RETAINING SURVEYORS, GEOTECHNICAL AND HAZARDOUS SUBSTANCES SPECIALISTS IS DANGEROUS!

CLARIFICATIONS TO EXCLUSIONS FOR RETENTION OF SURVEYORS, GEOTECHNICAL AND POLLUTION (HAZARDOUS SUBSTANCES) SPECIALISTS

The updated Pro-Demnity policy wording that has or will come into effect at each Ontario architect's annual renewal on or after April 1, 2024, re-affirms that the provision of services provided by any of Surveyors, Geotechnical and Pollution (Hazardous Substances) specialists is excluded from coverage.

It also includes an important clarification that engaging or retaining these types of specialists on behalf of a client is also excluded from coverage.

The February 1, 2024, Pro-Demnity Notice about the Refreshed Policy Wording includes the following:
Clarification of coverage related to Geotechnical engineering and Surveying Services.

The *performance* or *engagement of* geotechnical engineering services or services that constitute the practice of cadastral and professional surveying under the *Surveyors Act*, are not covered. This reinforces our current practice and policy wording *[Exclusions: What is Not Covered. Item 17]*. Further, the performance or engagement of professional services related to "pollution" are also excluded. *[Exclusions: What is Not Covered. Item 18]*

Review the entire February 1, 2024, Notice about the Refreshed Policy Wordings.

CLIENTS ARE RESPONSIBLE FOR PROVIDING THIS INFORMATION

Surveyors, Geotechnical Engineers and Hazardous Substances (Pollution) specialists provide

critical information to an architect and its subconsultants about the existing condition of a client's property. However, architects are reminded that supply of this information and engagement of those who are qualified to provide it must remain the client's responsibility.

It is also important that an architect be entitled to rely upon the information provided by a client or these specialists as the foundation for its own services and the services of any subconsultants retained by the architect to assist with the design.

Recently updated OAA Practice Tip PT.30 reminds architects that the OAA continues to recommend against architects retaining any of these three types of "Owners Specialists".

In fact, with Pro-Demnity's Refreshed Policy Wordings, to do otherwise is simply not covered by your insurance.

STANDARD FORMS OF CLIENT / ARCHITECT AGREEMENT WORK FOR YOU

Consistent with Pro-Demnity's and the OAA's positions, standard forms of Client / Architect Agreement provided by the OAA and RAIC require the Client to supply information provided by Surveyors, Geotechnical and Hazardous or Toxic Substances (Pollution) specialists to the Architect and, where necessary, for the Client to retain any of these specialists in order that it can supply the necessary information.

And, very importantly, the standard forms of contract with a client provided and endorsed by the architectural profession provide that the architect is entitled to rely upon the information about the existing property provided by the client and these specialists.

Standard forms of contracts between a Consulting Engineer and a client endorsed by the engineering profession in Canada include similar provisions respecting the client's responsibility to provide information to the professional as requested by the consultant.

PROFESSIONAL LIABILITY INSURANCE COVERAGE IMPLICATIONS

The updated Pro-Demnity policy wording has or will come into effect at each architect's renewal on or after April 1, 2024. This Bulletin highlights applicable clarifications to exclusions impacting coverage where an architect opts to retain these specialists on behalf of the client / owner.

POLICY WORDINGS – RELEVANT EXCLUSIONS FROM COVERAGE INCLUDE:

Exclusion 9 – *Performance of Services NOT Usual and Customary*
Exclusion 17 – *Geotechnical Engineering and Surveying Services*
Exclusion 18 – *Pollution*
A related exclusion that may apply in circumstances where an architect agrees to retain any of these specialists is also included in this Bulletin:
Exclusion 27 – *Waiver of Insurer's Right of Recovery.*
The impact of each of these exclusions is discussed in more detail in this Bulletin.

EXCLUSION 9 – PERFORMANCE OR ENGAGEMENT OF SERVICES NOT USUAL AND CUSTOMARY FOR AN ARCHITECT

Provision or engagement of the services provided by a surveyor, or specialists providing geotechnical investigations or pollution (hazardous materials) investigations and mitigation services fall outside what are considered Usual and Customary services of an architect. These "Owner's Specialists" should be retained by the client or owner of the project. This position has not unchanged, notwithstanding the apparent enthusiasm of some client's procurement personnel to transfer their responsibilities onto the architect or a "Prime Consultant" – presumably to save themselves some work or transfer owner's risk related to their property onto others.

