

# The Limitations Act

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## Summary

New legislation governing the limitation periods in Manitoba came into force in 2022. Architects should have a basic understanding as to when a limitation period commences, and when it expires, relative to the delivery of their professional services, to help determine how best to maintain and manage their files; and should consult with their own legal counsel and/or insurer, as and where appropriate.

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## BACKGROUND

Manitoba's limitation period legislation changed on September 30, 2022, when *The Limitations Act* came into force.

It is important for architects to be aware of this change in the legislation. Knowing when a limitation period begins to run, and when it expires, can assist architects in determining how best to maintain and manage their files, in the event that a legal action relating to one of their projects is commenced.

## THE OLD REGIME: LIMITATION PERIOD UNDER *THE LIMITATIONS OF ACTIONS ACT*

The types of claims which may be made against an architect on a construction project vary, but can include claims for damages relating to:

- Negligence or other breach of duty;
- Breach of contract;
- Personal injury; and/or
- Damage to property.

Under Manitoba's old limitation period regime, each of the above-listed causes of action were subject to different limitation periods, generally ranging from 2-10 years. For example, claims for negligence were subject to a six-year limitation period, meaning that a negligence claim

needed to be brought within six years following the date on which the cause of action arose.

Determining when a cause of action "arose" depended on the particular project. As one example, in a case involving a claim against an architect for negligent design and project supervision, the cause of action was found to have arisen (and the six-year limitation period started to run) on the date of substantial completion of the project.

## THE NEW REGIME: LIMITATION PERIODS UNDER *THE LIMITATIONS ACT*

### Basic 2-Year Limitation Period

Manitoba's limitation period regime changed on September 30, 2022.

Under the new limitation period regime, *The Limitations Act*, CCSM c L150, any claim discovered after September 30, 2022, is now subject to a basic two-year limitation period.

The basic two-year limitation period begins to run from the date on which the cause of action is discovered by the claimant. In other words, a claim cannot be commenced more than two years after the day the claim is discovered.



## REGULATORY

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For the purposes of *The Limitations Act*, a claim is discovered on the day when the claimant first knew, or ought to have known, all of the following:

- that injury, loss or damage has occurred;
- that the injury, loss or damage was caused by or contributed to by an act or omission;
- that the act or omission was that of a person against whom the claim is or may be made; and
- that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

It is important to remember that claims against architects may be discovered several years after a project has been completed. The date on which a claim is “discovered” for the purposes of *The Limitations Act* will vary and will depend on the facts of a particular project.

**Example Scenario:**<sup>1</sup>

- A dry sprinkler system is installed in the Owner’s business premises and is inspected by the general contractor in October 2022;
- On January 11, 2024, the sprinkler system ruptures, causing significant flooding inside the premises;
- The Owner makes an insurance claim relating to the flood damage. The claim adjuster retains an engineer, who inspects the damage and sends an email to Owner explaining the likely cause of the damage on January 28, 2024;
- The Owner receives an expert report on February 28, 2024, which provides a conclusive opinion about the cause of the sprinkler system failure;
- Although the Owner received a formal expert report on February 28, 2024, the limitation clock began to run on January 28, 2024, when the insurance

adjuster’s engineer emailed the Owner its opinion about the likely cause of the damage. This is because a claimant (in this scenario, the Owner) only needs to know enough facts on which it can base its allegation of negligence against the general contractor in order to file a Statement of Claim against the general contractor;

- The limitation period for the Owner’s claim against the contractor therefore expires on January 28, 2026.<sup>2</sup>

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<sup>1</sup> This scenario is based on the Ontario Court’s decision in *Taiga Building Products Ltd. v Classic Fire Protection Inc.*, 2021 ONSC 676. Note that because the changes to Manitoba’s *Limitations Act* are recent, the Manitoba Courts have not yet analyzed when claims are considered to have been “discovered” for the purposes of Manitoba’s new Act. However, other Provinces, including Ontario, have had similar discoverability legislation for years.

<sup>2</sup> If you require assistance or information regarding claims made in Ontario, please consult legal counsel in Ontario.

### **Limitation Period for Third Party Claims**

Under section 8 of *The Limitations Act*, the basic two year limitation period for claims for contribution and indemnity does not begin to run until the day the liability of the claimant is confirmed by a court judgment, arbitration award, or settlement agreement.

Claims for contribution and indemnity are often filed as Third Party Claims, for example, where a plaintiff (claimant) has filed an action against a defendant, the defendant can file a third party claim, seeking contribution and indemnity from a third party who was not initially named in the action by the plaintiff.

**Example Scenario:**

- An Owner engages an Architect to design its project and hires a General Contractor to oversee construction of the project.
- The Architect completes the project design on December 1, 2023, and the General Contractor begins construction on January 1, 2024, and

completes construction on June 1, 2024.

- On October 1, 2024, the project Owner discovers various construction deficiencies on the project.
- The Owner files a Statement of Claim against the General Contractor for defective workmanship on the project on November 1, 2024, but does not name the Architect in the action.
- The action goes to trial and the Court awards judgment in favour of the Owner on February 1, 2027.
- The General Contractor wants to file a Third Party Claim against the Architect on March 1, 2027, seeking contribution and indemnity from the Architect for the damages which were awarded against the Contractor and alleging, among other things, that the loss suffered by the Owner was caused or contributed to by the negligence of the Architect.
- In this scenario the Contractor's limitation period to file a Third Party Claim for contribution and indemnity against the Architect does not begin to run until February 1, 2027, which is the date of the Court judgment against the Contractor. The Contractor's limitation period to file a Third Party Claim for contribution and indemnity against the Architect expires on February 1, 2029.

