

March 23, 2021

RECOMMENDATION FOR THE OALA TO DEVELOP MINIMUM PROFESSIONAL INSURANCE REQUIREMENTS FOR APPLICABLE OALA MEMBERS

COUNCIL DATE: This report was presented to OALA Council on March 22, 2021

PURPOSE OF THE REPORT: RECOMMENDATION

INTRODUCTION: At its meeting March 22, 2021, OALA Council approved the recommendation to develop minimum professional insurance requirements as described below subject to ratification by the Association membership at the OALA AGM April 22, 2021.

RECOMMENDATION: That Membership approve the direction to develop minimum professional insurance requirements for applicable OALA Members; and that the Insurance Task Force return to Council and the Membership at the 2022 AGM with defined minimum requirements, based on industry data and best practice, applicable to various OALA Membership categories and types of practice for Membership consideration and ratification.

EXECUTIVE SUMMARY:

Over the past year, the Liability Limitation Task Force has been working to understand:

- What are the current standards of comparable professional associations for members to carry minimum insurance coverage; and
- Are OALA Members and the general public being left open to risk from gaps in the policies and types of coverage currently carried by and available to OALA Members?

From our initial background work, the Task Force believes that in order to fully protect the health and safety of the public and to minimize the risk to OALA Members as professionals working in the built environment, the OALA should have minimum insurance requirements. These requirements should be clearly identified, based on industry claims data and that proof of coverage should be required for maintenance of OALA Membership.

More work is needed to detail which membership categories and/or types of practice would require proof of insurance and who would be exempt.

While OALA Council could approve this requested direction to develop minimum professional insurance requirements, this initiative will require significant volunteer and supporting OALA Staff time and legal review fees. The Task Force is seeking Membership approval-in-principle for this direction before

investing the time and costs required to further develop recommendations for minimum insurance requirements and a potential optional OALA Group Insurance Program.

BACKGROUND:

The Liability Limitation Task Force has completed the following initial background work toward answering the above questions:

- A comparison of professional associations similarly working in the built environment, including: AOLS, OAA, CEO, ARIDO, and OPPI.

We have found that across the board, the industry standard is to require members to carry professional liability / errors and omissions insurance. This is being done under various models, including: OAA having their own insurance company which insures and provides other supports to their members; CEO requiring members to carry and submit proof of insurance secured independently; and, ARIDO and AOLS offering programs tailored to their membership from which members can choose to join or alternatively provide proof that minimum insurance coverage has been secured elsewhere (including by their municipal or multi-disciplinary employers).

Generally, the rationale for professional associations requiring members to carry insurance coverage is that: in working in the built environment with the public interest, public health and safety being held paramount, that these professionals must be held to a higher standard of care than the average individual. Identifying the minimum acceptable insurance requirements and requiring this as a component of membership is one of the strongest tools to ensure that the public interest, health and safety are protected.

- Discussions with several representatives from different organizations in the insurance industry.

These discussions along with some first-hand accounts on liability exposure incidents from OALA Members have helped our group to better understand where the gaps are in the insurance options currently available to OALA Members. These gaps include:

- With no stated minimum E & O insurance required to maintain OALA Membership, and the changing business climate and complexity of landscape architectural works combined with increasing costs of settling claims, many OALA members are likely carrying insurance in insufficient amounts or types to protect the public interest, health and safety along with their own practices.
- Many OALA Members rely on and trust in the insurance policies carried by their employers, with no real insight or verification as to whether the employer's insurance is sufficient. Where firms have failed to carry sufficient insurance or have gone bankrupt, the insurance representatives who we have spoken with have outlined examples of individuals currently and formerly working with those firms being named directly in claims and left to defend themselves.
- Generally members working for municipalities or government are exempt from the requirements of the above mentioned professional associations to carry E & O insurance; however, those associations make it clear that if those members take on even one small project outside of their government employment, they would be required to meet the minimum insurance requirements. XL and HUB insurance representatives outlined examples of where projects amounting to less than \$5000 in fees have generated claims that cost \$150,000 + in legal and settlement costs. This gap is

