

Headline: Contractual Limitation Periods

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Many strata corporations have suffered from premature building envelope failures, or premature hot-water pipe failure, or other such major problems with the original construction of their buildings. Many of those strata corporations have brought law suits against those involved in the original construction, seeking to recover some of the costs of making good the original poor design or work. In some cases the building may have been constructed many years ago. Such strata corporations are usually relieved to hear that in BC they have six years from the time that the claim was discoverable to sue in this type of claim. The law suits for these "leaky condos" are generally claims in tort for negligence; they are based on the principle that even though there is no contract between those who designed and constructed the building and the strata corporation, there is a duty to design and construct the building to certain standards that is owed to the future owners and occupants of the building.

To fix these problems, many strata corporations have entered into contracts themselves with architects and engineers and contractors. It would be natural to think that the same rules about suing would apply; that a strata corporation has six years from when the claim was discoverable to start an action. That may not be the case, because the law suit now would be based both in contract and in tort. When a claim is based on contract, then the terms of that contract may take precedence over more general laws. For example, the standard agreements, developed by the architects' associations in Canada and by the Association of Professional Engineers, includes a limit both on how long you have to sue and on how much you can collect from the architect or engineer if they make design errors that later cause damage to the building.

The standard agreement term in both the architects' standard agreement and the engineers' standard agreement provides that an action must be started within the *shorter* time period of the limitation period set by the Limitation Act, or six years from substantial completion of the project. An example will help to explain how this works. If the work was completed and a certificate of substantial completion is issued on June 1, 2000, the last day for starting a law suit against the architect or engineer would be May 31, 2006, even if the strata corporation did not discover the problem until June 1, 2008. If the Limitation Act provision applied, the strata corporation would have until May 31, 2014 to start an action.

The Court of Appeal has recently upheld this type of clause as valid and enforceable, and dismissed claims against architects brought by two BC school districts in connection with "leaky schools" cases. (see *Howe Sound School District # 48 v. Killick Metz Bowen Rose Architects and Planners Inc.*, 2008 BCCA 195)

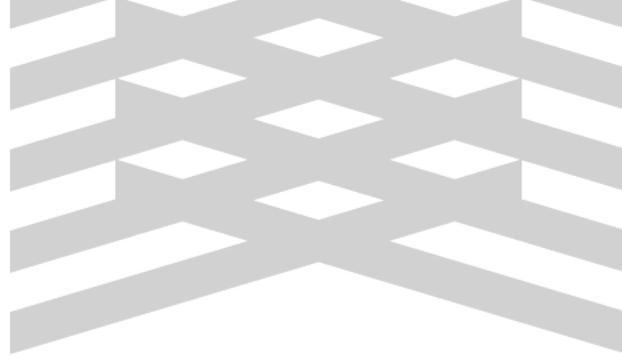
Architects and engineers also often include in their agreements a limit on the quantum, or amount, that you can collect if there is a claim. These usually take one of two forms; either they seek to limit damages to an amount related to their insurance limits, or they seek to limit damages to an amount related to the amount of fees paid for the work.

There may be a number of legal arguments that can still be made about whether such agreements should be enforceable or not. This article will not get into those arguments. The point I would like to make here is

how to avoid such clauses being used to prevent a strata corporation from recovering damages from a responsible party.

The first option, if you are entering into an agreement with a design profession now, is not to agree to those sorts of terms. "Standard" terms can be changed. This means the strata council members have to read the entire agreement, or hire a lawyer to help explain it, so you understand what clauses are there that seek to limit the strata corporation's rights in the case of a dispute. Then you have to try to negotiate different clauses, such as higher numbers for the damages limits, or change the contractual time limit for suing. The engineer or architect may want something in return for this increased risk. For example, where the liability limit is based on the amount of insurance available, it may be necessary to pay more for additional insurance to protect the strata corporation.

If it is too late to negotiate better terms in the agreement, because it was signed in the past, or if the registered professional refuses to agree to change the terms, the agreement should be reviewed carefully to see what limitation of liability clauses it contains. If there is a six years from substantial completion clause, then it would be prudent to note that date and assess, six to twelve months before that date, how the repairs are holding up. If there are problems, don't wait to deal with them, and if there are design issues, hire a lawyer and start the action within the contractual time period.



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page 2

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