HANDLE WITH CARE

Volume 14, Issue 3 **Spring 2019**

A Risk Management Newsletter For the Health Care Protection Program Members

The HCPP website is unavailable as we work to remediate a security risk identified through routine maintenance. We anticipate the website will be operational in the near future. In the meantime, we have provided online access to staff contact information and a select number of frequently requested documents. Your patience is appreciated during remediation. If you have specific concerns, please contact HCPP at HCPP@gov.bc.ca.

Article Index and 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 HCPP@gov.bc.ca. And, please feel free to distribute the newsletter to anyone that may be interested.

INCLUSIVE LANGUAGE

In July 2018, the BC Public Service Agency's published "Words Matter: guidelines on using inclusive language in the workplace" [1]

Handle with Care has adopted the principles of this directive and will be using an inclusive language format. "Inclusive language is language that is free from words, phrases or tones that reflect prejudiced, stereotyped or discriminatory views of particular people or groups. It is also language that does not deliberately or inadvertently exclude people from feeling accepted. The use of inclusive language plays an important role in promoting respectful workplaces and demonstrates our commitment to public service values." [2]

The annual inclusion of new words into the dictionary is a reminder that that language is not static, but continuously evolves. In 2018 the latest edition of the Merriam Webster dictionary included such words such as "hangry" and "fintech", words that did not exist a few years ago.[3] Grammar too evolves, and what was previously considered grammatically incorrect, such as split infinitives as another example, can become grammatically acceptable.

One of the ways that Handle with Care will be using inclusive language is in ceasing the use of gendered pronouns such as he, she, hers, his, him, her, etc. when referring to someone whose identified pronouns are not known. Instead we will be using non-gender based language such as "they, them, their". For example instead of "Zeefrim was asked to observe the waiting room and to note his observations in the log", the sentence may be written as "Zeefrim was asked to observe the waiting room and to note their observations in the log", or "The student was asked to watch the waiting room and to record any observations in the log".

Handle with Care strives to be inclusive for all persons and Health Care Agencies in our articles and recognizes that the use of language that is not inclusive to a person's sense of self could cause that individual to feel disrespected and unwelcome.

For any article that was first published in another source, we will be asking the author(s) to consider revising the article to have inclusive language for our re-print publication.

We thank you for your patience as strive to be inclusive in our publication, because Words Matter. ❒

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[1] https://www2.gov.bc.ca/gov/content/careers-myhr/all-employees/working-with-others/promote-respect,
[2] *Ibid*
[3] https://www.merriam-webster.com/words-at-play/new-words-in-the-dictionary-september-2018

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INTRODUCING THE INDEMNITIES AND GUARANTEES REGULATION (153/2018)

Effective August 1, 2018 the Guarantees and Indemnities Regulation (248/27) under the *Financial Administration Act* (FAA) was repealed, and was replaced by the Indemnities and Guarantees Regulation, BC Regulation (153/2018). The new regulation can be located at: http://www.bclaws.ca/civix/document/id/complete/statreg/153_2018

While you are familiar with the requirement in the FAA that all government corporations, which includes Health Care Agencies (HCAs), must have indemnities they intend to grant be approved by either the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance; you may be less familiar with the similar obligation to have guarantees approved.

One of the primary purposes of the regulatory change is to align the process of guarantee approval with that of indemnity approval. The associated policy changes are reflected in Chapter 9 of the Core Policy and Procedures Manual (https://www2.gov.bc.ca/gov/content/governments/policies-for-government/core-policy/policies/guarantees-and-indemnities). The new regulation aligns the approval process for guarantees with the process already in place for indemnities to ensure consistent approval scrutiny and central recordkeeping for both indemnities and guarantees. Financial obligations to honour guarantees are not changed by this regulation.

A guarantee is a legally binding promise to pay a debt or perform an obligation of another party if that other party fails to do so. A key indicator of a guarantee is the involvement of three parties: the creditor, the principal and the guarantor. A creditor receives the guarantee in the form of a legally binding obligation from the guarantor comprising a promise that if the principal fails to fulfill some obligation to the creditor, the guarantor will do it for the principal. In other words, the guarantor agrees to answer for the debt or default if the principal does not perform as required by an arrangement between the principal and the creditor.

Guarantees can cover financial obligations only, or can cover a wide variety of performance obligations including financial obligations. As with indemnities above, the approval requirement for guarantees relates to guarantees given by or on behalf of government or government corporations (which includes the Health Authorities). Guarantees given by or on behalf of a HCA will often create incremental contingent liability, increasing the HCA's financial exposure through the assumption of another party's risk.

Similar to the existing process by which you have your indemnities approved, please forward to our office the final unexecuted version of the agreement that contains the guarantee to be submitted into our guarantee approval process. Early engagement of HCPP for advice about proposed guarantee language in agreements during contract negotiations can be helpful in ensuring approval of the final form of the agreement. We thank you for your support in implementing this change. ❒

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ICE DAMMING

Ice Damming

HCPP has noticed an increase in claims as a result of ice damming including a $1,000,000 loss in the winter of 2017/18. Ice damming is a preventable situation and we encourage our clients to take the necessary steps to minimize the opportunity for ice dams to form.