Exclusion 9 excludes coverage for:

The performance of services not ***Usual and Customary*** *for holders of a Certificate of Practice* (i.e. architectural practices)*, or Architects OAA* (members of the Association) *or holders of certificates of authorization under the Professional Engineers Act* (i.e. professional engineering practices).

Where the architect retains a subconsultant to provide services, the architect usually acquires contractual or vicarious liability for the subconsultant's services to the client with whom the architect has a contract. If an engineer or other subconsultant makes an error that causes damages to the client, it is the architect who will typically be sued by the client *in contract* even if the architect played no role in the error or negligence involved.

The architect can try to recover any damages assessed against it from the subconsultant; however, its ability to do so may be hampered by several factors including the availability of adequate insurance covering the engineer and sub-contract provisions related to the subconsultant's services that are prejudicial to the architect.

The same applies to surveyors, and specialists providing geotechnical investigations or pollution (hazardous materials) investigations and mitigation services retained by an architect. Since engagement of these specific specialists is NOT a *Usual and Customary* professional responsibility of an architect, Claims related to provision, or engagement of these services would already be excluded from the architect's PLI coverage on that basis – even if the following specific exclusions were not included in the policy.

EXCLUSION 17 – GEOTECHNICAL AND SURVEYING SERVICES

The updated Pro-Demnity policy wording, *Exclusions 17 – Geotechnical Engineering and Surveying Services* includes a clarification that BOTH the *performance* or *engagement* of these specialized services by an insured Ontario architect are excluded from coverage (underling for emphasis). Excluded from coverage are:

17. Geotechnical Engineering and Surveying Services*. The performance or engagement of geotechnical engineering services or services that constitute the practice of cadastral and professional surveying under the Surveyors Act, by the Named Insured.*

This means that where an architect has retained any of surveyors, geotechnical investigations or pollution (hazardous substances) investigations and mitigation services on behalf of a client or property owner, a claim against the architect related to the failures, errors, omissions or negligence of any of these specialists will be excluded from the architect's PLI coverage.

Pro-Demnity will NOT provide a defence or pay damages assessed against the architect related to such claims made against the architect.

WHAT ARE THE IMPLICATIONS FOR AN ARCHITECT WHO AGREES TO RETAIN THESE SPECIALISTS?

If an architect engaged any of these specialists and was named in an action related to the specialist's negligence – presumably because the architect had assumed "contractual" or "vicarious" liability for the work of the specialist as a subconsultant – the architect would need to retain its own lawyer to manage its legal defence including claiming-over against the specialist with whom the architect has a contract. This would be at the architect's own cost and risk.

WHAT ARE THE IMPLICATIONS FOR A CLIENT?

When a client insists that the architect retain these specialists it is in effect, "shooting itself in the foot" – eliminating one avenue for the client' to pursue a claim against the specialist, since it would not be able to sue the specialist directly *in contract*.

Furthermore, they receive no benefit as whatever PLI limits the architect maintains, or the client requires the architect to maintain, will NOT be available to contribute to any damages assessed against the architect because of *Exclusion 17*.

EXCLUSION 18 – POLLUTION

Exclusion 18 – Pollution, paragraph 18 a) clarifies that both the *performance* or *engagement* of professional services related to pollution investigation or mitigation are excluded from coverage (underling for emphasis).

Excluded from coverage are:
… the discovery, presence, handling, removal, or disposal of or exposure of persons or property to Pollution in any form, on, in or under lands, into waterways, sewage or drainage systems, Pro-Demnity Insurance Company Professional Liability Insurance Policy PD.FORM 1F/24 Page 23 of 40 or into the atmosphere. Any injury or damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of Pollution, or any Claim arising out of any request, demand, order, claim or proceeding to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of Pollution. This exclusion applies regardless of whether or not the Pollution was accidental, expected, gradual, intended, preventable or sudden.

