THE ADDITIONAL INSURED: DEFENCE, INDEMNITY AND HOLD HARMLESS – THE DEAFENING SILENCE

THE BIFURCATION

The Agreement: indemnity, hold harmless and policy of insurance.

Servicing Agreement Sample

OWNER INDEMNIFIES MUNICIPALITY

18. The "Owner" covenants and agrees to save harmless and effectually indemnify the "Municipality" against:

a) all actions and proceedings, costs, damages, expenses, claims and demands whatsoever and by whomsoever brought by reason of the construction, installation, maintenance or repair of the "Works";

b) all expenses and costs which may be incurred by reason of the construction, installation, maintenance or repair of the "Works" resulting in damage to any property owned in whole or in part by the "Municipality" or which the "Municipality" by duty or custom is obliged, directly or indirectly, in any way or to any degree, to construct, install, maintain or repair; and

c) all expenses and costs which may be incurred by reason of liens for non-payment of labour or materials, Worker's Compensation, Unemployment Insurance, Federal or Provincial tax, check-off or encroachments owing to mistakes in survey.

d) all expenses and costs which may be incurred by the "Municipality" as a result of faulty workmanship and defective material in any of the works installed by the "Owner".

The above clauses shall not be construed as to extinguish any rights which the "Municipality" would have were it not for the inclusion of Clause 18 in this Agreement.

INSURANCE BY OWNER

19. The "Owner" will at his sole expense throughout the currency of this Servicing Agreement carry Comprehensive Liability Insurance acceptable to the "Municipality" in the amount of at least three million dollars ($3,000,000.00) with insurance companies licenced to carry on business in the Province of British Columbia in partial discharge of its obligation under Clauses 18(a), (b), (c) and (d).

INSURANCE COVERAGE

20. The "Owner" covenants and agrees to provide the following insurance coverage, and to provide the "Municipality" with a copy of the insurance policy prior to the commencement of any construction of the works:

a) To protect the "Owner" and the "Municipality" against all claims arising out of:

i. Death or injury to persons; and

ii. Damage to, or loss of use of, any property of third persons, including without limiting the foregoing; the following classes of property: Real property, chattels, land, works, buildings, structures, wires, conduits, pipes, mains, shafts, sewers, tunnels, and apparatus in connection therewith, even when the damage or loss of use is caused by vibration, moving, shoring, underpinning, raising, rebuilding or demolition of any building, structure or support, or by excavation, tunneling or other work below the surface of the ground or water; and

iii. Damage to or loss of any Municipal buildings, structures, stores, equipment and materials included in or required for the carrying out of the "Works".

b) Every policy of insurance required will:

i. Name
, an additional insured; and

ii. State that the policy applies to each insured in the same manner and to the same extent as if a separate policy had been issued to each insured; and

iii. State that the policy cannot be cancelled, lapsed or materially changed without at least thirty (30) days written notice to the Municipality, delivered to
Clerk.

MARSH

Certificate of Insurance

No. 2009-23-REV-1 Dated: April 04, 2011

This document supersedes any certificate previously issued under this number

This is to certify that the Policy(ies) of insurance listed below ("Policy" or "Policies") have been issued to the Named Insured identified below for the policy period(s) indicated. This certificate is issued as a matter of information only and confers no rights upon the Certificate Holder named below other than those provided by the Policy(ies).

Notwithstanding any requirement, term or condition of any contract or any other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the Policy(ies) is subject to all the terms, conditions and exclusions of such Policy(ies). This certificate does not amend, extend or alter the coverage afforded by the Policy(ies). Limits shown are intended to address contractual obligations of the Named Insured.

Limits may have been reduced since Policy effective date(s) as a result of a claim or claims.

Certificate Holder:	Named Insured and Address:
Engineering Division	

This certificate is issued regarding:
Evidence of Insurance for the
Highways Use Permit

Type(s) of Insurance	Insurer(s)	Policy Number(s)	Effective/ Expiry Dates	Sums Insured Or Limits of Liability	
WRAP-UP LIABILITY • 24 Months Completed Operations • Broad Form Property Damage • Cross Liability • Non-Owned Automobile Liability • Products / Completed Operations	Lloyd's Underwriters	DR405309	Apr 09, 2009 to Nov 30, 2014	Per Occurrence Aggregate - Completed Operations Hazard	CDN 5,000,000 CDN 5,000,000

Additional Information:
It is hereby agreed and understood that the _____ is added to the Wrap-Up Liability Policy as Additional Insured, but only with respect to Liability arising out of the operations of the Named Insureds with respect to the above noted project.

Notice of cancellation:
The insurer(s) affording coverage under the policies described herein will not notify the certificate holder named herein of the cancellation of such coverage.

Marsh Canada Limited
800 - 550 Burrard Street
Vancouver, BC V6C 2K1
Telephone: -
Fax: -
mark.venier@marsh.com

Marsh Canada Limited

By: Mark Venier

Mark Venier

COVERAGE UNDER AN ADDITIONAL INSURED ENDORSEMENT

Additional insured endorsements are usually limited to "liability arising out of the named insured's operations/activities".

The determination of whether or not liability could be said to "arise out of" the "operations" or "activities" of the named insured is often the sole issue for the Court when it is attempting to determine whether a duty to defend is triggered.

WHEN THE INSURER MUST DEFEND

The test to establish a duty to defend is whether the allegations in the pleadings, if true, would require the insurer to indemnify the insured.

- The Court is not limited to the pleadings and will consider the true nature of the claim by reviewing the underlining agreement to insure. The agreement can be considered on the basis that it has been held to disclose the insuring intent.

Despite agreement on the test, Courts continue to come to different conclusions on the outcome depending on how liberal or narrow their interpretation of the contract.

Most of the case law is centered around coverage contests in the context of a "duty to defend" under a CGL policy.

A RECENT EXAMPLE

Zhou v Markham (Town), 2014 ONSC 435

- Slip and fall on a sidewalk.
- City hired a contractor to provide winter maintenance.
- There were three issues: 1. duty to defend; 2. separate counsel; and 3. past legal fees.
- HELD: the insurer was required to defend the City.
- The plaintiff claimed that his injuries were caused by the negligence of both the City and the contractor in failing to keep the sidewalk free of ice and snow.
- The particulars of negligence alleged against the City and the contractor were identical.

LIBERAL INTERPRETATION

Cowichan Valley School District No. 79 v Lloyd's Underwriters, Lloyd's, London, 2003 BCSC 1303

- **Appollo's Hockey Club used the District's field for a baseball tournament.**
- **Player broke his ankle and sued the Club and District for failure to warn of hazards/failure to maintain the field.**
- **HELD: The claims fell within the policy coverage.**
- **The injury would not have occurred if not for the club's decision to have the tournament.**
- **The claims against the District were not separate and distinct from the allegations against the club.**
- **"But for" test applied: Plaintiff would not have broken his ankle "but for" the insured's decision to put on the tournament.**

LIBERAL INTERPRETATION

Williams (Litigation guardian of) v B.C. Conference of the Mennonite Brethren Churches, 2010 BCSC 791

- **Rock concert held at a church.**
- **Floor collapsed and concertgoers were injured.**
- **There were allegations of negligent design and construction of the church building which would have preceded the concert.**
- **HELD: there was a duty to defend.**
- **Had the promoter not put on the concert, then no injuries would have occurred. Thus, the potential liability arose out of the operations of the insured.**
- **Certificate vs. Endorsement**

NARROW INTERPRETATION

Waterloo (City) v Economical Mutual Insurance Co, [2006] OJ No 5252

- City granted a permit to K-W Oktoberfest to conduct a parade.
- People were injured by a train crossing near where they were watching the parade.
- The claim alleged that the City negligently permitted the scheduling of the K-W Oktoberfest parade at the same time and place as the scheduled crossing of King Street North by the train and negligently permitted K-W Oktoberfest to operate the parade without taking reasonable or adequate steps to protect the crowds.
- HELD: no duty to defend.
- Liability didn't arise out of the operations of K-W Oktoberfest. The K-W Oktoberfest parade was merely the site or occasion of the accident with the train.

NARROW INTERPRETATION

***Kinnear v Canadian Recreational Excellence (Vernon) Corp*, 2012 BCCA 291**

- **Vernon Vipers Hockey Club hosted games at a recreation facility.**
- **Attendee at a hockey game fell while leaving the property through an area he alleged was unsafe.**
- **HELD: no duty to defend the property owners.**
- **"arising out of the Named Insured's operations" imposes a causal requirement greater than a simple "but for" test. The phrase "arising out of" is to be construed as requiring an unbroken chain of causation and a connection that was more than merely incidental or fortuitous.**
- **The most that the pleadings alleged was that the Club's operations caused him to be in a place where, for unrelated reasons, he became injured.**

THE MEANING OF "OPERATIONS"

Kinnear v Canadian Recreational Excellence (Vernon) Corp, 2012 BCCA 291

- **The term "operations" is a word of sufficiently broad meaning to include the creation of a situation, or circumstance, that is connected in some way to the alleged liability. It does not necessarily imply an active role by the named insured in creation of the liability event. Operations can include the occupation and use of premises or other "passive" conduct that might not be included within the meaning of the word "activities".**

COVERAGE FOR OWN NEGLIGENCE

Tinkess v NM Davis Corp, [2007] O.J. No. 1026

- Slip and fall on a walkway leading to a parking lot.
- Parking lot operator hired a snow removal contractor.
- HELD: the contractor was not required to indemnify or defend the parking lot operator against claims relating to the operator's own negligence.
- Since the contractor was only required to remove ice and snow from the walkway when requested by the parking lot operator, there was room for the factual possibility that no such request was made or the fall occurred in the two hour response time permitted by the contract.
- If one is to be protected against or indemnified for one's own negligence, there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms.
- (Analysis confined to agreement: no mention of the pleadings.)

MIXED CLAIMS

Atlific Hotels & Resorts Ltd v Aviva Insurance Co of Canada (2009), 97 O.R. (3d) 233

- Slip and fall on a snowy or icy path.
- Hotel owners hired a contractor for snow removal.
- HELD: the insurer had to defend the complaint of negligent snow removal but not the entire action.
- No duty to defend claims in negligence against the hotel for its manner of operating a hotel, including inadequate lighting, lack of non-slip matting and failure to organize activities in order that guests were not obliged to navigate snowy or icy paths.
- In cases with mixed claims, where the plaintiff advances both covered and non-covered claims, the insurer is obliged to defend only those claims that potentially fall within coverage.

"TRUE NATURE"

RioCan Real Estate Investment Trust v Lombard General Insurance Co, [2008] OJ No 1449

- Slip and falls in mall parking lots as a result of snow/ice.
- RioCan hired a contractor to provide winter maintenance.
- The plaintiff pled multiple theories of negligence/occupier's liability.
- HELD: there was a duty to defend the entire claim.
- The true nature of the claim was that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries.

"TRUE NATURE"

Saanich (District) v Aviva Insurance Co of Canada, 2011 BCCA 391

- District rented part of a recreation centre to a lacrosse association.
- Plaintiff in the main action was hit with a lacrosse ball.
- HELD: the true nature of the claim was bodily injury arising from the lacrosse activities.
- Although the particulars of the negligence alleged with respect to Saanich were not identical to those concerning the lacrosse defendants, they were inextricably linked.
- Identical particulars of negligence are not a necessary prerequisite to establish the duty to defend so long as the potential liability arises out of the activities of the named insured.

"SAVE HARMLESS"

Demets v Brant (County), 2014 ONSC 686

- County hired a contractor to complete paving and related work of one of its recreational trails.
- A bicyclist lost control of his bike after hitting a "wooden lip" placed by the contractor.
- HELD: duty to defend and to pay all reasonable legal costs of the County in having the contract enforced.
- An obligation to "save harmless" a party regarding certain claims means that that party "should never have to put his hand in his pocket" in respect of such a claim, so long as the legal costs are reasonable and in proportion to the work required.

FAILURE TO OBTAIN ADEQUATE INSURANCE

***Papapetrou v 1054422 Ontario Ltd*, 2011 ONSC 4731**

- **Building owners hired snow removal contractor.**
- **Slip and fall as a result of ice on the stairway.**
- **Contractor did not add the owners to the insurance policy.**
- **HELD: The contractor was ordered to assume the defence of the owners and to indemnify them for any damages awarded.**
- **The contractor could not escape responsibility to defend and indemnify because it failed to meet its contractual responsibility to insure the owners or to carry adequate insurance.**

CERTIFICATE PROVIDED BUT NO ENDORSEMENT

A certificate of insurance will usually state the certificate does not itself confer any rights. If no endorsement is issued, the additional insured named in the certificate may not be covered.

***Williams (Litigation guardian of) v B.C. Conference of the Mennonite Brethren Churches*, 2010 BCSC 791**

- **Certificate was issued but the insurer had not endorsed the promoter's policy to add the church and the bands as additional insureds.**
- **HELD: the church and bands were covered by the policy on the specific facts of the case.**
- **The broker had the implied authority to issue the certificates to the church and the rock bands, based on industry practice and the past dealings of the brokers and insurer.**

RECOMMENDATIONS

1. To ensure ongoing defence obligations, include in contract: indemnity, hold/save harmless, and "defend".

2. Look closely for disclaimers in Certificate.

3. Write broker and confirm Certificate will be accepted as evidence of additional insured status under the referenced policy.

4. As soon as there is a claim, notice of claim – write the broker and include a copy of the applicable Certificate and request that defence counsel be appointed and that this be confirmed within 10 business days. If no response, continue to write those letters, as they may find their way into an affidavit in support of an application for a declaration for a duty to defend.

5. If defence counsel is appointed, do you require independent counsel?