LENDERS’ UNDERTAKINGS (AKA “BANK” OR “FUNDER” LETTER)

Since 2020, Pro-Demnity continues to receive increased calls from architects who are faced with an unfamiliar but seemingly harmless request from their client: to sign a form of undertaking addressed to a third party – most often to a lending institution or financial partner – that is providing funding for the project.

Architects seeking advice about such undertakings may be conflicted. They want to assist their client or facilitate the flow of funds so the project can proceed, but they still wonder what the liability and insurance considerations might be. They may also be looking for reasons to say “no” to the request from their client.

But these undertakings can be very dangerous. The wordings are intended to establish that, by signing, the architect has accepted a “special” Duty of Care to the lender that would not otherwise apply at law. This may make it easier for the lender to sue the architect, and may trigger an exclusion from professional liability coverage: Exclusions 1.(e) and 1.(f).

Lenders’ undertakings display the following characteristics:

- They are invariably addressed to the lender – a bank, financial institution or other funder for the project.

- They may also be addressed to a lawyer who is acting as a broker or intermediary, is advising the lender, and/or has written the undertaking on behalf of the lender.

- The actual wordings vary, most requiring the architect to “guarantee” or “warrant” an outcome, for instance:
  - providing assurances outside an architect’s professional expertise, such as adherence

to all laws and regulations applicable to the project – more properly addressed by a lawyer;

- requiring the architect to assure the lender that the client's budget and funding are adequate to complete the project;
- requiring assurance that the provisions of the relevant building codes have been met, or assurance that the authorities having jurisdiction will issue any required permits.
- They invariably include a provision that, in signing the undertaking, the architect acknowledges that **the lender will be relying upon the contents** when making decisions about advances of funds to the borrower (the architect's client).
- They require the architect's signature.

Pro-Demnity's advice is consistent: **Regardless of content, do not sign any undertaking addressed to a lender – or almost any other third party.** There are many reasons for this:

- There are implicit conflicts of interest between the client-borrower's interests (to obtain a draw-down of funds) and the lender's interests (to protect itself).
- There are further conflicts of interest where the client's ability (or willingness) to pay the architect's outstanding account is conditional on receipt of the lender's next advance – a conflict of interest that could qualify as professional misconduct.

- Under these circumstances, the architect cannot serve two clients. In addition, the lender has ample access to independent consultants to review the progress of the work, architect's certificates, etc.

If saying "no" to the client's request remains a problem, architects are advised to obtain legal advice to amend the wording, since, apart from any other consideration, an architect who signs the undertaking would be assuming unnecessary additional responsibility/ liability/ transfer of the lender's business risks onto itself – without compensation commensurate with the risk.

Disclaimer:

WHY DO LAWSUITS AGAINST ARCHITECTS TAKE SO LONG TO RESOLVE?

One of the best parts of my practice as a defence lawyer at Pro-Demnity are initial meetings with architects at the outset of a case. I find it fascinating to learn about the diverse projects being designed and delivered by practices across Ontario.

Of course, I am under no illusion that the feeling is mutual, or that any architect would look forward to discussing the circumstances leading them to being sued. But these meetings usually result in good conversations and an opportunity for any questions about the legal process to be answered.

The most frequent question asked by architects facing allegations of professional negligence, error or omission is: "*how long will the litigation last?*" My typical response is that many cases take **three to five years**, and some cases even longer, to resolve. This is the unfortunate truth.

In this article I try to explain why litigation involving architects takes so long to resolve, why this has only been getting worse, and finally on a more hopeful note, why and how some cases do resolve more quickly.

WHY DO CASES INVOLVING ARCHITECTS LAST SO LONG?

While all civil litigation can be slow, a good rule of thumb is that the more parties that are included in a lawsuit, the longer each stage of the litigation will take. Cases involving architects are particularly prone to take a long time to resolve because design and construction of a project involves so many different parties.

THE STAGES OF LITIGATION AND WHY EACH CAN BE SLOW:

A lawsuit begins when a Statement of Claim is served by the plaintiff, the person who commences the lawsuit (i.e., an owner, developer, contractor, consultant, etc.), on the defendants, those they are choosing to sue (i.e., an architecture firm, contractor, consultant, owner, developer etc.). In a typical case, there are many stages which follow, and each can take months or longer to take place and resolve.