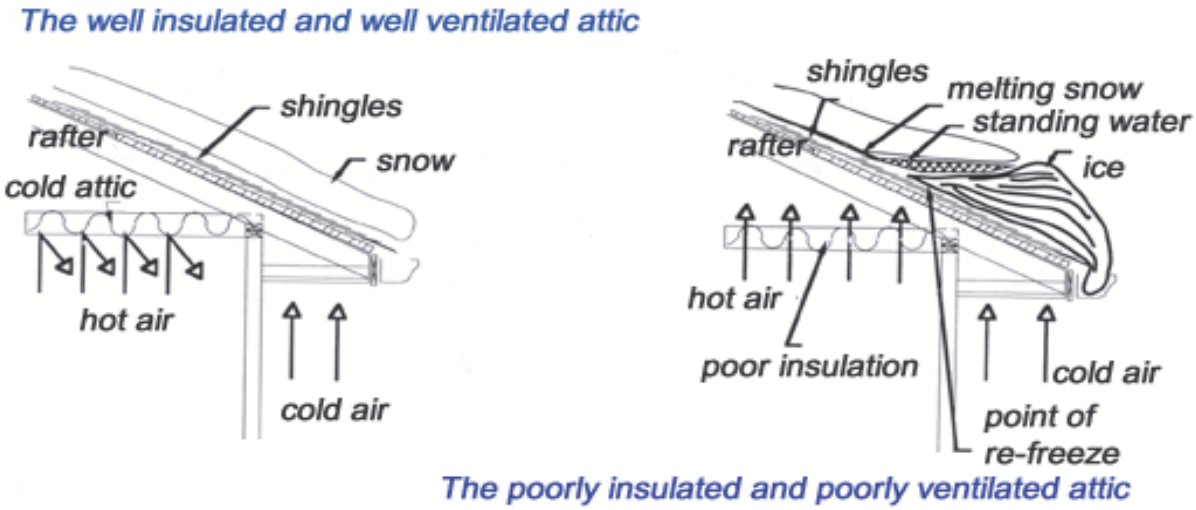
What is an Ice Dam?

In order for an ice dam to form there must be snow on the roof, and, at the same time, higher portions of the roof's exterior surface must be above zero degrees Celsius while lower exterior surfaces remain below zero. For this to occur, outside temperatures must be below 0°C and the interior portions of the roof must be heated.

The snow on the roof surface that is at a temperature above zero will melt. As water flows down the roof it reaches the portion of the roof that is below zero degrees. There the water freezes. This process of melt, flow, refreeze continues overtime, and gradually grows into a mound of ice. Voila! - an ice dam.

The dam grows as it is fed by the melting snow above it, but it will limit itself to the portions of the roof that are below zero. So the water above backs up behind the ice dam and remains a liquid. This water finds cracks and openings in the exterior roof covering and flows into the occupied space.

In the right hand diagram below, the creation of an ice dam is illustrated. In contrast, the left hand diagram shows how an ice dam is unable to form when the roof temperature does not fluctuate through the use of insulation and ventilation.



http://www.coolflatroof.com/flat-roofing-blog/ice-dams-prevention-ventilation-of-low-slope-roofs/

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Warning Signs

- Icicles forming at the roof's edge;
- Water stained ceiling and walls particularly around the perimeter of the building;
- Signs of mold;
- Paint deterioration on exterior siding and soffits.

https://www.yourroofcleaner.com/dangerous-ice/

Dealing with a Dam

- The best way to limit damage is to open channels in the ice near the roof edge so water can freely run off;
- Melt troughs through the dam with calcium chloride ice melter (do not use rock salt). A good trough maker is a long tube of cloth (such as a leg from an old pair tights). Fill the tube with calcium chloride, tie the top off and lay it vertically across the dam. It will slowly melt its way down through the dam clearing a path for the underlying water to flow free. Ensure downspouts and gutters are clear;
- In an emergency situation pour hot water in the direction which water normally flows off the roof to melt a pathway ;
- Remove the dam by breaking it free in small chunks. Tap lightly with a blunt mallet. This is slow, dangerous work so it can be best to hire someone experienced in roofing. Even when done safely this may cause damage to the roof;
- **DO NOT** use an ax or sharp tool as you will cut through the shingles.

Prevention (Doing your Dam-est)

- During the winter season regular inspections of the roof edge should be undertaken to identify ice dams as they start to form;
- Remove heavy snow loads from roof as part of your regular maintenance whenever possible using a broom or plastic shovel;
- Ensure gutters and downspouts are cleared before the start of the winter season;
- Heat migration to the attic needs to be limited. This can be achieved by increasing ventilation, adding insulation, seal all points where warm air can leak from the occupied space to the attic area below the roof;
- Vent space between insulation and roof sheathing so any heat that leaks through is carried

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away;
- Cap roof hatches with weather-stripping;
- Install flashing around chimneys to fill any gaps;
- Caulk around electrical cables and vent pipes with fire stop sealant ;
- Make sure ducts vent outdoors through roof or walls, not through soffit.

