

THE straight line

TEN MINUTES WELL SPENT | ISSUE 1 | DECEMBER 2015



Welcome to *The Straight Line*

This is the inaugural issue of *The Straight Line*, a newsletter that will appear occasionally throughout the year. Articles will cover a broad range of topics that will engage Ontario architects—whether in practice or not—and others with an interest in the profession.

The Straight Line will provide a forum for commentary from experts outside the profession whose special knowledge can assist us by explaining areas of law and business that lie beyond our daily experience, but could affect us in unanticipated ways. Our “Ask an Expert” feature provides an opportunity for readers to have their own questions and concerns addressed in a forum that is broadly shared.

Our goal is to provide “ten minutes well spent”—an easy read that you will find interesting and informative. Topics that require more time or more detailed explanation will continue to be addressed through Pro-Demnity Bulletins, Notices and Loss Prevention Events.

We encourage readers to suggest topics for future issues of *The Straight Line*. Please send any suggestions to: editor@pd-straightline.com

Christopher Fillingham
Chair of the Board,
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How long should I keep my project records?

Architects often ask Pro-Demnity this question. At one time the simple answer might have been *forever*. But thankfully, the *Ontario Limitations Act, S.O. 2002, c.24 Sched. B*, which came into force as of January 1, 2004, provides some guidance and limits.

The Act provides that, in most cases, an architect will be free from exposure to claims or litigation related to its services 15 years after completion of the project or services. This suggests that architects can reasonably dispose of their project records 15 years after completion of their services on that project.

For projects completed before January 1, 2004, the 15-year period commences on that date. So for projects completed before 2004, records will not be necessary after January 1, 2019.

Architects should bear in mind that there may be other reasons for maintaining at least some of the project records and documents, particularly where the architect hopes to maintain a long-term relationship with a client.

Mario Delgado of Brunner and Lundy explains further:

Impact of Limitation Period on Record Keeping

The legal ramifications of design and construction don't end once the architect has completed the project. Design and construction deficiencies that were not observed before the conclusion of the project may cause a civil lawsuit to be commenced against an architect at a later

date. The law refers to unnoticed defects as “latent”—Latin for *hidden, concealed* or *dormant*.

Imagine, for example, that a latent defect in the design and construction of an exterior wall, unnoticed during construction or at the completion of the project, has allowed water to infiltrate the assembly. Over time, the water may have caused key components of the structure to corrode, including the fasteners for the cladding. On discovering the extensive damage, the current owner might well choose to commence a civil action in the hope of obtaining damages to offset the repair or replacement costs.

The action may name the architect as a defendant and make the common allegation that the defendant failed to meet the standard of care required of a prudent architect in carrying out a general review.

Typically, during the construction phase, the architect would have documented site reviews in the form of reports, which could help in establishing that the architect's obligations were diligently carried out. Without these records, the architect must rely on the memories of the person(s) carrying out the site reviews—memories that, with the passage of time may be frail and unreliable. Worse, those involved in the project may not be around

to give evidence. In any lawsuit, a defendant with only fallible memory to rely on may leave the court the option of accepting the plaintiff's version of events.

Clearly, an architect named in such a lawsuit will be best served by having records generated during the project to rely upon in its defence.

This raises the question: how long should records be kept? In Ontario there is a montage of statutes that deal with this issue. Many architects believe that records should only be retained for a period of six years, a misconception that may stem from the fact that the *Canada Business Corporations Act* recommends this retention period for certain records. But for architects, given that latent defects are common (perhaps an intrinsic part of design and construction), it is advisable that records be kept until the expiry of the limitation period on the project.

When does the limitation period start and end? In Ontario, the *Limitations Act* provides the public with a complicated formula to determine when a limitation period begins and ends. Unfortunately, the *Act* contains many caveats that cannot be covered in this article. As said, what follows may provide some guidance for determining how long one should keep records.

Section 15(2) of the *Ontario Limitations Act* states that:

No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the

act or omission on which the claim is based took place.

Section 15(6) explains when the limitation period begins to run:

- a) *in the case of a continuous act or omission, the day on which the act or omission ceases;*
- b) *in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;*
- c) *in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made.*

What does this mean for an architect?

In most instances, the limitation period commences when the project is substantially complete, since any errors in design or construction would be apparent at this stage. However, as discussed above, there could be latent deficiencies that cannot be discerned upon substantial completion. For this reason, prior to purging a file, the architect should consider whether the ultimate limitation period has expired on the project.

When section 15 is read in conjunction with other sections of the *Act* (and the case law that interprets the *Act*), it means that the ultimate limitation period expires on January 1, 2019 for projects completed prior to January 1, 2004. Therefore, architects who have records with respect to projects that pre-date January 1, 2004,

would be wise to retain those documents until at least January 1, 2019.

For projects commenced after January 1, 2004, it is recommended that records be kept for a period of at least 15 years from the date that the architect last rendered services. To minimize the risk of extending the limitation period, it is further recommended that architects send their clients a letter identifying the date on which they last provided services and keep a copy in their file. This document will assist in calculating when it is appropriate to purge the project file.

