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# RISK MANAGEMENT STRATEGIES FOR PREVENTING SEXUAL ABUSE CLAIMS

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## **RISK MANAGEMENT STRATEGIES FOR PREVENTING SEXUAL ABUSE CLAIMS**

The purpose of this paper is to provide (a) a definition of sexual abuse, (b) a discussion of strategies to prevent claims of sexual abuse against Church officers and volunteers (c) recommendations for developing protocols for dealing with allegations against Church officers and volunteers and (d) information regarding coverage to insureds under its Comprehensive General Liability Policy.

Over the past two decades there has been a rising concern regarding sexual abuse committed by Church officers against children and adult members of the laity. In the 1980s the Federal government appointed the Badgley Committee<sup>1</sup> to investigate child sexual abuse to determine the adequacy of Canadian laws in protecting children from sexual offences. As a result of the recommendations made by the Badgley Committee, the criminal law was reformed in 1988 by amending various sexual offences and by making it easier to prosecute sexual abusers. One of the main concerns of the Badgley Committee was with adults in a position of trust with children, such as priests, who committed sexual offences against children.

Since the publication of the findings of the Badgley Committee, there have been significant changes in society's view of sexual abuse of children, in the legal community's approach to the reception of children's evidence in court and to the elimination of any time requirements for bringing civil claims for damages for injuries arising from sexual abuse occurring during childhood. Further, there have been changes in society's view of sexual abuse of adults involved in a professional relationship with another adult. These changes have resulted in an increase in the number of actions for sexual abuse brought against professionals, including church officers and employees, who work with children and adults. Given the increase in claims, it is imperative that organizations have written codes of professional ethics, policies and procedures dealing with hiring and supervisory practices, and protocols for dealing with allegations made against its employees and volunteers.

### **I. SEXUAL MISCONDUCT DEFINED**

Sexual misconduct includes sexual harassment<sup>2</sup>, sexual touching and sexual assault<sup>3</sup>. Child sexual abuse occurs when a child is used for the sexual gratification of an older

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<sup>1</sup> Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984 (Chairperson: Dr. Robin Badgley )) [the "*Badgley Committee*"].

<sup>2</sup> The Supreme Court of Canada has defined sexual harassments as ...[Unwelcome] conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences of the victims of the harassment..." (*Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284.

youth or adult and involves exposing a child to sexual contact, activity or behaviour. This may include invitation to sexual touching, intercourse or other forms of sexual exploitation such as prostitution or pornography.<sup>4</sup>

There are several sections of the *Criminal Code*<sup>5</sup> that directly impact on Church officers and volunteers. The offences are as follows:

Section of the Criminal Code	Name of Offence	Offence against
151	sexual interference <sup>6</sup>	child under age 14
152	invitation to sexual touching <sup>7</sup>	child under age 14
153	sexual exploitation (by adult in a position of trust or authority <sup>8</sup>	child between age 14 and 18
159	anal intercourse	any person, but is not an offence if it involves consenting persons over 18 or if it involves persons under 18 who are husband and wife
163.1	child pornography <sup>9</sup>	child under 18
173	indecent acts	any person
173(2)	indecent acts - exposure of genitals for sexual purpose <sup>10</sup>	child under 14
271-273	sexual assault and aggravated sexual assault <sup>11</sup>	any person; consent is no defence when a child is under 14 years of

<sup>3</sup> A sexual assault is intentional conduct which gives rise specifically to an apprehension of imminent physical contact of a sexual nature. (E. K. P. Grace & S. M. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000) at 8.

<sup>4</sup> A.F. Brown & M.A. Zuker, *Education Law* (Scarborough: Carswell, 1994) at 119 - 120.

<sup>5</sup> R.S.C. 1985, c. C-46.

<sup>6</sup> is an indictable offence for every person who for a sexual purpose touches directly or indirectly any part of the body under the age of fourteen.

<sup>7</sup> is an indictable offence for every person who for a sexual purpose invites, counsels or incites a person under the age of fourteen to touch the body of another person.

<sup>8</sup> is either an indictable for summary conviction offence for a person who is in a position of trust or authority towards a young person who is fourteen years of age and under eighteen years of age for a sexual purpose to touch directly or indirectly the body of the young person, or for a sexual purpose, invites, counsels or incites a young person to touch directly or indirectly the body of another person.

