



HANDLE WITH CARE

Volume 12, Issue 2

Fall /Winter 2015

A Risk Management Newsletter for the Health Care Protection Program's Members

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Health Team Leader's Message

As we prepare to close the door on 2015, I look back on a busy year of transition for HCPP. We've bid farewell to departing staff, welcomed new consultants and claims staff, and settled into new office space with a new way of working. We maintained a high level of service amidst all these changes and I'm excited to now have a full team in place to carry this momentum through into 2016.

In this edition of Handle With Care we bring a mix of articles arising from recent issues we've been working on. A BC Supreme Court decision involving a health care construction project illustrates how ambiguous insurance wordings are considered by the courts and also how the Public Private Partnership (P3) model can effectively transfer construction risk to the private partner.

Our new claims examiner has jumped in to contribute an article explaining how the HCPP Property Agreement deductible applies when many sites are affected by the same loss event. Fall means vehicle fleet renewals and, since we fielded questions the past few months related to fleet management and employee-owned vehicles, it seemed like a good idea to share the information here.

Separately incorporated Auxiliaries have been eligible for HCPP coverage since 2012 and we receive many inquiries about them — check out Risk Wise Answers for responses to commonly asked questions. When resources are shared, greater efficiencies can be realized so we've highlighted a couple of provincial resources available to health authorities when managing risk or procuring products/services. And finally, we've provided a springboard to a few reports and legislative change that may be of interest to those in the health sector. ◀

Sharon White, Director — Client Services Health Care Protection Program

What's New at HCPP

We are very happy to announce that we have a new addition to our claims team to fill the role of examiner. Emily Kemshaw joined our team starting on August 10th. Emily comes to us from Excel Adjustco where she has been working as an independent adjuster for the last several years. Welcome Emily!

Please refer to the last page of this newsletter for a complete listing of all HCPP staff and up to date contact information. ◀

And in other news, it has been one year since we said goodbye to Pandora Avenue, and moved into our new office space at 617 Government Street. While it has been a year of adjustments and learning about Leading Workplace Strategies, the move has not been without its benefits. This past summer saw the first Food Truck Festival occur behind the Royal BC Museum. And much to the chagrin of our waists, the Festival has been extended through the winter. Getting a 'salad' for lunch seems to be code for BBQ or fries. ◀

Design, Build, Insure: What a B.C. Court Case Means for your Construction Clients

Have you ever wondered if the courts would seek out the Health Authority if a loss happened to the contractor during a Private Public Partnership (P3) agreement? While the focus of this article is regarding the interpretation of the agreement between the Contractor and its Insurers, it is interesting to note that the Health Authority was not brought into this lawsuit.

The following article first appeared in the November 2014 edition of Canadian Insurance Top Broker Magazine. It is reprinted here with permission from Borden Ladner Gervais.

A recent court case in British Columbia interprets, for the first time, a standard exclusion clause in a standard construction policy, potentially setting a precedent that brokers and insurers throughout Canada should note. In *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company et al*, the province's Supreme Court ruled that the insurer must pony up—to the tune of \$8.5 million—to cover repairs of concrete slabs that were damaged during construction. The case could have ramifications even beyond our borders, because while the policy language is used in construction project insurance policies around the globe, the courts have not weighed in much on the proper interpretation of these clauses.

The project at the heart of Acciona was a public-private partnership: a \$250-million extension of the Royal Jubilee Hospital in Victoria, B.C.—the biggest facility of its kind on Vancouver Island. The extension was an eight-storey concrete structure, with four wings linked at a central core. Apart from being massive, the structural design was quite complex: each floor consists of thin suspended slabs (250 mm thick) with large spans (over 9 m). During construction, the slabs “over-deflected” (engineer-speak for “bent too much”), which made them not level. To make the floors level—one of the project's serviceability requirements—the slabs required extensive remediation.

After being denied coverage for its claim for all remedial costs under the project's COC policy, the project's design/build contractor, Acciona, commenced litigation. (*Original Editor's Note: the article's authors represented Acciona in court.*)

In its judgment earlier this year, the British Columbia Supreme Court cited a Supreme Court of Canada case that summarized the principles that apply broadly to the interpretation of insurance policies. In that 2010 case, the Supreme Court wrote that “the primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole.” But if the language is ambiguous, the courts should turn to “general rules of contract construction.” One of those rules is that the court should interpret the policy in a way that's “consistent with the reasonable expectations of the parties,” as long as the actual text of the policy justifies that interpretation—that means no interpretations that come way out of left field. “Courts should also strive to ensure that similar insurance policies are construed consistently,” the Supreme Court wrote in its summary of construction insurance case law.

If none of these principles solve the ambiguity problem, it's generally resolved in the insured's favour—coverage provisions are interpreted broadly, and exclusion clauses narrowly—because the insurer chose the policy wording.

Establishing Coverage

In order to establish coverage under a COC policy, the insured must show that the loss falls under the policy's “perils insured” provision. In *Acciona*, that provision contained a typical clause covering “all risks of direct physical loss of or damage to the property insured... except as hereinafter provided.”

Part of the reason the insurers disputed coverage was that they disagreed with the contractor over whether the suspended slabs' over-deflections and related effects constituted “damage” within the insuring agreement. The contractors argued that the over-deflections and cracking was “physical loss” or damage within the meaning of the

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Design, Build, Insure: What a B.C. Court Case Means for your Construction Clients *(continued from page 2)*

“perils insured” provision, pointing to the Canadian Oxford Dictionary’s definition of “damage.” The insurers, on the other hand, argued that the slabs’ over-deflections and cracking constituted defects—not damage—and that regardless, the loss was not fortuitous, so did not fall under the policy.

Overall, the court found that the contractors had established coverage under the insuring agreement. In particular, the court confirmed that the over-deflection and **cracking** of the concrete slabs constituted damage that was fortuitous, as it was unexpected or unintended. With that finding, the loss was covered under the perils insured clause, and the burden shifted to the insurers. If they wanted their denial of coverage to stick, they needed to show that a clause in the policy excluded the loss or damage that was otherwise covered. This brings us to the key issue in Acciona: the interpretation of a standard exclusion clause developed by the London Engineering Group, a UK insurance industry think tank. The group develops model policy wordings for its members for use in various insurance policies, including COC and “All Risks” policies, referred to as “LEG2/96.” This is one of three model “defects” exclusion clauses (the other are LEG 1/96 and 3/96). As the court wrote, “LEG 1/96 contains the broadest exclusion, and therefore the narrowest coverage, LEG 3/96 contains the narrowest exclusion and broadest coverage.” And LEG2/96? Well, it’s somewhere between the two extremes.

Prior to Acciona, no court in the world has interpreted LEG 2/96, although it had been commented on in various articles and papers. As worded, the LEG2/96 clause excludes “all costs rendered necessary by defects of material workmanship, design, plan, or specification, and should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.

“For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship, design, plan or specification.”

The Court interpreted the exclusion clause as having two distinct components, which “must be read together in order to give meaning to the clause as a whole”: a) “All costs rendered necessary by defects of material workmanship, design, plan, or specification;” and b) “Should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.”

The court further interpreted the clause to conclude that the excluded costs are only the costs that would have fixed or prevented the defect “before any consequential or resulting damage occurred, but the exclusion does not extend to exclude the cost of rectifying or replacing the damaged property itself; the excluded costs crystallize immediately prior to the damage occurring and are thus limited to those costs that would have prevented the damage from happening.”

The court held that the exclusion was relevant, as the loss was caused by a defect in workmanship—namely, inadequate formwork and shoring/reshoring procedures used during the pouring of the slabs. The court then found that the “damage” in this case was the cracking and over-deflection of the concrete slabs. However, the court couldn’t quantify the costs of remedying or rectifying the defect before the damage occurred (“i.e. the costs of implementing proper formwork and shoring/reshoring procedures or incorporating additional camber into the formwork”) because there was no evidence. The court wrote simply that such costs “would have been minimal.” As such, the exclusion did not apply and the court held that all remedial costs to the concrete slabs, corresponding site general conditions, and profit were covered—totalling \$8.5 million. Allianz has filed an appeal.

This case serves as a reminder for insurers that if they have language at their disposal that can make an exclusion

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Design, Build, Insure: What a B.C. Court Case Means for your Construction Clients *(continued from page 3)*

clause unambiguous, “they should incorporate such language. Otherwise the normal principles of interpretation will apply, including the principle that coverage provisions will be interpreted broadly and exclusion clauses narrowly.” If the insurers had wanted the defects exclusion in the COC policy to be interpreted similarly to the “resulting damage” clauses that appear in Canadian insurance policies, they should have incorporated such readily available language in the policy.



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Note: The counsel for the defendant insurers has applied for leave to appeal the case to the Supreme Court of Canada. ◀

Property Deductibles

One Event at Multiple Locations — How Many Deductibles do you Incur?

The HCPP Property Agreement policy offers occurrence based coverage for losses to multiple locations caused by a single event. Our coverage allows a Health Care Agency (HCA) to incur only one deductible for damages originating from one disturbance that affects several locations of the HCA.

This policy feature comes into effect when there is an event, such as a large windstorm or earthquake, that causes damage to more than one site belonging to one HCA. Rather than each site incurring a deductible for each individual loss, the claims will be treated as a single loss and only one deductible applied. This coverage is applicable when multiple claims are incurred as a result of: windstorm or hail caused by one atmospheric disturbance, earthquake within a 168-hour period, flood and lightning. This feature of our coverage can be extremely helpful when multiple sites suffer minor damage that, individually, would not exceed the deductible.

For example, a HCA has three hospitals, each of which suffer minor damage as a result of the same severe windstorm. If the cost of repairs to each hospital is \$7,000.00 respectively, only one deductible of \$10,000.00 would be applied for a net claim of \$11,000.00. If multiple locations within your HCA are damaged by a single event, please advise the HCPP immediately and detail the damages to each location. ◀

Emily Kemshaw
Claims Examiner

Risk Buzz — How is Your Fleet being Managed?

It is very likely that each Health Care Agency (HCA) has some degree of vehicular assets, a subset of their real properties owned or leased. The fleet can represent a substantial portion of an organization's total net value, and a significant portion of the total budgeted operating expenses. How these assets are managed can have a profound impact on the cost effectiveness of a public agency subjected to budgetary constraints. Selecting the most appropriate solutions for the development, maintenance, and administration of fleet management becomes a critical success factor in operations.

The first step, is determining the needs of the HCA in fleet acquisition. Careful consideration is given to the following factors in the selection process: cost comparison of fuel types for the fuel consumption, maintenance and repair, resale value, operational requirements, emission levels, changes in vehicle technology and purchase price. The fleet composition needs to have the ability to meet service level requirements and there must be a mechanism in place to determine whether ongoing and new transportation needs can be met within the existing fleet, or through the use of alternative transportation options.

Fleet management in practice is multifaceted; it could be considered more akin to business management in comparison. The expectation is to maintain several internal and external relationships to ensure delivery of services in dealing with leasing companies, automobile dealers, supply or service contractors, insurance, corporate reporting, employee use, and requires extensive knowledge of internal policies and procedures. The development of clearly defined guidelines is imperative to shape decisions that employees are required to follow in conducting the business of the organization and usage of its fleet vehicles. The scope and complexity of the fleet operations will determine what fleet management solutions are best suited to the HCA needs.

For a small to medium sized fleet, in house management can be a viable option to facilitate tracking relevant data and cost management. A fleet manager will have some working knowledge of financial administration, data collection/analysis, maintenance requirements, vehicle fuel management, and some degree of risk management. Ongoing professional development and education becomes essential in light of emerging technology, changes in policy, increasing responsibilities and changes in legal issues. Based on the needs of your fleet management team, consideration for procurement of an "off the shelf" fleet management software system, which could in the long run assist in mitigation of costs and streamlining data tracking for analysis, could prove a valuable program addition.

When the scale and complexity of a fleet grows to a point where internal management solutions are no longer cost effective, outsourcing fleet management companies enters the conversation. Broader public sector agencies have an option to either conduct their own procurement of a fleet management service through a request for proposals (RFP), or access the corporate supply arrangements where the Province of British Columbia has already completed procurement of fleet management services through a company called ARI. The key to any successful negotiation be it for a service agreement or any contract, is to know what you want, ask for it, and determination of a fair price. On both sides of the table, a successful service agreement should be beneficial to both the company and the fleet management provider. Before delving into an agreement with a fleet management company, establish what you are seeking (if your needs are not currently being met) and how this might be addressed.

Fleet management company service deliverables need to be clearly defined and must align with your organization's needs. A company having the right services should lead to seamless customer service and enhanced monitoring of the vehicles. It should offer solutions to increase efficiencies of the fleet by trimming down costs using their extensive industry data analysis, and through use of their established vendor relationships. The ideal fleet management company will look to work with you as an expert who will listen to your needs and be ready to offer flexible solutions tailored to your organization. Finding a company with experienced personnel and a successful track record which understands all aspects of the business can go a long way in finding the most cost effective approach.

There are limitations to every decision we make, the same can also be said when exploring the option to outsource to a fleet management company. Potential breakdown of internal and external relationships can occur, surrounding fleet management related activities, when inserting a 3rd party service provider. The employees would no longer

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How is Your Fleet being Managed ? *(continued from page 5)*

have a direct relationship for inquiries and problems or concerns with their fleet manager which they may have developed a working relationship with. Previous control and insight over operations can also be lost, therefore it is important to maintain clear lines of communication with the service provider to keep up to date on operational requirements via regular reporting and feedback.

To highlight a complication (as an example) with the fleet management provider procured by the provincial government, ARI data storage is located within the United States. In the event of a motor vehicle accident with a 3rd party, the *Freedom of Information and Protection of Privacy Act* prohibits storage of information outside of Canada. This complication led to the additional need to develop an internal information gathering mandate for fleet managers, to ensure we are capturing and recording the information needed to initiate insurance claims.

Final decisions made regarding fleet management solutions are not always an easy choice for an organization. However, it should be based on the needs and culture of the HCA, service requirements, in house expertise, current systems in place, and even economic climate. But potential benefits in cost reductions, increased efficiency, accurate data accumulation and analysis, and improved service function can be advantageous and hard to ignore. <

ICBC Rate Class for Employees Who Use Their Own Vehicles for Work

Sometimes Health Care Authority (HCA) employees will use their own vehicles in the course of their work duties. For example, to travel between work locations such as home support workers travelling from one client's home to another in the community. From time to time, employees using their own vehicle for work will also transport a client to an appointment or outing. Transport of clients is more common in areas where no Handy Dart or volunteer driver programs are in place to assist clients in getting around the community. Questions from employees about the appropriate rate class to use when arranging ICBC coverage for their vehicle in these circumstances have arisen, including whether private bus use is needed or if a special driver's license is required if clients are transported.

When employees use their own vehicle in the course of work, their vehicle must be rated for the appropriate business use class (either 007 or 027) when arranging ICBC coverage. If the transport of clients is ancillary to the work duties of employees, the private bus rate class should not be used.

It is appropriate to use the private bus class if the sole purpose of the vehicle is to transport passengers who do not pay a fare for the trip. Vehicles with this primary purpose are rarely, if ever, owned by HCA employees and it is more likely that a vehicle used this way would be owned and operated by a HCA facility or program. For example, residential care facilities or community outreach programs will often have a van or mini bus with the primary purpose of taking residents or clients on outings – transporting passengers from one place to another is mostly what the vehicle is used for.

Also, employees do not need a special driver's license to transport clients in their own personal vehicle; whereas commercial driver's license is required for drivers of taxis, ambulances, school buses and other large commercial transport trucks. <



Riskwise Answers — Auxiliaries Q & A

Q. What information does Health Care Protection Program (HCPP) require for an Auxiliary to be eligible for HCPP coverage?

- A. To receive HCPP coverage, an Auxiliary will need to provide the following:
- confirmation it is independently incorporated under the *Society Act*
 - its incorporation number
 - its legal name



Q. Does an Auxiliary need to be a member of the BC Association of Health Care Auxiliaries (BCAHCA)?

- A. No. They do not need to be a member of BCAHCA in order to receive coverage from the HCPP. However, non-members are required to contact BCAHCA for access prior to being eligible for HCPP. All Auxiliaries must be recognized by the Hospital/Health Authority they support. Our intent is the administration of the coverage, and the first point of contact for an Auxiliary will be through the BCAHCA.

Q. How long have Auxiliaries had access to HCPP coverage? What type of coverage is provided by the HCPP? How much does it cost?

- A. Effective July 1, 2012, independently incorporated Auxiliary organizations that provide support to hospitals in BC were eligible to receive coverage for Liability, Directors & Officers Liability (also known as Administrators Errors and Omissions Liability) and Crime coverage through HCPP. This coverage is made available at no cost to the auxiliary. Please note that neither Property coverage nor Boiler and Machinery coverage is provided through the HCPP.

Q. How are Unincorporated Auxiliaries provided with coverage?

- A. Unincorporated Auxiliaries, as well as volunteers to a Health Care Agency (HCA), are covered under the HCPP Commercial General Liability for that health authority. This extension has existed for many years by virtue of the “additional insured” status extended to unincorporated Auxiliaries and volunteers with respect to liability arising from operation of the HCA. ◀

Hospital Corners — Quick Risk Tip

Looking for risk management resources? The Risk Management Branch (RMB) has made the following available to public sector organizations, including publicly funded Health Care Agencies:

- ISO 31000 – Risk Management – Principles and Guidelines
- ISO 31004 – Risk Management – Guidance for the Implementation of ISO 31000
- ISO 31010 – Risk Management – Risk Assessment Techniques

These are under a group license arrangement with distribution controlled by the RMB. If you are interested in a copy, please contact the Risk Management Lead for your organization who will make arrangements with our office. To ensure that as many copies can be accessed as possible, please save your electronic copy as each download counts as a license access. ◀

BC Bid Resources — A One-Stop Shop for Procurement

Introducing BC Bid Resources: A Modern Website To Help You Manage All Your Procurement Needs

The process of buying goods, services and construction in government can be a bit of a mystery to a newcomer. There are so many questions: which process should you use; what supply arrangements are in place; what do you do once you have a contract in place?

You'll be happy to know that whether you're a new, occasional or experienced buyer, the process just got easier. No more agonizing over which form to use: the RFP vs. RFQ vs. ITQ vs. SRFP. (That is: a Request for Proposals, a Request for Qualifications, an Invitation to Quote and a Short-Form Request for Proposals.)

Your wait is over - The new BC Bid Resources website <http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources> has information and tools to help you manage the entire procurement lifecycle, including:

- Planning a request.
- Posting on BC Bid.
- Evaluating results.
- Setting up a contract.
- Evaluating performance.
- And everything in between.



This website was developed as part of the Procurement Transformation Initiative, a multi-year phased approach to maximize value to citizens through government procurement. **Be sure to bookmark the site!** The next phase of this project is to create more information for vendors.

Broader Public Sector Procurement Community of Practice Members (PCoP): While this site is geared to the core provincial government (ie. ministries), you will find the website informative and can use the information it contains as you wish.

BC Bid Resources answers your questions:

- How do I find out if government already has a supply arrangement?
- What are Moral Rights?
- How do I know what type of solicitation process I should use?
- When can I direct award?
- How long should I post a solicitation?
- What can I say in a debrief?
- How do I do a risk assessment?
- What do I need to do a cost/benefit analysis?
- How do I create my evaluation handbook?

RMB Fun Facts

Did you know that HCPP facilitated RMB review and approval of over 30 indemnities for flu clinics in 2014? If you are holding a clinic at a location not owned by the Health Authority, and the agreement contains an indemnification, please send a copy of the unexecuted agreement to our office for indemnity approval. ◀

Reports and Legislation of Interest to Health Agencies

On August 13, 2015, the Auditor General of British Columbia (AG) tabled a report in the Legislature titled, an “Audit of the Panorama Public Health System”, a full copy of the report can be located on AG’s website: http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC_PanoramaReport_FINAL.pdf. Panorama, the IT system that the Government of Canada implemented following the SARS outbreak of 2003, was to improve the management of communicable disease outbreaks and immunization programs across the country. The BC Ministry of Health co-led the initiative. The Auditor has made three recommendations to improve practises for future projects and recommended an independent review to assess the ongoing suitability of Panorama.

On September 30, 2015, the Office of the Information and Privacy Commissioner (OIPC) released a report titled “Examination of British Columbia Health Authority Privacy Breach Management”. A copy of the full report can be found at: <https://www.oipc.bc.ca/special-reports/1864>. Breaches most commonly occurred due to misdirected communications, human error; lost records, unsecured storage, and inappropriate access.

The *Laboratory Services Act*, which sets a framework to strengthen and standardize BC’s clinical laboratory system, went into force as of October 1, 2015. The Act will:

- remove laboratory services as benefits administered under the *Hospital Insurance Act* and the *Medicare Protection Act*;
- provide a single legislative framework to govern the provision of laboratory services as benefits, and
- provide flexibility for the administration and delivery of laboratory services through a mix of models.

Consequential changes have been enacted to the following Acts:

- *E-Health (Personal Health Information Access and Protection of Privacy) Act*
- *Health Care Costs Recovery Act*
- *Health Professions Act*
- *Hospital Insurance Act*
- *Medicare Protection Act*
- *Medicare Protection Amendment Act*
- *Pharmaceutical Services Act, and*
- *Tobacco Damages and Health Care Costs Recovery Act*

Upcoming Conferences around British Columbia

Quality Forum 2016 February 24-26, 2016
(Western Healthcare Improvement Network)
Vancouver, BC
www.inspirenet.ca

13th Annual Critical Care Conference March 1-4, 2016
Whistler, British Columbia
www.canadiancriticalcare.ca

Healthy Mothers and Healthy Babies March 11-12, 2016
Vancouver, British Columbia
www.perinatalservicesbc.ca

Association of Medical Microbiology and Infectious
Disease Canada March 30-April 2, 2016
Vancouver, British Columbia
www.ammi.ca

The 7th National Biennial Conference on Adolescents
and Adults with Fetal Alcohol Spectrum Disorder (FASD)
April 6-9, 2016
Vancouver, British Columbia
www.cpha.ca

Canadian Vascular Access Association April 27-29, 2016
Vancouver, British Columbia
www.cvaa.info

Canadian Society of Transfusion Medicine
May 11-15, 2016
Vancouver, British Columbia
www.transfusion.ca

The DNA of PHARMACY May 26-28, 2016
Kelowna, British Columbia
www.bcpharmacy.ca

About Our Organization...

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing, and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC. ◀

Handle With Care is published twice a year by the Health Care Protection Program

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We Need Your Feedback!

What do you think about “Handle with Care”? We always love to hear your comments. Please send us your feedback! Are there any topics you would like us to cover? Email us at HCPP@gov.bc.ca

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. ◀