

AT RISK

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A Risk Management Newsletter for the British Columbia Provincial Government, its Ministries and Organizations

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Executive Director's Message

I'm pleased to present this issue of *At Risk*.

In it you will find a variety of articles and information, reflecting the wide scope of topics and influence that risk management and government security touches in our daily work.

As this edition goes to press, there is a lot of talk in the news and lots of preparation in government, about the coming flu season and the H1N1 virus. In addition to the pandemic response, ministries and other public sector entities have been busy reviewing and updating business continuity plans.

The risk management process, and particularly a risk register, is an ideal tool to

identify and prioritize, on an organized basis, the critical risks facing organizations in delivering essential government services during a pandemic.

The roll up of risk information on an enterprise-wide basis aids in identifying gaps, overlaps, interdependencies and interrelationships. Additionally, progress on risk mitigation strategies can be tracked and reported on an ongoing basis.

Staff at Risk Management Branch are always available to provide assistance on any aspect of risk management and we welcome your enquiries. <

Phil Grewar, Executive Director

Information Systems Risk Assessments

Some types of risk assessments are so specialized that Risk Management Branch is not the expert! For example, Threat and Risk Assessments that are specific to information systems—essential, but not our area of expertise.

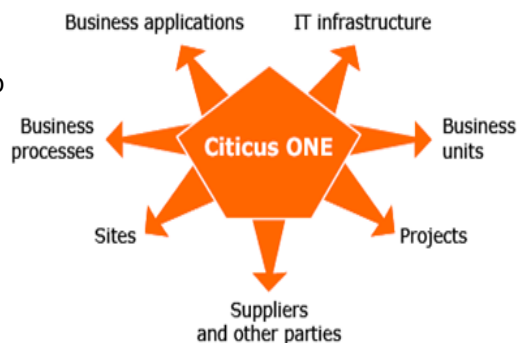
The Information Security Branch of the Ministry of Citizen's Services has rolled out a new application called Citicus to help with these types of risk assessments.

This web-based system is designed to help evaluate the adequacy of government's information, programs, systems, and services security through assessing criticality, risk and compliance.

Citicus should be used to assess any information system, service or application

within government or connecting to government.

If you have any questions about Citicus or require access to the application, please contact the Information Security Branch <http://gwww.cio.gov.bc.ca/about/InformationSecurity.htm> or your Ministry Information Security Officer. <



Effective Risk Identification—introducing a new approach

Baseball great Walter Johnson was quoted as saying, “You can’t hit what you can’t see”. The power-pitcher may have been talking baseball, but the phrase could just as easily be applied to effective risk management. You can’t mitigate a risk unless it’s clearly and accurately identified. Risk Management Branch has recently modified its approach to risk identification to make it easier, more effective, and to help lead more naturally to the formulation of prevention, mitigation and recovery strategies.

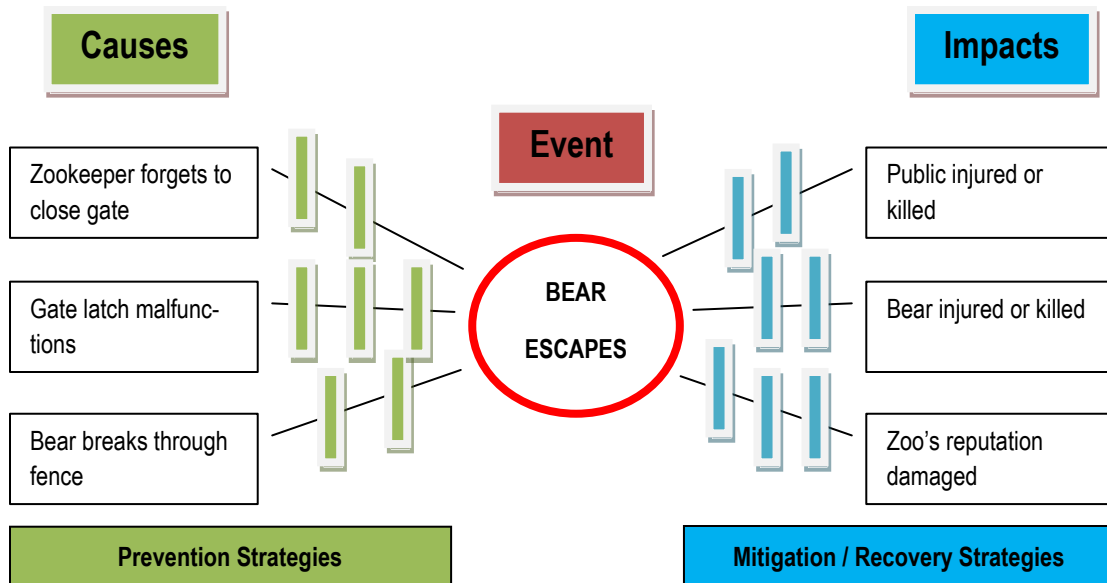
Many of you will remember learning about the old fire triangle approach to fire prevention. We learned that to enable fire, we needed three elements: fuel, oxygen, and a source of ignition. By taking any one of those things away, a fire can be prevented or extinguished. If we consider risks the same way, we can break them down into three elements: causes, the event, and impacts.

