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RIMS CANADA™

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FORESEEABILITY OR MERE POSSIBILITY?

SHUTTERSTOCK

One of the legal concepts lawyers struggle with when dispensing legal advice is the issue of duty of care and specifically the question of whether the type of harm suffered by a plaintiff was a "reasonably foreseeable" consequence of the defendant's conduct.

That very question was recently addressed by the Supreme Court of Canada in *Rankin's Garage & Sales v. J.J.*, 2018 SCC 19. The issue in that case was neatly summed up by the Court in the opening paragraph of the decision:

"A vehicle is stolen from a commercial garage. The vehicle is crashed. Someone is injured. Does the business owe a duty of care to the injured party? The question in this appeal is whether the courts below erred in recognizing a duty of care owed by a business that stores vehicles to someone who is injured following the theft of a vehicle."

Late one night, after consuming alcohol and marijuana, two teens walked around Paisley, Ontario looking for opportunities to steal valuables from unlocked cars. They ended up at Rankin's Garage & Sales and found the lot unsecured. On the lot, they found an unlocked car with its keys in the ashtray. C., who was 16 and did not have a driver's license, decided to steal the car and told his friend J. to get in. C. crashed the car on the highway and J. suffered a catastrophic brain injury. J. sued C., C.'s mother, who had provided the teens with some of the alcohol they drank that night, and Rankin's.

At trial, the judge held that Rankin's owed J. a duty of care on the basis that previous cases had already established this duty exists. The trial judge went on to find that it "ought to be foreseeable" that injury could occur if the vehicle were used by inebriated teenagers. The jury went on to find that Rankin's was 37% at fault.

The Ontario Court of Appeal upheld the trial decision, however, it did not accept that the duty fell into a recognized category and undertook a full analysis. Ultimately it concluded that the risk of theft encompasses a risk of theft by minors in whose hands vehicles are potentially dangerous, and therefore that it was reasonably foreseeable that injury would result if a car was stolen from Rankin's lot.

The Supreme Court of Canada overturned the decision of the lower courts and dismissed the claim against Rankin's. In doing so, Judge Andromache Karakatsanis, writing for the majority, held that to establish a duty of care in novel circumstances, a plaintiff must provide a sufficient factual basis to establish that the type of harm suffered by the plaintiff, in this case personal injury, was a reasonably foreseeable consequence of the defendant's breach of the standard, in this case, failing to secure vehicles to prevent theft.

The Court distinguished the risk of theft generally from the risk of theft by minors. It was reasonably foreseeable to Rankin's, or a commercial garage in Rankin's position, that an unlocked car could be stolen. In fact, Rankin's' evidence was that it took precautions to secure vehicles to prevent theft. However, it was not theft of the vehicle which caused J.'s personal injury; it was the dangerous manner in which C. drove the stolen vehicle.

Of course, this case was ultimately decided on its particular facts. In arriving at its decision, however, the court made several comments that should prove to be helpful to legal counsel and their clients in advocating for a narrowing of the scope of what is foreseeable. First, the court commented that the fact something is possible does not mean that it is reasonably foreseeable. Any harm that actually occurs is by definition possible. The court held that for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met.

Secondly, the court provided commentary on the evidence required to establish foreseeability. At trial, the owner of Rankin's agreed under cross-examination that security was important to ensure that anyone who takes a vehicle "doesn't get hurt." However, the court found that such evidence cannot provide the foundation for a legal duty of care. The question asked of Rankin's was answered with the benefit of hindsight and did not relate to the relevant issue, namely whether physical injury was reasonably foreseeable prior to the occurrence of the accident. In determining whether or not something is "reasonably foreseeable," an objective test must be applied. Such a test must focus on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did. The court then called out a warning that triers of fact should exercise vigilance "in ensuring that the analysis is not clouded by the fact that the event in question actually did occur." Rather, "the question is properly focused on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight."

In order to find that the harm suffered was foreseeable, the court required some evidentiary basis to conclude that the risk of theft included the risk of theft by minors. Otherwise theft by a minor would always be foreseeable—even without any evidence to suggest that this risk was more than a mere possibility. There was no evidence the garage intended to attract minors or that it knew it attracted minors. The court was also not persuaded on the evidentiary record that physical harm was an expected consequence of theft. Accordingly, it was not reasonably foreseeable to Rankin's that its failure to secure the vehicle, which C. eventually stole, could lead to physical harm.

This case highlights the need for a plaintiff to adduce evidence that establishes a link between the breach of standard and the type of harm suffered when arguing a duty of care should be recognized in new circumstances. Arguably, the case serves to place constraints on trial judges who might be inclined to make a finding that if something actually occurred, it must therefore have been reasonably foreseeable. It also reinforces what defendants have consistently argued before the courts, often unsuccessfully; that simply because something is possible does not mean it is reasonably foreseeable. If the case tells us anything, it is that judging the conduct of others by the use of 20/20 hindsight is not justice. ■

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SHUTTERSTOCK

CHAPTER SPOTLIGHT: MARITIME

RIMS Maritime Chapter officially relaunched with a spectacular event at the Cambridge Suites in Halifax, Nova Scotia, on November 29, 2018. Risk management professionals from Nova Scotia, New Brunswick and Prince Edward Island were invited to educational sessions about Canadians' ability to protect critical infrastructure and respond to emerging threats, followed by a holiday reception.