Summary

- A prudent architect will maintain project records for at least 15 years after project completion.
- Architects who can produce their own records, rather than relying on those produced by the plaintiff, are generally better able to defend themselves in the event of a claim.
- Adequate and well organized project records may be taken by a court as evidence of sound administrative practice by the architect.

A written record in an email or letter trumps recollections of conversations. But as the old adage states: "A picture is worth a thousand words." So photographs or sketches that supplement site review reports may provide the most valuable aids to your defence.

— Mario Delgado

What Records are Most Important to Keep?

There is no simple rule. What records prove to be most important will depend on the particulars of the claim, and will differ in each instance. When litigation occurs, it is the lawyer's task to find out what went wrong and who is responsible. Mario Delgado recommends that the following information be retained. It may prove valuable to understanding the claim and developing a defence:

1. Contract between Architect and Client
2. Contracts between Architect and sub-consultants
3. Construction contract between Owner and General Contractor, Construction Manager or Builder (where available to the architect)
4. Insurance policies of sub-consultants
5. Other insurance policies and bonds, where applicable (e.g. Builder's Risk Policy, Performance Bond, etc.)
6. Communication documents such as emails, letters, faxes, etc.
7. Minutes of meetings
8. Bid and tender documents
9. Drawings and specifications
10. Certificates of Substantial Performance, Letters of Assurance, Statements of Completion
11. Field review reports, site review notes, site observations and photographs
12. Supplemental instructions
13. Change Order logs, RFI logs and shop drawing logs
14. Certificates of Payment and Progress Payment support documentation
15. Budget documentation

Ask an Expert

“Ask an Expert” offers advice from members of a panel of experts familiar with insurance and other considerations related to architectural practice. Selected questions will deal with legal and insurance issues that have broad applications, while ensuring anonymity of individuals, projects and circumstances. Questions should be directed to: ask@pd-straightline.com

Answers will be general in nature and cannot be taken as legal or insurance advice for readers to apply to their own circumstances. Please consult your own lawyer or Pro-Demnity regarding any questions or concerns impacting your own practice.

An Ontario architect poses our inaugural question:

We were recently retained to carry out an inspection of an existing building. We retained a structural engineer to assist with the investigation and report. Our inspection disclosed that required re-stopping had not been installed. In our opinion this is a serious “life safety” omission that requires correction, and we informed our client of this.

However, when we advised our client about the missing re-stopping and our concerns about it, he immediately told us that he no longer wanted a written report, and that we were not to share the information with the local building department or re chief.

The engineer has told us that it has a duty under the *Professional Engineers Act* to report such a life safety concern to its client; however, we are both concerned that this isn't enough.

We have a number of questions we hope you can help us with:

1. If we uncover unsafe conditions in a building, what are our obligations as architects?
2. How should we address this issue with our client?
3. When should we take our concerns about an unsafe condition to building officials?

Andrew Lundy of Brunner and Lundy offers this advice:

If you become aware that your client plans to take no action about the life safety issue you have identified, you should not stand idly by—action is required, including, perhaps, notification to the chief building official.

Canadian case law provides no clear direction as to whether, in your specific circumstance, there exists a common law duty to warn of danger to someone other than the building owner—and at what precise moment any duty of confidentiality to your client is supplanted by a legal or ethical duty to warn. However, you have identified a significant risk of harm or death to the occupants of the building, and in those circumstances, a court may well impose a duty to warn.

In its current form, the *Architects Act* does not directly address the question: What should an architect do if confronted with a client who refuses to perform remedial work to correct a life safety issue? However, Section 42 of the Regulations provides some guidance by giving examples of what constitutes “professional misconduct” on the part of the architect. Subsection (38) provides that professional misconduct means: “doing or failing to do anything while engaged in the practice of architecture that shows a deliberate or reckless disregard for the rights and safety of others.”

The scenario that you describe has some factual similarities to the events that led to the collapse of the Algoma Centre Mall in Elliot Lake, Ontario. In the Report of the Elliot Lake Commission of Inquiry, the Commissioner, the Honourable Bélanger, found that the failure of various engineers to report unsafe building

conditions to the Municipality was a contributing factor to the roof collapse. In his summary of conclusions, Commissioner Bélanger stated:

Some engineers forgot the moral and ethical foundation of their vocation and profession—to hold paramount the safety, health and welfare of the public. They occasionally pandered more to their clients' sensitivities than to their professional obligation to expose the logical and scientific consequences of their observations.

In making recommendations based on lessons learned, Commissioner Bélanger added:

Experience is the best teacher. To ensure that we do not repeat the mistakes of others but benefit from the knowledge of their successes and failures, we need to carefully document lessons learned and pass them along to our successors.

One of Commissioner Bélanger's recommendations is that structural engineers be required to deliver certain reports to a municipality's chief building official, if minimum conditions have not been met during the course of their inspections. Further, these reports must explain what repairs or maintenance actions are required to correct the situation.¹ While it remains to be seen whether the recommendations from the Elliot Lake Commission of Inquiry are implemented, architects should be mindful of Commissioner Bélanger's words to “hold paramount the safety, health and welfare of the public.”

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