What is Covered by HCPP

- Resultant damage such as interior water damage, dislodged eaves troughs, flashing and shingles are typically covered;
- Costs associated with snow removal or preventative steps taken are not covered. ❒

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WAITING ROOM TRIP HAZARDS

HCPP has received multiple claims for trip and falls in waiting and reception areas where individuals have fallen over furniture and equipment. Even furniture specifically designed for patient comfort such as hip-friendly chairs or chairs that include unexpected features such as a step up or built in stool (*Figure 1)*, can be a trip hazard.

Figure 1

Designate a particular staff member to conduct regular reviews or inspections of public areas to identify any hazards. HCPP recommends this staff member perform an inspection of the area at the start of their shift and subsequent inspections at regular intervals to identify and remove potential tripping hazards. Where there are moveable objects, prominently display signs which encourage the return of items to a secure location when not in use. If the HCA supplies portable aides, such as stools, it is recommended that a sign be placed on each stool reminding the user to return the aide to the designated location after use. Even with such reminders, staff will need to be vigilant in monitoring and clearing the area for trip hazards as visitors may be distracted or physically compromised.

Figure 2

Moveable objects such as stools (*Figure 2*), children's toys and cushions should be returned to a secure location as soon as they are no longer in use. Books, magazines and pamphlets should be organized and stored out of the way of foot traffic. It is important to allow enough space between rows of chairs to allow for easy access by those with limited mobility who may be using walkers or canes. If there are any changes in elevation adjacent to waiting & reception areas, these need to be clearly marked and well lit.

If a patient receiving care is being located in a waiting or common area, care needs to be taken to ensure the patient and mobile medical equipment is not placed in a location that would create a trip hazard to others. A critical eye is required by all staff to ensure that there is nothing in the area that would impede the flow of traffic. ❒

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PRIVACY BREACH BY YOUR ROGUE EMPLOYEE: ARE YOU LIABLE?

Collecting, storing, and using personal information is often the key to developing and delivering individualized products and services in our current economy. As consumers, businesses, and service providers alike become increasingly comfortable using electronic platforms to exchange or store personal information, reports of privacy breaches seem to be on the rise. It is not only the outside hackers that are contributing to these increasing reports, but also employees who have clearly gone rogue.

So what happens if your organization or business gets hacked, or worse yet your employee goes rogue and breaches privacy while in your employ? Can you get sued for breach of privacy where the breach occurs as a result of the unauthorized acts by your employee? How would the Office of the Information and Privacy Commissioner of British Columbia ("OIPC") respond to such an unfortunate situation, and what are the potential ramifications for your business or organization?

Consequences for Breach of Privacy when before the Court and Privacy Commissioner in British Columbia

In British Columbia, the *Privacy Act,* RSBC 1996, c. 373, establishes a statutory cause of action for a breach of privacy. The British Columbia Court of Appeal has confirmed that there is no co-existing common law tort of breach of privacy in British Columbia.[1]

What this means is that a person whose privacy is breached in British Columbia, either by someone they know or by a stranger, has a right to sue only if the breach meets the elements of the statutory tort set out in the *Privacy Act.* While persons will not have to prove that they have suffered harm as a result of the breach, they will have to prove that the breach was wilful, without claim or right, and violated their reasonable privacy expectations.

This limited statutory cause of action differs from what may be available in other provinces. Some other provinces have introduced the common law tort of intrusion upon seclusion, which was recognized by the Ontario Court of Appeal in *Jones v. Tsige,* 2012 ONCA 32. This common law cause of action for breach of privacy is more inclusive as it covers acts that are not only intentional, but acts that are reckless.

In addition to the risk of being sued for breach of privacy in the courts, there is the risk of being subjected to investigation by the OIPC. The OIPC is responsible for providing independent oversight and enforcement of BC's privacy laws, including the *Personal Information Protection Act,* SBC 2003 c. 63 ("*PIPA*"), which protects and governs personal information in the private sector. When *PIPA* was introduced in British Columbia, the legislature recognized that individuals have a right to protect their information; however, many organizations have a simultaneous need to collect, use, and disclose information in the normal course of business. *PIPA* is designed to balance those interests and to reassure the public that their information will be protected by those to whom it is given.

The OIPC is also responsible for overseeing and enforcing BC's *Freedom of Information and Protection of Privacy Act* ("*FIPPA"),* which performs a similar function as *PIPA* but in the public sector.

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Section 30 of *FIPPA* requires public bodies in British Columbia to protect personal information that is in their custody or control by making reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure, or disposal. Public bodies are required to report unauthorized disclosures, which include situations where a person, known or unknown, accesses personal information that is stored electronically without authorization. *PIPA* has similar provisions. In enforcing these requirements, the OIPC may conduct a full inquiry and impose remedial orders if it finds that an organization or business has failed to take appropriate measures to protect the personal information it holds.

While an adverse OIPC decision will typically not impose serious fines, adverse decisions often result in valuable time having to be invested, and significant expert expenses being incurred, to comply with insisting that your organization impose additional security safeguards. OIPC findings that your organization did not adequately safeguard personal information will also result in significant reputational harm, particularly where the decision attracts media attention.

Can your business or organization be held accountable for your rogue employee's breach of privacy?

