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PRACTICE NOTE 10: PROFESSIONAL LIABILITY INSURANCE AND RELATED ISSUES

SECOND EDITION: JUNE 2007

This edition is entirely new and replaces its obsolete May 2000 edition, withdrawn in November 2004. Members are strongly encouraged to review its contents carefully in relation to their various professional roles and practices. It is important for architects to be well-informed regarding their risk management strategies and insurance needs. In these regards, advice from experienced insurance-industry professionals is essential.

*Owing to the extent and depth of this Practice Note, a **Table of Contents** is provided to facilitate access and reference to specific topics.*

Cross-References: these industry documents are among those to which members can turn for further information: AIBC Practice Note 3; AIBC Document 6C-H; AIBC Bulletin 66 Professional Liability Insurance (PLI); CCDC-21: A Guide to Construction Insurance; the Canadian Handbook of Practice.

Members are also strongly advised to maintain awareness of evolving civil liability law (e.g. Statute of Limitations; Joint & Several v. Proportionate Liability); the commercial PLI marketplace; terms, conditions and exclusions of specific insurance policy wordings; and emerging regulatory requirements.

This Practice Note has benefited from review by experienced insurance-industry professionals.

The AIBC and its Liability Insurance Committee are appreciative of intelligence and feedback from members and industry.

Table of Contents	Page
(1) Introduction	3
(2) Responsibility	3
(3) Liability	3
(4) Insurance	3
<i>A. Public Protection</i>	3
<i>B. Professional Legitimacy</i>	3
<i>C. Practitioner Protection</i>	4
(5) Professional Liability Insurance Coverage	4
<i>A. Definitions and Distinctions</i>	4
<i>B. PLI Market</i>	5
<i>C. The Policy – Exclusions, Riders and Endorsements</i>	5
<i>D. Policy Timing</i>	6
<i>E. Policy Limits</i>	6
<i>F. Additional Coverage</i>	7
<i>G. Project Insurance</i>	7
<i>H. Premiums and Deductibles</i>	7
(6) Prohibitions and Obligations	8
<i>A. Policy Prohibitions</i>	8
<i>B. Insurer Notification</i>	8
<i>C. Disclosure</i>	8
(7) Circumscribing Liability Exposure	9
<i>A. Professional Diligence</i>	9
<i>B. Contract Terms and Conditions</i>	9
<i>C. Notice</i>	10
<i>D. Business Structure</i>	10
(8) Related Issues	10
<i>A. Letters of Assurance</i>	10
<i>B. Warranty Programs</i>	10
<i>C. Loss Control and Education Programs</i>	11
<i>D. Risk Management and Personal Assets Protection</i>	11
(9) Background Topics	11
<i>A. Building Envelope Failure – BC Coastal Region in the 1990s</i>	11
<i>B. Rogue Letters of Assurance</i>	12
<i>C. Full Accountability Framework</i>	12
<i>D. Civil Liability Law Reform</i>	13
<i>E. Compulsory Insurance and AIBC's Role in PLI Delivery</i>	14

(1) Introduction

Professions, such as architecture, provide an important societal role. They facilitate the provision of complex services, prerequisite for which are high levels of skill and expertise, and the exercise of which requires responsible, informed judgment, while in aggregate minimizing transaction costs to those relying on these services. The institution of the profession provides the framework to support lengthy practitioner investment in acquiring the requisite skills and expertise, as well as the essential mechanism to maintain oversight, through self-regulation, that is not practical by other means.

(2) Responsibility

Individual members benefit from their professional status through the monopoly endowed under legislation to practise in their defined field. The counterpoints to this are the obligations attendant upon professionals to uphold standards of ethical conduct and the application of a duty of care to both clients and third parties. These standards apply to judgment and actions taken (potential sources of error) as well as to failure to take appropriate action (potential omissions) where circumstances generate an obligation.

(3) Liability

Professional practice has an inherent degree of potential liability arising from one's responsibility and accountability. In a situation where due process determines that a member of a profession is negligent in rendering services, the party or parties harmed are entitled to redress. Professional bodies such as the AIBC acknowledge the legitimacy of this obligation. Notwithstanding that the AIBC has concerns on issues of fairness and legitimate member self-interest, as discussed below, the AIBC fully recognizes that to sustain its status and to cultivate a respected profession it is essential to accept the obligation of professional responsibility willingly and proactively.