The Maritime Chapter was excited to present Les Williams, partner and chief revenue officer at Risk Cooperative and Kevin Quigley, professor and director of the Dalhousie University School of Public Administration's MacEachern Institute for Public Policy & Governance. Both sessions were very informative and well received by those in attendance. The presentations were especially timely as Nova Scotia was struggling with widespread power outages that had affected up to 250,000 customers.

The Chapter's executive team was introduced at the event and is made up of group of strong and committed individuals:

Jennifer Goodwin, *Scotia Investments Limited, President*
Adib Samaan, *J.D. Irving Limited, Vice President*
Enille Currie, *Emera Inc., Secretary*
Tanya Schiefer, *Chorus Aviation Inc., Treasurer*
Andrea Cameron, *Empire Company Limited, RIMS Delegate, RCC Liaison*
Vanessa MacLean, *Empire Company Limited, Membership Director*
Elle Stephens, *ACOA/APECA, Program Director*
Thomas Wood, *WorkSafe NB, Program Director*
Dee Vipond, *Halifax Regional Municipality, Social Events Director*
Joel Plater, *Halifax Regional Municipality, Nova Scotia Representative*
Joe MacDonald, *Innovacorp, Webmaster*

The evening wrapped with a reception that included a RIMS Maritime Chapter signature cocktail, networking and door prizes.

The revitalized Chapter is committed to having at least one meeting a year in each of its member provinces. The next meeting will be in the Annual General Meeting in Halifax in April 2019. The Chapter will then host its famous Prince Edward Island Retreat (and lobster dinner) at Stanley Bridge Resort on June 20 and 21, 2019. Further details will be announced on its website as they become available.

Special thanks go out to Dee Vipond and Elle Stephens for their hard work creating such an amazing event and to Les Williams and Kevin Quigley for their engaging presentations.

For more information on RIMS Maritime Chapter, visit **https://community.rims.org/maritimechapter/home**, follow them on Twitter @RIMSMaritimes, or email at RIMSMaritimeChapter@gmail.com.

Seismic Risk in Quebec

by Michel Turcotte

The earthquake insurance penetration rate for assets in the province of Quebec is at a much lower level when considering the level of risk. What explains this phenomenon and how should it be addressed?

A LITTLE HISTORY

The largest earthquake in Montreal dates back to September 16, 1732. On that day, an earthquake with a magnitude of 5.8 hit New France. The tremors were felt in Montreal and produced a landslide of chimneys and cracks in walls for a total of about 300 houses damaged and 185 buildings destroyed by the fires that followed.

IMPACT (OR SEVERITY)

In an article published in the Canadian Press on January 13, 2018, it was mentioned that Montrealers could suffer losses of $45 billion if an earthquake of a magnitude similar to that of 1732 shook the city. This figure could be even higher if we take into consideration certain characteristics such as: aging infrastructure, loose sub-soils, old buildings, height of buildings, a strong downtown economic activity, presence of manufacturing industries, or even, the high density of population in some areas.

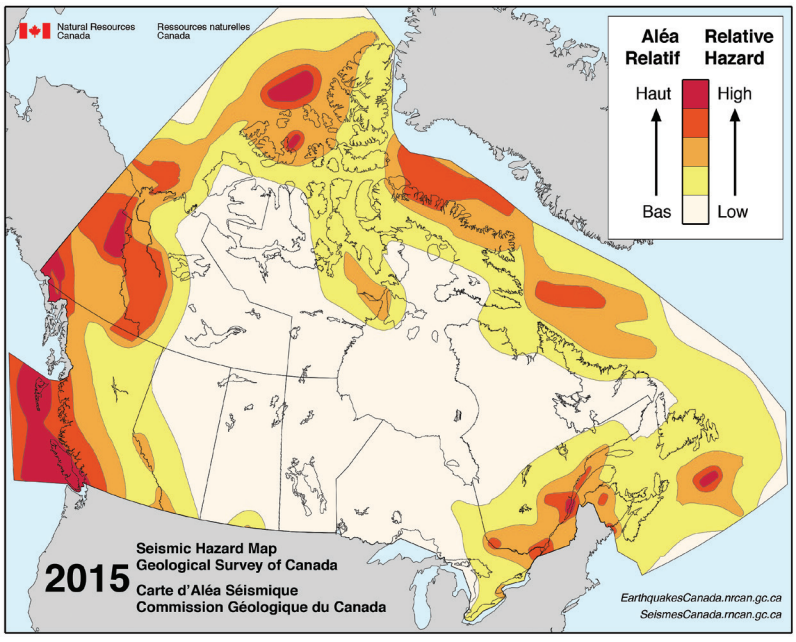
To these losses, one needs to add the impact on public finances. Indeed, a study completed by the World Bank in 2011 revealed that disasters result, on average, in an increase in government spending of 15% and in a decrease in tax revenues of 10%, which translates into a combined increase of budget deficits of 25%.

According to a study from Swiss Re, earthquakes in Eastern Canada tend to have a lower magnitude than those in Western Canada, but the damage they can cause remain important, especially in the South of the province of Quebec and Eastern Ontario.

