6.1 Introduction

The following section on Risk Management and Insurance issues begins with information specific to the Professional Surveyors Canada Professional Liability Insurance Committee and Program. It includes a description of the specific roles of the Committee, the Insurance Managers, and the Broker. It provides a summary of the policy itself and describes special features of the Professional Surveyors Canada insurance program. Current contact information is provided for all Committee members as well as the Insurance Managers and the program Broker. This information is also published in the form of a brochure which is updated and distributed regularly to every firm insured under the Professional Surveyors Canada program.

The other subsections are adapted from a series of articles provided by the former Professional Surveyors Canada Professional Liability Insurance Broker, Jardine Lloyd Thompson Canada Inc. Our new broker is The CG&B Group.

The following is an introductory letter by Mr. Brett about his contribution to the Guide:

> These articles give Surveyors an incisive review of significant issues that they will encounter in their everyday operations.
>
> Unlike other works on this subject, the articles are designed to assist the Surveyor by providing advice and examples to meet their everyday requirements.
>
> Please note however, that the issues covered are dynamic and situations change. For specifics of your practice and coverage, always consult your insurance provider.
>
> By: Roger Brett

6.2.1 The Professional Surveyors Canada Professional Liability Insurance Program

The Professional Liability Insurance Committee (PLIC)

Please request a pdf copy of The Guide.

6.2.2 Providing Feedback

The PLIC, ENCON, and the Broker want feedback from you, the insured. Feedback that is timely and specific provides the opportunity to give direct assistance to insureds and to improve the policy and the claims process. Second or third hand reports of past problems, dissatisfaction or general complaints are very difficult to substantiate or address in any meaningful way. Contact information for the insurance managers, the brokers, and the PLIC members are provided below so that you can call, write, or email, any of the individuals listed to explain problems or ask questions related to an application, a renewal, an incident, or a claim as they arise.

THE BROKER

The CG&B Group

120 South Town Centre Blvd.
Markham, Ontario L6G 1C3
Toll Free: 800-267-6670

Laura Stewart, Account Manager, Professional Liability Department
Telephone: 905-752-8745
Fax: 905-479-9164
E-mail: Laura.Stewart@cgbgroup.com

Mark Sampson, Senior Vice President
Telephone: 905-948-2631
Fax: 905-948-2707
E-mail: Mark.Sampson@cgbgroup.com

CG&B
PART OF THE ARTHUR J.GALLAGHER GROUP

THE INSURANCE MANAGERS

Encon Group Inc.

Suite 500, 1400 Blair Place
Ottawa, ON K1J 9B8
Website: www.Encon.ca

Stephen Panciuk, Vice-President
Telephone: 800-267-6684(2026)
E-mail: stephen.d.panciuk@Encon.ca

Stephen Black, Claims Analyst
Telephone: 800-267-6684(2063)
Fax: 613-238-7180
E-mail: stephen.j.black@Encon.ca

encon

PLIC MEMBERS

Dave Gurnsey, SLS, CLS, P.Surv., Chair
311 Albert Street
Regina, SK S4R 2N6
Telephone: 306-522-5962
E-mail: plic@psc-gpc.ca

Greg Browne, BCLS
4180 Auto Road
Salmon Arm, BC V1E 1X7
Telephone: 250-832-2840
E-mail: gsbrowne1@gmail.com

Robin Davis, NLS
R. Davis Surveys Ltd.
P. O. Box 129
Stephenville, NL A2N 2Y9
Telephone: 709-283-2776
E-mail: robin.carl.davis@gmail.com

Jim Gunn, NSLS, CLS
279 Beach Crossing
P.O. Box 99
Ingonish Beach, NS BOC 1L0
Telephone: 902-285-2232
E-mail: jimgunn@ns.sympatico.ca

Jim Halliday, ALS
Box 1656
Cochrane, AB T4C 1B5
Telephone: 403-804-8105
E-mail: jimhalliday@xplornet.ca

Ria van der Veen, BCS, Secretary
900 Ch. Dynes Road, Suite/Bureau 101B
Ottawa, ON K2C 3L6
Telephone: 613-695-8333
Toll free: 800-241-7200
E-mail: ria@psc-gpc.ca

6.3 Why do we need professional liability insurance?

In most of North America, Design Professionals face civil liability for negligent acts, errors or omissions arising out of the performance of their professional services. This article will explain the sources of professional liability claims, common types of claims, categories of liability, and what a liability insurance policy does, including two primary types of policies you should be aware of.

6.3.1 Sources of Professional Liability Claims

Firstly, let us look at the sources of professional liability claims against Design Professionals:

Owners: may incur damages as a result of a negligent act, error or omission of the Professional.

Contractors: may incur damages as a result of delays or of additional costs they incur as a result of a Professional's negligence.

Third Parties: may incur damages because of problems that arise during construction or from defects in the project after completion.

Other Consultants: may incur additional costs as a result of delays or changes, resulting from the Professional's negligence.