“Pollution” is defined in the Pro-Demnity policy as:
Pollution *means any actual, alleged or threatened emission, release, discharge, dispersal, seepage, migration, escape or disposal of any solid, liquid, gaseous or thermal irritant or contaminant, including (without limitation) smoke, vapour, odours, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollution also includes (without limitation) any substance or contaminant prohibited or restricted under the Environmental Protection Act, R.S.O. 1990, c.E.19, any of the regulations prescribed therein or any other applicable federal or provincial environmental legislation.*

This definition of “Pollution” is very broad, including an array of toxic or hazardous substances that

may be present at properties owned by a client.

Exclusion 18 – Pollution, Paragraph 18 b) describes limited coverage that may be available where a Claim relates to asbestos or polychlorinated biphenyl (PCB). Elsewhere in the policy there is a Sub-Limit for Pollution claims as follows:

7. *With respect to the limited coverage extended under the exclusion for* ***Pollution****, the maximum limits We* (Pro-Demnity) *will pay under the exception in section 18(b) are as follows:*
a) ***Claim*** *Limit: $250,000 per* ***Claim****;*
b) Project Limit: $500,000 maximum for all ***Claims*** *related to a single project; and*
c) Annual Aggregate Limit: $1,000,000 maximum for all Claims reported in the ***Period of Insurance****.*

WHAT ARE THE IMPLICATIONS FOR A CLIENT?

When a client insists that the architect retain a Pollution or Hazardous or Toxic Substances specialist, it is prejudicing its own ability to recover damages from the specialist, since it would not be able to sue the specialist directly *in contract*.

The Professional Liability Insurance claim limits the architect maintains, or the client requires the architect to maintain beyond the minimums noted in a), b) and c) above for claims related to asbestos or polychlorinated biphenyl, will NOT be available to contribute to any damages assessed against the architect. Both the architect and the client stand to lose.

EXCLUSION 27 – WAIVER OF INSURER'S RIGHT OF RECOVERY

Pay attention to your Subconsultant Contracts!

Exclusion 27. of the updated Pro-Demnity policy excludes coverage for the architect where it has given an indemnity, limitation, waiver or undertaking to not enforce any rights for the benefit of an engineer or other specialist subconsultant:

> *27. Waiver of **Insurer's** Right of Recovery.*
> ***We** will not cover **You**, pay **Damages** or provide **You** with a defence or make supplementary payments for **Claim(s**) made against **You** where **You** have entered into any agreement or given a waiver or provided an undertaking not to enforce any rights, that may prohibit, restrict, postpone, or imperil **Our** right of recovery against any other person.*

Many engineer-authored agreements with a client often include a limitation on the engineer's liability to its client to a dollar amount that is far less that the available claim limit provided by its professional liability insurance…perhaps limited to fees paid to the engineer or a specified amount that is clearly inadequate.

And today, the mandatory minimum professional liability insurance claim limits to be maintained by consulting engineers in Ontario, regardless of size of practice and scale of projects are $250,000 per claim, $500,000 in the aggregate.

Where an architect retains the engineer – or any other specialist consultant – as its subconsultant, the architect becomes the engineer's client and may find that it has agreed to provide an indemnity or waiver of liability to the engineer…meaning the architect will be partially or fully liable to their own client or others for the engineer's errors, omissions or negligence respecting the engineer's services.

Provision of such an indemnity, waiver or acceptance of inadequate financial exposure of an engineer or other specialist should never be agreed to by the architect. Unfortunately, too many architects appear to not pay sufficient attention to the contents of the agreements they have with their subconsultants. That neglect may prove costly for the architect when it triggers *Exclusion 27*. in the Pro-Demnity policy.

ARCHITECTS' RISK MANAGEMENT TOOLS

Accepting contractual liability for a wide array of specialists under the guise of "Prime Consultant" exposes the architect to contractual liability for a much broader array of services than it may recognize or be comfortable assuming. However, some architects may consider agreeing to a client's wishes, in order to secure a commission or in the belief that "It can't happen to me."

