Ontario architects have turned to Pro-Demnity for risk management advice since 1987. The initial sources of this advice were the Claims Managers, with the support of David Croft’s popular Claims Stories.

As part of our support tripod – Underwriting, Claims Handling and Risk Management – Pro-Demnity has, since 2005, continually expanded its Risk Management program to include province-wide Loss Prevention events, Bulletins, Notices, issue-specific advisories, research, advocacy and publications such as this newsletter.

In this issue, Pro-Demnity’s Vice President, Practice Risk Management shares two current pieces of Risk Management advice, both deserving special attention.

**Client-Authored Indemnification Clauses**

The dangers of indemnification clauses have been addressed in numerous Pro-Demnity and OAA publications, and for good reason: Some of these clauses are so dangerous to architects that they have been dubbed “Murder Clauses.”

Client-authored indemnification clauses inserted into a standard contract are a particular concern since, despite their benign appearance – just looking out for your client’s interests – they may be at your expense. To quote Pro-Demnity Claim Watch No. 24 (August 2005):

> Any agreement to indemnify or defend another party to a contract in excess of what you would be liable for in ordinary common law will not be insurable in the ordinary liability insurance context.

This warning has been repeated in OAA Practice Tip PT.39.1, May 1 2019, (dealing with “Overly Broad Indemnification Clauses”), as well as Pro-Demnity Bulletins issued in 2005, 2015, and 2017, and Loss Prevention Events, including “Anatomy of a Murder (Clause).” Of note, Pro-Demnity Bulletin, March 22, 2018, “Client-Authored Contracts for Architectural Services,” tells us:

> of growing concern is contractual language promoted by some clients that has included a number of elements which exceed the architect’s existing liability at law and hence its insurance coverage; in effect transferring client’s or owner’s risk onto the architect.

To nullify the ill effects of such client-authored indemnity wordings, Pro-Demnity has, for more than 16 years, offered a “Notwithstanding Clause” as an antidote:

> Notwithstanding the foregoing, the obligations and liabilities of the Architect are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.

Current forms of Client/Architect Agreements for the provision of professional services developed and recommended by the OAA do not include an indemnity provision, reasoning that it is not required. An architect’s (or any professional’s) obligation to indemnify a client or others respecting damages arising from its professional services is already a matter of established law.
However, there is a concern that the absence of an indemnity clause might be perceived as a "void," triggering clients (or their lawyers) to concoct provisions to fill the perceived gap.

Several years ago, with the assistance of two lawyers familiar with these issues, Pro-Demnity arrived at a "Benign Indemnification" that can be substituted for whatever indemnity wording a client proposes:

The Architect shall, within the limits of its insurance coverages, indemnify the Client from claims, demands, losses, costs, damages, actions, suits or proceedings in respect of claims by a third party, or from losses, costs or damages suffered by the Client, provided these are attributable to error, omission or negligent act of the Architect or of those for whom it is responsible at law.

Pro-Demnity has presented this alternate indemnity wording in recent Bulletins, at recent Loss Prevention Events, and in advice to individual architects. The wording has also been offered to the OAA for possible inclusion in the next update to OAA Document 600. This would have the benefit of filling any perceived void in the OAA recommended forms, perhaps heading off a client's effort to fill the perceived gap. At the same time, the clause would provide suitable indemnification wording, in sync with the architect's professional liability insurance and the OAA's advice. An architect could compare this wording to whatever alternate a client might present.

Lenders’ Undertakings

During 2020, Pro-Demnity has seen an increase in calls from architects who are faced with an unfamiliar but seemingly harmless request from their client: to sign a form of undertaking addressed to a third party – most often to a lending institution or financial partner – that is providing funding for the project.

Architects seeking advice about such undertakings may be conflicted. They may also be looking for reasons to say “no” to the request from their client. At the same time, a possible motive for the borrower-client to present these lender’s undertakings to architects is the avoidance of administrative costs imposed by the lender when it retains its own independent consultant to protect its own interests. Consultants (including architects) are available to be retained directly by the lender to act as a monitor.

But these undertakings can be very dangerous. The wordings are intended to establish that, by signing, the architect has accepted a “special” Duty of Care to the lender that would not otherwise apply at law. This may make it easier for the lender to sue the architect, and may trigger an exclusion from professional liability coverage: Exclusions 1.(e) and 1.(f). Lenders’ undertakings display the following characteristics:

- They are invariably addressed to the lender – a bank, financial institution or other funder for the project.
- They may also be addressed to a lawyer who is acting as a broker or intermediary, advising the lender, and/or has written the undertaking on behalf of the lender.
- The actual wordings vary, most requiring the architect to “guarantee” or “warrant” an outcome, for instance:
  - providing assurances outside an architect’s professional expertise, such as adherence to all laws and regulations applicable to the project – more properly addressed by a lawyer;
  - requiring the architect to assure the lender that the client’s budget and funding are adequate to complete the project;
  - requiring assurance that the provisions of the relevant building codes have been met, or assurance that the authorities having jurisdiction will issue any required permits.
- They invariably include a provision that, in signing the undertaking, the architect acknowledges that the lender will be relying upon the contents when making decisions about advances of funds to the borrower (the architect’s client).

They require the architect’s signature.

Pro-Demnity’s advice is consistent: Regardless of content, do not sign any undertaking addressed to a lender – or almost any other third party. There are many reasons for this:

- There are implicit conflicts of interest between the client-borrower’s interests (to obtain a draw-down of funds) and the lender’s interests (to protect itself).
- There are further conflicts of interest where the client’s ability (or willingness) to pay the architect’s outstanding account is conditional on receipt of the lender’s next advance – a conflict of interest that could qualify as professional misconduct.
- Under these circumstances, the architect cannot serve two clients. In addition, the lender has ample access to independent consultants to review the progress of the work, architect’s certificates, etc.