(4) Insurance

Professional Liability Insurance (PLI), also known as Errors and Omissions (E&O) Insurance, is one of the important means by which appropriate redress or indemnification to those suffering harm is provided in circumstances of fault. It is the policy of the AIBC that all practising members - those holding a Certificate of Practice (with possible limited exceptions) - should maintain suitable professional liability insurance coverage under the rationale of:

A. Public Protection

As outlined above, there is a connection between professional entitlement and responsibility. The public has a right to expect protection from malpractice through sanctions by the Institute on its members and/or through financial indemnity. PLI provides the primary means for funding indemnification.

B. Professional Legitimacy

Since the profession and its members accept their obligation to redress harm legitimately attributed to a failure in exercising a duty of care, it undermines the legitimacy of the profession as a whole if there is no capacity to provide the redress.

C. Practitioner Protection

Practitioners without PLI coverage are in essence self-insuring, as the absence of policy coverage does not diminish liability exposure (*cf.* further discussion on this below). PLI protects practitioners from financial loss, potentially career-ending and devastating in its magnitude, as a consequence of a damage claim or legal suit.

The foregoing does not imply that with PLI an architect is fully covered. It may be that an architect with some insurance protection is still exposed, especially if policy exclusions or the dollar amount of available coverage does not fulfill obligations imposed by the courts. It is possible that a plaintiff will pursue personal assets if PLI coverage is inadequate.

(5) Professional Liability Insurance Coverage

Professional liability insurance covers liability that is the result of failure to meet professional standards. However, professionals are not expected to be omniscient and the general test is that of how a reasonable individual should have acted given what he or she knew, or ought to have known, at the time. There are at least three important distinctions:

A. Definitions and Distinctions

- i) Although things may go badly and cause harm on a project that has an architect engaged, it is not necessarily the fault of the architect, i.e. the architect is not 'de facto' responsible to ensure the absence of project failures – there may be problems entirely (or partially) attributable to other parties as well as failures that are truly unpredictable or accidental.
- ii) In a similar vein, PLI is intended to indemnify only for risk as outlined above; it is not warranty coverage. Actuaries who set PLI rates are attendant to this distinction and it undermines the industry when claims/settlements violate the principle. While it may at times appear fuzzy in practice, the actual concept is that a warranty applies to statistically regular and expected failures. Examples of the latter are more easily appreciated with regard to industrial production (say of light bulbs) where the manufacturer will know that despite quality control measures a certain low percentage of units will be defective, and replacement is automatic through a warranty undertaking. In the case of PLI risk assessment, there is necessarily consideration of claims probability as the basis for setting rates, but this is assessed in the context of the field of activity as a whole, not a particular process, and the pertinent risk is for harm that is attributable specifically to negligent judgment on the part of the professional, not on the fact that harm was suffered. When the insurance providers see a risk that does not conform to the exposure they are underwriting they typically will incorporate policy exclusions in response.
- iii) Failures are usually due to inter-related factors and it is very often the case that a failure in professional responsibility is a contributing but not sole cause of harm. The concept of proportional liability is important, particularly if there is a fairly negotiated settlement. However, civil liability law (in BC) does not necessarily result in the imposed distribution of financial redress on this basis; ability to pay can trump the degree of responsibility because of current law based on joint and several liability (i.e. liability that is both jointly and individually applied; see civil liability law discussion, in section 9D.)

B. PLI Market

PLI is a subset of insurance coverages available, and required by a prudent practitioner. It should not be confused with general liability coverage, property coverage, and for example, coverage extended through the policies of a general contractor for the architect's risk exposure from association with the construction process.

While some other professions, and architects in some other jurisdictions, have established mechanisms that are controlled by the professional bodies for delivering PLI coverage, AIBC firms are reliant on PLI through the market place. The PLI market is volatile, going through cycles typically of seven to nine years' duration. The number of entities writing policies (especially new policies) has gone down to one in recent times, and even in buyer-friendly times is unlikely to be more than five to seven. Underlying the policies themselves is an even smaller number of underwriting funds. These are international in scope so that the cycles in the BC PLI market are largely independent of the claims circumstances in BC, although this has not been the case during the building envelope failure episode where BC presented a particularly unattractive market from which a number of providers fled.

The types and limits of coverage available through PLI policies to AIBC firms are dependent on what the market is willing to provide. As a generalization, PLI providers operate in a manner that makes financial sense relative to their own interests, both for the policy coverage and the way that settlements are managed. For them, insurance protection is a commodity not a goal. AIBC firms are dependent on these insurers, and while they provide an essential and valuable service, their interests and those of individual practitioners and their clients are not in many cases identical. An essential characteristic of PLI insurance available to professionals is its *claims-made* basis. This means that the availability of coverage for a claim is dependent on the policy (including exclusions) in effect at the time the claim is made, not the time at which the action or the event causing harm occurred.

C. The Policy - Exclusions, Riders and Endorsements

The exposure which is actually covered is defined by the PLI policy wording. Unfortunately, the policy language is typically phrased in obscure language. A prudent practitioner will read the policy carefully, although, for the most part there is little variation or scope for modifying the policy except at specific junctures in the market, or around limited issues. At certain times, for example, there were, and may be, options for whether the cost of defence is within or in addition to the policy limits. The time limits correlating to the BC provincial government's HPO (Homeowners Protection Office) warranty program (eg. 2-5-10 versus 2-10-10) may also vary by policy. (see Section 8B)

Policies typically include a number of named exclusions, i.e. types of failure or exposure that are excluded from coverage. These vary over time as a reflection of the claims context; cost and market competition, and differences among the policy providers may make a comparative search for coverage worthwhile. Exclusion items of note may include:

- i) Geotechnical advice
- ii) Pollution and contaminated sites
- iii) Asbestos and mould-related issues
- iv) Water ingress unless in compliance with specific contractual, warranty and service conditions.
- v) Earthquake damage

- vi) Project/construction management
- vii) Cost estimating or financial feasibility advice
- viii) Warranties and Guarantees
- ix) Advice on Insurance and Bonds
- x) Design/Build project delivery

Due to the extended tail of liability exposure, it is prudent to ensure PLI coverage is extended to:

- i) Predecessor firms
- ii) Retired members of continuing firms
- iii) Cross-owned companies

Retired architects without coverage through an enduring firm's policy are advised to acquire "legacy" coverage. Premiums will reduce over time as the exposure diminishes.

D. Policy Timing

Since PLI policies are on a claims-made basis the relevance of the policy in effect at the time of a claim lies in whether or not the policy provides coverage back to the time of errors or omissions by the architect. It is essential, therefore, to know if the policy provides coverage (and with what exclusions, deductible, limits, et al) backwards in time for either (a) the architect's entire career; or (b) only to some more recent (retroactive) date.

E. Policy Limits

It is incumbent on practising firms to purchase PLI coverage with appropriate limits, i.e. the amount of funds available through a policy to address claims over an annual period, as applied to both single claims and the aggregate of all claims for the period. There are a number of factors to consider:

- i) Industry standard contracts are written with certain minimum limits assumed. At this time, client/architect contracts RAIC Document 6 and AIBC Document 6C are based on minimum per claim coverage of \$250,000.
- ii) Many clients, particularly public agencies, will specify higher limits as a condition of signing a consulting services agreement. (refer to AIBC Document 6C-H and Practice Note 3 for sliding scales of coverage requirements for publicly funded health care facilities and schools, respectively.
- iii) The aggregate policy limit should be set relative to the size of the practice and a risk assessment of the client profile. Coverage can be exhausted when more than one claim is made during an annual period.
- iv) Even if clients stipulate a type or coverage limit, it does not necessarily follow that it is available at any reasonable rate or at all. It is important to avoid committing to carry a level of coverage if it is not clear that it can be obtained at reasonable cost.
- v) Policy limits can sometimes be negotiated with a client so as not to exceed a reasonable amount.
- vi) Contractual and tort (3rd party) liability both may arise. Negotiating limits of contractual liability with clients does not limit tort liability. Architects are cautioned to avoid inequitable indemnification language. (See AIBC Practice Note 3 for appropriate wordings.)

F. Additional Coverage

There may be circumstances under which a firm will need to augment the coverage provided by its basic PLI policy by purchasing additional insurance, often at a client's request. If that is achievable, the associated additional premium should be recoverable either by a larger professional fee or as a project-specific reimbursable expense.