By removing one of the elements, you can remove the risk. Short of ceasing the activity that might expose you to a risk event (not often an option in government), you seldom can eliminate this element, but by thoughtful identification of the causes and impacts, you can more easily prevent the event from occurring, mitigate the negative effects if it does occur, and speed recovery once the immediate impacts are past. Since a risk is defined as “the chance of something happening that will have an impact on objectives”, it is often helpful to

directly tie your organization’s objectives to the risk identification. If we define the event as being the failure to achieve one of your objectives, the causes and impacts become easier to identify.

As an example, let’s say we manage a zoo, and one of our objectives is to keep the grizzly bear safely contained. The risk event is the failure to meet that objective: the bear escapes. Using a bowtie diagram to organize our thoughts, the event goes in the middle. Next, list on the left the causes that might lead to the event occurring. Finally list on the right the potential impacts of such an event. By structuring our risk identification this way, we’re now poised to formulate effective strategies to either address the causes to reduce the chance of the event occurring, or to mitigate the effects and speed recovery. Once the causes, event and impacts are clear, these can be inserted into our risk register to facilitate further analysis and mitigation planning.

Risk Management Branch has adopted a new risk register template that takes advantage of this modified approach to risk identification. Contact us for more information, or check out our intranet site at <http://gww.fin.gov.bc.ca/pt/rmb/erm/ermTools.stm>.





Ask Risk

What is a Limitation of Liability, and what effect does it have?

A limitation of liability (LoL) is a contractual risk management technique, or risk financing technique, where a maximum financial responsibility is set out in the contract. This maximum amount might be a different amount (more or less) than what common law would impose in the absence of such contract terms.

A limitation of liability in favour of the contractor effectively “caps” the overall amount the contractor will have to pay for losses for which the contractor is responsible under the contract. A risk assessment covering the services provided, the types of things that could go wrong, and the value of the loss or damage that could occur will help determine whether a particular limitation of liability is reasonable in its context.

An LoL often appears along with an indemnity clause, where the contractor agrees to be liable for payment to the Province for losses or damage the Province may suffer as a result of acts or omissions on the part of the contractor, but only up to the maximum specified in the contract. Sometimes only a word or two are added to an indemnity that limit the contractor’s liability to almost nothing, and sometimes there are pages of clauses describing how and by how much their liability is limited.

Common requests for limitations of liability we see are amounts that are equivalent to the amount of insurance carried by the contractor (often in professional services contracts like engineers and auditors). Contract value, or fees payable, is another common limitation—in some instances this might be acceptable (a multi-million dollar contract for example).

If the value of the LoL is more than the total estimated value of loss or damage, it’s probably a reasonable limitation of liability. If the value of the LoL is less than the total estimated value of losses or damage, risk has been shifted back, or retained by the Province since there would be no other means to recover from the contractor under the contract. Can your program area afford to absorb such a loss? Remember the Province self-insures and there is no pot of money to fund your loss. Is it still worth this risk, with all other factors considered?

It’s important to have these limitation of liability provisions reviewed in advance of executing the agreement, during contract negotiations. Risk Management Branch is happy to help do that as part of a comprehensive risk management review. We may have precedents on hand or be able to help you reach a compromise more favourable to the Province.

The Province does not generally encourage the practice of limiting contractor liability. Generally the Province rejects any limitation of liability related to: bodily injury, damage to real property or tangible personal property, infringement of third-party intellectual property rights, breach of confidentiality or privacy, gross negligence, and certain other limitations.

