



RISKED

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Volume 20, Issue 1

Spring/Summer 2016

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

Team Leader's Message

Welcome to our latest edition of Risk Ed. We hope you will find it useful and informative. This edition features articles on accommodating employees, use of consents and waivers, risks associated with natural play areas, and copyright trolls. There is very little risk management information available relating to natural play areas. Therefore, we trust the Natural Play Spaces article will help your district plan the effective, safe use of these play spaces.

We have been very busy since our last publication which we hope indicates the value of our services. Our goal is to develop risk managers within the school districts, therefore, please feel free to contact us at any time regarding any specific areas of risk management we can help you with (e.g. Enterprise Wide Risk Management.).

It was great for us to meet so many district staff at last year's EFMA and BCASBO conferences. Networking is a valuable way for us to gain an understanding of specific issues whilst putting a face to a name. We were also grateful for the opportunity to present on current issues.

Please feel free to contact us at protection.program@bcspp.org with any suggestions for future topics and, as always, we will do our best to accommodate. Our previous articles are listed on our web site alphabetically under the Publications tab and we recommend using this as a growing library of useful information.

Andrew Green
Director, Client Services — Education

Staff Changes

We are very happy to announce that we have a new addition to our claims team to fill the role of examiner. Emily Kemshaw has replaced Darren Nelson who has moved to the Health team at the Risk Management Branch. Emily joins us from the private sector where she worked for nearly a decade in the Insurance Industry, most recently spending six years as an independent adjuster. Emily is a welcome addition to our team and she looks forward to meeting and working with you in her new role. ◀

Natural Play Spaces

Written by Jeremy M. Poole, Partner, Alexander Holburn Beaudin & Lang LLP

INTRODUCTION

Before the advent and popularity of manufactured playground equipment in the form of increasingly large and elaborate playground structures, play for children was more focused on exploring their natural environment and using natural spaces as a playground. In recent years, there has been a move among many responsible for children's play spaces, whether they are school authorities or governmental authorities, to revisit the idea of natural play spaces as an amenity instead of the more manufactured approach. Natural play spaces can give a more diverse and complex array of experiences and encourage creativity on the part of the children using them. Experts who have studied this matter have concluded that there are educational and developmental benefits to the use of natural play spaces as well as an ability to create a better connection for children between themselves and their natural environment.

In addition to these benefits, there are economic considerations as well. Manufactured play equipment can be expensive both in terms of the cost of purchasing and installation as well as ongoing costs related to inspection and maintenance. Tailoring and enhancing the natural environment for use by children as a play space is often less expensive in terms of capital expenditure and ongoing maintenance.

There are a wide variety of experiences and materials that can be incorporated into a natural playground. School Districts wishing to create or expand natural play spaces should consider the age range and experience of the children who will be using those spaces as well as the input of students, parents, teachers and consultants as to the desired look, feel and utility of such spaces.

THE LEGAL FRAMEWORK

As an owner of school properties that contain natural play spaces, a school district has legal responsibilities and duties owed to those who can be expected to use those spaces. Under the *Occupier's Liability Act*, a School District is an occupier of its natural play space areas subject to the duty imposed by that legislation to take reasonable care to see that a person using such premises will be reasonably safe in doing so. This statutorily imposed duty applies to all who could be reasonably foreseen to use a natural play space whether it is during school hours and under some form of adult supervision or at other times outside of school hours when children are known or expected to access the premises to play. The standard of care is one of reasonableness and not one of perfection. Accordingly, it creates an obligation to take reasonable steps regarding safety in the original construction and ongoing inspection and maintenance, but it does not make a school district an insurer such that any untoward event would necessarily lead to a finding of liability. Risk can never be completely managed or removed entirely, but reasonable steps to mitigate risk should be identified and implemented.

