

Neutrality is Non- Negotiable

*Southern Butler Price
Shares Their
Approach to
Conducting
Investigations*

by

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What (and Who) is SBP?

Ten years ago, I started my own law firm from my kitchen table in North Vancouver. By that time in 2014, I had had the privilege of working as in-house counsel for both Surrey and North Vancouver School Districts, and had conducted workplace investigations for both districts in that role. Just as I loved the sector, I loved the work of conducting investigations – it was the perfect blend of functions and skills for me, where I could lean into my time as an adjudicator at the Labour Relations Board to ensure that the process was fair, while also having the latitude to conduct the discovery that I determined was necessary and relevant in the circumstances to find out what happened. Most of the investigation files I had at that time involved K-12, where I investigated a multitude of issues that ran the gamut from misconduct towards students to complaints against parents, and from conduct involving casual custodians to leaders in the sector.

Ten years later, and my practice and the firm has evolved and grown in conjunction with the work. Today, Southern Butler Price LLP (SBP) is the largest firm of its kind in Canada, with more than 35 lawyers and offices in two cities.

Our firm is different from a typical labour and employment law firm. Our team is made up of respected talent from *both sides* of the labour community.

Most labour law firms declare themselves as ‘employer side’ or ‘union/employee side’. Prior to SBP, no BC labour law firm offered purely neutral services. Given legislative changes and growing awareness of workplace human rights issues, we believed the best way to serve clients was from a neutral firm platform, effectively, ‘no one’s side’. SBP committed to only offering core services – investigations, assessments, mediations, arbitrations, and training – as ‘impartial’. You will not see us advocate on behalf of a school district, a union or an employee;



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argue for one side or another; or try to defend a party or prove an outcome. Fundamentally, fairness is key, and neutrality is non-negotiable.

When Might Your Work Connect with Ours?

There are several different ways a Principal or Vice-Principal may come into contact with a SBP lawyer. You may meet one of our lawyers delivering training on respectful workplace issues (boundaries training, for example) or on investigation skills. You may encounter us at an arbitration or mediation relating to a workplace grievance. You may participate in a culture assessment or environmental scan led by our team to support engagement with school district staff in a collaborative process designed to improve morale or address points of friction.

More commonly, though, you may meet one of our lawyers in the course of an investigation. It is on this topic that I want to share some key information – as well as tips and tricks – that I hope will help you feel more knowledgeable and, therefore, comfortable participating yourself or supporting your staff who may be working through the process.

What Does an Investigation Look Like?

When a request for a workplace investigation is received, a very structured approach is taken to ensure the process reflects the requirements of the employer's policies, and reflects the needs for privacy and confidentiality of the complainant and the respondent.

Our paramount job is to ensure that the investigation process we offer is fair for all involved. This overarching requirement guides us in our work and how we manage complex, and at times fractious, matters.

Typically, the investigative process takes the following rhythm.

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Step 1: Terms of Reference (TOR)

Based on the initial communications about the complaint and its required investigation, and a review of applicable policy and/or collective agreement language, we work to establish the TOR. The TOR set out the scope of work, timeline, deliverables, and reporting structure.

Step 2: Interviews

The Investigator interviews those who they identify as having relevant information, and may also ask for documents or other evidence from the employer or the participants. The first interview is typically with the complainant to fully understand their complaint, followed by witnesses or by the respondent, depending on the nature of the issues. Prior to interviewing the respondent, the Investigator synthesizes the allegations and provides a document referred to as 'particulars' (the who, what, when, where) to help them understand the nature of the allegations before they are asked to answer any questions.

We promote the practice of allowing all participants to have a support person present during their interview, even the witnesses. We recognize that these processes can be stressful for all of those involved, and that it is valuable to have someone to

debrief with, take notes of what was discussed, and be another set of ears to digest information about the process.

Each interview is structured to ensure due process and administrative fairness. The Investigator explains their role and then reminds participants of their three key obligations:

1. Confidentiality is crucial to a fair and effective investigation. Participants need to keep confidential all information they discuss during their interviews. It is especially important that they do not have any communication related to what is being investigated with any witnesses. Exceptions may include discussing the investigation with their support person/representative and any medical professionals they utilize to assist in managing their health and wellness.
2. All participants are entitled to be free from negative reprisal for having participated.
3. All participants are required to be honest and forthright in the investigation process. The Investigator relies on the information that participants provide, and it is imperative (and a part of their employment obligations) that participants be co-operative and honest in the process.

Step 3: Analysis and Report Writing

Each investigation necessitates synthesizing evidence, making factual findings, and reporting out. The final report is written and submitted consistent with the TOR. Any follow-up meetings and discussions are scheduled as required. SBP does not provide recommendations on discipline if allegations are substantiated. This is left for the school district to decide, with assistance from its legal counsel. Our job is fact-finding and determining if there is a breach of policy and/or law; it is not to give advice on outcomes.