6.3.2 Common Types of Claims

Secondly, let us look at the most common types of claims:

Physical Damage to the project itself: The cost to rebuild a structure that collapses as a result of a design error;

Physical damage to the property of others: Failure to locate an under ground pipe line that is breached when inserting a monument, causing oil to be strewn over a farmer's property;

Deficiency corrections: Failure to transfer field measurements correctly to the office, resulting in a well having to be drilled in the correct location, that now necessitates costly remedial measures.

Delay or loss of income claims: The building is declared unfit for its intended purpose and the Owner can not collect the rental income originally projected;

Cost increases: It is found that outbuildings which were specified, do not fit the property for which they were designed, due to an error in a survey, necessitating the purchase of some additional land;

Bodily injury: Where a Design Professional designs a plant and there is an accident where a worker gets caught up in the process machinery and receives serious injuries resulting in permanent disability.

6.3.3 Contractual, Tort and Strict Liability

Thirdly, there are a number of situations which impose legal obligations on the Professional. They include contractual liability, tort liability and strict liability.

In a "breach of contract" claim:

If two parties enter into a contract, there are certain obligations that must be rendered to each party, arising either out of the contract or in tort. The terms and conditions of the contract will define the extent of the obligation or duty owed by the two parties to the contract. A Design Professional entering into a contract with an Owner, to provide services and fails to provide the contracted services, the Owner must establish the following to succeed in his/her claim:

a) That there was a valid contract between the Owner and the Professional;
b) That the Professional materially failed to perform the obligations under the contract;
c) That the Owner suffered damages as a result of the Professional's breach;

The Owner need only prove that a material breach occurred and that damages resulted. The courts will attempt to assess damages to restore the Owner to the position he would have been in, if the contract had not been breached.

In a "tort negligence" claim:

If tort negligence applies (the most common suit), then negligence is generally defined as the lack of ordinary care, but on a much more encompassing basis than mere carelessness. The Owner must establish all of the following to be successful in his/her claim:

a) That the Professional owed the Owner a duty of care;
b) That the duty or standard of care was in fact breached;
c) That measurable damages resulted from the breach;
d) That there was some causal connection between the breach of duty and the damages that occurred.

In a tort suit, the Court would look to see if the evidence established that the Design Professional departed from local custom and standard practice. Both the plaintiff and the defence could use expert witnesses. If the Professional is found negligent, the Court would attempt to compensate the Owner for any damages incurred which could reasonably have been foreseen by the Professional.

In a "strict liability" claim:

In this type of liability claim it is held that the producer of a product is strictly liable if the following conditions are met:

a) That the product malfunctioned or was defective;
b) That, as a result of the malfunctioning or defective product, the plaintiff suffered injury.

In essence, Strict Liability is liability imposed without the plaintiff having the burden of establishing negligence. Suits are seen in cases of "Design/Build" contracts where the Design Professional also acted in the capacity of a general contractor.

6.3.4 What does a professional liability policy do for you?

The Insurer will pay on behalf of the Insured, and subject to the policy terms and conditions, any damages or negotiated settlements up to the limits of the policy, less any applicable deductible. They are also responsible for providing or arranging the defence of the claim and negotiating a settlement. The Insurer will have access to experienced claims adjusters and defence counsel with a proven record of success in construction related claims.

Claims handling and defence costs are borne by the Insurer subject to any deductible applicable under the policy. In Canada most insurers pay all of these costs without application of any deductible. This is referred to as "first dollar defence" cover. Some insurers will also pay assessable court costs, pre-judgement interest and other costs which may be incurred as a result of the claim. The Design Professional should review the policy (or proposed policy) wording to ensure that it provides cover for these potentially high costs. Professional Liability policies differ and should be checked in advance for broadness of coverage.

6.3.5 Claims Made vs. Occurrence Professional Liability Insurance

Since 1968, the "Claims Made" liability policies have replaced traditional "Occurrence" policies for most professional liability coverages.

A) Under an "Occurrence" policy, coverage is triggered at the time injury or damage occurs. The claim can manifest itself over a period of years and can involve more than one insurer. This might lead to disputes between Insurers, the Insured may then be required to pay all costs of defence litigation and interest on any costs and settlements, until the Courts decide which policy or policies should respond.

   Problems arise as illustrated in cases of environmental hazards. The time between initial exposure and apparent effect can be several years. Prolonged exposure can lead to additional damage, having a cumulative effect. The result is uncertainty as to the date of the occurrence, which can now cause protracted litigation. Another problem with an "Occurrence" policy is that the limits of cover provided, are those applicable to the policy in force at the time of the occurrence. If the occurrence was several years ago much lower limits than are available today may have been purchased. The Insured is now faced with yesterday's low policy limits applying to today's awards.

B) The "Claims Made" policy, while not perfect, overcomes both of these problems. "Claims Made" coverage provides that the policy in effect when the claim is first made for injury or property damage provides the protection. The Insured is not involved in disputes between Insurers as to who should pay the loss. The professional liability policy in effect when the claim is made, responds to the claim, and today's policy limits apply to today's awards.

   Another distinct advantage is the lower cost of a "Claims Made" policy. Underwriters are better able to quantify their risk to a contained period, i.e. the policy period.

