

# THE straight line

TEN MINUTES WELL SPENT | ISSUE 2 | JUNE 2016

## Welcome to *The Straight Line*

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- What limits should I carry?
- Mandatory limits changed
- Serving on a Condominium Board

This is the second issue of *The Straight Line*, a newsletter that will appear occasionally throughout the year. Articles will cover a broad range of topics that will engage anyone with an interest in the profession, including Ontario architects insured by Pro-Demunity, other OAA members—whether in practice or engaged in other businesses—and others.

We encourage readers to suggest topics for future issues of *The Straight Line*. Please send any suggestions to: [editor@pd-straightline.com](mailto:editor@pd-straightline.com)

### New Chair at Pro-Demunity



Bill Birdsell

At the recent Pro-Demunity Annual General Meeting, Bill Birdsell was elected to the Board and appointed as the new Chair. Chris Fillingham, the retiring Chair of Pro-Demunity, has assumed the role of Director Emeritus for the coming year to assist with the transition.

Bill served on OAA Council for seven years, including two terms as President. During his time on Council, Bill was appointed to the Pro-Demunity Board as an OAA designate for several terms. He has been a champion of strengthened understanding of the role of Pro-Demunity throughout the profession and at Council.

— *The Editor*

## What limits should I carry?

Pro-Demunity is regularly asked by architects to suggest what would be appropriate claim limits for their practice. There is no single answer or formula that applies, and every architect must reach its own conclusion reflecting its own circumstances. Mario Delgado, a lawyer experienced in defending claims against architects, offers his observations.

Before finalizing an agreement with a prospective client, architects should consider whether they carry sufficient coverage.

All architects with a Certificate of Practice are legally required to have stipulated minimum limits of professional liability insurance unless exempted. But sometimes, the amount of coverage is imposed on the architect as a condition of engagement. In other cases, the amount of professional liability coverage may be negotiated with the client. Where a client does not have its own requirements, the option of higher limits is left to the architect's discretion.

In this article we discuss the wisdom of relying on the minimum coverage and limits, and point out some of the problems that may arise if this issue is given insufficient thought.

### Consequential Damages

Architects often assume, erroneously, that the amount of coverage should reflect the value of the project or the fees being charged, or that they should take out only the minimum coverage and limits required under the *Architects Act*. As the following examples show, when you are named as a Defendant, you may be responsible for all “consequential damages” sustained by the Plaintiff as a result of an error or omission in carrying out your scope of work. “Consequential damages”

may bear little relationship to the size or value of the project.

For example, imagine that you have been retained to design a retail store and to carry out typical contract administration services during the construction phase of the project. If the value of the project is \$400,000.00, it might seem that an annual practice insurance with a claim limit of \$250,000.00 and a project limit of \$500,000.00 would cover you adequately.

Now imagine that the project isn't completed on time and that part of the reason for this delay is an omission in the architectural drawings, or a failure to adequately review the shop drawings, or a communication breakdown between architect and contractor during the construction phase. As a result of the delay, the store opening is held up for eight months. Once the project is complete, the owner commences a legal proceeding against the architect, claiming that it cost \$350,000.00 to carry out the remedial work necessitated by the alleged errors and that a loss of \$250,000.00 in profits was incurred. The owner is seeking damages of \$600,000.00, plus pre-judgment interest and legal costs, well in excess of the \$250,000 claim limit under the policy.

In another example based on the same project, imagine that the owner seeks damages of \$300,000.00 against the architect, because of a deficiency in the stair design requiring its complete

replacement. Imagine as well that the contractor commences its own claim against the architect for \$300,000.00 on the same project, on the grounds that it lost profits due to the delay caused by the architect. The combined damages claimed on the same project total \$600,000.00, thus exceeding the \$500,000 project limit under the policy, as well as the maximum for each claim of \$250,000.

### Consultant Liability

Attention to the amount of professional liability should also be given in cases where the architect retains other consultants (structural, mechanical or electrical, e.g.). If a sub-consultant fails to carry sufficient insurance coverage, then the architect, by way of contract, could be exposed to the balance of the damages caused by any error on the part of the sub-consultant. For instance, assume that (in addition to any architectural issues) an error in the HVAC design has resulted in unnecessarily high operating costs to the owner, requiring a complete redesign and installation. If the mechanical sub-consultant only carries \$250,000.00 in professional liability, then the architect risks being exposed to the balance of the claim. In this instance, the combined claim against the architect for the architectural and mechanical issues may easily exceed the architect's project limit under the policy.

### Personal Injury

In addition to the examples above, an architect may be exposed to claims for personal injury arising from the design of a structure. Personal injury cases can vary in severity and damages can easily exceed the minimum coverage. To illustrate the point, imagine that an error has been made in the calculation of the rise/run ratio of the stairs, and that this design error has not been caught during the construction phase of the project. Now imagine that this mistake results in a person tripping down the stairs and sustaining an injury so serious that the person (prospective Plaintiff) requires significant medical treatment and is unable to work to his/her current capacity. Imagine also that the Plaintiff is married, with dependants. In these unfortunate circumstances, the architect could be held responsible for all (or part) of the damages sustained by the injured Plaintiff. These

damages might include: past and future medical care, past and future wage loss of the Plaintiff, "pain and suffering" of the Plaintiff, past and future wage loss of the spouse for taking time to care for the Plaintiff and "loss of companionship" that the spouse and dependants have suffered as a result of the injury sustained by the Plaintiff. In this instance, the damages of the Plaintiff could easily exceed \$250,000.00. In personal injury cases claims in the range of \$1,000,000.00 or higher are, unfortunately, not uncommon.

These examples illustrate how important it is for architects to carefully consider the amount of professional insurance to take out at the beginning of the project.

### Consequences

Assume that you carried only the minimum professional liability coverage under the preceding scenarios. After putting your insurer on notice of the claim(s), you will probably receive a letter that includes the following passage:

*As the Statement of Claim seeks damages which may exceed the sum of \$250,000.00, which is over and*

*above the claim limit in Pro-Demnity Insurance Policy No. 1, you should immediately advise your excess insurer of this claim if you have such coverage under a professional liability insurance policy.*

*You are entitled to appoint your own lawyers to protect your interests with respect to the part of the claim which exceeds \$250,000.00, in the event that you have no excess insurance.*

Carrying only the minimum of professional liability insurance coverage has the potential consequence of exposing the assets of the architectural firm, or worse, the personal assets of the architect where the insurance proves insufficient. To avoid this, the architect should conduct an internal self-audit to assess any potential risks arising from the type of projects that it engages in. Further, if warranted, the architect should retain a third party to assist in identifying areas of risk. Lastly, architects should contact their insurer to establish a level of coverage that is appropriate for the practice.

— Mario Delgado

## What are the Mandatory Limits?

Effective January 1, 2016 the Ontario government approved changes to the Mandatory Limits of Liability required to be maintained by architects. Three levels of mandatory limits now apply, depending on gross fees received and reported by the practice for the prior year, as illustrated on the chart below:

<u>Total Gross Fees</u>	<u>Minimum Claim Limit</u>	<u>Project Limit</u>	<u>Aggregate Limit</u>
\$0 - \$499,999	\$250,000	\$500,000	\$1,000,000
\$500,000 - \$999,999	\$500,000	\$1,000,000	\$2,000,000
\$1,000,000 and above	\$1,000,000	\$2,000,000	\$4,000,000

**Claim Limit** is the maximum amount the Insurer will pay as Damages for each Claim during the Period of Insurance.

**Project Limit** is the maximum amount the Insurer will pay as Damages for all Claims during the Period of Insurance arising from the performance of professional services with respect to one project, subject always to the Claim Limit of Liability for one Claim.

**Aggregate Limit** is the maximum amount the Insurer will pay as Damages for all Claims during the Period of Insurance, subject always to the Claim Limit of Liability for one Claim and the Project Limit of Liability for all Claims with respect to one project.

Refer to Pro-Demnity Policies No. 1 and No. 4, PART II: YOUR INSURANCE, 1. DAMAGES, LIMITS OF LIABILITY for complete policy wording describing Limits of Liability.

# Ask an Expert

“Ask an Expert” offers readers the opportunity to obtain advice from members of a panel of experts familiar with architectural practice and insurance considerations. Questions will be selected that illustrate legal and insurance issues and principles that apply broadly in practice, while ensuring that specific individuals, projects and circumstances cannot be identified.

Answers provided will be general in nature and cannot be taken as legal or insurance advice for readers to apply to their own circumstances. Please consult your own lawyer or Pro-Demnity with respect to any questions or concerns impacting your own practice. Questions should be directed to: [ask@pd-straightline.com](mailto:ask@pd-straightline.com)

## An Ontario architect poses a question:

I am an Ontario architect. I've been asked if I would consider joining the board of directors of the condominium in which I live. What can I do to protect myself from liability as an architect while best serving the condominium corporation?

