



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Indemnity Clauses: Worth The Paper They're Printed On?

David M. Pick



BROWNLEE LLP
Barristers & Solicitors



- A contractual provision obligating an indemnitor to answer for any specified or unspecified liability or harm that an indemnitee might incur.
- “**Indemnitor**” is the person or company that gives indemnity. **Indemnitee**” is the person or company that receives indemnity.
- This presentation will provide a general overview of their structure, the obligations they impose and how those obligations are enforced.



- Indemnity clauses can be broken into three parts:
 - The preamble
 - The damages condition
 - The condition precedent



- Begins an indemnity clause and sets out the indemnitor's obligations:
 - **The Contractor shall indemnify, defend and hold the Owner harmless** from and against any loss, claim, liability, damage or expense that the Owner may suffer, sustain or become subject to as a result of any negligent act or omission by the Contractor or the intentional misconduct of the Contractor during the performance of its obligations under this Contract.

- Follows the preamble.
- Typically begin with “from and against” or “from any and all”
- States which losses the indemnitor is obligated to indemnify, defend and save the indemnitee harmless against:
 - The Contractor shall indemnify, defend and hold the Owner harmless **from and against any loss, claim, liability, damage or expense that the Owner may suffer, sustain or become subject to** as a result of any negligent act or omission by the Contractor or the intentional misconduct of the Contractor during the performance of its obligations under this Contract.

- Concludes an indemnity clause.
- Typically begin with “as a result of” or “resulting from”.
- States when the indemnitor’s obligation to indemnify, defend and save the indemnitee harmless arises:
 - **The Contractor shall indemnify, defend and hold the Owner harmless from and against any loss, claim, liability, damage or expense that the Owner may suffer, sustain or become subject to as a result of any negligent act or omission by the Contractor or the intentional misconduct of the Contractor during the performance of its obligations under this Contract.**

- Bare Indemnity
- Reverse/Reflexive Indemnity
- Proportionate/Limited Indemnity
- Third Party Indemnity
- Party/Party or Mutual Indemnity

- Most common.
- Example:
 - The Contractor shall indemnify, defend and hold the Owner harmless from and against any loss, claim, liability, damage or expense that the Owner may suffer, sustain or become subject to as a result of any negligent act or omission by the Contractor or the intentional misconduct of the Contractor during the performance of its obligations under this Contract.

- States that the indemnitor will indemnify, defend and hold the indemnitee harmless against losses arising out of the indemnitee's own negligence or intentional misconduct.
- Example:
 - The Tenant shall indemnify, defend and hold the Landlord harmless from and against any loss, claim, liability, damage or expense that the Landlord may suffer, sustain or become subject to as a result of any negligent act or omission by the Landlord or the intentional misconduct of the Landlord during the term of the Tenancy.

- States that the indemnitor will indemnify the indemnitee unless the loss arises out of the indemnitee's own negligence.
- Example:
 - The Contractor shall indemnify, defend and hold the Subcontractor harmless from and against any loss, claim, liability, damage or expense that the Subcontractor may suffer, sustain or become subject to during the performance of its obligations under this Contract unless such loss, claim, liability, damage or expense results from or allegedly results from any negligent act or omission by the Subcontractor or the intentional misconduct of the Subcontractor.

- States that the indemnitor will indemnify losses arising out of the indemnitee's own negligence.
- Example:
 - The Contractor shall indemnify, defend and hold the Owner harmless from and against any loss, claim, liability, damage or expense resulting from claims, actions, suits or proceedings brought against either of them by third parties as a result of or alleged to result from the Contractor's performance of its obligations under this Contract.

PLUS Party/Party or Mutual Indemnity

- States that the parties will indemnify each other against losses arising out of one another's negligence.
- Example:
 - Each party shall indemnify, defend and hold the other party harmless from and against any loss, claim, liability, damage or expense that the indemnified party may suffer, sustain or become subject to as a result of any negligent act or omission by or the intentional misconduct of the indemnifying party during the performance of their obligations under this Contract.

- Is an obligation “to **repay** for what has been lost or damaged” (*Lafrentz v M & L Leasing Ltd Partnership*, 2000 ABQB 714).
- An indemnitor is not obligated to repay an indemnitee unless their loss or damage resulted from the condition precedent.



PLUS

Obligation to Indemnify Continued

- An indemnitee has a right to claim indemnity **after** the full amount of its loss is determined (*Peterson Steels Inc v Arctic Steamship Line* (1980), [1981] 2 FC 192).
- An indemnitee can make a third party claim or crossclaim for indemnity before the full amount of its loss is determined (*Peterson Steels Inc v Arctic Steamship Line* (1980), [1981] 2 FC 192; *Maher v Great Atlantic & Pacific Co of Canada Ltd*, 2010 ONCA 415).

