



RISK 101

In this Issue:

- ❖ Team Leader's Message
- ❖ Program Update
- ❖ Risk Management in Contracts
- ❖ Insurance and Risk Management in Lease Agreements
- ❖ Intra Vires: A Comment on the Barbour Case
- ❖ About Our Organization
- ❖ Our Team of Professionals

Please feel free to copy and distribute as necessary.

If you would like to receive an electronic version of this publication just drop us a line at protection.program@bcucipp.org and we will add you to our distribution list.

Volume 21, Issue 1

Summer/Fall 2017

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

Team Leader's Message

Welcome to our latest edition of Risk 101 containing articles which we hope you will enjoy and find both useful and informative. 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. We have just reviewed our previous articles which are listed on our web site alphabetically under the Publications tab and we recommend using this as a growing library of useful information.

After the success of last year's conference for our university clients, we are pleased to announce that another conference is being planned for the Spring of 2018. Building on the success of these past conferences, we are extending the mandate to include school districts, health authorities, ministries and crown corporations. It will be an exciting initiative and we will release more details as they become available. Feel free to contact us with any questions or suggestions you may have.

Program Update

Staff Update:

Justin Dosanjh joined the UCIPP team as a Law Co-Op student from January to the end of April. He completed his 3rd year in the UVIC law program and worked in an analytical role within our busy team; working on publications and other projects.

At the beginning of December 2016, Michael Dahlseide joined the UCIPP team as a Risk Management Consultant. He comes to us with 7 years of insurance industry experience and has his Chartered Insurance Professional (CIP) designation. Please join me in welcoming Michael to the Education team.

New Submission Update:

Due to the additional staff in our team, we have updated our intake policy to allow for us to process new certificate requests and indemnity reviews in the most efficient manner. This will require some assistance from you and your local teams and offices. We are now asking that ALL new inquiries be sent to the general email address: protection.program@bcucipp.org. This mailbox is always monitored no matter who is in a meeting, out of the office or has fallen ill and will be the most efficient way to get a timely response.

Resource Reminder:

On the UCIPP website (www.bcucipp.org), there is a fantastic tool called the Insurance Matrix that can be used when trying to determine which type of insurance should be requested when building a contract, based on the type of work that will be completed in the performance of the same. ◀

Risk Management in Contracts

There are many circumstances in which a University, College & Institution Protection Program member institution (UCIPP or Institution) will contract with another party including service contracts, sales agreements, leases, affiliation agreements and clinical trial agreements.

A contract is an agreement that is enforceable at law. It is the primary tool through which Institutions govern relationships and understanding with the other party. There are 5 components of a contract, all of which must exist in order for the contract to be legally binding on the parties. These components are:

1. Legal Capacity

The parties to the contract must have the legal capacity to enter into a contract. Legal capacity means that the parties are of legal age and are competent. It also means that the party is a legal entity (example: an Institution is a legal entity, a faculty or program is not). Individuals signing the contract must have the authority to bind the legal entity to the agreement.

2. Offer & Acceptance

There must be a genuine intent to enter into the agreement from all parties. Allegations of coercion or intimidation can be grounds to render the contract void.

3. Consideration

To be legally enforceable something of value must be given by one party in return for the promise of action, or omission of action by the other party. Most commonly the consideration takes the form of money, but it could be something else of value (example: goods or services).

4. Legal Purpose

The purpose of the contract must be for legal endeavours (example: contracts for a supply of illegal drugs would not be enforceable at law).

5. Conditions

The contract must specify the terms that will govern the agreement.

