfully argued that the defendant breached his privacy and defamed him. It was held that the defendant improperly obtained the plaintiff's name and other personal information, attached it to defamatory statements regarding the plaintiff, and published it on the Internet. The judge was careful to analyze the law of defamation and the law on breach of privacy separately and broke down the plaintiff's damage award accordingly.

The plaintiff in *Hollinsworth v. BCTV*, 1996 CarswellBC 2820, [1996] B.C.J. No. 2638 (S.C.), affirmed (aff'd) in (1998) 59 B.C.L.R. (3d) 121 (C.A.), had undergone surgery to correct his baldness. In doing so, he signed a release permitting the doctor to film the procedure and share the recording with other physicians for training purposes only.

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Seven years later, BCTV was doing a story on baldness and its treatment and got in contact with Look International, an organization which the plaintiff's doctor had released the training video to. Look International provided the video to BCTV and lied about having permission from the plaintiff to do so. BCTV aired the clip, which showed the plaintiff's full face for approximately three seconds.

The plaintiff brought an action for libel and for breach of privacy. He was not successful in his libel claim, because the court found that the video was true – he had undergone treatment for baldness. However, the plaintiff was successful on the grounds of breach of confidentiality and breach of his right to privacy under the Act against Look International. Again, the judge considered the issues separately and distinctly.

These issues also come up in more protracted, complex disputes. In *Nesbitt v. Neufeld, 2010 BCSC 1605*, aff'd in 2011 BCCA 529, the defendant, Ms. Neufeld, sought damages from the plaintiff, Dr. Nesbitt, for defamation and breach of privacy in her counterclaim. The plaintiff engaged in inappropriate conduct throughout the course of the custody dispute, including: faxing intimate email exchanges Ms. Neufeld had had with a subsequent partner to the partner's work repeatedly; writing letters to the Rotary Club Ms. Neufeld belonged to suggesting that she was mentally unstable, sexually deviant, lied about him in court, and was exposing their daughter to pedophiles; sending letters to the Ministry of Child and Family Development suggesting the same; posting a video to YouTube about Ms. Neufeld; creating two malicious websites about her; and so on.

The Court was careful to consider the defendant's claims for defamation and breach of privacy discretely. It found the documents written by the plaintiff about the defendant to be defamatory and the dissemination of the defendant's personal email correspondence to be a breach of privacy under the Act. Although the two issues were considered separately, the Court awarded global damages of $40,000 for both torts.

If you are thinking of bringing a defamation claim in addition to a breach of privacy claim, or if you are the defendant in an action where both claims have been brought against you, remember that although there may be some overlap, the courts consider the two issues independently of one another. Keep in mind that the courts tend to have minimal tolerance for plaintiffs that plead multiple unnecessary causes of action. Accordingly, attempts to inappropriately "dress up" a defamation claim as a breach of privacy claim as well, or vice versa, are ill-advised.[9] We recommend that you consider retaining counsel that can highlight such issues for the court and effectively navigate these complex areas of the law if you find yourself in the unfortunate position of having to mount or defend such a claim. ❐

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[1] *Lougheed Estate v. Wilson, 2017 BCSC 1366* at para. 155

[2] Raymond Brown, *Brown on Defamation*, 2nd ed (Toronto: Thomson Reuters Canada) at 1.6

[3] *Hung v. Gardiner, 2003 BCCA 257*

[4] *Jones v. Tsige, 2012 ONCA 32* at para. 54

[5] At para. 52

[6] *Ibid* at para. 53

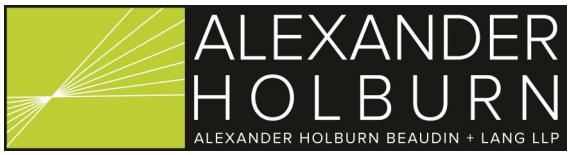
[7] *Ibid* at paras. 65-67

[8] See also *Heckert v. 5470 Investments Ltd., 2008 BCSC 1298*, wherein the plaintiff was also awarded $3,500 after surveillance cameras were installed directly outside of her front door by her apartment's building management to specifically track her movements.