Of increasing concern is the potential risk of wide scale privacy breaches, including by rogue employees, resulting in court certified class actions.

As discussed above, thanks to the *Privacy Act,* liability for breach of privacy in British Columbia will only be found against someone who acted wilfully. Further, if you are governed by *FIPPA*, there is jurisprudence protecting your organization from being sued for failing to keep its information secure in compliance with section 30 of your governing privacy legislation.

In *Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468 ("Ari"), an ICBC employee accessed the personal information of Ufuk Ari and 65 other ICBC clients without an apparent business purpose. Ufak Ari commenced a class action against ICBC as representative plaintiff (Plaintiff) of the 65 other clients. The Plaintiff attempted to rely on the common law tort of breach of privacy, but this was rejected due to British Columbia not recognizing such a common law tort. The argument was also raised, unsuccessfully, that ICBC was negligent in the implementation and supervision of its statutory mandate under section 30 of *FIPPA* to keep its personal information secure. The BC Court of Appeal agreed with ICBC that a failure to meet the obligations set out in section 30 does not on its own give rise to a claim in negligence.

The Court then went on to consider whether ICBC could be vicariously liable for the rogue employee's breach of the personal privacy of Ufuk Ari and the 65 other ICBC clients. Although the Court recognized that the statutory breach of privacy under the *Privacy Act* requires wilful conduct, the Court recognized that the intentional aspect of the tort was not necessarily incompatible with the imposition of vicarious liability. The Court ultimately found that it was necessary for it to receive evidence in order to fairly address whether ICBC could be vicariously liable. The Court, as a result, declined to strike the

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vicarious liability claim, without trial, and the appellate Court upheld this finding.
The long established principle of vicarious liability holds that an employer can be held vicariously liable for the tort of an employee where the act was either authorized, *or* unauthorized but so connected with the authorized acts of the employee that they may be regarded as modes, albeit improper modes, of doing an unauthorized act. Vicarious liability has been relied upon to impose liability on an employer for the intentional acts of its employees, including grave acts such as sexual assault.

Ari is the only Canadian decision which has considered the issue of whether an employer can be vicariously liable for a breach of the *Privacy Act.* *Ari* has not proceeded to trial, although the case is apparently still pending.

Current UK case of concern - Morrisons Supermarket

If you are an employer concerned about being held vicariously liable for the privacy breach of your employee, the below decision from the United Kingdom will sound like your worst nightmare. This UK decision is under appeal, with the appeal to be heard in the fall of 2018.

In December of 2017, a court in the United Kingdom issued a decision, namely *Various Claimants v WM Morrisons Supermarket Plc*, (Rev 1) [2017] EWHC 3113 (QB) ("Morrisons"), in which it found an employer vicariously liable for the intentional acts of its employee who blatantly violated UK's *Data Protection Act.*

Morrisons is a supermarket chain in the UK. One of its employees, clearly disgruntled and technically savvy, posted a file containing highly personal and sensitive information of 99,998 of Morrisons' employees on a website which then went viral. In particular, the leaked data contained the names, addresses, gender, dates of birth, phone numbers (home and/or mobile), national insurance numbers (akin to our SINs), bank codes, bank account numbers and the salaries of the 99,998 employees. The data came from a secure internal database that only a limited number of employees could access. Morrisons was quick to respond, taking down the website within hours and alerting the authorities. The employee ended up being sentenced to eight years imprisonment.

Obviously upset, the various employees whose very personal and sensitive information had been published on the internet sued Morrisons. The Court found that there was a sufficient connection between the position in which the rogue employee was employed and the wrongful conduct. The rogue employee was put into the position of handling and disclosing highly sensitive data to Morrisons' external auditor (albeit the data was to be disclosed to the external auditor alone). The employee had been appointed to that position on the basis of being trustworthy to deal with personal information safely; Morrisons took the risk that it might be wrong in placing its trust in the employee.

The Court held that in the circumstances that it was just, fair, and reasonable for Morrisons to be held vicariously liable. The Court gave regard to, among other things, the following:

- the commission of the tort was entirely dependent upon the activities assigned to the employee by that employer;

- vicarious liability is appropriate in cases where an employee misused the position in a way which injured the claimant; the employer who selected the employee and put the employee in a

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position that could be misused, should be held responsible;

- Morrisons is more likely to have the means to compensate the victims than the rogue employee, and can be expected to have insured against that liability.

The above findings were reached notwithstanding that Morrisons key arguments included highlighting the fact that:

- the rogue employee's act of posting the personal information on the internet was temporally and physically disconnected from any employment responsibilities. The privacy breach was committed from the employee's home and on the weekend;

- the rogue employee's conduct was designed to harm Morrisons, and therefore if the Court held Morrisons vicariously liable it would essentially be helping the rogue employee achieve what the employee set out to do – harm Morrisons financially.

These arguments did not satisfy the Queen's Bench. We shall see if the Court of Appeal holds otherwise.

The UK's jurisprudence on vicarious liability is consistent with Canada's, and Canada draws upon UK precedents.