<sup>9</sup> is either an indictable or summary conviction offence to produce, import, distribute or possess child pornography.

<sup>10</sup> is a summary conviction offence if a person for a sexual purpose exposes his or her genitals to a child under the age of fourteen.

Section of the Criminal Code	Name of Offence	Offence against
		age with some exceptions (s.150(1))

In enacting these sections, Parliament has made it clear that there is zero tolerance for persons in positions of trust or authority in relation to young persons under 18 years of age, engaging in any form of direct or indirect sexual touching or other types of sexual activities with children. Priests obviously fall into the category of a person of trust or authority towards young persons and adults they may be counselling. Thus, if a priest invites a young person to engage in sexual touching, directly or indirectly, such as touching genitals over clothing, he is committing a *Criminal Code* offence. Further, if a priest engages in unwanted sexual touching of an adult, he is also committing an offence under the *Criminal Code*.

## II. STRATEGIES TO PREVENT ALLEGATIONS OF SEXUAL ABUSE

It is imperative that episcopal organizations develop workplace policies<sup>12</sup>, including codes of conduct as well as appropriate hiring and supervisory practices of Church officers and volunteers given that courts may find the organizations directly or vicariously liable for the sexual misconduct of employees and volunteers.

Direct liability means that an organization has been found liable as a result of failing to follow an appropriate standard of care when hiring and supervising employees and volunteers who engage in sexual misconduct. When the courts find an organization vicariously liable, the organization may not have been negligent in hiring or supervising an individual. Rather, the organization is liable as a result of the perpetrator's relationship with the organization, if the perpetrator is an employee, independent contractor or agent, the courts may find the organization liable for the acts of the individual.

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<sup>11</sup> makes sexual assault in 271 an indictable or summary conviction offence and an indictable offence in sections 272 and 273; consent is not a defence in sections 271-273 if the accused is an adult and the complainant is under fourteen years of age

<sup>12</sup> As a starting point see *Responsibility in Ministry: A Statement of Commitment*, (Ottawa: Canadian Conference of Catholic Bishops, 1996) at p. 15.

## A. WORKPLACE POLICIES

Clear, written information about your organization's goals, policies and employment practices are important in developing an environment designed to prevent sexual misconduct.<sup>13</sup> The policies should address the following issues:

### 1. Staff Training

One of the most important strategies to prevent sexual abuse allegations is to provide ongoing opportunities for Church officers, volunteers and the laity to understand the legal problems that ensue from such conduct. Education programs should inform the community about the nature of sexual abuse and foster the development of non-abusive relationships between children and persons in relationships of authority and trust.<sup>14</sup> Additionally, the professionals involved with members of the laity must learn more about the factors that contribute to sexual abuse and about the signals that should raise suspicions of abuse.<sup>15</sup>

These educational opportunities should address "*new scientific knowledge about child sexual abuse, church policy as well as civil and criminal law and issues concerning theology, professional ethics, and the theology of sexuality.*"<sup>16</sup> Finally, the continuing education programs must provide information on the requirements in provincial legislation to report a matter to the proper authorities if a person believes a child is or has been sexually abused. In British Columbia the *Child, Family and Community Service Act*,<sup>17</sup> provides as follows:

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<sup>13</sup> British Columbia, *Help Stop Child Abuse: A Handbook for Employers and Volunteer Coordinators*, 2<sup>nd</sup> ed. (Victoria: 1995) at p. 43.

<sup>14</sup> Newfoundland, *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy - Conclusions and Recommendations*, vol. 3 (St. John's: Archdiocese of St. John's, 1990) at 24. As a starting point for training see *Breach of Trust Breach of Faith: Child Sexual Abuse in the Church and Society, Materials for Discussion Groups*, (Ottawa: Canadian Conference of Catholic Bishops, 1992). However, these materials do not deal with the reporting requirements required by the *Child, Family and Community Service Act*, 1996, c. 46.

<sup>15</sup> *Supra* note 14 at 25.

<sup>16</sup> *From Pain to Hope – Report from the Ad Hoc Committee on Child Sexual Abuse*, (Ottawa: Canadian Conference of Catholic Bishops, 1992) at 59.

<sup>17</sup> R.S.B.C. 1996, c. 46 (the "Act"). In Alberta see *Child Welfare Act*, R.S.A.2000, c. C-12, section 1 and 4(1). Section 4(1) requires any person who has reasonable and probable grounds to believe that a child is in need of protective services shall report the matter to a director; in Saskatchewan see the *Child and Family Service Act*, SS 2000, c. C-7.2, sections 11 and 12(1)-(4); section 12 requires every person who has reasonable and probable grounds to believe that a child is in need of protection shall report the information to an officer or peace officer. Section 11(a)(iii) defines a child is in need of protection if as a result of action or omission by the child's parent the child has been or is likely to be exposed to harmful interaction for a sexual purpose... In Manitoba see *Child and Family Services Act*, .C.C.S.M, c. C80. s. 17 and 18(1)-(1.1).

*Duty to report need for protection*

14(1) *A person who has reason to believe that a child*

- (a) *has been, or is likely to be, physically harmed, sexually abused or sexually exploited by a parent or other person...*

*must promptly report the matter to a director or a person designated by a director.*

(2) *Subsection (1) applies even if the information on which the belief is based*

- (a) *is privileged, except as a result of solicitor-client relationship, or*
- (b) *is confidential and its disclosure is prohibited under another Act.*

"Child" is defined in the *Act* as a person under 19 years of age and includes a youth. "Youth" means a person who is 16 years of age or over but is under 19 years of age.

The reporting requirements require a priest to report a disclosure to the Ministry of Children and Families (the "Ministry") made to him during a confession if the priest has reason to believe that a child has been or is likely to be sexually abused by another person. This requires a priest to make a report, even if a disclosure was made to him by an adult who had been sexually abused as a child by an officer or volunteer of an ecclesiastical organization. It also requires a person to report a disclosure to the Ministry if a child discloses that he is about to be or is being abused by another child or youth.

These are mandatory reporting requirements and a failure to report is an offence under the *Act* resulting in a penalty of a fine of up to \$10,000 or imprisonment of up to 6 months, or both. The limitation period governing the commencement under the *Offence Act*<sup>18</sup> does not apply to a proceeding relating to an offence under the *Act*. Thus, even if the limitation period has expired for an offence under the *Offence Act*, a person who has failed to report who had a reasonable belief that a child was about to or was being sexually abused can be prosecuted.

Workers and volunteers must be familiar with the episcopal organization's protocol for dealing with disclosures of sexual abuse that are reported to them. In addition to

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<sup>18</sup> R.S.B.C. 1996, c. 338.

reporting to the Ministry, they must know to whom in the organization they are to advise.

## **2. Development and Implementation of Code of Professional Ethics**

It is recommended that a code of professional ethics for clergy, pastoral agents, including volunteers be developed and implemented<sup>19</sup> ("Code"). Your Code may include some of the following points:

- Respect the dignity of children, youth and other adults;
- Avoid contact that may be interpreted to have sexual connotations;
- Avoid being alone in a room with a child, youth or individual you are assisting. Where possible, have others join in the activity. Leave the door open or use a room with a window;
- Avoid social contacts with children, youth or other individuals you are assisting after work hours to prevent false allegations of inappropriate behaviour.<sup>20</sup>

This Code should be distributed to all Church officers and volunteers and published in newsletters so that the laity knows the expected standards of conduct of Church officers and volunteers.

## **B. HIRING AND SUPERVISORY PRACTICES**

### **1. Hiring Staff and Volunteers**

When hiring an individual, especially when the individual will be dealing with children, it is important that the following practices be developed:

- That a written application and resume for all volunteers and potential employees is received and reviewed. Resumes are useful but generally only tell you what the applicant wants you to know, rather than what you need to know<sup>21</sup>;
- That at least two references who have recently worked directly with the candidate are spoken to and questions are asked concerning the candidates dealing with children and families;
- That a formal interview process is conducted with the candidate in person with at least two persons interviewing the candidate;

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<sup>19</sup> *Supra* note 16 at 61.

<sup>20</sup> *Supra* note 13 at 46.

<sup>21</sup> *Supra* note 13 at 16.

