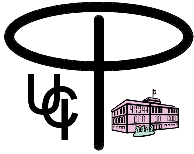

Risk 101

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A Risk Management Newsletter For The University, College & Institute Protection Program's Members

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Team Leader's Message

Welcome to our latest edition of Risk 101 containing many new articles which we hope you will find useful and informative.

Risk Management Conference Planned for November 28th and 29th

After the success of last years' conference we are pleased to announce that another conference is being planned for November 28th and 29th of this year. We want to make this year's conference even better than last year's!

This event is being planned now so feel free to discuss it with either myself or your risk management consultant. Based on feedback received last year this year's conference will take many subjects to a more detailed level in a workshop environment. We intend to include some social networking events as options for the evening. This conference is being designed specifically for you, our clients, so please provide us with your input on topics and/or format.

Please feel free to contact us at protection.program@bcucipp.org with any suggestions for future topics and we will do our best to accommodate you. Our previous articles are listed on our web site alphabetically under the Publications tab and we recommend using this as a growing library of information.

Andrew Green
Director , Client Services—Education

"And The Winner Is….": How To Launch a Successful Contest

Note: Although written for government by Wanda Kelley and Dorothy Wong of the Legal Services Branch, Ministry of Justice, the principles contained in this article are equally applicable to post-secondary entities looking to initiate contests.

Promotional contests have become a popular tool to promote government initiatives and programs. They can be highly effective in drawing the public's interest. However, you may not be aware that there are a number of legal requirements to meet before launching a contest. Indeed, the Supreme Court of Canada just confirmed an award of damages, including punitive damages, for an "Official Sweepstakes Notification" that was "riddled with misleading

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representations" and thus contrary to Quebec's consumer protection legislation: *Richard v. Time, Inc. and Time Consumer Marketing, Inc.,* 2012 SCC 8. (http://scc.lexum.org/en/2012/2012scc8/2012scc8.html)

What do you need to do before you issue that press release and announce your contest? Below, we describe some of the legal requirements, and we also provide a checklist for drafting the contest rules. These are all things to consider in addition to contacting the Legal Services Branch at the Ministry of Justice for advice appropriate for your particular contest.

The Law:

The law pertaining to contests in Canada is found in a number of sources: the *Criminal Code of Canada*, the federal *Competition Act*, provincial and federal privacy legislation and, for contests open to residents of Quebec, the Quebec *Lotteries Act* and the *Charter of the French Language*.

Criminal Code

Sections 206(1)(a) to (d) of the *Criminal Code* prohibit schemes for disposing of property "by any mode of chance". The Supreme Court of Canada has clarified that only games of "pure chance" are prohibited, not games that mix chance and skill. So long as the contest includes an adequate skill-testing component, it will not be in violation of the *Criminal Code*. For random draws, mathematical questions are a good option, but overly simple skill-testing questions (e.g., "what is 31+24?") are less likely to satisfy the legal test.

Why do contests say "no purchase necessary"?

Section 206(1)(f) of the *Criminal Code* makes it an offence to "dispose of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration". So your contest rules need to state that "no purchase is necessary", and if there is a purchase component (e.g., "buy a bottle of BC wine!"), you must also include a non-purchase option.

Section 206(1)(f) must also be considered in contests where it is contemplated that contest entrants will provide **user-generated content** (such as a photo, a video or a mobile application they have created) with their entry. Although there is not much guidance from the Canadian courts on the issue, user-generated content could well be considered "other valuable consideration". To be on the safe side, consider making user-generated content optional rather than mandatory wherever possible.

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"And The Winner Is….": How To Launch a Successful Contest (continued from page 2)

NOTE: There are significant penalties for violations of Section 206(1):

- indictable offence punishable by imprisonment for a term of up to two years; or
- summary conviction offence punishable by a fine of up to $25,000.

Competition Act

Section 74.06 of the *Competition Act* requires that there be "adequate and fair disclosure" of the following:

- number and approximate value of the prizes (market value or a range of possible values);
- details about the regional allocation of prizes, if applicable (e.g., if the contest covers Canada, "x number of prizes will be awarded per province/ territory");
- the contest closing date; and
- any facts that materially affect the chances of winning (e.g., odds of winning, eligibility rules).

The *Competition Act* also requires that the distribution of prizes cannot be "unduly delayed" and that contestants be selected or prizes distributed on the basis of skill or on a random basis.

NOTE: There are significant financial penalties for violations of the *Competition Act*: up to $750,000 for a first time occurrence by an individual and up to $10,000,000 for a first time occurrence by a corporation; these penalties increase to up to $1,000,000 and up to $15,000,000 respectively for subsequent violations.

Privacy Legislation

Relevant privacy law must also be considered when planning a contest. You will need to comply with the provisions of B.C.'s *Freedom of Information and Protection of Privacy Act* (FOIPPA) with respect to the collection, use and disclosure of contest entrants' personal information (e.g., name, address, phone number, email, image in photos or video, or opinions). In particular, you will need to inform entrants, through the contest rules and/or entry form, of the purposes for which their personal information will be collected and the statutory authority for this collection. You will also need to provide contact information for someone in your branch or division who can answer any questions entrants may have regarding the collection of their personal information.

Thought should also be given to any promotional activities involving contest winners – for example, in an online contest you may wish to include photographs of the winners on the contest website – as your release must contain appropriate language to address these issues and to authorize the disclosure of personal information on the internet. You should also keep in mind that only the minimum

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"And The Winner Is....": How To Launch a Successful Contest (continued from page 3)

personal information necessary for the purpose (e.g., operating the contest) should be collected.

Quebec Law

Canada-wide contests that include the province of Quebec raise additional legal issues. Under the Quebec *Lotteries Act*, the Regie des alcools, des courses et des jeux has the authority to create rules governing "publicity contests" in Quebec. Contest organizers must pay duties to the Regie, which vary depending on the value of the prizes and the geographic scope of the contest, and must also file contest rules and certain other materials with the Regie within a specified timeframe prior to the contest launch.

In addition to the *Lotteries Act*, the Quebec *Charter of the French Language* requires all contest materials, including the contest rules and related advertising, to be made available in French, so you may need to engage the services of a translator. Quebec legal counsel will also need to review the rules to ensure compliance with Quebec law.

Other Jurisdictions

If your contest includes other jurisdictions (either within or outside of Canada), you will also need to consider any other applicable legislative regimes.

The Contest Rules:

Contest rules establish the eligibility requirements and award conditions. Full disclosure of contest rules is essential not only to comply with the law, but also to provide contractual protections for the Province. Before drafting contest rules, you should be able to answer the following questions:

WHY?

What are the objectives or business goals your program area hopes to achieve through this contest?

WHO?

Who is the intended audience? (provincial employees only, residents of BC, residents of Canada, anyone in North America, an international audience, a specific target audience such as youth in schools, First Nations, or visitors to provincial parks?)

What is the age range of contestants? (minors? adult contestants only? open to all ages?) If minors can enter the contest and/or receive prizes, there are additional legal requirements.

Who else needs to be involved*?* If sponsors are donating any of the prizes, you will need to enter into a sponsorship agreement with each sponsor.

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"And The Winner Is....": How To Launch a Successful Contest (continued from page 4)

WHAT?

What are the eligibility requirements and what do contestants need to do to enter and, if successful, claim their prize? (see discussion on **releases** below.) If the contest is adjudicated, what are the criteria for evaluating entries?

What are the prizes, how many are there, and what is their approximate value? Is there a regional allocation of prizes?

What information or materials are you collecting from contestants? (see discussion on **user-generated content** below.) What information or materials are you giving to contestants (see discussion on **other considerations** below)?

WHERE?

Where will the contest be held (if it is location-based)? Where can contestants enter (online, at a specific location?)? Where can contestants get a copy of the full contest rules?

WHEN?

What is the internal timeline for launching the contest? This needs to be realistic and factor in time for drafting the contest rules, legal review (including review by legal counsel in other jurisdictions if the contest is international and/or includes Quebec), finalizing sponsorships, complying with regulatory and statutory requirements, and engaging in promotional activities.

When does the contest start and when does it end? If the winner is selected by a random draw, when will the draw take place and where? If the winner is selected by adjudication, when will the winner be announced and when does the winner have to claim or redeem their prize?

HOW?

How do contestants enter? Consider whether entries are made online, through submission of hard copy entry form, or in person at a specific location. If you are running an online contest, you will need additional disclaimers for system glitches and errors, limitations on the number of entries, and provisions to address privacy issues and IP issues (see discussion on **user-generated content** and **privacy issues** below) and your right to take down infringing or inappropriate material.

How do contestants claim their prize?

User-generated Content:

As noted above, if the contest contemplates the submission of user-generated content, you will need to ensure compliance with the *Criminal Code* provisions but user-generated content raises intellectual property and privacy issues.

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"And The Winner Is....": How To Launch a Successful Contest (continued from page 5)

Intellectual Property Issues

In the absence of any agreement to the contrary, the author of the user-generated content is the copyright owner, and the Province has no legal right to use the content (even for purposes connected with the contest, such as display of the material on the contest website) without the owner's permission. Consider how you will be using any user-generated content and what parameters will apply to this content (e.g., entrants may not submit material owned by another party), and ensure your contest rules adequately address these issues.

Privacy Issues

User-generated content can also raise issues from a privacy perspective. Certain basic personal information will likely be collected on the contest entry form. If an entrant also submits user-generated content such as a photo, a video or a story, this content may include additional personal information. One option is to state in the contest rules that user-generated content must not contain the entrant's personal information. Depending on the nature of the contest, however, this may not be practical, and you may need to address this issue in the contest rules.

A more difficult issue is the inclusion of third party personal information in user-generated content (e.g., an entrant submits a photo of him/herself and three friends). Since FOIPPA provides that personal information must be collected directly from the individual, except in certain specified circumstances, this issue requires careful consideration. Again, the contest rules can state that user-generated content must not include third party personal information, but if this is not practical given the nature of the contest, your contest rules will need to include specific language (such as directing entrants to get the written consent of third parties) to ensure that the collection, use and disclosure of any third party personal information complies with applicable law.

Releases:

Before you award any prizes, you should ensure that contest winners sign a release. The release document should, at a minimum, require the winner to confirm their compliance with the contest rules, including their acceptance of the prize as set out in the rules, and to release the Province from any liability associated with their participation in the contest or use of the prize. If additional personal information is collected from contest winners (e.g., photos), the release should also address how such information will be used and/or disclosed.

Other Considerations:

Running a contest in a government context raises some unique considerations. If you are providing any Province-owned material for the use of contest entrants (*e.g.*, provision of data sets for entrants to use in building a mobile app), this will

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"And The Winner Is….": How To Launch a Successful Contest (continued from page 6)

need to be approved in advance by the Intellectual Property Program. Relationships with sponsors may include joint advertising or press releases, or the use of a sponsor's trademark on a government website. These issues should be discussed in advance with your Government Communications and Public Engagement representative. Complex privacy issues may entail liaison with the Knowledge and Information Services Branch of the Office of the Chief Information Officer, while Canada-wide or international contests may involve the Intergovernmental Relations Secretariat.

Conclusion:

Contests can produce great results, but they do require careful planning in order to avoid the legal pitfalls. There is no "one size fits all" template or solution, but we hope that this article provides some guidance that will help to ensure your future endeavours in this area are a success.

NOTE: This article is not intended to replace legal advice that you may require for your specific contest.

Wanda Kelley & Dorothy Wong
Legal Services Branch—Ministry of Justice
Province of British Columbia

Home Owners and WorkSafeBC

Do you own a Home? Yes.
Are you an employer? No.
*Are you **sure** you aren't an employer?*

Recently there have been some high profile cases involving home owners that highlight some little known parts of Workers Compensation Law in BC. As a homeowner (or even a renter that is having work done on your behalf) you may have some WorkSafeBC obligations that you didn't know about and that could have costly consequences.

WorkSafeBC (WSBC) administers the workers compensation insurance program that all employers pay into to ensure that any worker injured on the job receives any required medical treatment and/or wage loss benefits. The definition of "employer" under the *Workers Compensation Act* is very broad and includes home owners. If you are completing renovations, building a home or hiring long term help you may either need to register as an employer with WSBC or ensure that the company has WorksafeBC coverage.

If you are hiring someone to work around your house for less than 8 hours a week or for a specific job that will be less than 24 person hours work, then you will not be required to register as an employer with WSBC. This covers

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Home Owners and WorkSafeBC (continued from page 7)

situations such as hiring neighbourhood kids to look after your lawn or shovel snow for the season or having someone come in for a short, specific project like painting a fence. There is also an exemption for child care work for before/after school care for up to 15 hours per week

If you hire a worker for more than 8 hours on average a week, or for a larger project that will require more than 24 person hours, you should register as an employer with WSBC and you will have to pay premiums to WSBC based on the amount of wages you pay the workers. Note this applies when you are hiring individual workers (part time or full time), *not a company,* to do the job(s).

When you hire a *company* to work in or around your home, always ask them if they have WSBC coverage. Check their information by requesting an online clearance letter from WorkSafeBC before they begin work. Clearance letters can be quickly and easily obtained by going to: http://www.worksafebc.com/insurance/managing_your_account/clearance_letters/default.asp

It is vital to ensure the company you hired has WSBC coverage, and continues to have coverage for the duration of the project. If a worker of the company sustains an injury you may be responsible for the cost of the accident (medical treatment, wages, etc.) if the company does not have current WSBC coverage; or you may be responsible for paying the premiums of the company.

There is also an advantage to ensuring that you or your contractor has WSBC coverage: it removes the right for an injured employee to sue for damages. They can only make claims under the no-fault *Workers Compensation Act*, limiting your liability.

If you are having work done where there will be multiple contractors on site, you are building your own home or have situations where one contactor may affect the safety of another contractor at your house, you may require a “Prime Contractor” under the *Workers Compensation Act*. If a Prime Contractor is not designated in writing the role defaults to the owner, YOU!

The role of a prime contractor is to coordinate safety activity on the worksite and establish a system or process that will help ensure compliance with the *Occupational Health and Safety Regulation*, not something the typical home owner wants to try and take on.

In most cases on a large job with a general contractor and multiple trades on site, the general contractor will be the Prime Contractor. But you must ensure that you designate the Prime Contractor in writing, so ensure it is in the building contractor attached in a schedule or memo signed bay both parties.

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Home Owners and WorkSafeBC (continued from page 8)

As a home owner, you can 'accidently' be a Prime Contractor if you hired different companies to be at your home at the same time. For example, you hire an exterior painting company and a company to fix your deck and they are on site at the same time. These two companies may affect each other's safety and will require a Prime Contractor to coordinate. In this case approach one of the companies and ask them to be Prime Contractor (and designate it in writing) or simply schedule the companies to be there on different days.
It is also possible to require a Prime Contractor even if the two companies are not on site at the same time but will affect each other. This tends to be the case on complex and high risk projects, so it is best to ensure a Prime Contractor is designated and if you have any doubts about contact WSBC's Prevention Department.

WorksafeBC has some resources available to help home owners:

Home owner information for renovating and building homes: http://www.worksafebc.com/publications/how_to_work_with_the_wcb/Assets/PDF/homeowner.pdf

Obtaining Clearance Letters:
http://www.worksafebc.com/insurance/managing_your_account/clearance_letters/default.asp

Worksafe Hiring Contractors Bulletin
http://www2.worksafebc.com/i/posters/2005/WS%2005_05.htm

Prime Contractor Information:
http://www2.worksafebc.com/publications/ohsregulation/Policies-WorkersCompensationAct.asp#SectionNumber:D3-118-1

If you acting as your own Prime Contractor, you may want to contact the Employers' Advisers Office who provide free, unbiased advice about safety, claims and dealing with WSBC: http://www.labour.gov.bc.ca/eao/

One final item, condominium strata have the same obligations as home owners (and a few more). If you are involved with the strata, best to ensure the strata is asking for WSBC coverage from any contractors on site. Otherwise your strata's reserves could be paying for a workplace injury.

Brad Buck, CRSP
Manager, Safety Advisory Services
BC Public Service Agency

Navigating the New Copyright Waters

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Introduction

Significant developments in Canadian copyright law occurred during 2012: in July, as reported in our *Knowledge Bytes* newsletter, the Supreme Court of Canada handed down five key copyright decisions, and in November 2012 significant amendments to the *Copyright Act* (the "Act") came into force. Many of these amendments directly impact higher learning institutions, which are well-known environments for developing, fostering, and producing original written, musical, artistic, and dramatic works that are subject to copyright protection. This article details a number of the most significant changes to the Act that impact higher learning institutions. Understanding these amendments is essential for higher learning institutions as they work towards balancing competing copyright-related interests.

Fair Dealing Exceptions

Higher education requires that institutions teach materials which may be subject to copyright. Copyright law has long recognized that in certain limited circumstances, known as "fair dealing", it is possible to use copyright-protected materials without obtaining the consent of the copyright owner and without constituting copyright infringement. The amendments to the Act have expanded the fair dealing exceptions. Previously, the Act recognized limited fair dealing exceptions in relation to research, private study, criticism, review and news reporting. As a result of the amendments, fair dealing now includes education, parody and satire. For higher learning institutions, the inclusion of "education" in the list of fair dealing exceptions is a step in the right direction. However, it is important to recognize that the concept of fair dealing is a fact-specific analysis that does not end with the enshrining of "education" as a statutory category for fair dealing. Rather, Canadian case law holds that for fair dealing to be operative as a defence to copyright infringement, not only must the purpose of the dealing fall within the categories enshrined in the *Copyright Act*, but the dealing must be found to be "fair" as determined by a number of factual factors, which include the following: (i) the character of the dealing (i.e. how were the works dealt with?); (ii) the amount of the dealing (i.e. how much of the work was used?); (iii) alternatives to the dealing (i.e. were there alternatives that were not copyright-protected that could have been used?); (iv) the nature of the work (e.g. was the work widely published or confidential in nature?); and (v) the effect of the dealing on the work (i.e. is it likely to affect the market for the work?). Accordingly, higher learning institutions need to recognize that the inclusion of "education" within the fair dealing exceptions does not give

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higher learning institutions *carte blanche* to do as they please with copyright-protected works. Rather, they need to consider all of the factual circumstances before coming to the conclusion that the fair dealing exception is available for educational use.

Educational Use Exceptions

The amended Act also contains a number of education-sector specific exceptions to copyright infringement that are similar to the more general fair dealing exception for education. For example, the amendments include specific exceptions for educational institutions to communicate or reproduce educational lessons by telecommunication for educational or training purposes. These exceptions are especially relevant in the context of today's changing educational climate where an increasing number of students receive part or all of their lessons over the Internet via distance learning programs. Importantly however, for these exceptions to be operative, higher learning institutions must satisfy a number of strict conditions found in the *Copyright Act* including, in some circumstances, the requirement that students and the educational institution destroy any fixation (e.g. recording) of the lesson within 30 days after students receive their final course evaluations. Given that today's higher learning institutions are likely to develop a more significant presence in distance learning programs, it is essential that they ensure that all of their online learning programs are compliant with the significant changes found in amended sections 29 and 30 of the Act.

Technological Protection Measures

Another central change to the amended Act is the addition of provisions regarding technological protection measures (TPM), sometimes referred to as "digital locks". Under these provisions, in most circumstances, an individual incurs liability if he or she circumvents a digital lock, offers circumvention services to the public, or manufactures or imports devices, technologies or components whose primary function is to circumvent a TPM.

Institutions of higher learning arguably receive a certain measure of protection against liability related to TPMs in that the amended Act only allows for an injunction – and not damages – to be issued against an educational institution liable under the TPM provisions. However, such protection is conditional upon the institution satisfying the court that it was unaware and had no reasonable grounds to believe that its actions constituted a contravention of the TPM provisions. Importantly, these provisions are focused on the liability of an educational institution itself contravening the TPM provisions; they do not specifically address whether an educational institution could avoid indirect liability in the case where a student infringes the TPM provisions using resources owned and controlled by the educational institution. Due to this uncertainty, it is again incumbent on higher learning institutions to review the copyright-related policies that affect their students; further, it is important for higher learning

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institutions to have suitable policies in place for responding to allegations that institutional resources are being used for illicit purposes.

Commissioned Photographs

The *Copyright Act*, as amended, no longer contains distinct provisions dealing with copyright ownership of photographs. Historically, an entity that commissioned a photograph became the first owner of such photograph. For example, if a university commissioned a photographer to take photographs for use on the university website, the university would, by statute, be the first owner of those photographs. However, as a result of amendments to the Act, photographs are now to be treated like other copyright-protected works and initial ownership will vest with the photographer. Accordingly, and continuing with the above example, the university would no longer be the first owner of the photographs absent an express agreement between the university and the photographer, and subsequent use of the photographs by the university would be prohibited. As such, it is important for universities and other higher learning institutions to review their agreements with third party service providers, such as photographers, to ensure that the agreements are in line with the new changes to the Act.

Moving Forward

As with all new or amended legislation, the true test of its impact will be how the Canadian courts interpret the updated *Copyright Act*. As such, 2013 is expected to be another important year for Canadian copyright law as the courts will have their first opportunities to render decisions guided by this updated statute.

From a practical perspective, it is recommended that all higher learning institutions review their internal copyright policies and copyright-related agreements to ensure that they are appropriate in light of the recently enacted amendments to the Act. A review of internal copyright policies and agreements also provides an opportunity for a higher learning institution to reconsider how it wishes to deal with the protection, ownership, exploitation, and enforcement of intellectual property protection, especially in light of ever-changing technologies.

If you have any questions or wish to discuss the impact of this amended legislation, please contact the author of this article, Jeff Morton, at jdm@cwilson.com or 604.643.3166, or the Chair of Clark Wilson's Higher Learning Practice Group, Brock Johnston, at rbj@cwilson.com or 604.643.3116.

Jeffrey D. Morton
Clark Wilson LLP

BC Court of Appeal upholds indemnity in school rental contract

Note: *Although the case in this article involves a school district, the information is still useful and relevant for post-secondary institutions. For this reason, we have included it in this newsletter. Individual circumstances will dictate whether or not it is appropriate for a post-secondary institution to transfer liability for the negligence of the institution to another entity in the context of a user group or rental agreement. This article explains the importance of the use of clearly worded indemnity language when the institution is looking to transfer liability.*

School buildings and grounds are routinely used by a wide variety of community groups seeking to host events, meetings and classes. As the owners of school property, school districts are responsible as occupiers of the property to take reasonable care to ensure the safety of individuals who come onto the school property for events hosted by a community group and may be found liable where an individual suffers an injury while attending such an event. To address this exposure to liability, school districts commonly use standard form rental contracts which include indemnity clauses that seek to protect the school district from liability and allocate all of the risks associated with the event to the community group. Although courts are willing to give effect to clearly worded indemnity clauses that transfer liability for the negligence of one party to another party, in the absence of clear language, courts will assume that the parties did not intend such a result.

The B.C. Court of Appeal recently considered the scope of an indemnity clause in a school use contract in *Shelton-Johnson* v. *Delta School District No. 37*[1]. The Plaintiff, Ms. Shelton-Johnson, was attending the Highland Games hosted by the Sons of Scotland at South Delta Secondary School and an adjacent playing field owned by the Corporation of Delta in June 2009. She was injured when she tripped and fell on a sidewalk leading into a cafeteria in the school building that was used for the Highland Games event. The Plaintiff alleged that she tripped on an uneven section of the sidewalk and sued both the Sons of Scotland and the School District, claiming negligence and breach of their duties under the *Occupiers' Liability Act*.

The rental contract between the Sons of Scotland and the School District included both an indemnity clause in favour of the School District and an insurance clause requiring the Sons of Scotland to obtain insurance for the School District's liability associated with the event. The Sons of Scotland were also required to supervise the event, to ensure the school premises were left in an appropriate condition and to prevent unauthorized access to the school buildings.

The School District applied to the B.C. Supreme Court for a declaration that the Sons of Scotland was required to indemnify it for any liability owed to the Plaintiff and for the legal and adjusting costs incurred by the School District in defending the Plaintiff's action. The B.C. Supreme Court dismissed the application on the grounds that the indemnity clause did not clearly apply to the claims of the

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BC Court of Appeal upholds indemnity in school rental contract (continued from page 13)

Plaintiff and therefore the Sons of Scotland was not required to indemnify the School District. The Court of Appeal found that the indemnity clause did apply to the Plaintiff's claim, set aside the order of the B.C. Supreme Court and granted the relief sought by the School District.

The reasons of the Court of Appeal and of the B.C. Supreme Court demonstrate both the utility of indemnity provisions in school use contracts and the importance of using clear and consistent language in the indemnity provision and in the whole of the contract to establish the expectations and obligations of the parties and to clearly express the parties' agreement on how the risks associated with the event are to be allocated.

Analysis of the indemnity clause

The key terms in the indemnity clause provided:

- The Sons of Scotland agreed to accept the premises at their own risk and to save harmless and keep indemnified the School District from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to any person, or property of any person howsoever caused,
    - ◊ who uses the School facilities as a result of the Sons of Scotland entering into the rental contract, or
    - ◊ who is permitted by the Sons of Scotland to use the School facilities,
- notwithstanding that the injury, damage or loss may have been contributed to or occasioned by the negligence of the School District.

The written contract identified the "facility" that the Sons of Scotland rented as two specific rooms within the School building, the cafeteria and a classroom. The calculation of the rental fee to the Sons of Scotland was based on the two rooms specifically identified as the "facility" in the written contract. The Sons of Scotland were also permitted to use washrooms in the School building and to use exterior areas, including the sidewalk where the Plaintiff fell, which provided access to the School building.

The B.C. Supreme Court relied on the leading decision in this area, *Canada Steamship Lines Ltd. v. Regem*[2], for the proposition that in order for an indemnity clause to protect a party from liability for its own negligence, the clause must be "unequivocally certain". There was no dispute that the indemnity clause was clearly intended to protect the School District from liability for its own negligence. However, the Supreme Court judge, using the test of "unequivocal certainty", held that the indemnity clause only applied to the "facilities" that were specifically identified in the written contract and to the other areas within the School building that the Sons of Scotland were permitted to use for the event.

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BC Court of Appeal upholds indemnity in school rental contract (continued from page 14)

The Supreme Court judge, referring only to the part of the indemnity that applied to injuries suffered by persons who used the School facilities, found that as the Plaintiff was injured on the exterior sidewalk and not in the “School facilities”, the indemnity clause did not apply.

In determining that the exterior sidewalk was not part of the “facilities”, the Supreme Court judge noted the use of different terms to describe the school property and parts of the school property within the indemnity clause, the rental agreement and other related documents. As noted above, the rental contract identified the ‘facilities” as the cafeteria and a classroom. The indemnity clause referred to “premises” and “facilities” suggesting that there was a distinction between the two. Elsewhere in the rental contract there were references to the “premises”, the “building”, and the “school property”.

The Court of Appeal questioned the reliance of the Supreme Court judge on *Canada Steamship*, where the indemnity clause clearly included the negligence of the School District. However, the Court of Appeal decided the appeal on a reading of the whole of the indemnity clause, which did not require a finding that the Plaintiff was using the “School facilities” at the time of her fall, but simply that she was permitted by the Sons of Scotland to use the School facilities.

Reasonable expectations of the parties

On a reading of the whole of the indemnity clause, the Court of Appeal confirmed that the scope of the indemnity was directed at the risk of liability created by the people who would be attending the Highland Games and using the School building and exterior areas of the School property. The Court commented on the commercial sense of this interpretation:

> “Sons of Scotland wanted to hold an event on the field adjacent to the School and wanted to use some interior rooms of the School in conjunction with the event, The School District was prepared to rent out part of the School as long as it would not attract any liability as a result of the event taking place. In that regard, one of the requirements in the rental agreement was that Sons of Scotland obtain liability insurance with the School District named as an additional insured. The parties agreed upon an allocation of risk in the event someone was injured while attending the Highland Games.”

The Court dismissed an argument that the result was a “commercial absurdity” and not within the expectation of the parties. The Court noted that the Plaintiff was on the sidewalk because of the Highland Games and the parties expected that persons like the Plaintiff would use the sidewalk to access areas within the School building that were part of the event. The obligation on the Sons of Scotland to provide insurance for the School District for the event was part of the overall allocation of risk as between the parties and supported the Court’s analysis of the parties’ reasonable expectations.

