Date: 20190110
Docket: CI 16-01-03594
(Winnipeg Centre)
Indexed as: City of Portage la Prairie et al. v. Tower Engineering Group Limited Partnership et al.
Cited as: 2019 MBQB 4

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

CITY OF PORTAGE LA PRAIRIE, RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE, and PORTAGE REGIONAL RECREATION AUTHORITY INC.,

applicants,

- and -

TOWER ENGINEERING GROUP LIMITED PARTNERSHIP, TOWER ENGINEERING GROUP INC., STUART OLSON CONSTRUCTION LTD., STANTEC ARCHITECTURE LTD., STANTEC CONSULTING LTD./STANTEC EXPERTS-CONSEILS LTEE, AMBASSADOR MECHANICAL CORP. and CRANE STEEL STRUCTURES LTD.,

respondents.

APPEARANCES:

Brian J. Meronek, Q.C. and Erin Lawlor-Forsyth
for the applicants

Timothy J. Fry
for the respondent, Tower Engineering Group Limited Partnership

Michael J. Weinstein
for the respondent, Stuart Olson Construction Ltd.

Karen Poetker
for the respondent, Stantec Consulting Ltd.

James Mercury
for the respondent, Ambassador Mechanical Corp.

Michael Finlayson
for the respondent, Crane Steel Structures Ltd.

Judgment delivered:
January 10, 2019

EDMOND J.

Introduction

[1] This is an application pursuant to s. 14(1) of ***The Limitation of Actions Act***, C.C.S.M. c. L150 (the "***Act***").

[2] The applicants, City of Portage la Prairie (the "City"), Rural Municipality of Portage la Prairie (the "RM") and Portage Regional Recreation Authority Inc. ("PRRA"), seek leave to issue a statement of claim against the respondents for alleged breach of contract and negligence respecting certain design and construction defects in the multi-purpose recreation facility constructed in Portage la Prairie, Manitoba in 2010. The recreation facility is comprised of two arenas, a community hall and other amenities ("Recreation Centre") and the Shindleman Aquatic Centre comprised of a pool, change areas and other amenities ("Aquatic Centre").

[3] The applicants entered into various contracts with the respondents for the design, project management, construction management and construction of the Recreation Centre and Aquatic Centre.

[4] The facilities have been plagued with deficiencies from the time of opening in 2010 up to the current time. Numerous steps have been taken by the applicants, some of the respondents and third parties to rectify the deficiencies.

[5] In July 2015, the applicants retained experienced construction litigation lawyers to provide advice and assistance to resolve the outstanding deficiencies. As a result of that advice, the applicants retained independent experts to conduct building

assessments of the condition of the Recreation Centre and the Aquatic Centre and the deficiencies.

[6] On September 1, 2016, the applicants filed an application seeking an order granting leave pursuant to s. 14(1) of the ***Act***, which the applicants allege is within 12 months after the applicants first became aware of all material facts of a decisive character as defined in the ***Act***.

[7] The respondents oppose the application on the following grounds:

a) The applicants knew, or ought to have known of the material facts necessary to commence an action against the respondents before the limitation period expired and the causes of action are now statute barred;

b) The application for leave to commence the action was not made within the required 12 months after the applicants first knew or ought to have known of all material facts of a decisive character; and

c) The alleged causes of action do not have a reasonable chance of success against one or more of the respondents.

[8] A draft statement of claim ("statement of claim") is attached as Exhibit "F" in the affidavit of David Sattler, sworn December 22, 2016.

Facts

[9] Extensive evidence has been filed in connection with this application including:

a) Affidavit of Wayne W. Tennesey, sworn November 23, 2016 (Document No. 3);

b) Affidavit of Patrick Gloux, sworn December 22, 2016 (Document No. 4);

c) Affidavit of David Sattler, sworn December 22, 2016 (Document No. 5);

d) Affidavit of Jack Abiusi, affirmed August 29, 2017 (Document No. 11);

e) Affidavit of David Sattler, sworn November 3, 2017 (Document No. 12);

f) Supplemental affidavit of David Sattler, sworn December 14, 2017 (Document No. 13);

g) Affidavit of Balwinder Singh, sworn December 18, 2017 (Document No. 14);

h) Affidavit of Laura Keller, affirmed February 28, 2018 (Document No. 17);

i) Motion Brief of Respondent (Document No. 18);

j) Motion Brief of Applicants (Document No. 19);

k) Cross-examination transcript of David Sattler, January 25 and 26, 2018 (Document No. 20);

l) Cross-examination transcript of Jack Abiusi, January 25, 2018 (Document No. 22);

m) Motion Brief of Ambassador Mechanical Corp. (Document No. 25);

n) Motion Brief of Stantec Architecture Ltd. (Document No. 26);

o) Motion Brief of Tower Engineering (Document No. 27);

p) Affidavit of Laura Keller, affirmed April 13, 2018-Vol. 1 (Document No. 29);

q) Affidavit of Laura Keller, affirmed April 13, 2018-Vol. 2 (Document No. 30);

r) Affidavit of David Sattler, sworn July 27, 2018 (Document No. 31);

s) Affidavit of Scott Neish, sworn August 24, 2018 (Document No. 32);

t) Reply Application Brief of Applicants (Document No. 33);

u) Supplemental Motion Brief of Ambassador Mechanical Corp. (Document No. 34);

v) Motion Brief of Crane Steel Structures Ltd. (Document No. 35);

w) Answers on Interrogatories (Document No. 36);

x) Answers on Interrogatories of respondent, Stantec (Document No. 37);

y) Questions on Interrogatories of applicants (Document No. 38);

z) Answers on Interrogatories of Ambassador Mechanical Corp. (Document No. 39);

aa) Supplementary Application Brief of Tower Engineering (Document No. 40);

bb) Affidavit of Laura Keller, affirmed September 28, 2018 (Document No. 41);

cc) Answers on Interrogatories of Stuart Olson Construction Ltd. (Document No. 42);

dd) Supplemental Motion Brief of Stantec Architecture Ltd. (Document No. 43);

ee) Affidavit of Debby Watkins, sworn October 3, 2018 (Document No. 44);

ff) Undertaking by David Sattler, Answers re: cross-examination (Document No. 49).

[10] The following is a summary of the facts that are relevant to the determination of the issues on this application.

[11] The evidence relied upon by the applicants in support of their application is substantially provided by Mr. David Sattler, the General Manager of what is commonly referred to as the Portage Credit Union Centre ("PCU Centre"), which includes the Recreation Centre and the Aquatic Centre. The PCU Centre is owned by the City and the RM and is operated by a non-profit corporation, PRRA. As General Manager of the PCU Centre, Mr. Sattler reports to the Board of Directors of the PRRA (the "Board").

[12] The City and the RM entered into contracts with the respondents respecting the design and construction of the PCU Centre. The agreements entered into with the respondents include:

a) A project Management Services Agreement entered into with Tower Engineering Group Limited Partnership ("Tower"), dated May 14, 2007;

b) Construction Management Contract entered into with Dominion Construction Company Inc. (now known as Stuart Olson Construction Ltd.) ("Stuart Olson"), dated October 31, 2007;

c) A Contract for Architectural Services entered into with Stantec Architecture Ltd., Stantec Consulting Ltd. ("Stantec"), dated July 19, 2007;

d) Agreement entered into with Ambassador Mechanical Ltd. ("Ambassador"), dated October 26, 2008, to furnish all materials and perform all work required in relation to the installation of the mechanical

systems for the recreation facility, including the aquatic facility, as provided in the Contract Documents ("Mechanical Contract");

e) Agreement entered into with Crane Steel Structures Ltd. ("Crane") for the design, supply and erection of three Behlen Flex-System Buildings, dated October 8, 2008 ("Buildings Contract").

[13] On or about February 27, 2010, construction of the Recreation Centre housing the two arenas was completed. The Aquatic Centre was completed and commissioned in or about August 2010.

