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.