

AT RISK

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A Risk Management Newsletter for the British Columbia
Provincial Government, its Ministries and Organizations

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Executive Director's Message

Welcome to another diverse and informative edition of *At Risk*. As usual we have good advice from expert contributors.

First up we examine some of the issues with quantitative data in the world of risk management where uncertainty reigns.

Our first guest author is from Legal Services Branch. BC Government has a brand identity and Wes Crealock gives us some practical advice about protecting our brand.

Finally in this edition of *At Risk* we are featuring the expert advice of an insurance lawyer, Nigel Kent, who speaks to a recent

court decision that clarifies additional insured coverage under a Commercial General Liability insurance policy.

Finally, we have a sad announcement concerning the passing of one of our long-time branch employees, Glen Frederick. Many of our readers would have had occasion to seek his advice over the years. He is greatly missed.

We hope you enjoy this edition. Thank you for reading *At Risk* and we welcome your comments, questions or feedback at RMB@gov.bc.ca ←

Phil Grewar, Executive Director

Searching for Truth in Numbers

As facilitators we help subject matter experts and stakeholders identify and evaluate risk. At times the discussion is lively and full of debate as participants contribute their insight and rationale and ultimately a value upon the likelihood of a given event and its potential consequence. Recently, at the conclusion of a raucous session, a participant turned and asked, "OK, but what's the *real* risk?" In other words, show me the numbers.

Despite the good efforts of this well experienced team to build a collective estimate of risks, she felt that that opinion—even expert—is more akin to guesswork than to fact. Some people are comforted by quantitative assessments and the presumption of an unbiased objective reality – the truth. Engineering, information security, public health and insurers among other professions and sectors rely heavily on quantitative risk assessment to make predictions and aid decision making. And society benefits by way of safer roads,

healthier communities, secure technologies and so forth.

But can numbers tell the full story?

Nassim Nicholas Taleb, probability expert and *Black Swan* author, is critical of the assumptions many predictive models are built upon and the faith given over to them. Reflecting on the history of catastrophic failure in the marketplace he puts the blame on "blind users applying half-baked expertise" to high uncertainty, high consequence spheres. He accuses risk managers and regulators of "creating more risk than they reduce."

"Numbers have no way of speaking for themselves ... data-driven predictions can succeed—and they can fail" says statistician and blogger Nate Silver. Silver gained fame for accurately forecasting the outcome of 49 of 50 states in the 2008 US

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Searching for Truth in Numbers (continued)

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election. He warns in his best-seller, *The Signal and the Noise, Why So Many Predictions Fail But Some Don't*, that when “we deny our role in the process the odds of failure rise.”

Taleb and Silver warn of the limits of statistics and overconfidence in them. “A lot of things that look great in a computer model or in PowerPoint don't really pan out, and to some extent also, they reverse,” says Silver. This point is echoed by Taleb who claims that more money was lost through the sub-prime mortgage crisis than was ever made. Silver blames “our failure to see how fragile our models were to our choice in assumptions.”

Few alarm bells rang prior to the 2008 global financial crash in part because the players believed what they saw. The high rate of return was evidence of the sustainability of their models. The truth is that there are an infinite number of variables affecting financial markets and other complex spheres of modern life so as to make certainty incalculable. Therefore, when we use historical data to predict future performance we are identifying trends and indicators where none exist. Neuroscientist Tomaso Poggio describes this as our capacity to “find patterns in random noise.”

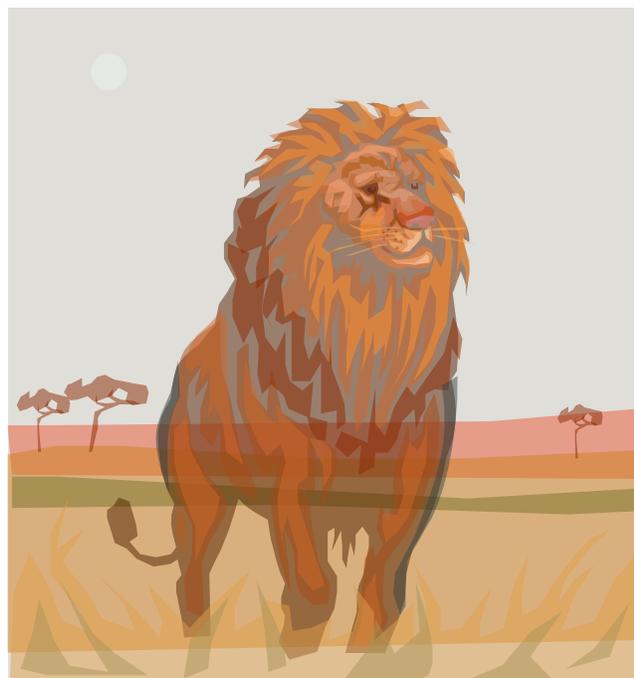
Observers say this ability to see what is not there is an evolutionary holdover from simpler if deadlier times when vulnerable, relatively weak primitive man learned to survive by observation and intellect. Survival relied on the ability to identify patterns and respond quickly. In *Risk: The science and politics of fear*, author Dan Gardner contends that if our ancestors waited for confirmation that the shadow in the tall grass was a lion they wouldn't have lived long enough to become our ancestors. However decision making in the information age, he says, requires greater sophistication and the false certainty generated by a primitive mechanism can get us into trouble.

“[Our brain] is constantly churning out hypotheses

based on current observations, prior experiences, and existing beliefs. It does that automatically, effortlessly. And quickly.” --Dan Gardner

The ways of thinking and the false certainties that arise from them are known in psychological jargon as heuristics and cognitive bias. Heuristics are the mental shortcuts—common sense, rules of thumb—we use to draw conclusions or make decisions quickly. Bias is the inaccuracy that can arise from these mental leaps. For example, the availability heuristic will draw our attention toward things that are easily remembered and which may have greater emotional impact like terrorism or gun crime. The bias may manifest through a belief that these events occur more frequent than they actually do. This might explain why people worry more about plane crashes than getting hit crossing the street.

This brief look at the challenges to calculating (un)certainty reveals that “real risk” may not exist, but an awareness of the psychological mechanisms at play and the biases that can arise serve facilitators well in their effort to reach an objective truth... however nebulous that might be. <



In Memoriam: Glen Frederick

In our last issue of *At Risk*, we were celebrating the receipt of the Queen's Diamond Jubilee Medal by our Director of Client Services for Core Government and Crowns, Glen Frederick. Now, with heavy hearts, we share the news of his passing on August 9, 2013 after a long illness.



Glen was a risk manager before he came to work at Risk Management Branch 20 years ago. During his years with us, Glen was instrumental in the evolution of risk management in the BC public sector. He helped introduce Enterprise Risk Management and its methodologies to government and to the major projects in which he became involved, notably the 2010 Olympic and Paralympic Winter Games, public-private partnerships, and major government outsourcing deals.

Glen was very active with the Risk and Insurance Management Society (RIMS) Canada Council having held all executive positions, with the exception of Secretary, over his 10 years with the Council. In addition he served on the National Conference Committee of RIMS Canada and on the local organizing committees for 5 RIMS Canada Conferences (co-chairing the 2003 conference in Victoria) and one Western Regional Conference.

He was an instructor for Simon Fraser University, teaching the Canadian Risk Management courses in Victoria from 1994 until his illness caused him to step down. Many of us at RMB are graduates of the program and have him to thank for his guidance, mentorship and advice in and out of the classroom. He had no shortage of real life stories, many of them told with humour, to illustrate the concepts and processes of risk management. He enjoyed teaching very much and it showed. He was quoted as saying, "Our profession has made great strides since the early days of my career. It has been a privilege to be a part of that

progress and, as an educator, I've had the great opportunity to give back to future risk professionals."

Glen received numerous awards for his achievements. In 2011 he received the Harry and Dorothy Goodall Award for lifetime achievement, the highest honour bestowed by RIMS. Later that year the Ontario chapter of RIMS awarded him the Donald M. Stuart Award which recognizes Canadians who have made outstanding contributions in the risk management profession. In accepting these awards, Glen made sure to thank his teams—both at home and at work—for helping to make his achievements possible.

His final accolade, the Queen's Diamond Jubilee Medal, was awarded for his significant contribution and service to the province and to our community. The award acknowledged his many years of involvement with youth football teams and Scouts Canada, teaching, and for his involvement with RIMS.

"A man dedicated to his family, community and profession, he will be missed by all who knew him." We miss him every day. We miss his good humour, words of encouragement and common sense approach to life. While his contributions to our profession of risk management were significant, his contribution to our branch was immeasurable. His influence was wide-reaching and will live on for many years to come. We are all better off and are forever grateful for having known and worked with him. <

Protecting Government's Brand Identity

By Wes Crealock
Lawyer and Trade-mark Agent
Legal Services Branch

While “branding” may be thought of differently in the public sector than in the corporate/commercial sector, it is no less important to government. In fact, given government's role in providing essential programs and services to the public, it may be even more important to establish and protect government brand recognition and prevent public confusion than in a commercial context.