[14] Since 2010, the applicants experienced problems with the heating loop system installed as part of the mechanical systems pursuant to the Mechanical Contract. The heating loop system was not operating efficiently and effectively and caused the boilers to run non-stop.

[15] Numerous deficiencies were identified upon completion of the Recreation Centre and the Aquatic Centre. For example, in January 2011, the bottom of the pool in the Aquatic Centre collapsed and caused damage.

[16] Since August 2010, the evidence establishes that the applicants have had ongoing issues with the Dectron units in the pool area. The Dectron units are part of the mechanical systems installed by Ambassador pursuant to the Mechanical Contract and are used to heat, ventilate, air condition and de-humidify the Aquatic Centre. There is a significant amount of evidence concerning problems with the Dectron units, which are detailed in the affidavits and cross-examinations and summarized in the brief of Ambassador at paragraph 13. The facts relied upon by the respondents are disputed

by the applicants and it is not necessary to review the details of the problems for the purpose of this application.

[17] Mr. Sattler acknowledged during cross-examination that the Dectron units were nothing but problems since 2010 and the applicants had spent over $30,000 on maintenance to attempt to resolve the problems as of March 25, 2015. The applicants were planning to spend an additional $6,000 to $7,000 on the Dectron units. During cross-examination, Mr. Sattler described the Dectron units as "lemons".

[18] In or about May 2014, sprinkler heads in the Recreation Centre began to leak causing damage.

[19] As at February 2015, there were still items on the original deficiency list that were outstanding. The applicants attempted to resolve many of the issues, paid for the cost of repairs and determined at that point that it was less expensive to effect repairs than to commence legal proceedings to pursue any claim against the respondents or third parties. The applicants allege that none of the items on the deficiency list outstanding in February 2015 have been pursued or are included in the statement of claim except a claim related to the Dectron units.

[20] In or about February 2015, Mr. Sattler approached a representative from Stantec to seek advice on the heating loop issue in the Recreation Centre arenas. Mr. Penner of Stantec advised that Tower had designed the heating system and that Mr. Sattler should approach Tower and that a representative of Tower, Stantec and Mr. Sattler would meet to discuss potential solutions.

[21] Notwithstanding that discussion, a meeting between Mr. Sattler and representatives of Stantec and Tower did not take place.

[22] Between March 25, 2015 and June 23, 2015, Mr. Sattler attempted to have Tower act on numerous issues of concern on the deficiency list including the heating loop issues in the Recreation Centre and the de-humidification problem in the Aquatic Centre.

[23] Mr. Jack Abiusi of Tower took certain steps and provided advice regarding improvements of the heating loop system. According to Mr. Sattler, Mr. Abiusi led the applicants to believe that the issues could be fixed and that Tower had contractors that were going to attend to the repairs.

[24] A site meeting was convened on June 23, 2015 and representatives of the applicants, Mr. Abiusi and other parties were present to discuss the following issues:

a) Heating loop in the arenas;

b) Dectron units;

c) Lighting system;

d) Pool system;

e) Sprinklers;

f) Eavestroughing;

g) Pool change room ceilings; and

h) Sound systems.

[25] The evidence establishes that Tower agreed that the complaints of the applicants were legitimate and that steps would be taken to get the problems resolved. At the meeting on June 23, 2015, Tower stated and/or undertook the following:

a) Mr. Dean Archibald would be the main Tower contact, to look into issues and come up with a solution.

b) Pool issues should be under warranty.

c) Tower would review the construction contracts to complete a list of items under warranty.

d) The list would include deficiencies for which Stuart Olson would be liable.

e) Tower would attend a Board meeting on July 27, 2015 to provide further information for moving forward.

f) It was likely the applicants would need to involve legal counsel to send letters to the contractors and possibly file a legal action.

g) Tower would "quarterterback" the solutions to the various issues and ensure the applicants would get what they paid for.

h) The applicants would not be charged for Tower's background work and due diligence over the next months and throughout the process.

i) Tower would visit the facilities over the next month to take a closer look at the concerns.

j) Tower requested that the applicants do no move forward with any unnecessary repairs until Tower has had a chance to present the Board with an option to move forward.

[26] On or about July 21, 2015, Mr. Sattler completed an updated list of deficiencies and provided it to Tower. The applicants maintain that the only item on the updated list of deficiencies included in the statement of claim relate to the Dectron units.

[27] A meeting was scheduled between representatives of Tower and the Board. At the request of Mr. Abiusi, the meeting did not proceed. Mr. Abiusi recommended that the applicants retain a lawyer and write letters to the contractors to get their attention and cooperation to assist in resolving the deficiencies.

[28] On or about July 28, 2015, the applicants contacted a construction litigation lawyer, Mr. Jonathan Woolley of Thompson Dorfman Sweatman LLP ("TDS"). Mr. Woolley requested and received from the applicants the names of potential parties if litigation were to proceed so that TDS could conduct conflict checks.

[29] On August 5, 2015, Mr. Abiusi met with the Board and made a presentation regarding the various problems being encountered, including the Dectron units, the building envelope of the pool system and engaging a third party expert to determine the cause and whether the building envelope issues were design or installation problems. Tower offered to provide an assessment report to the applicants and to provide services at cost. Tower advised that the process would take a couple of months of work and that Tower intended to be accountable for its work.

[30] By August 7, 2015, the applicants received advice and were aware the applicable limitation period for breach of contract was six years.

[31] Based on the advice received from TDS, the applicants on or about August 10, 2015, decided to retain independent expert consultants to review the buildings and

provide an assessment. Quotes were received from expert consultants including KGS Group Consulting Engineers ("KGS") and others. On August 19, 2015, KGS toured the facilities in preparation of a fee proposal.

[32] In or about August 2015, Mr. Sattler advised Mr. Abiusi that Tower would not be engaged as an expert consultant and on the advice of legal counsel, they proposed to engage an independent expert to conduct a general building condition assessment of the PCU Centre.

[33] On September 3, 2015, a representative of Enersol from Montreal, the supplier of the Dectron units, visited the Aquatic Centre and conducted an inspection. The representative of Enersol pointed out to representatives of the applicants that the ductwork had been installed incorrectly. This is the first time this fact had been identified by anyone.

[34] On September 10, 2015, the applicants received a copy of the owner's manual for the Dectron units from Enersol.

[35] On or about September 28, 2015, Mr. Sattler prepared a report and presented to the Board regarding the Dectron units and the quotes for a building condition assessment. The report recommended that the Board proceed to retain KGS to conduct a building condition assessment.

[36] Following that meeting, steps were taken to retain KGS and in January 2016, KGS submitted a quote to complete an assessment of the de-humidification system and building envelope serving for the Aquatic Centre. On January 20, 2016, KGS and the

applicants entered into a contract respecting the independent review of the de-humidification system and the building envelope of the Aquatic Centre.

[37] KGS conducted a visual site investigation of the Aquatic Centre on February 29, 2016. As a result of the investigation, KGS recommended that a further expert specialist be engaged to investigate and test the steel roof purlins given the rusting that was observed.

[38] The applicants retained Testlabs International Ltd. ("Testlabs") to conduct a metallurgical/corrosion engineering inspection of the Type 304 steel roof purlins of the interior roof of the Aquatic Centre.

[39] Preliminary reports were received by the applicants from KGS in April 2016 and from Testlabs May 25, 2016.

[40] KGS's preliminary report, including findings and recommendations are set out in detail in the affidavit of Patrick Gloux, sworn December 22, 2016. The report deals with building envelope systems, structural systems and mechanical systems in the Aquatic Centre. The KGS report identified concerns and recommended that further investigation be undertaken.

[41] The Testlabs draft report concluded that the Type 304 stainless steel roof purlins showed stress corrosion cracking which is causing severe deterioration. A further detailed onsite inspection was recommended.

[42] Final reports were issued by Testlabs on October 26, 2016 and by KGS on November 29, 2016.

[43] Numerous recommendations were made by KGS regarding the building envelope systems, structural systems and mechanical systems. As well, Testlabs summarized its conclusions at page 16 of 74 of the October 26, 2016 report as follows:

> In summary, stress corrosion cracking has initiated at many location [sic] in the purlins where cold work, either by bending or punching, had been imparted into the Type 304 stainless Steel. The structural designers and the persons supplying the Type 304 Stainless Steel Purlins should have been aware of the severe corrosive environment existing at the ceiling height in indoor swimming pools. There was a significant body of corrosion engineering/structural engineering knowledge in existence outlining the hazard of using Type 304 stainless steel for structural components in the ceiling space of indoor swimming pools for the approximate 18 years prior to the construction date of the Shindleman Aquatic Centre, Portage La Prairie, Manitoba in 2009.
>
> In conclusion, the presence of literally "thousands" of stress corrosion cracks, located at many locations in the purlins, which will be continually growing in size with continued service, would make the Type 304 stainless steel purlins unsafe for continued service.

[44] After receiving the expert reports, the applicants decided to engage KGS to do a building assessment respecting the Recreation Centre.

[45] In or about September 2016, KGS submitted a draft report to the applicants outlining numerous findings regarding the mechanical systems and a number of boiler plant issues in the Recreation Centre.

[46] On December 14, 2016, KGS submitted a final report confirming certain findings. As a result of the expert reports, the applicants engaged KGS to remove and replace the Aquatic Centre's roof. As part of the work completed by KGS, another expert was retained, Canadian Quality Inspections Ltd. ("CQI") to determine certain issues relating to the coating application used on the stainless steel components.

[47] In or about February 2017, CQI submitted a report dated February 28, 2017 and on or about July 27, 2017, a further report was obtained from Axis Inspection Group

Ltd. ("Axis") to assess the adequacy of the coating systems installed on the structural steel components in the Aquatic Centre, which in addition to the purlins had shown spotting. CQI identified deficiencies and stated the quality control and quality assurance completed for the project was minimal and appeared "to be in non-conformance with the project specifications reviewed."

[48] Axis determined that the coating application measured was less than the material specifications or too thin. Axis expressed the opinion that areas of insufficient thickness of coating application show corrosion, as those areas cannot protect the base metal in a chloride-rich environment present in the Aquatic Centre.

[49] The within application was filed on September 1, 2016.

The Law

[50] The issues to be determined in this application have been considered in numerous other authorities in this court and the Manitoba Court of Appeal. (See ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.); ***Weselak v. Beausejour District Hospital No. 29*** (1987), 34 D.L.R. (4th) 478, 49 Man.R. (2d) 86 (Man. C.A.); ***Brandon University v. M.C.M. Architects Inc.*** (1995) 100 Man.R. (2d) 56, 19 C.L.R. (2d) 83 (Man. C.A.); ***Johnson v. Johnson***, 2001 MBCA 203, 163 Man.R. (2d) 46; ***Chan v. Chan***, 2001 MBCA 191, [2001] M.J. No. 508; ***Swan River Valley Hospital District No. 1 v. MMP Architects***, 2002 MBCA 99, 166 Man.R. (2d) 129; ***Driedger v. Peters***, 2004 MBQB 58, 183 Man.R. (2d) 69; ***Winnipeg Condominium Corp. No. 30 v. Conserver Group Inc.***, 2008 MBCA 20, 228 Man.R. (2d) 30; ***Penner v. Martens***, 2008 MBCA 35, 228 Man.R. (2d) 42; ***Andison v. Katz***,

2012 MBCA 107, 288 Man.R. (2d) 53; ***McIntyre v. Frohlich***, 2013 MBCA 20, 288 Man.R. (2d) 291; ***Sochasky v. Winnipeg (City)***, 2013 MBQB 204, 296 Man.R. (2d) 143; ***Morry v. Janzen*** (8 December 2014), Winnipeg, CI 10-01-67479 (Man. Q.B.), affirmed ***Morry v. Janzen***, 2015 MBCA 86, [2015] M.J. No. 236; ***Cahill v. Pasieczka***, 2014 MBQB 217, 311 Man.R. (2d) 138 (QL); ***Winnipeg (City) v. AECOM Canada Ltd.***, 2015 MBQB 188, 322 Man.R. (2d) 214; ***Guertin v. Hanuschak Consultants Inc.***, 2016 MBQB 144, [2016] M.J. No. 220, affirmed ***Guertin v. Hanuschak Consultants Inc.***, 2017 MBCA 68, [2017] M.J. No. 195 (QL); ***Wolinsky v. Assiniboine Credit Union***, [2016] M.J. No. 29, 263 Man.R. (2d) 312; ***Fawley et al. v. Mosleneko***, 2017 MBCA 47, 413 D.L.R. (4th) 36 (QL); ***Embil v. S. Maric Construction Ltd.***, 2017 MBQB 155, [2017] M.J. No. 255; ***Benson v. Manitoba (Workers Compensation Board)***, 2013 MBQB 129, 293 ManR. (2d) 42 (QL); and ***Olford v. Springwood Homes Inc.***, 2018 MBQB 78, [2018] M.J. No. 138)

[51] The applicable law and relevant statutory provisions were summarized in my decision of ***Cahill*** as follows at paras. 24-27:

> **24** Applications seeking leave to extend the time to commence an action are very common and have been the subject of numerous decisions of this court and the Court of Appeal. Part II creates a comprehensive statutory discoverability regime in Manitoba to deal with possible injustices that may arise when a limitation period expires prior to discovery of material facts of a decisive character required to commence a claim. See ***Rarie v. Maxwell*** (1998), 131 Man. R. (2d) 184 (C.A.).
>
> **25** Such applications are governed by the following relevant provisions:
>
> **Extension of time in certain cases**
>
> **14(1)** Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between

(a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and

(b) the date on which the application was made to the court for leave.

Evidence required on application

15(2) Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

Definitions

20(1) In this Part

"**appropriate advice**" in relation to any fact or circumstance means the advice of competent persons qualified, in their respective spheres, to advise on the professional or technical aspects of that fact or that circumstance, as the case may be;

"**court**" in relation to an action, means the court in which the action has been or is intended to be brought.

Reference to material facts

20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:

(a) The fact that injuries or damages resulted from an act or omission.

(b) The nature or extent of any injuries or damages resulting from an act or omission.

(c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.

(d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.

(e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

Nature of material facts

20(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have

a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

Where facts deemed to be outside knowledge
20(4) Subject to subsection (5), for the purposes of this Part, a fact shall, at any time, be taken not to have been known by a person, actually or constructively if

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of ascertaining the fact; and

(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of obtaining appropriate advice with respect to the circumstances.

26 The onus is on the applicants to file sufficient evidence to support the application. The decision to extend the time is discretionary in the sense that section 14(1) provides that the court "may grant leave" to the applicant to bring an action. The primary question or issue argued in this case is the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based.

27 The requirements on an application for leave were summarized by this court in ***Sochasky v. Winnipeg (City)***, 2013 MBQB 204, [2013] M.J. No. 291 (QL), as follows:

> [22] Taken together, these sections provide that in order to be successful on an application for leave under sections 14(1) and 15(2) of ***The Limitation of Actions Act***, the moving party must:
>
> (a) prove by evidence that he or she has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success;
>
> (b) prove, at the very least, that he or she first learned of a fact material to his or her cause of action within the 12 months next before the application was filed;
>
> (c) establish that the fact, first learned within that period, is "material" within the sense defined in section 20(2); it must be of "a decisive character" as that phrase is defined in section 20(3);
>
> (d) establish that the fact must not be one which the applicant ought to have known about earlier.
> See ***Einarsson et al. v. Adi's Video Shop et al.*** (1992), 76 Man. R. (2d) 218 at paras. 10-13 (C.A.).

[52] Since the decision in ***Cahill***, the Manitoba Court of Appeal considered the application of the relevant provisions of the ***Act*** in ***Morry***, ***Guertin*** and ***Fawley***, and regarding the first part of the test, the court stated in ***Fawley*** as follows at paras. 21-24:

> **21** The first part of the test is a statutory discoverability rule. The judge considers the evidence adduced by the applicant, in light of the legal principles set out in sections 14(1) and 20 of the *LAA*, and decides whether the applicant knew, or ought to have known, all material facts of a decisive character upon which the action is based not more than 12 months before the date on which the application was filed. Twaddle JA summarized the applicant's onus this way in *Einarsson et al v Adi's Video Shop et al* (1992), 76 ManR (2d) 218 (CA) (at para 13):
>
> > Thus, an applicant must prove, at the very least, that he first learned of a fact material to his cause of action within the twelve months next before the application was filed. The fact, first learned within that period, must be "material" within the sense defined in s. 20(2); it must be of "a decisive character" as that phrase is defined in s. 20(3); and it must not be one which the applicant ought to have known about earlier.
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> See also *Manitoba Hydro Electric v Inglis (John) Co et al* (1999), 142 ManR (2d) 1 at para 25 (CA).
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> **22** The statutory discoverability rule has both a subjective and an objective component. The applicant must demonstrate both that she was unaware of the decisive material facts earlier than 12 months before the application was filed and that, in the circumstances, her lack of awareness was objectively reasonable (see *Johnson* at para 31). Awareness of having a possible cause of action is not to be confused with a party having a complete understanding of the particulars of the cause of action; whether it would, as opposed to could, succeed; or the amount of damages likely (see *Rebizant v Greenwood et al* (1998), 127 ManR (2d) 35 at para 71 (QB); *Johnson* at para 15; *Budd v Cardoso* (1996), 113 ManR (2d) 101 at paras 29-31 (CA); *Munroe v Holder*, 2002 MBCA 39 at paras 32-33; *Swan River Valley Hospital District No 1 v MMP Architects*, 2002 MBCA 99 at paras 20-31; *Lacroix (Guardian of) v Dominique*, 2001 MBCA 122 at para 14; and *Winnipeg Condominium Corp No 30 v The Conserver Group Inc et al*, 2008 MBCA 20 at paras 18-22).
>
> **23** The *LAA* recognizes that the nature of the given material facts in a particular case may require a party to seek appropriate advice from a third party as to whether the facts are of a decisive character, for purposes of advancing a claim, before filing his or her application for relief from the limitation period. Hamilton JA explained the relevant principles in the following way in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at paras 57-58):

> Sections 20(3) and (4) of the *Act* impose an "objective/subjective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience. This assessment contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts.
>
> Advice can be legal, medical or other expert advice. Depending on the factual circumstances, the date of receipt of an expert report has been found to constitute the date that a plaintiff knew of all the material facts of a decisive character. See, for example, *Winnipeg Condominium Corp. No. 30 v. Conserver Group Inc. et al.*, 2008 MBCA 20, 228 Man.R. (2d) 30, in which M.A. Monnin J.A. wrote (at para. 22):
>
> > I do not, by any stretch, wish to state that in every case the requirements of s. 14(1) of the **Act** require that a putative plaintiff obtain expert evidence to buttress its position, but in this case it was necessary to satisfy the "decisive character" requirement of the **Act**.
>
> **24** Assuming there is no issue that the applicant did not actually know all of the material facts of a decisive character earlier than 12 months before the application is filed, the discoverability determination the judge is tasked to make under the *LAA* is as follows: on what date, given the nature and character of the facts and the proposed cause of action, would it have been evident to a reasonable person, standing in the shoes of the applicant, that she could have a cause of action with a reasonable prospect of success? If there has been consequential delay because of the seeking of third-party advice, the appropriateness of that delay will turn on whether or not the material facts are of such a nature that they put the applicant "on notice" of the potential cause of action before seeking the third-party advice (see *Penner* at para 18; *Morry et al v Janzen et al*, 2015 MBCA 86 at paras 7-8, 13-14).

[53] The Manitoba Court of Appeal has dealt with the evidence required on an application pursuant to s. 14(1) and the correct interpretation of s. 15(2) of the ***Act***. The various tests applied in the cases were reviewed by the court in ***Laing v. Sekundiak***, 2015 MBCA 72, 319 Man.R. (2d) 268 (QL), at para. 66 as follows:

> **66** In my view, these different articulations of the test created under s. 15(2) really say the same thing. Therefore, to be successful, an applicant seeking leave must adduce sufficient evidence to establish a *prima facie* case and that means demonstrating a case that has a reasonable chance of success. This is the test that was upheld by Chartier J.A. (as he then was), writing for the court in *Timmerman v. Selkirk and District Planning Area Board et al.*, 2008 MBCA 52, 228 Man.R. (2d) 77. See also *Benson v. Workers' Compensation Board (Man.) et al.*, 2014 MBCA 19, 303 Man.R. (2d) 186, which also referred to "reasonable chance of success" (at para. 4).

Issues, Positions of the Parties and Analysis

[54] This application involves a determination of the following issues:

(1) Have the applicants established that they have a cause of action with a reasonable chance of success against each of the respondents?

(2) When did the limitation period(s) applicable to the applicants' claims expire?

(3) When did the applicants first know, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action against each respondent is based?

(4) If the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action against the respondents is based before the limitation period expired, does s. 14(1) of the ***Act*** still apply and permit the application for an extension to be brought within one year of when the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character?

Issue No. 1: Have the applicants established that they have a cause of action with a reasonable chance of success against each of the respondents?

[55] Only the respondent Crane advanced the position that the evidence failed to establish that the proposed action against Crane had a reasonable chance of success.

Crane submits that the Building Contract required them to supply and completely erect three Behlen Flex-System Buildings as per the Crane Steel design proposal. Crane submits that discussions between Crane and Stuart Olson led to the material for the roof purlins to be changed to Type 304 stainless steel. Further, Crane submits that there is no credible evidence before the court that Crane knew or ought to have known that Type 304 stainless steel purlins were unsuitable for use as roof purlins and accordingly the claim against Crane has no reasonable chance of success.

[56] Contrary to the submission of Crane, the evidence of the applicants including the opinion expressed by Testlabs, if accepted at trial, meets the low threshold required of establishing that the applicants' claim against Crane has a reasonable chance of success. It is also important to recognize that the application must be considered on the basis of the evidence adduced by or on behalf of the claimant and pursuant to s. 15(2) of the ***Act***, the test is applied "in the absence of any evidence to the contrary." In its brief, Crane has relied on evidence to the contrary.

[57] On the basis of the admissible evidence filed, including the expert reports relied upon by the applicants as well as a review of the alleged particulars or breaches of contract and/or particulars of negligence set forth in the statement of claim, I am satisfied that the applicants have met the test of establishing that a cause of action grounded in negligence and/or breach of contract against the respondents has a reasonable chance of success.

Issue No. 2: When did the limitation period(s) applicable to the applicants' claims expire?

[58] The applicants and the respondents do not agree on the dates the limitation periods expired regarding the cause of actions alleged by the applicants in the statement of claim. Determining this issue is particularly important in this case because the respondents submit that the applicants knew or ought to have known that they had a cause of action based on breach of contract and/or negligence before the applicable limitation periods expired. Thus, the applicants ought to have commenced proceedings before the limitation periods expired and this application was unnecessary or was simply filed too late and without exercising reasonable diligence.

[59] Section 2(1)(i) of the ***Act*** specifies that an action for breach of contract must be brought within six years of the cause of action arising. Section 2(1)(f) of the ***Act*** specifies that an action for trespass or injury to real property must be brought within six years of the cause of action arising. A cause of action alleging a breach of contract arises from the date of the breach, regardless of when the damage results.

[60] The proposed action in negligence or tort is based on allegations of negligent performance of design and construction services. The alleged causes of action arise in tort when the loss, or risk of loss, first occurs. A review of the relevant authorities establishes that the loss occurs when the plaintiff relies on a negligent service that exposes the plaintiff to damage or requires a repair. (See ***Burke v. Heaton***, 2003 MBCA 104, 177 Man. R. (2d) 213; ***Sentinel Self-Storage Corp. v. Dyregrov***, 2003 MBCA 136, 180 Man. R. (2d) 85; ***Riddell v. Meyers Norris Penny & Co.***, 2004 MBQB 131, 186 Man. R. (2d) 132)

[61] Applying these principles to the present case, the various causes of action arose at different times. As pointed out in ***Central Trust Co.***, applicable limitation periods in contract and negligence can commence and run concurrently.

[62] Generally speaking, limitation periods for breach of contract in construction litigation begin to run when the defective design or construction services are performed and completed. The cause of action in negligence arises when the damage occurs. In this case, some of the respondents submitted that the court should find that the applicable limitation period runs from the date the entire project was completed and commissioned. While that interpretation may simplify matters, in my view, that is not the correct interpretation of the limitation provisions of the ***Act*** and determining the limitation period applicable to the facts of this case is not that simple.

[63] It depends on the date when the alleged breach or alleged defective design and/or defective construction services occurred. The cause of action alleging design errors commences when the specific design work is completed and used in the construction of the Recreation Centre and Aquatic Centre. That is not only when the breach occurs, but also when the risk of loss occurs due to an error in the design.

[64] As regards alleged errors or omissions in construction work or services and installation of materials, the cause of action in contract arises when the work that is alleged to be deficient is completed. In tort or negligence, the cause of action arises when the damage or risk of loss relating to the alleged breach occurs which, in most cases, is at the same time. To determine the applicable limitation periods, it is necessary therefore to examine each alleged cause of action relating to the alleged

deficiency. I propose to deal with the claims advanced in the statement of claim separately.

Aquatic Centre Building Envelope

[65] The evidence establishes that the building envelope of the Aquatic Centre was completed on or about November 25, 2009. I agree with the applicants' submission that the limitation periods for breach of contract and negligence began to run at approximately that time and therefore expired on or about November 25, 2015.

Aquatic Centre De-humidification (Mechanical) System

[66] The evidence establishes that the design drawings for the mechanical systems for the Aquatic Centre were approved by Stantec on October 31, 2008, sealed by Tower on November 3, 2008 and made available to contractors on November 13, 2008. It would appear that the design for the de-humidification (mechanical) system was completed by no later than November 3, 2008. Therefore, the limitation periods for breach of contract and negligence relating to the design began to run on or about that date and expired on or about November 3, 2014.

[67] The evidence establishes that the completion of the installation of the mechanical systems for the Aquatic Centre occurred by September 17, 2009. The evidence also establishes that the de-humidification and mechanical systems were deficient from almost day one and therefore the limitation periods for breach of contract and negligence related to the construction services expired on or about September 17, 2015.

Aquatic Centre Roof Purlins

[68] A review of the revisions to the specified purlins to replace the light gauge epoxy painted G-90 purlins to stainless steel purlins occurred between January 5, 2009 and February 5, 2009. The limitation period for the alleged designs errors therefore expired on or before February 5, 2015.

[69] The evidence establishes that the roof purlins were installed on or before May 4, 2009. The limitation period respecting the installation of the roof purlins therefore expired on or before May 4, 2015.

Aquatic Centre structural steel coating

[70] On or about October 31, 2008, Stantec issued specifications for the structural steel coating. The alleged deficient design work was completed at that time and the applicable limitation periods expired by October 31, 2014.

[71] The installation of the structural steel coating occurred between November 25, 2009 and January 31, 2010. The applicable limitation periods therefore would have expired on or before January 31, 2016.

Arena Mechanical (heating loop) System

[72] The mechanical system design drawings for the arenas was sealed by Tower on November 3, 2008. The design was completed by that time and the limitation therefore expired on or about November 3, 2014.

[73] The installation of the mechanical heating loop system in the Recreation Centre arenas was completed prior to the date that the arenas were completed and open to the public, which occurred on February 27, 2010. The commissioning and testing

occurred in January and February 2010 respecting the two arenas. For the purposes for the present analysis, it is probable that the limitation expired relating to alleged construction deficiencies on or before February 8, 2016.

[74] I disagree with the submission made by one or more of the respondents that because the Recreation Centre was completed in February 2010, and the Aquatic Centre was completed in August 2010, that the limitation periods of six years expired in February 2016 and August 2016 respectively. The causes of action for alleged breach of contract/negligence must be examined as above in order to apply the applicable facts to the governing limitation periods in the ***Act***. Construction projects naturally have many applicable contracts and different services provided by a number of parties. The applicable limitation periods are different depending upon the cause of action advanced and when the work and services were performed or materials were supplied and installed by the various parties. While I agree that applying one limitation period in construction actions makes practical sense, doing so is not the law in Manitoba and the correct application of the relevant provisions of the ***Act***.

Issue No. 3: When did the applicants first know, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action against each respondent is based?

[75] The respondents rely upon numerous authorities of this court and the court of appeal including; ***Swan River Valley Hospital District No. 1***, ***Andison***, ***Driedger***, ***Guertin*** and ***Morry***, and submit that the applicants were aware of the material facts of a decisive character before the expiry of the applicable limitation periods and did not commence an action within the six-year timeframe.

[76] Alternatively, if the applicable limitation periods expired, the respondents submit the applicants failed to commence the application within the 12-month timeframe required pursuant to s. 14(1) of the ***Act***. The respondents also submit that the applicants did not take diligent steps to pursue the various claims and that they ought to have known the material facts necessary to ground a claim with a reasonable prospect of succeeding prior to September 1, 2015. (See ***Andison***, ***Driedger***, and ***Swan River Valley Hospital District No. 1***)

[77] The applicants submit that the material facts of a decisive character were not known until after experts were retained and the alleged design and construction deficiencies were identified. The applicants differentiate between the list of deficiencies that was prepared and reviewed by Tower and the cause of action set forth in the statement of claim. The applicants acknowledge that they are not advancing a claim for deficiencies that they knew or ought to have known existed prior to September 1, 2015.

[78] Prior to September 1, 2015, the applicants knew or ought to have known that they had serious problems and deficiencies relating to:

a) The heating loop mechanical system in the Recreation Centre arenas;

b) The Dectron units and humidity problems in the Aquatic Centre;

c) Lighting system;

d) Pool system (leaks, lane lines, skimmers, lights);

e) Shower system;

f) Ice melting pit ("poor design", "missing exchanger");

g) Ice plant design and wiring;

h) Sprinkler systems;

i) Eavestroughing;

j) Hot tub tiles;

k) Dressing Room 10, "foul smell";

l) Aquatic Centre change room ceilings; and

m) Sound systems.

[79] As at June 23, 2015, Tower undertook to assist with the solutions to the various issues. Mr. Abiusi, the representative of Tower, recommended that the applicants retain a lawyer to assist in writing letters to the contractors who were responsible for the ongoing deficiencies.

[80] On or about July 28, 2015, the applicants took the necessary steps to retain legal counsel and seek advice on the manner to proceed. In my view, the steps taken by the applicants were reasonable in the circumstances. The advice they received was that an independent building condition assessment should be conducted to determine the cause of the problems, identify solutions to rectify the ongoing deficiencies and problems and determine who was at fault. While it is arguable that they may have been able to seek legal advice earlier and commence the process of securing expert reports before the limitation periods expired, I am satisfied that the applicants did not know the extent of the problems and took numerous reasonable steps to try to resolve the ongoing problems without incurring the cost of commencing legal proceedings in part because they took reasonable steps to have the respondents respond and resolve the problems.

[81] On my review of the evidence, the applicants provided a reasonable explanation as to why they did not commence an action earlier or within the limitation period applicable to each alleged deficiency.

[82] While it is fair to say that the applicants knew the Recreation Centre and Aquatic Centre had ongoing problems, the question that must be determined is when the applicants knew or ought to have known of the material facts of a decisive character grounding a claim with a reasonable prospect of success against the respondents. Put another way, the court must assess the evidence and determine when, given the nature and character of the facts and the proposed cause of action, it would have been evident to a reasonable person, standing in the shoes of the applicants, that they could have a cause of action with a reasonable prospect of success.