[9] At para. 59

[10] *Niemela v. Malamas & Niemela v. Google Inc., 2015 BCSC 1024* at para. 51

Karen R. Zimmer, Partner
Alexander Holburn Beaudin + Lang LLP
Barristers + Solicitors
2700 - 700 West Georgia Street , Vancouver, BC
V7Y 1B8
Direct: 604.484.1762
http://www.ahbl.ca/people/lawyers/karen-zimmer/) /
kzimmer@ahbl.ca



The assistance of Emma Waterman, temporary articled student, in preparation of this post is gratefully acknowledged.

Karen Zimmer is partner at Alexander Holburn Beaudin + Lang LLP and leads the firm's Defamation + Publication Risk Management Practice Group. Her libel and slander practice involves defending media, regulatory bodies, health authorities and professionals, school boards, colleges and universities, municipalities, non-profit associations, and other professionals. Ms. Zimmer also represents clients in a variety of director and officer liability matters, complex commercial litigation matters and society disputes.

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PREGNANCY LEAVE: A Brief Explanation of Maternity and Parental Leave

Leaves from work are essential for pregnant women and families to ensure the health and well-being of biological mothers and newborn children. A clear understanding of the logistics of maternity and parental leave is critical to effectively planning one's leave. An issue that has been raised is gender discrimination in supplementary benefits plans based on the unavailability of maternity benefits for biological fathers. This article seeks to provide a general understanding of pregnancy and parental leave and address potential gender discrimination in supplementary benefits plans.

Pregnancy Leave

In British Columbia, the *Employment Standards Act*[1] gives pregnant employees the statutory right to request pregnancy leave, otherwise known as maternity leave. Maternity leave serves to protect the health and well-being of new mothers undergoing pregnancy, labour, or childbirth, or recovering from childbirth. Furthermore, maternity leave facilitates a reasonable and safe return to the workplace. Pregnant employees are entitled to up to 17 consecutive weeks of unpaid leave, which can begin as early as 11 weeks before the expected birth date and end no later than 17 weeks after the actual date of birth[2].
Pregnant employees may qualify for employment insurance (EI) benefits for up to 15 weeks of their maternity leave under the *Employment Insurance Act*[3].

Parental Leave

Employees are also entitled to parental leave under the *Employment Standards Act*. Parental leave entitles birth mothers to an additional 35 consecutive weeks of unpaid leave beginning immediately after the end of their pregnancy leave.[4] The other parent is entitled to 37 consecutive weeks of unpaid leave, which must be claimed within a 52 week period after the child is born.[5] An adoptive parent is also entitled to 37 consecutive weeks of unpaid leave, which must be claimed within a 52 week period after the child is placed for the purpose of adoption.[6]

Under the *Employment Insurance Act*, employees may qualify for EI benefits during their parental leave to supplement their income. The federal government's proposed budget for 2018-2019 amends existing leave benefits by allocating funding for the introduction of a new EI Parental Sharing Benefit, which will create a "use it or lose it" incentive for each parent to take parental leave.

Supplementary Benefits

Often times, organized bodies of employees, such as unions, come together to negotiate collective agreements with their employers which may give them additional benefits on top of their statutory entitlements. For example, a supplementary benefits plan may give employees partial wages while on maternity leave. These plans often act as "top-ups" to benefits received under the federal employment insurance scheme.

Benefits plans set in collective agreements have the ability to extend maternity-related financial benefits to biological mothers while excluding biological fathers and adoptive parents. This has raised concerns of potential gender discrimination against biological fathers and concerns of family status discrimination to adoptive parents. However, the ineligibility of biological fathers for benefits related to maternity leave under a collective agreement has been found to be not in violation of the BC *Human Rights Code* ("the *Code*").[7]

In a case brought before the BC Human Rights Tribunal, the claimant, a male nurse employed by a BC Health Care Agency, brought an action claiming discrimination contrary to section 13 of the *Code*. The action was based on discrimination in the claimant's employment because of apparent gender discrimination within a maternity benefits plan. The claimant was a biological father who did not receive the supplementary maternity-related financial benefits set out in the collective agreement negotiated by his bargaining association.[8]

The Court held that a biological father's ineligibility for pregnancy and maternity-related benefits under a collective agreement did not violate equality rights, and was therefore not contrary to the *Code*. The Court recognized that differential treatment in the availability of maternity leave benefits is necessary to ensure the equality of women, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination.[9]

Although this case specifically involved a Health Care Agency, the decision of the Tribunal is relevant for school districts and post-secondary institutions in the province which have collective agreements that provide pregnancy and maternity-related benefits exclusively to women. A similar claim brought forward by an employee of a BC school district or a post-secondary institution would likely be decided in the same way.

