

PB-05 LIMITATIONS ACT

SUMMARY

On September 16, 1998 Alberta's *Limitations Act* was proclaimed by Order in Council, effective March 1, 1999. The Act consolidates previous legislation and applies to several professions where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

HISTORY

Prior to March 1, 1999, legislation provided for the possibility that for architects and other professionals, the actual Period of Limitations may never expire. This has obvious implications for an active practice and a retired practitioner. The main problem with the former legislation was centered around the legal concept of “discoverability”. The previous law did provide for a limited period of liability, however, the commencement of that period was the subject of debate and confusion. The Courts made the determination of the date when a cause of action arose to be very difficult to determine. Hence the reason for the new legislation.

THE LIMITATION ACT OF MARCH 1999

The Act retains the concept of “discoverability” however provides an outside limit on the commencement of an action. Additionally, the difference between contract and tort claims has been eliminated. The types of claims arising from construction projects that affect Architects/Licensed Interior Designers meet the definition of “injury” as described by the *Limitations Act*. The Revised Statutes of Alberta 2000 Chapter L-12, current as of October 1, 2011 define “injury” as:

- (i) personal injury,
- (ii) property damage,
- (iii) economic loss,
- (iv) non-performance of an obligation, or
- (v) in the absence of any of the above, the breach of a duty

A key component of the *Limitation Act* relates to when the clock starts ticking or in other words when a claim arises. This is now clearly defined as when the conduct terminates or the last act or omission occurs. The Act also provides that a claim must be commenced within 10 years after the claim arose. This means that in virtually all cases the absolute last date for commencement of action would be 10 years following the performance of the last duty. This is a significant change from the former legislation which held that the limitation time period commenced from the date the cause of action could reasonably be “discovered”.

On construction projects the date of the performance of the last duty is likely the last site review or payment authorization. If the service scope is limited, the 10 year period might start to run earlier in the sequence of construction.

There is also a two year basic limitation period which operates within the ten year maximum time period. The two year period is relevant if the conditions for “discoverability” are met. In this case, the claim would arise when the claimant knew or ought to have known, that injury had occurred,

that the injury was attributable to the conduct of the Defendant and that the injury warranted the bringing of a proceeding.

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In certain cases, the two year period may apply however, since the determination of “discoverability” is a subjective matter, it is not advisable for an Architect/Licensed Interior Designer to rely upon the two year limitation period.

RULE OF THUMB

Architects/Licensed Interior Designers practicing in the province of Alberta should consider the time limitation on their projects to expire ten years after the date of the last service on a project. To be safe, members should consider the last date of service to be the performance of the Warranty Review if applicable.

DOCUMENT RETENTION

Proper project documentation would assist in the determination of the date of the very last service on a project and it is advisable to retain project records for the ten year period along with the always present requirement for well documented communication between owner and professional. Comprehensive project records provide legal counsel with possible arguments for the use of the two year limitation period.

The Alberta Association of Architects does not have a specific policy in place for document, contract or drawing retention and members are advised to verify matters with their legal counsel and insurance provider. Nevertheless, the following is recommended:

- ▶ Retain any and all work products *within* the limitation period.
- ▶ Once the period has elapsed, it is still recommended to:
 - » retain all original, sealed contract documents, project files and client files including electronic files
 - » superseded documents and journals are optional, but may be useful in tracking development and decision making on a project. These support documents could also become important if the need for recall arises in the event of a conflict or third party situation that might arise years after a project is complete. The self - test would be to ask – *what information might I need to defend myself in the event something goes wrong?*

Unfortunately for architects – there is no limitation on third party liability. For example, if someone issues a claim for a ‘slip and fall’ 20 years after a project is complete, could one prove the decision to use that material was an owner or a contractor substitution or, a decision made outside of the architect’s control by someone else and not one’s own firm?

NOTES

The Alberta Association of Architects understands the statute of limitations for financial information is seven (7) years. Members are advised to verify this information with their financial advisor.

The *Alberta Association of Architects* thanks Barbara Komisar for the legal framework of this Practice Bulletin. Ms. Komisar is a lawyer with *Ogilvie and Company* and practices in the areas of corporate and commercial law.

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