Manage your risks

What risk management steps can your organization take while the aforementioned risks are on the forefront of your mind? In brief, consider the following:

- Review your security safeguards with an IT expert;

- Be careful in choosing the employee to whom you entrust with your organizations personal information;

- Ensure that only certain trusted employees have access to the personal information;

- Ensure that you do not expose your organization to other causes of actions. For instance, do not impose upon your organization unnecessary and additional obligations by way of policies, contracts or service agreements in which you undertake to keep personal information secure. You do not want to expose your organization to a breach of contract claim or duties of care if it can be avoided. You may be faced after all with a claim in which a Plaintiff's counsel is seeking to find creative ways to bring a multifaceted class action for not only breach of privacy, but breach of contract and negligence. Consider whether you can get away with terms that your organization will abide by the applicable privacy legislation and be accountable to the OIPC for any resulting breach;

- Ensure that you have an adequate breach response plan in place so that if a breach occurs you are able to mitigate and contain the breach to the greatest extent possible. ❐

[1] *Mohl v. University of British Columbia, 2009 BCCA 249; Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468.

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MANAGING RISKS WHEN ASKED FOR AN EMPLOYEE REFERENCE

At times, one is called upon to provide an employment reference for a former employee who was hardly impressive. It can be difficult to pinpoint the basis for believing that the employee was mediocre at best, or significantly inferior to his or her predecessors. So, what do you do and say when asked for a reference, and what kind of legal risks are you dancing around in providing or not providing a reference?

Risk of exposure to defamation action:

The first risk to be alive to is the risk of a defamation action being commenced against you. Keep in mind that your former employee may be motivated to sue you for defamation if they believe, rightly or wrongly, that your less than stunning reference cost them a job.

So, how can you avoid legal risks, or at least best position yourself to defend such a claim?

1. Govern not just your words, but your tone and insinuations: a defamation lawsuit is no less actionable when made by insinuation

It should come as no surprise that the best thing that you can do is to take great care in your message, including not only your words but your tone of voice and questionable pauses. The meanings and innuendoes you may have to defend in a defamation action are not the meanings and innuendoes that you intended to convey, but rather the meanings the Court believes a reasonable and ordinary reader or listener would take from your message. In considering this meaning, the Court will give regard to your whole message, including your tone, questionable pauses, and insinuations.

2. Make sure that you have both an honest belief in each imputation conveyed, as well as a reasonable basis for that belief

The most typical defence relied upon in a defamation employee reference case is the defence of qualified privilege. Qualified privilege provides a complete defence for defamatory statements that turn out to be untrue, or not provable as being true.

When relying on this defence, you want to be able to convince a Court that you not only had an honest belief in the message you conveyed, but also a reasonable basis for that belief. Here is why:

A former employee is usually able to establish that an occasion of qualified privilege arose. An occasion of qualified privilege arises where: (i) a person 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 it. The reciprocity of interest is essential.

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Generally, the Court will find that such an occasion arises when you are asked to provide a reference.

A finding of malice, however, will defeat this defence. An absence of malice is often established by showing that you "honestly believed" the truth of your message, and had a basis for that belief.

Determining whether one was motivated by malice when publishing the words entails an inquiry into the state of mind of the speaker or writer at the time the statement was made.

To find malice, a Court does not have to go so far as to find that one's dominant motive in communicating information was "vindictiveness" or a desire to humiliate or injure. Malice at law can also be found where the Court concludes that a statement was made with "reckless indifference" as to whether it was true or not. Likewise, malice can be found where one is reckless by placing unreasonable reliance or belief in rumours, and giving credence and credibility to such unsubstantiated concerns.

3. Don't be too quick to think that a comment is fair

Although fair comment is a defence to a defamation claim, you should not assume your statements are fair comment unless you have a very convincing legal opinion that it is, and even then you should be wary.

Fair comment is a very technical 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 person honestly express that opinion on the proven facts; and, the defendant must not have acted with malice.

This defence often fails because the defendant is unable to satisfy the Court that the defamatory words would be recognizable to the ordinary reader as comment upon true facts, as opposed to a bare declaration of facts. Depending on the context, the statement that "she is incompetent" could be found by the Court to convey either a comment, or a statement of fact. The defence of fair comment is not available if the Court finds that it was conveyed as a statement of fact.

4. Can you really prove a statement to be true?

The defence of truth, also 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 message 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.

The meanings that you will have to prove as being true is not the message you intended to convey, but the meaning the Court finds that your words and tone of voice would have conveyed to an ordinary reader or listener in the circumstances.