On the website of the city of Montreal, we can read that Montreal is considered the second city in Canada in terms of vulnerability after Vancouver for this type of disaster. An excerpt from the site:

> *Montreal is in the Western Quebec Seismic Zone, which extends from Montreal to Temiscamingue and the Laurentians east of Ontario. It is considered the second most vulnerable city for earthquakes, after Vancouver, because of its high population density and type of soil. Since seismological monitoring stations were installed in eastern Canada, it has been shown that the Montréal area is in a zone of moderate seismic hazard, where a 5-6 magnitude earthquake occurs approximately every 25 years, and every 100 years for earthquakes with a magnitude greater than 6. The strongest earthquake to hit Montréal was estimated at 5.8 on the Richter scale and happened in 1732.*

Map Illustrating the Importance of Seismic Risk in Canada



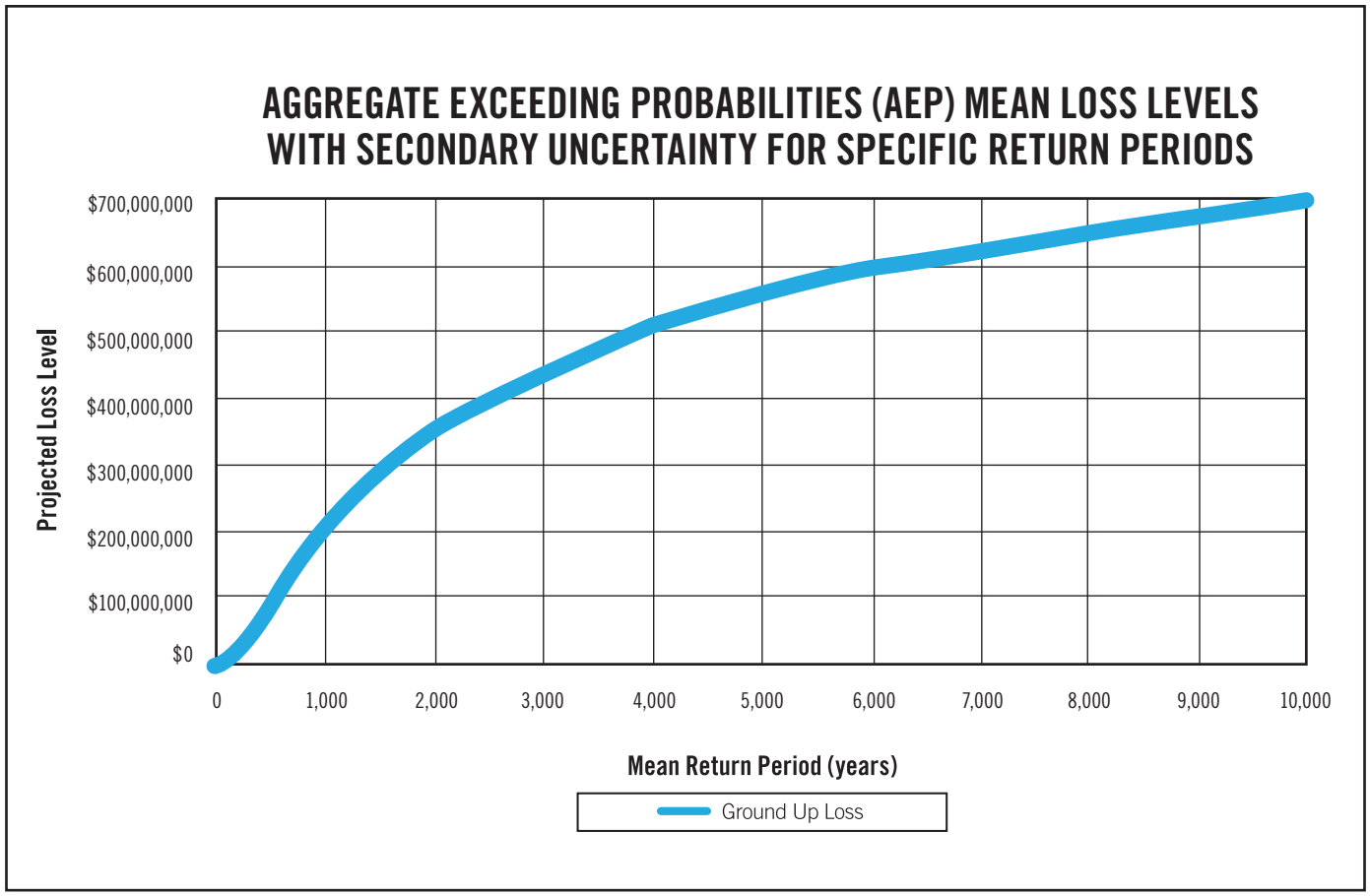
FREQUENCY (OR PROBABILITY)

In a 2016 article, the Chambre de l'assurance de dommages indicated that the risk of an earthquake with a magnitude of 7.1 affecting the province of Quebec in the next 50 years is of the order of 5% to 15%. A modest probability, but not to be ignored. A seismologist at Geological Survey of Canada added "that the risk of a magnitude 6 earthquake occurring is even greater and could still do a lot of damage if the epicenter was near an urban area."

EARTHQUAKE INSURANCE (OR RISK TRANSFER)

In a survey conducted by IBC in 2017, 85% of respondents said they did not fear that their home would be damaged by an earthquake. Obviously, they have not been sensitized to the real risks. In addition, barely 3% of the residents of the Quebec City area and 4% of those in Montreal reported buying quake insurance. It is not much better on the corporate side with just over 40% of companies being protected.

In comparison, another Swiss Re study revealed that more than 65% of residents in British Columbia do buy insurance to protect against quake risks.



HOW TO EXPLAIN THIS PHENOMENA

One explanation would be that the absence of significant modern event has reduced the level of awareness of property owners in Quebec. None of us has been affected by the earthquake of 1732, and the absence of any new significant event does not affect our collective imagination as did the earthquake of October 17, 1989 in San Francisco. Today, all San Franciscans remember what they were doing that day.

A second explanation may lie in the fact that many homeowners believe they are covered against earthquakes because they are covered for fire following, coverage often automatically included in homeowner's insurance policies. They then think, wrongly, that they will be protected for the rest.

And a third explanation might be the false impression that homeowners could rely on a government compensation program. However, such a program is not intended to replace the coverage offered by insurers when it exists, not to mention that the amount of eligible financial aid is never the full amount of the damages.

We invite all Canadian risk managers whose employers hold assets in the province of Quebec to take into account the true seismic risk when reflecting on their strategic combination of transfer and retention of this risk.

RISK TRANSFER

To properly feed its reflection on risk transfer, the risk manager should have a seismic survey completed for its assets in the province Quebec to identify the values at risk. The measure generally used is expressed in terms of recurrence period. The most used periods are 72 years, 475 years and 975 years. These recurrence periods respectively correspond to 50%, 10% and 5% probability of exceedance over a period of 50 years (which corresponds to the lifetime of a building).

The PML475 or the "Probable Maximum Loss" for an occurrence of a recurrence of once every 475 years is the generally accepted industry standard. The calculation of PML475, for example, could give a result of $100 million in potential losses for a given portfolio (see chart above). This means that in nine cases out of ten, the losses from such an event would not exceed $100 million. But in one case out of ten, they might exceed this amount (where the 10% risk of exceeding). Thus, the generally accepted level of certainty is 90%.

The use of this standard to establish the desirable insurance limit allows a balance between the cost and the level of financial protection in areas where the cost of such insurance is prohibitive.

It should be understood that this insurance coverage will not fully provide protection against earthquakes of greater frequency. If an earthquake of a recurrence of once every 10,000 years occurs, losses could reach $700 million per the previous example.

Fortunately, the cost for quake insurance for assets located in the province of Quebec is not as high as that found in California or the Pacific Northwest, allowing risk managers to purchase higher limits without too much difficulty. ■

Michel Turcotte is senior director, risks and insurance at Ivanhoe Cambridge.

Le risque sismique au Québec

par Michel Turcotte

Le taux de pénétration de l'assurance tremblement de terre pour les actifs au Québec est à un niveau beaucoup trop bas lorsqu'on considère le niveau du risque. Qu'est-ce qui explique ce phénomène et comment y remédier ?

UN PEU D'HISTOIRE

Le plus important tremblement de terre survenu à Montréal remonte au 16 septembre 1732 vers 11 heures. Ce jour-là un séisme d'une magnitude de 5,8 a touché la Nouvelle-France. Les secousses ont été ressenties à Montréal et ont produit des écroulements de cheminées et des fissures dans des murs pour un total d'environ 300 maisons endommagées et 185 bâtiments détruits par les incendies qui ont suivi.

L'IMPACT (OU LA GRAVITÉ)

Dans un article de la Presse canadienne publié le 13 janvier 2018, on mentionne que les Montréalais pourraient subir des pertes financières de 45 milliards de dollars si un tremblement de terre d'une magnitude similaire à celle de 1732, soit de 5,8, ébranlait la métropole. Ce chiffre pourrait même être plus élevé si on prend en considération certaines caractéristiques intrinsèques telles que: des infrastructures vieillissantes, un sous-sol meuble, des bâtiments anciens, des édifices en hauteur, une forte activité économique en centre-ville, une présence d'industries à risques, ou encore, une forte densité de population dans certains secteurs.

À ces pertes, il faut ajouter l'impact sur les finances publiques. En effet, une étude menée en 2011 par la Banque Mondiale a révélé que les catastrophes entraînent, en moyenne, une augmentation des dépenses gouvernementales de 15% et une diminution des recettes fiscales de 10%, ce qui se traduit par une augmentation combinée des déficits budgétaires de 25%.

Selon une étude de Swiss Re, les séismes dans l'Est du Canada tendent à avoir une magnitude moins élevée que ceux dans l'Ouest du pays, mais les dommages qu'ils peuvent causer demeurent importants, surtout dans le sud du Québec et l'est de l'Ontario.

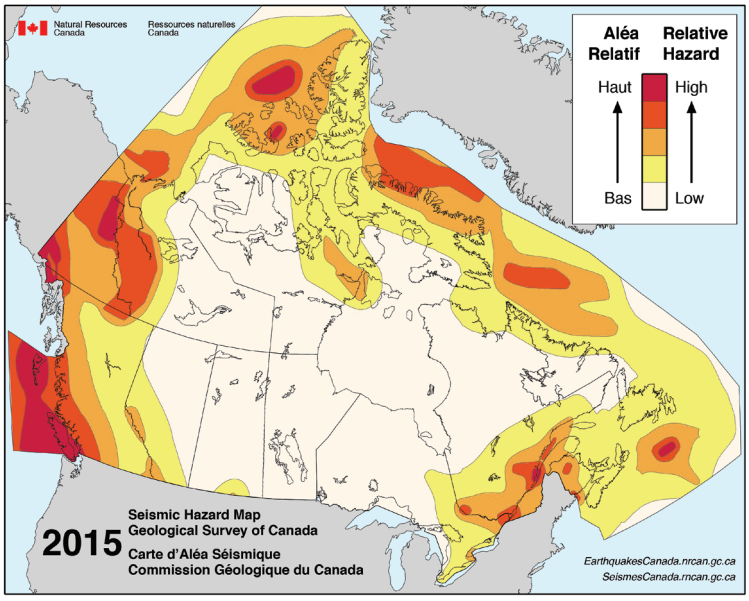
Sur le site internet de la ville de Montréal on peut lire que Montréal est considéré comme la seconde ville au Canada en termes de vulnérabilité après Vancouver pour ce type de catastrophe. Voici un extrait du site:

Montréal se trouve dans la zone sismique de l'ouest du Québec qui s'étend de Montréal au Témiscamingue et des Laurentides à l'est de l'Ontario. On la considère comme la 2e ville canadienne après Vancouver en termes de vulnérabilité sismique en raison de sa forte densité de population et du type de sol que l'on y retrouve. Depuis l'installation de stations de surveillance sismique dans l'Est du Canada, on a démontré que la région de Montréal est dans une zone d'aléa sismique modérée où l'occurrence d'un séisme de magnitude 5-6 est de l'ordre de 25 ans et de 100 ans pour une magnitude supérieure à 6. Le plus fort séisme à avoir frappé Montréal a été estimé à 5,8 sur l'échelle de Richter et s'est produit en 1732.

FRÉQUENCE (OU PROBABILITÉ)

Dans un article de 2016, la Chambre d'assurance de dommage indiquait que le risque qu'un séisme d'une magnitude de 7,1 touche la province de Québec dans les 50 prochaines années est de l'ordre de 5% à 15%. Une probabilité modeste mais quand même à considérer. Un sismologue à la Commission géologique du Canada ajoutait «que le risque qu'un séisme de magnitude 6 survienne est encore plus grand et pourrait quand même causer bien des dommages si l'épicentre se situait près d'une zone urbaine».

Map Illustrating the Importance of Seismic Risk in Canada



L'ASSURANCE TREMBLEMENT DE TERRE (OU LE TRANSFERT DE RISQUE)

Lors d'un sondage effectué par le BAC en 2017, 85% des répondants avaient déclaré ne pas craindre que leur maison soit endommagée par un tremblement de terre. Visiblement, ils n'avaient pas été sensibilisés aux véritables risques. De plus, à peine 3% des résidents de la région de Québec et 4% de ceux de Montréal ont déclaré avoir une assurance contre les tremblements de terre. Ce n'est guère mieux du côté corporatif avec à peine plus de 40% des entreprises protégées.

En comparaison, une étude de Swiss Re rapportait que plus de 65% des Britanno-Colombiens possède une assurance contre ces mêmes risques.

COMMENT EXPLIQUER CE PHÉNOMÈNE ?

Une première explication serait que l'absence d'événement significatif moderne réduit le niveau de sensibilisation des propriétaires de biens fonciers au Québec. Personne n'a été affecté par le séisme de 1732 et l'absence de nouvel événement significatif depuis ce temps ne permet pas de toucher l'imaginaire collectif comme l'a fait le séisme du 17 octobre 1989 à San Francisco. Aujourd'hui, tous les San-Franciscains se souviennent de ce qu'ils faisaient ce jour-là.

Une seconde explication pourrait résider dans le fait que plusieurs propriétaires se croient couverts contre les tremblements de terre parce qu'ils sont couverts pour les incendies consécutifs à un tremblement de terre. Une garantie souvent incluse automatiquement dans les polices d'assurance habitation. Ils penseraient alors, à tort, qu'ils seront protégés pour le reste.

Enfin, une troisième explication pourrait être la fausse impression que les propriétaires pourraient compter sur un programme d'indemnisation gouvernemental. Toutefois il faut bien préciser qu'un tel programme ne vise pas à remplacer les protections offertes par les assureurs lorsqu'elles existent. Sans oublier que le montant de l'aide financière admissible n'est jamais le plein montant des dommages.

Nous invitons les gestionnaires de risques de toutes entreprises canadiennes qui détiennent des actifs au Québec à bien prendre en considération le véritable risque sismique dans leur réflexion pour leur combinaison stratégique de transfert et de rétention de ce risque.

LE TRANSFERT DE RISQUE

Afin de bien alimenter sa réflexion sur le transfert de risques, le gestionnaire devrait faire effectuer une étude sismique de son portefeuille au Québec par une firme spécialisée afin d'identifier le montant de perte potentielle. La mesure généralement utilisée est exprimée en termes de période de récurrence. Les périodes les plus utilisées sont 72 ans, 475 ans et 975 ans. Ces périodes de récurrence correspondent respectivement à 50%, 10% et 5% de probabilité de dépassement sur une période de 50 ans (ce qui correspond à la durée de vie d'un immeuble).