In conclusion, collective agreements between employers and employees may provide additional benefits to employees on top of statutory allowances. However, a collective agreement that provides differential treatment in favor of pregnant women for the availability of maternity leave benefits does not constitute a human rights violation. This differential treatment is necessary to ensure equality in the workplace and the well-being of pregnant employees. ❐

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[1] *Employment Standards Act*, RSBC 1996, c 113.
[2] *Ibid*, s. 50.
[3] *Employment Insurance Act*, SC 1996, c 23, s. 12(3)(a).
[4] *Employment Standards Act*, *supra* note 1 at s. 51(1)(a).
[5] *Ibid*, s. 51(1)(b).
[6] *Ibid*, s. 51(1)(d).
[7] *Human Rights Code*, RSBC 1996, c 210.
[8] *World v Health Employers Association of BC*, 2016 BCHRT 58, 2016 CarswellBC 1166.
[9] *Ibid*.

JUSTIN DOSANJH, BA (hons)
University of Victoria Law Co-op Student
2017

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Managing Your Organization's Risk of Employee Fraud

The recent BC Supreme Court decision in *Vancouver Coastal Health Authority v Moscipan*, 2017 BCSC 2339 sends a message to the public that they will not benefit from the misdeeds of others when they know or ought to know of unlawful gains. Furthermore, this case highlights the various red flags that employers should be aware of in order to recognize employee fraud, and the steps that employers can take to proactively manage this risk. This article will outline the facts of the case and the decision of the Court, and then offer some insights about how an organization can effectively manage its risk of employee fraud.

Background

Wanda Moscipan was a long-term employee in a position shared between the Vancouver Coastal Health Authority (VCHA) and the Faculty of Medicine at the University of British Columbia (UBC). Between 2003 and 2011, Ms. Moscipan stole and defrauded from the two institutions over an estimated one million dollars, of which approximately $570,000 was taken from VCHA. Ms. Moscipan accomplished this primarily by having busy physicians sign blank cheque requisitions which she directed into an account she controlled. She then used money in the account to pay herself, her husband and their son as well as write cheques for outstanding Visa balances held in their names. In October 2010, Ms. Moscipan was diagnosed with a terminal form of cancer and took medical leave, but asked to continue working evenings. A new Department Head at UBC became suspicious of some of Ms. Moscipan's behaviours, as Ms. Moscipan was not cooperative with him or with the temporary person hired to assist him. In February 2011, the Department Head went to the Dean of Medicine at UBC and requested an audit be conducted of his Department. Shortly after the audit began, Ms. Moscipan transferred a half interest in the family home to her husband, Miroslaw Moscipan. The audit uncovered bookkeeping and accounting irregularities, which led to Ms. Moscipan being relieved of her role at the university in August 2011. A subsequent investigation led to the discovery that Ms. Moscipan was paying herself 100 per cent of a full-time salary from the university, when it should have only been 20 per cent. It was also discovered that Ms. Moscipan gave herself a three percent raise by forging the signature of UBC's Department Head. Ms. Moscipan's fraudulent use of the VCHA account was later uncovered.

Unfortunately, Ms. Moscipan passed away in July 2012. VCHA and UBC filed separate lawsuits against Ms. Moscipan's estate and Mr. Moscipan for the recovery of the misappropriated funds. At this date, the UBC lawsuit has not gone to trial.

