

BUSINESS INNOCENT COVERED PARTY ENDORSEMENT INFORMATION SHEET

Preface

This information sheet is not intended to be exhaustive or definitive. The BIC endorsement wording governs. The information provided is for your guidance only.

1. Introduction

The Business Innocent Covered Party Endorsement (the “BIC endorsement”) is optional coverage designed to protect members and firms against vicarious liability claims arising from a professional liability claim that has been denied due to the “business exclusion” in the compulsory professional liability policy (the “Policy”). As with the Policy, the BC Lawyers Indemnity Association (“BCLIA”) is the indemnitor of the endorsement.

The business exclusion, Exclusion 6.2, operates to exclude a claim by or in connection with any organization in which the indemnified member, their family or their law firm partners, associates or associate counsel had effective management or control or a greater than 10% ownership interest at the time of the error. Coverage is excluded for both the indemnified member *and* for any member and law firm vicariously liable for the indemnified member’s acts.

The BIC endorsement adds this language to Exclusion 6.2:

except that we will pay all sums **additional Covered Parties** become legally obligated to pay as **damages** because of any **vicarious liability claim** first made and reported to us in writing during the **BIC coverage period**.

Members and firms covered by the BIC endorsement must make reasonable and regular inquiries of those they supervise to inform themselves of circumstances that may trigger the application of the business exclusion. If the lawyer knows, or ought to have known with due diligence about those circumstances, there is no coverage under the BIC endorsement.

A member who is a partner, apparent partner, MDP partner, lawyer, director or shareholder who is covered under Part A of the Policy and may be vicariously liable for a lawyer at the same firm may apply for the BIC Endorsement. However, the firm must complete the application form and all members at the firm covered by the Policy must also apply for the coverage.

This information sheet is intended to provide you with more information about the BIC endorsement and the due diligence requirement. ***We strongly recommend that you review the due diligence information set out below and attached to your application when completing your application for the BIC endorsement.***

2. Coverage

- a) The BIC endorsement limits are the Part A limits, with a firm aggregate of \$2 million, inclusive of both defence costs and indemnity payments, and subject to a deductible of 10% of the total amount of any such costs or payments.

- b) Only one limit of coverage is available for each error giving rise to a claim, regardless of the number of lawyers in the firm.
- c) The BIC endorsement extends coverage to all members at the firm who are also indemnified by the Policy, including any who join the firm during the BIC endorsement term.
- d) There is no coverage for any errors occurring before January 1, 2002. Coverage is available for errors occurring after January 1, 2002, and only if the firm has BIC endorsement (or formerly BIC Policy) both at the time of the error **and** at the time the claim is reported. The coverage need not be continuous, provided these two requirements are met.
- e) BCLIA is at liberty to subrogate against the responsible lawyer for any payments made under the BIC endorsement. This is consistent with the Policy wording.
- f) There will be no surcharge or loss of part-time discount for any claims paid under the BIC endorsement.

3. Cost

- a) The annual premium is calculated on the basis of \$300 for each member at your firm — partners, associates, associate counsel — covered under Part A of the Policy.
- b) Although the BIC endorsement must be renewed annually, firms may purchase it during the year at a pro-rated cost (the premium is pro-rated over the BIC endorsement's remaining term).
- c) There is no additional premium for lawyers joining the firm during the BIC endorsement period, nor is there any refund for lawyers departing.
- d) Discovery period coverage will also be available, at a cost to be determined.

4. Reporting Requirements

- a) Notice of a claim or potential claim under Part A of the Policy may be given by the firm or by any member at the firm.
- b) Notice by a firm of a claim or potential claim under Part A of the Policy will be deemed to be notice on behalf of the firm under the BIC endorsement.

5. Due Diligence Information

The BIC endorsement provides coverage to those lawyers who had no knowledge of the circumstances giving rise to the application of the business exclusion under Part A of the Policy, and who exercised due diligence in making reasonable and regular inquiries that could have disclosed those circumstances.