In addition to these obligations, there are also obligations imposed upon a school authority with respect to supervision and oversight of student activities including student use of natural play spaces. The oft cited standard that applies in this area is for school authorities to provide the same supervision as would be provided by a "careful or prudent parent". This standard does not require constant supervision at all times, but it does require supervision that is consistent with the nature and size of the area to be supervised, the number and ages of the students using the area and that

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nature of the activity or activities that are in progress. With respect to a natural play space, an area containing larger rocks, logs or tree stumps as natural play features might not require much or any direct supervision when used by older elementary school students whereas some level of closer supervision might be required should such spaces be used by younger children.

The Canadian Standards Association has specific standards that apply to the construction and installation of manufactured playground equipment (CSA Standard Z614). While this standard does not strictly apply to natural play spaces, it can apply if a natural play space also includes manufactured equipment. The installation of such manufactured equipment should be compliant with the CSA standard. In addition, there are certain CSA standards that would likely be used by a court as a guide in determining whether the installation and condition of natural play spaces was reasonable. For example, there are standards as to the amount of soft ground cover that should be in place in areas where there could be a fall from height from installed playground equipment. The same standard could be applied by a court where a similar risk of a fall from height was present with respect to a natural feature that was incorporated into a play area. In addition, there are standards that relate to the size of openings in playground equipment that are designed to prevent children from catching their bodies or heads in openings. Those same standards of openings would likely apply to openings that exist in the set-up of a natural play space. For example, spaces between logs that are put in place as a form of natural play space might need to be configured to remove the risk of a child being caught between those logs and injured.

RISK MANAGEMENT

Just as with manufactured playground equipment, there are consultants and suppliers who specialize in the design and installation of natural play spaces. School districts should consider using such resources when planning and implementing the installation or expansion of a natural play space. Although keeping features in a natural state is part of the benefit of natural play spaces, it is still advisable to remove or minimize recognizable hazards such as sharp edges, dangerous protrusions and slippery surfaces. The balance to be struck is between providing children with features that are interesting and challenging, without creating an unreasonable risk of harm.

School districts should provide the level of supervision that is reasonable for the nature of the natural play space and those that will be using it during school hours. School districts should also have protocols in place for record keeping relating to regular inspection, maintenance and supervision. Having records to demonstrate the steps taken are crucial in properly responding to incidents when they occur from both a legal perspective and a risk management perspective. Observing the use of natural play spaces by children will also be important. When a space is used and explored by children, unanticipated risks may be identified. In such circumstance, they should be assessed and mitigated or removed if as appropriate.

CONCLUSION

Whether playground spaces are made up of manufactured play equipment, natural play spaces or some combination of the two, the key for school districts is to be reasonable and responsive. Care and attention should go into the planning and installation of natural play spaces as well as ongoing maintenance and supervision of use. If incidents occur, they should be reported to the Schools Protection Program. In such cases where an accident occurs, districts may wish to take the opportunity to consider adjustments to the space that would mitigate identified risks to avoid future reoccurrence. ◀

Copyright Trolls

Over the past few years, the School Protection Program (SPP) has been advised by a number of different school districts of letters threatening the districts with lawsuits from what have become known as “Copyright Trolls.” This article is intended to raise awareness of this issue among school districts. Care needs to be taken when images are downloaded from the internet either by employees or contractors of the school district.

Copyright Trolls are stock image companies that have a large number of stock images, photographs, for which they purport to own the copyright to these images. These images cover a vast array of subjects, from the artistic to the mundane, and are displayed on the companies’ websites. The term Copyright Troll has emerged recently to describe the practice of some stock image companies of surveying the internet to see if there are any unauthorized uses of their images. If unauthorized use is detected, the stock image company sends a letter advising that a licensing fee has to be paid or the company will sue the alleged wrongdoer for copyright infringement.