- similarly true for members who are between jobs, or who are working for private practice firms and are engaging in small amounts of work on the side without carrying their own separate insurance policies.
- Landscape architects and other professionals working in design and construction are subject to Ontario's 15 year + statutory limit of liability (which in actual practice can extend well beyond 15 years) and current insurance offerings available to OALA Members (who are retiring, selling their firms without liabilities being included, or moving from private to public practice) are limited to 3-5 year tailings policies. This is leaving OALA Members and in many cases their estates, open to substantial liability exposure long after they are able to have adequate coverage in place. Mark Sampson with Gallagher insurance outlined how the AOLS (voluntary) program identified this issue and is one of the very few instances where retirement insurance is provided for life, including throughout the duration of the insured's estate settlement process for members who have been in the insurance program for a minimum of 5 years prior to retirement. This is likely why the voluntary program has a 95% uptake by AOLS members with multi-disciplinary firms mainly making up the remaining 5%.
 - One of the best ways to protect public health and safety is for professionals to learn from their mistakes. One benefit of a voluntary insurance program in which the professional association is a partner is that opportunity to (under strict ND agreements) review claims quarterly or annually and to have the insurer or reviewing committee prepare a "lessons learned" presentation for each AGM or when needed, to issue a "best practices advisory" to avoid the repetition of mistakes. The AOLS program has a claims-review-committee that works with the insurance provider to do this.
 - A recent request from the OALA PP&E committee asked whether the OALA could find the capacity within a committee or through partnership with the insurance industry to provide a review service for RFPs, to identify uninsurable and problematic terms, conditions or scope of work, much as the OAA and PEO provide for their members. An OALA insurance program (which members could choose to sign up with or choose to secure their minimum insurance requirements elsewhere) would provide an opportunity to request this service from a partner insurer.

The Liability Limitation Task Force believes that in order to fully protect for public health and safety and to minimize risk for OALA Members as professionals working in the built environment, the above items must be addressed and updated.

At this early time in our work on this topic, we believe that:

- Insurance and the limitation of liability and risk management should be a strong educational component provided by the OALA, or in partnership with insurance industry professionals tailored toward the needs of OALA Members.
- The OALA should have minimum insurance requirements clearly identified, based on industry claims data and that proof of coverage should be required for maintenance of OALA Membership.
 - OALA Members who are working for government or in academia and who are not doing design work outside of their main employment should very likely be exempt from this requirement.
 - More work would be required to detail which membership categories and/or types of practice would require proof of insurance.
- It may be highly beneficial to OALA Members and in the advancement of the profession, to develop an OALA insurance program for professional insurance, tailored to the specific needs of

landscape architects, and focused on addressing identified gaps in coverage that OALA Members face throughout their professional careers and beyond.

- Further work would be required to assess whether and how the OALA could qualify for a voluntary group insurance program as our membership and firm numbers are lower than some of these allied organizations.
- There is a need to address precedent setting claims to protect Members from unfair or lopsided lawsuits and this may also be best addressed through a voluntary group insurance program.

In order to move forward on the above items, the task force feels that we are at a point where Membership support on this direction is needed.

Should the Membership vote to approve this direction, the Task Force would proceed with background research in partnership with insurance industry and legal representatives on the types of claims involving landscape architects and costs associated with those claims in order to determine appropriate minimum insurance types and coverage amounts.

Next steps would involve:

- gathering data on the number and sizes of landscape architectural firms in Ontario;
- reaching out to the OALA Membership by anonymous survey for questions on what types and amounts of insurance firms and individuals are presently carrying;
- typical costs for annual premium amounts;
- additional services that Members are looking for from their insurance; and
- what types of claims OALA Members have encountered.

Based on the above research, the Task Force would work to develop defined minimum professional insurance requirements for applicable OALA Members, bringing these forward to the OALA Membership for consideration and ratification at the 2022 OALA AGM.

POLICY AND BUDGET IMPLICATIONS:

Policy Implications: A review of OALA by-laws and policies will be required by the task force and by lawyers once a draft program is proposed.

Budget Implications: Eventual legal fees to identify which policies would need revision and ratification to implement a new program. An amount has been earmarked for legal fees within the 2021 OALA Budget. Potential additional OALA administration time and associated costs if proof of insurance is required to be provided by Members at time of dues payment.

Respectfully submitted,

OALA Council

Appendix:

Did You Know: Professional Liability Insurance and Landscape Architects in Ontario whitepaper



Ontario Association of
Landscape Architects

DID YOU KNOW?

- As practitioners working in the built environment, landscape Architects are held to a higher standard of care.
- The OALA recommends that Members carry adequate and appropriate professional liability insurance coverage.
- Even the smallest projects can leave you with liability exposure.
- You can be professionally liable for any project that you work on.
- Your work as a landscape architect is subject to Ontario's 15-year Statute of Limitations.
- Retired Members may not have access to adequate insurance coverage.
- Your estate may remain exposed to liability after your passing.
- There are different ways to be professionally insured.
- If you are named in a lawsuit, you must defend yourself at minimum to where responsibility is determined, which can be expensive.
- Some contracts place an unreasonable amount of risk on the design professional.

Continue reading below for more information on how these topics apply to you.

Professional Liability Insurance and Landscape Architects in Ontario

For the past two years a small task force of the OALA has been researching the implications of professional liability insurance with a focus on errors and omission insurance (E&O). This research has investigated both the level of insurance coverage and access to insurance options for OALA Members.

