AN OVERVIEW OF CONSTRUCTION CLAIMS: HOW THEY ARISE AND HOW TO AVOID THEM

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AN OVERVIEW OF CONSTRUCTION CLAIMS:
HOW THEY ARISE AND HOW TO AVOID THEM

I. INTRODUCTION

The intent of this paper is to provide the reader with an overview of construction related claims, along with some useful, practical advice on how to avoid these claims.

II. HOW DO CONSTRUCTION CLAIMS ARISE?

Construction claims can be caused by a number of factors. Understanding what causes construction claims is the first step in avoiding them. In general, construction claims occur because of the following:

- Delays in construction and completion of the contract;
- Delays in the delivery and supply of materials;
- Weather which slows down or prevents construction from proceeding;
- Owner requested changes;
- Changes which occur not at the request of the owner;
- Poor management and administration of the construction site;
- Site conditions which differ from those expected;
- The work becomes impossible to perform;
- Insufficient plans and specifications;
- Failure of any one party to disclose information which is material to the construction;
- Conflicts between those involved in the construction of a project;
- Termination of the contract by the owner or the contractor;
- Acceleration of the work;
- Failure to adequately schedule and coordinate the work; and
• Failure of parties to cooperate with each other in the performance of the work.

III. GENERAL RECOMMENDATIONS FOR AVOIDING CONSTRUCTION

Those readers who have been involved in construction claims, and especially those which have resulted in arbitration or litigation, are aware that they are often a costly process. I encourage my clients to avoid such expenditures by performing effective risk management at the outset by trying to avoid construction claims in the first place.

Effective risk management for avoidance of claims involves a cost/benefits analysis at each stage of the construction. The realities of the construction industry and the profit driven bottom line often make it unrealistic and not cost effective to take all or even most of the recommended steps for avoiding construction claims. However, employing some of the following steps may save you more money in the long term by allowing you to avoid claims:

• The best way to ensure that something occurs or does not occur is to put it in the contract. Obtain good legal advice before entering into the contract in order to ensure that your interests are properly and adequately reflected in the contract. The standard general conditions may not be adequate for your needs. This is particularly true of public entities which have special and diverse needs and interests;

• Owners should try to hire contractors and consultants with whom they have a good relationship and who have a good reputation in the industry. You may have to do some research in order to determine a party’s reputation in the industry;

• Owners should realize that the lowest bid is not always the best bid;

• Owners should ensure that the contract allows them to have some say in the general contractor’s selection of its subtrades;

• Each party to a contract should ensure that they understand their duties and obligations under the contract and that they have the ability to perform these duties and obligations as required by the contract;

• Owners should ensure that a project is well planned from the outset to minimize the need for change orders or change directives. At least one study has shown that changes to the contract work increase the risk of construction claims and decrease productivity1;

• Both owners and contractors should do what they can to ensure proper management and administration of the project, including proper and adequate staffing and co-ordination of the project and trades;

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1 The Construction Industry Institute study on the quantitative effects of project change (May 1995).
• All parties benefit from an atmosphere of mutual trust and respect and each party should do what they can to engender such an atmosphere;

• While it may be initially attractive to a party to shift all of the risk in the contract to the other party for matters such as insufficient plans and specifications and unexpected site conditions, a contract overly skewed in favour of one party over the other results in a higher chance of there being a dispute and hence, a construction claim. In my opinion, a contract that protects the interests of all parties and that does not include an overly unfair allocation of risk will result in a decreased likelihood of construction claims;

• Ensure proper and adequate documentation for the project;

• Acknowledge and settle claims which have merit at an early stage; and

• Ensure that the contract has an adequate ADR process for dispute resolution.

IV. NOTICE REQUIREMENTS FOR CONSTRUCTION CLAIMS

Providing timely notice in writing of a dispute is essential to the success of a construction claim. The notice should include: details of the disputed item or issue, the circumstances which gave rise to the claim, what a party is claiming for, and an indication that further work is being conducted under protest if further work is to be done.

The general conditions of the CCDC 2 specify a number of notice requirements which I will discuss under the respective topics in this paper. I will say, at the outset, that awareness of and compliance with the notice provisions in a contract is often crucial to the success of a claim.

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2 See Appendix “B” for a list of suggested document files for a construction project.

3 CCDC 2 refers to the CCDC 2 – 1994 form of Stipulated Price Contract between the owner and the contractor. Please note that the Canadian Construction Documents Committee has proposed certain changes to the CCDC 2 which will be implemented this Winter.
V. CLAIMS ARISING OUT OF DELAY

A. DELAY

I will ask the reader to keep in mind that entire textbooks have been written on delay claims. This section of my paper will attempt to provide a general understanding of delay claims and to point out the key issues relating to delay claims.

1. What is Delay

Delay on a construction project occurs when:

(a) The construction of a project or a part of the project is not completed within the time period originally intended and as specified in the contract; or

(b) The scope of the work as contemplated in the contract increases to the extent that more work is required to be performed within the original contract time.

2. Causes Of Delay

Delay can be caused by a number of unexpected events during construction which increase the time required for completing the work or increase the work which must be completed within a specific period of time. Common causes of delay include the following:

Delay Not Caused By A Party

(a) Site conditions which differ from what was expected;

(b) Severe weather;

(c) Strikes;

(d) Natural disasters such as floods, fires, and earthquakes;

(e) Acts of municipal and government authorities;

(f) Acts of God;

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Delay Caused By The Owner

(g) Excessive changes in requirements or design;
(h) Defective or insufficient plans and specifications;
(i) Owner interference;
(j) Failure to provide adequate access to the site;
(k) Failure to obtain necessary permits for the work;
(l) Failure to coordinate the job when there are separate contracts awarded;
(m) Failure of the consultant to provide or approve drawings in a reasonable time;

Delay Caused By The Contractor

(n) Contractor management and performance problems;
(o) Failure to properly man and perform the job;
(p) Poor workmanship;
(q) Failure to order materials and equipment in a timely fashion;
(r) Delays due to the fault of the contractor;
(s) Unavailability of labour, material or equipment;

Delay Not Caused By A Party

Delay not caused by a party is often referred to as excusable (as opposed to inexcusable) delay, or non-compensable (as opposed to compensable) delay:

- An excusable delay is one that will serve to justify an extension of the contract performance time – it excuses the party from meeting a contractual deadline;
- Inexcusable delay is one for which the party assumes the risk of the cost and consequences, including the resulting impact on others, such as delay due to a contractor’s own mismanagement;
- Generally, whether a delay is excusable or inexcusable is a matter of contract. The question asked is, does the contract permit the delay in question?
Excusable delays may be further classified into compensable and non-compensable delay;

- Generally, delay that could have been avoided by due care of the one party is compensable to the innocent party suffering the damage as a result of the delay’s impact;
- Delay not caused by a party is generally non-compensable delay;
- If a delay is deemed compensable, then the party will be entitled to additional compensation for the costs of delay, as well as additional time for contract performance; and
- It is possible for a delay to be compensable without extending the contract time.

In short, delay not caused by a party is excusable and not compensable to the innocent party. When such delays occur, the owner is typically required to give an extension of the time to perform the contract to the contractor, but does not permit the owner to make a claim for any additional costs arising out of the delay, or to terminate the contract on that basis.

**Delay Caused By The Owner**

Delay caused by an owner are often compensable delay for which the owner must provide an extension of time to the contractor to complete the work and for which the owner must compensate the contractor in respect of additional costs resulting from the delay.

**Delay Caused By The Contractor**

Delay caused by a contractor does not require an owner to provide an extension of time under the contract to complete the work. If the contractor fails to complete the work in the required time, the owner is entitled to make a claim against the contractor for additional costs arising out of the contractor-caused delay.