One drawback to a claims made policy is the difficulty in changing back to occurrence cover from claims made. If coverage is no longer available under a claims made form or if it is more economical to purchase an occurrence form, an Insured must be sure to

take into consideration that there would be no cover in future years for claims arising out of occurrences during the term of the claims made policy. It is necessary to renew a claims made policy each year to ensure continuous protection.

Claims made policies started in the U.S.A. with difficult long tail (that is to say a potentially long period of time, between when something happens and when the claim may be made) risks, such as professional liability medical malpractice and products liability. Claims made policies have now spread to other classes of insurance as the advantages have become better understood. Canada has followed the U.S.A. and most of these same difficult classes have changed to claims made policies.

In summary, the advantages of a claims made policy do tend to outweigh the disadvantages. The claims made policy form provides many benefits as economic circumstances impel increasing numbers of Insureds to seek innovative ways of combining lower premium dollars with improved insurance protection.

By: Roger A.H. Brett

For contact information please see Section 6.2.

NB: The information contained herein is believed to be accurate, but individual circumstances, local business and insurance practice and the Law can vary extensively and Jardine Lloyd Thompson and its associated and subsidiary companies are not responsible for any errors and omissions or any loss or damage arising from the use of this information. In the event of situations such as are described in this article, the reader should seek legal counsel and specific advice from your Insurance Broker.

6.3.6 General Liability vs Professional Liability Insurance

The two main types of liability insurance for professionals are **General Liability insurance** and **Professional Liability insurance**. Both coverages are important to properly protect a professional organization from financial loss.

General Liability insurance will protect an organization in the event the insured causes bodily injury or property damage to others and becomes legally obligated to pay damages. Liability for Bodily Injury can occur when a physical injury to a person is caused by third party. Liability for Property Damage can occur when a third party causes direct or indirect damage (such as loss of use of property) to another person's property.

General liability insurance is standardized and relatively easy to obtain. It is often provided in a package policy with other coverages, sometimes called a business office package policy. Most general liability policies issued to professional organizations contain exclusions for professional liability claims.

Professional Liability insurance is designed to provide coverage to professionals for claims arising out of their professional activities or services provided to clients. It is also called errors and omissions insurance or E&O (or medical malpractice for doctors). Coverage is typically provided by stand-alone professional liability policies and includes coverage for the defense costs associated with a claim. Coverage is not usually provided for intentional or dishonest acts.

It is very important, for both types of liability insurance, to consult with a qualified broker that has experience with the type and size of organization that you are insuring. Provide your broker with as much detailed information as possible to ensure that the coverage included in your policies, general liability and professional liability, reflect the type and level of risk to which you are exposed. Basic packages can be modified to suite your particular needs through endorsements or extensions to a more general policy. Have any exclusions and limits in the policy carefully explained by your broker to be sure they are appropriate for your situation. Consult your broker for information about 'claims made' versus 'occurrence' type policies for both general and professional liability insurance. (See section 6.7 for more information on this topic.)

6.4 Professional Liability Insurance for Surveyors

When Surveyors in North America attain their degrees in the various colleges and universities throughout Canada or U.S.A. they are made aware of the litigious nature of the North American owner or North American public in general. Surveyors from other countries around the world who emigrate to North America may not be aware of this until it is too late. In the many years that the writer has specialised in the area of professional liability insurance, he is still mystified at the lack of awareness by the average surveyor of:

a) The potential in the size of an award for damages;
b) The amount of legal and adjusting costs that can be incurred in defending a potential claim;
c) The differences in coverage offered by the policies that are available;
d) The amount of personal trauma incurred as a result of a claim against the Surveyor.

For those surveyors who may be considering purchasing this class of Insurance or may just wish to review their coverage, the writer will attempt in this article to:

1) Explain the application form and its purpose;
2) Provide "pointers" for completing an application;
3) Briefly review the policy insuring agreements;
4) Briefly review the policy exclusions;
5) Recommend what to look for in an Insurer.

6.4.1 The Application Form and Its Purpose

The application is a signed statement of facts and actually forms part of the policy. The application provides the underwriter with a breakdown of the applicant's operations, fee income and claims history, if any. Usually a signed and dated application is valid only for a period of 30 days.

6.4.2 Pointers in Completing an Application

Applicants should complete the applications very carefully. The name of the applicant and or the company name that the applicant operates under, should be correctly noted on the application and it should include **all** subsidiary companies where the applicant has more than a 50% interest and all holding companies and office management companies. There is generally no premium charge for the additional names, but you will want your policy to provide legal and defence costs for these names. Predecessor firms in which the applicant or any director or officer had previous involvement should also be identified under the application as a former name to be noted on the proposed policy. Details of each licensed surveyor will be required, and a list of their local provincial association designations, including whether or not, they are a Canada Lands Surveyor. Insurers will also want to know how many staff you have and how many are professional engineers.

When filling in the question on gross billings, the **last fiscal year end** fees should be used, as these are generally readily available from your accountant. Note separately, any fees for work performed or located in the USA as these are rated separately, most times at twice the Canadian fees rate. The application also asks whether the surveyor has been involved in

bartering instead of receiving a fee for any work done on a project.