The process to date has included the following:

- the task force has spoken with members who have experienced difficulties acquiring insurance of the type, value and duration necessary to protect the members, firms, and the public interest;
- the task force has met with insurance industry professionals to discuss options available to landscape architects in Ontario; and
- the task force has met with other allied professions and initiated a comparison of how other professional associations working in the built environment are approaching insurance for their members.

Associations that the task force has spoken with so far include: Consulting Engineers of Ontario (CEO), Association of Ontario Land Surveyors (AOLS), Ontario Association of Architects (OAA), Association of Registered Interior Designers of Ontario (ARIDO) and the Ontario Professional Planners Institute (OPPI). This work is ongoing, and we welcome any suggestions from the OALA Membership for comparable professional associations with insurance requirements and/or programs that we should be looking at.

The following information sheet seeks to highlight some of the key issues surrounding insurance for landscape architects in Ontario and to get OALA Members thinking and talking about insurance considerations and best practices.

Did you Know? Landscape Architects are held to a higher standard of care.

As professionals working in the built environment, landscape architects are held to a higher standard of care and responsibility in the protection of public health and safety than the average lay person. When a negligent act, error or omission results in a loss to a client or an injury to a third party, the courts attempt to determine, through litigation, how that injured party can be made 'whole' again. Carrying sufficient professional liability (errors and omissions) and commercial general liability insurance is the only way to protect the public interest, yourself, your employees and your company.

Did you Know? The OALA Code of Ethics recommends members to carry adequate and appropriate insurance coverage.

The OALA's incoming updates to the Code of Ethics and Standards of Professional Practice will include recommendations for OALA Members to carry sufficient and appropriate errors and omissions insurance to protect themselves in their practice.

Public practitioners should understand the extent and limitations of their employer's liability for their work.

It is common for public sector employers to have a legal fund set aside to cover errors or omissions and/or to have professional liability insurance in place, covering their employees in the work that they do for that organization. Each employee should understand that any landscape architecture work completed outside of that organization, or any willfully harmful or unlawful acts will not be covered. Each public sector employee should be clear on whether and to what extent they will be protected against liability for their work as a landscape architect within their public sector organization.

If public practice landscape architects wish to undertake any amount of work outside of their public employment, they would be left open to considerable risk unless they have acquired their own professional liability insurance.

Did you Know? Even small projects can leave you open to liability.

Whether you work for a **public or private organization**, your employer's insurance will not cover any landscape architectural or landscape design work that you undertake independently. If you complete even a single project outside of the umbrella of your employer's insurance, whether it is for compensation or not, you could be held liable personally for any errors or omissions made associated with that work. Insurance providers are seeing many instances of landscape architectural lawsuits costing upwards of \$150,000 (based on real OALA case results) to resolve, stemming from relatively small projects with less than \$5,000 in fees involved.

Did you Know? If you work on any project, you are professionally liable for that work.

If you leave a company and the company subsequently goes bankrupt, ceases its operations, dissolves, or fails to maintain proper insurance, you could be held liable as an individual for work completed where your name and/or stamp is on a set of drawings.

Did you Know? You could be liable for 15 years after a project is completed.

Ontario's Statute of Limitations (Ontario Limitations Act, S.O. 2002, C.24 Sched. B) allows for lawsuits to be brought against landscape architects and other professionals for 15 years + following when an error or omission took place. The statute may begin at the moment the work is ready for use or upon substantial completion. Insurance professionals tell us that the Ontario statute of limitations has yet to be tested in court on projects involving the built environment and that 15 years should be considered as the minimum limit of exposure to liability for landscape architects. Despite the statute, if a claim is filed after 15 years, a landscape architect would need to defend themselves through litigation, until the court decides whether or not the statute of limitations of 15 years should apply. There are substantial costs involved in a defense. Even relatively minor/small claims can cost tens of thousands of dollars to defend.

Did you Know? In retirement, tailings insurance may still leave you liable between the time it expires and when the Ontario Statute of Limitations ends.

When OALA Members retire, move out of sole proprietorship, or when a firm is acquired without its liabilities being assumed by the new owners, an option to purchase tailings or retirement insurance exists. Tailings insurance is currently only available to landscape architects for a limited duration of time following completion of your career, work or individual projects. Premiums for a tailings policy are generally required to be paid up front and in full and tailings insurance is currently only being offered to landscape architects for terms of 3-5 years. What this means is that, when an individual retires and the firm in which they worked no longer exists, the firm and/or the individual can only purchase coverage for E&O insurance for 3 to 5 years, leaving the individual personally exposed to liability in the 10 to 12 year gap between the end of the tailings policy and the statute of limitations of 15 years. The OALA has flagged this limited duration of available tailings and retirement insurance options as a major liability gap for landscape architects and is in the early stages of working with insurance industry representatives to address this issue for OALA Members.

Did you Know? Your estate could be exposed to liability if your tailings insurance does not provide adequate coverage.