This is why government is able to take advantage not only of standard trade-mark protections, but also “official mark” and other statutory mechanisms aimed at preventing others from using marks that could be mistaken for government marks or that would suggest that there is an affiliation with or endorsement by government when this is not the case. This is also why great care must be taken to ensure that proper protocols are followed so as to not unwittingly diminish the value or integrity of the marks or symbols that the Province uses to identify itself.

Government branding can be protected in several ways:

Registered Trade-marks

A trade-mark is a word (or words), a design, or a combination of these, used to identify the goods or services provided by one person or organization and to distinguish these goods or services from those of others in the marketplace. Like any other entity, governments are entitled to register trade-marks that they use in association with the provision of particular goods and services to the public. The Province of BC is the owner of approximately 50 registered Canadian trade-marks, including the BC SHARING mark.

Registration gives the owner of the trade-mark the right, across Canada, to prevent others from using a confusingly similar mark, but only with respect to goods or services that are similar to the goods and services set out in the registration. This explains why there can, for example, be “Apple” computers

and “Apple” auto-glass, despite the marks being identical.

Certification Marks

A certification mark is a special type of trade-mark and is therefore also associated with particular wares and services. However, a certification mark is intended to indicate to the public that the user of that mark meets a particular standard that has been set by the mark's owner. As a result, the owner of the mark cannot itself be the user of the mark, but rather must be the overseer of the relevant standard.

A familiar example is the “CAA” mark which indicates to the public that a hotel displaying that mark meets minimum standards of quality and cleanliness set by the Canadian Automobile Association. One certification mark owned by the Province of BC is the “EDUCATION QUALITY ASSURANCE” mark, which certifies that the user is a BC post-secondary institution whose educational programs meet the Province's minimum standards.

Common Law Trade-marks

Even without registration, trade-marks that have developed a significant reputation through extensive use over time can be protected at “common law”. However, proving in court the extent of this reputation and any harm caused by unauthorized use of the mark by a third party can be very time-consuming and expensive. A better approach is to work with Government Communications and Public Engagement (“GCPE”) to proactively obtain registration of the Province's valuable trade-marks.

Use of Government Trade-marks by Others

Regardless of whether a mark is a registered trade-mark, a certification mark or a common law trade-mark, the Intellectual Property Program (“IPP”) has the statutory mandate to authorize (or, in limited circumstances, must be consulted regarding) the disposition of the Province's intellectual property to third parties. The IPP's statutory mandate is reflected in core policy in s. 6.3.4(f). It is



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Protecting Government's Brand Identity (continued)

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important to note that that all three types of trade-marks are "intellectual property", and that a "disposition" includes not only the sale but also the licensing of trade-marks to third parties.

IPP must therefore be consulted when any other entity wants to use or reproduce a Province of BC trade-mark for any purpose. This is particularly important not only because of IPP's statutory mandate and core policy, but also because if a third party is allowed to use a trade-mark in the absence of appropriate licensing terms, that trade-mark can be deemed to be non-distinctive, with the result that all rights in the mark can be lost, and perhaps even the mark's registration expunged.

Official Marks

In addition to, or sometimes in place of, regular trade-marks, governments or other "public authorities" can take advantage of official mark protection. Unlike a trade-mark, for which registration can be sought based either on actual or proposed future use, official marks cannot be obtained until after adoption and use by the public authority has taken place and offer no protection until the date that they are "advertised" in the *Trade-marks Journal*.

The Province of BC holds approximately 450 official marks, with one of the most important and widely used being the "BC identity symbol":



Official marks are not tied to any particular wares or services but rather act as a complete prohibition to the adoption and use of that mark by a third party in a commercial context, unless consent has been obtained from the owner of the mark. For Province of BC official marks, consent is provided by

GCPE. However, the prohibition applies only to virtually identical marks, rather than to confusingly similar marks (as is the case with trade-marks). As a result, in many situations it is often beneficial to obtain both a registered trade-mark as well as an official mark.

Applicable Provincial Legislation

In addition to the federal *Trade-marks Act* and the common law, BC's *Provincial Symbols and Honours Act* gives the following special protection with respect to what could appear to be unauthorized representations of government authority: "A person or organization must not assume, display or use a name, title or device that indicates or that is reasonably susceptible of the interpretation that the person or organization has authority from the government to do so or is exercising a function of the government, if in fact the person or organization has no authority from or is not exercising a function of the government." This act also protects against unauthorized use of the Coat of Arms of British Columbia, or any design so closely resembling it as to be likely to deceive, and could be extended to include the flag of British Columbia.