Policy for Risk Management in Contracts

Contracting has the potential to create many risks. Care in managing these risks can protect the Institution from loss. Therefore, we recommend all Institutions have a written policy in regards to risk management in contracts. This policy should address broad risk issues related to all contracts including;

- Requirement that all contracts must be written;
- Designated authority levels to negotiate and sign contracts (generally, the greater the amount and potential exposure, the greater the level of authority required);
- Requirement that all contracts be reviewed for risk management considerations prior to acceptance;
- Requirement that any indemnities granted by the Institution are approved pursuant to the requirements of the *Financial Administration Act* (see Indemnification section below);
- Designated central storage areas, including who can access stored contracts and procedures to obtain copies;
- Requirement that current listings of all contracts be maintained;
- Schedule defining how frequently contracts should be reviewed for both performance and risk management issues;
- Archiving procedures for expired contracts, including how long they will be retained;

Risk Management in Contracts (cont'd)

(Continued from page 2)

Anyone dealing with contracts must know if they have the authority to negotiate and sign the contract and, if they do not, who does. The institution's employees must understand the obligations under the contract and the risks associated with those obligations. Therefore, employees responsible for contract negotiation should receive instruction or training on how to effectively review a contract.

Contract Review

In order to facilitate consistent and thorough contract review practices we recommend Institutions develop a tool such as a checklist in order to ensure the quality of the review process. We have included a sample checklist at the end of this publication for your consideration.

All contracts must be reviewed periodically to determine if changes are needed, or even if the contract should be continued. Considerations for contract continuation include the changing needs of the Institution, new regulations or legislation and performance evaluation of the contracted party.

At minimum, a contract review should confirm the following:

- Parties to the contract are legal entities and the correct legal names (or defined abbreviated terms) are utilized throughout the contract
- Performance measures and reporting requirements are set
- Any changes to the contract are required to be made in writing and signed by all parties
- British Columbia is specified as the jurisdiction for governing law
- Insurance requirements are specified
- If there are limitations of liability, they are identified and reviewed for reasonableness, given the context of the contract
- Assignment of the contract to another party is not allowed without written approval of the Institution
- Subcontractors must be approved by the Institution and bound by all the same terms and conditions as the primary contractor
- Confidentiality issues are addressed and contractor is obligated to follow FOIPPA
- Contractor required to be trained and licensed to provide the services (where appropriate)
- Termination provisions are specified and reasonable
- Dispute resolution processes are identified

Indemnification

The objective of all contracts should be the acceptance of responsibility by a party for loss arising from its own actions and those for whom it is responsible. Indemnification is an agreement between parties to protect one or both of them from loss or damage that it may incur as a result of the fulfillment of the agreement. An agreement to indemnify is voluntary and may create obligations beyond those imposed by negligence.

Institutions should consider the necessity of indemnification and hold harmless clauses in any contract, agreement, license or permit to protect the Institution from claims arising out of the actions of the other party. The other party should agree to reimburse losses sustained by the Institution (indemnify the Institution), and to defend and pay for any losses itself with no Institution involvement (hold the Institution harmless) when the loss arises out of the actions of the other party. The intent of indemnification is that the Institution be returned to the financial position it was in before the loss occurred.

(Continued on page 4)

Risk Management in Contracts (cont'd)

(Continued from page 3)

Institutions are frequently asked to provide an indemnity in contracts. Before granting this request the Institution must carefully review the contract terms to ensure the indemnity provided is only for liability which arises from the contract and only for acts over which the Institution has control or for which it has agreed to accept responsibility. Ensure the indemnity granted excludes liability which arises from the acts or omissions of other parties. Ideally an indemnification agreement should allocate risk to the party who is best able to manage the risk. Indemnity agreements which do not allocate risk to the party who is best able to manage it should be reviewed with your risk management team.

Indemnities provided by those Institutions which meet the definition of a government corporation under the *Financial Administration Act* must receive prior approval from the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance pursuant to the *Financial Administration Act*. Your UCIPP risk consultant co-ordinates this process for you.*

Insurance

Requiring contractors to prove they carry sufficient insurance to cover the exposures inherent in their services provides assurance the contractor has the financial capacity to indemnify and hold the Institution harmless.

There is no one-size-fits-all insurance requirement. The types and amounts of insurance should be customized relevant to a specific contract. Consider the activities the contractor will perform to deliver the goods or services, and the risks arising from those activities. The following illustrates some common types of insurance and when to request the coverage in contract. Contact your risk management team for specific recommendations.

Type of Insurance	When to request this coverage
Commercial General Liability (CGL)	All contracts that deal with a commercial or business arrangement between the contractor and the Institution.
Professional Liability	Services of "professionals" where their advice, specifications, prescription or design could be negligent or faulty by means of error or omission and cause a loss to Institution or a third party. Includes medical professionals, lawyers, accountants, IT consultants, engineers, architects and others.
Environmental Impairment Liability	Risk that the contractor's operations or products will cause the discharge, dispersal, release or escape of irritants, contaminants or pollutants into or upon land, air or water.
Tenants Legal Liability	The Institution is leasing or renting a building(s) to the contractor.
Property Insurance	Assets owned by Institution in the care, custody or control of the contractor OR the contractor owns that if lost or damaged would impair their ability to perform the contract.
Builders Risk Insurance (Course of Construction)	With the exception of UBC, all Institution are required to place insurance for construction projects with a value in excess of \$250,000.00 through the provincial construction insurance program which is administered by UCIPP. For Projects under \$250,000 the contractor hired to build the project is required to carry the coverage.
Fidelity Bonds	Contractors with access to student's property for example, home support workers, security or janitorial personnel

(Continued on page 5)

Risk Management in Contracts (cont'd)

(Continued from page 4)

Limitations of Liability

Limitation of liability clauses are increasingly relied upon by service providers to minimize the risk exposures of contracting parties. A limitation of liability, unlike a waiver, does not fully release the other party from liability. Instead, it limits the degree to which one party can be held responsible by capping, or limiting the amount of damages the Institution can recover from the provider for loss arising out of the agreement. A limitation of liability clause may be drafted so that it apportions the potential liability between the parties, or the clause may limit the dollar amount for which the other party can be held liable.

Frequently, a contract will seek to limit liability to an amount no greater than the amount of fees paid or payable under the contract. In reality, the amount of fees paid or payable has no bearing on the degree of risk in the contract. It is never acceptable to limit liability for death, bodily injury, breach of security or confidentiality or infringement of intellectual property.

Limitations of liability can also apply to the type of damage incurred. For instance, contracts will often seek to limit liability to direct damage only. Institutions need to consider the potential for indirect or consequential loss related to the product or service for which they are contracting. For example: Computer servicing contracts can result in loss of data without direct damage to the equipment itself. The indirect cost to restore lost data can be significant. Allowing a provider to limit their liability arising from indirect damage could leave no means of recovery from them for the costs associated with restoring the lost data.

A contractor should be willing to indemnify for the scope of services they are paid to provide without unreasonable limitations. Prior to agreeing to accept limitations, Institutions need to think about what could potentially go wrong as a result of the services, how likely it is to occur, and if it does occur, what is the impact to the Institution. If the limitations requested are reasonable in light of the potential impacts to the Institution they may be accepted. If not, further negotiation is required.

Contract Review Checklist

Issue	Yes	No	Comments
1. Identification of Parties: <i>Are all of the parties to the contract identified?</i>			
<i>Are all of the parties legal entities?</i>			
2. Definitions: <i>Are capitalized words defined at the outset of use?</i>			
3. Term: <i>Is the length of the contract specified?</i>			
<i>Are the renewal terms (if applicable) clearly defined?</i>			

(Continued on page 6)

Risk Management in Contracts (cont'd)

(Continued from page 5)

Issue	Yes	No	Comments
4. Termination: Are termination provisions specified?			
<i>Does the Institution have the ability to terminate the contract with notice?</i>			
5. Performance Measures: Is there a full description of each party's obligations and responsibilities?			
<i>Are the obligations and responsibilities measurable? Attainable?</i>			
6. Insurance Requirements: Are the requirements for insurance specified?			
<i>Are the insurance requirements appropriate for the risks associated with the contract?</i>			
<i>Does the contract require the Institution to be notified of material change or cancellation of any required insurance policy?</i>			
7. Limitations of Liability: Do limitations of liability exist in the contract?			
<i>Are the limitations of liability reasonable in the context of the agreement?</i>			
8. Indemnification/Hold Harmless: Is there an indemnity and a hold harmless within the contract?			
<i>If so, are the parties assuming responsibility only for their own acts?</i>			
<i>If the indemnity is being provided by the Institution to another party has it been approved by the Risk Management Branch?</i>			
9. Changes to Contract: Does the contract specify that any changes must be made in writing and signed by all parties?			
10. Jurisdiction: Is the Province of BC specified as the jurisdiction for governing law?			

(Continued on page 7)

Risk Management in Contracts (cont'd)

(Continued from page 6)

Issue	Yes	No	Comments
11. Assignment: <i>Does the contract prohibit assignment to another party without the written approval of the Institution?</i>			
12. Subcontractors: <i>Does the contract require all subcontractors to be approved by the Institution in advance?</i>			
<i>Are any subcontractors clearly bound by all the same terms and conditions as the primary contractor?</i>			
13. Confidentiality: <i>Are confidentiality issues addressed within the contract?</i>			
<i>Is the contractor required to comply with FOIPPA?</i>			
14. Dispute Resolution: <i>Are dispute resolution processes specified in the event of any disagreements?</i>			
<i>Are any provisions for formal dispute resolution (arbitration etc) based in BC?</i>			
15. Signatories: <i>Are the names, titles and signatures of the appropriate parties recorded on the signature page?</i>			
16. Appendixes/Schedules: <i>Are any appendixes and/or schedules referred to in the contract attached?</i>			

*There are some institutions that are able to approve their own indemnities, this is only possible after their process for approving indemnities has been reviewed and accepted by the ministry. ◀

Insurance and Risk Management in Lease

Poor drafting of language in a lease agreement can lead to ambiguity and confusion between landlords and tenants which is particularly troublesome should a claim occur. Because the landlord usually provides the lease agreement when the Institution is the tenant, the Institution should negotiate with the landlord to arrive at language that ensures a fair and enforceable transfer of risk between the parties and avoids potential liability and insurance issues.

The lease agreement should be reviewed prior to signing. There are multiple sections in a lease which are related to and will have an impact on risk and insurance. The purpose of this article is to assist the Institution in understanding the clauses and how they will affect risk and insurance where the Institution is the tenant. Each party should arrange its own program of insurance, avoiding duplication.

Landlord's Insurance

A landlord should be required to provide insurance on the building and its fixtures (all risk property) and commercial general liability to protect the landlord against loss arising from their own negligence. This requirement should be stated in the lease.

The cost of the landlord's insurance will usually be flowed through to the tenant as a portion of the operating costs, included in the rent. If this is the case, it is a requirement of the University, College & Institute Protection Program (UCIPP) that the insurance MUST contain a waiver of subrogation in favour of the Institution. This means the landlord's building insurance will pay for damage, if any, caused by the Institution. This is reasonable because the Institution has paid for that insurance.

If a lease makes the Institution responsible for insuring the building on behalf of the landlord and the Institution is unable to negotiate otherwise, the Institution should contact UCIPP for further advice. UCIPP does not provide coverage for the landlord's benefit and the Institution will usually have to arrange commercial insurance through the private insurance markets.

Tenant's Insurance

The tenant should provide insurance on its property (contents in the building) including tenant's improvements and commercial general liability to protect the tenant against loss arising from its own negligence. You may find a requirement that this insurance contain a waiver of subrogation in favor of the landlord. Such a waiver is not reasonable because the landlord has not contributed to the cost of the tenant's insurance. We would recommend that the Institution, as tenant, not routinely accept a waiver of subrogation or waive its rights of recovery against the landlord. If this is done, the Institution and/or UCIPP will be unable to recover from the landlord if the landlord negligently causes damage to the Institution's property.

The tenant may also be required to provide insurance on plate glass and/or boilers and machinery. If this type of property is within the control of the Institution, this is reasonable and can be covered by UCIPP.

Note that the UCIPP provides all risk property insurance and commercial liability insurance that meets the terms of most commercial leases. If you have any doubt about the ability of UCIPP to meet the insurance requirements of a specific lease, please contact UCIPP directly.

We recommend that the lease include the following language to acknowledge UCIPP as the Tenant's coverage provider:

"Notwithstanding anything contained in this paragraph, the landlord acknowledges that the tenant is

(Continued on page 9)

Insurance and Risk Management in Lease (cont'd)

(Continued from page 8)

insured for all risk property insurance and commercial general liability insurance under the provisions of the University, College & Institute Protection Program and the landlord confirms that the tenant is deemed to be in compliance with the provisions of this paragraph provided that the tenant remains insured under the University, College & Institute Protection Program throughout the term.”

Landlord as Additional Insured

It is common practice for a landlord to be included as additional insured under the tenant's insurance policy. This provides the landlord with protection against liability arising from their ownership, use or operation of the leased property as long as it arises as a result of negligence on the part of the tenant. A landlord may be added as additional insured to UCIPP liability coverage; however, a landlord may not be added as additional named insured.

Subrogation Waivers

Subrogation gives an insurer the right to recover their insurance payouts from negligent parties, in the name of their insured. Waivers of subrogation deny insurers this right. The UCIPP will not agree to waive its rights of subrogation. If pressed to do so, Institutions should contact UCIPP for advice.

Indemnity Provisions

Under an indemnity provision, one party agrees to reimburse another party for certain types of loss. An indemnity can be narrow, only encompassing bodily injury or property damage arising from one party's negligent acts or omission; or it can be broad, encompassing all loss irrespective of how caused. For this reason it is important to review the indemnity provisions carefully to ensure that the desired objectives are met.

The *Financial Administration Act* contains a requirement that all government corporations, which includes public post-secondary institutions, must have indemnities they grant approved by the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance. UCIPP can make recommendations on the approvability of such indemnities and facilitate the approval process on your behalf.

Release

Parties to a contract have certain rights. A release from one party means the party agrees to forfeit a right it may have otherwise had. For example, the landlord may seek to be released from liability for death or injury of any nature whatsoever that may be sustained by the tenant or employees, agents or customers of the tenant arising from any occurrence in, upon, at or relating to the leased premises. Furthermore, the landlord may ask to be released for any damage or damages caused by explosion, fire, theft, breakage, failure of sprinkler, drainage or plumbing systems, or removal of snow, rain or ice, or by steam, gas, water, rain, snow or other substances leaking, and so on. We recommend that you accept this only with the insertion of the words “except to the extent caused or contributed to by the negligence of the landlord or those for whom the landlord is responsible in law or for which the landlord is insured or required to provide insurance pursuant to this agreement”. This ensures the landlord retains responsibility for those risks within its control. ◀

Intra Vires: A Comment on the Barbour Case

The powers and jurisdiction of universities and colleges is an issue of critical importance. A previously posted article “Ultra Vires, Revisited” discussed the impact the B.C. Supreme Court’s (“BCSC”) decision in *Barbour v. The University of British Columbia* (“*Barbour*”) had on the University’s scope of power.ⁱ In *Barbour*, it was held that the University’s ability to enforce parking fines against violators of its parking regulations was “ultra vires”, or not within the University’s power.ⁱⁱ However, the broad implications the BCSC’s decision would have had were limited by subsequent legislative response.

Artificial entities, such as colleges, institutes and universities, do not have the powers of a natural person. Further, if they are statutorily created, their authority is limited to what is permitted in their incorporating legislation. If an artificial entity takes an action which does not fall within the scope of powers given by its incorporating legislation, the action is deemed void because it is outside of their power (“ultra vires”).

The issue in *Barbour* was whether collecting fines and impounding vehicles in violation of its parking regulations was within the powers delegated to the University’s Board of Governors under its incorporating legislation, the *University Act*.ⁱⁱⁱ The BCSC ruled that collecting these fines was outside of the University’s powers and found that those who had fines imposed were entitled to restitution.