A few BC school districts have received these types of letters from two companies in Canada and the United States. What seems to have happened is that someone in the school, or connected to the school, was putting together a newsletter and searched the internet for an image to include in the newsletter to give it more visual appeal. There are websites on the internet where images can be downloaded for free. However, there are also websites that contain images for which the stock image companies purport to claim copyright ownership. In other words, these companies require a fee to be paid in order to use the image. It is not always clear whether a downloadable image on a website is free or not.

If you receive a letter advising that your school district has infringed a copyright, please forward that letter to the SPP. Please do not contact the sender yourself. Once SPP has considered the letter, we will advise you on the best course of action. <

An Accommodation that Passed the Smell Test

Accommodating an employee who is sensitive to fragrance is no small task. After all, airborne allergens in publicly accessible areas cannot be controlled nor do they affect all people. A recent human rights decision assessed what an employer did to accommodate its employee.

A teacher with a severe dust and scent allergy requested accommodation from the School District. Among other things, she was sensitive to laundry detergents, shampoos and Bounce fabric softener. The teacher claimed that she could not take medication to ward off some of the effects of scent and the only remedy was complete avoidance.

To accommodate the teacher, the School District did the following:

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An Accommodation that Passed the Smell Test

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- In 2010, with collaboration from Human Resources, the teacher, and the union, an accommodation plan referred to as the “Exposure Control Plan” was put in place and updated over time during progress meetings with the union;
- The carpet in the teacher’s classroom was removed and replaced with linoleum;
- Signage about being scent-aware was posted inside and outside the classroom;
- Staff were advised what scent-free and scent-aware entailed and were asked to be respectful of the teacher’s condition. This was communicated during start-of-year staff meetings and, in a separate session, by the human resources manager and a union representative;
- The teacher and the principal collaborated on newsletters to parents and school-wide notices about being scent-free;
- All soap in the school was changed to unscented foam soap;
- Liquid white-out was replaced with white-out tape;
- The teacher was provided with an employer-paid cell phone so that she could contact the office from anywhere in the building if she needed to step away from her duties due to an exposure;
- The teacher was given a classroom with a door to the outside so she could step out if necessary;
- Because of the close working relationship between the special education assistant and the teacher, the principal defrayed some of the costs incurred by the education assistant in purchasing unscented products that she bought to accommodate the teacher;
- During school-wide events such as the Christmas concert, the education assistant would take students to the gym in place of the teacher.

Although the teacher had been transferred to a scent-aware school, she continued to experience reactions to scent. She eventually went on medical leave. The teacher then filed a human rights complaint against the School District and the human resources manager who managed her accommodation. The teacher alleged that they refused to accommodate the teacher by not providing or enforcing a scent-free work environment and that they subjected her to psychological harassment. The essence of her complaint was that because she continued to react to scent exposures at the school, she wanted more control over her environment, including over individuals –staff and students alike– by asking them to leave the room or even by having primary age children change their clothes and permitting her to wash the clothes at her home and return them. She also wanted control in common areas such as the computer lab, photocopier room, and the library.

The Exposure Control Plan was amended in February 2013 to provide that in the event the teacher suffered a scent exposure, she was to report to the principal or teacher-in-charge and if necessary, go home. She was not permitted to ask the students or their education assistants to leave the classroom. In one instance, she was advised that it was not appropriate that she had moved the children and their desks outside in 10°C weather, due to her perception of a scent.

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An Accommodation that Passed the Smell Test

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While an employer is obligated to accommodate an employee to the point of undue hardship, the employee cannot expect a perfect accommodation and must work with the employer to achieve a reasonable accommodation. The Supreme Court of Canada has stated, “[i]f a proposal that would be reasonable in all the circumstances is turned down, the employer’s duty is discharged”¹. The Tribunal noted that the impact on others is one of the key considerations in *Renaud*.

No one can guarantee that a building accessible by the public will be entirely scent-free. Schools designated as “scent-aware” request through signage and newsletters that the parents/public/staff refrain from using scented products. The School District, however, did not have the authority to ban or discipline staff or students for wearing scents at school. Nor would the school be the only source of exposure.