- That during the interview process the candidate is questioned concerning any gaps in his work history and he is questioned regarding his interests outside the Church, what experience he has had working with children and families;
- That written notes be kept of the interview of the candidate, including notes detailing the conversations with the references contacted and all documentation the candidate has submitted is kept in a file;
- That if the candidate is working with children, you may choose to conduct a criminal records check.<sup>22</sup> Conducting a criminal record check on candidates who may have contact with children is only one step in a thorough recruitment and hiring process, as it only identifies those individuals who have been convicted or charged with an offence. Some of the limitations of criminal record checks are:
  - A person may have been investigated for suspected child abuse but may never have been charged or convicted;
  - Convictions from other countries are not available;
  - Convicted offenders can after a period of time apply for pardons and pardons cannot be revealed.<sup>23</sup>

## **2. Requirement of a Probationary Period**

It is recommended that all new employees be placed on probation for a period of 3 to 6 months before a decision is made to hire the employee permanently. This allows the employer to assess the suitability of the individual for the position.<sup>24</sup> Under the *Employment Standards Act*<sup>25</sup> an employer has the right to terminate employment within the first three months without notice or without having to have cause for dismissal.

## **3. Supervision and Evaluation of Church Officers and Volunteers**

A key factor to prevent sexual abuse is to have a regular schedule of supervision of all program and church officers and volunteers. The person responsible for supervising officers and volunteers should maintain written notes of the dates and observations

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<sup>22</sup> *Criminal Records Review Act*, 1996, c. 86 ("CRRA") makes criminal record checks mandatory for all current and prospective employees and licensees who work with children in agencies that are operated, licensed or receive funding from the provincial government. The CRRA does not require volunteers to submit to a criminal record check. Organizations that are not covered by the CRRA may still require applicants to undergo a criminal records check.

<sup>23</sup> *Supra* note 13 at 34.

<sup>24</sup> *Supra* note 13 at 39.

<sup>25</sup> R.S.B.C. 1996, c. 113.

made of the individual being supervised and evaluated. Additionally, it is recommended<sup>26</sup>:

- Follow the two adult rule (always require two adults to be present with children);
- Require participants in an activity to sign a Permission and Release Form ("Release") (see Schedule "A") and ensure that the employee and/or volunteer is obtaining the Release from all participants prior to the individual engaging in the activity;
- Promptly investigate suspicious behaviour and discuss the concerns with the individual and take appropriate action;
- Provide adequate supervision for all activities and ensure that there is an appropriate ratio of adults to participants;
- Exercise special care for overnight activities and include as supervisors members of the laity;
- If transportation is involved, require at least two adults in the vehicle; and
- Conduct regular written evaluations of staff and volunteers.

### **III. DEVELOPING A PROTOCOL FOR THE INVESTIGATION OF SEXUAL ABUSE ALLEGATIONS**

It is important to have a protocol developed so that when an allegation is made the episcopal organization deals with the complaint in an effective manner. This will guard against an allegation that there was a failure to act on the complaint or that it was handled in a negligent manner.

An effective protocol should clearly define the procedural roles and responsibilities of individuals appointed to deal with allegations. Ideally a protocol could address the following issues:

#### **A. RECEIPT OF THE ALLEGATION**

Regardless of how the allegation is made or by whom, the individual who receives the complaint should make immediate written notes of what she or he has been told and by whom and what is the proposed plan of action.<sup>27</sup>

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<sup>26</sup> L. Morris, *Claims Tips for Adjusting, Evaluating and Settling the Sexual Molestation Claim*, Third Party Liability: Current Trends and Issues, DRI Practice Seminar, January 18 - 19, 1996, at K-13.

<sup>27</sup> J. Sanderson, Q. C. *Langley School Board Inquiry - Complaints of Abuse: A report of Process and Procedure*, unpublished, June 23, 1998.

## **B. IDENTIFICATION OF INDIVIDUALS WHO DEAL WITH THE ALLEGATIONS**

The diocesan bishop should appoint one or more priests<sup>28</sup> who have responsibility for verifying the allegation and then conducting a preliminary investigation into the allegations. Thus, once an individual receives a complaint he or she must contact one of the appointed priests and advise him of the allegation.