If your tailings or retirement insurance does not cover your estate beyond your death, until fully settled, your estate could be held liable for damages resulting from an error or omission.

Anecdotally, the task force was informed of an incident where an Association of Ontario Land Surveyors (AOLS) member had died and a lawsuit was filed against the deceased person's estate before the estate was settled. The suit was successful and the heirs of the estate lost part of their inheritance to the litigated claim.

Did you Know? There are different ways to be professionally insured.

Other related professional organizations working in the built environment have mandated minimum insurance requirements for their members. There are a number of financial models of how this works, but the end result is that insurance premiums per individual member become less costly, and the benefits the insurance program can offer, can be more elaborate and tailored to the needs of the profession, e.g. E&O coverage for life.

As an example, the AOLS has a partnership insurance program. It is mandatory for AOLS members to carry professional insurance and they may choose to secure this through the association's partner program or from another provider. Benefits of the group program include the opportunity for members to learn from (anonymized) real case studies from their own profession, and automatic E&O coverage that extends for life and through the estate settlement period.

Did you Know? If named in a lawsuit, a professional must defend themselves until responsibility is determined.

The complexity of landscape architectural and other built form projects has been increasing substantially over at least the last three decades. Landscape architectural offices are leading larger multi-disciplinary teams and/or acting as sub-consultants within very large teams in complicated projects and corresponding high-risk potential. At the same time, the world and the construction industry in particular, has become more litigious. The task force has learned that blanket suits (the 'Shotgun' approach) in which the entire multi-disciplinary team is sued, are becoming more prevalent. Most prime consultants, leading large projects, insist that all sub-consultants carry E&O, precisely for this reason. Regardless of a firm's or individual's implication in the lawsuit, each individual company must defend itself against the charges until responsibility is determined. In less serious cases, proportioning blame never reaches a courtroom, but is achieved through a pre-trial process. Not defending yourself in these situations can lead to a default judgment, resulting in a claim regardless of responsibility. This has resulted in ever increasing legal fees. The legal costs associated with adjusting an insurance claim have also risen sharply.

Did you Know? Some contracts place an unreasonable amount of risk on the design professional.

Landscape architects, other professionals and insurance companies have flagged a trending concern regarding municipal and public contracts and RFPs containing terms that unreasonably transfer risk and liability to professionals as a major challenge. To address this issue the following initiatives have been undertaken:

- Some insurance companies have been proactive in offering advice on best practices for landscape architects to respond to these RFPs.
- The OALA is developing standardized forms of contract and a guideline to help support OALA members in their discussions with municipalities and public sector clients. These are anticipated to be released in 2021.
- Some professional organizations have created what they describe as 'rapid response teams' to push back at unfair clauses in both RFPs and formal contracts between their members and government clients. These teams try to identify uninsurable tasks or scope of work that would put a consulting team unnecessarily or unwittingly at risk. Professional associations engaged in this work tend to have

Practice Acts in place, which encourages the public sector organizations to work with the associations in developing fair terms.

Conclusions

In summary the task force has learned the following:

- **economy of scale** - it is possible that a coordinated profession-wide insurance program/policy may provide cheaper insurance with better coverage for each member than what might be obtained individually. There are several innovative financial models that can provide incentives to the individual members to actively participate and benefit from their involvement.
- **learning from our mistakes** – there are lessons in every mistake or omission; particularly those that result in litigation. There is enormous opportunity to learn from everyone's collective mistakes or a pattern of failures, to put the public at less risk and to educate our members regarding best practices. Some coordinated insurance programs have established annual or quarterly review programs, to analyze claims and educate members on how to address issues arising from professional practices. An accurate historical record of claims can be an invaluable tool to improving design and practise methods that ultimately reduce risk.
- **precedents** – each new claim has the potential to set new precedents. This has contributed to escalating costs of insurance and associated litigation. It is **not possible** for individual policy holders to address this kind of problem. A coordinated insurance program can assess these trends and understand where and when an unfair or lopsided precedent is about to be established. Identification of potential unfair precedents can prioritize and guide the allocation of resources to challenge them through the legal system.
- **more comprehensive benefits** – there are many tangible benefits to a profession operating within the context of a coordinated insurance program. E&O for life, mutual learning, pre-emptive participation in the legal and litigation process, are but a few examples of what an association-wide policy might offer. This can create a loop of understanding to inform and improve upon professional practises.

Next Steps

Moving forward, The Insurance Task Force plans to:

- Conduct more research into improved professional liability insurance coverage options for OALA Members;
- submit a recommendation at the 2021 AGM for OALA Members to support the direction of investigating and proposing minimum insurance requirements for certain, applicable membership categories for Membership consideration; and then to submit a recommendation for Members to vote on at the 2022 AGM; and
- provide additional educational resources on professional insurance and liability management for OALA Members.