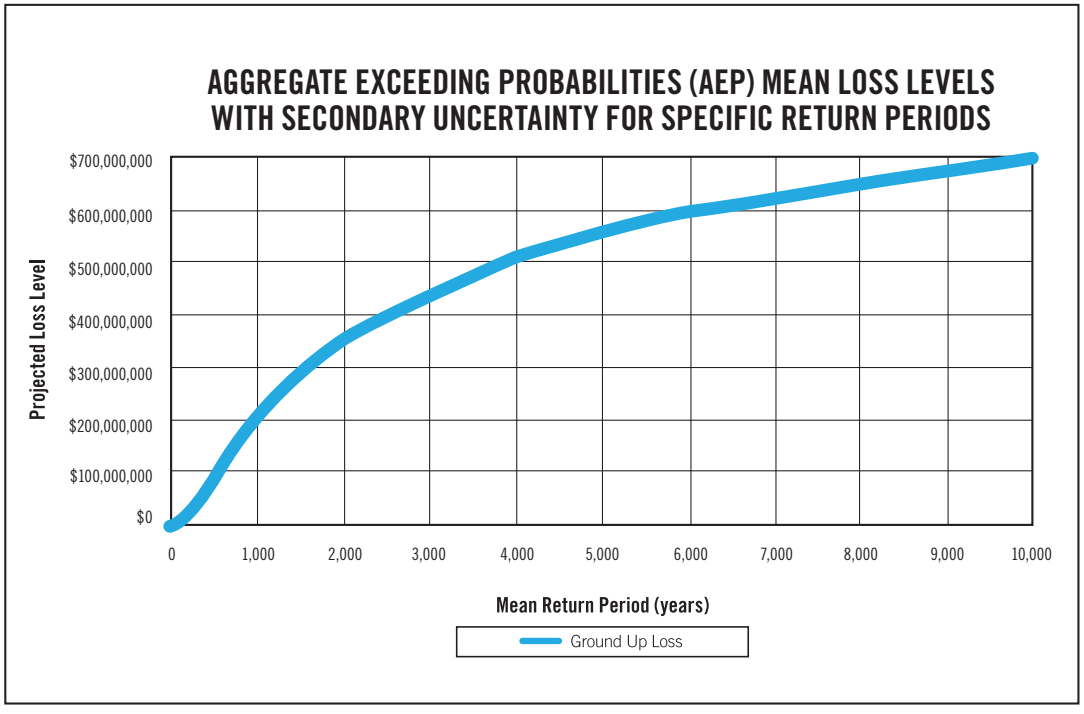
Le PML475 ou le « *Probable Maximum Loss* » pour un sinistre d'une récurrence d'une fois tous les 475 ans est la norme généralement reconnue dans l'industrie. Le calcul de PML475 pourrait par exemple donner un résultat de 100M$ de pertes potentielles pour un portefeuille donné (voir graphique). Cela signifie que dans neuf cas sur dix, les pertes découlant d'un tel incident ne dépasseraient pas 100M$. Mais dans un cas sur dix, elles pourraient excéder ce montant (d'où le 10% de risque de dépassement). Ainsi, le niveau de certitude généralement accepté est de 90%.

L'utilisation de cette norme pour établir la limite d'assurance souhaitable permet un équilibre entre le coût et le niveau de protection financière dans les zones où le coût d'une telle assurance est prohibitif.

Il faut bien comprendre que cette protection d'assurance ne protègera pas entièrement la société contre les séismes de plus grande fréquence. Si c'était un séisme d'une récurrence d'une fois tous les 10 000 ans qui frappait, les pertes pourraient atteindre 700M$ dans l'exemple précédent.

Heureusement, le coût des assurances tremblement de terre pour les actifs au Québec n'est pas aussi élevé que ce que l'on retrouve en Californie ou dans la Pacifique Nord-Ouest, ce qui permet aux gestionnaires de risques d'acheter des limites supérieures à cette norme sans trop de difficulté. ■

Michel Turcotte est directeur principal, risques et assurance chez Ivanhoé Cambridge.



Managing Risks When Asked for an Employee Reference

by Karen R. Zimmer

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?

SHUTTERSTOCK

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

In general, anyone who makes defamatory statements because of legal or moral obligation to communicate the information to another person who has a legitimate interest in receiving them may be granted the qualified privilege. However, a finding of malice 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.

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.

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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Gérer les risques liés à une demande de références d'employé(e)

par Karen R. Zimmer

Parfois, nous sommes appelés à fournir une référence d'emploi pour un ancien employé qui n'était guère impressionnant et il peut être difficile de cerner les fondements nous permettant de qualifier qu'un employé était, au mieux, médiocre ou nettement inférieur à ses prédécesseurs. Alors… que faire et que dire lorsqu'on vous demande une référence, et à quels types de risques juridiques vous exposez-vous en fournissant ou non une référence?

RISQUE D'EXPOSITION À UNE ACTION EN DIFFAMATION

Le premier risque auquel il faut porter attention est le risque qu'une action en diffamation soit intentée contre vous. N'oubliez pas que votre ancien employé peut être incité à vous poursuivre en diffamation s'il est convaincu, à tort ou à raison, que votre référence peu élogieuse lui a coûté un emploi.

Alors, comment pouvez-vous éviter ce risque, ou du moins vous positionner pour défendre une telle poursuite?

1. Choisissez bien vos mots et portez attention au ton utilisé ainsi qu'à vos insinuations: même si basée sur des insinuations, il n'en demeure pas moins qu'une poursuite en diffamation puisse être intentée.

Ce ne devrait être une surprise pour personne que la meilleure chose à faire soit de faire très attention à votre message : non seulement à vos paroles, mais également au ton de votre voix et aux pauses douteuses. La signification des mots utilisés et les sous-entendus que vous pourriez devoir défendre dans une action en diffamation ne sera pas celle que vous vouliez exprimer, mais plutôt la signification que la Cour estimera qu'un interlocuteur raisonnable et ordinaire retiendrait de votre message. De fait, la Cour tiendra compte de l'ensemble de votre message, y compris votre ton, les pauses douteuses et les sous-entendus.

2. Croyez sincèrement en chacun de vos énoncés et assurez-vous qu'un fondement raisonnable justifie votre conviction.

La défense typiquement invoquée dans une action en diffamation à la suite de la référence d'un employé est l'immunité relative. Il s'agit d'une notion juridique qui permet une défense complète contre les déclarations diffamatoires qui se révèlent fausses ou ne peuvent pas être prouvées comme véridiques.

Lorsque vous vous appuyez sur cette défense, vous devez être en mesure de convaincre un tribunal que non seulement vous croyiez sincèrement à votre message, mais que la véracité de votre message s'appuyait sur des fondements raisonnables. Voici pourquoi:

Un ancien employeur est généralement en mesure de démontrer qu'une situation d'immunité relative existe. Une telle situation survient dans les cas suivants: (i) une personne d'intelligence normale avec des principes moraux se serait sentie obligée de communiquer les informations dans les circonstances; et (ii) les informations n'ont été transmises qu'aux destinataires intéressés. La réciprocité des intérêts est essentielle. En règle générale, la Cour constatera qu'une telle situation se présente lorsqu'on vous demande de fournir une référence.

En général, quiconque tient des propos diffamatoires par obligation légale ou morale de les communiquer à une autre personne qui aurait un intérêt légitime à les recevoir peut bénéficier de l'immunité relative. Toutefois, la personne qui invoque l'immunité relative peut en perdre le bénéfice si ses commentaires étaient empreints de motifs malveillants. L'absence de malveillance est souvent établie en démontrant que vous «croyiez sincèrement» en la véracité de votre message et aviez des fondements solides vous permettant de justifier ce fait.

Démontrer qu'une personne était motivée par la malice en prononçant ses paroles implique une enquête sur l'état d'esprit de l'auteur de ces paroles au moment où la déclaration a été faite.

Pour établir la malveillance, un tribunal n'a pas besoin d'aller jusqu'à conclure que le motif dominant de la communication d'informations était «vindicatif» ou qu'il était basé sur le désir d'humilier ou de blesser. En droit, la malveillance peut également être établie lorsque la Cour conclut qu'une affirmation a été faite avec une «indifférence téméraire», qu'elle soit vraie ou non. De même, la malice peut être démontrée lorsqu'une personne est téméraire en ayant confiance ou ayant une croyance déraisonnable dans des rumeurs, et en donnant de la crédibilité et à des propos non fondés.

3. Ne soyez pas trop prompt à penser qu'un propos est raisonnablement justifiable.

Bien que le « commentaire loyal » soit un moyen de défense contre une plainte en diffamation, vous ne devez pas supposer que vos déclarations

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sont des commentaires raisonnables à moins d'avoir un avis juridique très convaincant, et même dans ce cas, vous devez être prudent.

La notion de défense de « commentaire loyal, » issue du common law, est très technique et certains critères sont appliqués pour déterminer si la défense de commentaire loyal est recevable, à savoir : i) le commentaire ou l'opinion doit porter sur une question d'intérêt public - il doit s'agir d'un commentaire ou d'une opinion fondé sur des faits existants au moment de la communication et être soit mentionné dans la communication, soit de notoriété publique; ii) il faut que la déclaration mise en cause soit présentée comme une opinion ou un commentaire plutôt que comme un fait; iii) le commentaire doit répondre au critère objectif suivant: toute personne pourrait honnêtement exprimer cette opinion vu les circonstances prouvées; et iv) le défendeur ne doit pas avoir agi avec malice.

Cette défense ne tient souvent pas la route parce que le défendeur est incapable de convaincre la Cour que les propos diffamatoires seraient reconnus par toute personne comme des commentaires basés sur des faits réels, par opposition à une simple déclaration de faits. Selon le contexte, la Cour pourrait déterminer que l'énoncé «elle est incompétente» peut exprimer soit un commentaire, soit un fait et la défense de commentaire loyal n'est pas recevable si la Cour estime qu'il s'agissait d'un énoncé de faits.

4. Pouvez-vous vraiment prouver qu'une déclaration est vraie?

Une défense fondée sur la véracité des propos (techniquement «justification») peut constituer un moyen de défense absolu contre une action en diffamation. Essentiellement, si une personne est capable de prouver que la déclaration communiquée est véridique en son sens naturel et ordinaire, elle ne peut être poursuivie pour diffamation avec succès. Après avoir examiné la totalité de la preuve, le juge des faits pourra ajouter foi à la déposition, même en présence de faits contestés, s'il est persuadé que le témoin dit la vérité.

Le sens des propos que vous devez prouver comme étant vrai n'est pas le message que vous aviez l'intention de formuler, mais le sens que la Cour estime que vos paroles et votre ton de voix aurait véhiculé à un interlocuteur ordinaire dans les circonstances.

