



## The CGL Policy and the Additional Insured Endorsement in CANADA

*by*

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## The CGL Policy and the Additional Insured Endorsement in Canada

### 1. **BACKGROUND:** **COVENANTS TO INSURE OTHERS IN COMMERCIAL CONTRACTS**

#### 1.1 Introduction

While there are a variety of liability insurance policies available in Canada which contain coverages tailored to specific risks, industries or professions, the most common form of coverage issued to the vast majority of business is the so-called “Commercial General Liability” (CGL) policy. Unlike, for example, automobile insurance, the wording of liability insurance in Canada is essentially unregulated. However, standard form wordings have been formulated over the years by industry organizations such as the Insurance Bureau of Canada (IBC) and, in the U.S.A., the Insurance Services Office (ISO).

Standard form wordings have changed quite considerably over the years. Insurance companies can, and invariably do, modify the wordings. In addition, brokers may draft their own “manuscript” forms, either generally or for specific clients or risks to which insurers may subscribe. The result can be, and often is, a confusing array of wordings where slight variations in syntax can have significant impact on the extent of coverage afforded to an insured in any given situation.

And so it comes as no surprise that the wordings of Additional Insured Endorsements (AIE) to liability policies, whether labeled “standard form” or otherwise, can vary greatly as therefore will the coverage afforded under the same. This paper will briefly review the coverage afforded by an AIE, the case law considering same, and some of the issues insureds, brokers and underwriters should consider when addressing the subject.

#### 1.2 Covenants to Insure Others

All commerce entails risk, whether it be leasing a building or selling a cup of coffee. Unlike most consumer transactions, however, sophisticated commercial transactions will usually be documented by a written contract. It is very common for such contracts to address contractual transfer of risk whether through limitations of liability, indemnity provisions or covenants to obtain insurance.

Covenants to insure extend beyond insuring the property that is the subject matter of the contract, to include liability coverage as well. The former subject, which gives rise to its own unique

implications and controversies<sup>1</sup>, is not addressed in this paper. Rather, this paper will consider contractual obligations to obtain liability insurance for other parties and the mechanisms by which this is accomplished, primarily the use of an Additional Insured Endorsement on a CGL policy.

Examples of contractual scenarios that very often entail obligations to obtain liability insurance for others include construction projects, lease agreements, distributorship/retail agreements, agency contracts, and the like. Sometimes the contractual provision comprises only one or two sentences. Sometimes the provision is very detailed. One common lease provision reads:

**“ARTICLE 6 – TENANT’S COVENANTS**

**6.2 Insurance**

(a) The Tenant shall, at its sole cost and expense during the Term and during such other period of time that the Tenant occupies the Premises, take out and maintain in full force and effect, the following:

(i) “all risk” insurance upon all merchandise . . . ;

(ii) automobile liability insurance . . . ;

(iii) comprehensive bodily insurance and property damage liability insurance applying to the operation of the Tenant... and which shall include, without limitation, personal injury liability, product liability, contractual liability, non-owned automobile liability and protective liability with respect to the occupancy of the Premises...; and such insurance shall be written for an amount of not less than Three Million Dollars (\$3,000,000.00) per occurrence . . . ;

(b) All policies of insurance referred to in this paragraph 6.2 shall include the following provisions:

(i) the policies shall not be affected or invalidated by any act, omission or negligence of any person which is not within the knowledge or control of the insured thereunder;

(ii) all policies of liability insurance shall include the Landlord and any persons, firms or corporations affiliated with the Landlord and designated by the Landlord as Additional Insureds....”

See also the following extract from the CCDC 2 Stipulated Price Contract<sup>2</sup> standard construction contract:

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<sup>1</sup> For information on the topic, see Nigel Kent, “*Tort Immunity: Covenants to Insure and Waivers of Subrogation*”, 2006, [www.cwilson.com/pubs/insurance/npk1](http://www.cwilson.com/pubs/insurance/npk1)

<sup>2</sup> Canadian Construction Documents Committee which includes representatives appointed by the Association of Consulting Engineers of Canada, the Canadian Construction Association, Construction Specifications Canada, the Royal Architectural Institute of Canada.

“Part 11 INSURANCE – BONDS

GC 11.1 Insurance

11.1.1 Without restricting the generality of GC 12.1 – INDEMNIFICATION, the Contractor shall provide, maintain, and pay for the insurance coverages specified in GC 11.1 – INSURANCE. Unless otherwise stipulated, the duration of each insurance policy shall be from the date of commencement of the Work until the date of the final certificate for payment. Prior to commencement of the Work and upon the placement, renewal, amendment, or extension of all or any part of the insurance, the Contractor shall promptly provide the Owner with confirmation of coverage and, if required, a certified true copy of the policies certified by an authorized representative of the insurer together with copies of any amending endorsements.

- .1 General Liability insurance shall be in the joint names of the Contractor, the Owner, and the Consultant, with limits of not less than \$2,000,000 per occurrence and with a property damage deductible not exceeding \$2,500. The insurance coverage shall not be less than the insurance required by IBC Form 2100, or its equivalent replacement, provided that IBC Form 2100 shall contain the latest edition of the relevant CCDC endorsement form. To achieve the desired limit, umbrella, or excess liability insurance may be used. All liability coverage shall be maintained for completed operations hazards from the date of Substantial Performance of the Work, as set out in the certificate of Substantial Performance of the Work, on an ongoing basis for a period of 6 years following Substantial Performance of the Work. Where the Contractor maintains a single, blanket policy, the addition of the Owner and the Consultant is limited to liability arising out of the Project and all operations necessary or incidental thereto. The policy shall be endorsed to provide the Owner with not less than 30 days notice in writing in advance of any cancellation, and of change or amendment restricting coverage. . . .”

Stipulating liability insurance in a commercial contract is one thing, obtaining it is quite another. The party who is obligated by contract to obtain the insurance may or may not comply. He may provide the contractual provision to his broker or he may simply issue a (perhaps inaccurate) directive. The broker may issue a Certificate of Coverage but forget to issue a formal policy endorsement. The stipulated coverage may or may not be available in the marketplace. It will readily be seen there is considerable room for error and non-compliance, which in turn can (and does) spawn secondary litigation when things go awry and the anticipated liability insurance either was not obtained or does not apply.

## 2. THE WORDING OF THE ADDITIONAL INSURED ENDORSEMENT

There are two mechanisms by which persons other than the Named Insured on a liability policy might be added to coverage, namely,

- An expansive definition of “Insured” in the policy itself; or
- A specific endorsement (i.e. the Additional Insured Endorsement).

The “standard” CGL policy wording issued by IBC does not contain an expansive definition of “Insured” under the policy which includes persons for whom the Named Insured has agreed to obtain liability coverage<sup>3</sup>. However some CGL policies, usually manuscripted by brokers, may contain an additional “blanket” provision in the above section such as the following example:

“This policy also insures all persons and entities for whom the Insured has agreed to obtain, or has the responsibility for placing, insurance.”

The extent of coverage provided to the “Additional Insured” by virtue of the above definition mechanism will be determined by the language of the clause itself. Unlike the above example, it may contain a limitation “. . . but only with respect to liability arising out of the operations of the Named Insured”, or some similar variant. As will be seen later in this paper, such language may not provide quite as narrow coverage as might have been thought. However, if the clause contains no limitation of any sort, then it is clear that the “Additional Insured” will enjoy coverage for all liabilities of the sort covered by the policy regardless of any connection to the Named Insured.

By far the most frequent mechanism for extending coverage under a CGL policy to a person other than the Named Insured is use of an “Additional Insured Endorsement”. As the wording of liability policy forms in Canada usually follow the suit of the U.S.A., it is instructive to look at the development of the AIE south of the border. When the 1973 comprehensive general liability format was replaced in 1985 with the revised commercial liability policies, the Insurance Services Office issued several different standard Additional Insured endorsements.

The two principal AIEs were CG 2009, which is also known as Form A, and CG 2010, which is also known as Form B. The wording of both forms has been changed many times since 1985. The words “you” or “your” in any of the ISO’s AIEs is a reference to the Named Insured.

The 1985 versions of CG 2009 and CG 2010 are substantially different in the extent of coverage that they each provide to an Additional Insured. CG 2009 is said by some to provide coverage to the Additional Insured only for its vicarious liability for the work performed by the Named Insured and the Additional Insured’s general supervision of the work performed by the Named Insured.<sup>4</sup> In sharp contrast, CG 2010 is significantly more broad in scope as it extends coverage

<sup>3</sup> See IBC’s Standard CGL policy form 2100 03-2005 (r), Section 11 “Who is an Insured”

<sup>4</sup> Julia A. Molander, “*Additional Insured Endorsements and the Transfer of Risk: Vexing Problems and Practical Solutions*,” (December 2005) *Insurance Coverage and Practice* at 218. This article provides an excellent overview of the numerous changes to the ISO forms over the years.

to liability of the Additional Insured that arises out its own actions. This has been held to include but not be limited to supervisions of the Named Insured.<sup>5</sup>

The 1985 version of CG 2009 (Form B) states:

*Who Is an Insured* (Section II) is amended to include as an insured the person or organisation shown in the Schedule but only with respect to liability arising out of

A. “Your work” for the Additional Insured(s) at the location designated above, or

B. Acts or omissions of the Additional Insured(s) in connection with the general supervision of “your work” at the location shown in the Schedule.

This insurance does not apply to . . . “bodily injury” or “property damage” arising out of any act or omission of the Additional Insured(s) or any of their employees, other than the general supervision of work performed for the Additional Insured(s) by you.

The 1985 version of CG 2010 (add Form B) states:

*Who Is an Insured* (Section II) is amended to include as an insured the person or organisation shown in the Schedule but only with respect to liability arising out of “your work” for that insured by or for you.

As indicated, the ISO forms have undergone a number of substantive changes over the years, each of which was designed to refine or limit the coverage extended to the Additional Insured. There has been extensive litigation in the U.S.A. concerning the ISO forms and the perceived frailties in same<sup>6</sup>.

In 1985 the ISO actually issued some 14 different types of Additional Insured endorsements and it is beyond the scope of this paper to review all of the variations here. However, one such form which will be of interest because it addresses the lessor-lessee context, is CG 2011 which adds the lessor as an Additional Insured, “but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the Named Insured]”.

These numerous forms and the existence of widely varying terminology in the same provides fertile ammunition for comparative challenges to the scope of coverage afforded by any particular language. Additional Insureds confronting denials of coverage by underwriters may wish to review in detail the alternative forms and the arguments they present for ambiguities or shortfalls in the wording of their own endorsements.

In Canada, the IBC has not followed ISO’s example of issuing a large number of Additional Insured Endorsement forms. Their standard document, which is commonly used with the CCDC construction contract and which was last updated in 2005, is IBC form 2320 which provides:

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<sup>5</sup> *Ibid.* at 218.

<sup>6</sup> For a review of the changing forms and the litigation see *Molander*, *supra*.

In consideration of an additional premium of \$\_\_\_\_\_ each of the [persons or entities described on this AIE form] is to be included as an Additional Insured but only with respect to liability arising out of or attributable to the work of the Named Insured shown above, as described below.

The phrase “arising out of” parallels the ISO’s standard form AIEs and may be very broadly interpreted. However, the use of the words “attributable to the work of” are not found in the ISO forms and the meaning of this phrase will be uncertain until it is interpreted by Canadian courts.

### 3. THE CONTROVERSIES AND THE CASE LAW

Rather surprisingly, litigation in Canada over Additional Insured endorsements is sparse. As indicated earlier, the controversies arise out of the specific language found in the endorsement and hence general principles of AIE interpretation remain elusive.

#### 3.1 Additional Insureds and Policy Exclusions

In *Stolberg v. Pearl Assurance Co.* [1971] S.C.R. 1026, three construction companies were the Named Insured under a CGL policy and the president of the companies was added to coverage by way of a separate endorsement which read:

“It is hereby understood and agreed that the name of the Insured on the Policy to which this endorsement is attached is as follows and ceases to read as heretofore written.

“Stolberg Mill Construction Ltd. and/or Stolberg Construction (1957) Ltd. and/or Stolberg Installation Ltd. and/or John Stolberg as their interests may appear”

It is further understood and agreed that this said policy shall cover John Stolberg only with respect to liability arising out of the operations of Stolberg Mill Construction Ltd. and/or Stolberg Construction (1957) Ltd. and/or Stolberg Installation Ltd.”

(emphasis added)

One of the employees of the corporate insureds was killed during a building collapse. The insurer denied coverage to all insureds on the basis of the policy exclusion respecting bodily injury “sustained by any employee of the Insured while engaged in his duties as such”. Judgment was ultimately granted against John Stolberg who had been personally sued and he brought action to enforce coverage under the CGL policy.

The Supreme Court of Canada held that the exclusion did not apply to the coverage afforded to Mr. Stolberg. The exclusion was to be interpreted as excluding coverage only for the actual employer of the employee plaintiff. Since Mr. Stolberg was not the employer, the exclusion had no application and he was entitled to coverage under the policy.

The case stands for the proposition that the policy terms and conditions do have application to Additional Insureds but, as with any multiple insureds scenario, the particular application of any given exclusion will depend upon the language of same.

Contrast the *Stolberg* case with the outcome in another Supreme Court of Canada decision considering an Additional Insured endorsement, *Foundation of Canada Engineering Corp. v. Canadian Indemnity Co.* [1978] 1 S.C.R. 84. There, the insured Fenco was added to the CGL policy by way of an endorsement which provided “but only with respect to the construction, erection and installation of [a specified plant]”. Fenco was in charge of the structural engineering for the plant and, during its construction, acted as construction manager. When it was subsequently sued following the collapse of the building, it turned to the CGL insurer for indemnity but coverage was denied based on the exclusions which excluded claims for,

“ . . . damage to or destruction of . . . a work done by or for the Insured, where the cause of the occurrences defect in such products or work . . . ,  
 . . . third party liability assumed by the Insured under contract for construction or demolition operations.”

The Court affirmed the denial of coverage holding that both exclusions clearly applied to the Additional Insured in the circumstances of the case.

### **3.2 Coverage for Claims Between the Named Insured and the Additional Insured**

Sometimes the Additional Insured misunderstands the nature of coverage bestowed by an Additional Insured endorsement. Sometimes too the insurer misunderstands the separate nature of the coverage provided to the Additional Insured for certain claims.

An example of the confused Additional Insured is found in *Steinberg Inc. v. Foodesign Corp.* [1988] O.J. No. 1909 (H.C.J.). The Plaintiff Steinberg retained the Defendant Foodesign to design and install a meat processing system in the Plaintiff’s plant. The various written agreements between the parties required Foodesign to obtain liability insurance with a minimum coverage of \$1 million. The latter did in fact secure a liability package which combined a form of CGL, products liability and professional liability coverage. An endorsement was attached to the policy which provided, “it is hereby understood and agreed that [Steinberg] is added as an Additional Insured as respects the operations and activities of the Insured”.

Foodesign eventually abandoned the project and, along with various other defendants, was sued by Steinberg. The action was not defended and Foodesign was noted in default.

Steinberg also directly sued the insurer in the same action. It argued that its status as an independent Additional Insured entitled it to directly recover from the insurer the losses occasioned by the Named Insured, Foodesign.

The Court ruled that the policy only conferred coverage in respect of third party liability and did not confer upon the Additional Insured any entitlement to directly recover from the insurer losses occasioned by other persons insured under the policy. Rather, in order for such direct recourse to be available, the Additional Insured would have to first obtain judgment against the Defendant co-insured and thereafter proceed against the insurer.

An alternative ground for denying coverage, which the Court also upheld, was voiding the policy for non-disclosure of material facts. The Court held that both Foodesign as Named Insured and Steinberg as Additional Insured were well aware before policy renewal of the fundamental inadequacies and serious shortcomings with the Foodesign system and should have disclosed this circumstance to the insurers upon the renewal. Failure to do so disentitled the Additional Insured to any cause of action against the insurer. In these circumstances, it was not necessary for the Court to address a possibly more interesting question, namely, whether any misrepresentations by the Named Insured at policy inception would void the contract *vis-à-vis* an innocent Additional Insured in light of any “separation of insureds” clause in the policy.

A “separation of insureds” or “cross liability” clause was the focus of attention in a case involving litigation between the Named Insured and Additional Insured, *ING Insurance Co. of Canada v. Sportsco International LP* (2004) 12 C.C.L.I. (4th) 86 (Ont. S.C.J.). Sportsco was the owner/operator of the Toronto Skydome. The retractable roof malfunctioned resulting in the postponement of a regularly scheduled major league baseball game between the Toronto Bluejays and the Kansas City Royals. The Jays sued Sportsco alleging a significant loss of revenue arising from the inability to use the facility. Sportsco referred the resulting lawsuit to its CGL insurer, but coverage was denied.

The Bluejays had been added to the policy by way of an Additional Insured endorsement which used the following common language:

“It is understood and agreed that [the Bluejays] are hereby included as Additional Insureds but only with respect to the operations of the Named Insured as stated in the declarations of this policy”.

In denying coverage the insurer invoked the “owned property” exclusion which excluded coverage for “property damage . . . to property owned or occupied by or rented to or loaned to any Insured . . .”.

The Court noted the cross liability clause in the policy which provided,

“15. Cross Liability:

The insurance afforded by this policy shall apply in respect to any claim or action brought against any one Insured by any other Insured. The coverage shall apply in the same manner and extent as though a separate policy had been issued to each Insured. Any breach of a condition of this policy by any Insured shall not affect the protection given by this policy to any other Insured. The inclusion herein of

more than one Insured shall not operate to increase the limit of liability under this Policy.”

The Court ruled that the cross liability clause was “clearly designed to modify the [owned property] exclusion”. This was not a first party claim masquerading as a third party liability claim. Rather, the losses sustained by the Bluejays were entirely different than those suffered by the stadium owners and hence the exclusion had no application.

### 3.3 How Broad is the Coverage for the Additional Insured

It is occasionally argued that by linking coverage under an Additional Insured endorsement to the operations of the Named Insured, coverage is intended to be restricted to the vicarious liability of the Additional Insured for the acts of the Named Insured. The case law demonstrates that coverage for Additional Insureds is much broader.

In *Mercer v. Paradise* [1991] N.J. No. 126 (Nfld. S.C.T.D.) the Plaintiffs sued because of interference with their private residential water supply arising from the installation of a municipal water services project. They sued the municipality which owned the project, the general contractor who carried out the works, and the consultant, Delcan, retained by the municipality to design the project and oversee the construction.

The construction contract between the municipality and general contractor was based on the CCDC document and contained insurance provisions similar to those set out on page 4 of this paper. The contract required the insurance to be in the joint names of the Contractor and the Owner but to also “cover as Unnamed Insureds all subcontractors and engineering consultants”. The specified CGL coverage was to also include a cross liability clause and, indeed, such a clause was incorporated into the policy by way of an endorsement.

The CGL policy issued to the contractor did not actually name Delcan as an Additional Insured, whether by way of general language or a specific endorsement. However, the broker had issued a Certificate of Insurance respecting the project expressly certifying to the municipality that the required CGL insurance had been obtained and also expressly indicating that Delcan had been added to the policy as an Additional Insured. The Court commented,

“To their credit, in this proceeding the [insurers] agree in argument that the effect of the Certificate, with its reference to the addition of Delcan, is that Delcan was added as an Unnamed Insured under the general liability cover in the policy.”

The insurer argued that it was never contemplated the CGL policy would provide protection to Delcan other than for vicarious liability arising out of the activities of the general contractor in carrying out the construction contract. In support of the argument, the insurer cited published literature discussing the insurance provisions of the CCDC contract which suggested that the purpose of the clause is to cover vicarious liability only and that “it was not the intent of the contractual provisions that the owner or contractor (and the engineer or architect for example) have the benefit of the policy for liability arising out of their own activities.”

The Court ruled,

- There was nothing in the language of the contract's insurance provision which expresses any such limitation;
- Indeed, the provision envisaged very broad coverages of a sort that would not necessarily involve vicarious liability;
- If coverage was to have been limited to vicarious liability only, such a limitation could have been easily and clearly added;
- It is difficult to see how the acts of the general contractor could, even in principle, make Delcan vicariously liable and hence, restricting coverage to vicarious liability claims would effectively eliminate any meaningful coverage for Delcan; and
- The combination of the certificate and the policy expressly created Delcan an insured within the total scope of the policy and there was nothing in the wording which limited the indemnity obligation to vicarious liability arising from the misdeeds of the Named Insured.

The Court in *Mercer* then went on to consider whether any of the exclusions in the policy applied, so as to eliminate any duty to defend on the part of the insurer. It concluded that the claims were mostly covered, that the duty to defend had indeed arisen, and that Delcan was therefore entitled to recover its costs of defending the underlying tort proceeding. What is interesting, however, is that Court's treatment of the policy exclusion respecting property damage arising out of "use of explosives for blasting . . . vibration . . . removal or weakening of support". The construction contract between the municipality and the general contractor expressly required that the CGL insurance include coverage for "shoring, blasting, excavating . . ." and the Certificate of Insurance issued by the broker purported to certify that such coverage had in fact been obtained. In these circumstances, the Court observed that the Plaintiff's property damage claims arising from the blasting activities was indeed covered by the policy regardless of the exclusion.

The court also found in favour of the insured in the B.C. Supreme Court decision *Cowichan Valley School District No. 79 v. Lloyd's Underwriters*, 2003 BCSC 1303. In this case, the school district owned a baseball field which it allowed a sports club to use for one of its tournaments, pursuant to a certain "Use Agreement". A condition of the Use Agreement was that the club had to obtain third party liability coverage although interestingly enough, the Agreement did not expressly specify that the district was also to be insured under that coverage. The club did in fact obtain liability coverage from Lloyd's and the district was added to the policy under an Additional Insured clause which stated:

It is understood and agreed that the following are added as Additional Insureds, but only with respect to liability arising out of the operations of the Named Insured for the coverage term indicated.

Cowichan Valley School District No. 79.

During the course of the baseball tournament, one of the players broke his ankle and sued the district. In denying coverage, Lloyd's argued that the claims against the district did not "arise out of" the operations of the club, as required by the policy's language, but instead were founded upon the district's entirely independent occupier's liability obligations as the owner of the field. Lloyd's argued the district owed the same duty of care to any casual, uninvited user of the field regardless of whether any tournament was being held. Hence, so the argument went, coverage was not triggered in the circumstances.

The Court rejected Lloyd's argument. It ruled that the allegations against the district were not sufficiently "separate and distinct" from the operation of the tournament to avoid coverage. Rather, there was a "clear nexus" between the tournament, the alleged negligence and the alleged injury. The claims therefore "arose out of" the operations of the sports club as host of the tournament, "the very operations that Lloyd's agreed to insure". As a result, coverage was enforced against Lloyd's and the insurer was required to reimburse the district for its defence costs incurred to date.

Yet another case that recently focused on the phrase "arising out of" was the Ontario decision *Lacombe v. Don Phillips Heating Limited and Francis Fuels Ltd.*, 2005 CarswellOnt 4386 (Ont. Master). In the case, the Lacombes hired Francis Fuels to replace their oil furnace, and Francis subcontracted this work to Don Phillips. The service contract required the subcontractor, Phillips, to obtain at least \$1 million CGL insurance with Completed Operations coverage including all liabilities assumed by the subcontractor under the Agreement. The subcontractor obtained and forwarded to Francis a "general liability insurance certificate" which read, "This is to certify that the Assured set forth below [Francis] is insured by insurance companies as noted below, which insurance is described as follows." The Certificate then stated the policy number, the amount of liability coverage, the fact that this liability coverage was provided to Don Phillips, and under the heading "Extensions to Policy" it stated "The policy must include: Francis Fuels Ltd. as an additional Named Insured". Francis was never provided a full copy of the CGL policy itself.

The installation of the new furnace proved problematic, an oil spill occurred and Francis found itself sued by its customer for the resulting property damage and cleanup costs. Francis sought coverage under the CGL insurance obtained by its subcontractor. Francis had in fact been added to the policy by virtue of an Additional Insured endorsement extending cover "solely with regard to liability arising out of the operations of the Named Insured [Phillips]". The insurer denied coverage on the basis that the loss arose out of independent operations of Francis, namely failing to inspect following installation of the furnace.

The Court observed,

"The term "arising out of" has a broader significance than "caused by". In *Amos v. I.C.B.C.* [1995] 3 S.C.R. 405 (S.C.C.), at para. 21, the Supreme Court of Canada held that the words "arising out of" have been said to mean "originating from", "having its origin in", "growing out of", "flowing from", "incident to", or

“having connection with”. So long as Francis’ liability has any connection to the actions of Phillips coverage will be available.” (emphasis added)

In order to avoid coverage, the Court held that the insurer had to “draw a clear line between the actions of the [Named Insured] and the [Additional Insured]”, which had not been done. There was no claim against the [Additional Insured] that was completely independent of the actions of the Named Insured. Hence, coverage was available to the Additional Insured in the circumstances.

Another very interesting aspect of the *Lacombe* case is the enforcement of the so-called “anti-subrogation rule” which arguably prevents a property insurer from subrogating against a party insured by the same insurer under a completely separate liability policy. In this particular case, Aviva was the property insurer of the homeowners, had paid the oil spill cleanup/repair costs and was purporting to subrogate against the head contractor, Francis. Aviva, it turns out, was also the CGL insurer of the subcontractor, Phillips, and hence the CGL insurer (subject to their denial of coverage) of Francis by virtue of the Additional Insured endorsement on the policy. In defence of the subrogated claim, Francis invoked the U.S. case law enforcing the anti-subrogation rule referred to above. The Court agreed that the anti-subrogation rule applied in the circumstances and dismissed the insurer’s subrogated claim.

It is clear from the above case law that, generally speaking, coverage under an Additional Insured endorsement extends far beyond mere vicarious liability of the Additional Insured for the conduct of the Named Insured. The common phrase, “only with respect to liability arising out of the operations of the Named Insured” will extend cover to the Additional Insured so long as the latter’s alleged liability has any connection to the actions of the Named Insured. Indeed, claims as between the two insureds, whether for contribution, indemnity or otherwise, may also be covered under the endorsement and the very existence of the endorsement might provide a complete defence to such claims based on the so-called “anti-subrogation rule”.

#### **4. FAILURE TO OBTAIN THE ADDITIONAL INSURED ENDORSEMENT**

There are three scenarios here, namely:

- The contract between the parties requires one to obtain CGL insurance for the benefit of the other and the former simply fails to do so;
- The broker issues a Certificate of Insurance indicating the Additional Insured has been added to coverage but actually fails to secure such an endorsement from the insurer; and
- An Additional Insured Endorsement is indeed obtained from the insurer but it contains limitations on coverage which were not contemplated by the contract.

There will be widely varying degrees of diligence exercised by the parties to the contract. Some putative Additional Insureds will not follow up in any way to see that the required coverage has been obtained. Others may request a certificate from the other party’s broker but not bother

obtaining either the policy or the Additional Insured Endorsement supposed to be attached to same. Experience tells us few people ever read insurance policies or endorsements until a claim actually materializes.

There are no Canadian cases dealing with a Named Insured who failed to obtain an Additional Insured Endorsement; it is thus necessary to turn to US case law to examine this issue. In *Borough of Wilkinsburg v. Trumbull-Denton Joint Venture*, 568 A.2d 1325 (Pa. Super. Ct. 1990), Borough and the general contractor had entered into a contract requiring the general contractor to add Borough as an Additional Insured on the general contractor's insurance policy. After a law suit was brought against Borough, it was discovered that the general contractor had failed to name Borough as an Additional Insured. Borough looked to its own insurer, the one with which it had a policy as a Named Insured, for a defence and that insurer later brought an action against the general contractor for reimbursement. The Court held that a breach of the contract between Borough and the general contractor had occurred and the general contractor was liable for the entire amount that was awarded against Borough in the lawsuit against it. The Court did not inquire into whether Borough would have been entitled to coverage had the general contractor named Borough as an Additional Insured. This may have been because the possibilities for coverage are endless as a result of the availability of several different standard form AIEs and the option of adopting custom wording.

In *PPG Industries v. Continental Heller Corp.*, 603 P.2d 108 (Ariz. Ct. App. 1979), PPG failed to meet its contractual requirement to name the other party, Continental, as an Additional Insured. A PPG employee was injured and sued Continental, which is when PPG's failure to add Continental as an Additional Insured came to light. Continental's own CGL insurer defended the claim, paid the judgment that was awarded against Continental, and then filed a subrogation claim against PPG for its failure to add Continental as an Additional Insured. PPG attempted to avoid liability in the subrogation claim. It argued that Continental did not suffer a loss as a result of PPG's failure to meet its contractual requirement, because Continental's insurer paid the award against Continental. The Court rejected this argument, stating that PPG could not be relieved of its unquestionable liability for failing to add Continental as an Additional Insured merely because Continental had taken the precaution of obtaining excess insurance coverage. In the end, PPG was required to pay to Continental's insurer the amount of the judgment it had paid in the claim against Continental.

Where a Named Insured breaches a contract by failing to add another party as an Additional Insured to the Named Insured's insurance policy, the Named Insured can expect to pay any judgment that is made against the person or organisation who should have been named as an Additional Insured that would have otherwise been covered by the Named Insured's insurance policy. This result is likely to be the case unless it is clear that the insurance coverage that the Additional Insured was to have received would not have covered the claim in question, and that fact can only be clear if the contract specifies the scope of coverage that the Named Insured must obtain for the Additional Insured.

In cases where a Certificate of Insurance is issued indicating the existence of coverage for the Additional Insured but where no endorsement is actually issued by the insurer, the outcome is

more problematic. The question is whether the insurer is somehow bound to extend coverage as a result of the Certificate or whether it can simply take an off-coverage position due to the fact that the Additional Insured is not named under its policy.

The liability of the insurer will likely be determined by the law respecting agency, authority of the broker to bind coverage, and the tort of misrepresentation. Some writers suggest that a Certificate of Insurance by itself cannot alter the terms of the insurance policy<sup>7</sup>

However, it will be recalled that in *Mercer v. Paradise*, supra, the insurer did not contest that the Certificate of Insurance was sufficient to add the Additional Insurance to coverage notwithstanding the absence of an express endorsement to the policy. The Court observed in *obiter*,

“If in the absence of the admission by the [insurer] that Delcan is an insured for the purposes of the policy, it were held that the certificate did not in law have the effect of adding Delcan as an insured, or if it were held that the policy excluded coverage with respect to [a risk required to be insured pursuant to the contract and suggested as covered in the Certificate], the position of the [insurers] with respect to Delcan’s claim against them in these proceedings might well fall to be considered not on the basis of the contractual relationship between Delcan and [the insurer] under the policy, but on principles of tort arising from arguable representations made by the [insurer] through causing this Certificate to be issued [by the broker] in the first place . . . it is certainly arguable that in issuing the Certificate, the insurer, through its agent [the broker], and [the broker] itself, were liable to third parties other than the [project owner], including particularly Delcan, to whose attention the Certificate and the policy would certainly be intended to come. . . . It is also significant that the [insurer] expressly acknowledged that they did not allege any contributory negligence on Delcan’s part in failing to request clarification of coverage, or in failing to protest the contents of the policy and the Certificate.”

A similar approach has been adopted in the U.S.A. where in one case it was held that when an insurance agent has issued a Certificate of Insurance stating that a person or organisation is an Additional Insured, but no AIE has been issued and there is no automatic Additional Insured clause in the policy, the insurer was prevented from denying coverage to the Additional Insured because the Additional Insured has reasonably relied on the certificate as evidence that it was insured under the policy (*Marlin v. Wetzel County Board of Education*, 569 S.E.2d 462 (Sup. Ct. of App. of W. Va. 2002)).

Similar considerations arise when an Additional Insured endorsement has actually been issued by the insurer but on terms which extend coverage less broadly than required by the contract between the Named Insured and the Additional Insured. If a Certificate is involved, then possibly the misrepresentation/estoppel arguments suggested above might apply to prevent the

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<sup>7</sup> Molander, *Op. Cit.*, at 217. See also, Lisa Shreiber, “*Additional Insured Coverage*” (2004) 6 J. Defense Assn. 14 at 14.

insurer from denying coverage for a type of liability of the Additional Insured which would otherwise be excluded by the narrow terms of the endorsement or the policy exclusions. If this argument does not avail, and if the liability in question is one for which the Named Insured was supposed to have obtained coverage pursuant to the contract between the parties, then the Additional Insured will have its remedies in contract against the Named Insured.

## 5. OVERLAPPING COVERAGE AND PRIORITY CONTESTS

It is interesting that none of the cases discussed above refer to overlapping coverage issues. Almost invariably any Additional Insured under another party's policy will have their own CGL coverage in respect of which they are the Named Insured. Hence, assuming the additional insurance coverage has actually been put in place, there will be a situation of overlapping coverage as between that afforded by the Additional Insured Endorsement and that afforded by the party's own CGL policy. The question then arises whether the policies provide primary, contributory or solely excess coverage for the insured in the circumstances.

A detailed discussion of the principles respecting overlapping coverage is beyond the scope of this paper<sup>8</sup>. Almost invariably liability policies will contain "Other Insurance" clauses which purport to address how overlapping coverage for the Insured will be resolved.

The leading case in Canada on this issue respecting competing liability policies is *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48. In that case, the SCC stated that the extent of coverage provided by each policy depends on the wording of the "other insurance" clauses in the policies. If,

- the "other insurance" clauses can be reconciled and enforced in a commercially sensible fashion, then those "other insurance" clauses will be applied to determine the contribution under each of the policies; however,
- if the "other insurance" clauses cannot be reconciled, for instance if both "other insurance" clauses state that the policy provides only excess coverage, then each of the policies will be required to contribute equally up to the exhaustion of each respective policy limit.

The standard form CGL policy issued by the Insurance Bureau of Canada was revised in March 2005<sup>9</sup> and contains a new subparagraph in the "Other Insurance" clause of the policy which provides as follows:

"This insurance is excess over:

- (2) any other primary insurance available to you covering liability for "compensatory damages" arising out of the premises or operations or

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<sup>8</sup> For an excellent review of the law in this area see Neo Tuytel, "Who's on the Risk (and For How Much?): Allocating and Apportioning Indemnity and Defence Costs Among Insurers in Canada", 2004, [www.cwilson.com/pubs/insurance/njt2/execsum.pdf](http://www.cwilson.com/pubs/insurance/njt2/execsum.pdf).

<sup>9</sup> IBC Form 2100, 03-2005 (r)

products-completed operations for which you have been added as an Additional Insured by attachment of an Endorsement.”

If the two policies available to the Additional Insured contain the same provision, then coverage under the AIE will likely be primary. If, however, the “Other Insurance” clauses in the respective policies differ, then the question of priority will be determined by the general principles referred to above. The point, however, is that just because an Insured is covered by virtue of an Additional Insured Endorsement obtained by another party for a specific project or undertaking, it does not necessarily mean that the latter insurance provides primary coverage for any liability claim that may ensue. In each case, there will have to be a careful analysis of the overlapping coverage issues to determine whether any given policy is primary, contributory or excess in any given situation.

## **6. CONCLUSION: ENSURING REALITY MEETS EXPECTATIONS**

Covenants in commercial contracts to obtain liability insurance for other parties gives rise to a complicated coverage matrix involving the contracting parties, their brokers and underwriters. In most cases, in the event of a liability claim emerging of a sort contemplated by the covenant to insure, disputes between some or all of the players are inevitable. And this is so, whether or not the contracting parties have been diligent in ensuring that the coverage arrangements contemplated by their contract have actually been put in place.

Even if the insurance obligations have been complied with to the letter, there will still be priority disputes as between insurers providing overlapping coverage. Matters will be considerably complicated when oversights or errors occur in respect of the placement or securing of the coverages contemplated by the contract and claims for breach of contract and/or professional negligence on the part of brokers are the likely result. Ensuring that the coverage reality meets expectations is no guarantee litigation will be avoided. Failing to attempt same is a guarantee that litigation will ensue.

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