

Liability Waivers and the Limitation of Risk

by Bruno De Vita



Waivers are an important tool for businesses and government organizations to effectively delineate and limit the scope of their risk when entering into contracts with others. An organization that uses a well-drafted waiver is often able to avoid litigation or, if litigation has commenced, apply to have claims dismissed summarily, thus saving the time and expense of defending a claim on its merits.

Generally speaking, courts are concerned with two essential issues when interpreting and applying waivers. The first is whether the waiver is worded with sufficient particularity so as to cover the accident that occurred. Second, the court must be satisfied that the litigant is bound by the terms of the waiver, given the particular circumstances of the case.

The jurisprudence in this area states that a party seeking to rely on a waiver to limit its exposure to liability should ensure that the language of the agreement covers a broad range of eventualities. It is good practice to include in the waiver a general statement of the inherent risks of the activity in question in order to give context to the contract and clarify the nature and extent of the risk that the releaser (the signatory) has agreed to assume.

It is particularly important that the waiver specify in clear language that the releaser is waiving his or her right to make any claim against the

releasee, including a claim for the releasee's own negligence. If the waiver is in any way ambiguous it will be interpreted strictly against the party who drafted it (i.e., the organization seeking to rely on it). Accordingly, waivers should be written in very clear terms using plain language and prefaced by a clearly visible heading that sets out the nature and purpose of the document. Specifically, the waiver should include words that clearly explain its legal import. Many of the waivers upheld by the courts begin with the following language set out boldly at the top of the document:

- Release of Liability, Waiver of Claims, Assumption of Risks and Indemnity Agreement
- By Signing This Document You Will Waive Certain Legal Rights, Including the Right to Sue.
- PLEASE READ CAREFULLY!

Well-drafted waivers require releasers to place their initials next to these words. This serves to refute any argument subsequently raised by signatories that they did not appreciate the importance of what they were signing.

Even if the waiver is drafted in unambiguous terms, the releaser may still not be bound by it. In a leading case on the law of waivers, the court found that, in general, persons are bound by the terms of a waiver that

they have signed except where the releaser can demonstrate that 1) the waiver was signed "in circumstances which made it not his/her act"; 2) the waiver was induced by fraud or misrepresentation; or 3) in the circumstances, a reasonable person would have known that the releaser did not intend to agree to the waiver and that the releasee failed to take reasonable steps to bring the contents of the waiver to the releaser's attention. Most of the waiver jurisprudence focuses on the third exception to the rule.

Releasers must be given a reasonable opportunity to familiarize themselves with the release before signing it. If, given this opportunity, the releaser still chooses not to read the waiver before signing it, the courts will likely find that the waiver is enforceable (assuming the language of the waiver is sufficiently clear). Further, if the party who presented the release can demonstrate that the releaser had a reasonable opportunity to make himself or herself aware of the contents of the waiver, a court will generally not accept the argument that the patron did not read or understand the terms of the waiver. Moreover, even if the releaser chooses not to read the waiver and has no knowledge of its contents, the waiver may still be enforceable if the releasee can satisfy the court that it took all reasonable steps to draw to the attention of the releaser the terms of the waiver. Evidence of reasonable steps include the general practices of the

releasee, preferably supported by manuals and policies, which set out the procedures invariably used when presenting patrons with the waiver form for signature.

The waiver form itself is often scrutinized by the court in assessing whether the import of the document has been adequately brought to the releaser's attention. Effective waivers include appropriate use of larger font, bolded and/or capitalized letters, and coloured highlights in order to draw attention to the legal significance of the waiver and all of its implications to the signatory.

For organizations involved in programs or events that entail a certain level of inherent risk, a waiver program is one way to effectively control exposure to liability. A release may also serve as a statement of the risks inherent in an event or activity, thus helping to "weed out" as participants those who are not prepared to assume the risk. Further, the waiver may serve to reduce a participant's expectation of recovery, which in turn may tend to reduce the incidence of frivolous or unmeritorious claims. While the waiver defence will not always be successful, the use of waivers should be part of every risk management program. ■

Bruno De Vita, QC, is the managing partner of Alexander Holburn Beaudin + Lang in Vancouver, British Columbia. For a sample waiver form, please email the author at bdevita@ahbl.ca.

risk knowledge

A searchable, user-friendly library of practical insights for today's risk manager

RIMS
the risk management society

www.RIMS.org/Knowledge

RIMS Survey Roundup

TOTAL COST OF RISK DECLINES

For the third consecutive year, businesses saw a decline in their total cost of risk, according to the *2017 RIMS Benchmark Survey*. The survey, produced in collaboration with Advisen, analyzed data from more than 20,000 insurance policies.