Pro-Demnity cannot endorse such a decision and reiterates that such decision is likely to jeopardize your own insurance coverage. But if you do agree to retain any of these specialists at a client's request or engagement requirement, the following risk management advice may prove valuable:

Use standard forms of Client / Architect Agreements such as *OAA Document 600-2021* that include provision of surveys, geotechnical investigations, toxic or hazardous substances, air and water pollution tests and a legal description of the site as a Client Responsibility – *Article A12 – Items 12.1, 12.2, 12.3, 12.4 & 12.5, and GC 05 Client Responsibilities – GC 5.3.6 and GC 5.3.7*
and
Include a limitation on the contractual liability assumed by the architect retaining any specialist subconsultant identified as the Client's responsibility in the standard form of contract.
OAA Document 600 – 2021 General Condition GC09 – GC 9.3.1 & GC9.3.2 and GC 9.7)
Insist that the Client / Owner indemnify you / your practice respecting the

contractual or vicarious liability you will assume by retaining any specialists required to provide necessary information about the client's property and the existing conditions of the property…including surveyors, geotechnical investigations, toxic or hazardous substances and / or pollution identification and mitigation. This protection for the architect retaining these specialists on the client's behalf is consistent with a client / professional relationship and is reflected in OAA standard forms of contract such as:
OAA Document 600-2021, Articles A 11.2 and A12, and GC Client's Responsibilities, GC 5.3.6
or
OAA Document 800-2021 Articles A08.2 & A09, GC02 – Client's Responsibilities GC 2.1.2, and *GC05 – Indemnification and Liability of the Architect GC5.1 & GC5.2.7*,

Do not accept a fee proposal or agree to a subconsultant contract with any engineer or specialist that includes a clause limiting the liability of the subconsultant, or any indemnification in favor of the subconsultant that is not also included in your own contract / agreement with your client – the project owner.

Insist that any subconsultant, including Surveyor, Geotechnical or Pollution (Hazardous Substances) specialists you retain or recommend to a client, carry professional liability insurance with per claim and aggregate limits that meet or exceed those carried by or required for the architect.

Since engagement of these specialists is excluded from your PLI coverage, the specialist's own PLI and adequate contract protections are the only things standing between yourself and contractual liability for financial damages caused by these specialists if you engage any of them as subconsultants.

Recognize and understand the significance of key features in the engineer's or specialist's professional liability policy including whether:

- the aggregate limit is a MULTIPLE of the claim limits, and

- defence costs are IN ADDITION to the claim limits.

Where these features are NOT provided in the engineer's or specialist's policy, insist upon higher claim limits to compensate.

Recognize that insurers, including Pro-Demnity, DO NOT define architectural practice or determine what are the *Usual and Customary* services of the profession. That is determined by legislation and the profession itself. Architects should govern themselves accordingly, so they do not find they are providing services outside the *Usual and Customary* test.

Importantly, client purchasing departments and client preferences **DO NOT** determine what qualifies as *Usual and Customary* services of an architect that will be covered by PLI. To address this consideration, in the instances that are the subject of this article, Pro-Demnity has clarified coverage concerns with specific exclusions in the policy.

Be sure that you meet your obligation to advise / warn your client about the negative implications of their requirements. Specifically, make sure that you advise your client of the applicable exclusions from your PLI coverage in writing.

Obtain legal advice before you agree to engage any of these specialists.

IMPORTANT INFORMATION

Architects who have questions about the content of this Bulletin, or about the engagement of any other Specialists that may fall outside the Usual and Customary services of an architect, are encouraged to contact Pro-Demnity's *Risk Services* advisors to review the circumstances.

Pro-Demnity's *Risk Services* advisors are also available to review any other insurance questions or concerns, or for risk management advice on other topics.

This advisory is for information only. It is NOT a legal opinion and cannot be relied upon as assurance of coverage in any particular circumstance. Review any coverage questions impacting your own practice with your lawyer. Coverage is determined in accordance with the Certificate of Insurance, policy wording and any endorsements in force at the time a Claim arises. Coverage decisions can only be made at the time a Claim arises, based on the allegations and then known circumstances. Policies issued by different or excess insurers may have different policy wordings.