To prove that she suffered discrimination, the teacher had to show that the School District, on a balance of probabilities, treated her adversely in her employment because of her dust and scent allergy and failed to appropriately accommodate her. If an employee’s disability cannot be accommodated without undue hardship, the complaint will not succeed.

After going on medical leave, the teacher did not seek further modifications to the Exposure Control Plan, which was the result of discussions between herself, her union, and the employer and which all parties had approved. The principal had also been diligent in documenting how he had responded to each and every complaint or concern brought forward by the teacher.

The human rights tribunal member found that the respondents took significant steps to accommodate the teacher, and that there was no evidence their efforts were somehow flawed. The Member agreed with the respondents that the process of reaching an accommodation or working within it once agreed cannot itself constitute a breach of the Human Rights Code or adverse impact² for harassment.

As a result, the teacher’s complaint was dismissed.

This case is a good example of an employer responding in a thoughtful and sensitive way to a difficult accommodation issue which required the balancing of a number of important interests. It also demonstrates the significance of collaboration in the accommodation process and the critical importance of documenting both any agreements reached and the resolution of any issues which may arise after agreements are signed off.

This accommodation indeed passed the smell test. ◀

Penny A. Washington, Partner, Bull Houser & Tupper LLP
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¹ *Central Okanagan School District No. 23 v. Renaud* [1992], 2 S.C.R. 970

² *Petrar v. Thompson Rivers University and another*, 2014 BCHRT 193

Consent Forms and Liability Waivers: A Discussion of Student Field Trips for Post Secondary Institutions

On October 1st and 2nd, 2015 the conference Risk Management: Behind the Wheel: What's Ahead? was held at Kwantlen Polytechnic University. This was a collaborative effort between Kwantlen Polytechnic University, Thompson Rivers University, University of British Columbia, College of New Caledonia, Selkirk College and UCIPP. One of the sessions during the conference was presented by Carla Forth, QC, Partner, Guild Yule LLP and Kira Kenny, Senior Risk Management Consultant, SPP and provided valuable information on consent forms and liability waivers. For this presentation, Carla Forth and Mary Nguyen of Guild Yule LLP provided a paper that is relevant across both the schools and post-secondary sectors titled: Consent Forms and Liability Waivers: A Discussion of Student Field Trips for Post-Secondary Institutions.

INTRODUCTION

“Field trips can promote various aspects of student development by providing an active learning environment. Field trips can also present challenges to organizing parties, particularly educational institutions, and frequently raise questions about liability. What duty is owed to students on field trips? What should go into the waiver? What risks must be disclosed?”

To read the entire paper, click [here](#). ◀

September 2015

Helpful Links

Schools Protection Program (SPP) receives inquiries on many risk related topics. We would like to remind you that SPP provides the School Districts with many helpful tools and relevant articles on our website located at: <http://www.bcspp.org>. If you have not already or it has been a while, please take some time to avail yourself of these resources. Some tools are the Administrators' Handbook/ Guide to SPP Coverage and multiple forms, including consents, fire impairment notices, or those for obtaining construction or optional property insurance. There are also clauses for user groups or occupancy agreements as well as our Insurance Matrix to assist you to determine which form of coverage should be used in a contract. In addition to this, you will find an abundance of resource articles covering risk related topics such as occupier's liability, varying types of insurance coverage, legal commentaries, risks in contracts, the value of risk assessments, fieldtrips or opening or closing schools checklists as a highlight. We are always welcome to receiving new ideas on pertinent risk related topics that you would like us to write about. ◀

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. The program is housed within the office of the Risk Management Branch of the Ministry of Finance, which also has responsibility for similar programs such as the Health Care Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management, and claims and litigation management services to SPP member entities including all the School Districts.

RiskEd
is published twice a year by the Schools Protection Program

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See us at:
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It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate.