PRODEMNITY
INSURANCE COMPANY

200 Yorkland Boulevard
Suite 1200
Toronto, ON M2J 5C1
Canada

T 416 386-1770 F 416 449-6412

prodemnity.com

December 7, 2017

Mr. Michael Cox, MAA, FRAIC
President
Royal Architectural Institute of Canada
330-55 Murray Street
Ottawa, ON K1N 5M3

Dear Mr. Cox,

Re: Transfer of Risk: Questions from Senator Wetston

We have reviewed the material which the RAIC provided to us and in particular the text of questions and comments during the hearing of the RAIC presentation to the Senate of Canada. In particular, we have focused on Senator Wetston's question which was as follows:

Senator Wetston:

I have one follow-up question if I may. I don't understand where the risk is being transferred. In your professional capacity you are avoiding and you have a duty of care so you're concerned about negligence or some sort of tort action that might occur as a result, so I'm just trying to understand if there is a transfer of risk can you get insurance with respect to the Professional Insurance that you obviously might require?

And second, what is the risk transfer exactly that you were talking about?

In response to the Senator's questions we offer the following:

In recent years a number of large institutions, some municipalities, and some government entities or corporations have begun to amend their basic contracts for design and construction projects to include much broader indemnities than they had previously sought from consultants and contractors.

As Senator Wetston's question suggests, with respect to architects, professional insurance is available and is provided to deal with issues arising out of errors and omissions on the part of architects in the provision of services. That, of course, is nothing new, and in Ontario we have had mandatory insurance for Architects since 1987. That insurance was statutorily enshrined in the *Architects Act* and Regulation thereto, and since that time professional liability insurance has been provided to Ontario architects under a mandatory program provided by Pro-Demnity Insurance Company.

Accordingly, every architect in Ontario holding a Certificate of Practice issued by the Ontario Association of Architects has a policy of professional liability insurance with Pro-Demnity Insurance Company for at least the minimum required limits as described in the Regulation.

The arrangement is similar to the mandatory professional liability insurance program provided to Ontario lawyers through LawPRO.

The policy limits maintained by an architectural practice vary depending on the regulatory requirements as well as by decisions taken by the architect related to the needs of practice, the type of work done and services provided by the particular architect. Many practices maintain higher than the minimum limits, either through increased limits with Pro-Demnity or excess insurance purchased from other insurers.

Any professional, including an architect, has an obligation to indemnify a client respecting certain damages and costs arising from error, omissions or negligence in the provision of services. This obligation is imposed by existing law rather than through a contract provision. However, some clients have insisted on including contractual language to address the indemnity. Where that language is coextensive with existing law, the architect has no problem since it has not taken on additional liability contractually that its insurance would not address.

However, of growing concern is contractual language promoted by some clients that has included a number of elements which exceed the architects' existing liability at law and hence its insurance coverage, in effect transferring client or owner's risk onto the architect. For instance:

1. Express warranties, guarantees, indemnities or penalty clauses. These sorts of promises of perfection or obligations do not reflect the professional's obligations at common law, and are excluded from professional liability insurance coverage to the extent the obligations placed on the architect exceed what would already be its at law in the absence of the provision.

2. Inflation of the duty of care of the professional to parties outside of the client itself, including as an example a diverse group such as "agents, directors & officers, shareholders, volunteers, and contractors." Agreeing to such a broad additional group of indemnitees would lead to gaps in coverage provided by the professional liability insurance available to architects. Taking "contractors" as an example, an insurer would simply not accept that an architect who owes a duty to an owner with whom he is contracting should extend his liability to a contractor who is also providing services on the same project. That contractor owes its own duty to the owner and presumably carries its own form of contractor appropriate insurance.

In addition, many client-authored indemnity provisions include the obligation for the architect to provide a defence to any or all of the indemnitees at the architect's cost, without limits on the obligation. There will be no professional liability insurance coverage for such an obligation assumed by the architect in a contract with a client.

3. Promises to indemnify the owner for legal costs incurred on a "substantial indemnity" basis. While most policies of professional E & O insurance cover the insured for costs payable as ordered by a court or arbitrator it is well known that the norm of costs ordered are on the basis of "party and party" and not of "substantial indemnity." In these clauses the owner is insisting that the indemnity from the architect provide in all cases for "substantial indemnity" costs, or even "all" costs to be paid whenever costs are payable. The difference between "party and party" costs which might be covered by the insurer and "substantial indemnity" costs, or even "all" costs of the owner as agreed to contractually could run into the hundreds of thousands if not millions of dollars in a serious case.