[83] The onus is on the applicants to establish that the materials facts were outside their knowledge and applying the provisions of the ***Act*** the test is partly subjective and partly objective. The meaning of material fact was dealt with in ***Johnson***, and bears repeating:

> [14] Section 20 fleshes out the important terms found in s. 14(1). The term "material fact" is explained in s. 20(2). Section 20(3) sets out what are to be considered material facts of a decisive nature. They are facts which an applicant, given her personal circumstances, and having made reasonable consultations with others, would have recognized as grounding a claim with a reasonable prospect of success. Section 20(4) places a positive obligation upon an applicant to demonstrate that she took all reasonable steps under the circumstances, including the taking of appropriate advice, to ascertain the facts necessary to ground the cause of action.
>
> [15] A review of the Manitoba case law reveals a paucity of jurisprudence on the standard to be applied to an applicant pursuant to ss. 14 and 20 of the ***Act***. However, in ***John Doe v. Griggs et al.*** (2000), 144 Man. R. (2d) 249; 2000 MBQB 16 (Q.B.), Wright, J., had the following to say in imposing a fairly rigorous standard on the applicant (at para. 31):

> "I have said the key issue on this application is whether the applicant has met the requirements of s. 14(1) in the context of the definition sections applicable in the ***Act***. That issue can be narrowed to whether the applicant has shown that from the date he first knew, or ought to have known, to the required statutory extent, there could be a connection or link between his emotional or other problems and the alleged sexual assault, no more than 12 months elapsed until he brought his application for leave. It should be noted that the extent of the applicant's knowledge is only that he knew or ought to have known there could be a link between the assault and his problems sufficient to establish a cause of action. It is not required that he have knowledge sufficient to establish that there actually is such a link. This is a fine distinction, but it is important. It is a distinction which tends to favour the position of the respondents and which I have in mind in deciding the issue under s. 14(1)." [Emphasis in original.]

See also ***Weselak v. Beausejour District Hospital No. 29*** (1987), 49 Man. R. (2d) 86 (C.A.), at para. 7.

[84] The respondents submit that the deficiencies in the Recreation Centre and Aquatic Centre were patently obvious from 2010 and onward. The respondents submit that the applicants failed to meet the test for leave primarily because the applicants learned of material facts of a decisive character long before the 12 months preceding September 1, 2016. Further, the respondents submit that the applicants ought to have known about these material facts earlier.

[85] In response, the applicants submit that they took reasonable steps to identify the problems and then engaged independent experts to identify the problems and recommend solutions. In essence, the applicants say that the expert opinions were required in order to determine the material facts of a decisive character which would support a cause of action with a reasonable prospect of success. They rely on numerous authorities in which the court accepted that expert opinion evidence was required. (See ***Brandon University***, ***Loboz v. Klassen Concrete Inc.***, 2002 MBQB

62, [2002] M.J. No. 71 (QL); ***Loeppky v. Wolanco Construction Ltd.***, 2004 MBQB 158, 186 Man.R. (2d) 139; ***Winnipeg Condominium Corp. No. 30***, ***Olford*** and ***Cahill***)

[86] These cases do not stand for the general proposition that an expert report is required in order to establish material facts of a decisive character required to commence an action. Expert reports are one way in which to establish material facts of a decisive character. As pointed out in the authorities, each case must be examined on its facts to determine whether the onus has been met by the applicants.

[87] Applying the principles established in the various authorities to the facts of this case, in my view, requires an examination of each of the potential causes of action to determine when the applicants knew or ought to have known of the material facts of a decisive character relating to each claim. As was undertaken with the limitation periods assessment above, the analysis must be undertaken regarding each of the proposed claims.

Aquatic Centre Building Envelope

[88] The evidence filed establishes that the applicants knew they had condensation and humidification problems in the Aquatic Centre since 2010. What they did not know was what caused the excessive humidity and condensation. In my view, the applicants did not know the material facts of a decisive character to ground a claim against one or more of the respondents that had a reasonable chance of success until they received the KGS preliminary report on April 22, 2016 at the earliest or until they received the

KGS final report in September 2016 or with some deficiencies until reconstruction work was undertaken on or about July 17, 2017.

[89] The KGS preliminary report identified problems and indicated that the excessive condensation and corrosion on the building envelope component should be eliminated. It recommended further investigation including destructive investigation to determine whether insufficient insulation or workmanship issues were the cause. KGS also recommended that the walls and roof be analyzed to determine whether the amount of insulation in the walls is sufficient for the pool environment.

[90] The evidence filed by the applicants establishes that certain deficiencies were not determined until reconstruction work was performed on July 17, 2017. At that time, the applicants discovered a missing wall in the ceiling space above the office in the Aquatic Centre and missing insulation in the steel rod decking and structural steel columns.

[91] The limitation periods respecting the design and construction of the building envelope were as noted above and expired before the material facts of a decisive character were known or ought to have been known by the applicants, which occurred after receiving the KGS reports or during the course of reconstruction.

Aquatic Centre De-humidification (Mechanical System)

[92] The evidence establishes that the Dectron units were installed in the Aquatic Centre to heat, air condition and control airflow and humidity. There is extensive evidence that the Dectron units broke down or malfunctioned and had to be repaired or certain components replaced. Ambassador was engaged on a number of occasions to

complete repairs or replacements to ensure that the units operated. Prior to September 1, 2015, the applicants hired another contractor with experience working on Dectron units. The applicants also hired Royal Mechanical, the Manitoba repair company for the Dectron units. A representative attended at the Aquatic Centre and the manufacturer of the Dectron units paid for the replacement. The problems with the Dectron units was well known and a source of concern for the applicants on or before September 1, 2015.

[93] One material fact was discovered by the applicants relating to the Dectron units after September 1, 2015. On September 3, 2015, a representative of Dectron from Montreal visited the Aquatic Centre to conduct an inspection. He advised that the ducting had been installed incorrectly, such that warm air was blowing down picking up moisture from the pool and creating a humidity problem, which in turn caused the Dectron units to break down. The applicants requested and received the owner's manual for the Dectron units on or about September 10, 2015. The applicants also received advice regarding that issue.

[94] To the extent that the claim relating to the installation of the ducting is an alleged design error, the limitation period had expired by September 3, 2015. However, September 3, 2015 is prior to the expiry of the limitation period applicable to the claim for breach of contract or negligence against the installer, Ambassador. The notice of application was filed on September 1, 2016, within the 12-month period of the applicants becoming aware that the duct work was designed and or installed incorrectly. This will be analyzed further under Issue No. 4.

Aquatic Centre roof purlins

[95] The applicants knew that the surface of the roof purlins was discoloured with rust, but the evidence establishes that there was a reasonable basis to believe that it was surface rust and they received a recommendation that it should be cleaned and re-painted. The applicants also experienced rusting of steel columns in the Recreation Centre arenas which had been repaired by priming and repainting. The applicants had planned to proceed with cleaning and new painting in 2016.

[96] The evidence establishes that it was not until KGS recommended that further testing be done on the corroded metal building components in the preliminary report received April 2016 and then once the applicants received the expert report prepared by Testlabs confirming the extent of the problem with the roof purlins and specifically that stress corrosion cracking had occurred in the Type 304 stainless steel purlins, that the applicants knew that the problem was more serious and that the purlins installed may not have been suitable or fit for the purpose.

[97] In my view, the applicants did not know or ought to have known about the stress corrosion cracking discovered in the purlins until they received the expert opinion from Testlabs and therefore I am satisfied the material facts of a decisive character relating to the roof purlins was not known or ought to have been known by the applicants prior to September 1, 2015.

Aquatic Centre structural steel coating

[98] Similarly, on the basis of the evidence filed, the applicants did not ascertain or discover the material facts of a decisive character regarding the structural steel coating

until they received the QAI and Axis reports in February 2017 and on July 27, 2017 respectively.

[99] The limitation period for breach of contract/negligence for the design specifications and the application of the coating had both expired before the date the applicants received these reports.

Arena Mechanical (heating system)

[100] There is no question that the applicants knew there were problems associated with the heating loop system in the Recreation Centre. Once the preliminary report was received from KGS regarding the Aquatic Centre, a decision was made to engage KGS to do a building assessment and report concerning the Recreation Centre.

[101] The KGS draft report relating to the Recreation Centre was received in September 2016. KGS made a number of findings regarding the mechanical system identified in the report which were not known to the applicants prior to receiving the report. The recommendations regarding the mechanical systems are contained on page 39 of the KGS draft report (Exhibit "C" to affidavit of Patrick Gloux sworn December 22, 2016).

[102] KGS submitted a final report on December 14, 2016 confirming the findings as particularized in the KGS draft report (see Exhibit "D" attached to the affidavit of Mr. Gloux sworn December 22, 2016). The limitation period for breach of contract/negligence for errors in the design and installation of the heating system had both expired before the date the applicants received these reports.

[103] In my view, the applicants did not know or ought to have known about the mechanical deficiencies identified by KGS until they received the expert opinion from KGS and therefore I am satisfied the material facts of a decisive character relating to the mechanical deficiencies identified in the Recreation Centre were not known until on or after the application was filed, September 1, 2016.

[104] I am not satisfied that the findings made by the Manitoba Court of Appeal in ***Swan River Valley Hospital District No. 1***, ***Morry*** and ***Guertin*** apply in this case. The applicants took reasonable steps to have the consultants, project management team and contractors attend to the deficiencies. Some were completed and others were not. However, the statement of claim relates to alleged design and construction deficiencies that were not identified until experts were engaged and provided their opinions as noted above.

[105] The facts in ***Morry*** are distinguishable from the facts of this case. In the ***Morry*** decision, the applicants filed an application seeking an order granting leave pursuant to s. 14(1) of the ***Act*** on July 21, 2010. The applicants contracted with the respondents to build them a high-end, custom built home, which was completed in 1994. Within 15 years, the applicants were experiencing significant moisture problems in the interior of their home. More than one year prior to the application being filed, part of an internal wall in the ceiling of a bedroom was removed (January 2009) to reveal wood rot on the wall studs and ceiling joists which were shown to one of the applicants and described to him as being a structural problem. It was also pointed out to one of the respondents that the vapour barrier had become detached. Similar problems were found during an

inspection of the crawl space in late February and early March 2009. The applicants retained an engineer and after conducting a thermographic survey of the entire home on March 9, 2009, the engineer advised the applicants that there was a fair amount of deterioration within the walls such that remediation work should be undertaken in the upcoming construction season.

[106] The court of appeal in ***Morry*** noted at para. 12:

> **12** The application judge concluded that, upon receiving the results of the thermographic survey, "[g]iven their life experience and education, the applicants ought to have known, at that time, that a link to this significant damage to the house could be traced to the actions of the parties they hired to design and build a high grade residence for them, less than 20 years earlier."

[107] The court of appeal found that the application judge was entitled to conclude that the applicants ought to have known of all material facts of a decisive character upon which their proposed action was based, by March 22, 2009, more than 12 months before the application for leave was filed.

[108] In this case, the applicants only knew of the deficiencies and claims reviewed above after September 1, 2015, when they received expert advice which was received within or after the 12 months before the application was filed. The applicants did receive some advice from Tower identifying problems, but they were not aware of the material facts of a decisive character necessary to ground claims with a reasonable prospect of success against each of the respondents.

[109] In ***Guertin***, the applicants sought leave to extend the limitation period and commence an action in tort and contract against parties that entered into a project management agreement for the construction of a house in Winnipeg. The construction

project was substantially completed in February 2006. The application was filed on November 12, 2014 and sought an extension of the limitation period to commence an action in contract and tort against a builder in relation to the construction of a balcony on the applicants' home, which was completed in 2006.

[110] In dealing with the problems associated with the balcony, the application judge stated at paras. 38 and 39:

> **38** Putting aside the question as to how discernible the sagging in the upper balcony would be to someone without any expertise in detecting a slight deflection, by July 2013 the evidence establishes that the owner knew there were serious problems with respect to the balcony because of the presence of broken pavers. One would reasonably expect that information would be acted upon immediately, especially since the house was on the market and her agent told her that some repairs could be complicated.
>
> **39** In my view, the failure to act when this problem was brought to her attention, fixing her at the least with knowledge that there was an issue with respect to the structure of the upper balcony, puts the owner outside the requirements of the statute which would entitle her to succeed on her applications. Even if she did not know, she ought to have known then.

The application judge's decision was upheld by the court of appeal.

[111] In my view, the ***Guertin*** case is distinguishable for the same reasons the ***Morry*** case is. In the ***Guertin*** case, the application judge found that the owner knew that there were serious problems and did not take reasonable steps to act upon the problems. In contrast, the applicants in this case took reasonable steps to have the respondents correct the problems that had been identified prior to September 1, 2015 and once the respondents had failed to take steps to correct the problems, the applicants acted on legal advice to retain their own experts to provide appropriate advice so that the problems could be assessed, recommendations could be received

regarding the remedial work required and the applicants could determine who was responsible. It was only when those reasonable steps were taken that the applicants determined the extent of the deficiencies, what corrective action was required and which parties that they had a cause of action against with a reasonable prospect of success.

[112] In my view, there are similarities between the facts of this case and ***Winnipeg Condominium Corp. No. 30***. The applicant in ***Winnipeg Condo Corp. No. 30*** sought leave to issue a statement of claim against the respondents pursuant to s. 14(1) of the ***Act***. The respondent provided mechanical design engineering services and construction services for remedial work on the applicant's heating and cooling system. There was evidence that the applicants' maintenance person reported the matter to the property manager indicating that the wrong type of pipe might have been used and that the insulation was improperly installed on the pipes. The applicant contacted the respondent to conduct an inspection and it was recommended that an experienced installation contractor be retained to investigate the matter and provide an opinion. An expert was retained and the opinion was relied upon for the applicant's application under s. 14(1).

[113] The Court of Appeal distinguished the facts of this case from ***Swan River Valley Hospital District No. 1*** stating:

> **18** Although, at first blush, it may appear that the facts in the present case are similar to the facts in *Swan River Valley*, there is, in my view, a substantial difference and that is in *Swan River Valley* the applicant had received expert reports prior to the report that it was relying on to justify its application. In the present case, the applicant prior to receiving Thermo Applicators' report of June 5, 2003, had in my view only limited substantiation for its application based on

> the limited expertise of its own on-site maintenance person and the comments of David Waldman that his own employer might be liable.
>
> **19** The fact situation in the present case would have been more akin to what existed in *Swan River Valley* if, for example, the applicant having in hand the report from Thermo Applicators, was attempting to bring an application at a later date on the strength of the reports from either G.D. Stasynec or that of SMS Engineering, which both confirm facts that were previously known.
>
> **20** I am therefore of the view that the motions judge erred when she applied the reasoning of *Swan River Valley* to the facts of the present case. I am satisfied that, until the applicant had received the report from Thermo Applicators Inc., the applicant did not have knowledge of material facts of a decisive character sufficient upon which to base an action against either one or both respondents and that it had a reasonable chance of success in doing so.
>
> **21** There will be situations wherein it will be evident that given facts lead to a conclusion of potential liability against a putative defendant but I do not consider the facts of this case to be of such a nature. It was both reasonable and prudent that the appellant would wish to obtain evidence that would not only clearly identify the problem it was facing but that would also identify who was responsible for the creation of the problem.
>
> **22** I do not, by any stretch, wish to state that in every case the requirements of s. 14(1) of the *Act* require that a putative plaintiff obtain expert evidence to buttress its position, but in this case it was necessary to satisfy the "decisive character" requirement of the *Act*.

[114] In this case, the applicants experienced various problems with the Aquatic Centre and the Recreation Centre. Steps were taken and repairs were completed, but the problems persisted. Stantec and Tower identified some of the problems but did not offer solutions. Tower recommended that the applicants obtain an expert consultant to provide an opinion. I accept that the applicants knew they had problems, but I am not satisfied they ascertained the material facts of a decisive character until they received expert reports dealing with the various claims they are now seeking to advance. That said, I accept that the applicants knew or ought to have known of material facts necessary to ground claims relating to certain deficiencies and those claims are statute

barred and the applicant will not be granted leave to issue a claim relating to those deficiencies. The claims relating to those deficiencies are particularized in my conclusion.

Issue No. 4: If the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action against the respondents is based before the limitation period expired, does s. 14(1) of the ***Act*** still apply and permit the application for an extension to be brought within one year of when the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character?

[115] The respondents submit that the applicable limitation periods expired in February 2016 for claims relating to the Recreation Centre and August 2016 for claims relating to the Aquatic Centre. I have already addressed the applicable limitation periods. The applicants acknowledge that the limitation period respecting the claim for breach of contract/negligence respecting the Aquatic Centre de-humidification (mechanical system) issue expired September 17, 2015. The applicants also submit that they were first aware of the alleged incorrect ducting in the Aquatic Centre on September 3, 2015, when they were advised by a Dectron representative. This information was provided prior to the expiration of the applicable limitation period relating to the alleged construction claim. The applicants submit that the proper interpretation of s. 14(1) of the ***Act*** is that a party may still commence the application even where the limitation period expires during the 12 months between the date the plaintiff knew or ought to have known of all material facts of a decisive character upon which the action is based and the time of filing the application.

[116] The applicants rely upon ***Hunt (Estate) v. Lee***, 2011 MBQB 252, 271 Man.R. (2d) 201, in which the application judge granted the plaintiff leave to amend the statement of claim pursuant to s. 14(1) of the ***Act*** by adding a new cause of action against a doctor. The application judge gave very comprehensive reasons and stated as follows:

> **55** Interpreting s. 14 to allow the plaintiff one year from discovery of the material facts to make the application, regardless of when those facts were discovered, is consistent with the policy underlying the common law discoverability rule. Section 14 is of course more limiting than the common law rule in that it restricts the extension of the limitation to one year (or, at least, the application for an extension must be made within one year), as opposed to the two years that the common law rule would allow in personal injury cases. By thus limiting it, the Legislature has struck a balance between the rights of the plaintiff and the rights of the defendant.
>
> **56** The fact that the ***LAA*** allows a plaintiff a year after material facts come to the plaintiff's attention to bring an application for an extension indicates an acknowledgement that a plaintiff cannot be expected to act with the immediacy suggested by the defendants. The comments of counsel for the defendant that it is not "impossible" for a plaintiff to file a handwritten claim and file it immediately to preserve her rights, in my view, places an unreasonable burden on the plaintiff that is not intended by the legislation. In my view, where a person acts with reasonable diligence in determining the material facts, the only limitation imposed by Part II is that that person must act on that information within a reasonable period of time (the reasonable period of time being the one year set out in the Act) regardless of when that information is acquired.

[117] The respondents rely on the ***Driedger*** case and submit that the applicants did not act diligently to pursue the claim and "slept on their rights". In ***Driedger***, the court found that the applicant knew the cause of action, diagnosed the cure, and carried out the remedial work between August 2002 and January 2003, which was well within the applicable limitation period. Mr. Driedger did not file an application for leave to extend the time for filing a statement of claim until April 22, 2003. The court found that the applicant had sufficient time to commence proceedings and provided no explanation for

the delay. Therefore, the court refused to exercise discretion under s. 14(1) of the ***Act*** and dismissed the application on that ground.

[118] With each of the claims advanced in the statement of claim, other than the claim relating to the Dectron units, I am satisfied that the material facts of a decisive character were not known or ought to have been known by the applicants within the applicable limitation period.

[119] However, if I am wrong on the dates the limitation periods expired and the dates are after September 1, 2015, or in the case of the Aquatic Centre de-humidification claim, the date the limitation expired is after September 1, 2015, then it is necessary to determine whether s. 14(1) of the ***Act*** still permits an application for an extension of time to be brought within one year of the date the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action against the respondents is based.

[120] As stated in ***Cahill***, "... Whether the knowledge of the material facts of a decisive character was acquired one day, as was argued in the ***Hunt*** case, or several months prior to the expiry of the applicable limitation period as was the case in ***Driedger***, an applicant has the onus of moving expeditiously and providing an explanation for any delay in not filing a statement of claim within the limitation period. ..." In this case, I am satisfied that the applicants acted with reasonable diligence in determining the material facts by seeking out and receiving expert advice and then acting within one year to commence the application.

[121] There is no question that an extension of time under s. 14(1) of the ***Act***, is a discretionary order and as stated in ***Cahill***, "I agree with the approach adopted and the reasons for decisions given by this court in ***Hunt***, ***Driedger***, and ***Benson*** at paras. 54-57." In this case I am prepared to exercise my discretion to grant the application for leave other than respecting certain deficiencies noted in the conclusion below.

Conclusion

[122] I am satisfied that the applicants have provided sufficient evidence of the following:

a) They have causes of action against the respondents, which, subject to any defence that may be raised, have a reasonable chance of success;

b) Not more than 12 months elapsed between the day on which the applicants first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based against the respondents, and the date on which the application was made to the court for leave;

c) Having regard to material facts relating to the causes of action as defined in s. 20(2) of the ***Act*** and the nature of the material facts as defined in s. 20(3), the applicants first knew of all materials facts of a decisive character on or after September 3, 2015, when they discovered that the ductwork had been incorrectly installed in the Aquatic Centre and when experts reports were received from KGS, Testlabs, CQI and Axis relating to the other claims;

d) The material facts of a decisive character upon which the proposed causes of action are based, are not facts which the applicants reasonably ought to have known about earlier. The applicants took reasonable steps to ascertain the causes of the problems in the Recreation Centre and the Aquatic Centre;

e) To the extent that the material facts of the decisive character were known or ought to have been known to the applicants before the expiry of the limitation period, the analysis in the ***Driedger***, ***Hunt***, and ***Benson*** decisions applies and in my view, the applicants acted with reasonable diligence in determining the material facts of a decisive character and commenced the application within the one year time frame.

f) The applicants knew or ought to have known of numerous problems and deficiencies which existed prior to September 1, 2015, and leave is not granted to advance any claim respecting those deficiencies including:

   i. The deficiencies in the heating loop mechanical system in the Recreation Centre arenas that were identified prior to September 1, 2015;

   ii. Claim relating to the repair or replacement of the Dectron units themselves;

   iii. Lighting system;

   iv. Pool system (leaks, lane lines, skimmers, lights);

   v. Shower system:

vi. Sprinkler systems;

vii. Eavestroughing;

viii. Aquatic Centre change room ceilings;

ix. Sound systems;

x. Hot tub tiles;

xi. Dressing room number 10, "foul smell";

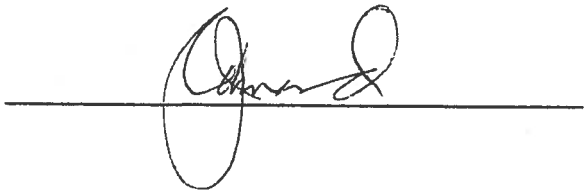
xii. Pool change room odours;

xiii. Ice plant design and wiring;

xiv. Ice melting pit ("poor design", "missing exchanger")

[123] Accordingly, leave is granted to the applicants to commence an action against the respondents. Pursuant to s. 14(5) of the ***Act***, the applicants will be permitted to file and serve their statement of claim within 30 days of the signing of the order. Leave is not granted to the applicants to commence an action claiming damages relating to the deficiencies identified in para. 122(f) above. The applicants indicated in their application brief and during oral submissions in court that they were not seeking leave to advance claims respecting deficiencies that had been identified prior to September 1, 2015. The proposed statement of claim includes many general allegations of breach of contract and negligence of the respondents. While the allegations are drafted using general language, granting leave does not mean that the court is approving the form of the statement of claim. Leave is only granted to the applicants to commence an action against the respondents in connection with claims that have been identified above

where material facts of a decisive character were ascertained on or after September 1, 2015. Costs shall remain in the cause.



J.