**3. The Concept Of “Float”**

Float is the slack time built into a construction schedule by the contractor in the event that additional time is required to complete a certain portion of the work. Float allows a contract to temporarily remove work from the critical path\(^5\) to prevent delays to the overall construction of the project. A critical activity has been described as one that, if allowed to grow in duration at all, will cause the overall time required to complete the project to increase\(^6\).

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\(^5\) A construction schedule contains a path of events that are dependent upon each other. That path is referred to as the critical path.

Consequently, float time allows a construction project to absorb some delays in the construction schedule. However, when the float is used up, the work at issue returns to the critical path, and the delay which was absorbed by the float may result in construction claims and the need for one party to compensate another for any resulting costs associated with the delay.

A final consideration is that the amount of float to include in any construction schedule involves a costs/benefits analysis by the contractor. Including some float time is obviously a good idea, but including too much float increases the contract price. The contractor thus must do a balancing act between the competing interests in this regard.

4. **The Concept Of Acceleration**

Acceleration is an effect of delay. Acceleration occurs when:

(a) A contractor must complete its work faster than it had originally planned in the construction schedule; or

(b) Despite excusable delay meriting an extension of time in the contract schedule, the owner requires the contractor to complete the construction as originally scheduled;

- Here, an owner requires a contractor to complete the work as originally scheduled but the contractor has lost time in the schedule due to factors beyond its control. When a contractor is excusably delayed, it is entitled to a time extension. When an owner requires that the contract work be completed as per the contract completion date, then a contractor must accelerate its work to meet that demand.

The first type of acceleration listed above is direct, while the second type is constructive.

An owner’s denial of the valid time extensions to a contract may lead to claims for damages for breach of contract in an amount representing the additional costs to the contractor for having to do more work in the available time period. Such additional costs may result from the need to replay and re-sequence the work, hire additional workers, work overtime, accelerate material delivery, obtain additional supervision, or use additional equipment. A contractor should note that it may succeed at a claim for acceleration damages even if it did not achieve the requested completion date.

Contractors should realize that acceleration may not be as obvious as expected. While a clear order from an owner to accelerate leaves little ambiguity, circumstances are often more obscure. Keep in mind that a threat to terminate a contract for default when a known excusable delay is present may be tantamount to acceleration, as is a request, as opposed to an order, to accelerate. Pressure may be adequate for an acceleration claim.

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7 *Construction Delay Claims*, 3rd Ed., Barry B. Bramble and Michael T. Callahan, 2000, Aspen Law & Business, at p. 4-8s
5. **What Is Required For A Successful Delay Claim?**

In order to establish a delay claim, the following elements must be proven or present:

(a) The delay must affect the overall construction and did not just eliminate the float. It is not sufficient that the delay be troublesome; it must be *critical*. Critical delays are those that extend the overall project completion date. For example, changing the type of electrical switchplates may not delay substantial completion of the project, but changing the type of structural steel members while the contractor is erecting structural steel on a multistory office building will do so;

(b) The events or problems alleged actually *caused* the delay. One of the principal methods used for proving causation in delay claims is to use the critical path method ("CPM"):
   - CPM compares an originally planned construction schedule with an as-built schedule so that the parties can determine whether delay has occurred and the cause of the delay;
   - A CPM analysis establishes whether or not delay has occurred on the critical path; and
   - Determination of the critical path is often required for the calculation of delay damages;

(c) The innocent party must prove that the delay is inexcusable and compensable (i.e. the responsibility of the party at fault);

(d) Notice (either actual or constructive) of the delay must be given;

(e) A contractor should review the contract to determine whether the contract allows for an extension of time or both an extension of time as well as compensation; and

(f) Evidence in the form of accounting records to prove damages must be available.

6. **The Heads Of Damages**

In general, delay causes two types of losses which can be categorized as follows:

(a) Productivity and impact costs – inefficiencies occur as a result of having to do more work in the scheduled time frame than originally planned; and

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(b) Time related costs – the amount of time required for completing the work is extended and hence resulting in time sensitive costs.