## **C. VERIFICATION PHASE**

The allegation must be verified in a preliminary way with a view of determining whether an investigation is justified. A suitable person should be designated to meet with the parents of the children who have allegedly been abused or the adult victim.<sup>29</sup> This process involves sufficient checking of the story to determine whether it has been made up, is grossly exaggerated or seems to have a ring of truth.<sup>30</sup> This means that judgments have to be made on a reasoned and careful basis and the decision tilted in the direction of an investigation unless it is clearly apparent that the complaint is frivolous or totally without merit.<sup>31</sup> It is also important that any judgements as to guilt or innocence not be undertaken with respect to the accused person.

## **D. THE INVESTIGATIVE PHASE**

The investigative phase is a vital step in the effective handling of an allegation of sexual abuse and should be handled by the same person who verified the complaint. The purpose of this phase is to determine the facts to clarify what happened and define the dimensions of the allegations and it is not to decide what form of discipline should be imposed. The investigation must be conducted in a thorough and expeditious manner.<sup>32</sup>

The investigation consists primarily of interviews, each of which must be carefully and discreetly handled. Written notes should be kept of the interviews.<sup>33</sup> Once the investigative stage is completed, the results of the investigation must be reported to "a supervisor", another person who has been chosen in advance for this role. If both the investigator and supervisor agree that it is not reasonable to proceed to the action

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<sup>28</sup> *Supra* note 16 at 46.

<sup>29</sup> Newfoundland, *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy – Conclusions and Recommendations*, vol. 1 (St. John's Archdiocese of St. John's, 1990) at 192.

<sup>30</sup> *Supra* note 27 at 5.

<sup>31</sup> *Ibid* at 6.

<sup>32</sup> *Ibid* at 6 and 7.

<sup>33</sup> *Ibid* at 7.

phase, then the process is suspended. However, if either the investigator or the supervisor believe that the matter should proceed to the action phase, then the next phase begins. The investigator notifies the bishop of the findings in writing and conclusion before withdrawing from the case.<sup>34</sup>

If the accused is a cleric and is a member of a religious institute, his major superior should be notified by the investigator at the beginning of the investigation, as needed during the course of the investigation and at the conclusion of it. However, if the accused cleric is incardinated to another diocese, his bishop should be notified in a similar manner.<sup>35</sup>

#### **E. MANAGING RELATIONS WITH THE POLICE**

If during the investigation if it becomes apparent that the allegation constitutes a criminal act, the police should be notified immediately. While the fact that there is a police investigation ongoing does not preclude the episcopal organization from conducting its own investigation there must be coordination with the investigation by the police so that the police investigation is not comprised. Thus, if the police are of the opinion that at the beginning stages of the investigation that the accused individual should not be immediately notified, then the timing of notifying the accused individual must be organized with the police.

#### **F. REPORTING TO THE MINISTRY AND THE POLICE**

If the person who received the disclosure or the investigator is of the belief that a child is about to or has been sexually abused, then a report must be immediately made to the Ministry. *If a child is in immediate danger, every person aware of it must call the police right away, then report to a child protection social worker as soon as possible. If a child is not in immediate danger, report to a child protection social worker. They will call police if they believe a criminal offence is occurring or may have occurred.*<sup>36</sup>

#### **G. ACTION PHASE**

This phase will be instituted if either the investigator or the supervisor is of the opinion that it is reasonable to do so. At this phase, it does not mean that a criminal offence has occurred or been substantiated, but it means that the conduct warrants further action. At this phase the following should occur:

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<sup>34</sup> *Supra* note 29 at 199.

<sup>35</sup> *Ibid* at 199.

<sup>36</sup> British Columbia, *The B.C. Handbook for Action on Child Abuse and Neglect*, (Victoria: Ministry of Children and Families, 1998) at 19.