The application will now ask for a breakdown of the applicant's fees relative to the type of surveying he/she does. The application breaks out the type of work done into eleven categories, and these are all rated separately. The writer would strongly recommend that survey companies utilise computers to accurately break down the fees into the various areas of work done by the firm. The application also asks for the fees earned from consulting engineering work, which requires the stamp of a professional engineer. At this point in time, fees in this category are rated at twice the rate than for instance, the fees earned by a surveyor doing legal surveys. Each area of work is rated according to the risk that has been assessed by the Insurers over the years.

The applications then asks for details on any claims or incidents that might lead to a claim at a future date, that you may have had in the last five years. Insurers will want to know how much was paid and any legal and adjusting costs that may have been incurred. Claims history questions should be fully answered with full explanations and information on any claims being attached to the application together with the latest status of the claim.

Applicants should always ask for quotes for various limits with various deductibles, as this will enable an applicant to select the type of policy that will best suit the potential for suits and the company budget. Generally, insurers will restrict the maximum size of the deductible to 1% or 2% of the total gross fees subject to any local Provincial Association requirements. Look to selecting the highest limit you can afford and reduce the policy cost by carrying as high a deductible as is affordable or allowed by the Insurer. The application should then be dated and signed by and sent back to the broker to process.

6.4.3 The Insuring Agreement

The insuring agreement defines the Insurer's duties and includes the Insurers obligations to pay damages and defend "you" the Insured. Most policies pay "on behalf of the insured" all sums which the Insured shall become legally liable to pay as damages arising out of a claim". This applies as long as the Insured's liability is the result of a negligent act, error or omission in the performance of professional services for others, in the Insured's capacity as a surveyor or in certain circumstances, Engineering if the policy has been endorsed to include engineering activities. Some policies refer to "services customary to a Surveyor", the question can arise as to what is "customary". Some policies may use the more restrictive wording, "professional services as described in the Declarations page of the policy" and some other policies state "services for which the surveyor is qualified." There could be questions as to whether coverage would apply if a claim arises out of a discipline that is not described in the policy declarations or the qualifications of the surveyor are in question for the category of service being provided.

The policy coverage is also subject to certain criteria:

i) that notice of the incident or claim is first made to the Insurer during a valid policy period;

ii) that the surveyor was not aware of an incident or claim at the start of the policy period.

The applicant should advise their broker to extend the activities described in the policy and amend the exclusions if the insured is

involved in such areas as construction management, project management or forestry consulting, or if they use contract employees. The Association-sponsored policy, has a number of the extensions built into their wording, such as contract employees.

The applicant should also look at the policy defence agreements. Most Canadian Insurers provide first dollar defence; where the Insurer pays ALL legal and adjusting costs without application of any deductible. This can represent significant dollars, sometimes up to 50% of the sums of money the Insurer is called upon to pay. The writer has seen claims in Canada where the legal/adjusting costs incurred have exceeded $1,500,000.

The territorial limits of the policy should also be checked. Some insurers provide cover only in Canada, others will provide world-wide cover provided suit is brought in Canada or the USA. If coverage is provided outside of Canada, the applicant should be aware that the policy will be endorsed, so that the deductible will apply to defence and adjusting costs. Another restriction found in most policies where coverage extends outside of Canada is that the limit of liability selected, **includes** defence and adjusting costs. The Association sponsored policy covers defence and adjusting costs without applying any deductible, and the legal and adjusting costs are in **addition** to the limits of liability, if limits of $2,000,000 per claim or less are selected.

6.4.4 The Exclusions

The exclusions in an errors and omissions policy basically address:

a) Uninsurable business risks;

b) Uninsurable hazards;

c) Coverage provided by other types of Insurance policies;

d) Certain exposures that may be covered for an additional premium by endorsing the basic policy form. i.e. extending the policy to cover work that requires the stamp of a consulting engineer.

The Association sponsored policy has only got the following exclusions:

a) Claims resulting from fraudulent or criminal acts;
b) Insolvency or bankruptcy of the Insured;
c) Claims resulting from the performance of services which, by the provisions of any applicable Federal, Provincial, or Municipal law, statute, legislation, or regulation are required to be performed by a professional engineer, (unless the policy has been endorsed to extend coverage to include consulting engineering);
d) Claims arising out of the ownership, maintenance, use or operation, by or on behalf of the Insured, of any aircraft, watercraft or motor vehicle;
e) Claims arising out of the nuclear energy hazards as defined in the Nuclear Energy Exclusion Endorsement that is attached to the policy;

6.4.5 What To Look For In An Insurer

When buying insurance consider the three "C's", policy **COVERAGE**, **COST**, and the insurance **COMPANY**. While all of these are important, the reputation and financial position of the Insurer is the most important. If the insurer becomes insolvent and there is a serious claim that is not paid, the future financial security of both the individual surveyor and the applicant company may be destroyed. The insurer's financial position is of great importance when arranging professional liability insurance. While

property insurance claims (such as fires) are usually settled in months, professional liability insurance claims often take up to seven years to investigate and work their way through the courts. An insurance company, which was marginally acceptable at the time insurance was placed, could be in severe difficulties or unable to pay the losses by the time a professional liability claim settlement is negotiated.