Court Decision

Liability of Ms. Moscipan's Estate for Conversion and Fraud

Ms. Moscipan's liability was not contested at trial, but a summary of the damages suffered by VCHA as a result of her conversion and fraud was provided by the court. The tort of conversion was defined by the Supreme Court of Canada in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31 as the "wrongful interference with the goods of another, such as taking, using, or destroying these goods in a manner inconsistent with the owner's right of possession." Ms. Moscipan was found to have clearly committed the tort of conversion by taking the funds of VCHA and using them for her own benefit. In *Bruno Appliances and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, the Supreme Court of Canada defined the tort of civil fraud as consisting of the following elements: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. Again, Ms. Moscipan was found to have clearly committed the tort of civil fraud by knowingly making false representations which caused medical staff from VCHA to authorize payments to the account that Ms. Moscipan controlled, resulting in a substantial loss to VCHA. As such, liability against Ms. Moscipan's estate was established.

Liability of Mr. Moscipan for Knowing Receipt

One of two focal points at trial was the liability of Mr. Moscipan, who denied that he was aware of, or had anything to do with, his wife's fraud. Mr. Moscipan was a stay-at-home parent, and so the family's only source of income was Ms. Moscipan's salary of approximately $75,000 per year (after all source deductions). There was no evidence at trial that Mr. Moscipan had direct involvement in or knowledge of Ms. Moscipan's fraud. Sometime prior to the fraud, Ms. Moscipan received a substantial amount of money from her father. Mr. Moscipan argued he suspected both that his wife was receiving even more money from her father and that her salary was more than $100,000 per year, given that he thought by working for the two institutions she was actually working more than one full-time position.

As Mr. Moscipan did not hold a position of trust within VCHA, it had to be determined whether he may be held liable to VCHA for his wife's conversion and fraud. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 85 at para. 19, the Supreme Court of Canada determined that "liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property," referred to as "knowing receipt." In these "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, the Court held that constructive knowledge, which is knowledge of facts sufficient to put a reasonable person on notice or inquiry, will suffice as a basis for liability. Mr. Moscipan was found to have constructive knowledge of his wife's conversion and fraud, as a reasonable person in his position would have had sufficient knowledge of the facts to be put on notice or inquiry. Evidence tendered at trial, including expert opinion, showed the Moscipan family led a richer lifestyle than a typical family of their size with a net income around $75,000. For example, over the period of the fraud, the Moscipan family purchased approximately 15 vehicles and spent

approximately $23,000 per year on food when the average family in their circumstances spends approximately $9,000 per year on food. Furthermore, Mr. Moscipan gave evidence that he was suspicious of where his wife was receiving her additional income.

Mr. Moscipan was found liable for knowing receipt for all funds which exclusively benefited him, as well as half of all funds attributable to "family expenses," being those expenses for which both spouses were responsible or received a benefit.

Fraudulent Conveyance of the Family Home

Finally, the Court examined whether the disposition of the family home by Ms. Moscipan was intended to delay, hinder or defraud creditors under the *Fraudulent Conveyance Act,* R.S.B.C. 1993, c. 163. If the disposition was found to be a fraudulent conveyance, the Court could order that the family home be sold to satisfy the judgment against the estate of Ms. Moscipan. As indicated in *Kelly v. Gonzalez*, 2014 BCSC 1269 at para. 41, when one or more of the "badges of fraud" are shown to be present, a presumption of fraud arises, causing an evidentiary burden to be placed on the parties to the conveyance to explain the circumstantial evidence of fraud. The following factors are all considered to be badges of fraud: (1) the state of the debtor's financial affairs at the time of the transaction; (2) the relationship between the parties to the transfer; (3) evidence of haste in making the disposition; (4) the timing of the transfer relative to notice of debts or claims against the debtor; and (5) whether the transferee gave valuable consideration for the transfer. The Court concluded that all the badges of fraud were present, causing a presumption of fraud to arise. It was further determined that the circumstances of this case made it apparent Ms. Moscipan's intent in transferring a half interest in the family home to her husband was to protect her family by delaying, hindering or defeating VCHA, meaning it was ultimately a fraudulent transfer. As such, the Court ordered that the conveyance by Ms. Moscipan to Mr. Moscipan was a nullity.

Lessons Learned

This case provides a clear example of a number of red flags which may signal that an employee is partaking in fraudulent activities. While none of the below factors are conclusive evidence of employee fraud, they are important indicators that all personnel should be educated about.