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The Investigator may be required to attend a school board hearing, arbitration or civil trial, but not in the role of advocate; rather, it would be to provide information on their work as Investigator and how they came to their determination regarding findings.

Important Legal Tidbits

Investigators need to be mindful of the basic requirements for **procedural fairness**: impartiality, lack of pre-judgment, transparency and honesty with the parties, provision of particulars of allegations, consideration of relevant evidence, and conforming to the applicable policies and collective agreements. While these basics do not change, the degree to which the principles of procedural fairness apply may vary between investigations. In the simplest of terms: the more serious the allegations and potential outcomes, the more diligence and process the Investigator may need to apply.

The standard for investigations is **reasonableness**, not perfection. There is rarely, if ever, one right answer to any complaint or allegation. To illustrate, imagine a complaint has been brought to the Human Rights Tribunal. The same complaint is given to five different Tribunal members for decision making. It is possible, and reasonable, that members may decide differently whether or not the complaint is founded.

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They may run different hearings to arrive at their decision. So long as their process is fair, it would meet the standard of reasonableness, even if each of the five members' processes has differences within them. Even in the unlikely result that all five members make the same decision, it is a certainty that they would all arrive at that decision differently and would express the reasons for their decision differently. This scenario shows that even in judicial and administrative hearings (which investigations are not), in every case, there may be a range of different decisions, and different reasons for those decisions that – though they are different – would all be reasonable.

The Goldilocks of process is **timing**: it needs to be not too slow but not too fast. Delay can impact the investigation process in several ways, including undermining the quality of the evidence; undermining the confidence that the participants have in the process; creating uncertainty; undermining the acceptability of the ultimate findings; and creating the perception that the issues are complex or the findings hard to determine. Investigation work is reactive work, often involving emotional, difficult issues and conflict. There is almost always a sense

of urgency with respect to the process and most clients want action and answers immediately. While this dynamic is understandable, and understood by our team, we maintain that reaction cannot be the primary driver for how a process is conducted. Timely answers are desired, but no one is served by a rushed, flawed process.

Top Tips

First, let me acknowledge the wonderful work you do to support your staff, community, and most importantly, the kids. Whether you are the complainant, respondent, or witness, hold on to these thoughts as you work through the investigation process.

1. If this feels hard, get support. You do not need to be doing this in isolation. You have the BCPVPA and school district HR staff who can give you information about the process and how it works. Take the uncertainty, newness, and isolation out of this by talking to those you can (bearing in mind confidentiality). If it is stressful, talk to a counsellor to get help coping.
2. If you are the complainant or respondent, make sure you ask your Investigator some key questions to clarify the process and timelines:
 - a. Who will get a copy of the report? What does reporting out look like?
 - b. What is the estimated timeline? Can you contact the Investigator to get an update on timelines?
 - c. Can you provide names of witnesses?
 - d. When can you submit documents you think are relevant?
 - e. Who can you speak to about the process?

3. If you are the respondent, make sure you have particulars in advance of answering questions so you can fairly respond to them. If you are surprised by an allegation during an interview and are not ready to respond, explain that and ask for some time.

4. If your staff are participating in this process (and you are not involved as a complainant or respondent), do not make the mistake of thinking you cannot talk to them at all. Investigations can be very isolating for participants. You can remind them to get support, offer them reassurance that the process is designed to be fair for all, and express that you and the school district value their honesty in this matter and how much they are appreciated generally. Saying nothing is an ineffective HR strategy. We do not want participants sharing their evidence, but we also do not want them to feel ignored, isolated, or unappreciated. A simple thank you – an acknowledgement and reminder of appropriate supports – goes a long way in helping staff feel better about their role in this process, and in connecting to their school community.

Concluding Thoughts

If you are involved in an investigation, make sure you reach out to school district HR staff and the BCPVPA to get advice if you are unsure about your role or the process.

If you connect with one of our lawyers, feel free to also ask questions and seek understanding about the process and your contributions to it. A key goal of an investigation is to find out what happened, but another important goal is to try to help those involved understand the process and ensure they feel they have been treated fairly and respectfully throughout.



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The BCPVPA recommends that members contact an MSS Director for more information about being a witness, complainant or respondent within a formal investigation process. The Director will answer questions and guide members through the process, communicate with the district and investigator, and can be present during the interview process.

To find out more, contact
mssinfo@bcpvpa.bc.ca

Read “The Role of a ‘Witness’ in a Workplace Investigation” in the May 2024 issue of *Principled* magazine:
bit.ly/BCP_M24_Witness

BCPVPA members who are going through an investigation process can access confidential counselling support through humanworks. For more information on humanworks, please contact Rochelle Morandini, BCPVPA Director of Member Health and Well-being at rochelle@bcpvpa.bc.ca