- The supervisor should secure legal counsel for the episcopal organization and advise the accused to retain his/her own legal counsel;
- The supervisor shall convene a specific “action team” consisting of legal counsel and other individual providing pastoral care for those involved;
- The supervisor should report the incident to the insurers;
- The cleric or other employee is given an immediate leave of absence with pay and should have no contact with children and no counselling with adult females, as appropriate for the given case. The cleric should not return to the parish where he is assigned;
- The cleric should be given an appropriate place to reside pending the outcome of the investigation;
- A meeting could be held with the various lawyers, the accused and a member of the episcopal organization;
- The supervisor will coordinate any public statements on behalf of the episcopal organization regarding the allegations and subsequent actions of the organization; She or he will secure whatever legal, canonical, psychological or other professional advice is required;
- The legal counsel should review the various provisions of Canon Law and act accordingly. It may be determined during this phase, that a formal canonical trial should be conducted. This would likely not be conducted until criminal or other civil actions have been concluded; and
- If sexual abuse has been verified, counselling should be continued to the victim and the family<sup>37</sup>.

#### IV. CIVIL LITIGATION DEFENCES - LIMITATIONS

In British Columbia the limitation period has been eliminated for actions for damages arising from sexual misconduct.<sup>38</sup> The *Limitation Act* states:<sup>39</sup>

3(4) *A person is not governed by a limitation period and may at any time bring an action...*

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<sup>37</sup> *Supra* note 29 at 200.

<sup>38</sup> In Alberta and Manitoba the limitation period for intentional torts, such as assault and battery, is two years from the time the cause of action arose. See *Limitations Act*, S.A. 1996, c. L-15-1, s. 3(1) and *Limitations of Actions Act*, R.S.M. 1987, c. L150, s. 2(1)(e).

<sup>39</sup> R.S.B.C. 1996, c. 266. Also, in Saskatchewan the statutory limitation period has been eliminated for sexual abuse claims. See *The Limitation of Actions Act*, .S.S. 2000, c. L-15, s. 2(3.1).

- (k) *for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,*
  - (i) *where misconduct occurred while the person was a minor, and*
  - (ii) *whether or not the person's right to bring the action was at any time governed by a limitation period;*
- (l) *for a cause of action based on sexual assault, whether or not the person's right to bring the action was at any time governed by a limitation period.*

The courts have concluded that the words "*based on misconduct of a sexual nature*" are not to be interpreted narrowly and that it includes all matters that are reasonably related to the tort of sexual assault, including physical assault that occurs as part of a sexual assault.<sup>40</sup> The courts have also concluded that "*based on a sexual nature*" includes actions in negligence and vicarious liability against the employer of the perpetrator who committed the sexual assaults because sexual assault is a main ingredient in the negligent hiring or supervision action.<sup>41</sup>

Thus, it is important to carefully scrutinize the allegations in the pleadings to determine if the victim is making a claim that is based on sexual misconduct rather than physical assault. If the claim arises out of physical assault and if the action was not commenced within two years after the date of the assault, then it may be barred.

If the victim commences a civil action for damages for personal injury arising from the sexual abuse and the victim is an employee, a key defence to avoid liability against the episcopal organization is a defence that the claim is barred as a result of the provisions in various provincial *Workers' Compensation Acts*<sup>42</sup>. The victim's action will be barred if the following is proven:

- (a) the victim was a worker;
- (b) the perpetrator was an employer or a worker;

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<sup>40</sup> *W.R.B. v. Plint* [2001] B.C.J. No. 1446 (S.C.) at 33, para. 262.

<sup>41</sup> *J. P.v. Sinclair* (1997), 93 B.C.A.C. 175 (C.A.).

<sup>42</sup> In British Columbia, the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, in Alberta, *Workers' Compensation Act*, R.S.A. 2000, C.w-15, sections 17(1) and 23(1); in Saskatchewan, *Workers' Compensation Act*, S.S. 2000, c.W-17.1, sections 44 and 168 and in Manitoba, *Workers' Compensation Act*, C.C.S.M., c.W200, sections 9(7) and 12.

- (c) the injuries occurred in the course of employment.

In order to conclude that a victim's action is barred, either the victim or the alleged perpetrator or the perpetrator's employer (if named in the action) is entitled to make an application to the Appeals Division of the Workers Compensation Board for a ruling that the victim's claim is barred. The Appeals Division will make a ruling once it receives submissions from all parties. If it is concluded that the victim's claim is barred, then the Appeal Division will provide a certificate stating that the victim was a worker, the perpetrator was a worker and that the injuries occurred in the course of employment. The certificate is then filed in court and an application is made to dismiss the victim's claim.