G. Project Insurance

An alternative to PLI covering each individual party engaged on a project is the concept of project, or wrap-up, insurance. This is a policy usually or often secured by the owner within which all parties on a project, the architect and other consultants, are named insureds. Revenue for services on projects so insured is typically not included in the premium calculation for the base policy maintained by an architectural firm for other work, so there is likely a cost saving to the architect for the time period that service is covered by the project insurance (notwithstanding whatever fee adjustment might be associated with the project insurance). The major concern for project insurance from the consultant's perspective is the time period that the coverage is extended beyond substantial completion of the project. As a function of the claims-made nature of PLI coverage, at the date of a failure and claim, architects are well advised to make certain that either the project policy or their basic policy provide coverage at any given time. Even with project insurance, architects may wish to investigate duplicate coverage through their base policy.

H. Premiums and Deductibles

To obtain PLI coverage, architectural firms with a practice history typically submit an application with a profile summary of projects, fee revenue and claims, to PLI providers, typically through agents or brokers. In a good market a number of quotes can be obtained. While it is supposed that the market rates are carefully calibrated to actuarial analysis, in practice when there is any significant level of competition in the market, rates offered can vary considerably – it often pays to shop (bearing in mind value, not just cost) or alternatively to leverage the prospect of alternate coverage. However, there are cautions when changing carrier, particularly to ensure future options for coverage are not unduly curtailed.

While annual premiums are determined and assessed by examining all aspects of the practice, they are often expressed or compared as a percentage of firm revenue. The availability of multi-year policy options cycle in and out of the market place.

An important aspect of the premium is the amount of the deductible, i.e. the initial level of cost the policy holder is responsible for in response to a claim before the policy coverage begins. Where there is choice, the premium amount will go down as the value of the deductible goes up. In deciding on the acceptable value of the deductible it should be remembered that whether or not a claim has substance, it requires a defence response that will incur costs – often payable by the policy-holder up to the limit of the deductible for each claim. Flexibility on deductible amounts also cycles in and out of the market place.

New firms without a practice history, and small firms with low annual revenues, have experienced significant difficulty in a hard market in obtaining PLI coverage, especially at reasonable cost. The AIBC has encouraged providers to address this issue with mixed results.

(6) Prohibitions and Obligations

A. Policy Prohibitions

Policy wording outlines prohibitions for the policy holder, the violation of which may provide basis for coverage denial by the insurer. In general terms, extreme caution should be exercised to avoid:

- i) Practising in contravention of the policy exclusions;
- ii) Taking any action that admits guilt for a failure of duty associated with a claim or potential claim;
- iii) Failing to notify and to provide all relevant information in a timely manner to the insurer on a claim or indication of a potential claim; and
- iv) Expanding liability exposure through contract or other instruments. Areas to be wary of in this regard include:
 - client-written contracts that may carry expanded liability exposure relative to industry standard contract wording (see section 7B);
 - “rogue” municipal Letters of Assurance (see section 9B);
 - commitments requested in writing by lending agencies;
 - written opinions that can be construed as a product endorsement; and
 - opinions that can be construed as a guarantee of a future outcome (e.g. success of a rezoning initiative, project completion date or profitability and/or the performance of other parties (e.g. quality or code compliance of construction)).

B. Insurer Notification

It is essential to notify the insurer at the earliest reasonable time of a claim or potential claim. With caution, policy holders may be mindful of the consequences of the precise timing of notice at the time of policy renewal, although in no case can reporting be untruthful or incomplete.

C. Disclosure

AIBC policy (*cf.* Bulletin 66) outlines the responsibility of members for disclosing PLI coverage.

In summary:

- i) AIBC members have a duty to fully disclose their coverage to active clients, including at the time of engagement and at any time coverage changes during the course of providing services under the contract's duration.
- ii) Regulatory authorities are entitled to request demonstration of PLI coverage at the time of application for a Building Permit and AIBC members should comply providing the request does not include any expansion of the professional obligations or exposure. AIBC members are not expected to notify the authorities of subsequent changes to coverage. It is the position of the AIBC that the authorities are not entitled to dictate minimum coverage limits nor to request verification that the coverage conforms precisely to the itemized aspects of Schedule B of the building code's Letters of Assurance. The former is the prerogative of the architect, the latter would require the architect to give assurances about policy conditions that are not, for the most part, controllable by the architect and may vary during a project's duration.