Delay damages are generally broken down into the following categories:

<table>
<thead>
<tr>
<th>HEAD OF DAMAGES</th>
<th>DESCRIPTION OF HEAD</th>
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| **ON-SITE OVERHEAD**                    | • Extended field office overheads including supervision, costs of the site office and equipment and labour costs for the extended period.  
  • These are usually proved by reference to the contractor’s accounting records and the on-site costs including daily logs, foreman’s reports, rental invoices, etc. |
| **INFLATIONARY OR OTHER INCREASE IN COST OF MATERIALS AND LABOUR** | • These costs will arise directly as a result of the increased costs of the contractor in working an extended period.  
  • They are usually proven by reference to collective bargaining agreements and invoices with respect to the increase of costs and materials. |
| **COSTS OF FINANCING AND INSURANCE**    | • These are also time sensitive costs.  
  The contractor is delayed in receiving its revenue where the contract time is extended, in addition, the contractor will experience an increase in insurance costs. |
| **HEAD OFFICE OVERHEADS**               | • Recovery of head office overheads has been approved as an item of recovery.  
  • A number of formulas have been developed to prove the amount of the cost. Generally speaking, the theory is that an extended contract will create additional head office costs and will result in a lower revenue base for the contractor as it will be unable to assume additional work during the extended period. |

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PRODUCTIVITY

- Productivity is a difficult cost to prove. The disturbance of the contractor’s progress or plan will likely result in the loss of productivity or efficiency. This usually results in delay circumstances where the contractor is required to demobilize and re-mobilize as a result of changes in the scope of work or changes to its construction sequence. Labour and equipment are rendered idly, access to the work is insufficient and only congested work areas become available. Weather reduces activity, co-ordination of trades becomes increasingly difficult and the contractor is forced to perform certain work on an overtime basis which in and of itself is less productive.

B. RECOMMENDATIONS FOR AVOIDING DELAY CLAIMS AND ENSURING YOUR RIGHTS ARE WELL PROTECTED IN RESPECT OF DELAY

(a) Ensure that the contract contains adequate provisions for an extension of time due to delay;

(b) Ensure that the contract contains specific provisions allowing for the resolution of delay related issues within the scope of the contract;

(c) Ensure that sufficient float is built into the schedule so that when delays do occur, they are absorbed into the contract and are less likely to become critical to the overall construction schedule. In other words, ensure there is adequate construction time for the circumstances;

(d) Consider including express clauses in the contract allowing for proprietary rights over the float in the construction schedule;

(e) A contractor should ensure that the contract provides for both an extension of time plus compensation for costs in the event of excusable and compensable delay;

(f) A contractor should include contract terms which specify the exact heads of damages to which it is entitled for compensation in the event of compensable delay; and

(g) An owner should consider obtaining a genuine pre-estimate of the owner’s damages in the event of delay in the completion of the work.
VI. CLAIMS

A. DIFFERING SITE CONDITIONS

During the construction of a project, contractors often encounter subsurface or hidden conditions which were not anticipated and which may have a major impact on the time and cost of performing their work.

1. Types Of Differing Site Conditions

There are two general categories of differing site conditions:

(a) Conditions that materially differ from those indicated in the contract documents – this category relates to conditions that differ materially from the conditions anticipated by the parties when they entered into the contract; and

(b) Conditions that materially differ from what is typical in the circumstances and hence were not anticipated nor included in the contract.

What is considered to be “materially different” is a question of fact determined by the court. An industry expert from the United States has suggested that where a variation of quantities in excess of 30 percent can be demonstrated, courts are likely to find a material difference.

The situations giving rise to the two categories of differing site conditions claims are not inherently different, but have to do with the basis for the analysis: for category #1, the basis of analysis is the contract documents; and for category #2, the basis of analysis involves consideration of what is normally expected in the circumstances.

2. Category #1 Conditions – What Was Indicated In The Contract Documents

As I will discuss below, the assumption that a contractor may rely on and plan the work based on conditions anticipated by the contract is reflected in General Condition 6.4 of the CCDC 2 (“GC 6.4”). If the actual conditions encountered by the parties are materially different from those contemplated in the contract, then recovery may be achieved via the provisions in GC 6.4.

In order to succeed at a claim for this category, the trend in the Canadian jurisprudence suggests that the contractor must prove that he could not have reasonably anticipated the conditions actually encountered, despite careful consideration of the contract documents.

The most common problems in this category are subsurface soil conditions and hidden utility lines. Specific examples of problems in this category include the following:

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• The presence of subsurface water where none had been indicated by the contract documents;

• The encountering of loose, soft material at a location or an elevation where the contract documents indicated the existence of sound materials;

• The encountering of ground water at a higher elevation, or in quantities in excess to those indicated or reasonably anticipated from the contract documents;

• The presence of a higher moisture content in the soils to be compacted than was anticipated from the contract documents;

• The failure of designated borrow pits or quarry sites to produce the required materials entirely or in sufficient quantities without excessive waste, or unusable materials beyond that reasonably anticipated from the contract documents;

• Physical difference in the behavior, characteristics, and workability of soils encountered as contrasted with the type of soils indicated by the contract documents, even though the soils encountered could be utilized with additional effort for the intended contract purposes;

• The reusable condition of existing material is not as anticipated;

• High water table;

• Subroofing conditions are different than anticipated; and

• Drainage systems are not as effective as expected.

3. Category #2 – Conditions Not Anticipated And Not In The Contract

In order to succeed at a claim for this category of differing site conditions, the differing site condition need not be extraordinarily unusual in order to be “materially different”, but it must not be ordinarily expected and hence the contractor could not have reasonably expected to encounter the condition in the circumstances.

Some examples of this type of differing condition include the following:\[14:\]

• Buried railroad ties;

• Boulders;

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• Unusually thick concrete slabs;
• The need to demolish a double roofing system;
• Corrosive ground water which damages de-watering equipment;
• Unusually high levels of rain causing corrosion and other deterioration of the ground materials; and
• Failure of rock from an approved borrow pit to fracture as expected for producing concrete aggregate.

B. CONTRACT CLAUSES IN GENERAL AND ALLOCATION OF RISK

One significant issue in respect of this topic is which party will bear the risk of differing site conditions.

Most differing site condition clauses in the contract: (1) require notice, (2) provide an opportunity for investigation, (3) define and apportion the risk of the unknown, (4) state the grounds upon which the contractor may base its expectations, (5) require a prebid inspection by the binders, and (6) provide a method of recovery, generally by allowing an adjustment in the contract time or amount or both. Without such clauses, the contractor may not be able to recover under the contract.

Some have suggested that such contract clauses benefit both the owner and the contractor. By allocating risk, the contractor is able to submit a more precise and competitive bid without high contingency factors. The contractor can rely on the representations of the contract documents and is not required to perform costly, extensive prebid investigations. Because these costs would have been passed on to the owner, the owner ultimately benefits from the use of differing site conditions clauses15.

C. GENERAL CONDITIONS OF THE CCDC 2 - 1994

The general conditions of the CCDC 2 contemplate the two categories of differing site conditions discussed above. Please turn to Appendix “A” which sets out the provisions under GC 6.4 of the CCDC 2.

1. Differing Site Conditions Clauses

GC 6.4 states that the owner will bear the cost associated with unanticipated differing site conditions, so long as the contractor complies with the notice requirements contained in those provisions (please see my discussion of this issue below).

15 Ibid, at p. 2-47
2. **Withholding Contract Monies And Termination Of Contract**

A situation may arise in which a differing site condition prevents the completion of a certain portion of the work under the contract. For example, extreme and unexpected weather conditions during the winter may prevent construction from proceeding until the next Spring.

Where construction cannot continue because of a differing site condition, GC 5.8.1 states that where climatic or other conditions, reasonably beyond the control of the contractor, prevent certain of the contract work to be completed, an owner must not withhold payment to the contractor for that portion of the work which *has* been performed as certified by the consultant. However, an owner may withhold, until the incomplete work is finished, an amount under the contract determined by the consultant to be sufficient and reasonable to cover the cost of performing the incomplete work.