Further, the *Business Practices and Consumer Protection Act* may apply if a supplier makes some form of representation that they or their goods or services have a sponsorship, approval, status, affiliation or connection, including to government, that they do not have.

Conclusion

Ultimately, many tools are available to help prevent public confusion regarding the source of valuable government programs and services and to guard against misrepresentations of governmental approval or affiliation. However, it is important to ensure that these tools are used appropriately and as effectively as possible, and that all applicable graphic standards established by GCPE are followed. Assistance with these matters should always be sought from Legal Services Branch, IPP, GCPE and/or Risk Management Branch as appropriate. <

Coverage for Additional Insureds

BC Court of Appeal narrows the test for coverage under an Additional Insured endorsement

By Nigel Kent

On June 29, 2012, the BC Court of Appeal issued judgment in *Vernon Vipers Hockey Club v. Canadian Recreation Excellence (Vernon) Corporation*, 2012 BCCA 291 and in doing so narrowed the scope of coverage for persons added to a CGL policy by way of an "Additional Insured" endorsement.

The Named Insured's business will frequently involve contracts which require other parties to be added to and protected by the Named Insured's liability policy. This sort of requirement is common in commercial leases, rental agreements, construction contracts, and the like.

In Canada, the most common form of Additional Insured endorsement will usually add the third parties as Additional Insureds under the policy "...but only in respect of liability arising out of the Named Insured's operations". This qualification raises questions about the "reach" of the coverage under the Additional Insured endorsement: what sort of link to the Named Insured's business does the phrase "arising out of" import? Does the coverage extend to the Additional Insured's own negligent conduct or only to liability imposed on that party because of the Named Insured's negligent conduct?

In the *Vernon Vipers* case, the plaintiff slipped and fell as he was leaving the hockey rink facility to buy some refreshment at a retail outlet across the street. The complex was the home of the Vernon Vipers Hockey Club and it was owned and managed by the municipality and CREVC. The latter two entities were added to the hockey club's CGL policy "but only in respect of liability arising out of the [hockey club's] operations".

The plaintiff sued only the owner and manager of the complex and did not name the hockey club as a defendant. He claimed he lost his footing as a result of defective lighting and made a variety of negligence

and Occupiers Liability allegations against the owner/operator of the complex relating to lightings, warnings, safe walking routes, etc. The owner/operator turned to the hockey club's liability insurer seeking coverage for the claim under the hockey club's policy by virtue of the Additional Insured endorsement.

The question squarely before the court, then, was whether the alleged liability for unsafe premises "arose out of the hockey club operations". In particular, the focus was on the nature and extent of connection required between the injury and the operations in order that the former might be said to "arise out of" the latter.

Both the Supreme Court and the BC Court of Appeal held there was insufficient connection between the injury and the hockey club operations to trigger coverage under the policy. The Court of Appeal held:

"At the heart of this appeal is a question of pure law: what degree of connectedness is required by the phrase "arising out of"? Does it mean simple "but for" causation, ... or does it require a stronger nexus? ...I conclude that the latter interpretation is the correct one";

"...the correct interpretation of "arising out of" and "arising from" in the context of an insurance contract requires a closer causal connection than a simple "but for" test...Though [some case law] contain excerpts which, taken in isolation, seem to equate "arising out of" with simple causation, this interpretation is not supported by a reading of the cases in their entirety. Compliance with a simple "but for" test is necessary, but not sufficient";

"Merely incidental or fortuitous connections are not enough to satisfy the causation standard";



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Coverage for Additional Insureds (continued)



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"I conclude that the contractual term "arising out of the Named Insured's operations" as written in the hockey club's policy endorsement, imposes a causal requirement greater than a simple "but for" test. Borrowing from the cases discussed above, the phrase "arising out of" should be construed as requiring "an unbroken chain of causation" and a connection that is more than "merely incidental or fortuitous".

The court reviewed a number of cases where the connection between the Named Insured's operations and the alleged source of the Additional Insureds liability was "direct and apparent". For example, the claimant struck by a stray lacrosse ball launched out of bounds during a lacrosse game was an obvious and sufficient "causal link" between the sports club activities and the injury such that the Additional Insured municipality in that case was covered under the lacrosse team's policy.

In the *Vernon Vipers* case however, the court held,

"By contrast, the link here is far more tenuous, even allowing for a broad and liberal interpretation to the term "operations". No aspect of the hockey club's operations are alleged to have *caused* [the plaintiff] to fall and injure himself. The most that the pleadings allege is that these operations caused him to be in a place where, for unrelated reasons, he became injured. This might have been enough to meet a simple "but for" test but in my view, it cannot satisfy the more rigorous causal requirement established in [the case law]".