## Rachel Migicovsky of Shibley Righton LLP offers this advice:

Architects are frequently approached by the condominium boards to join as directors. It seems like a win-win for the board and for the architect: the board may think it gets an architect to give them free advice on important decisions; the architect gets to build her profile. However, it is important for the architect to take precautions. See below for more detail.

## Manage Expectations

There are no problems with the architect joining the board as a unit owner. However, the architect must remember that she is on the board in a personal and not professional capacity. The architect must ensure that she does not present herself as an “in-house architect” and that the other board members do not treat her as one. This may involve explicit reminders from time-to-time,

and the architect should be prepared to step aside if the board members don't get the message. This is important: architects must protect themselves and not take any steps that might interfere with their insurance coverage.

In this respect:

## Understand the Insurance

Architects are not covered by their Pro-Demnity Insurance Company Professional Liability Insurance Policy (the “Policy”) when acting as a director of a condominium corporation. Under Part III(1)(g) “Exclusions”, the Policy says that Pro-Demnity will not cover the architect for claims arising out of “the performance of services not usual or customary for holders of certificates of practice, or members of the [OAA]” i.e. the architect is not covered for providing services to the condominium that are not architectural and not provided through its certificate of practice.

However, a condominium corporation should (and most do) offer Directors and Officers insurance coverage to protect their directors in the event of claims against the condominium corporation. The architect should be certain to review that policy and find out what she is and is not covered for. In certain circumstances the directors of a corporation can be held personally liable for wrongdoing by the corporation, and the architect sitting on the board of a condominium corporation should be protected by insurance against that eventuality.

The *Condominium Act*, 1998, 1998 S.O. c. 19, s. 39 says that the condominium corporation shall purchase and maintain insurance for the benefit of a director or officer where the insurance is “reasonably

available.” The *Condominium Act* does not define when coverage is “reasonably available.” The architect should confirm that coverage is in place before agreeing to join the board of directors.

## Conflicts of Interest

There can be issues where an architect is a director and also accepts a retainer for a project relating to the condominium. Residents and other board members may perceive the architect to be acting in her own self-interest for accepting the retainer, and may be seen to be putting her own interests ahead of those of the condominium. Directors of corporations owe fiduciary duties to the corporations, which means they must always act in the best interest of the corporation. The test is not whether the architect *has* placed her own interest above that of the corporation, but whether there is the *appearance* of a conflict. If the architect is seen to place her own interest above that of the corporation, then she is in a conflict of interest.

The architect should not offer her services as architect to the corporation, if she is also a director, and should be cautious about making recommendations with respect to architects when hiring for a particular project. If the board decides to retain an architect for a project, the architect should consider abstaining from the vote, or even the entire process.

Provided an architect does not place herself in a position of conflict, she can serve on a condominium corporation's board of directors and provide a benefit to the condominium.

— Rachel Migicovsky



## Letters to the Editor

Dear Straight Line:

What a surprise, or rather shock it is to read your suggestion that architects should ask their client “what steps it will be taking to address the life safety issues.”

Though it is our obligation (both professional and moral), to make our clients well aware of any health or life safety issues that one encounters during a requested review, or accidental for that matter, why would an Architect, its governing body or insurer wish to take on the role of “Policeman”? Once the question is asked, there is no turning back.

Architect

*Dear Architect:*

*The scenario giving rise to our recommendation assumes that the architect has reasonable grounds to believe that the owner is turning a blind eye to the “life safety” issue. Further, the scenario contemplates that the architect knows, or ought to know, that should the “life safety” issue not be addressed, it could pose a serious risk to the public. Under these circumstances, for the reasons given in the article, it is prudent to take some action. We stress that the steps suggested in the article should not be taken lightly. If you encounter this situation, we strongly encourage that you contact Pro-Demnity or consult legal counsel.*

*Kind Regards,*

*Andrew Lundy  
Partner, Brunner and Lundy*

## Our Contributors



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## THE straight line

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**Pro-Demnity Insurance Company** is a wholly owned subsidiary of the Ontario Association of Architects. Together with its predecessor the OAA Indemnity Plan, it has provided professional liability insurance to Ontario architects since 1987.

Questions related to the professional liability insurance program for Ontario architects may be directed to Pro-Demnity Insurance Company. Contact information for the various aspects of the program can be found on the Pro-Demnity website:

**www.prodemnity.com**

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