By contrast, some limitations of liability are imposed by statute, or are pre-agreed, negotiated arrangements with certain industry sectors. For example, each of the *Marine Liability Act* & Regulations and *Canada Transportation Act* & Regulations impose maximum amounts a party may claim for damages in the event of loss. There are standard limitations of liability in construction documents: Canadian Construction Document Committee – CCDC2 (2008) <http://www.fin.gov.bc.ca/pt/rmb/ref/cp/Ministry%20-%20Owner%20Insured%20Projects.pdf>. The Province’s Information Technology Services, Management Consulting, and Financial Assurance sectors have negotiated a limitation of liability in exchange for always having professional liability insurance—see General Services Agreement, Schedules D & F http://www.pss.gov.bc.ca/psb/gsa/gsa_index.html.

For more on limitations of liability, contact Risk Management Branch. <

I should probably get everybody to sign a waiver!

My staff asked to use the boardroom for exercise space outside work hours. I support ActNow and fitness generally, so I gave them permission. I thought they'd be doing aerobics or dancer-size or that sort of thing. I have since found out that a volunteer has been coming in twice a week to lead Yoga classes so now I'm worried.

What is my liability if there is an injury to my staff? What if this volunteer gets hurt on our premises? I should probably get everybody to sign a waiver! Can you send me a really good one I can use?

This is a fictitious example of a common question that comes to us with many variations: from a DM-sponsored inter-ministry street hockey tournament, volunteer-led boot camp, contractor-led yoga, Weight Watchers meetings, ministry-paid entry fees for major public charity runs — the list goes on and on. The risk management advice is basically the same regardless of the activity.

If the employer has sanctioned, endorsed, granted permission for, encouraged or approved the activity, and it involves employees only, don't worry about it! Recall that all ministry employees are indemnified by the province under their respective terms and conditions of employment or collective

agreement. Government corporations generally have a resolution of their board of directors that indemnifies their employees. So if government employees are leading each other in group activities, unless they are doing something illegal, they are covered.

If there is a contracted instructor: seek employer permission to use employer's space for non-work related activity. Check for qualifications and general liability insurance, and enter into a contract with the instructor. Get proof of the insurance. If the contracted instructor, as part of their own risk management practices, wants participants to sign waivers that's up to them—it's not a requirement of government and it's up to individual participants whether they are comfortable doing this.

If there is a volunteer instructor: same recommendation as for the contracted instructor. Also note that this type of volunteer is NOT considered eligible for the purposes of the volunteer liability and accidental death and dismemberment insurance programs run by the province. They should have their own coverage.

In all of these cases, there is no need for you to require anybody to sign a waiver. <



High Hazard Construction Risk

Just because a construction project is considered "small" (for example, those under \$1,000,000) it does not necessarily mean the project is low risk. Potential "high hazards" or "unusual exposures" such as injury to visitors, damage to an existing facility or surrounding third party property damage have no relation to the value of any project.

The following sample questions can assist project managers in determining if higher than normal hazards or exposures exist:

- Are there any dangerous operations that increase the likelihood of loss (e.g. hot roof applications, blasting, underpinning, tunnelling, demolition or crane operations)?
- Would the impact be more severe should an accident occur (e.g. close proximity to existing structures, near a sensitive/

protected ecological site, or on culturally significant properties)?

- Is the value of third party property surrounding the project high (e.g. urban environment with adjacent structures)?
- Is the project in or a near a populated area, increasing the likelihood of injury (e.g. near high vehicle or pedestrian traffic)?

In short, high-hazards or unusual exposures are construction-related terms that cannot be easily defined. For this reason, it is best to contact Risk Management Branch when a construction project seems to present higher than normal levels of risk. A Risk Management Consultant can assist in assessing the risks, and exploring risk mitigation treatment options including additional insurance if required. <

Indemnities in Disguise: catch them before they catch you

An indemnity is a promise to make whole, or take financial responsibility for losses incurred by another party. An indemnity might be worded so that the indemnity is limited to certain types of losses or causes of loss or a maximum amount (see ASK RISK in this edition for more on Limitations of Liability). You can't use an indemnity to transfer legal liability (as determined by the courts), but you can agree that another party will be responsible to pay losses caused by your legal liability.

Indemnities must be reasonable; that is, they usually include things that would be covered by common law, fortuitous events that haven't happened yet, and things that are within the control of the entity granting them.

A government indemnity must first be approved in accordance with the *Financial Administration Act*, (by either the Minister of Finance, or the Executive Director of Risk Management Branch) and once it has been properly approved it becomes a statutory payment from the Insurance and Risk Management Account. In an environment of balanced budget legislation and budget cuts, this is an important consideration for program areas that might be unable to absorb substantial losses if they fail to get indemnities approved. Identifying all indemnities and putting them forward for approval is prudent risk management.

Many indemnities use typical language and phrases, such as "indemnify and hold harmless", which make them easy to recognize. A sample indemnity clause might look like this:

The Province will indemnify and save harmless the Contractor from any losses, claims, damages, actions, causes of action, costs and expenses that the Contractor may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, where the same or any of them are based upon, arise out of or occur by reason of any claim of infringement of third-party intellectual property rights related to any Materials provided to

the Contractor by the Province in connection with this Agreement .

However, sometimes the language is not so obvious, making the existence of an indemnity harder to identify. An indemnity need not explicitly include the words "indemnify and hold harmless" to be an indemnity obligation. Some agreements do not consolidate all indemnity obligations in one or two paragraphs. For these reasons (among others!) it's important to read an entire contract very carefully.

An indemnity obligation may be present if the language appears to indicate the government may have to pay to make an entity whole after loss or damage has occurred. Indemnities may be masquerading in wording such as:

- "accept responsibility for costs"
- "reimburse"
- "defend and pay"
- "obligation to repair or repay for repairs"
- "pay for damage"
- "pay all financial obligations, loss or claims"
- "assume liability"
- "compensate for losses or damages"



A disguised indemnity might look something like this:

The Province agrees to *reimburse* the Lender for the replacement cost for the items borrowed and damaged. The Province further agrees that if it breaches any guidelines or rules and this should result either directly or indirectly in any costs and/or liabilities for the Lender that the Province shall be *liable for such costs*.

If you're not sure, submit the entire agreement to Risk Management Branch for review. We may recommend a legal opinion to verify if the language constitutes an indemnity and whether approval under the *Financial Administration Act* is required. ↩



Ongoing Risk Management Education

- ❖ **British Columbia Risk & Insurance Management Association (BCRIMA)**
BCRIMA provides education primarily through monthly luncheon speakers and a spring Professional Development Day session. Educational opportunities are posted on the BCRIMA website as they become available:
<http://britishcolumbia.rims.org/RIMS/BritishColumbiaChapter/Home/>
- ❖ **Canadian Risk Management (CRM) Program**
The three CRM courses offered by Simon Fraser University are offered in January and September. Evening courses are scheduled at the downtown Vancouver campus, and in Victoria at Risk Management Branch.

For more info: <http://www.sfu.ca/cstudies/mpprog/rims.htm>

Management and Professional Programs, Continuing Studies
Simon Fraser University Vancouver 515 West Hastings Street Vancouver, BC
Tel: 778-782-5095 Fax: 604.291.5098 Email: mpp-info@sfu.ca

Conferences to Note

- ❖ **RIMS 2010 Annual Conference & Exhibition** April 25-29, Boston
<http://www.rims.org/annualconference/RIMS2010/Pages/Default.aspx>
- ❖ **2010 RIMS Canada Conference** September 26-29, Edmonton
http://conference.rimsCanada.ca/RIMS/RIMS_Canada_Conference/Edmonton2010/Default.aspx

About Our Organization ...



Who's the boss? Executive Director, Phil Grewar.

Phil Grewar established the Risk Management Branch and Government Security Office in 1985. He is also responsible for the province's self insurance and risk management initiatives including extensive programs for the public education and health care sectors. In 1998 Phil was honoured by being named "Risk Manager of the Year" by Chicago based **Business Insurance** magazine, the first public sector recipient and the second Canadian to receive this award in its 21 year history. He was more recently awarded the Queen's Golden Jubilee Medal in recognition of his contribution to the province.

To learn more about Risk Management Branch and Government Security Office visit our internet site: <http://www.fin.gov.bc.ca/PT/rmb/index.shtml> or give us a call.

Government staff may access our Intranet: <http://gww.fin.gov.bc.ca/PT/rmb/index.stm>

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.

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MAILING ADDRESS:
PO Box 3586
Victoria BC V8W 1N5

PHONE:
(250) 356-1794

FAX:
(250) 356-6222

CLAIMS FAX:
(250) 356-0661

E-MAIL:
RMB@gov.bc.ca

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<http://www.fin.gov.bc.ca/PT/rmb/AtRisk.shtml>

Comments, questions, further information about the contents of this newsletter, or questions for possible inclusion in our ASK RISK column can be directed to "At Risk Editor" at RMB@gov.bc.ca or faxed to (250) 356-6222.