

# SMS Agreements

## Selected Topics for Discussion



Ben Esch, Legal Counsel

# Introduction

- Ben Esch
- Legal Counsel - Office of General Counsel
- Previously at Witten LLP, Edmonton (2012-16)
- At the University since June of 2016
  - primarily contract related work
  - SMS, Real Estate, investments/borrowing, UAI, Faculties

## OUTLINE

- 1) Office of General Counsel (“OGC”) - Who are we and what do we do
- 2) Purpose of Contracting
- 3) “Choice of Law” Clauses
- 4) Exclusion of Liability and Damages
- 5) Indemnities

# 1. OGC: Who are we and What do we do?

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— HENRY MARSHALL TORY, FOUNDING PRESIDENT, 1908

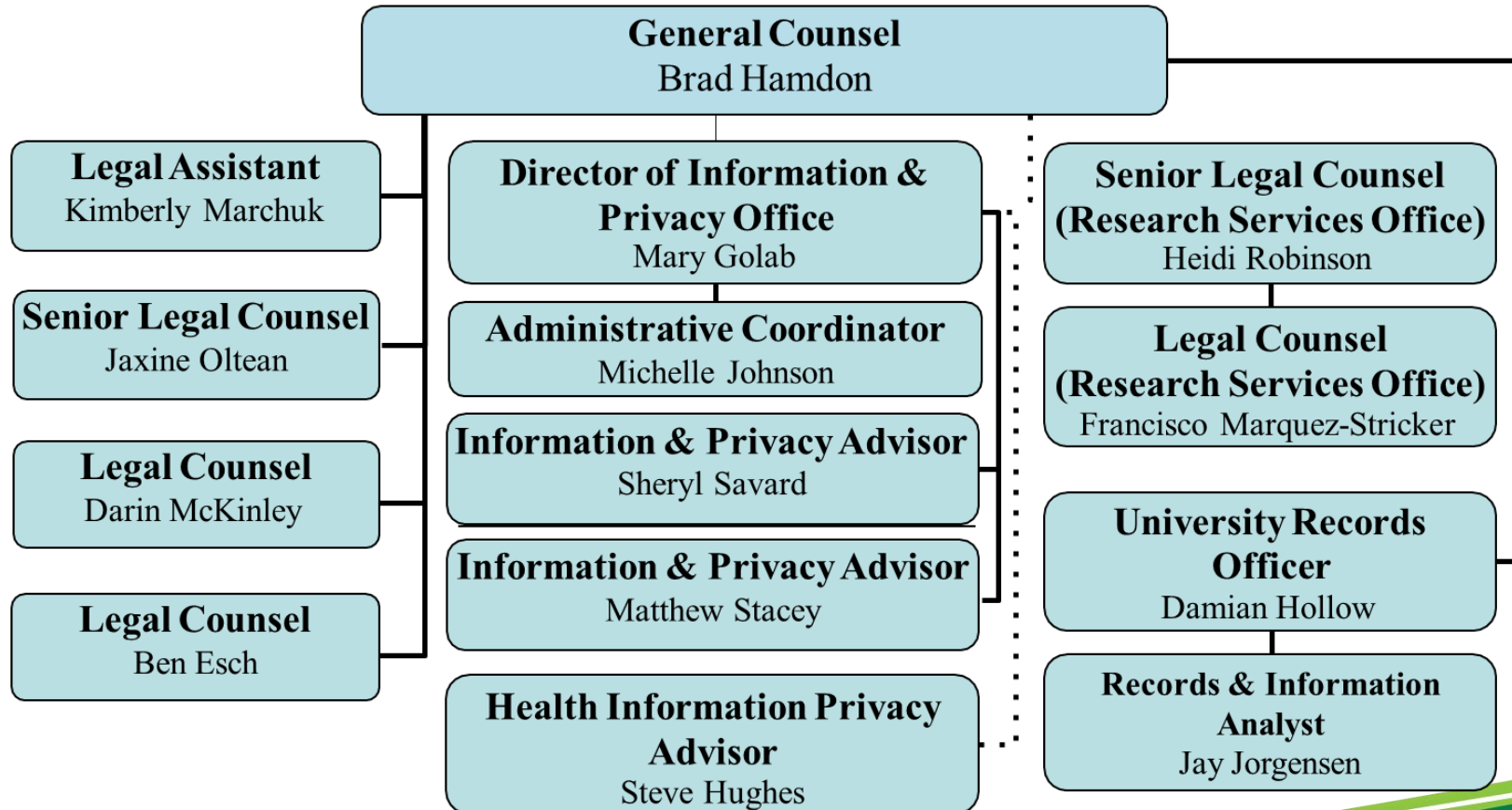
## 1. OGC: Who are we and what do we do

- The Office of General Counsel (“OGC”) provides legal advice to the University, including its Faculties and various units
  - Legal Counsel professional insurance
  - No legal advice to students, or associations (NASA, AASUA)
  - No legal advice to “spin-off” companies
  - No personal legal advice
- OGC provides legal advice and support to those who are authorized to enter legal agreements on behalf of the University of Alberta
  - Noting of risks and red flags
  - OGC does not approve legal agreements

# 1. OGC: Who are we and what do we do

- OGC is thankful for the work done by SMS on goods and services agreements
- OGC provides advice to SMS on the structure and risks associated with various clauses or types of agreements
  - Changes to U of A template
  - Contractor's form of agreement
  - All things strange
- Located in the South Academic Building

## Office of General Counsel Organizational Chart



## 2. Purpose of Contracting

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## 2. Purpose of Contracting

- Agreements are important whenever there is the potential for significant or uncertain liability to flow to the University
    - financial implications, significant university resources or reputation
    - potential for injury/damage
- A) The importance of risk allocation
- University wants to reduce its risk
  - sorting these matters after an issue arises is costly and difficult
- B) The importance of clarity
- key terms need to be clearly identified

## 3. “Choice of Law” Clause

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### 3. “Choice of Law” Clause

- **SMS Services Agreement: 17(d)** This Agreement shall be interpreted under and governed by the laws in force in the Province of Alberta, the courts of the Province of Alberta have exclusive jurisdiction over any legal proceedings arising from this Agreement and the parties attorn to the jurisdiction of such courts.
- Clause has two components:
  - A) Alberta laws apply
    - Alberta legislation
    - Alberta Courts’ precedent
  - B) Alberta courts will be used (exclusively in this case)
    - Location in Alberta
    - Procedural rules of Alberta

### 3. “Choice of Law” Clause

- Why is this clause important?
  - Certainty in the event of a dispute (Alberta vs. BC vs. China)
  - OGC can only advise on the laws of Alberta
  - Costs of litigating in another jurisdiction or other laws
- Governing Law → Often international entities want the law of their jurisdiction to govern an agreement
  - But we want the same thing (and have some power)!
  - There are significant issues to accepting international laws
  - Options are available to address risks, but uncertainty still exists

### 3. “Choice of Law”

- What are our options if we cannot agree on Alberta?
  - agree to a neutral jurisdiction
  - agree to the defendants jurisdiction (laws uncertain until a claim is made?)
  - agree to contractor’s preferred choice
  - silence on law (not without risk)
  - split laws and jurisdiction
- Which jurisdictions are preferred?
  - Canadian provinces (Quebec is less desirable)
  - USA: New York, California, Delaware are most common
  - “Common Law” jurisdictions (e.g. many Commonwealth countries)
- Questions on Choice of Law?

# 4. Exclusion of Liability and Damages

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## 4. Exclusion of Liability and Damages

- **SMS Services Agreement: 12** Notwithstanding anything to the contrary expressed or implied in this Agreement, the University shall not be liable to the Contractor for any general, indirect or consequential damages or any economic losses of any kind, regardless of whether the liability to which such damages relate arises in contract, tort or otherwise in law, or for any bodily injury, loss or damage sustained by the Contractor, its employees, agents or sub-contractors arising from any cause whatsoever.
- Strong clause in the University's favour
- May be asked to be responsible in the event of University negligence, fraud, willful misconduct, etc.
- Generally, prefer not to provide the reciprocal to the contractor (depends on type of agreement and industry).

## 4. Liability and Damages

- **SMS Services Agreement: 12** ...the University shall not be liable to the Contractor for any general, indirect or consequential damages or any economic losses of any kind....
- **General damages** are losses that cannot be easily quantifiable in money (e.g. pain and suffering). More common in personal injury cases.
- **Indirect and consequential damages** are losses not directly related to the obligation (i.e. obligation to pay for services) or the incident. Examples include, loss of profits, lost opportunity and future expenses.
- What is left?
  - **Special damages** are easily quantifiable in money
  - **Direct damages** are directly related to the obligation or incident.



## 4. Liability and Damages

- **Liquidated damages** are an agreed upon amount to be payable in the event of a specific occurrence.
  - e.g. In the event this Agreement is terminated by the University prior to the end of the Term, the University will pay to the Contractor, as liquidated damages, an amount equal to 50% of the remaining fees payable during the Term.
- We see less reference to liquidated damages than other types of damages (not in standard services agreements), but may be in some specialized agreements.
- May also see limits on liability
- Questions on Exclusion of Liability and Damages?

# 5. Indemnities

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## 5. Indemnities

- What is an indemnity?
  - additional protection for the indemnified party in the event of losses/damages (i.e. if the University suffers a loss as the result of Contractor providing Services, Contractor will pay for the loss).
- Generally, we are talking about losses or claims made by third parties against the indemnified party.
- An indemnity is just one way to add protection. Parties can still sue each other without an indemnity (likely a third party claim).

## 5. Indemnities

- **SMS Service Agreement: 13** The Contractor holds harmless and indemnifies the University (including its Board members, officers, employees and agents), from and against any costs, losses, damages, actions and liabilities incurred by the University arising directly or indirectly in connection with or as a result of any breach, default, negligent act or omission or willful misconduct by the Contractor, its employees or agents in the performance of its obligations under this Agreement or as a result of any misrepresentations in this Agreement. This indemnity shall survive the expiration or termination of this Agreement.
- Strong protection in favour of the University

## 5. Indemnities

- Areas of negotiation on an indemnity may include:
  - limit on the scope (e.g. directly related to the performance of the services)
  - common request may be to make the indemnity reciprocal (i.e. ask the University to provide an indemnity to the contractor)
- If giving a reciprocal indemnity, need to consider the circumstances (i.e. does it make sense? what is the likelihood of the indemnity coming to fruition?)
- Generally, willing to reluctantly grant a reciprocal indemnity (the University should likely pay if it is responsible for a loss)
- If granting a reciprocal indemnity, need to consider the impact on the exclusion of liability clause
- Questions on Indemnities?

# Questions?

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