- iii) AIBC members are not required to notify any party about the potential for policy coverage exhaustion prior to notification from the insurer that exhaustion has occurred (in which case there is no longer PLI coverage until a new policy period is reached).
- iv) Unless disclosure would violate the prohibitions of the policy, it is at the discretion of the AIBC member to decide whether disclosure is justified to other parties. For example, notifying a warranty provider from which a residential developer client is obtaining a policy is obviously in the interest of client service; disclosing coverage to a disgruntled purchaser of a commercial or residential unit is inadvisable.

(7) Circumscribing Liability Exposure

A. Professional Diligence

The primary way to avoid liability actions is to practise in a diligent and responsible manner. The AIBC has a policy (*cf.* Bulletin 90) under Bylaw 28, outlining minimum levels of service that sets a basic scope of service consistent with competent practice. The quality of service, and the exercise of professional judgment, are less easily defined but are the other essential dimensions of responsible practice. It is not the intent to try to address all the aspects of good practice here, but some recurring advice provided to members by other experts include:

- i) Screening clients in advance to avoid those who are predisposed to litigation;
- ii) Providing a full, comprehensive service and setting a fee that permits that level of service to be maintained – an insufficient fee is not a defence to provide less than the due diligence level of service;
- iii) Maintaining good project records;
- iv) Communicating regularly and proactively to avoid misunderstandings;
- v) Ensuring knowledge is maintained on emerging issues through continuing education and monitoring professional bulletins;
- vi) Ensuring clients are exposed to options and presented with the opportunity to make key decisions in an informed manner;
- vii) Ensuring field services are conducted rigorously;
- viii) Avoiding misrepresentation and inadvertent guarantees;
- ix) Ensuring assurances and certifications are soundly based.

B. Contract Terms and Conditions

Liability exposure from second parties (i.e. the clients or sub-consultants in direct contact with the first-party architects) can largely be limited through the details of contracts. The client-architect agreement, for example, can set the limit of a claim against the architect to an amount within the architect's policy limits (or fees; or some fixed amount). There are advantages in reducing exposure to vicarious liability (i.e. liability arising from errors or omissions of those consulting to the architect) if the (sub)consultants are contracted directly to the owner (*cf.* AIBC Client/Consultant Contract 6C). Third party liability exposure (e.g. in relation to people with whom the architect has no contract) cannot be limited in this way.

C. Notice

There may be circumstances wherein the client imposes decisions with which the architect disagrees but which are not of a nature where ethics would demand refusal to comply and/or resignation and/or notification of authorities having jurisdiction. An example might be the substitution of a structural system the owner believes will be less costly or require less time. While legal advice should be solicited, formal notice of the architect's contrary opinion may limit potential exposure.

D. Business Structure

Many architects engage in enterprises that are not governed by the *Architects Act*, and for which they are not putting forward their credentials as an architect. A separate business structure for these enterprises can reduce the potential for liability exposure to the architectural firm. Also, revenue from the separate firms is not included in the calculation of the architectural firm's PLI premiums.

(8) Related Issues

A. Letters of Assurance

Incorporated in the BC Building Code and the Vancouver Building By-law are Letters of Assurance. These are required at the time of submitting documents for a building permit application and prior to occupancy. The letters of assurance have been drafted collectively by the professions and regulatory authorities, and if executed exactly as worded, constitute an essential aspect of practice that does not increase liability exposure. As noted elsewhere, it is AIBC policy that regulatory authorities are entitled also to request proof of PLI coverage, but not to set criteria for the PLI policy coverage. Some municipalities request this information in the format of an additional schedule to the letters of assurance, typically not supported by the AIBC and to be avoided in practice. (See also discussion of "rogue" letters of assurance, in section 9B.)

B. Warranty Programs

Since 1999 (under the BC Homeowners Protection Act) developers of residential buildings are required to purchase warranty coverage that is transferred to the future owners of the units. That Act is administered by the Homeowners Protection Office (HPO) – an agent of government. That Act stipulates the minimum coverage and other conditions of this warranty protection, but the policies are purchased through private providers in the market place. The minimum coverage is often stated in simplified terms as 2-5-10, referring to the minimum time period (years) for coverage respectively on materials and labour, envelope, and structure. The developer is required to engage a builder with appropriate qualifications; also to show proof that consultants have appropriate PLI coverage, consistent with the warranty policy terms. There has been a problem in the market when certain PLI providers have required, in order for the architect's policy coverage to be valid, higher project warranty coverage (e.g. 2-10-10) than the developer was obligated, was able, or wished to obtain. Technically, this may constrain fully compliant coverage to a limited number of insurance/warranty providers. A consequence for architects is to recognize that the warranty provider administrators have become the equivalent of another approval authority, but with the difference that they have a direct financial interest in payment on claims. They constitute another knowledgeable participant in the industry that will not shy away from legal actions (perhaps against architects) to reduce its losses in the case of building failures.

C. Loss Control and Education Programs

The test of negligence requires professionals to maintain knowledge of the current state of information and best practices and to incorporate such in their service. Active participation in Continuing Education (CE) is a responsibility associated with assurances of professional competence and the AIBC has implemented a mandatory CE System. The AIBC also issues topical Bulletins, Practice Notes and advisories. However, members should not assume that participation in the AIBC CE System alone will assure the maintenance of their professional currency. Diligent reconnaissance of the state of knowledge in the field is a feature of professional practice. A particular type of continuing education is provided in the form of loss control programs delivered by PLI providers.

D. Risk Management and Personal Assets Protection

Architects are entitled to implement arrangements that will manage their personal risk and limit the exposure of their personal assets. The rationale for AIBC policy is that protection of the public, including clients, is met through appropriate levels of PLI coverage, after which architects should not be expected to expose their personal wealth to professional liability claims (note that there may be an ethical conflict if asset protection is pursued at the exclusion of PLI coverage). Architects cannot use the vehicle of limited liability companies as protection from personal, professional liability. However, other experience suggests the vehicle of a limited liability company can be used to advantage (where it makes financial sense) for architectural business operations and for other/separate non-architectural businesses in which an architect may have an interest. Managing the title of asset ownership (e.g. spousal and trust arrangements), and selecting certain types of investment savings products (e.g. types of segregated funds) are also elements of a risk management strategy. It is not legitimate under the law to restructure asset arrangements to avoid exposure to a known claim. Therefore, a risk management strategy must be put in place at an early stage and managed with documentation that will meet the scrutiny of the courts as to its legitimacy if required.

(9) Background Topics

A. Building Envelope Failure – BC Coastal Region in the 1990s

It is difficult to avoid some mention of this topic since it has had such a large impact on practice in general and PLI in particular. It is the contention of the AIBC, among others, that this is a classic case of a systemic failure – one that is caused by complex and multiple factors. Important to context is that the BC west coast represents a humid-temperature climatic zone, comparable to a limited number of similar zones in the world, each of which has experienced parallel problems. The list of cited factors for envelope failures in coastal BC includes: a building boom catering to imported and often inappropriate market tastes, perverse zoning constraints limiting proper design practices, the introduction of new building products without adequate quality control and/or particularly subject to degradation in the presence of moisture, improperly trained/regulated construction forces, and (the final straw in the assessment of many) changes to the building codes that, in the interest of energy saving resulted in entrapping moisture within the interstices of the envelope where damage was the inevitable result.

If an additional argument were required that the building envelope failure as manifest was a systemic problem, rather than, say, one of a sudden loss of competence by individual practitioners, it would be

the sheer scale of the number failures. The implication for PLI is that this type of failure is not what PLI insures for – at least not as an industry-wide phenomenon. And predictably PLI providers limited their exposure by excluding coverage at the earliest date possible as policies were renewed (and later adding only conditional coverage back into policies).

From the AIBC’s perspective, one disappointing dimension of the saga has been the inadequate, and sometimes exacerbating, actions of government and their agencies. In particular:

- i) The problem was not identified in a timely manner, and strategies were not devised to limit the extent of inadequate construction – the magnitude of the loss is bigger than it needed to be.
- ii) The provincial government’s intervention in the form of the Barrett Commission, while leading to some helpful innovations such as the HPO warranty program, failed when it mattered to use the authority of government to harmonize those measures that would most effectively apply resources to ameliorating the actual failures, thereby serving the interests of public protection, and reducing the application of large funds on legal process – the false premise of which was to treat each case as an individual failure and case of negligence.
- iii) Public agencies, notably BC Housing Management Corporation and the government ministries acting collectively for school districts, exacerbated the problem, particularly in the area of insurance coverage, by launching an indiscriminate spate of legal actions with the sole intention of tapping any available insurance fund. This policy gave scant attention to merit and sidestepped the responsibility of the agencies themselves in contributing to the cause of damage through their direct intervention in setting design/specification standards, undertaking plan and site review, as well as limiting quality through capital funding control. And, since it was purely a loss-minimizing exercise trying to tap into insurance funds, assurance was (tepidly) provided that assets of individuals would not be pursued – in this unsavory dynamic, having no coverage or exhausted coverage arguably was an advantage in deflecting legal action.