Si l'employé n'a pas été congédié pour un motif valable, il est probable que votre service des ressources humaines craigne que vous ne puissiez pas prouver que vos préoccupations étaient réelles. Même si un employé est congédié pour un motif valable, vous souhaiterez peut-être en discuter rapidement avec un avocat avant de donner des références.

RISQUE QUE VOS PROPOS NE DEMEURENT PAS CONFIDENTIELS

Souvent, nous sommes trop confiants que ce que nous disons ou écrivons demeurera confidentiel et ne sera pas révélé à un ancien employé. Ceci est particulièrement le cas lorsque vous connaissez et faites confiance à la personne à qui vous fournissez une référence.

Ne soyez pas naïf, d'autant plus que vos paroles et vos écrits (enregistrés par lettre, note manuscrite ou courrier électronique) pourraient faire l'objet d'une demande d'accès à l'information par votre ancien employé.

L'affaire Vancouver Island Health Authority, 2011 BCIPC 5, illustre le cas où un organisme public n'a pas réussi à s'opposer à la divulgation d'une référence d'emploi. En novembre 2009, l'infirmière à l'origine de la demande a demandé une copie d'une référence de travail envoyée par un médecin à la Vancouver Island Health Authority. La Vancouver Island Health Authority a rejeté la demande pour le motif que la référence du travail avait été fournie à titre confidentiel.

Après examen, le Commissariat à l'information et à la protection de la vie privée de la Colombie-Britannique (OIPC) a établi qu'il existait trois catégories d'informations en cause: les coordonnées de la tierce partie, qui sont exclues de la définition des informations personnelles et ne peuvent être divulguées; les informations sur les relations de travail entre la tierce partie et le demandeur, qui, selon l'OIPC, sont des informations relatives aux informations personnelles de la tierce partie; et des informations sur la position du demandeur dans l'établissement médical et des commentaires d'évaluation sur ses caractéristiques et ses compétences sur le lieu de travail, qui, selon le Bureau du commissaire aux comptes, constituaient des informations personnelles sur le demandeur. À la suite de ces déterminations, l'OIPC a conclu que le demandeur avait le droit d'accéder aux détails de sa position dans l'établissement médical.

De manière significative, l'OIPC a conclu que la Vancouver Health Authority n'avait pas établi qu'elle avait reçu les informations de référence sur le demandeur à titre confidentiel de la part de la tierce partie, même si cette dernière avait peut-être eu des attentes de confidentialité au moment de transmettre la référence. Il fût donc ordonné que les informations personnelles référencées soient divulguées.

EN CONCLUSION

Bien qu'en vertu du common law il n'y ait pas d'obligation de fournir une référence, le fait de ne pas en fournir peut aussi avoir des ramifications potentielles. Par exemple, si une action en licenciement injustifié est intentée, le refus de fournir une référence peut être considéré comme une preuve de mauvaise foi, entraînant une prolongation du délai de préavis (voir par exemple Wallace c. United Grain Growers, [1997] 3 RCS 710, paragraphe 97; Schmidt c. Amec Earth & Environmental Ltd., 2004 BCSC 1012).

Le meilleur conseil est de faire attention au message que vous véhiculez, de vous assurer que les préoccupations exprimées sont fondées, et de ne pas supposer que votre référence est fournie à titre confidentiel. ■

Karen Zimmer exerce au cabinet Alexander Holburn Beaudin + Lang LLP à Vancouver. Elle y dirige le Groupe de pratique sur la Gestion des risques de diffamation et publication et est membre du groupe de pratique Information et Protection des renseignements personels.

A Message from RCC Chair Ren Matterson

I expect everyone has recovered from another successful conference, this time in St. John's! I certainly enjoyed the education, networking and marketplace and want to once again thank the host NALRIMS chapter, RIMS as the event planner and the National Conference and Communications and External Affairs committees for their hard work as well. Next year we'll visit Edmonton and the Northern Alberta chapter under the 'transform' theme.

As my term as Chair of the RIMS Canada Council draws to a close, I can't help but reflect on my years of volunteering for the RIMS organization. Those of you who attended the RIMS Canada Conference in St. John's have heard that this has been a very rewarding journey for me.

My RIMS journey started when Bill McGannon worked with the local chapter and a couple of employers to get two eager young students a summer job in risk management instead of with an insurer. The summer job was closely followed by the 1998 RIMS Canada Conference in Calgary, where we, as students, helped hand out the famous white hats. I still have one in my possession! It was a great introduction to the profession and those two events shaped my risk management career.

My summer job led to permanent employment upon graduation and I haven't looked back. Although I've changed jobs, I will never forget those first experiences. In 2005 I decided it was time to give back to the community and I joined the Southern Alberta RIMS Chapter. Over the years worked up to be their President and to have an impact on the local risk management community was very rewarding, if not always easy. As President, I was asked to sit on the RIMS Canada Council. I had no idea what I was getting myself into, but eight years later, here I am, handing over the reins to the next Chair. All my volunteer experiences over the last 13 years have allowed me to grow both personally and professionally, I've expanded my network exponentially.

RIMS would not exist without its volunteers. The experience was extremely rewarding for me and I urge you all to connect with your local chapters. I know that they can all use a helping hand, whether it's with special events or on their board. As a perpetual volunteer myself, I see my next opportunity coming within my office on the Diversity & Inclusion committee. Thanks for allowing me to serve the Canadian RIMS community and I hope to see you in Edmonton!

Rieneke (Ren) Matterson
CPA, CMA, CIP

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