However, after the BCSC released its decision in *Barbour*, the Legislature enacted the *Miscellaneous Statutes Amendment Act* (“the Act”)^{iv}, which amended the *University Act*. The amendments set out the powers of the Board of Governors, including express powers to impose and collect penalties from anyone who contravened parking regulations. The amendments were made retroactive so that the University could argue it did not have to comply with the *Barbour* decision.

This led the Plaintiff to appeal *Barbour* to the B.C. Court of Appeal (“BCCA”).

The BCCA found that the *Act* applied to the case and stated that it made “intra vires that which was conceded to be ultra vires at [the BCSC] trial.”^v This meant that the University’s system for imposing fines for breaching parking regulations was within the University’s power. Further, the retroactive provisions of the *Act* made the University’s previous collection of fines lawful.

Barbour raised an issue of significant importance for universities and institutions concerning the regulation of parking and collection of fines. The original BCSC decision would have had broad implications in terms of limiting a university’s ability to enforce regulations and collect fines. Also, the unexpected expense of paying out refunds for previous fines could have negatively impacted university’s financial position, increased fees for students, and limited the overall operating budgets. Although the BCSC decision in *Barbour* pointed to a narrow reading of the powers given to universities by their governing statutes, the B.C. Legislature and the Court of Appeal limited the negative effects of the BCSC decision and provided greater clarity surrounding the powers of institutions. ◀

ⁱ Johnston, B & Munn, L. “Ultra Vires Revisited, Again,” *Campus Counsel*, Clark Wilson LLP, April 2, 2009.

ⁱⁱ *Barbour v. The University of British Columbia*, 2009 BCSC 425, 2009 CarswellBC 793

ⁱⁱⁱ *University Act*, RSBC 1996, c 468

^{iv} *Miscellaneous Statutes Amendment Act*, 2009 S.B.C. 2008 c 22 (“the Act”)

^v *Barbour v. University of British Columbia*, 2010 CarswellBC 282, 2010 BCCA 63 para 26

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.

Our Team of Professionals

Andrew Green – Director (250) 514-9674
andrew.green@gov.bc.ca

Jeff Milne – Senior Risk Management Consultant (250) 514-6809
jeffrey.Milne@gov.bc.ca

Kira Kenny – Senior Risk Management Consultant (250) 952-0851
kira.Kenny@gov.bc.ca

Lori Watson – Intermediate Risk Management Consultant (250) 217-3241
lori.watson@gov.bc.ca

Michael Dahlseide – Risk Management Consultant (250) 952-0784
michael.dahlseide@gov.bc.ca

Margo Piikkila – Senior Claims Examiner (250) 952-0842
margo.piikkila@gov.bc.ca

Kirsten Coupe—Senior Claims Examiner/Legal Counsel (250) 356-5578
kirsten.coupe@gov.bc.ca

Roberta Flett—Senior Claims Examiner (250) 415-3201
roberta.flett@gov.bc.ca

Emily Kemshaw—Assistant Claims Examiner (250) 507-2870
Emily.Kemshaw@gov.bc.ca

In addition to the core Education Team above, UCIPP continues to rely on the expertise of many individuals within the Risk Management Branch including:

Kim Oldham, Director, Claims and Litigation Management
 (250) 952-0837 kim.oldham@gov.bc.ca

Paul Stanley, Chief Security Officer, Government Security Office
 (250) 387-0522 paul.stanley@gov.bc.ca

Risk 101

is published twice a year by the University, College and Institute Protection Program

CONTACT INFORMATION

MAILING ADDRESS:

PO Box 3586
 Victoria BC V8W 9V1

PHONE:

(250) 356-1794

FAX:

(250) 356-6222

CLAIMS FAX:

(250) 356-0661

E-MAIL:

Protection.program@bcucipp.org

We're on the Web!

See us at:

www.bcucipp.org

It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate.