FOR WHOM THE LITIGATION TOLLS: EVERYTHING AN ARCHITECT NEEDS TO KNOW ABOUT TOLLING AGREEMENTS

WHAT ARE TOLLING AGREEMENTS?

Tolling agreements are something architects may never have heard of, nor do they need to know anything about, to have a well-functioning practice. Or at least, they do not need to know anything about them right up to the day someone, usually a client, asks them to sign one, at which point the need to know becomes urgent.

So, what are tolling agreements? No, they have nothing to do with road or bridge tolls, nor do they have anything to do with tolling bells.[i] They involve a third, more archaic, definition of the word "toll", which can be used as a verb as meaning to stop or abate the running of a time period.

Black's Law Dictionary defines a tolling agreement as:

"*An agreement between a potential plaintiff and a potential defendant by which the defendant agrees to extend the statutory limitations period on the plaintiff's claim, usually so that both parties will have more time to resolve their dispute without litigation.*"[ii]

This is accurate as a general definition, but more specifically, the tolling agreements architects will encounter in Ontario are concerned with extending the time to start a lawsuit beyond the times set out in Ontario's *Limitations Act*.[iii] Section 4 of the *Act* states that a lawsuit can only be commenced within two years of the claim being discovered. The inclusion of the term discovered means that often lawsuits are commenced far later than two years after a triggering event, but the general two-year rule can make this problematic, leading to the use of tolling agreements as a way to buy some extra time.[iv]

WHAT TO DO WHEN YOU ARE ASKED TO SIGN A TOLLING AGREEMENT?

In most cases where an architect is asked to sign a tolling agreement, the request will come from their client. However, while this is the most frequent scenario, a tolling agreement could be presented by anyone who believes they *may* have a right to sue the architect, including subconsultants, contractors, or even end users of a project.

Once you have been asked to sign a tolling agreement, you should promptly notify Pro-Demnity. The mere fact that someone has asked you to sign it signals a potential claim, since the only purpose of the agreement is to preserve a right to sue you. Under your policy with Pro-Demnity, you have an obligation to immediately notify Pro-Demnity as soon as you become aware of a claim, and a failure to do so could jeopardise your coverage.

However, reporting the Agreement to Pro-Demnity should not be viewed merely as a way to preserve your coverage, but also as an opportunity to tap into the expertise of our claims, legal and risk management teams to assist you in assessing why you have been targeted with this request, and whether or not to sign the agreement.

In addition to notifying Pro-Demnity, you may also wish to inform your firm's legal counsel of the request for a tolling agreement.

WILL PRO-DEMNITY WANT ME TO SIGN THE TOLLING AGREEMENT?

Pro-Demnity has a measured perspective on Tolling Agreements, and might recommend any of the following approaches, depending on your specific circumstances:

1. that you sign it as originally drafted;

2. that you reject it; or

3. that you try to negotiate better terms and then sign it.

Our guiding principal is that tolling agreements are worth signing when there is a possibility that they could help an architect avoid being sued altogether, but they are not worth signing when all they will do is confer a tactical advantage to a future opponent or extend the time an architect faces risk with no upside. These are complex judgment calls, which Pro-Demnity and the architect would explore together before agreeing on an approach.

The decision on whether to agree to or reject a tolling agreement, rests on an assessment of why it seems to have been requested. This will often fall into one of the following categories:

1. A party to an ongoing project is worried about developing problems that might result in them needing to sue another party, but also believes these problems might get resolved before completion. They do not want to sue and ruin relationships since there is a possibility it all resolves, but do not want to lose their right to sue in case things do not work out.

Pro-Demnity often views tolling agreements in these situations favourably.

- A party who knows they definitely want to sue an architect about an ongoing project, wants to wait until a project is complete before starting a lawsuit.

Pro-Demnity is skeptical of these situations, but tolling may be appropriate if cooperation over the rest of the project could help limit the damages that would ultimately be claimed.

- A party knows they are going to sue an architect and others, but just wants more time to put together their case before doing so.

Pro-Demnity is not in favour of having architects execute tolling agreements in these situations.

- A lawsuit has already been started against someone, usually an owner, who believes the architect's actions may be implicated, but thinks it is a frivolous case and would rather cooperate with the architect to defeat the case than to pull them into the ongoing litigation.

This may or may not be a case where a Tolling Agreement is appropriate, depending on whether Pro-Demnity agrees the case is frivolous and the architect might escape the lawsuit altogether. If it looks like the architect will ultimately become involved, then we would rather defend them from the beginning than be late to the party.

- A proposed tolling agreement might come about due to nothing more than a box-ticking exercise for the lawyers of another party. Sometimes, legal counsel get nervous at the idea of losing a right to sue even when they have no actual formed intention to sue.

Pro-Demnity is not in favour of having architects execute tolling agreements in these situations.

Even in the situations where a tolling agreement might make sense, it is important to consider how they are worded. One consideration is to always make certain that there is an end date, so that architects are not agreeing to be at risk indefinitely. These agreements can also be used to secure regular updates from the other party about the status of underlying lawsuits.

Four Tolling Agreements Dos and Don'ts:

- **Do:** treat it with urgency. The person sending it to you is probably worried that they are on the verge of losing a legal right and will keep pestering you until they get a response.

- **Don't:** sign a tolling agreement without discussing it with Pro-Demnity as this could jeopardize your coverage.

- **Do:** continue to provide your professional services as an architect, if a project is ongoing, while considering the tolling agreement.

- **Don't:** stress needlessly over being asked to sign one. Pro-Demnity's claims, legal and risk management teams have many years of experience assisting architects to navigate exactly these types of situations.

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[i] Unless you have been retained to design a toll road or bridge, or a bell tower, in which case it might…

[ii] "Tolling Agreement", Black's Law Dictionary, 8th edition: Thomson West, 2004.

[iii] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[iv] For more on limitation periods, see the author's previous article on the Ultimate Limitation Period.

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.