Firms may implement whatever due diligence processes they choose. To assist firms, the Lawyers Indemnity Fund (“LIF”) has developed a protocol which, if implemented, BCLIA will accept as meeting the BIC endorsement due diligence requirements. The protocol is:

1. at the time of completing the application for the BIC endorsement, each member in the firm is asked and answers the questions set forth in the Applicant Lawyer Questionnaire;
2. the lawyer authorized to sign the application on behalf of the firm and other members reviews each lawyer's completed Applicant Lawyer Questionnaire and:
 - i. answers questions 4 and 5 of the application, based on the information provided in the Applicant Lawyer Questionnaires;
 - ii. communicates the details of any affirmative answers to questions 4 and 5 of the application to all other partners or apparent partners in the firm, and confirms for them that there will be no coverage under the BIC endorsement for any claims arising from those activities detailed;
3. new lawyers joining the firm during the BIC endorsement period are asked and answer the questions set forth in the Applicant Lawyer Questionnaire, and the details of any affirmative answers to the questions are communicated to all potentially vicariously liable members who are covered under Part A of the Policy, with confirmation that there will be no coverage under the BIC endorsement for any claims arising from those activities detailed;
4. if, after completing the Applicant Lawyer Questionnaire, a lawyer provides details in response to the follow-up requirement in the Applicant Lawyer Questionnaire, those details are communicated to all potentially vicariously liable members, with confirmation that there will be no coverage under the BIC endorsement for any claims arising from those activities detailed; and
5. steps 1 through 4 inclusive are repeated each time the firm applies for the BIC endorsement.

If a claim is made, LIF will investigate the process to determine whether the BIC endorsement's requirements were met. If you would like BCLIA's position on whether or not your firm's specific due diligence process will satisfy the BIC endorsement requirements, please provide, in writing, a detailed description of your process to Shelley Braun.

In answering the Applicant Lawyer Questionnaire, a lawyer may be unsure whether or not certain facts or circumstances fall within the business exclusion, and therefore require disclosure. Further guidance on the interpretation of the business exclusion is offered in Exclusion 6 Information Sheet. If you would like BCLIA's position on the application of Exclusion 6.2 to a particular set of circumstances, please provide, in writing, a detailed description of the circumstances to one of the advance ruling advisors, Shelley Braun, Surindar Nijjar, Michael Soltynski or Lamour Afonzo.

Please note that the BIC endorsement **does not** provide coverage for legal services triggering Exclusion 6.1 of the Policy, the “benefit exclusion”. If a member provides services that fall within the benefit exclusion, coverage under the Policy will be denied to that member or any other member vicariously liable for the claim. For more information on the benefit exclusion, review the information sheet on Exclusion 6.

6. Code of Professional Conduct for British Columbia (the “Code”) Obligations

Rules 3.4-26.1 to 3.4-43 of the *Code* contain the general principles that should guide a lawyer’s conduct in instances where the lawyer is invited to act both as legal advisor and in a business relationship. It is the responsibility of each lawyer to ensure that they are acting in accordance with their *Code* obligations, and nothing in the BIC application process or BIC endorsement is intended to nor will discharge a lawyer’s *Code* obligations. The disclosure of any activities in the application for the BIC endorsement that may offend the *Code* obligations does not constitute the sanctioning of such activities by The Law Society of British Columbia.

**Summary of Exclusion 6.2 of the
B.C. Lawyers' Compulsory Professional Liability Indemnification Policy (the "Policy")**

Preface

This summary of Exclusion 6.2 as it applies to Part A of the Policy is not intended to be exhaustive or definitive. The BIC endorsement wording governs. The information provided is for your guidance only as coverage for any given claim or potential claim can only be finally determined once all the facts are placed before the BCLIA. Please note that where coverage is stated as available, we assume that there are no facts or circumstances that would affect coverage for reasons other than the business exclusion. If you would like the BCLIA's position on the application of Exclusion 6.2 to a particular set of circumstances, please provide, in writing, a detailed description of the circumstances to one of our advance ruling advisors, Shelley Braun, Surindar Nijjar or Michael Soltynski.