Red flags related to personnel may include:

- The employee is in financial trouble, such as having significant personal debt or credit problems.
- There is instability in the employee's personal life, including family situations causing financial stress such as a divorce, or habits such as gambling, alcohol use, or drug use.
- The employee refuses to take their vacation or sick leave.
- The employee requests to work outside normal business hours, is often the first to arrive at work, or is the last to leave.

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- The employee refuses to share work responsibilities, particularly relating to the control of financial records.
- The employee is easily annoyed at reasonable process-related questions about their work.
- The employee is highly trusted and heavily relied upon by those with financial authority.
- The employee has started to make purchases which seem inconsistent with their personal or family income, such as new properties, vehicles, or other expensive goods.

Red flags related to accounting practices may include:

- Payments made at unusual times of the day or the week, or payments which are out of season.
- Transactions being processed too frequently or not enough, or just generally outside of what the expected pattern should be.
- Payments being made for unusual accounts, such as too many large or small transactions, or too many transactions involving round numbers.
- A high number of refunded, altered, or voided transactions.

Questionable parties involved in the transactions, such as outside parties which do not typically receive payments from the company.

Most importantly, this case highlights the need for organizations to create a "risk aware culture", which aims to bring every level of the organization together to effectively identify, assess, and manage risks. These are five key principles or processes that can provide guidance to organizations of various sizes and types in establishing an environment to manage their risk of fraud. These principles or processes are as follows:

- Including a **Fraud Risk Management Program** in an organization's governing structure, which conveys the expectations of the board of directors and senior management regarding how to properly manage risks of fraud through written policies that encourage ethical behaviour.
- Conducting periodic **fraud risk assessments,** tailored to the organization's size, complexity, and industry, which include risk identification, an assessment of risk likelihood and significance, and risk response. Fraud risk assessments should include input from various individuals throughout the organization, including accounting or finance personnel, risk management personnel, opera -tions personnel, internal audit personnel, and legal personnel.

- Establishing **fraud prevention techniques**, such as policies, procedures, and training to avoid potential fraud risk events. Prevention techniques could include background checks on potential employees, anti-fraud training, tailoring the authority of personnel to their level of responsibility, rotating employees through different positions, dividing responsibility among multiple employees, requiring employees to take vacations, not allowing the signing of blank cheques, and reviewing third-party and related-party transactions.

- Implementing **fraud detection techniques** to uncover fraud events if they do occur. One of the strongest fraud deterrents is awareness that the organization has effective detection techniques. Educating employees about the "red flags" listed above is an example of an effective fraud detection technique. Other techniques include reconciliations, independent reviews, physical inspections, data analysis, and unannounced audits.

- Designing both an effective **reporting process** to obtain input on potential fraud, and a coordinated approach to **investigative and corrective action** to address allegations of potential fraud and instances of non-compliance. Organizations that investigate and prosecute cases of employee fraud reduce their crime losses by receiving compensation from those who are found liable, and also by establishing a reputation for being tough on crime, therefore dissuading employees from attempting to commit fraud against the organization.

Those who either directly commit conversion or fraud against an organization, or benefit from these offences, will be held accountable by the courts. This includes those who are in "knowing receipt" of unlawful gains, meaning that a reasonable person in their position would have had sufficient knowledge to be put on notice or inquiry. In addition to the actual sum lost to a fraudster, these losses can be very disruptive to a workplace due to the time and cost involved in undertaking investigations and corrective measures, as well as recruiting and training replacement staff. Employee fraud can also have negative impacts on staff morale and productivity, and may cause an organization to suffer reputational harm. Besides avoiding workplace disruptions, an organization which has proper fraud prevention policies and practices in place may be able to save a vulnerable employee who is undergoing unusual stress from making a bad decision. Start having a conversation with your organization's board, senior management, and internal auditors about how you can take steps to manage your risk of employee fraud. [1] ❒

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[1] Institute of Internal Auditors, the American Institute of Certified Public Accountants & Association of Certified Fraud Examiners, *Managing the Business of Risk: A Practical Guide* (2009). Note: This publication has been endorsed by the Chartered Accountants of Canada and the Association of Certified Fraud Examiners.