The following are the stages present in most lawsuits, and why they can take time to resolve:

- **Pleadings**
  Each party has a chance to respond in writing to the arguments raised by the plaintiff in the Statement of Claim. If they believe other parties not yet included in the lawsuit should be added, they can do so by bringing a Third Party Claim (or third parties can bring Fourth Party claims, etc.) Each time a new set of parties are added, this delays proceedings as they need time to retain their own lawyer and investigate the case before preparing their own written defence.

- **Examinations for Discovery**
  Also known as depositions, these examinations are when each party can be asked questions by the lawyer for each other party. This is only scheduled after pleadings are completed, and parties are satisfied they have the information they need to get the most out of the examinations. It can take many months to find a set of dates that representatives of each party and each of their lawyers are all available. The more parties in the lawsuit, the longer this takes.

- **Mediation**
  In Toronto, Ottawa, and Windsor, it is mandatory to hold a mediation in every case. In much of the rest of the province, they are held even if not required. Mediations are usually scheduled after Discovery. Even more people need to attend a mediation, including the parties themselves, insurance representatives, lawyers, and the mediator, making this an even greater scheduling challenge.

- **Pre-Trial**

A pre-trial is a meeting with a judge to discuss the logistics for a trial, and often again is a chance to try to settle a case with the judge as de facto mediator. Here the scheduling challenge involves all of the parties that must be present, but also the availability of the Court. In many jurisdictions, the first date a court will provide for a pre-trial is many months after the date one is requested.

- **Trial**
  Courts only have limited time available for trial, and while the time between pre-trial to trial varies in different parts of the province, in the busier courts like Toronto, this can be many months or over a year.

In addition to the time each of the stages typically take, there are some events that can add an additional delay to cases. For example, where a party needs to bring a motion, which is an argument made to a judge before trial, this can take months, or in complex cases, over a year to be heard.

In some cases, even ordinary steps like Discovery or mediation are postponed for a variety of reasons, such as where one party changes lawyers or someone suffers a health emergency at the last minute.

A TRENDING "CRAWL"

There are a few reasons why the trend over time has been for cases to become even slower to resolve in recent years. Here are four of them:

1. Courts prioritize criminal cases and family law cases. It makes sense that an accused cannot wait years for their trial, nor can a family wait years for custody issues to be resolved. In fact, several decisions of the Supreme Court of Canada in recent years have highlighted the government's duty to hold criminal trials expeditiously or risk violating their rights under *The Canadian Charter of Rights and Freedoms*. If criminal trials go to the front of the line,

something needs to go to the back, and those are civil lawsuits such as the ones involving architects.

2. COVID-19. When the pandemic began, most scheduled proceedings were adjourned due to the initial disruption. Overall, the system responded quite well in turning to using videoconferencing for hearings, but this did take some time to get up and running. There was also a period where filing court documents was nearly impossible due to restrictions on in-person filing, and an extension to deadlines that normally applied to cases. All of this caused a backlog in the legal system that has yet to work its way out.

3. Some tools that could be used to resolve cases more quickly have been whittled away. This includes a lengthening of the time before cases could be administratively dismissed for delay under Ontario's *Rules of Civil Procedure*, as well as decisions by judges that limit when lawyers can successfully bring Summary Judgment Motions (being motions to resolve part or all of a case without going to trial).

4. There is chronic underfunding of the Court system with not enough judges, court rooms, or administrative capacity to service Ontario's growing population. This underfunding exacerbates the three other points on this list.

WHY IS THERE ALWAYS HOPE FOR A QUICKER RESOLUTION?

Most cases ultimately resolve by settlement. For civil disputes of the nature involving architects, it would probably be safe to say more than 95% of cases resolve in this manner.

Settlement of a case may not always involve paying out; it could mean that a party has been convinced they were wrong to bring the case, or at least wrong to include the architect in the case and agree to let the architect out on agreed terms.

The timing of settlement is unpredictable. It only takes place when people are ready to compromise. That moment might arrive right near the start of a case, or it may not arrive until five minutes before a trial is set to commence. Sadly, there is no silver bullet that can force another party to see things your way, or even in a reasonable way, which is why the settlement opportunity arrives at a different time in every case.

In all situations, Pro-Demnity actively monitors every open claim, and communicates with the architect on the status of the litigation. Architects are always invited to reach out to us in between status updates, and are required to let us know when new information about their case comes to light.

THREE STEPS ARCHITECTS CAN TAKE ONCE A LITIGATED CLAIM IS UNDERWAY:

1. **Share relevant documents with your appointed Pro-Demnity Legal Counsel**
   These may include copies of contracts, project documents, files, notes, emails etc., Counsel will direct you as to what may be required. These are typically, but not exclusively, the records that you keep in the normal course of doing business.