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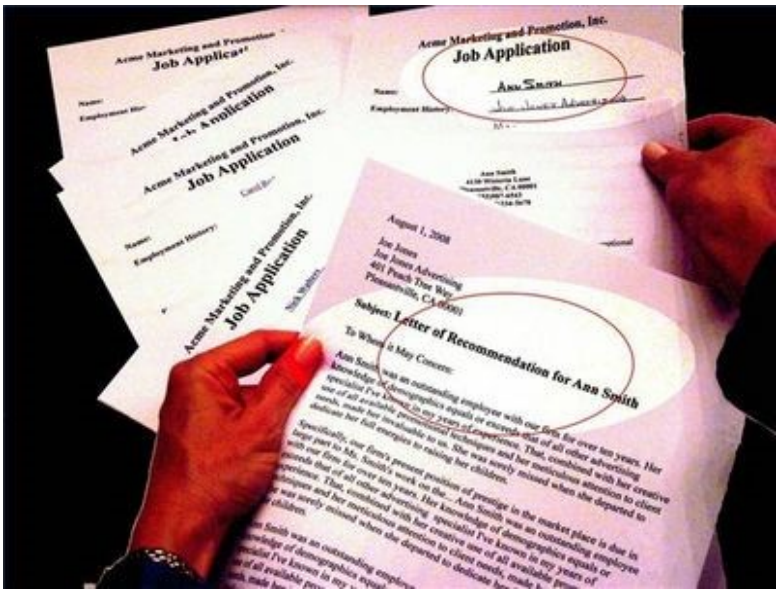
If the employee was not discharged for cause, chances are that your HR department is concerned that you cannot prove your concerns as being true in fact. Even when discharged for cause, you may want to have a quick chat with a lawyer before speaking.

Risk that what you say will not remain confidential

Often, one becomes too comfortable or trusting of assurances that what you say or write will be confidential, not to be revealed to your former employee. This is particularly the case where you know and trust the person to whom you are providing the reference.



Do not be naive, particularly in light of the fact that what you say or write (whether it be recorded by letter, handwritten note, or email) could become the subject of a freedom of information request by your former employee.

The matter of *Vancouver Island Health Authority*, 2011 BCIPC 5, illustrates an occasion when a public body was not successful in opposing disclosure of a job reference. In November of 2009, the applicant nurse, requested a copy of a job reference that a physician had sent to the Vancouver Island Health Authority. The Vancouver Island Health Authority denied the request for the reason that the job reference had been provided in confidence.

Upon review, the Office of the Information and Privacy Commissioner of British Columbia ("OIPC") established that there were three categories of information at issue: the third party's contact information, which is excluded by the definition of personal information and cannot be disclosed; information on the third party's working relationship with the applicant, which the OIPC concluded is information about the third party's personal information; and information about the applicant's position at the medical facility and evaluative comments about the applicant's attributes and skills in the workplace, which the OIPC concluded was the applicant's personal information. As a result of these determinations, the OIPC found that the applicant had a right to access the details of their position at the medical facility.

Significantly, the OIPC concluded that the Vancouver Island Health Authority had not established that it received the reference information about the applicant in confidence from the third party even though the third party may have had expectations of confidentiality when providing the reference. The personal information referenced above was ordered to be disclosed.

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Concluding Remarks

While there is no common law duty to provide a reference, not providing one can have potential ramifications. For instance, if a wrongful dismissal action is commenced, the refusal to provide a reference can be found as evidence of bad faith, resulting in an increase of the notice period (see for example *Wallace v. United Grain Growers,* [1997] 3 S.C.R. 710, para. 97; *Schmidt v. Amec Earth & Environmental Ltd.,* 2004 BCSC 1012).

The best advice is to take care in the message you convey, ensure that you have a basis for the concerns expressed, and do not assume that your reference is provided in confidence. ❒

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SEEING THROUGH THE SMOKE SCREEN:

Where Can Marijuana Users Light Up?

The Province of British Columbia has stated that upon legalization, it will generally allow adults to use non-medical marijuana in public spaces where tobacco smoking and vaping are permitted as per the *Tobacco and Vapour Produces Control Act*[1] (the "*Act*").

Under the *Act*, tobacco and vapour products are not allowed to be used on health board properties, unless the tobacco product is being used ceremoniously in relation to a traditional aboriginal cultural activity, or the use of the tobacco or vapour product is in an area of the property which has been designated by the health board as an area in which a person may use such products.[2]

Currently, the *Act* does not prohibit smoking of tobacco in private residences; however, it does prohibit smoking in entrances and common areas of apartments and condominiums, including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, and lobbies.[3] Individual units and balconies are not covered under the legislation.[4] Landlords and strata councils will be able to restrict or prohibit non-medical marijuana smoking at tenanted and strata properties, with similar considerations for residential care facilities.

This article will address how the smoking of non-medical marijuana may be regulated under the following policies and legislation: the smoke-free ground policies of the BC Health Care Agencies (HCAs); the *Strata Property Act*;[5] the *Residential Tenancy Act*;[6] and the *Human Rights Code*.[7]

Although municipal bylaws are outside the scope of this article, HCAs and other service providers need to also consider the municipal bylaws related to the use of tobacco and marijuana in public spaces that apply in their areas.

Smoke-Free Policies of Provincial Health Care Agencies

The smoke-free ground policies as set by HCAs are designed to meet the standards as set out in the *Tobacco and Vapour Products Control Act*. Therefore, these policies generally prohibit all smoking and vaping on health authority property, including the smoking or vaping of marijuana.