It is therefore important to note that where a Third Party Claim for contribution and indemnity is made against an architect, the limitation period does not begin to run when the claimant (in the example above, the Owner) discovers that they have suffered injury, loss or damage. Rather, it begins to run on the day a Court judgment is awarded in against an alleged wrongdoer (in the example above, the Contractor) in relation to the matter for which contribution or indemnity is sought (in the example above, damages for the Owner's loss with respect to the project).

## 15-Year Ultimate Limitation Period

*The Limitations Act* contains an ultimate limitation period of 15 years.

This means that even if the basic 2-year limitation period for a claim has not yet expired, a proceeding shall not be commenced more than 15 years after the day the act or omission on which the claim is based took place.

### *Example Scenario:*

- An architect enters into an agreement with an Owner, whereby the architect agrees to prepare drawings for the Owner's construction project;
- The architect completes the project drawings on August 1, 2022;
- On August 1, 2037, the 15-year ultimate limitation period for the Owner to file a claim against the architect for defective design expires;
- On August 1, 2044, 20 years after the architect completed the project drawings, the Owner discovers latent design deficiencies which have caused damage to Owner's property;
- On August 1, 2045, the Owner files a Statement of Claim against the architect, alleging breach of contract due to the deficient design of the project;
- In this scenario, the Owner's claim is statute barred. Even though the Owner only discovered the design deficiencies on August 1, 2044, and filed a Statement of Claim within two years of that date, the Claim was filed after the expiry of the 15-year ultimate limitation period.

## Agreement to Extend the Basic 2-Year Limitation Period

Another feature of the new regime is that parties to an action may now agree, in writing, to extend the basic 2-year limitation period.

However, the basic 2-year limitation period cannot be shortened by agreement,

nor can the 15-year ultimate limitation period be extended by agreement.

It may be beneficial for an architect to agree to extend a basic 2-year limitation period in certain situations. This includes situations where a dispute arises between the parties to an architectural services agreement and the parties are attempting to resolve the dispute, without commencing litigation, but the claimant (the party who has a claim against the other) is running out of time to file a Statement of Claim with respect to the dispute.

Extending the basic 2-year limitation period can give the parties involved in a dispute the opportunity to properly investigate a potential claim, with a view to resolving the dispute before litigation is commenced. The parties might also have a business relationship that they would like to maintain by attempting to resolve a dispute amongst themselves, rather than by commencing litigation.

*Example Scenario:*

- On January 1, 2025, the owner of a project discovers that it has a potential claim against the project architect for negligent design;
- The owner notifies the architect of the potential claim, and the parties begin negotiating a resolution. Both parties retain experts to investigate the allegedly negligent design;
- By mid-December 2026, while both parties would like to resolve their dispute without proceeding to litigation, the parties' experts have advised that they need more time to investigate and prepare their expert reports;
- In this situation, the owner's basic 2-year limitation period is set to expire on January 1, 2027;
- However, the parties may wish to enter into an agreement to extend the basic 2-year limitation period. In good faith and with a view to resolving their dispute without commencing

litigation, to allow their experts more time to investigate and prepare their respective reports.

There are also situations in which entering into an agreement to extend the basic 2-year limitation period would not be appropriate.

Whether or not an architect wants to extend a limitation period will depend on the circumstances of the particular project. For example, it may not be beneficial to extend the basic 2-year limitation period where the parties have been trying to resolve a dispute for several months without success and feel it is unlikely that further negotiations will result in a resolution of the dispute.

Additionally, the parties to an architectural services agreement are not in a position to decide, at the outset of a project, whether a basic 2-year limitation period should or should not be extended. The parties will not know the nature or details of any potential dispute at the time they enter into the architectural services agreement and therefore will not know whether they will be able to successfully resolve any disputes that may arise throughout the project without proceeding to litigation.

For these reasons, architects should look for and carefully consider contract provisions that would "automatically" extend the basic 2-year limitation period for any dispute that might arise throughout a project, particularly where the architect has not drafted the agreement themselves.

Before entering into any agreement to extend the basic 2-year limitation period, it is strongly recommended that architects consult with a lawyer and their insurer.

**Claims Discovered Before September 30, 2022**

Any claims that were commenced under Manitoba's old limitation period regime – *The Limitation of Actions Act* – will still be governed by that regime.

## **Recommendations for Document Retention**

To assist in defending any claim that may be brought against them, it is important for architects to engage in proper document retention and management practices.

It is therefore recommended that architects retain the following documents and information, indefinitely:

- Digital copies of all relevant project documents, such as drawings, plans, and reports, as well as copies of any invoices and progress payments issued on a project;
- Copies of e-mails, text messages, or other written communications that were exchanged between the architect and owners, contractors, and other professionals throughout a project; and
- Digital or original copies of any notes and journals that were maintained by the architect throughout a project. Keeping these documents will allow architects to assist in their own defence, and may serve as helpful memory aids where a claim relating to a project that took place several years earlier is subsequently discovered.

Destroying project documents after completion of the project is not recommended. At a minimum, original copies of all relevant project documents should be retained from the start of a project throughout the 15-year period following completion of the project, and architects should ensure that they continue to maintain digital copies of all relevant project documents thereafter.

## **Consult with Counsel and your Insurer**

If you have any questions about the applicable limitation period for claims that may be discovered following completion of a particular project, or question about how a limitation period may affect your file retention and management practices, be sure to contact legal counsel and your insurer.