The real impact of delays on evidence: When time erases evidence in complex litigation

May 14, 2025

In complex disputes involving several defendants who participated in the construction of a building, time is rarely an ally.

Consider a residential project built in the early 2000s. A decade after its construction, water infiltrations or cracks have been observed. Following several assessments by various professionals carried out over several months or even years, the findings made at an early stage suggest a plethora of potential errors by the various participants, whether in the design, execution, maintenance or even monitoring of the work.

The rest of the story is easy to guess. From this point on, legal proceedings are instituted against several defendants, including promoters, sellers, architects, engineers, contractors, subcontractors, and other professionals involved in the construction of the building in question.

In this context, where certain facts date back a long time ago, defending such a case can become a perilous exercise. Why? Because witnesses, although they are honest, have trouble remembering events so far away. In addition, the documents no longer exist or cannot be found, because they come from a time when paper records were only kept for a few years and then destroyed after 5, 7, or 10 years. Some of the parties who ought to be involved have even ceased to exist.

How can we ensure full defence in such a scenario? This article proposes a reflection on the impact of extended time limits, in particular when it comes to the administration of evidence for the defence side.

The passage of time: The enemy of evidence

The passage of time obviously works against the reconstruction of the facts, for all parties involved in litigation. On a human level, key witnesses are no longer available for a variety of reasons including death, retirement, relocation, or simply loss of contact. For those who are still around, their memories are often vague or imprecise.

Memory is fallible, especially when the facts date back several decades. This does not mean that a witness’s credibility will be affected, but simply that he or she will have

difficulty explaining facts from the time that might have been useful in some cases to both the claimant and the defence.

Documents, too, are rarely intact or complete with the passage of time. Record-keeping obligations have time limits. For example, several professional associations in Québec require a minimum period for the retention of records.[1] After this period, the documents can be legally destroyed. This means that key documents such as plans, reports, communications, or specifications may have disappeared long before litigation takes shape.

Notwithstanding the absence of these key documents, experts from the parties will, of course, be able to make findings by inspecting the premises. However, their conclusions will have to take into account the codes and standards that were applied at the time.

The impact on the rights of the defence

In many cases, the initial impact on the rights of the defence will be monetary. Indeed, as soon as a lawsuit is filed, every effort must be made to find as much evidence as possible.

All the lawyers involved in the case will have the same objective, and this will be followed by requests for pre-undertakings and longer examinations for discovery, therefore costlier to prepare and conduct with witnesses who struggle to answer questions, not because of a lack of will to do so, as mentioned above, but because they no longer remember the facts. Additional undertakings will be made in the hope that a key document may resurface, but the time it takes to find all these lost documents often becomes a significant challenge for clients.

Following the completion of the investigation, everything that has been obtained will then be handed over to the experts. Using the information at their disposal, they will attempt to distinguish each and every defendant’s responsibility or the absence thereof.

When, despite all the efforts made, the defendants' liability with regard to the evidence presented in the claim is still uncertain, a difficult choice will need to be made: pursue the case to trial, or settle along the way to avoid uncertainty and added costs?

Tools available to the defendants

What tools can be used and put forward in such a context where time plays against the parties?

a. **Procedural means**: Although it is difficult at a preliminary stage to request the dismissal of an action on the basis of the extinctive limitation period,[2] such an argument can always be put forward and pleaded to the trial judge when the defendants consider that a plaintiff has delayed in acting, as soon as the first signs of problems became apparent.
b. **Action in warranty or forced intervention**: If, for any reason, the plaintiff chooses to institute an action only against his promoter-seller or general contractor even though the expert report reveals several deficiencies on the part

of various professionals and subcontractors involved in the initial project that is the subject of the dispute, the principal defendant will have no choice but to institute proceedings against all of them, in turn. Moreover, although the addition of defendants may routinely have the effect of slowing down procedural steps for the file to be completed despite the goodwill of all the lawyers on the case, the presence of all the interveners involved in a case dating back several years makes it possible to try as hard as possible to obtain all the evidence available from all the parties.

c. **Proactive litigation management**: In defence, we must quickly position ourselves with regard to such litigation and use the procedural tools at our disposal to limit, in particular, unnecessary and repetitive requests, as well as preliminary examinations, which are sometimes not very useful, in order to focus our efforts on the existing evidence and the means at our disposal to advance the debate. As explained below, it is important to quickly mobilize experts and target the issues on which they will be asked to give an opinion.
d. **Expertise**: When time has erased the documentary evidence and key witnesses, expertise becomes a central lever for the defence. The expert will therefore have to carry out his analysis of the file with evidence that is not necessarily factual from the original witnesses. The expert will often have to make more than one site visit and examine the standards in force at the time in order to deliver an opinion that will eventually enable the court to draw probative conclusions from his expertise, despite the passage of time.

Key takeaways

The passage of time, which erodes the quality of evidence, often does so to the detriment of the defendants; this reality rings particularly true in the example given at the beginning of this article, regarding a building built a long time ago.

When an action is brought several years after the fact, the defendants end up fighting against forgetful omissions, an absence of key witnesses, and the disappearance of documents.

Not only does justice obviously require that this erosion of evidence be taken into account, but several tools and means remain available to defendants to mitigate the harmful effects of the passage of time. However, judges will nevertheless have to decide the dispute and render judgment based on reliable evidence.

Finally, this issue is a reminder of the crucial importance of document management in long-life sectors. For example, construction firms and other professionals may need to rethink their archiving strategies, and consider sustainable technological solutions that go beyond their mere obligations.

The primary motto of justice is that it is based on truth, but such truth must at least be documented, traceable and defensible — even 30 years later.

Footnotes

[1] Section 2.03 of the *Regulation respecting the keeping of records, the register and offices of architects* (A-21, r. 15) provides that "The architect's register and record must be kept for a minimum period of 5 years, commencing on the date of the last service rendered or, when the project has been carried out, commencing from the date of the end of the work."

Section 6 of the *Règlement sur les dossiers, les lieux d'exercice et la cessation d'exercice des ingénieurs* (chapitre I-9, r. 7.3) provides that "The engineer shall keep each record for at least 10 years after the date of its closure…"

[2] Article 2921 C.c.Q.

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