In order to accommodate patients, clients and staff who use tobacco, HCAs offer nicotine replacement therapy, cessation supports and educational seminars to these clients and staff.[8, 9, 10, 11, 12] Special accommodations may also been made for those in palliative care, residential care, and mental health facilities, where nicotine replacements and transport off the grounds to smoke are not possible primarily due to safety reasons.[13]

Most smoke-free policies of HCAs do not yet specify how patients, clients, and others will be accommodated in terms of using non-medical marijuana. The policy of one HCA that does address this states that those who use medically prescribed marijuana will have to leave the Health Care

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Authority's property to smoke in a location where they do not affect other people or use oral nabilone, a formulary alternative for those patients who cannot leave the hospital to smoke their marijuana.[14]

Strata Property Act

Strata corporations are able to create bylaws pursuant to the *Strata Property Act* to limit or ban smoking. A non-smoking bylaw can ban smoking in the strata lot and common property, while a non-smoking rule can limit or prohibit smoking on common property.[15] Most stratas have bylaws prohibiting owners and residents from causing a nuisance to another person or unreasonably interfering with the rights of another person to use and enjoy common property or another strata lot. [16]

In the case of *Strata Plan NW 1815 v Aradi*, 2016 BCSC 105, 2016 CarswellBC 145, an owner of a condo, who was a lifelong smoker, refused to comply with a strata bylaw passed pursuant to the *Strata Property Act*, which prohibited smoking in all units and common areas. The bylaw was passed in 2009, but the strata did not enforce the bylaw until 2013 when it began to fine the owner for smoking in the owned unit. Other owners complained that the owner was smoking in the unit, so the strata revised the bylaw to also prohibit smoking in hallways, elevators, parking, garages, electrical and mechanical rooms, on patios and balconies, and within three meters of door, window or air intake. The strata brought an application for injunction under s. 173 of the *Strata Property Act*, which required the owner to cease and desist from contravening the bylaw, and for the sale of the unit. The Court granted the strata's application in part, requiring the owner to cease and desist from contravening the bylaw.

Residential Tenancy Act

Under the *Residential Tenancy Act*, a landlord may include a no-smoking clause in tenancy agreements to ban smoking in units, balconies, and the entire residential property. If a no-smoking clause is not included in the tenancy agreement, a tenant is allowed to smoke in their unit. However, under section 28 of the *Residential Tenancy Act*, tenants are entitled to quiet enjoyment, including the right to be free from unreasonable disturbances. If other tenants complain of unreasonable disturbances from second-hand smoke, a landlord must address the problem. Furthermore, case law indicates that second-hand smoke may be grounds for a breach of quiet enjoyment.[17]

In the case of British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052), a subsidized tenant with disabilities, including asthma, testified that a neighbour's second-hand smoke negatively affected the tenant's health, and breached their quiet enjoyment. The tenant wanted a reduction in rent until the landlord made repairs to stop the smoke from entering. The Dispute Resolution Officer ordered that the tenant's unit be investigated and sealed, with repairs to be made within 30 days. If the repairs were not made within that time, the tenant could deduct $100.00 a month from the rent payment until the repairs were complete. [18]

However, a breach of quiet enjoyment is not always found in this situation; in BC Residential Tenancy Office, 2006 (Burnaby File # 186676), a tenant testified that second-hand smoke was entering the apartment and breaching the covenant of quiet enjoyment. The tenant wanted the landlord to comply with the Residential Tenancy Act to ensure freedom from unreasonable disturbance, repair the unit to prevent smoke from entering, and reduce the rent until the repairs were made. The Dispute Resolution Officer ordered the landlord to seal the tenant's unit, but did not order a rent reduction. The

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Officer stated that the landlord had not breached the covenant of quiet enjoyment, as this covenant does not assure a tenant of no inconvenience, nuisance or disturbance by another tenant. [19]

Human Rights Code

The BC *Human Rights Code* contains two provisions which may concern smoking and no-smoking policies in private dwellings: section 8(1) protects the public against discrimination in accommodation, service and facility, while section 10(1) protects the public from discrimination in tenancy premises.[20] A tenant who has a disability that is exacerbated by second-hand smoke, such as asthma or allergies, could take the position that their landlord has a responsibility to limit or ban smoking to accommodate their disability. Sensitivity to second-hand smoke by itself has not yet been found to constitute a disability. Canadian courts have repeatedly found that addiction to nicotine does not constitute a disability. [21]

In *Leary v Strata Plan VR1001*, 2016 BCHRT 139, 2016 CarswellBC 2649, the complainant alleged that the respondent strata was discriminatory by not acting on complaints of smoke entering the apartment when the tenant had a disability triggered by the second-hand smoke. The complainant's physician wrote that the tenant had allergic and asthmatic bronchitis with shortness of breath, which was negatively impacted by second hand smoke. The Tribunal found that the complaint was justified because the tenant had established the disability was related to exposure to second-hand smoke, and there was a clear connection between the exposure to the second-hand smoke and the adverse experienced impacts. The strata had a duty to accommodate, but did not take adequate steps to address the complainant's concerns. The strata was ordered to bring in an air quality specialist to determine the source of the smoke coming into the complainant's apartment and how to prevent it, and also ordered to pay $7,500 to the complainant for injury to dignity, feelings and self-respect.