- Indemnity claims are subject to provincial limitation periods, but are not subject to discoverability.
- Provincial limitation periods begin to run when the full amount of an indemnitee's loss is determined (*Peterson Steels* (1980), [1981] 2 FC 192; *Penhold (Town) v Boulder Contracting Ltd*, 2009 ABQB 550; *Killam Transit Mix Ltd v Andre*, [1985] A.J. No. 239 (ABQB)).

Penhold (Town) v Boulder Contracting Ltd, 2009 ABQB 550

- The Town entered a contract with Boulder whereby Boulder would install a sewer system.
- In 2002, dips developed in the pavement above the sewer system, which Boulder refused to remediate.
- In 2005, the Town's consulting engineer issued a report to Boulder detailing deficiencies and listing the extent of the remedial work that was required, but Boulder refused to remediate.
- In 2007, the Town completed the remediation for \$113,703.

- The Town subsequently brought an indemnity claim for the cost of the remediation pursuant to the bare indemnity clause contained in the contract:
 - Except as provided herein, the contractor shall indemnify and hold harmless the owner and the engineer, including their agents and employees, from and against all claims, demands, losses, costs, damages, actions, suits, proceedings, payments, recoveries or judgments of every nature and description arising out of or which may be attributable to the contractor's performance of the contract.

- The Court held that the limitation period for an indemnity claim begins to run when the full extent of the indemnitee's claim against the indemnitor is determined.
- The Court determined that the Town knew the full extent of its indemnity claim against Boulder in 2005 and dismissed its claim for falling outside of Alberta's two-year limitation period.

***Alitalia-Compagnia Aerea Italiana SpA v 1791949 Ontario Ltd,
2015 ONSC 6890, aff'd 2016 ONSC 1192***

- Airline entered a service agreement with TGAS whereby TGAS would provide wheelchair services to the Airline's passengers.
- Airline passenger sued the airline and TGAS over an accident involving a wheelchair at the airport.
- Passenger's claim was dismissed.

- Airline brought indemnity claim for legal expenses pursuant to the bare indemnity clause contained in the service agreement:
 - [TGAS] shall defend, indemnify and save the [airline] harmless from and against all claims, demands, losses, costs, damages, actions, suits, or proceedings by whomever made, brought or prosecuted... and to the extent arising out of or related to the performance or non-performance of the Services or any act or omission in relation to this Agreement, any breach of this Agreement, willful misconduct or negligent acts or omissions of [TGAS]...

- Trial judge determined that if the passenger had been injured, she was injured by an airline employee.
- As such, passenger's claim did not relate to the performance or non-performance by TGAS.
- Indemnity clause not enforced.

Maheer v A&P, 2010 ONCA 415

- A&P entered service agreement with CBSG whereby CBSG would provide floor cleaning services at A&P's grocery store.
- Shopper sued A&P and CBSG for damages she allegedly suffered in a slip and fall accident at the grocery store.

- A&P crossclaimed against CBSG for indemnity for the cost of defending the shopper's action pursuant to the bare indemnity in the service agreement:
 - [CBSG] will accept full responsibility for, indemnify, hold harmless and reimburse [A&P] forthwith for any and all damages, interests and/or costs incurred by [A&P] associated with the handling of any customer or employee accident claim which was caused or contributed by the contractor.

- Shopper's action was dismissed.
- Trial judge dismissed crossclaim because CBSG was only obligated to indemnify A&P for expenses incurred as a result of CBSG's actions.
- Upheld on appeal.

- An obligation to save harmless is an obligation to cover an indemnitee's on-going defence costs (*Kelly v Eldridge*, 2006 NBQB 426).

Kelly v Eldridge, 2006 NBQB 426

- Eldridge entered a contract with Glenhar Builders Ltd. whereby Glenhar was to build him a house.
- Neighbouring property owners sued Eldridge and Glenhar for property damage.



- Eldridge applied for an order requiring Glenhar to assume his defence of the neighbours’ action pursuant to the bare indemnity clause in their contract:
- [Glenhar] shall protect itself and indemnify and save [Eldridge] harmless from any and all claims which may arise from [Glenhar’s] operations under the Contract where bodily injury, death or property damage are caused...
- Court determined that the “save harmless” language imposed an obligation on Glenhar to bear Eldridge’s defence costs on an ongoing basis.