Most of these coverage contests occur in the context of "duty to defend" coverage under a CGL policy to which the Additional Insured has been added. The *Vernon Vipers* case represents a narrowing of coverage for such

Additional Insureds and makes it conditional upon a closer causation requirement than a simple "but for" test such as an unbroken chain of causation and a stronger connection that is more than merely incidental or fortuitous.

The implications of this decision may be significant. Questions to be considered in all of these Additional Insured cases include:

- Does the language of the Additional Insured endorsement match the requirement of the contract between the Named Insured and the third parties who are supposed to be added to coverage?
- If the connection between the Named Insured's operations and the injury triggering the source of the Additional Insureds liability is vague, must insurers assume the defence of the Additional Insured on a "reservation of rights" basis (raising the prospects of a denial of indemnity at a later date)?
- Must different defence counsel be appointed for the Named Insured and the Additional Insured?
- Are there additional conflicts as between the Named Insured and Additional Insured arising out of issues such as allocation of fault, indemnity provisions in contracts between the parties, and so on?
- Does the Additional Insured have its own liability coverage in any event and, if so, how is the priority of overlapping coverage determined?

While most endorsements in Canada extend fairly broad coverage for Additional Insureds, each case is fraught with its own unique complications and it would be wise for insurers to obtain advice from coverage counsel before stepping into the fray. <

This article was originally published in the July 6, 2012 of Clark Wilson's [Insurable Interest](#). Republished with permission.

Ongoing Risk Management Education

- ❖ **British Columbia Risk & Insurance Management Association (BCRIMA)**
BCRIMA provides education primarily through monthly luncheon speakers and a spring Professional Development Day session. Educational opportunities are posted on the BCRIMA website as they become available:
<http://britishcolumbia.rims.org>
- ❖ **Canadian Risk Management (CRM) Program**
Simon Fraser University offers evening courses toward the CRM designation in downtown Vancouver and downtown Victoria. For more information call them at 778-782-8000, see <http://www.sfu.ca/continuing-studies.html> or send an email to csreg@sfu.ca
- ❖ **University of Northern British Columbia** offers weekend courses toward the CRM designation in Prince George. For more information call them at 1-866-843-8061, see <http://www.unbc.ca/continuingstudies/certificates/riskmanagement.html> or send an email to cstudies@unbc.ca

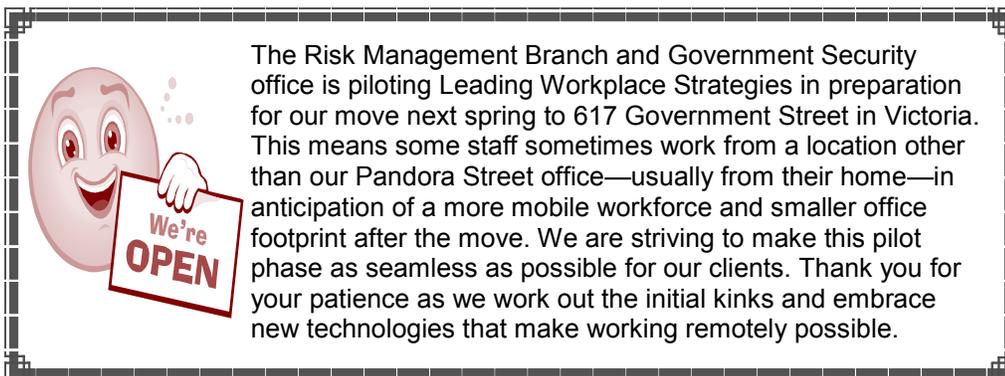
Risk Management Conferences

- ❖ **2014 RIMS Annual Conference** April 27-30, 2014 Denver, CO
<https://www.rims.org/RIMS14/Pages/default.aspx>
- ❖ **2014 Western Regional RIMS Conference** September 8-11, 2014 San Diego, CA
<http://sandiegorims.org/WRC-2014-SaveTheDate.pdf>
- ❖ **2014 RIMS Canada Annual Conference** September 14-17, 2014 Winnipeg, MB
<http://rimscanadaconference.ca/2014-rims-canada-conference.html>

Risk Management Resources

- ❖ **Risk Management Magazine** <http://www.rmmagazine.com>

About Our Organization ...



- ❖ Visit our public Internet site: <http://www.fin.gov.bc.ca/PT/rmb/index.shtml>
- ❖ Government staff: be sure to bookmark our Intranet site!
<http://gww.fin.gov.bc.ca/gws/pt/rmb/index.stm>

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.

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