4. Historically, indemnities have been based upon the party seeking compensation to establish its entitlement and the indemnity need not be fulfilled pending court order. In recent years some clients are insisting on obtaining fulfillment of indemnity prior to judgment based on the exercise of "set-off" against funds due the architect, at the sole discretion of the client. In so doing, clients are seeking to appoint

themselves as "prosecutor, judge, jury, and executioner" and are insisting on withholding or offsetting fees until such time as the professional in effect proves his innocence. The owners have reversed the burden of proof. An owner who exacts this sort of execution before judgment compromises the ability of the architect to continue to pay downstream fees to other consultants not to mention the compromise to the architect's own business by its inability to pay its staff for the work it is doing on the job.

If the exercise of a set-off by the client is presented as agreement by the architect to accept such as settlement of a claim by the client, the architect may forfeit its professional liability insurance coverage for what could otherwise have qualified as an insured "Claim" under its insurance policy. A settlement reached by client and architect without the insurer's express approval is excluded from coverage.

5. Dispute resolution or settlement provisions that negate the architects' insurance coverage. Owners are frequently requiring architects to agree to dispute resolution provisions which require the architect to participate in any arbitration between the owner and any other party. In agreeing to such a provision the architect is in breach of its duty to permit the insurer to control the course of litigation on its behalf. Such a provision may well void coverage.

6. These sorts of problems are exacerbated in cases where the project includes an RFP with a provision to the effect that the contract's indemnity clause is non-negotiable. In such cases, the owner runs the risk of losing viable and strong contending bidders who bow out rather than expose themselves to significant uninsured liability. A much more sensible strategy for owners is to avoid deliberately exposing consultants to uninsurable risk.

7. Additional risk transfer concerns with insurance implications include expansion of the scope of services demanded of the architect by a client, often as a convenience to a client or its procurement group who prefer "one-stop shopping" to meeting the client's own obligations in the client /architect relationship. An example would be an RFP requiring the architect to retain certain specialists required for a client to meet its obligation to provide an architect with essential information about the existing state of its property as a prerequisite for the architect to provide its own services respecting changes to the property. Common examples are specialists required to provide surveys, geotechnical and soils information and information about toxic or hazardous materials on the property or in an existing building. Until quite recently, clients/owners retained these specialists to provide required information without question; however, a growing number of clients are attempting to shift the burden onto the architect.

Insurers may include specific exclusions for claims related to some of these services. Most architects and professional literature consider retention of these specialists to fall outside the "usual or customary" services of an architect, and there is a risk that as such, they are not covered by an architect's professional liability insurance. Further, if the architect retains any of these specialists instead of the client or property owner, it assumes contractual liability for the errors or negligence of the specialists, in contrast to being entitled to rely upon information that has been previously accepted as a client responsibility.

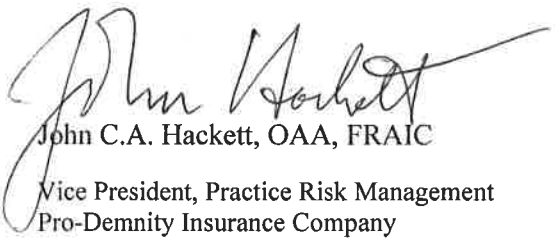
8. In a similar vein, some clients are issuing RFPs that require an architect to act as a procurement service to retain a broad array of specialists whose services the client requires for the project. A common circumstance is a procurement policy of the client/owner that requires a "bid" process for every purchase, a policy that can be overridden by passing the retention of the specialists onto an architect. Many of these may have little or nothing to do with the architect's services on the project. The architect assumes contractual liability for these consultants but has no input into the work or the recommendations made to a client by the specialists.

A few examples include Information Technology consultants advising a client directly, Security consultants whose advice may qualify as confidential from even the design consultants, or a Moving consultant (moving company) retained to assist the client plan for its relocation.

The number of the possible "specialists" that clients' purchasing groups may require an architect to retain on their behalf is extraordinary…60 plus based on a recent research project. Some of these are not recognized professionals and will not carry professional liability insurance, leaving the architect as the default insurer, if retention of the specialists passes a "usual or customary" service of an architect test. This is very much in doubt.

We trust the preceding is helpful in addressing the questions posed to the RAIC.

Yours truly,



John C.A. Hackett, OAA, FRAIC

Vice President, Practice Risk Management
Pro-Demnity Insurance Company