2. **Follow Pro-Demnity's lead**
   The appointed legal counsel provides valuable instructions once an Architect becomes a Defendant, including important preparation for Discoveries, Mediations or Trials.

3. **Keep calm and practice on**
   Don't let a claim sideline your practice or your business. Whether the claim goes on for a year or five, you have other clients, projects and employees who need you. Pro-Demnity acts swiftly on your behalf, will engage you as needed and keep you informed along the way.

Our Contributor

Philip is an experienced litigator with a practice dedicated to defending architects against professional liability lawsuits as in-house Senior Legal Counsel at Pro-Demnity Insurance Company, which he joined in 2020. He has successfully represented clients at all levels of Court in Ontario, as well as at mediations, arbitrations, administrative tribunals and professional colleges. Philip was called to the bar in 2012 after graduating from Queen's University Law School in 2011. Further, he completed an internship at the Khmer Rouge Tribunal in Cambodia. He is a member in good standing of the Law Society of Ontario, the Ontario Bar Association and Canadian Defence Lawyers. Recognized for his litigation expertise, Philip has contributed articles and been asked to present to insurance professionals, professional associations, and to fellow lawyers.

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THE ARCHITECT AS EXPERT WITNESS

As an architect, you may be asked to appear as an expert witness. The first thing you may ask yourself is: “What would I be getting myself into?” Many architects have wisely asked Pro-Demnity that same question. So here is a brief but hopefully illuminating answer that summarizes our guidance, while reminding you that, as always, every case is different.

HOW TO MANAGE YOUR CLIENTS AND MINIMIZE CLAIMS

Once you've decided to take on a client, it's important to be risk-proactive.

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MY CLIENT WAS MY FRIEND, UNTIL THEY SUED ME

Fourteen guidelines for architects on how to deal with personal–professional relationships.

Disclaimer:

LIMITATION PERIODS: IS AN ARCHITECT EVER SAFE FROM LITIGATION?

By the very nature of the profession, when an architect is sued, it has to do with a dispute centred on a building. Since most buildings are designed to last decades or longer, does this mean an architect should remain fearful of litigation about each project indefinitely, or could they ever rest easy knowing the risk has passed?

The answer is one I must often give as a lawyer: *It Depends*.

Architects may have some familiarity with Ontario's basic two-year limitation period, meaning that a lawsuit must be brought within two years of whatever caused it, but this is subject to a significant "discoverability" exception. Less known is that there also is an umbrella 15 year Ultimate Limitation Period.

WHY THE BASIC LIMITATION PERIOD IS NOT ENOUGH TO SLEEP SOUNDLY

Going back in time, Ontario used to have several different limitation periods applying to different sorts of litigation. This changed after 2002, with the enactment of the *Limitations Act, 2002*,[1] section 4 of which set out a "Basic Limitation Period" that for every civil claim in Ontario:

"a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."

This means that a lawsuit can be dismissed if it is begun more than two years after the claim on which it is based was discovered. *When* a lawsuit is discovered is a complex legal issue, guided by section 5 of the *Limitations Act* and the many decisions that interpret it.

What is important for architects to know, is that there are many situations where a problem to a building might not be discovered until many years after it is complete.

This means that, in the architectural context, there are two types of disputes:

1. those where the Basic Limitation Period would apply, meaning that a lawsuit could not commence more than two years after a project is complete, and

2. those where the principle of discoverability means an architect cannot rely on the two-year Basic Limitation.

Here are some examples of each scenario:

- The Basic Limitation Period would cut off claims that could be known within two years of project completion, such as disputes relating to:
    - municipal approvals

    - troublesome site conditions encountered during construction

    - construction delay

- Claims that might only be discovered when a subsequent event takes place might not be known within two years of project completion, such as:

- personal injury events due to alleged dangerous conditions
- property damage events such as rainfall floods, burst pipe floods, or fires
- problems with design or construction discovered during subsequent renovation or construction projects.

Based only upon the Basic Limitation Period, it could be possible to bring a lawsuit 20, 30 or 40 years after a project is complete, for example if a person is only injured at that time but alleges the original design was flawed in a way that contributed to their injury. Fortunately, that is where the Ultimate Limitation Period comes into play.

WHAT IS THE ULTIMATE LIMITATION PERIOD?