While insurance brokers do not guarantee the financial security of the insurers with whom they place business, most brokers carefully monitor the finances of the insurers they deal with. Unfortunately not all brokers set the same standard and there are some brokers who are prepared to use insurers who do not meet high standards of solvency or stability because the Insurer is willing to underwrite at very low rates or the Insurer offers a higher commission.

To protect against these problems, it is recommended that applicants make specific inquiries about the insurers who write their business. There are a number of ways in which this can be done. There are several independent organisations, such as the A.M. Best Company that provide financial ratings for many insurance companies or the TRAC Report. This type of rating takes into account both quantitative and qualitative factors. In the quantitative evaluation they consider such factors as profitability, leverage and liquidity, all of which are compared with acceptable standard norms. In the qualitative evaluation, such factors as spread of risk, adequacy of reinsurance, quality of investments, adequacy of loss reserves and management are considered.

In Canada there is an annual report called the "TRAC" Report, which measures 8 different financial ratios for insurance companies. It is not unusual for companies to fail to meet an acceptable standard for one or two of these ratios. Companies that fail to meet the acceptable standard for several of the ratios should be carefully reviewed as in some cases this failure may indicate serious problems.

We urge all applicants have their broker make proper inquiries regarding the financial stability of the insurers with whom they place business and have them provide copies of the information that they obtain. Recently the Ontario Association of Professional Engineers warned their members against using certain insurers that did not meet specific criteria. It is worthwhile noting that since 1980 there have been eighteen (18) insurers writing this class of insurance. Since then nine of these insurers have either gone bankrupt or pulled out from writing this class of business. Four have changed their name or only write certain classes of architects or engineers. There are presently only four to six serious markets that are writing this class of insurance.

Finally, we urge all surveyors and engineers, when considering this class of insurance to ensure that they are dealing with a broker who can access most of the available markets and have an extensive knowledge of this type of insurance.

By: Roger A.H. Brett

For contact information please see Section 6.2.

NB: The information contained herein is believed to be accurate, but individual circumstances, local business and insurance practice and the Law can vary extensively and Jardine Lloyd Thompson and its associated and subsidiary companies are not responsible for any errors and omissions or any loss or damage arising from the use of this information. In the event of situations such as are described in this article, the reader should seek legal counsel and specific advice from your Insurance Broker.

6.5 The Impact of Mergers and Acquisitions on Professional Liability Insurance

The sale, merger or acquisition of a professional business such as surveying, engineering, law practice or insurance brokerage business requires careful handling of both the merger agreements and the insurance policies to ensure that all parties are adequately protected from errors and omissions claims.

In virtually all cases when a professional business is sold or merged the principal assets that get transferred are customer goodwill and the continued employment of key people. For the sake of simplicity we will call the parties to an outright sale the "*vendor*" and "*purchaser*" and we will call the parties to a true merger – "*merging parties*". It has to be recognised that any of these parties may be a corporation, a partnership or a sole proprietor.

6.5.1 The Agreements

When you buy real or personal property it is usually defined in fairly precise legal terms and if the property delivered varies in a material way from the specification the contract may be rescinded or price adjustment may be made. When you purchase or merge a professional business, that business will also be defined in precise terms, partly by its financial statements and partly by the warranties and representations made by the *vendors* or *merging parties*.

In a typical agreement involving the sale of a business, both parties will make certain warranties. Some warranties are absolute, while others are "to the best of our knowledge". The *purchaser* will normally warrant that they have the funding and capacity to make the purchase. The *vendor* might warrant that they have the legal capacity to sell the business and that there are no known errors and omissions that might result in a claim or errors for which claims have actually been made, except as stated in the exceptions to the warranties. The *vendor* would also make representations and warranties describing their professional liability insurance and which claims or potential claims have been reported to their insurers. A typical agreement would also include an indemnification provision in which each party would agree to indemnify the other if the warranties prove to be wrong.

In an outright sale the purchaser may either acquire the shares or certain assets of the *vendor* under a share purchase agreement, or an asset purchase agreement. These agreements should clearly define the responsibilities of the *vendor* and *purchaser* in general and in particular with respect to known, unknown and potential errors and omissions claims. In the case of a true merger the two organisations will, generally speaking, merge and form a single organisation that will be responsible for all claims arising out of the merged businesses.

In a typical share purchase agreement the *purchaser* will become the owner of the shares in the business and will, unless other terms are spelled out, assume full responsibility for the past, current and future obligations of the business. Most prudent *purchasers* will not wish to be responsible for circumstances known to the *vendors*, unless these known problems are reflected in suitable adjustments to the purchase price. For example the *vendor* may have made an error that resulted in a large claim that was unsettled on the closing date. In the event that the *vendor's* professional liability insurers paid this claim, there might be a large deductible and it is possible that the amount of the claim would exceed the policy limits. This claim would have to be declared by the *vendors* and the *purchaser*

might assume responsibility for these amounts but would in all likelihood require an adjustment to the purchase price. The share purchase agreements are therefore similar to real or personal property sales agreements and attempt to define the business being purchased as precisely as possible.

6.5.2 The Insurance Policy

In general terms the insurance industry is flexible and the *vendor* and *purchaser* or the *merging parties* should be able to structure a transaction on a commercially and tax effective basis. In most cases the insurance industry will be able to properly protect the various parties, although the cost of insurance may vary significantly depending on how the agreement is formulated.

It is essential to have a good understanding of professional liability policies so that a transaction can be properly structured and the correct coverage arranged. Most professional liability policies are written on a "claims made" basis, which means, generally speaking, that they cover claims made and reported to the insurer during a valid policy period.

There are, in fact, three coverage periods or time slots that are important:

1. The first of these is the period within which the error occurred, for there to be coverage.
2. The second is the period within which the claim or suit has to be made for there to be coverage.
3. The third is the period within which the claim must be reported to the insurer.

In the most limited form of policy, all three events would have to occur during the policy period. More typically errors made at any time prior to the end of the policy period are covered, provided that the insured did not have knowledge of a claim or potential claim on the inception date of the policy. In this type of policy the claim must be made or the error discovered during the policy period, and the claim or circumstance must be reported to the insurer during the policy period. Some policies contain an extended reporting provision, providing a window after the expiry date for reporting claims made or circumstances discovered immediately prior to expiry.

6.5.3 Legal Responsibilities, Insurance and the Transaction

As the parties negotiate, various options with respect to errors and omissions insurance may be considered, some of these options are as follows:

1. The *vendor* may be responsible for all errors made prior to the closing date regardless of when a claim may be made. This is obviously an unattractive arrangement for the *vendors*, as they will have to continue their professional liability insurance for as long as they perceive the risk of a claim being made. (Purchasing a “discovery coverage” extension, which may be available for periods of up to six years can look after this type of exposure). A discovery extension will cover claims made and incidents reported during the discovery period that arise from an act, error or omission made during a period of time immediately preceding the discovery period. The period, during which errors that occur are covered, may be the entire time that you have been engaged in your profession or for a period as short as one year.

   In this type of arrangement, the *purchaser* is only responsible for errors made after the *purchaser* had taken over control of the business or professional office. The owner of a professional

business that is contemplating a sale may wish to consider available renewal terms to ensure that his policy includes an option to allow him to purchase discovery coverage for an agreed premium in the event of a sale. Such options are not always available.

2. The *vendor* may be responsible only for known errors and known circumstances that might give rise to a future claim. In this type of arrangement, the *purchaser* will have carried out a "due diligence" search of the *vendor's* business to determine all known claims and circumstances likely to give rise to a claim. If the *purchaser* is satisfied with the outcome of this search, and if all known claims are reported to and expect to be covered by the *vendor's* insurers, the *purchaser* will assume responsibility for any new claims or circumstances discovered after the closing. Because these circumstances are unknown at closing, there is an insurable risk and the *purchaser* should be able to insure these unknown risks.

In these circumstances the only risk to the *vendor* after the closing is the risk of a known error that was not reported and therefore not assumed by the *purchaser*. The vendor can cover this risk. The vendor may purchase an "extended reporting" provision allowing the *vendor* to report claims made before the closing, and more importantly, "circumstances" that might give rise to a claim of which the *vendor* was aware prior to closing, but which he had not disclosed to either the *purchaser* or his insurers. It is most unlikely that anybody would fail to report a claim that had been made, but it is possible that the *vendor* could be aware of circumstances that a "reasonable man" should have known might give rise to a claim.

Extended reporting coverage does provide some comfort in these situations but of course the insurers might be able to take a reservation of rights letter and later deny coverage if their position had been prejudiced by late reporting. Anyone contemplating the sale of a business or professional office would be wise to try to include an option in their professional liability policy that gives them the right to purchase extended reporting coverage, if the policy is terminated. Such options are not always available. With respect to errors and omissions the general effect of this type of arrangement, is that the *purchaser* assumes full responsibility for all errors, except those that were known to the *vendors* and not disclosed to the *purchaser* at the time of closing.

By: Roger A.H. Brett

For contact information please see Section 6.2.

6.6 Client as 'Named Insured'

6.6.1 What should I look for when my client asks to be added as a named insured under my liability policies?

The first item to check is whether your professional liability policy has been issued through a Canadian insurer or a US Insurer. Many of the wordings issued by US Insurers, use a different format, and will allow the "owner" to be added to the policy as an "Additional Insured" but not as an "Additional Named Insured". Most of the wordings issued in Canada, are issued through Canadian insurers, or Canadian underwriting groups using Canadian-based wordings. These wordings will not accommodate the "owner" being added to the policy as an "Additional Insured".

The owner may be asking you to add them, to your professional and general liability policies, as they are either without insurance themselves or self insure substantial portions of their own risks and are looking to the "consultant" to insure their risk as well as your own risk. It is quite common to do this with general liability policies but not with professional liability policies.

6.6.2 General Liability Insurance

Most general liability insurers have no problem adding the "owner" as an additional insured under your policy. It is usual however to add the "owner" as an additional insured", but only with respect to services the consultant provides on the "owner's" behalf. This is referred to as *vicarious liability*. This is generally done by your insurer for no additional premium charge. There are occasions, where the "owner" with whom you may have contracted, may ask for you to cover **all of their losses** howsoever they may arise. Avoid doing this, as your insurer will undoubtedly require a fairly substantial additional premium. The owner may also require that your policy be written on a "primary" basis and that it be "non-contributing". Check your "other insurance" clause within your policy wording, as this can usually be modified if requested. Most consultants have a standard policy with a clause stipulating that it will pay on a contributory basis with any other available insurance. This request by the "owner" is designed to protect the "owner's" insurance from having to pay. Your insurer may well ask for an additional premium for this additional risk. The "owner" will probably also request that your policy has a cross liability / severability of interest clause, this should not be a problem.

The "owner" may also request that you have your policy endorsed to waive the insurer's right of subrogation against them. This is referred to as the "Waiver of Subrogation" clause. The clause states that the Insurer will waive all rights of bringing any action against the "owner", even in the event that they may be partially to blame for the circumstances that have led to the claim. Insurers will generally provide this endorsement at no charge under general liability policies, however it is unnecessary if the "owner" has been added as an additional insured under the policy. Insurers will not subrogate against another insured under general liability policies. So we see no need for this request if the "owner" has been added as an additional insured. It should be noted, that insurers of professional liability policies **will not** waive their rights of subrogation under the policy under any circumstances.

6.6.3 Professional Liability Insurance

As mentioned above, **no** Canadian insurer of professional liability insurance will add the "owner" to the consultants professional liability insurance. Some of the reasons for

this are that the owner has no insurable interest in the professional liability policy. Further, Canadian professional liability policies for design consultants do not have a "Cross Liability" clause but they do have an insured versus insured exclusion. The professional liability policy is covering the consultant in the event that he/she/they make an error in the course of providing their professional services. If the consultant does make an error, then the consultant's professional liability policy is triggered by the owner making a claim against the consultant. If the owner was added as an additional named insured under the consultant's policy, the owner would not be able to sue the insured for damages and collect from Insurers. American professional liability wordings are entirely different to Canadian wordings. We strongly urge consultants to ensure that this requirement is deleted from their contractual requirements with an owner, if they have a policy wording issued by a Canadian insurer.

6.6.4 With regard to my Professional Liability policy, what can I request of my Insurer?

You may ask your agent/broker to provide you with a Certificate of Insurance for the owner, that names them on the certificate and provides the "owner" with confirmation from your insurer that they will provide the owner with 30 days (or whatever is required) written notice of cancellation of your policy. **The insurers will NOT provide any written notice of material change, alteration or reduction in limits to your professional liability policy.** The reason for this is, most professional liability policies are written on a "claims made basis" and have a limit per claim and an aggregate limit. This aggregate limit could be substantially reduced if a claim has been reported to the Insurers resulting from work done for another owner. Notification of the other claim to the owner could seriously impair the settlement of the claim reported from the other work.

6.6.5 Summary Note

Ensure that your contractual requirements do not call for you (the Consultant) to add the owner of the project as an additional insured under the professional liability policy. Also, ensure that the contract does not require you to have your insurer provide 30 days notice of material change, alteration or reduction in the limits available under your professional liability policy.

By: Roger A.H. Brett

For contact information please see Section 6.2.

NB: The information contained herein is believed to be accurate, but individual circumstances, local business and insurance practice and the Law can vary extensively and Jardine Lloyd Thompson and its associated and subsidiary companies are not responsible for any errors and omissions or any loss or damage arising from the use of this information. In the event of situations such as are described in this article, the reader should seek legal counsel and specific advice from your Insurance Broker.

6.7 Explaining Claims Made Professional Liability Insurance Policies

This article has been written in an attempt to explain the principals of "**Claims Made**" basis policies vs. "**Occurrence**" basis policies. Since 1968 most design consultants professional liability insurance policies have been written on "Claims Made" forms. On the other hand most general liability policies have continued to be written on an "Occurrence" form, however some high risk General Liability policies are also being written on "Claims Made" forms.

6.7.1 Claims Made Basis Wordings as they Relate to Surveyors

If the owner of a project makes a claim against the surveying firm, or the surveyor reports to his or her insurer, a potential incident that may later result in a claim, against an insured, the report then triggers this class of policy to respond to the claim. The plaintiff (owner) will usually make the surveyor (insured) aware that there is a problem either in writing or verbally. To respond to the claim, the surveyor must have or be able to conform to the following:

1. The insured must have a valid policy of insurance in place at the time the claim or reported incident is made against him/her. The policy must not have lapsed or expired. Too frequently we see owners asking our clients to obtain professional liability insurance for a project at the commencement of the survey and the contract states that they have to carry the insurance until the project is completed (substantial completion). In these scenarios, there is obviously a lack of understanding of this class of insurance by the owner, of what he or she is requesting of the surveyor.
2. The surveyor must not be aware of any potential problem with the project prior at the inception date of the policy.
3. The surveyor must not make any admissions of guilt or make any statements that may impair the ability of the insurer to provide the insured with a defence.

