



Facility Use Agreements: Why, When, and How?

A Presentation for ABmunis

Dawson Horning
David Girard
Caitlin Merritt
July 18, 2023

Canada's Specialty Insurance Law Firm

VANCOUVER | KELOWNA | CALGARY | GUELPH | TORONTO

[dolden.com](https://www.dolden.com)

Dolden

Introduction



Dawson Horning



Caitlin Merritt



David Girard

Topics to Cover

- Facility Use Agreements
 - Contract Fundamentals
 - Waiver
 - Indemnity
 - Insurance/Additional Insured

Facility Use Agreements

- Agreement whereby user agrees to terms and conditions for use of a facility
- Facilities
 - Arenas
 - Parks
 - Rec Centres
 - Courts
 - Picnic Areas
 - Gyms
 - ETC.

Facility Use Agreements

- Contract Fundamentals:
 - Parties, event, activity, date, time, location, main contact, attendees
 - Meeting of the minds & consideration
- Confirm that an inspection of the facility has taken place and is acceptable

Facility Use Agreements

- Waiver of all claims against the owner
- Indemnity provision in favor of the facility owner
- Insurance provision that requires that owner be listed as an additional insured.

Sources of liability

- Contract
- Common law – Negligence
- *Occupiers' Liability Act*
 - *Hindley v Rocky View Schools*, 2023 ABKB 95

Facility Use Agreements

- One-off events?
- Community events?
- Reality and practicality

Waivers

- Effective risk management tool
- Courts increasingly willing to enforce waivers
- Complete defence

Waivers

The waiver must:

- 1) Identify the parties protected
- 2) Include a detailed description of the risks associated with the activity
- 3) Say “negligence”
- 4) Highlight that by signing you are waiving your right to sue
- 5) If standalone, ideal if on one piece of paper
- 6) Must be witnessed

Waivers - Presentation and Execution

- 1) Identify the document as a waiver
- 2) Allow time to review and consider the waiver
- 3) Present the waiver before activity is paid for
- 4) Optional participation
- 5) Do not include waiver with other documents (i.e. Team roster)
- 6) Clearly identify risks (i.e. river rafting = drowning);

Waivers - Typical Legal Challenges

- “I did not actually read the waiver, and would not have signed it if I knew I was giving up my right to sue.”
- *Tyax* - Insufficient for plaintiff to say they did not read the waiver

Waiver - Typical Legal Challenges

- *Apps v. Grouse Mountain* (2020) BCCA
 - Snowboarding accident
 - “ticket” case – no signature
 - Insufficient notice of waiver

Recent Case Law - Positive Trends

Quilchini v. Wilson's Greenhouse (2017) SQB

- Plaintiff injured during a go-kart race when he crashed into a concrete barrier
- Electronic waiver enforced
- Claim dismissed

Recent Case Law - Positive Trends

Arksey v. Sky Zone Toronto 2021 ONSC 4594

- Trampoline dodgeball game
- Pl. didn't read waiver, but approved through electronic terminal
- Case dismissed

On the other hand...

Zaky v. 2285771 Ontario Inc. 2020 ONSC 4380

- Injury at indoor trampoline park
- Electronic waiver defence unsuccessful
- Insufficient evidence that terms of waiver properly brought to Pl. attention

Indemnity Clauses

- A contractual indemnity is an agreement by which one party promises to protect another against future loss.
- This is expressed using wording such as “*hold and save harmless from loss*” or “*keep harmless from loss*” .
- In short, indemnity causes liability to flow *through* to another party.

Scope of Indemnity

When indemnity agreements become the subject of litigation, it is often the scope of the indemnity that is at issue.

A question commonly asked is whether the agreement extends to liability arising from the negligence of the indemnified party themselves.

Griffiths v. New Westminster (City), 2001 BCSC

Player injured during recreational hockey game at a City-owned ice rink.

City sought indemnity under facility use agreement that had been signed by a player when booking the ice time.

Griffiths v. New Westminster (City), 2001 BCSC

Wording of the indemnification stated that it was operative in relation to:

“any and all claims, demands, actions, suits, and costs arising out of any act or omission of the Licensee or any servant, agent or employee of the Licensee or arising of or resulting from the use of the said Facility by the Licensee”

Griffiths v. New Westminster (City), 2001 BCSC
1482

Court: indemnity not enforceable.

Indemnity extended to acts or omission of that player only, not his organization or the other players.

Indemnity clause too onerous to be enforceable under any other interpretation.

Griffiths v. New Westminster (City), 2001 BCSC

Court:

“There is a heavy burden on a party claiming indemnity to establish that the words of the clause actually impose the obligation alleged by the drafter of the indemnity”

Neely v. MacDonald
2014 ONCA 874

Player injured by a runaway golf cart down a steep hill during golf tournament. He sued the tournament and the course owner.

Course owner sought indemnification from tournament host under indemnity clause: “*Claims of any nature that may arise from or through the use of a golf cart.*”

Neely v. MacDonald
(2014) 37 DLR (4th) (Ont. C.A.)

Steep hill had been the subject of prior complaints.

Court: to shift the risks of owner's own negligence onto the tournament's host, the contract between them had to say so in the clearest of terms.

Wording too ambiguous to provide the golf course owner with indemnity for own negligence.

Parental indemnities

Wong v. Lok's Martial Arts Centre Inc., 2009
BCSC 1385

- Minor injured during martial arts sparring match
- Studio attempted to rely on waiver/indemnity signed by mother
- Unsuccessful – Studio's application dismissed

Parental Indemnities

- **But**, see Dewitt (Litigation guardian of) v. Strang, 2016 NBQB 28
- 15 year old rendered quadriplegic following accident during motocross event
- Father had signed clear waiver; defendants relied on waiver in defence.
- Plaintiff brought application to strike waiver defence, required to show defence was “frivolous” or vexatious”. Court said waiver defence not vexatious or frivolous. (2016 NBCA 63)

Parental Indemnities

- **Probably not** enforceable, but this matter has not been conclusively decided outside of BC where there is a clear statutory prohibition on contracts such as waivers being enforceable against minors.
- This statutory prohibition does not exist in Alberta, so its possible a court could rule otherwise.

Additional Insureds

- Insurance coverages: Named Insured / Additional Insured
- Not responsible for premiums
- Less extensive coverage
- Usually: risk arises from operations of Named Insured
- Various flavours: named list or endorsement

Insurance Requirements – Additional Insureds

- Obligation by one party to obtain insurance for another party.
- The purpose for such clauses is to “shift” the risk of legal actions to an insurer.
- Expectation of the party named as an “additional insured” is that if they are sued, the insurer for the party who added them will assume their defence under the policy.

Williams (Litigation guardian of) *v. B.C. Conference of the Mennonite Brethren* *Churches, 2010 BCSC*

- During a rock concert, the floor of a church collapsed, causing people to fall into the basement.
- The promoter of the rock bands that were playing had liability insurance.
- Church sought coverage under the promoter's policy as additional insured.
 - Named as an additional Insured in Certificate of Insurance
- Result: church entitled to coverage under the promoter's policy.

“Arising out of”

Vernon Vipers Hockey Club v. Canadian Recreation Excellence Corporation 2012 BCCA 291

- Pl slipped and fell outside hockey rink
- Municipality and CREAVC added to hockey club's policy “...but only in respect of liability arising out of the Named Insured's [hockey club's] operations”

*Vernon Vipers Hockey Club v.
Canadian Recreation Excellence
Corporation 2012 BCCA 291*

- Pl. claimed insufficient lighting, warnings, safe walking routes caused his injury
- Owner sought indemnity from hockey club
- Did the liability for unsafe premises arise out of the hockey club operations?

Vernon Vipers Hockey Club v. Canadian Recreation Excellence Corporation 2012 BCCA 291

- Answer: No. Insufficient connection between injury and hockey club operations
- Examples of causal links:
 - Lacrosse ball strikes patron
 - *Williams*
 - Injury while running bases at baseball tournament

Additional Insureds And Conflicts of Interest

- How do conflicts arise?
- What happens if a conflict arises between the insurer and additional insured?
- *Lefeuvre v. Boekee*, 2017 ONSC 6874

Primary Insurer and Additional Insured Status

- What happens if municipal policy and additional policy respond?
- *Markham (City) v. AIG Insurance Company of Canada*, 2020 ONCA 239

Summary:

Checklist for Waivers & Facility Use Agreements

- Identify document as a waiver/user agreement
- Use clear and concise language
- Identify the parties protected
- Identify the activities and locations covered
- Include a clear description of the risks associated with the activity

Summary:

Checklist for Waivers & Facility Use Agreements

- Make sure the waiver includes reference to the word “negligence”
- Highlight that by signing, participant is waiving their right to sue
- For waivers, try to fit on a single piece of paper
- Present the agreement before the activity is paid for or commenced

Summary:

Checklist for Waivers & Facility Use Agreements

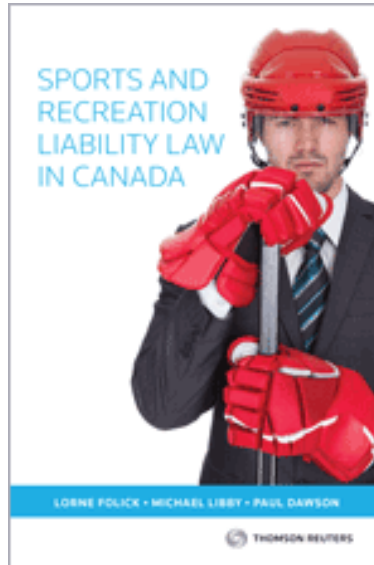
- Ensure it is clear that participation is optional (ie. it is okay to back out)
- Waivers are not legally binding on a minor, but still have them execute one (or their parents)
- Post agreement on website for advanced public viewing if possible
- Ensure agreements are saved and stored

Summary:

Checklist for Waivers & Facility Use Agreements

- Have main contact inspect facility to ensure it is acceptable for users
- Facility use agreements to include:
 - Name of parties
 - Date & time of event
 - Name of event
 - Nature of activities taking place at event
 - Location
 - Main contact
 - Descriptions of attendees

Shameless Plug...



<http://www.carswell.com/product-detail/sports-and-recreation-liability-law-in-canada/>

Canada's Specialty Insurance Law Firm

VANCOUVER | KELOWNA | CALGARY | GUELPH | TORONTO

dolden.com

Dolden

QUESTIONS?

Canada's Specialty Insurance Law Firm

VANCOUVER | KELOWNA | CALGARY | GUELPH | TORONTO

dolden.com

Dolden

DOLDEN WALLACE FOLICK LLP
Insurance Lawyers

Canada's Specialty Insurance Law Firm

VANCOUVER | KELOWNA | CALGARY | GUELPH | TORONTO

dolden.com

Dolden 42