The *Limitations Act* provides some security where the Basic Limitation Period is open-ended through section 15, which provides for an Ultimate Limitation Period, and which states, regardless of whether or not the Basic Limitation has expired:

"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".

For architects, this means that a lawsuit should never be brought against them more than fifteen years after they provided their final services on a project.

EXCEPTIONS TO THE ULTIMATE LIMITATION PERIOD

Unfortunately, even the Ultimate Limitation Period has a few exceptions. For example, it does not run (i.e., is “on pause”) for:

- the period that a claimant is a minor under the age of 18
- the period a claimant is incapable of bringing a claim due to their “physical, mental or psychological condition”
- undiscovered environmental claims, such as for groundwater contamination

THREE TAKEAWAYS FOR YOUR PRACTICE

Architects and other design professionals are more susceptible to lawsuits where the Basic Limitation Period will not protect them due to the fact that buildings are designed to stand for decades. Are they ever *ultimately* safe from litigation? For the reasons noted above, while there are exceptions, most cases cannot be brought after 15 years. In every case, you can rest easier if you follow the following three guidelines

1. Keep records on each project for at least 15 years, and even longer if practicable.
2. Even where a claim relates to a long-completed project and may seem farfetched, take it seriously and report it promptly to Pro-Demnity; we are the ones best suited to determine what limitation period might apply and how to use it to defend you in the context of litigation.

3. Remember that Pro-Demnity's policy is tailor-made to protect architects from risks unique to their practice. In the context of claims for long-completed projects, Remember that Pro-Demnity has your back through our Retirement from Practice coverage, which protects the architect for the length of their retirement, plus their estate (and beneficiaries) for up to 6 years after the architect is deceased.

Learn more about Pro-Demnity's Retirement from Practice Program or contact our Underwriting Team at 416-386-1770 ext. 1 if you are ready to retire from practice. If you have any questions about potential claims, speak with our Risk Services team at 416-386-1770 ext. 2, or contact claims@prodemnity.com.

[1] Full citation: *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B

Our Contributor

Philip is an experienced litigator with a practice dedicated to defending architects against professional liability lawsuits as in-house Senior Legal Counsel at Pro-Demnity Insurance Company, which he joined in 2020. He has successfully represented clients at all levels of Court in Ontario, as well as at mediations, arbitrations, administrative tribunals and professional colleges. Philip was called to the bar in 2012 after graduating from Queen's University Law School in 2011. Further, he completed an internship at the Khmer Rouge Tribunal in Cambodia. He is a member in good standing of the Law Society of Ontario, the Ontario Bar Association and Canadian Defence Lawyers. Recognized for his litigation expertise, Philip has contributed articles and been asked to present to insurance professionals, professional associations, and to fellow lawyers.

Disclaimer:

WHAT ARCHITECTS NEED TO KNOW ABOUT 30.10 MOTIONS

Imagine this scenario: a busy architect is out making a site visit when it happens: their phone buzzes and an email pops up from a colleague alerting them that legal documents were served on the firm at reception.

When the architect opens the attached pdf, they see a bunch of legal documents, possibly under a cover letter, with the first page being entitled “Motion Record” or “Notice of Motion”.

If the architect is (fortunately) inexperienced with litigation, they may believe that they have been sued – but they were not. Even if savvy enough to know that this is something else, they may not know what to do.

Pro-Demnity has been seeing more of these motions in recent months.

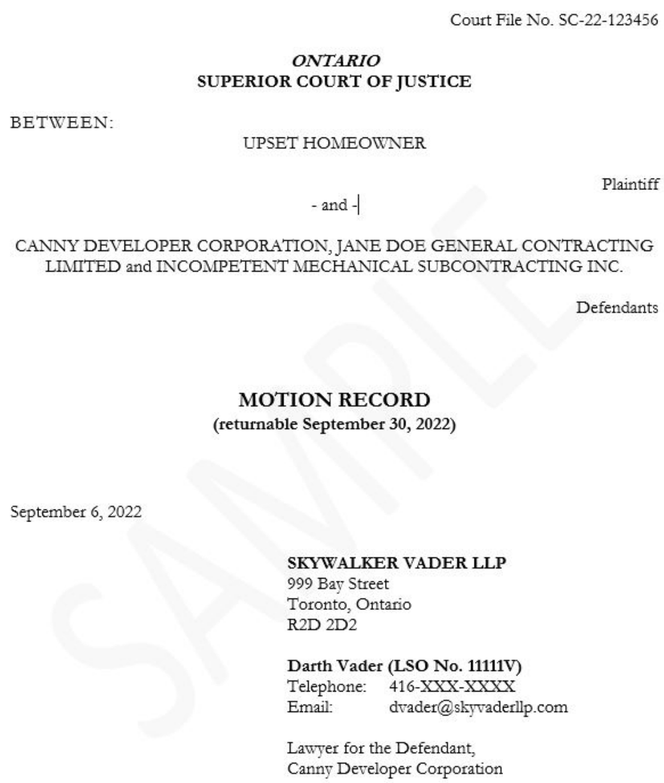
WHAT IS A 30.10 MOTION?

A 30.10 motion refers to a motion seeking the production of documents needed for a lawsuit from an individual, business or other organization *that is not involved in that lawsuit*.

There are several types of lawsuits where an architect's file(s) might be crucial to determining key issues in dispute by other parties, even where an architect has not been sued. This could include cases where a project owner has sued a contractor, a contractor has sued a subcontractor, another consultant has sued the project owner, an end user has sued the owner, or vice versa for any of these scenarios.

The authority to seek this relief from a Court is derived from Rule 30.10 of Ontario's *Rules of Civil Procedure*, which is the regulation that guides how civil litigation is conducted (think of the *Rules* as the Ontario Building Code of lawsuits), hence its name as the 30.10 motion.

Here is a sample below:



Court File No. SC-22-123456

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

UPSET HOMEOWNER

Plaintiff

- and -

CANNY DEVELOPER CORPORATION, JANE DOE GENERAL CONTRACTING LIMITED and INCOMPETENT MECHANICAL SUBCONTRACTING INC.

Defendants

MOTION RECORD
(returnable September 30, 2022)

September 6, 2022

SKYWALKER VADER LLP
999 Bay Street
Toronto, Ontario
R2D 2D2

Darth Vader (LSO No. 11111V)
Telephone: 416-XXX-XXXX
Email: dvader@skyvaderllp.com

Lawyer for the Defendant,
Canny Developer Corporation

Sample Motion Record Cover. In a 30.10 motion, the next page would indicate it is sent to the architect's attention.
If you receive one, contact Pro-Demnity and your legal counsel.

WHAT TO DO WHEN SERVED WITH A 30.10 MOTION?

Just because an architect is not yet part of a lawsuit, this does not mean that someone who is party to it might not try to bring them in later, possibly after reviewing your file documents. **This means that you should report a 30.10 motion to Pro-Demnity as a *potential* claim.** The motion may be an innocent attempt to obtain documents that will come to nothing, but Pro-Demnity's team are in the best situation to determine this. If there is a substantial risk that the architect could get drawn into the lawsuit, we may appoint a lawyer to represent you at the motion.

In many cases, a 30.10 motion is harmless, or unlikely (in Pro-Demnity's view) to lead to you being involved in a lawsuit. However, even if the 30.10 motion is "harmless" from this perspective, you or a representative are still legally required to attend court on the date and at the location indicated in the Notice of Motion.

In such a case there is no coverage for Pro-Demnity to appoint a lawyer to act as your defence counsel. Large firms may have an in-house lawyer, or a go-to private lawyer who can deal with the lawyer bringing the motion and/or attend the motion on their behalf. If not, you may wish to consider retaining one of the lawyers included on Pro-Demnity's Risk Services' list of lawyers resources.

WHAT WILL BE THE RESULT OF THE MOTION?

The outcome of the 30.10 motion in nearly all cases will be to order you to provide copies of your file documents to the party seeking them. However, if you or a lawyer attend the motion, this could still be helpful in the following ways:

1. Limiting the extent of the documents to be provided;
2. Extending the time you have to provide the documents; and
3. Securing a requirement that the party seeking an architect's documents pay a reasonable fee for your time in administering the document transfer.

5 POINTS TO TAKE AWAY:

1. Being served with a Motion Record for a 30.10 Motion is not a lawsuit brought against you but a request for documents to be given to someone who is involved in a lawsuit.

2. Do not ignore or put off dealing with a 30.10 Motion – there are tight timelines.

3. Notify Pro-Demnity of a potential claim if served with a 30.10 Motion.

4. You or a representative must respond to the motion or bad things can happen (in the extreme case, you could be found in contempt of court, a criminal offence).

5. You should expect the court to require you to provide documents, but you can influence when and how.

As your professional, protective ally, Pro-Demnity always has your back and will proactively defend you against allegations of errors, omissions, or negligence. If you have any questions about potential claims, speak with our Risk Services team at 416-386-1770 ext. 2, or if you receive a 30.10 motion, contact claims@prodemnity.com.

Our Contributor

Philip is an experienced litigator with a practice dedicated to defending architects against professional liability lawsuits as in-house Senior Legal Counsel at Pro-Demnity Insurance Company, which he joined in 2020. He has successfully represented clients at all levels of Court in Ontario, as well as at mediations, arbitrations, administrative tribunals and professional colleges. Philip was called to the bar in 2012 after graduating from Queen's University Law School in 2011. Further, he completed an internship at the Khmer Rouge Tribunal in Cambodia. He is a member in good standing of the Law Society of Ontario, the Ontario Bar Association and Canadian Defence Lawyers. Recognized for his litigation expertise, Philip has contributed articles and been asked to present to insurance professionals, professional associations, and to fellow lawyers.

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CLIENT MANAGEMENT AS A RISK MANAGEMENT STRATEGY

Seven client-focused things architects can do to reduce liability claims.

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WORKING TOGETHER TO KEEP WATER IN ITS PLACE

This is an abbreviated version of an article that was published in the Fall 2018 edition of *Pushing the Envelope Canada*, which is printed twice per year by Matrix Group Publishing Inc. for the Ontario Building Envelope Council. Portions of the original article have been reprinted with permission and may not be reproduced without prior written consent. To read the original article in full, please go to https://www.obec.on.ca/pte-newsletter.

In a recent research project, we found that water damage to the building enclosure was the leading trigger of professional liability claims against Ontario architects. This was the first time that anyone has measured patterns in such claims, and we were struck by the fact that all building types were affected, in all regions of Ontario, and that liability was often shared with building science consultants.

Readers can access the Claims Experience Workbook: Lessons from a review of professional liability insurance claims. Published in early 2018 (by Pro-Demnity and the Ontario Association of Architects), the Workbook fully documents our findings and highlights actions that architects can take to manage their
risks – some of which have implications for building science consultants.

Because the Claims Experience Workbook mentions engineers, and others, frequently within its pages, I'd
like to see non-architects read it, in its entirety. Here, I highlight the types of water-related claims

that arose most often; how “what failed” varied with building type; and where building science consultants were either part of the problem or could be part of future solutions.

I then suggest how continuing education for mid-career practitioners might respond to the patterns we saw in the claims. Finally, I recommend two additional items to study – right now – to help with day-to-day decisions about the design and construction of better building enclosures.

WHAT HAPPENED?

Because Pro-Demnity Insurance provides the mandatory professional liability insurance coverage for all architectural practices in Ontario, we were able to look for patterns among all of the claims that were lodged against any Ontario architect, during a recent five-year period. We found that water damage was “the biggest of the big” trigger of claims, that building science consultants were found liable (alongside the architect) in roughly 20 per cent of enclosure-related settlements, and that roofs, walls, windows, and foundation walls were each affected, to varying degrees.

From the individual building owner’s or occupant’s point of view, each claim arose because a water-related event incurred significant un-planned costs and caused headaches. In a few cases, an entire building had to be re-clad. In many more, remedial measures were substantial and took years to complete. Each claim was unique, and most arose because of a cluster of errors or omissions, large or small, perceived or real. In Ontario, we have not (yet) experienced a BC-style leaky-condo crisis. But make no mistake, over the course of five years at numerous sites across Ontario, significant water damage to an enclosure actually happened.

Among the factors frequently at play were:
• Fundamental choices at the earliest stage of design;
• The selection of products or systems;
• The quality of the whole design team’s drawings and specifications;
• Oversights during field review or third-party inspection; or
• The acceptance of construction-phase substitutions of non-specified products.

To the extent that consultants professing advanced knowledge of the science of the building envelope were involved in any of these activities, they were called to defend their actions. As to the physical facts, claims involving water damage to the exterior wall were the most costly, if not the most frequent. Next were roof leaks or condensation (sometimes due, in part, to insufficient ventilation).

Moisture migration through the wall, as dramatically illustrated in this case in northern Europe, triggered several professional liability claims in Ontario. *Photo credit: Ilya Andriyanov*

Broken pipes in under-insulated or unheated spaces made up another class of mishap. Below-grade leaks, poorly planned (or constructed) site drainage, and poorly planned (or constructed) interior floor drainage also gave rise to claims. Claims that a window failure involved an architect were remarkably few.

The Claims Experience Workbook suggests some very general risk management strategies to address each of these matters.

DIFFERENT ISSUES FOR EACH BUILDING TYPE

Assembly buildings and office buildings were more often affected by roof failures and leaky pipes than by wall failures. These were mostly low-rise buildings with a variety of roof shapes and roofing systems, and plenty of uniquely-configured roof-to-wall junctures. In multi-unit residential buildings (MURBs) and hotels (whether low- or high-rise), the inverse was true: walls were most often affected. Face-sealed exterior insulation finishing systems (EIFS), pre-cast concrete panels, and brick and wood cladding were all featured in one or more of the claims we examined. In single-family houses, costs went mainly to settle wall failures, but roof failures were as numerous.

> ARCHITECTS ARE REQUIRED to meet an extraordinary number of professional challenges in practice. It is unreasonable to assume that every architect is equally equipped through education and experience to deal with all of these.
>
> Pro-Demnity's risk management advice to architects has regularly included the benefit of establishing and maintaining a quality assurance/ quality control program for the practice. Many such programs include the participation of additional specialists to supplement the architect's own expertise.
>
> Often, claims that arise against architects involve design decisions and "gaps" in documentation and specifications. In the intense spotlight trained on the architect facing a claim, it has often become apparent that many "errors" or "oversights" might have been avoided if the work had been subject to a quality assurance review or collaboration with another professional who brought different perceptions and expertise to the design as it was being developed.

The plaintiffs who lodged the claims also varied markedly with building type. For instance, MURBs were distinguished by a high number of claims lodged against consultants by condominium associations (or unit owners), regardless of the fact that these entities were not the architect's or specialist consultant's original client. Purchasers frequently alleged a designer or field inspector was liable, regardless of who was originally contracted to whom.

The Claims Experience Workbook discusses these patterns more thoroughly and suggests building-type-specific risk management priorities.

BUILDING SCIENCE CONSULTANTS: PART OF THE PROBLEM OR PART OF THE SOLUTION?

Enclosure design consultants, roof inspectors, and Tarion Bulletin 19 field review consultants each figured in claims where architects were also named. MURBs were the setting of several of these claims, as were public buildings of various types, but single-family houses were not exempt. Icicles, parapet leaks, missing scuppers, so much mould that the wall framing begins to rot – specialists in this business will recognize the potential consequences of poorly designing or poorly constructing a building enclosure in Ontario's demanding climate. One spectacular failure of a vegetated roof on a single-family house was even featured in the pages of the *Toronto Star* newspaper.

While they have shared in the problem, clearly building science consultants have a significant role to play in developing future solutions.

> "**There's a lot to know, and we practice in one of the fastest-paced construction environments in the world. I strongly suggest we hold hands and work together.**"

We were troubled to see, however, that appropriate insurance of all defending parties was not in place in
all of the claims Pro-Demnity defended. In Ontario, both the *Architects Act* and the *Professional Engineers Act* require any firm that is giving advice about the design or construction of a building (and this certainly includes the enclosure) to carry professional liability insurance. In the Claims Experience Workbook, therefore, the OAA and Pro-Demnity strongly reinforce these requirements, reminding architects to help protect the best interests of the public by confirming that any building science consulting firm with whom they contract carries appropriate levels of professional liability insurance.

IN-SERVICE (RE-)TRAINING NEEDED

In a world where new products seem to emerge nearly every day, where the pressure to build at the utmost speed is unrelenting, and where hailstorms, rainfall, and high winds are becoming more frequent and more extreme, it seems to me that continuing education for all building-enclosure professionals is in order. While just a small percentage of Ontario's 1,500 architectural firms were named in the claims we reviewed, the pressures that led to claims exist for everyone.

I want to see robust continuing education that is multi-disciplinary and is, at least in part, building-type specific. It should treat our shared duties to the public as a central theme and express confidence in our shared ability to uphold it. Climate-appropriate design also ought to be a featured topic. (Detailing in North Bay should – to a degree – emphasize somewhat different concerns than detailing in St. Catharines.) Climate-change resilience is clearly another urgent concern. (Extremely high winds during the spring of 2018 produced quite a bit of roof repair business; but would it not have been preferable to make the roofs more wind-resistant in the first place?)

One of the most exciting building science curricula I've seen for architects featured the whole host of actors in the construction process at the podium: building science professionals, architects, insurers, builders, and others.

For architects, continuing education is best when there is more emphasis on creative synthesis of the whole design than on deep analysis of its parts. We can always use reinforcement about the management and resolution of the full range of perspectives (builder, inspector, designer, occupant, operator, and so on). Tactile evaluation of materials and systems is always appealing, as are detailed case studies.

Earlier this year, I thoroughly enjoyed my first-ever trip to the Canadian Roofing Contractor's Association's ROOFTech show, where they build stuff, full-scale. If you're an architect like me, who has never been, go! If you're a building science professional, encourage the architects you know to go. Finally, I think we need to design continuing education for more than one level of learning. This is very challenging and needs some shared thought. I'm excited about the new modules being developed to support seekers of the OBEC Building Science Specialist designation, and I imagine great potential for them to be part of a larger system which could help serve an even larger audience.

READERS' CHOICE

For now, as a result of what I saw in the insurance claims, I recommend the following web-based video and book to anyone with a professional interest in making better buildings in Ontario.

First, consider watching Great Lakes, Global Warming, and Crazy Weather (original air date: September 13, 2017), presented by TVO's The Agenda. It's 30 minutes well spent. Climatologist David Phillips and Gail Krantzberg, professor of engineering at McMaster University, discuss the health of the Great Lakes, the economics of the cross-border region, and building for resilience. They suggest that better roofing and storm drainage are connected to improving ecosystem health, trade, and community safety. Now, let's hear from the architects and consulting engineers!

Second, Brian Palmquist's An Architect's Guide to Construction, Tales from the Trenches, aims to increase the effectiveness of everyone involved in the construction process. Although Palmquist set out mainly to provide intern architects with guidance and inspiration, I also found this book (despite my many years in practice) an inspiring read. The commentary is informed by extensive knowledge of professional liability claims in British Columbia and from the author's direct experience as consulting architect, building science consultant, and contractor. Nevertheless, the approach is upbeat and hopeful. I've seen nothing else in print like it (published in Vancouver, in 2015 by Quality- by-Design Software Ltd., available through Amazon).

While architects and building scientists can jointly be proud that the overall cost of resolving errors and omissions claims has been, to date, but a fraction of the value of construction starts in Ontario, we can – and ought to – continue to strive to do better. Should water-related damage to the building enclosure be the most significant single driver of professional liability claims against architects? Or might that be avoidable?

To the individual building owner, no leak is acceptable. To the consulting architect or engineer, no claims-
resolution process is enjoyable, either. Beyond mere avoidance of trouble, the higher shared goal, really, is more comfortable, durable, energy-efficient, and resilient buildings – buildings that truly benefit from the attention and skills of committed design professionals. I hope that the Claims Experience Workbook will help serve that goal, starting now. In the future, I hope that the Ontario Building Envelope Council and the OAA will continue to work together to enhance Ontario's continuing education programs for all building envelope professionals.

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CONTRIBUTING AUTHOR: BARBARA ROSS, M.ARCH., CUT, OAA, FRAIC

Barbara Ross is the principal of The Research in Architecture Studio. A particular interest is understanding and explaining emerging "ways and means" that aim to lower the loads that mid-sized public-sector buildings impose on the natural environment.
Quoting Barbara:

"Asking an open question may feel risky – but it is how we learn. The evidence that The Studio will uncover should be eye-opening, and may challenge existing assumptions. In all cases, but particularly when researching a "green" or "ecological" topic, we try to move the discussion from dogma to data."

This approach is exemplified in Barbara's work with Pro-Demnity – assisting with a number of important investigations, including the science associated with vegetated (green) roofs, and an understanding of concrete failures in the presence of pyrrhotite, which has triggered significant claims in Quebec and elsewhere.

Barbara was responsible for the milestone research into Pro-Demnity's claims experience over a five-year period that is summarized in the Claims Experience Workbook and the accompanying Checklists & Worksheet. Starting in 2016, Barbara delivered over 24 Risk Education events to Ontario architects reporting on the findings from the research and, through "Workbook Workshops," helping prepare participants to apply the lessons to their own practices.

Barbara can be reached at:
The Research in Architecture Studio
T: 905-823-8784 E: rosstrum@bell.net

Disclaimer:

2022 ANNUAL UPDATE

From our early beginnings as an indemnity plan in 1987, Pro-Demnity was designed to be the architects' trusted, protective, professional ally, providing Ontario's architectural practices with professional liability insurance solutions and risk management services.

We enable the architectural profession to improve society and human interaction through better design, by supporting the wise, effective, and efficient management of risk.

Read our 2022 Annual Update and learn how we are protective by design.

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