Last year, the average total cost of risk—defined as the cost of insurance, plus the cost of the losses retained and the administrative costs of the risk management department—fell to \$10.07 per \$1,000 of revenue, a 5% decrease from \$10.55 in 2015. Total cost of risk previously dropped 1% in 2014 and 2% in

the first three quarters of 2016 fell 28% from the same period in 2015 and net investment income dropped 16% in the first half of 2016 compared to the year before.

QUANTIFYING LOSSES TOPS LIST OF BUSINESS INTERRUPTION CHALLENGES

By taking control of their data, establishing a team and developing plausible business interruption figures before losses occur, risk managers can reduce the confusion and frustration common to these claims process, according to *RIMS Business Interruption Survey 2017*.

The survey found that 58% of risk managers who have been

whether the policy covered cyber risk.

“With a world of emerging risks keeping business leaders up at night, risk professionals must prepare their organizations for the very real possibility that their business might suddenly come to a screeching halt,” said RIMS CEO Mary Roth. “The exchange of knowledge and best practices makes it easier for risk professionals to ensure that appropriate measures are taken before, during and after an interruption occurs.”

DISRUPTIVE TECHNOLOGIES PRESENT AN OPPORTUNITY FOR RISK MANAGERS

Risk professionals have an opportunity to close the gap when it comes to understanding and managing rapidly advancing disruptive technology risks, according to a new report published jointly by Marsh and RIMS. In order to do this risk managers will be increasingly required to play a leading role as their organizations address complex challenges and opportunities in this environment.

The 14th annual *Excellence in Risk Management* report found an apparent lack of awareness among risk professionals about existing and emerging technologies, including telematics, sensors, the internet of things (IoT), smart buildings, and robotics, and their associated risks. For example, when presented with 13 common disruptive technologies, 24% of the respondents to the survey said their organizations did not currently use or plan to use any of them.



This is surprising, the report notes, considering other studies have found more than 90% of companies either using or evaluating IoT technology or wearable technologies.

The report also found that despite the impact disruptive technology can have on an organization's business strategy, model, and risk profile, 60% of respondents said they do not conduct risk assessments around disruptive technologies.

This lack of clarity presents an opportunity for risk professionals. “As organizations adapt to innovative technologies, risk professionals have the opportunity to lead the way in developing risk management capabilities and bring insights to bear on business strategy decisions,” said Carol Fox, vice president of strategic initiatives for RIMS and co-author of the report. “As a first step, risk professionals are advised to proactively educate themselves about disruptive technologies, including what is already in use at their organizations, what technologies may be on the horizon, and the respective risks and rewards of using such technology.” ■

SHUTTERSTOCK



2015. The reduction was largely driven by declines across most insurance lines and continued cost-cutting in risk management departments, where investment slid 7% in 2016.

Overall, insurers ended 2016 with average capital and surplus at the highest levels in 10 years, but excess capacity is undermining profitability—net income for the property/casualty market in

through a claim said that “difficulty quantifying loss” was the biggest challenge they faced, while only 17% of risk managers were “extremely confident” that their business interruption values and limits are adequate. In addition, 39% of risk managers indicated that their existing business interruption policy provides either insufficient or no coverage for cyber risk and 10% were unsure

Glen Frederick Inducted into the Risk Management Hall of Fame

Throughout Glen Frederick's nearly 30-year career in risk management, he demonstrated an immeasurable and selfless commitment to giving back to the profession that he loved.

As an integral member of a senior management team within the Government of British Columbia, Glen helped to establish a benchmark for risk management programs among Canadian Provinces. Glen and his team worked with government ministries, agencies and crown corporations to identify and select risk mitigation strategies that met broad government policies while minimizing risk. He was also very involved in analyzing the government's risk financing that included the development of both insured and self-insured programs. In addition to the traditional risk management activities, Glen was responsible for launching an enterprise risk management (ERM) strategy that was implemented throughout the provincial public sector.

Glen's team was also responsible for the successful application of an ERM strategy for the 2010 Olympic Games in Vancouver. This process was critical as the province was ultimately responsible for the success of the Games. He also provided risk management expertise to the Vancouver Organizing Committee and the International Olympic Committee (IOC). The Vancouver Games were the first to utilize an ERM strategy. As a result of the success of this initiative, the IOC now requires all future Olympic Games to implement an ERM strategy with similar methodology.

Glen also contributed to the advancement of risk management education. He was an instructor for the Canadian Risk Management designation courses for more than 20 years at Simon Fraser University and Algonquin College.

His involvement with RIMS spanned 25 years. He served on the boards of the Manitoba, Canadian Capital Region and British Columbia Chapters for almost all of his years as a RIMS member. He was very active with the RIMS Canada Council over a nine-year period, providing strong leadership in his role as chair, as well as other executive positions. Glen was also a member and chair of the RIMS Nominating Committee.

Sadly, Glen passed away in 2013, just two years after winning the RIMS Harry and Dorothy Goodell Award and RIMS Donald M. Stuart Award, the industry's highest-honor and Canada's highest-honor for risk professionals respectively. He is survived by his wife Alice, his sons Steven and Scott and his daughter-in-law Carolyn.

The Risk Management Hall of Fame (RMHF) honors those risk



professionals who have made exceptional contributions to advancing the risk management discipline. RMHF is a joint venture of RIMS and AIG, and was created to preserve the history and tradition of the profession. Founded in 2011, nominees are considered from around the globe and inductees are selected by the RMHF Selection Committee. New members to the Risk Management Hall of Fame are announced yearly at the RIMS Annual Conference & Exhibition. For more information, visit www.RiskHallofFame.org. ■

CONGRATULATIONS

The following Canadians have earned their RIMS-Certified Risk Management Professional designation (RIMS-CRMP). Well done! For more information on the RIMS-CRMP, visit www.RIMS.org/Certification.

- Darius Delon
- Charles McCabe
- Ginette Demers
- Mazlina Navarre
- Valerie Fox
- Nowell Seaman
- Sonia Kundi
- Richard Stewart
- Jan Mattingly



QRIMA CELEBRATES 60TH ANNIVERSARY

Despite a blizzard a day before, the Montreal insurance community came together on March 15 to celebrate the 60th anniversary of the Quebec Risk & Insurance Management Association (QRIMA).

It obviously would have taken more than 40 cm of snow to stop the Quebec members from attending this special evening. Even our honorary president, Montreal Mayor Denis Coderre, who had been on the radio as early as 5:30am, made it to the celebration. Also in attendance were our guests of honor: Mary Roth, CEO of RIMS, Ren Lips, chair of the RIMS Canada Council and risk manager at PCL Constructors, and Steve Pottle, RIMS delegate for Canada, RIMS Board member and director of risk Management at York University.

The event was held at a revitalised church, originally built in 1861 as a place to meet, celebrate and find support, not only commemorated this special anniversary but also 60 years of RIMS' presence in Canada.

Officially founded in 1957 by risk management pioneer and visionary John G. Harper, QRIMA was the first chapter of RIMS to be established outside of the United States and the first, and still only, bilingual one.

QRIMA was therefore doubly proud to celebrate its 60 years, but also to be at the origin of a unifying idea that has helped risk managers from across the country to exchange information and expertise with their peers, thanks to 10 Canadian chapters whose



Past presidents who attended the Gala: From left to right: Michel Pontbriand (2012-2014), Stéphane Cossette (2014-2016), Michel Turcotte (2004-2006), Michel Rodrigue (2002-2004), Ginette Demers (current president), Julie Chapdelaine (2006-2008), Marc Darby (1975-1976), Janice McGraw (1999 to 2000 and 2010 to 2012), Andrée Souaid (1995-1996), Laurian Rioux (1985-1986), Ben Eisenstat (1978-1979), and Ron Neill (1972-1973)

interests have been served by the RIMS Canada Council since 1995.

Surely, in 1957, the first members of the Quebec RIMS Chapter (then known as the Montreal Insurance Buyers Association) did not expect that its volunteers would contribute significantly to the evolution of our profession in Quebec, Canada and now in Europe, as QRIMA is a founding member of Club Francorisk.

In 60 years, the Quebec chapter has had 48 presidents. Two served as RIMS presidents (Dan Sullivan in 1975, then risk manager at Northern Electric and Marc Darby, then risk manager at Bombardier, who was president of RIMS in 1983), four are recipients of the Don Stuart Award (Marc Darby, Ben Eisenstat, Janice McGraw and Michel Turcotte), and an industry award was named

after one of our former president: the Fred H. Bossons Award.

Once Canada's largest RIMS chapter, having grown from five members in 1957, to 58 in 1966, and to 130 in 2017, QRIMA is more active and committed than ever and for the occasion, the chapter donated a portion of the proceeds from the event to Children's Wish to help bring happiness in a child's life. ■

THE MCGANNON FOUNDATION VISITS QUEBEC CITY

The McGannon Foundation, which supports risk management education in Canada, visited Université Laval on March 30 to participate in a joint activity planned by QRIMA and the University. The day included an afternoon "Risk Manager Role Simulation" for the students and Risk/Insurance Quebec City community followed by a conference and cocktail attended by both the Montreal and Quebec City RIMS community. The Foundation also presented scholarship to two Université Laval students: **Aurélie Poisson** and **Ariane Richard**. The future of risk management in Canada is looking bright!



SUBCOMMITTEE UPDATE: National Conference Committee

by Steve Matterson

This year's RCC subcommittee meeting saw a significant change in format and meeting deliverables. For the last four years the National Conference Committee (NCC) has been working to reduce the volunteer effort required to host the RIMS Canada Conference and increase the consistency of the conference experience for delegates and suppliers.

A new approach to conference management was finalized in January 2016. After a few missteps, the NCC developed a change management plan to help chapters understand the changes to the host committees' roles when hosting a conference. This plan is now being implemented. The first significant step of the plan was to have the conference host city also host the subcommittee meetings 18 months ahead of their conference. As a result, we headed to St. John's for the 2017 meeting. The second step was to change the subcommittee meeting format by reducing the NCC committee meeting to one long day and inviting the host conference and program committee members to a full day session on day two.

On Feb 25, 13 Newfoundland Labrador volunteers made their way through and around three-foot snow banks to join the NCC. The day was divided into three parts:



From top left to bottom right: Cyndi Ruff, Stuart Ruff-Lyon (RIMS), Bill Baker, Valerie Barber, Blanca Ferreris (RIMS), Len Cheryk, Steve Matterson (NCC Chair) and Sue Mephram.

1. A review of the conference purpose, high-level roles and responsibilities of the event planner (RIMS), the NCC, and the Host Conference Committee (HCC).
2. Presentations by RIMS on the services that they will be providing to stage the conference and who the key contacts are for each service.
3. Breakout sessions for the Program committee and the Administration committee members. Bill Baker and Cyndi Ruff led the

2018 Program committee through what they have in store for the next 18 months at a detailed level, while Len Cheryk, Sue Mephram and RIMS walked the rest of the volunteers through the details of what will be expected of them for the next 18 months.

The third step of the change management plan began May 2 with a two-hour meeting between the NCC and the NARIMS board to provide a high-level review of the new approach. A similar

meeting were scheduled with the Canadian Capital Chapter and the Saskatchewan Chapter.

This conference process change, started by April Savchuk what seems like many years ago, has now, thanks to the efforts of many, navigated the challenges of change in a volunteer organization. Thanks to all who have contributed their thoughts, time and efforts towards making this substantial improvement a reality. ■

Steve Matterson is the director of risk and insurance at British Columbia Ferry Services Inc. and the chair of the National Conference Committee.

A Message from RCC Chair Ren Lips

It is an honour to serve as this year's RIMS Canada Council chair. I have been involved with RIMS since 2005 when I joined the Southern Alberta chapter as its webmaster and I haven't looked back. The RIMS risk management community is a fantastic place to network, have risk topic discussions through the Opis forum, and learn leadership skills through different volunteer positions. The personal and professional growth from volunteering is priceless and the RIMS organization is greater because of its volunteers. I recommend getting involved at the chapter, national or international level of the organization and make a difference to RIMS, your organization, and yourself.

We started the year with the RCC Winter Planning Meeting in Toronto. We worked in roundtable groups on strategies for the RCC, our subcommittees, and our chapters and the meetings were very productive. The local Ontario chapter joined us for a portion of Day 1 to give us an overview of the RIMS Canada Conference that will be in Toronto September 24-27. Registration is open, so come join us for education and networking.

The Winter Planning Meeting was followed by subcommittee meetings in St. John's. The Host Chapter Committee joined us for a day of information sharing on conference planning and I have it on good authority that a few people were "screeched in" as honorary Newfoundlanders. The subcommittees worked very hard and I'm looking forward to seeing the results at the end of the year.

One of our Canadian RIMS chapters celebrates its 60th anniversary this year. The Québec chapter is the oldest Canadian chapter and the first international chapter of RIMS. The board organized a gala at a church in Montréal in March and the venue was breathtaking. Mayor Denis Coderre was the guest of

honour and other notable guests included past chapter presidents, RIMS CEO Mary Roth and RIMS Board of Directors member Steve Pottle. The gala was held the day after a significant snowfall that closed a provincial highway and during dinner the mayor enlightened us with his account of the events, amidst jokes about the Toronto Maple Leafs, of course. Stories like his confirm that risk is everywhere and needs to be managed. The next chapter to celebrate a milestone anniversary is the Saskatchewan chapter with 35 years. Congratulations to both chapters on their achievements.

As risk managers, we influence the people around us and the more we know and learn, the better our companies become. One of those places where risk managers go to learn and network is the annual RIMS conference, which returned to Philadelphia this year. Philadelphia has been at the forefront of many insurance advancements such as the establishment of the first mutual fire company in 1752, the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire. A few years later, in 1759, Benjamin Franklin set up



the first life insurance company, the Presbyterian Ministers' Fund, in Philadelphia. This year, it was also the site of the annual Spencer-RIMS Risk Management Challenge and for the first time a team of Canadian students made it to the Final Eight. BCIT students Makayla Robertson, Arshi Bassi, Nicole Howard and Van Dang had an experience of a lifetime. Although two of the four will be graduating, the remaining students have vowed to come back stronger next year. Great job and good luck in 2018. The future of risk management is in great hands and to help support our students, the RCC made a donation to the McGannon Foundation at Canada Night during the conference.

To close, I will use the motto of current RIMS President Nowell Seaman from the Saskatchewan chapter—Forward Together. It is important to remember that together we are stronger than we are alone and the Community theme for the RIMS Canada Conference reinforces this idea. With that, I look forward to seeing you all in Toronto in September!

Rieneke (Ren) Lips,
CPA, CMA, CIP

EDITORIAL POLICY

The RIMS Canada Newsletter is a publication of the RIMS Canada Council and is published periodically throughout the calendar year. The opinions expressed are those of the writers and volunteer members of the RIMS Canada Newsletter Editorial Committee. Articles submitted to the RIMS Canada Newsletter for publication are subject to the approval of the RIMS Canada Newsletter Editorial Committee. Approval of such articles is based on newsworthiness and perceived benefit to the readership. All decisions of the RIMS Canada Newsletter Editorial Committee are final and not subject to appeal. Individuals submitting articles to the RIMS Canada Newsletter hereby acknowledge their acceptance of the RIMS Canada Newsletter Editorial Policy.

Editorial Committee

Aaron S. Lukoni
British Columbia Government
Tel: (250) 356-8915

Seamus Gearin

RIMS Canada Consultants
(Becker Associates)
Tel: (416) 538-1650

Thank you to all of our newsletter contributors! If you are interested in writing an article for the RIMS Canada Newsletter, please submit the article to a member of the Editorial Committee for review. Any questions about the production or distribution of this newsletter should be directed to the Editorial Committee.

The RIMS Canada Newsletter is produced on behalf of the RCC by RIMS.

LIKE, FOLLOW & SUBSCRIBE!

The RIMS Canada Council is here to serve our Canadian RIMS chapters and members, and we invite you to reach out to us as we are here to assist you.

Visit the RIMS Canada website at rimscanada.ca or simply scan the QR code below on your smartphone for access to RIMS Canada risk management resources, including conference and education information.



Did you know that the RIMS Canada Newsletter is available on-line? Now you can read your favourite newsletter on the go at: rimscanada.ca/newsletter

As the world evolves and technology plays a more pivotal role in our daily lives, it is important to keep informed about topics relating to risk management and the insurance industry. Use #RIMSCANADA and stay connected by following us on social media:

www.linkedin.com/groups/4701774

@RIMSCANADA

www.facebook.com/RIMSCANADA

www.instagram.com/RIMSCANADA