All bolded words are defined in the Policy or the BIC endorsement:

Exclusion 6.2 of the Policy states:

“This Policy does not apply to:

6. a **claim**: . . .

6.2 by or in any way connected to any **organization** in which:

6.2.1 the **individual Covered Party**;

6.2.2 the **individual Covered Party's family**; or

6.2.3 the partners, associates or associate counsel of the **individual Covered Party** or of the **individual Covered Party's law firm**;

individually or collectively, directly or indirectly, had at the time of the **error** or thereafter, effective management or control of the **organization** or beneficial ownership of the **organization** in an amount greater than ten percent (10%), provided that with respect to any payment resulting from a **claim** that falls within Part B of this BIC endorsement, this Exclusion 6.2 applies only to exclude the **ineligible portion** of such payment.”

As a result, you will not have coverage for a claim that is by or in any way connected to¹ any *organization*² that is partially owned, indirectly or directly, or managed or controlled by you, your family or your colleagues, either alone or together.

¹ It is not necessary that the *organization* be the claimant. More often than not, it is a third party, such as an investor, financial institution or joint venture, who is advancing a claim against both the *organization* in which the lawyer has interest or control and the lawyer.

² Broadly defined in the Policy to mean “any business, business venture, joint venture, proprietorship, partnership, limited partnership, cooperative, society, syndicate, corporation, association or any legal or commercial entity”.

Whether you have “indirect” or “beneficial” ownership of an *organization* depends on the actual circumstances of ownership at the time the services were provided and the claim is advanced. Examples of indirect and beneficial ownership that would trigger the exclusion are:

- You and your spouse own all the shares of Holding Co, which owns 50% of the shares of ABC Co, which in turn owns 25% of the shares of DEF Co. Any claim arising from your provision of legal services to ABC Co or DEF Co would not be covered;
- You and your sister are the sole contingent beneficiaries of FamTrust Co, a trust set up by your father who has rolled all the shares of ABC Co into it. Any claim arising from your provision of legal services to ABC Co would not be covered.

Whether you, your family or your colleagues exercise “effective management or control” also depends on the particular circumstances present at the time the services were rendered and the claim is advanced. In investigating effective management or control, the BCLIA will consider a number of factors, for example:

- whether you, your family member or your colleague (referred to as “you”) is an officer or director of, or employer in, the *organization*, and if you are a director, how many other directors the organization has;
- whether the *organization’s* other directors look to you for guidance and generally accept the advice given;
- whether your shareholdings, alone or in conjunction with that of others under your influence, or your financial contributions, are sufficient to elect a majority of the Board of Directors or maintain de facto control of the *organization*; and
- whether you have day to day management of the *organization’s* affairs.

Application to trusts

Although the definition of ‘organization’ is very broad, it does not include trusts. As a result, you are free to provide legal services to your partner’s family trust, for instance, without concern that your partner’s relationship with the trust itself might trigger Exclusion 6.2. However, Exclusion 6.2 may still apply if, for instance, there is another organization related to the trust that is owned, controlled or managed by you, your family or your colleagues. Further, Exclusion 6.1 of the Policy, the “benefit exclusion”, may apply. For example, 6.1 will be triggered if you provide legal services to or act as trustee in relation to your own family trust. Although neither Exclusion will apply if you provide, either directly or through your firm, legal services in relation to an arms-length trust of which you are also a trustee, providing both types of services does increase the risk of claims. More information on this risk is on the Lawyers Indemnity Fund’s website (www.lif.ca) at Your Policy > What activities are covered and what are not > Acting as an executor or personal representative of a deceased, an administrator, an escrow holder, an attorney appointed under a Power of Attorney, a guardian, a trustee, a committee.