B. Rogue Letters of Assurance

As a direct consequence of the increased liability exposure experienced by municipal authorities from the widespread envelope failure problem coupled with BC’s civil law applying to joint and several liability, many jurisdictions have implemented measures to limit their exposure, and to transfer exposure to others – notably architects. Unilateral wording changes, or additional schedules, to the letters of assurance and within local building bylaws have been implemented by many municipalities as mechanisms for attempting to manage their own risk. Many of these undertakings cannot reasonably be signed by architects as they increase liability exposure in an unsupportable manner, and contravene the conditions of PLI policies (and hence would give cause for loss of coverage), and/or would require the architect to give commitments for areas over which he/she has no responsibility or control. AIBC directives have advised members not to sign these modified or additional schedules, which have been designated “rogue”.

C. Full Accountability Framework

The AIBC Liability Insurance Committee (LIC) has established a position in support for the concept of a Full Accountability Framework and this has been adopted by Council as AIBC policy.

This concept was first articulated when the AIBC drafted its submission to the BC Attorney General concerning contemplated changes to civil liability law (2002).

The *full accountability framework* is intended as an integrative foundation for a comprehensive set of initiatives to improve the conditions and practices associated with liability issues in the design and construction industry. The principles of the full accountability framework are:

- i) Inclusion – accountability in relevant measure should be applied to all major participants – this includes not only consultants and contractors, but also owners, developers, product suppliers and regulatory agencies;
- ii) Fairness – the assessment of liability and the apportioning of the responsibility for redress should be fair, criteria for which include proportional liability exposure and mediating the uneven ability of some participants to avoid liability exposure through, for example, limited liability incorporation;
- iii) Mandatory Means for Indemnification – it should be mandatory that all participants maintain the means to fund indemnification as is legitimately assessed.

In addition to the self-evident virtue of fairness, it is contended that the *full accountability framework* will serve the interests of:

- iv) Public protection;
- v) Competitiveness and economic well-being of the industry;
- vi) Research, innovation and its alignment with regulation;
- vii) Sustainability in the sense of maintaining building longevity.

The *full accountability framework* has practical benefits in helping to identify priorities and strategies for reform. These include such measures as extending the concept of warranties and maintenance standards, refreshing the alignment of the design professions and regulatory authorities. However, foremost are the issues of civil liability law reform.

D. Civil Liability Law Reform

The AIBC has been advocating reforms to civil liability law for many years. While by no means the start of this action, a major submission was made to government in 2002 followed by policy research and lobbying efforts. In the context of the government's current (2006/2007) Modernization Strategy, the AIBC has struck an alliance with other organizations and has made further formal submissions, while participating in the government's structure of policy development committees.

The key elements of the AIBC's position on civil liability reform are:

- i) The ultimate limitations period stated in the Limitation Act should be amended from 30 years to 10 years;
- ii) The beginning of the limitation period in the Limitation Act should be changed to commence at the time of substantial completion of the project (or the equivalent);
- iii) Joint and several liability should be replaced by a liability model based on modified proportionate liability;

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- iv) A Certificate of Merit (or equivalent) system should be introduced to place constraints on frivolous and vexatious lawsuits.

E. Compulsory Insurance and AIBC's Role In PLI Delivery

On four occasions over the past 15 years AIBC has formally considered initiatives to make PLI coverage compulsory for practising firms; on the first two occasions the proposition also involved the establishment of an AIBC-controlled PLI provider. These proposals have received support from the majority of members but have not generated the extraordinary majority vote (two-thirds) required for Bylaw approval under the conditions of the *Architects Act*.

The general rationale for mandatory PLI coverage and its affiliation with the concept of professionalism has been discussed above. Council and the LIC perceive additional advantages to the AIBC in its efforts to increase public confidence and to influence the policies of government in directions favourable to the profession. Among these are, civil liability law reform; suspension of efforts to off-load liability from regulatory authorities to the professions; the harmonization of codes and regulations; and the abandonment of vexatious legal actions from government agencies. Many contend that the credibility of the AIBC is eroded by our failure to make progress on this issue.

