Medical Research – Current Challenges in SR&ED

ISSUES AFFECTING MPCs

- Parties affected by current changes to CRA interpretations are typically:
  - Clinician scientists who carry out research alongside their work providing clinical care to patients
  - Clinical fees flow in to a Medical Professional Corporation (MPC)
  - Doctors are paid by the MPC, either as a contractor or employee
  - These salary and contract costs are claimed; the way these are allocated is highly dependent on practice plans and other agreements that govern responsibilities and compensation for owners/employees of the MPC

CURRENT CRA CLIMATE

- CRA is currently attempting to deny virtually all claims by MPCs who are affiliated with universities and hospitals

- Two pronged strategy:

1. Primary Position: SR&ED is NOT being carried out on behalf of MPCs, but on behalf of hospitals/universities by Dr's as individuals

2. Secondary Position: APP/AFP Funding is Government Assistance with respect to SR&ED

CRA Position: SR&ED Not Performed By or On Behalf of MPCs

- 2016 denial letter from Toronto Centre:
  - "there is no contract between [the hospital] and [MPC]. The [doctors], are appointed by [the hospital] to perform their duties as [doctors] and are affiliated with the [university]. In addition, the [doctors] are expected, if not required to do research. In doing research, they are fulfilling their obligations and/or expectations with aforesaid University and/or Hospital."
  - "our position is that the [doctors] are the ones who are undertaking the SR&ED and their work performed was in fulfilment of their appointment with [the hospital] and not [the MPC]."

CRA Position: SR&ED Not Performed By or On Behalf of MPCs

- 2017 denial letter from Montreal:
  - “Please note that a Doctor and his medical professional corporation, (MPC) are two separate entities and as such the responsibilities a Doctor may have for doing work for another health entity cannot be attributed to their medical professional corporation (MPC). In other words, if the Doctor has an obligation for doing research work for a health entity (other than the Doctor's MPC) that results from their employment, appointment, or other similar contract with this health entity, where by doing that research work the Doctor is fulfilling their obligations to that health entity, then that research work cannot be attributed to the Doctor's MPC, and in such as case the MPC would not be able to make an SR&ED claim for that research work.”

CRA Position: SR&ED Not Performed By or On Behalf of MPCs

- CRA is basing their analysis on:
  - Appointment letters: Obligation to perform research (often stated as a minimum % of a Dr's time to be spent)
  - How results are published (name of doctor, hospital/university – not MPC on paper) → have seen this even with non-academic researchers with no appointments
  - Hospital/university control over R&D (ethics board)
  - How clinical data is accessed (via hospital/university?)
  - Ownership of IP (Dr's as individuals own sole rights or share rights with hospital/university)

Analysis: SR&ED Not Performed By or On Behalf of MPCs

- How to separate R&D obligation under appointment from R&D done on behalf of MPC? Base on time spent above minimum obligation? Should not be all or nothing.
- Remuneration for R&D obligation: many doctors are not paid as employees or contractors of university/hospital for research activities – AFP/APP is the means of remuneration for this work?
- R&D as defined by hospital is not = SR&ED (ex. attending conferences, facilitation of research by others, etc.)
- Relevance of IP ownership vs. right to exploit results?
- Relevance of publication? Open source results are published by individuals while working for businesses, for example
- To what degree is hospital really directing R&D (vs. regulating it via ethics board)?

Analysis: SR&ED Not Performed By or On Behalf of MPCs

- Scenarios where MPC is directly hiring and paying fellows as T4 employees to carry out research activities on their behalf
  - Under direction of the Dr's, but have no university/hospital appointment
  - Paid by MPC
  - What happens to these costs if the project is deemed to be carried out by the doctor for the hospital/university but the MPC is paying for and directing fellows on the same projects? Joint project?

Alternative Payment Plan (APP)/ Alternative Funding Plan (AFP)

- An additional mechanism for compensating academic physicians whose activities go well beyond treating patients
- To receive, **doctor must have medical staff appointment and university appointment**
- Per the Academic Health Science Center AFP Template Agreement, the purpose is to:

a) Provide Funding that recognizes the unique contributions of academic physicians;

b) Increase the capacity of the AHSCs to provide **Clinical Services** and **Academic Activities** in an integrated manner;

c) Improve the coordination and integration of the interests of the medical staff, teaching hospitals and universities;

d) Facilitate the recruitment and retention of the academic physicians; and

e) Ensure that the funding reaches academic physicians in an open and transparent manner.

http://www.tohamo.ca/alternate-funding-plans/afp-phase-i

AFP: Definitions and Categories

ACTIVITIES:

a) "Academic Activities" meaning **teaching** and **research**;

b) "Administrative Activities" means any activity required to **manage and administer** the Agreement;

c) Participation in Critical Ontario;

d) "**On-Call Coverage**" meaning the availability to provide Clinical Services 24 hours each day, 7 days a week at the hospital

SERVICES:

a) "Clinical Services" meaning Insured Services provided to Insured Persons, including:

   i. Out-Reach Services;

   ii. Insured Services provided when another health care provider refers an Insured Person to a Group Physician

b) "Indirect Services" meaning all the services ancillary to the provision of Clinical Services

CATEGORIES:

Administrative	Additional Clinical	Clinical Phase I
Clinical New 25%	Clinical New 75%	
Clinical Flow-Thru Adjustments / Clawback		Recruitment Funds

AFP: Delivery Mechanism

- Funds are provided to the Academic Health Sciences Centre (Hospital)
- Funds are allocated and distributed to the various practice plans throughout the hospital by administration
- The majority of Funds (except Clinical New 75%) are allocated equally to all practice plans in the hospital, based on FTE headcount per practice plan with no direct linkage to any specific activities, research or otherwise, carried out by the members of that practice plan
- Only linkage is via appointment letters (ex. 70% clinical, 20% teaching, 10% research activities)

AFP: CRA Position

- Recent Toronto Centre decision:

"AFP Funds received are considered to be Government Assistance and would be allocated and netted against qualified expenditures for SR&ED as per the requirement of Subsection 127(18) of the Income Tax Act.

Not all AFP amounts are considered reasonable amounts in support of SR&ED, such as Recruitment Funding and Administrative Funds. The following funds should be allocated for SR&ED based on the doctor's time allocated for research activities in his academic appointment agreement:

1. Base Clinical Funds
2. Additional Clinical Funds (clinical repair)
3. Academic Funds
4. Academic Enrichment Funding"

This position was provided under the guidance of 'coordinator of medical files'.

AFP Analysis: Lack of Linkage

- There is no direct link from AFP funds to the SR&ED work being completed. There are a range of activities (most not SR&ED eligible and some might be) listed as to what AFP is intended for.
- Interpretation of the original funding plan (prepared by MoHLTC) has the following idealized or aggregated split of time intended for doctors participating in the AFP plans as detailed in AHSC Alternative Funding Plan Information Guide:
  - 70/30 clinical/academic; and of the academic roughly a 2/3 teaching (20% of FTE) vs 1/3 (10% of FTE) research was hoped for
  - The same requirements are reflected in Academic Appointment letters we have seen (70% clinical, 20% teaching, 10% research)
- There is no guidance or direction from the AFP or hospital body to the specific research that is to be completed.
- There is little oversight from the AFP or hospital to ensure that the total amount of R&D being completed is commensurate with payment

AFP: Possible Interpretations

1) Since there is no direct linkage and a great amount of uncertainty, **AFP should NOT be considered as assistance for SR&ED**

   →not paid in respect of a specific SR&ED expenditure. In established case law, government assistance is linked to SR&ED on a case by case basis.

2) Where AFP is allocated on a per FTE basis, treat it as one would any other form of labour grant or assistance → **reasonable allocation to SR&ED**

   take portion of grant and multiply by the portion of time spent on SR&ED as a percentage of total time, consider that to be in respect of SR&ED

3) Treat **AFP as remuneration with respect to the doctor's obligations as an individual** under their hospital/university appointments.

   Claim SR&ED costs only on for a Dr's R&D work over and above those obligations as work done for the MPC. AFP funds are then NOT in respect of SR&ED. (Could be very complex to separate these concerns based on flow of income through MPC.)

Other Structural Options for Medical SR&ED Claims

Formation and pooling of funds to an Eligible Research Institute (RI) to create protected research time

- MPCs pay in to this institute as 3rd party payors with advance or exclusive access to results
- RI pays doctors as individuals for their contributions to R&D activities at a daily rate for time spent, expenses, etc.
- MPCs claim these payments as a 3rd party payment for SR&ED

Possible issues:

- Separating individual obligations of Dr's to RI vs. their academic/hospital appointments
- Flow of AFP to this RI?

Current Status of National Policy on Medical SR&ED Claims

- Response to appeals on these issues as of Sep 2017:

"objections of similar issues of other taxpayers have been forwarded to the Appeals Headquarters for guidance on identified issues" and "this objection will remain in abeyance until further direction has been received from our headquarters"

- Status and timeline for resolution is unknown at this time
- No consultation with the medical community to date

- Suggested next steps for claimants: moving cases through to TCC