## V. INSURANCE ISSUES

The Supreme Court of Canada has significantly clarified the law regarding the duty of insurers to defend claims wherein the Plaintiff is alleging various causes of action arising from sexual torts. In *Non-Marine Underwriters, Lloyd's of London v. Scalera*<sup>43</sup> the insured's homeowner's insurance policy provided coverage for compensatory damages for "bodily injury" but, as in most policies, excluded coverage for bodily injury caused by an intentional act or criminal act. The Court determined that the insurer had no duty to defend the insured. In coming to this conclusion, the Court stated that although the pleadings alleged negligence, breach of fiduciary duty, sexual battery and negligent misrepresentation, the claim in substance was one of battery, which was excluded from coverage as an intentional tort. The Court held further that any allegations of negligence were entirely derivative in nature and, as such, were excluded from coverage.

*Scalera* has modified the law with respect to determining whether an insurer has a duty to defend a claim made against an insurer. Prior to *Scalera*, a court in determining whether the insured had a duty to defend was not concerned with the merit of the allegations or their likely outcome.<sup>44</sup> *Scalera* has sharpened the inquiry by requiring the court to determine the substance and true nature of the allegations, rather than merely focussing on the bare allegations in the pleadings.<sup>45</sup> As a result of *Scalera*, there likely

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<sup>43</sup> [2000] 1 S.C.R. 551 (S.C.C.) ("*Scalera*").

<sup>44</sup> F. Paul Morrison and Monique Shebbeare, "Insurance Coverage Disputes and the Duty to Defend" in *Practical Strategies for Advocates X: Practical Strategies for the 21<sup>st</sup> Century...What's Hot...What's Not* (Advocates Society (Ontario): February 9, 2001) at p. 2.

<sup>45</sup> *Supra* note 44 at p. 2.

will be fewer findings by the court of a duty to defend an insured who has been alleged to have committed sexual assaults.<sup>46</sup>

The Commercial General Liability policy that insures the episcopal organization, can either be an "occurrence based" policy or a "claims made and reported" policy. Both policies provide coverage to the episcopal organizations and its employees for bodily injury to third parties that occurred within the scope of employment during the policy period.

To trigger coverage under an "occurrence based" policy, the bodily injury to the third party must have occurred during the policy period. The bodily injury must be caused by an "occurrence" which is usually defined as follows:

*"an accident, including continuous or repeated exposure to substantially the same general harmful conditions."*

Coverage for the employee will likely be excluded because "sexual abuse" is not an accident but is an intentional act and will be excluded under the "intentional act" exclusion. Currently, the law in British Columbia is that an innocent co-insured, such as the episcopal organization which is not directly liable for the sexual misconduct of its employees, is owed a defence by its insurer when sexual torts are alleged against an employee<sup>47</sup>. However, the decision in *Scalera* inevitably invites reconsideration of the correctness of this area of law.

In a "claims made and reported" policy is one which disregards when the underlying wrongful act arose, but rather, requires that the claimant notify the insured of the claim and the insured report it to the insurer in the same policy year. The insured has an obligation under the policy to report a "claim" to the insurer in a prompt manner, so that the claim can properly be investigated. A "claim" means a *written or oral notice, or notice of an "Action" alleging that an insured is legally liable for "Compensatory Damages" for "Bodily Injury" to which this insurance applies*.<sup>48</sup>

The courts have interpreted notice to an insured to mean that when an insured is served with a demand or a Writ of Summons<sup>49</sup>. Thus, the duty of the insured to report to the insurer as soon as is practicable, commences when delivered with a monetary demand for damages for bodily injury for sexual assault or when served with a Writ of Summons.

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<sup>46</sup> *Ibid* at p. 2.

<sup>47</sup> *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4<sup>th</sup>) 318 (B.C.C.A.).

<sup>48</sup> Ecclesiastical Insurance Office plc Claims First Made and Reported Policy.

<sup>49</sup> *Bakshi v. American Home Assurance Co.* [2000] B.C.J. No. 2266 (S.C.).