If saying “no” to the client’s request remains a problem, architects are advised to obtain legal advice to amend the wording, since, apart from any other consideration, an architect who signs the undertaking would be assuming unnecessary additional responsibility/liability/transfer of the lender’s business risks onto itself – without compensation commensurate with the risk.

— John C. A. Hackett B.Arch., OAA, FRAIC

"It’s a mistake to borrow money from a friend."
The Grenfell Tower revisited

In a recent TV drama series *Little Fires Everywhere*, fires are represented physically as destructive conflagrations, and metaphorically as destroyers of conventions and the status quo. We hardly need reminding that in recent years, our world has suffered both types of fires to an excessive degree. The world set literally on fire by climate change was our major concern until a pandemic arrived to displace it. But still smouldering in the background is the aftermath of the Grenfell Tower fire in London, England, that claimed 72 lives on the night of June 14, 2017, and continues to spark disruption in the UK and around the globe.

In earlier issues of The Straight Line (No. 6, July, 2018; No. 9, December 2019) we shared our observations on the continuing effects of the fire, in particular: How is it likely to affect architectural practice in Ontario, Canada and the world? The answer to this question and others is gradually emerging as Phase 2 of the Grenfell Tower Inquiry continues.

Where Phase 1 of the Inquiry focused on the events of the night of June 14, 2017 (Report published October 30, 2019), Phase 2, which started up in early 2020, is examining the causes of the catastrophic events, particularly, how Grenfell Tower arrived at a condition that allowed the fire to spread, as identified in Phase 1. The second phase, interrupted by COVID-19 protocols, was resumed in July, and as it progresses, important repercussions are already being felt.

The disclosures arising in Phase 2 have not been good news for any participants. Evidence relating to the project’s architect, including the process for selecting the firm, have proven particularly damaging. Along with a number of others called to testify during Phase 2, the architect sought and was eventually granted immunity from criminal prosecution, respecting evidence provided to the Inquiry. The firm has since gone out of business.

This is in addition to other serious accusations of irregular, dishonest, secretive, abusive, negligent, possibly unprofessional and even criminal behaviour, on the part of several firms and agencies associated with the project. One witness told the Inquiry that the firms involved were “little more than crooks and killers.”

Among the determinations and revelations that have emerged so far:

1. In 2018, the relevant building regulations in the UK were hastily amended – then re-amended in November, 2019 – banning the use of combustible materials in or on the external walls of residential and other classes of buildings over 18 metres.

This regulation seems eminently sensible, but it may soon be followed by a second stringent regulation that could dampen worldwide enthusiasm for a current construction trend: “The government of England could be reducing the maximum height of wood-framed buildings from six storeys to three or four to avoid another Grenfell Tower Fire.”

What does wood framing – or indeed tall timber – have to do with aluminium cladding panels? Both employ flammable materials, but are permissible provided that critical precautions are taken to avoid flame intensity, duration and spread. Grenfell illustrates the catastrophe that ensues when, through a cascade of errors and omissions, hardly any of these precautions are taken. Two further questions arise. What happens before the precautions are in place – during construction, for example? And what happens if these precautions are not maintained?

Grenfell illustrates the catastrophe that ensues when, through a cascade of errors and omissions, hardly any of these precautions are taken.

2. “[A]n alliance of more than 80 organisations has agreed on a set of fire safety standards that can be applied to buildings anywhere in the world.” According to Warta Saya, an ABC Malaysia website, the International Fire Safety Standards (IFSS) Coalition consisting of an international group of construction, architecture and fire safety professionals, established in the wake of the Grenfell Tower fire, will establish “minimum levels of safety throughout the world in both developed and developing nations.”

3. As a forewarning of what could easily become an international insurance crisis, architects in the UK are already feeling the pinch, with some architects having difficulty finding professional liability insurance, and others seeing premium hikes by as much as 800% — in a competitive, non-mandatory insurance market.

There is already a great deal of uneasiness among architects, constructors and insurers, worldwide, regarding buildings with exterior panels identical or similar to those used in Grenfell Towers that are already completed and inhabited. In the UK alone, in June 2019, it was estimated that, of 328 buildings with aluminium composite material (ACM) cladding, 221 were still awaiting remediation work to start.

Notes


Beverly M. McLachlin, Arthur M. Grant. Toronto: LexisNexis, 2020

There are many laws that architects need to be familiar with – bylaws, building codes, codes of ethics, business regulations, structural principles, design rules, to name a few. It seems only fair to leave common law, tort law, statute law and contract law to the specialists: lawyers. On the other hand, a reasonable familiarity with the laws that impact the practice of architecture doesn’t seem too much to expect of a professional.

The Canadian Law of Architecture and Engineering: Third Edition won’t tell you all you need to know about Canadian law, but it will make you much better informed when you review contracts, deal with clients and contractors, or call to discuss your problem with the OAA, Pro-Demnity or your own lawyer.

The Right Honourable Beverley M. McLachlin, former Chief Justice of the Supreme Court of Canada has co-authored three editions of The Canadian Law of Architecture and Engineering. The first edition, co-authored with W. J. (Bae) Wallace was published in 1987; the second, co-authored with Wallace and Arthur M. Grant, was published in 1994. After a 25-year hiatus, including the 17 years when Ms. McLachlin served as the Chief Justice of the Supreme Court, the third edition of this definitive text, co-authored by McLachlin and Grant, became available in June 2020.

Watch The Straight Line for future articles based on the contents of this book.

Our Contributor

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www.prodemnity.com

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