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BC Court of Appeal upholds indemnity in school rental contract (continued from page 15)

Clarity and consistency of language

In order to effectively allocate the risk associated with community events on school property to the groups hosting the events, school districts need to have in place clearly and consistently worded rental agreements that set out the expectations and obligations of the parties. Although the School District in this case was successful on the appeal, the litigation may have been avoided, or more easily resolved, if the rental agreement used consistent terminology when referring to the same thing, for example, using “facilities” to describe the specific rooms rented and using a different term such as “premises” or “school property” when the clause is intended to apply to the whole of the school, including the buildings and exterior areas.

When drafting standard term school use contracts. School Districts should ensure that the terms of the contract are clear and are both internally consistent and consistent with other related documents, such as application or request forms. The contract should use the same term throughout when describing the same thing or, as in this case, the same area. If a term is used to define or describe a particular part of a school property, the same term should be used every time that particular part of the property is referred to in the contract. When the contract is intended to refer to the whole school property, a different term should be employed. The use of defined terms can be helpful in providing clarity and consistency for both the drafter of the contract and the reader. Any terms that are considered vague or susceptible to more than one interpretation may be interpreted *contra proferentum,* that is, against the interests of the school district as the drafter of the contract.

If the school district intends to require the community group to indemnify it for any liability arising from the event, the scope of that indemnity must be clearly set out. If the indemnity is intended to cover all liability arising from the event, including liability for the school district’s own negligence, that should be clearly stated in the indemnity clause. Indemnity clauses must be consistent with any insurance requirements in the contract. The insurance clause should require the community group to obtain sufficient coverage for its own liability as well as for the school district, including both its vicarious liability for the negligence of the community group and liability for its own negligence.

Conclusion

Properly drafted indemnity and insurance clauses in school use contracts are effective to allocate the risk of liability associated with events hosted by community groups on school property to the community group and its insurer, rather than to the school district and the Schools Protection Program. Indemnity and insurance clauses make commercial sense and are commonly used in all kinds of facility rental contracts. Clear language in the contract not only

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BC Court of Appeal upholds indemnity in school rental contract (continued from page 16)

increases the likelihood that the clause will be upheld, but also establishes the mutual expectations of the school district and the community groups who use school property for their events and programs.

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References

[1] *Shelton-Johnson v. Delta School District No. 37*, 2012 BCCA 439, 2011 BCSC 1545
[2] *Canada Steamship Lines Ltd. v. Regem*, [1952] 2 D.L.R. 786 (Judicial Committee of the Privy Council)

WorkSafe BC Contractor Basics

Employers will often use contractors to provide specialized services when they don't have the resources or expertise to do a job themselves. While the services may vary from small, short term IT tasks to larger projects such as ongoing field work or large construction projects, there are some key points that apply to all contracts from a WorkSafeBC standpoint. If contractors aren't properly managed, there can be an exposure for your organization.

WorkSafeBC Coverage

By law, all businesses in BC must register with WorkSafeBC (WSBC) if they hire full-time, part-time, casual or contract workers. The employer pays premiums to WSBC based on its risk level and number of workers, to insure its staff against injury on the job. The insurance is a no fault system that pays both wage loss for workers if they are injured and unable to attend work and any costs for medical treatment required. In the event that a worker is seriously injured and can't return to work, WSBC can provide long term medical care, and even retrain workers for a new career. By registering with WSBC an employer is protected against lawsuits from injured workers.

Self employed individuals/sole proprietors may also qualify for WSBC coverage through Personal Optional Protection (POP). In the same way larger companies insure their workers, POP also provides coverage for time loss and medical costs in the event of a workplace injury. As well, POP coverage removes the right of an injured worker to sue an employer.

Hiring a Contractor

When hiring a contractor it is imperative that the company or individual you hired has WSBC coverage, and continues to have coverage for the duration of the project. Check with your procurement department, in most cases contract templates for provision of services will have language compelling the contractor to have WSBC coverage, and language directing the contractor to comply with the *Workers Compensation Act* for safety standards. It is recommended that both issues are addressed: coverage and prevention with contract language

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WorkSafe BC Contractor Basics (continued from page 17)

similar to the following:

> *{Contractor name} agrees that it shall, at its own expense, procure and carry, or cause to be procured, carried and paid for, full Workers' Compensation Board of BC coverage for itself and all workers, employees, servants and others engaged in or upon any work or service which is the subject of this Agreement*.

> *The contractor shall observe and enforce all safety measures required by the Workers' Compensation act of British Columbia and attendant regulations, the safety requirements of the {Organization Name} (see attached or below) and all applicable statues. In the event of a discrepancy between such provisions the most stringent provision shall apply.*

Note: Further prevention language may be necessary for multiple employer worksites that will require a Prime Contactor.