Megan Parisotto
University of Victoria Law Co-op Student
2018

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Staff Changes

Our team is growing!

SPP welcomes Betsy Jensen-Jacobsen and Sarah Mokry to our team.

Betsy joined the SPP team in May 2018 in the role of Risk Management Consultant. Betsy comes to the branch with the Canadian Accredited Insurance Broker (CAIB) designation and over 15 years' experience in the private sector working as a personal lines insurance broker.

Sarah joined the SPP team in June 2018 in the role of Risk Management Consultant. Sarah comes to the branch with the Chartered Insurance Professional (CIP) designation and over 15 years' experience working in the insurance industry. Sarah has spent the past 10 years specializing in commercial underwriting.

Betsy and Sarah are welcome additions to our team and they look forward to meeting and working with you in their new roles.

Useful Links

Have you heard about the YouthSafe Outdoors Online?

The YouthSafe 2018 License and Subscription is now available!

Contact YouthSafe at http://www.youthsafeoutdoors.ca/yso-introduction-to-online-resources for more information and to arrange training.

Play It Safe!

As a reminder, the Vancouver School Board and ActSafe have developed a Safety Manual for School Theatres and Studios.

This informative resource is available at:

https://www.actsafe.ca/wp-content/uploads/2017/10/Play-It-Safe-Safety-Manual-PDF.pdf

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About Our Organization

We are the Client Services Team for the Schools Protection Program (SPP). SPP is a self-insurance program which is funded by the School Districts of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the University, College & Institute Protection Program and the Health Care Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing, and claims and litigation management to SPP member entities including all BC School Districts. ***Risk Ed*** is published twice a year by SPP.

SPP Contact Information

MAILING ADDRESS:
PO BOX 3586 Victoria BC V8W 1N5

CLAIMS FAX: 250-356-0661
CLAIMS EMAIL: **RMBClaims@gov.bc.ca**

RMB MAIN RECEPTION: 250-356-1794

RMB MAIN FAX: 250-356-6222

E-MAIL: Protection.Program@bcspp.org

WEBSITE: www.bcspp.org

Our Team of Professionals

Andrew Green – Director, Client Services (778) 698-5744 andrew.green@gov.bc.ca
Jeffrey Milne – Senior Risk Management Consultant (778) 698-5748 jeffrey.milne@gov.bc.ca
Kira Kenny - Senior Risk Management Consultant (778) 698-5740 kira.kenny@gov.bc.ca
Lori Watson - Risk Management Consultant (778) 698-5715 lori.watson@gov.bc.ca
Betsy Jensen-Jacobsen - Risk Management Consultant (778) 974-2337 Betsy.Jensen-Jacobsen@gov.bc.ca
Sarah Mokry - Risk Management Consultant (778) 698-2039 Sarah.Mokry@gov.bc.ca

Kim Oldham – Director, Claims and Litigation Management (778) 698-5733 kim.oldham@gov.bc.ca
Grant Warrington – Senior Claims Examiner/Legal Counsel (778) 698-5723 grant.warrington@gov.bc.ca
Kash Basi - Senior Claims Examiner/Legal Counsel (778) 698-5734 kash.basi@gov.bc.ca
Kevin Kitson - Senior Claims Examiner/Legal Counsel (778) 698-5735 kevin.kitson@gov.bc.ca
Kirsten Coupe - Senior Claims Examiner/Legal Counsel (778) 698-5713 kirsten.coupe@gov.bc.ca
Margo Piikkila - Senior Claims Examiner (778) 698-5749 margo.piikkila@gov.bc.ca
Roberta Flett - Senior Claims Examiner (778) 698-5750 roberta.flett@gov.bc.ca
Suzanne Armour - Senior Claims Examiner (778) 698-5753 suzanne.armour@gov.bc.ca
Michael Robinson - Claims Examiner (778) 698-7554 michael.w.robinson@gov.bc.ca
Rossana Cleriti - Senior Claims Clerk (778) 698-5751 rossana.cleriti@gov.bc.ca

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