6.7.2 Advantages of Claims Made Basis Policies

The advantages of claims made basis policies are:

i. The insured has today's limits to respond to today's claims.

ii. Insurers are able to quantify their exposures at the end of each year, as at the end of each policy year they would have received all the reports of potential claims.

iii. Any policy issued will pick up the Surveyor's past work right back to when he/she first started, even though there was no policy in place at the time some of the work may have been done. **Consultants should be cautious and ensure that the policy they have bought does not have a "retroactive limitation date" on the policy that would limit the period back to a specific date that the insurance would respond to.**

iv. Professional liability claims made policies are substantially less expensive than policies issued on an occurrence basis.

6.7.3 Disadvantages of Claims Made Basis Policies

The disadvantages of claims made basis policies are:

i. The insured has to continuously maintain a valid policy to ensure continuity of cover and protection.

ii. Most professional liability claims made wordings have not only a limit per claim but also an aggregate limit amount available for all claims made in any one policy period.

6.7.4 Occurrence Basis Wordings

As mentioned above, occurrence basis wording for consultants have not been issued since 1968. History tells us that prior to this period, insurers were issuing consultants' policies for the limits and premiums of the day and claims were coming in twenty or more years later for damages in figures that were never anticipated by the insurer. The premiums the insurer had received for the risk when the policy was written were totally inadequate to meet the claims of today. Further, most occurrence based wordings have a limit per claim and no aggregate limit except in the case of general liability policies, which have an aggregate limit applicable to "Products and Completed operations". (Some USA insurers also have aggregates under their general liability policies, but this is usually an exception to the rule).

By: Roger A.H. Brett

For contact information please see Section 6.2.

6.8 Insurance Related Items and Contract Negotiations

We are frequently requested to provide a certificate of insurance or to have your insurers sign a certificate of insurance confirming that coverage is in place for certain types of coverage under professional liability insurance policies and general liability insurance policies, and would like to advise as follows:

1. All professional liability insurance policy underwritten by Canadian insurers will not change their policy insurance agreements to include the word "wrongs". Canadian policy insuring agreements read "any *negligent* acts, errors or omissions…" Some American wordings read "any acts, errors or omissions." If you sign a contract with the word "wrongs" in it, there may, in certain situations, be no coverage afforded by your professional liability policy.

   We do not consider this to be in the Insured's (Your) interest nor in the interest of your client. The purpose of the professional liability insurance is to protect your client as well as yourself. If there is no coverage under the policy then the client will have to resort to making a claim against you personally. Unless you are very wealthy, there is the probability that they will get nothing out of you. Therefore we suggest that you discuss your clients insurance requirements with them and get them to modify their insurance requirements.

2. If you are required to give your client "notice of any ***material change or alteration*** to the policy…." under the professional liability insurance policy, even though they may state that this is with regards to the limits and deductible, this would mean that your insurers would have to notify your client, of any potential claim or actual claim that may be made under your policy, by any other party for whom you may work. This of course is not possible, as by doing so the insurers are alerting another party as to the potential reserve or settlement on a claim, which may still be in negotiation. Professional liability insurance policies, are written on a claims made basis and these policies have aggregate limits, unlike general liability policies which are written on an occurrence basis, and have an each and every claim limit as stated under the policy. Insurers are therefore only able to comply with providing "Notice of Material Change or Alteration…" under general liability policies.

3. Regarding the provision of waivers of subrogation under professional liability insurance policies, we can also confirm that no Canadian insurer will waive its rights of subrogation against any other party. Under certain circumstances certain American insurers will do this, due to the format of their wordings, which are very different to Canadian wordings. Insurers can provide this request by your client, under general liability policy wordings.

4. No Canadian professional liability insurer will add an owner or your client as an "additional Named Insured" under a professional liability insurance policy. As previously stated, professional liability insurance policies are written on a claims made basis, and the policy coverage is triggered when the owner, makes a verbal or written allegation or makes an actual claim against the named insured. If the owner was to be named as an additional named insured under the policy, the owner would technically be suing itself. This again, is not a problem

under general liability insurance wordings.

5. Another area that we find needs to be checked, is the proposed "Indemnification Clause". We have to stress at this point that we can not provide any legal opinions as we are not qualified to do so. We do suggest you have your proposed contract reviewed by your legal council, and have them review what you are being asked to indemnify your client against. Are you being asked to pay for his/her legal costs in any suit they may bring against you? If so, be advised that your insurance policies will not cover that. Are you being asked to indemnify the client from "any and all claims" from howsoever it may arise? All insurance policies have exclusions, check to see that they do not conflict.

In conclusion, we can advise that we are not aware of any insurer that will modify their wording to accomplish the Ministry of Defence's, or for that matter, any other Ministry's request. We have consistently seen these sought of requests from the Ministry of Transportation and Highways in B.C., Ministry of Health and Environment and from various cities and municipalities, and these departments need to be educated. We would be happy to discuss this further with your clients/owners should you request us to do so.

By: Roger A.H. Brett

For contact information please see Section 6.2.

6.9 Policy Features

Compare Professional Liability Insurance Options

Please request a pdf copy of the Policy Features brochure.