If the contractor does not have WSBC coverage and the contractor sustains an injury, your organization may be responsible for the full cost of the accident (medical treatment, wages, etc.) and/or may be responsible for paying the premiums of the contractor for the duration of the project.

The best way to ensure a contractor has WSBC is by requesting an online clearance letter from WSBC before work begins. Clearance letters can be quickly and easily obtained by going to: http://www.worksafebc.com/insurance/managing_your_account/clearance_letters/default.asp . You can also subscribe to the service and it will alert you if the contractor allows their account to lapse.

While dealing with a contractor that employs workers is normally straight forward (they are usually already registered and may be routinely asked to provide WSBC proof of coverage), POP accounts can be tricky. Sometimes the sole proprietors don't even know that coverage exists or it may be the only hurdle to them getting a contract with you. If you have a contractor asking about obtaining POP coverage, they can be directed to the Employers Advisers Office: http://www.labour.gov.bc.ca/eao/contact/location.htm , a free service that will assist them with WSBC issues including registering for coverage.

In some cases it can be a challenge for a self employed or sole proprietor to obtain POP coverage. Technically POP coverage is usually only granted to a self employed individual/sole proprietor with multiple contracts/revenue sources and the chance for profit or loss, not to someone with only one sole source contract who is not pursuing other work. WSBC does not always use the Canada Revenue Agency criteria for defining a contractor and they may find that a contractor is actually an employee of your organization for WSBC purposes, while CRA views them as a contractor.

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WorkSafe BC Contractor Basics (continued from page 18)

What's the Danger?

As noted earlier, having a contractor with no WSBC Coverage can lead to:

- Paying a contractor's WSBC premiums
- Being held responsible for direct costs from a work related injury to a contractor or their employee(s)
- Being open to a lawsuit for a work related injury of a contractor or their employee(s).

While it may seem unlikely that a contractor would be injured because the risk of injury is low, all work related activities must be considered. In one recent case, a firm was held responsible for the medical payments, wage loss and permanent physical impairment of a contractor that may exceed $1 million dollars over the life of the claim.

In this case, normally the contractor was working on relatively low risk activities at various outdoor sites. The incident occurred when a contractor was involved in a motor vehicle accident driving from a training session to a work site. WSBC ruled that the travel between the sites was part of the job, and therefore the accident was an accepted claim. The firm did not ensure that the contractor had current POP coverage. The injured contractor was engaged seasonally and had carried POP coverage in the past but did not have coverage at the time of the accident, and WSBC assigned those claims costs to the firm that hired him.

Ensuring that a contractor has WSBC coverage is the first step in protecting your organization from unforeseen claims costs. Normally if a worker were injured, the claim will be assigned to the contractor's firm. If there is no coverage, WSBC must decide if the injured person was a contractor or a worker of the firm that engaged the contractor. WSBC can then either assign the claim to the firm that engaged the contractor, or force the firm to pay retroactive premiums of the contractor for the project. Ensuring WSBC coverage using clearance letters is vital!

One Last Duty

Under the *Workers' Compensation Act*, before work commences you must give your contractor(s) any known information that is necessary to identify and eliminate or control hazards at the workplace. This is interpreted as 'reasonably foreseeable hazards' that the contactor may face, not an exhaustive list of all possible hazards. You do not have to create the safety program for the contractor or supervise their work; that is up to the contractor. Your job is to give them the information so they can find ways to protect their workers. This may be very simple in low risk scenarios for jobs that are office based such as IT work. On larger projects with multiple contractors or higher risk tasks this process can be complicated, and we recommend consulting a Safety Advisor or someone with experience this area prior to drafting language regarding hazards.

Brad Buck, CRSP
Manager, Safety Advisory Services
BC Public Service Agency

RIMS Canada Conference Preview

2013 RIMS Canada Conference October 6-9, 2013, at the Victoria Conference Centre http://rimscanadaconference. ca

Join risk and insurance professionals on a voyage of ***Discovery*** at the 2013 RIMS Canada Conference. Held only once every ten years in BC, here's your chance to attend this premier even with minimal travel expense. Engage, network and exchange ideas with leading industry professionals, including conference sponsors and exhibitors. Featuring "out of this world" plenary speakers and a full education program that includes topic-specific streams: Enterprise Risk Management, Risk Management, Claims, Legal , Environmental and Technological.

For program details and registration, visit http://rimscanadaconference.ca/registration.html

About Our Organization...

We are the Client Services Team for the University, College & Institute Protection Program (UCIPP). UCIPP is a self-insurance program which is funded by the Province of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Health Care Protection Program, and the Schools Protection Program. As part of the services of our program, we provide risk management and claims & litigation management services to UCIPP member entities including all institutions.

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