In *Beckett v Strata Plan NW 2603*, 2016 BCHRT 27, 2016 CarswellBC 474, the complainants alleged that the respondent strata discriminated against them with respect to services on the basis of physical and mental disability. They claimed that second-hand smoke coming into their apartment adversely affected their disabilities and that the strata had not responded to their concerns. The Tribunal found that although the complainants were likely exposed to second-hand smoke, however one of the complainants did not establish having a disability under the Code, while the other did have a physical disability but did not establish having experienced adverse impacts from the second-hand smoke exposure. Therefore, there was no protection that could be offered to the complainants under the *Code*. ❒

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[1] *Tobacco and Vapour Products Control Act*, RSBC 1996, c.451.
[2] *Ibid* at s. 2.21(3).
[3] *Ibid* at s. 2.3.
[4] Smoke-Free Housing BC, "BC Laws Impacting Second-hand Smoke – Provincial Smoke-Free Legislation" (Accessed 27 August 2018), online: <http://www.smokefreehousingbc.ca/tenants/bc-laws.html>.
[5] *Strata Property Act*, SBC 1998, c.43.
[6] *Residential Tenancy Act*, SBC 2002, c.78.
[7] *Human Rights Code*, RSBC 1996, c.210.
[8] Vancouver Coastal Health, "Smoke-Free Premises" (Accessed 27 August 2018), online: < http://www.vch.ca/Documents/Smoke-free-policy-for-VCH-facilities.pdf>.
[9] Vancouver Island Health Authority, "Smoke-Free VIHA: Frequently Asked Questions." (Accessed 27 August 2018), online: < https://www.viha.ca/NR/rdonlyres/78F24BDD-B26E-42A4-9C74-F7DA563D70A5/0/QA_Tobacco_SmokeFreePremises_WEB_Feb27.pdf>.

[10]Interior Health, "Smoke Free Environment" (Accessed 27 August 2018), online: < https://www.interiorhealth.ca/AboutUs/Policies/Documents/Smoke%20Free%20Environment.pdf>.
[11]Northern Health, "Tobacco Reduction" (Accessed 27 August 2018), online: < https://www.northernhealth.ca/health-topics/smoking-and-tobacco-reduction#smoke-free-grounds >.

[12]Fraser Health, "Smoke Free Policy" (Accessed 27 August 2018), online: < https://www.fraserhealth.ca/about-us/accountability/policies – "Smoke Free" >.
[13]Vancouver Island Health Authority, *supra* note 8.
[14]Vancouver Coastal Health, *supra* note 7.
[15]Province of British Columbia, "Strata Smoking Bylaws" (Accessed 27 August 2018), online: <https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/operating-a-strata/bylaws-and-rules/smoking-bylaws>.
[16]*Ibid*.
[17]Smoke-Free Housing BC, "BC Laws Impacting Second-hand Smoke – BC Residential Tenancy Act" (Accessed 27 August 2018), online: <http://www.smokefreehousingbc.ca/tenants/bc-laws.html>.
[18]*Ibid*.
[19]*Ibid*.
[20]Smoke-Free Housing BC, "BC Laws Impacting Second-hand Smoke – BC Human Rights Code" (Accessed 27 August 2018), online: <http://www.smokefreehousingbc.ca/tenants/bc-laws.html>.
[21]*Ibid*.

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GOODBYE MASTER INSURANCE PROGRAM, HELLO SOCIAL SERVICES GROUP LIABILITY PROGRAM

The Risk Management Branch is pleased to announce the launch of the Social Services Group Liability Program (SSGLP) and the termination of the Master Insurance Program (MIP).

SSGLP came into effect on January 1, 2019 and MIP will be wound down over a two-year period, terminating altogether on December 31, 2020. Eligible service providers with existing MIP enrolments will transition to the SSGLP as they come up for renewal beginning January 1, 2019.

Like MIP, the SSGLP will continue to provide liability insurance coverage for service delivery risks and facilitate the delivery of essential social services. SSGLP provides service providers of approved social programs delivering services to third parties on behalf of the health authorities with a Commercial General Liability insurance policy. There are some differences in coverage under the SSGLP insurance policy and the enrolment website also looks a little different. If you are a contract manager, if you work in procurement or if you're responsible for enrolling service providers for this coverage, you should familiarize yourself with all the SSGLP details.

Please contact the Special Group Insurance Programs Manager, Aaron Lukoni at (778) 698-5719 or Aaron.Lukoni@gov.bc.ca to receive our SSGLP information package which includes helpful documents like an FAQ for staff, the new mandatory insurance clauses that need to be inserted in any eligible agreement, an overview of SSGLP coverage, etc.

We anticipate that service providers will have questions as well and rather than fielding questions yourself, please redirect service providers to the SSGLP insurance broker, Aon Reed Stenhouse Inc. Aon can be reached toll free at 1-855-913-2227 or 250-388-7577 or by email, special.programs@aon.ca. An FAQ for Service Providers has been posted on Aon's SSGLP website, www.SSGLP.aon.ca. ❐

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About Our Organization

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Care Authorities 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 Schools Protection Program, the University, College & Institute Protection Program and the Midwives 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 HCPP member entities including all the Health Care Authorities and various other stand-alone health care agencies in the Province of BC. ***Handle with Care*** is published twice a year by HCPP.

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