If the insured does not report within the same policy year then there is no right to relief from forfeiture.<sup>50</sup>

## VI. ECCLESIASTICAL COURTS

In January 2002, the Vatican issued new rule for Roman Catholic church to deal with pedophile priests stating that they should stand trial in ecclesiastical courts. The new rules state that victims must make their accusations within 10 years after turning the age of 18. The rules are to be used by dioceses and religious institutions. Pursuant to these rules, priests can be dismissed from the Church and can be discharged from their priestly functions.<sup>51</sup>

The proceedings in the ecclesiastical courts are separate from any proceedings in the civil court. The civil court has jurisdiction over disputes involving allegations that a tort has been committed by a Church official against a victim. The requirement in ecclesiastical courts that require the victim to make their accusations within 10 years after turning the age of 18, has no impact on the period with which actions can be brought in the civil court for damages arising from sexual assault.

## VII. CONCLUSION

In era of increased legal accountability for the acts of sexual misconduct of employees and independent contractors of Churches, it is imperative that episcopal organizations implement appropriate practices to prevent sexual misconduct.

This requires appropriate hiring procedures and vigilance in supervising staff and volunteers. Further, it requires continuing education of staff and volunteers to ensure they understand reporting requirements required by provincial legislation and understand the protocol when an allegation is made to them. Finally, the episcopal organization must take appropriate steps when an allegation has been made and conduct a thorough and expeditious investigation into the matter.

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<sup>50</sup> *Stuart v. Hutchins*, (1998) 164 D.L.R. (4th) (OCA); *Falk Brothers v. Elance Steel Fabricating Co. Ltd.* [1989] I.L.R. 9709 (S.C.C.).

<sup>51</sup> P. Pulella, *The Vancouver Sun*, January 9, 2002.

**VIII. SCHEDULE A**

**PERMISSION AND RELEASE FORM**

ORGANIZATION:\_\_\_\_\_

**To the Parent or Guardian:**

Please find attached to this form information regarding the off-site activity (should be described in detail, especially if there are any high risk activities) to \_\_\_\_\_ which is planned. Please review the information and if you wish your son/daughter to attend, complete, sign and return this permission form to the person in charge of the activity as soon as possible.

Details of activity\_\_\_\_\_

\_\_\_\_\_

Destination and purpose\_\_\_\_\_

\_\_\_\_\_

Place, date and time of departure\_\_\_\_\_

Date and approximate time of return\_\_\_\_\_

**Medical Information:**

Name and telephone number of family doctor:\_\_\_\_\_

\_\_\_\_\_

Please provide details of any medical condition that may affect your child's performance or safety on the activity/visit.

\_\_\_\_\_

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Is your son/daughter allergic to any medications, food or other things? If YES, please specify.

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DECLARATION

I agree to my son/daughter receiving emergency medical treatment, including anaesthetic, as considered necessary by the medical authorities present. I understand the extent and limitations of the insurance cover provided.

I may be contacted by telephoning the following numbers:

Work: \_\_\_\_\_

Home: \_\_\_\_\_

My name is: \_\_\_\_\_

My home address is:

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If not available at above, please contact:

Name: \_\_\_\_\_

Telephone number: \_\_\_\_\_

Address: \_\_\_\_\_

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CONSENT TO PARTICIPATE

I agree to my son/daughter \_\_\_\_\_(name),  
d.o.b. \_\_\_\_\_(date of birth) participating in the above-mentioned  
activity/visit and having read the attached information sheet, agree to his/her  
participation in any or all of the activities described.

RELEASE AND WAIVER

In consideration of \_\_\_\_\_ agreeing that  
\_\_\_\_\_ is able to participate in the above-mentioned  
activity/visit, I for myself, my heirs, executors, administrators and assigns release  
\_\_\_\_\_ its respective servants, agents or employees from any claims,  
demands, damages, actions or causes of actions arising out of or in consequence of any  
loss, injury or damage to my daughter/son or property incurred while attending at or  
participating in \_\_\_\_\_ notwithstanding any such loss, injury or  
damage may have arisen by reason of the negligence of \_\_\_\_\_, its  
servants, agents or employees.

Signed: \_\_\_\_\_

PARENT OR GUARDIAN IF PARTICIPANT IS UNDER THE AGE  
OF 19 OR PARTICIPANT IF OVER 18 YEARS OF AGE