

Private Fire Services
Risk Management Issues

Introduction

There are three principal emergency response services in the province – police, fire and ambulance. Unlike police and ambulance, however, which are established pursuant to provincial statutes, fire departments are an optional service typically provided by or through local government. In a number of areas of the province, however, private fire services continue to exist. The private provision of fire services gives rise to a number of unique challenges and risks. For the purposes of this memorandum, a private fire service is defined as one which provides services to members of the public, typically through a society structure using some form of membership agreement or contract. These private fire services are principally self-funding, and are not providing services under contract or through any formal authorization from local government. Industrial fire brigades, which provide services to a particular company, are not included in this assessment.

The following memorandum provides a high level survey of the risk management and liability issues faced by private fire services. This survey should not be considered exhaustive of all possible issues, and does not constitute, and should not be construed as, legal advice. Private fire services should review these issues with their own legal counsel.

The challenges facing a private fire service may be grouped under two basic heading: authority and liability. Each will be considered in turn.

Authority

Police and ambulance, as provincially mandated services, have a uniform range of powers and authority defined by statute. As an optional, local service, fire departments lack this uniform body of powers. While there are certain authorities granted to local assistants to the fire commissioner under the existing *Fire Services Act* (B.C.), and the new *Fire Safety Act*¹ will confer certain powers on fire chiefs, fire investigators and fire inspectors, the powers needed to operate at and respond to emergencies must be found elsewhere. For fire departments which are created by, or operate under the authority of, local government, these powers and authorities are set out in the bylaws which establish the service and define the operational responsibilities of the particular department. These bylaws typically will authorize the delivery of various emergency response services, as well as grant a broad range of authority to the fire department and its personnel to operate at and control the scene of an emergency. The powers usually include (among others):

¹ Bill 4 – 2016, *Fire Safety Act*. The *Fire Safety Act* has passed first reading as of the date of this memorandum. See: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/5th-session/bills/first-reading/gov04-1>.

- the right to make entry onto property where an incident has occurred;
- the right to cross over or station on properties proximate to an incident where necessary;
- the ability to commandeer equipment or vehicles;
- the right to establish an exclusion zone around an incident; and
- the right to tear down, remove or alter, a building, structure or thing to prevent the spread of fire or to mitigate an incident.

Under the *Local Government Act* (B.C.) and/or the *Community Charter* (B.C.), local governments have been given the authority by the province to grant these powers to their fire departments, or to fire departments with whom they contract.

For a private fire service, the situation is less straight forward. The typical structure of these types of services involves a privately created entity delivering services either to members or customers under the terms of a membership agreement or contract (the “Agreement”).² As such, it is critical to ensure that the Agreement addresses all of the operational authorities ordinarily addressed by a bylaw. From an operational perspective, the Agreement should:

- define services which the private fire department (the “PFD”) provides;
- authorize the PFD to enter onto the Member’s property and premises to provide the services, regardless of whether Member is present or is the person who called in the alarm;
- authorize the PFD, without further consent, to cross over and station on a Member’s property, to access or combat an incident on another Member’s property or premises;
- authorize the PFD to take such actions as its officers and firefighters deem necessary to suppress the fire or mitigate the incident, including tearing down, removing or altering a building, structure or thing to prevent the spread of a fire.

The need to have express and clear authority to provide emergency services means that a PFD should not provide such services to non-Members, unless they can derive their authority from some other source. For example, a PFD may provide auto extrication and road rescue services under the auspices of the Provincial Emergency Program (“PEP”). PEP has been established under and operates pursuant to the *Emergency Program Act* (B.C.) and can authorize an emergency response, which typically is evidenced by a PEP task number.

Similarly, the Wildfire Service, operating pursuant to the *Wildfire Act* (B.C.), has province-wide authority. A PFD responding to an interface fire in support of the Wildfire Service, in accordance with the latter’s operational guideline OG 1.06.01, would be operating under that agency’s authority.

In relation to properties of non-Members, the PFD should clearly communicate that services will not be provided, so that no expectation will exist that services will be provided notwithstanding that the owner has not entered into an Agreement with the PFD.

² For convenience, we will refer to “members” and “customers” as “Members”.

Liability

The operation of a PFD by a society, and the provision of emergency response services to the public, gives rise to a number of operational risks and attendant liabilities. The management of a fire department has become increasingly complex over the past 15 – 20 years, as the standards and requirements surrounding the delivery of fire services have become increasingly demanding. From a regulatory perspective, a PFD must operate to the same standards as fire departments established, operated and funded through local government. In that regard, the society operating a PFD must ensure that the following regulatory obligations are met:³

Worker Compensation Act

1. the PFD has an occupational health and safety program which is compliant with the requirements of the *Workers Compensation Act* (B.C.) (the “WCA”);
2. the PFD meets all of the requirements of Part 31 to the *Occupational Health and Safety Regulation* (“Part 31”) made under the WCA;
3. the PFD maintains and operates its equipment properly (including testing of such equipment – e.g., annual ground ladder testing, annual fire hose testing, SCBA maintenance, etc.), and properly records such testing;
4. the PFD operates a joint committee (or appoints a worker representative) which meets the requirements of the WCA;
5. the PFD has a set of operational guidelines (“OGs”) which properly cover its principal activities, and which meet the specific requirements set out in Part 31; and
6. the PFD’s officers are properly trained and able to supervise the department members when delivering emergency response services or conducting training exercises;

Playbook⁴

7. the society responsible for the PFD, as the “Authority Having Jurisdiction,” must establish a service level in accordance with the Playbook. This service level – one of “Exterior Operations,” “Interior Operations,” or “Full Service” – must be selected by 30 June 2016;
8. the PFD must have a training program in place by 30 June 2016 which is designed to train its firefighters and officers to the requirements of the Playbook *and* to meet the other requirements for service delivery which are not covered by the Playbook;⁵ and

³ This list is not intended to be exhaustive, but provided by way of example.