***Stewart Title Guaranty Co v Zeppieri, [2009] OJ No 322
(ONSC)***

- Stewart Title agreed to indemnify and save Ontario Law Society members harmless from any claims arising under title insurance policies unless the claim arose from a member's gross negligence or willful misconduct.
- A lawyer's client sued them for failing to obtain good title in a real estate transaction.
- Stewart Title refused to cover the on-going costs of defending the client's action.

- Court determined that Stewart Title was obligated to cover the on-going costs of defending the client's action.
- Obligation to save harmless is broader than the obligation to indemnify.

- An obligation to defend is an obligation to assume an indemnitee's defence (*Minto Commercial Properties Inc v Modern Niagra Group Inc*, 2015 ONSC 2350).
- Courts have been reluctant to enforce without clear language setting out the extent of the obligation.
- *Minto* is an example of a court imposing an obligation to indemnify in place of the obligation to defend because the extent of the obligation was unclear.



***Minto Commercial Properties Inc v Modern Niagra Group Inc, 2015 ONSC
2350***

- Purchaser of a residential condominium sued the developer and the mechanical contractor over deficiencies.
- Developer applied for an order requiring the mechanical contractor to assume its defence.



- Contract between developer and mechanical contractor contained a Third Party Indemnity clause:
 - The [mechanical contractor] shall, to the full extent permitted by law, defend, indemnify and save harmless the [developer], the Construction Manager and the Consultant and their respective directors, officers, partners, employees and agents, from and against any and all claims, demands, losses, costs (including, without limitation, legal fees and disbursements), damages, actions, suits or proceedings from third parties directly or indirectly arising or alleged to arise out of or attributable to the [mechanical contractor's] performance of or the failure to perform the Work or its obligations under this Agreement.

- Court could not determine the extent of the mechanical contractor's obligation to defend, so the mechanical contractor was required to indemnify 33.3% of developers reasonable defence costs.





Ideal Indemnity Clause Contingent on Negligence

14. Indemnification

- Party A shall indemnify, defend and hold Party B harmless from and against any loss, damage, expense, claim, action, suit, proceeding or liability that Party B may suffer, sustain or become subject to as a result of any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract or that allegedly results from any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract.

15. Obligation to Indemnify

- The obligation to indemnify provided for in Clause 14 obligates Party A to repay Party B for any loss, damage, expense, claim, action, suit, proceeding or liability that Party B may suffer, sustain or become subject to as a result of any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract or that allegedly results from any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract.

IMPORTANT

16. Obligation to Defend

- The obligation to defend provided for in Clause 14 obligates Party A to assume Party B’s defence of any claim, action, suit or proceeding that Party B may become subject to as a result of any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract or that allegedly results from any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract according to the following stipulations:
 - Party A’s obligation to defend Party B commences when Party B notifies Party A that a claim, action, suit or proceeding has been commenced against it.
 - Party A’s obligation to defend Party B requires it to defend Party B, including **X**, **Y** and **Z**, but does not require Party A to defend **L**, **M** or **N**.
 - Party A’s obligation to defend Party B requires it to obtain independent legal counsel for Party B.
 - Party A’s obligation to defend Party B requires it to retain expert(s) when legal counsel deems them necessary.
 - Party A’s obligation to defend Party B requires it to pursue counterclaims, crossclaims and third-party claims if Party B wants to pursue a counterclaim, crossclaim or third-party claim.
 - Party A’s obligation to defend Party B requires it to pursue applications during the course of its defence of Party B when legal counsel deems them necessary.
 - Party A’s obligation to defend Party B does not affect Party A’s obligation to indemnify Party B as provided for in Clause 14 and 15 of this Contract.

IMPORTANT

17. Obligation to Save Harmless

- The obligation to save harmless provided for in Clause 14 obligates Party A to cover the ongoing defence costs Party B reasonably incurs defending any claim, action, suit or proceeding that Party B may become subject to as a result of any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract or that allegedly results from any negligent act or omission by Party A or the intentional misconduct of Party A during the performance of its obligations under this Contract according to the following stipulations:
 - Party A's obligation to cover Party B's ongoing defence costs commences when Party B retains legal counsel.
 - Party B's legal counsel will submit their invoices to Party A directly.
 - Party A will pay Party B's legal counsel in accordance with the time period stipulated on their invoices.
 - If Party A wishes to dispute any of Party B's legal counsel's invoices, it must notify Party B in writing and Party B must have the invoice reviewed pursuant to the *Alberta Rules of Court*, AR 124/2010.

IMPORTANT

Questions?

David M. Pick
dpick@brownleelaw.com