There is a substantive argument that if the AIBC imposes the requirement of mandatory PLI coverage on its members it is in tandem obligated to ensure the availability of PLI for its members. As the argument goes, to do otherwise is to cede the authority for deciding who is entitled to practise to the insurance industry. Under this logic, the two earlier initiatives led by the LIC included both mandatory coverage and an AIBC-controlled insurance vehicle.

It is also demonstrably the case that to consider a viable profession-controlled PLI program necessitates that it be mandatory for its members. There is a set of arguments in favour of such a program that begin with the advantages of PLI coverage obtained through means controlled by the profession rather than the market place, and where the issue of mandatory participation is a secondary effect. The supporting case concerns the quality of service:

- i) A profession-controlled program would provide significantly better claims information that could be channeled to practitioners in a much more effective manner than is currently the case. This would serve to reduce the overall magnitude of damage by modifying design/specification practices as early as possible.
- ii) The entire dynamic of claims could be altered. Assuming that claims information reliably identified the cause of failures in a timely manner, and that it was communicated to members and acted upon, the basis for judgments of negligence would be minimized – and hence the relative demand on PLI redress would be minimized (because it is the negligence and not the damage that PLI covers).
- iii) One complimentary consequence would be that architects would be less encumbered in following their instincts to try to make right what has gone wrong. Within guidelines, a program could direct higher proportions of its funds, without prejudice, to fixing a harm rather than defending a claim. It is a major deficiency of market PLI coverage that the providers have minimal incentive to actually pay out damage claims, but rather see advantage

in delay and the aggressive legal defence of claims. And the claimant may expend amounts in excess of the final settlement in pursuing the claim thereby netting no benefit.

However, it is worth noting that a self-run (i.e. profession-controlled) PLI program could not be more amenable to “paying up”, instead of defending claims, to an extent that would jeopardize the viability of the program. While information is difficult to verify, it has been suggested that currently less than 40% of some case expenditures reach the party suffering damage from the defendant’s (architect’s) policy coverage, while some PLI providers indicate they try to limit defence costs to between 30% and 40% of claims costs.

It is on occasion suggested that a profession-controlled PLI program would ensure lower PLI premiums. The Ontario Association of Architects program (Pro-Demnity) has demonstrated that lower premium costs are possible. However, it is unlikely that this can be held as the main, or even a possible, benefit in a small market base as represented by the AIBC. The more convincing argument is likely along the lines of better member support and continuity of coverage.

The most recent AIBC initiative (June 2006) proposed to make PLI coverage mandatory but uncoupled from AIBC delivery of coverage. This change of position was influenced by several factors, the first of which reflect the perception of threat to the profession:

- iv) Architects have faced increasing difficulty with the unilateral actions of municipalities amending the letters of assurance called for by the building codes, and intervening in the setting of PLI coverage standards. These “rogue” interventions have placed architects in a double-bind dilemma, that if taken at face value, jeopardizes our ability to practise. Universal PLI coverage for architects is seen as part of a strategy that could end this quagmire.
- v) It is the feeling of many members that it is only a matter of time until either the requirement of mandatory PLI coverage is imposed by government, or alternatively, the shortcomings of the current situation are used to justify the dismantling of the advantage the AIBC enjoys through the *Architects Act*.
- vi) Architects compete at the margins (i.e. on smaller projects, below the *Architects Act* thresholds) with other service providers that are able to obtain PLI coverage at lesser or no professional standards.

A second set of factors reflects the results of a survey of all AIBC firms holding Certificates of Practice where it was established that:

- vii) Even in the hard market, apart from newly formed and some one-or two-person firms, there were virtually no firms that could not secure PLI coverage, notwithstanding that its cost was often high.
- viii) In the case of the two groups noted, the industry had made laudable efforts to offer a responsive policy and terms (although the uptake of this has been disappointing).

Finally it was felt that:

- ix) The AIBC would be better able to influence the insurance market with the credibility and access to better information that mandatory member coverage would provide.
- x) While there could be hardship to emerging firms, also there would be avenues for ameliorating its consequences; and the degree of hardship needed to be balanced against the overall well-being of the Institute.

Only in the fullness of time will it become clear if the analysis counseling the AIBC to make PLI coverage a mandatory condition of practice was valid. In any case, it is unlikely that the issue will remain dormant.

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