⁴ “Playbook” means the mandatory minimum training standards set under paragraph 3(3)(b) of the *Fire Services Act* (B.C.) by Fire Commissioner and approved by the Minister of Justice, entitled *British Columbia Fire Service Minimum Training Standards: Structure Firefighters – Competency and Training Playbook* (2nd Ed., May 2015).

⁵ The Playbook is not a complete system covering all training requirements for a fire department. The society, as the “Authority Having Jurisdiction” needs to determine what standards will apply in relation to the training for functions and roles not covered by the Playbook.

9. the society is responsible for ensuring that the PFD maintains training records which enable the PFD to show the training level of each firefighter and officer. This obligation to maintain proper training records on an individual basis also exists under the WCA.

In relation to the training of firefighters and officers for matters not specifically covered by the Playbook, the society needs to ensure that the training provided is both appropriate and sufficient for the roles and tasks to be undertaken by its department. The National Fire Protection Association (the “NFPA”) has established comprehensive training requirements for fire service personnel, as well as standards for equipment and apparatus. Certain NFPA standards have been incorporated into provincial requirements – both Part 31 and the Playbook utilize NFPA standards, or aspects of those standards, in their various requirements. While it is open to a society and its department to develop their own standards for matters not expressly covered by the Playbook, this approach is potentially risky. As such, use of NFPA training standards for matters not covered by the Playbook is strongly recommended.

In relation to occupational health and safety matters, Bill C-41 made changes to the *Criminal Code* (Can.) which clarify the obligations of supervisors and management for the safety of their workers and increases the potential for criminal liability where there has been a serious accident or death.⁶ In a recent decision under that section, a construction site manager was sentenced to 3½ years in jail in connection with several deaths stemming from the collapse of scaffolding at a work site. In that case, the knowing failure to provide sufficient fall-arrest devices for the workers on the scaffolding was sufficient to establish the defendant’s culpability.⁷

It should be noted that the Court in *Kazenelson* was less interested in allegations regarding the defendant’s serial failure to meet various occupational health and safety requirements prior to the event in question, but focused almost exclusively on his failure on the day to deal with matters of which he was aware.⁸ The same, however, cannot be said of the approach that will be taken by WorkSafe BC in proceeding under the WCA, which will assess the overall approach of an employer to occupational health and safety matters, and identify all WCA violations when determining appropriate penalties.

The potential liabilities arising from poor or weak occupational health and safety practices are significant. It is an area where the society and its PFD must take proactive and effective steps to ensure compliance.

At the same time that administrative and regulatory pressures have increased, the risks of a negligence claim arising from the provision of fire services, also is on the rise. It is beyond the scope of this document to assess the standards that a court may apply when determining if a particular department, on the day, was negligent in the delivery of the service in question, such

⁶ See s. 217.1 of the *Criminal Code* (Can.)

⁷ *R. v. Kazenelson* 2015 ONSC 3639 (“*Kazenelson*”). See paragraphs 22 – 23.

⁸ *Kazenelson*, at paragraph 19.

that it bears liability for all or some portion of the damage caused.⁹ This issue is one that faces the fire service generally, whether that service is delivered through local government or by a society operating a PFD. All fire departments need to ensure that they are properly insured in relation to the services that they are delivering.

There is, however, a significant difference for the individual department members of a PFD, in contrast to firefighters in a service delivered by local government. For the local government departments, it is clear that fire department members are insulated from personal liability when delivering services. Under section 738(2) of the *Local Government Act* (B.C.), as “local public officers,” fire department members, whether employees or volunteers of local government, are generally exempt from personal liability for negligence.¹⁰ It is far from clear, however, that this section extends to volunteer firefighters who operate under a society structure, and, in the case of PFDs, are not associated with local government in any way. As such, there is a material risk that a liability claim could be made personally against an individual firefighter or officer, in addition to the society responsible for the PFD.

To manage its liability risks, a society should ensure that its Agreement with its Members:

- clearly states the level to which service will be provided and the limits on that service (e.g., will not make entry into a fire-involved structure);
- specifically recognizes that the service is being provided by volunteers or paid-on-call members, and that the turn-out for any given incident may be insufficient to render effective assistance;
- expressly excludes or limits the amount of damage that can be claimed if the turn-out is insufficient and waives (to the extent possible) claims for negligence in the delivery of the service.

To mitigate liability concerns, ensure stability of funding, and to clarify powers and authorities to operate, the 2009 Fire Services Liaison Group report recommended that the delivery of fire services be brought under the auspices of local government.¹¹ The Fire Chiefs Association of British Columbia participated in the preparation of that report and continues to support that recommendation.

⁹ In general, volunteer departments tend not to be held to the same standard of performance or requirement as career departments. That general approach, however, by no means eliminates the risk of a successful negligence claim if a department fails to meet prescribed standards (e.g., minimum training requirements) and is negligent in the delivery of its services.

¹⁰ The exceptions to this protection are where the local public officer has been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or where the cause of action lies in libel or slander. See: s. 738(4) of the *Local Government Act*.

¹¹ Fire Services Liaison Group, *Transforming the Fire/Rescue Service* (September 2009), Recommendation 9 at p. 6; see also the discussion at pp. 31 -32.