In circumstances where construction must be put off to a later date, the contractor will want to demobilize so that its crew can work on a different project, and to obtain a payout of the holdback monies. GC 5.8.1 provides the owner with the option of retaining sufficient contract monies to complete the work.

If a dispute arises between the contractor and the owner as a result of the differing site condition, or if the contractor refuses or fails to complete the work, then the owner may take steps to complete the contract on its own pursuant to the default provision under GC 7.1. If the owner has already retained an amount for the incomplete work under GC 5.8.1, then the owner may complete the work without having to spend additional funds for completing the work under GC 7.1.4.1. This is especially important if an owner is facing light financing.

Note, however, that it is generally more costly and troublesome for an owner to hire a new contractor to complete the contract. It is thus more advisable and cost efficient for an owner to change order out of the contract the incomplete work and include it in another contract with the contractor to be completed later.

If an owner chooses to utilize GC 7.1.4.1 to complete the work on its own in a dispute arising out of differing site conditions, it should carefully note the following:

(a) Both GC 7.1.2. and GC 7.1.4.1 require certification by the consultant;

(b) GC 7.1.4.2 allows an owner to terminate the contract with the contractor or terminate the contractor’s right to continue with the work. This clause is helpful in a situation where the relationship between the owner and the contractor has deteriorated to the extent it would not be practical or possible to continue the working relationship under the contract;

(c) The owner will need to ensure that the notice requirements under GC 6.4 are met;
(d) The owner should provide notice of the default not only to the contractor and the consultant, but also to the bonding company, who has a right to investigate the situation within a reasonable time.

D. NOTICE REQUIREMENTS UNDER GC 6.4

GC 6.4.1 states that the party which discovers a material change in site conditions must notify the other party in writing before the conditions are disturbed and, in any event, within 5 working days of that party discovering the condition. The contractor must then wait for the consultant to investigate and then make a finding as to whether the conditions differ materially which would result in an increase or decrease in the contractor’s cost or time to perform the work. If such a finding is made, then the consultant, with the owner’s approval, will issue instructions for a change in the work.

The requirement that the contractor must give notice to the owner prior to disturbing the site conditions protects the owner by giving the owner’s agent or consultant an opportunity to investigate and ascertain whether the conditions warrant a contract adjustment and to determine alternate ways of proceeding. An owner’s unreasonably slow response to the contractor’s notice of a differing site condition claim may be deemed a compensable delay.

A contractor must act immediately and in accordance with the notice requirements of the contract after discovering a differing site condition. It may be difficult to provide notice before the conditions are disturbed on a busy construction site.

It is important to remember that failure to comply with the notice requirements may disentitle a claim under these provisions. Indeed, our court has denied a contractor’s claim for impact costs as a result of the contractor’s failure to comply with the notice provisions of the contract.

Note, however, that parties have, in the past, tried to take the position that they did not technically receive notice under GC 6.4.1 because no written notice was provided to them, despite having been given notice of the differing site conditions by some other means. In those circumstances, the courts may find other forms of notice to be sufficient if the intent of the notice provision has been met. This is an example of courts trying to do justice between the parties.

E. DIFFERING SITE CONDITIONS MAY CAUSE DELAY

Subsurface conditions often delay excavation and foundation work. Differing site conditions are thus common causes of delay on construction projects. Contractors are often forced to request a

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16 In the CCDC 2 – 1994, “working day” is defined as a day other than Saturday, Sunday, or a holiday observed by the “place of the work”.
time extension due to the effect of the differing site condition on the project. It would be wise to ensure that that the contract allows for an adjustment of the contract time if such a problem arises.

F. SUGGESTIONS FOR AVOIDING CLAIMS ARISING OUT OF DIFFERING SITE CONDITIONS

(a) An owner should recognize that a cost/benefits analysis is involved in the allocation of risk. There should be a balance between shifting the risk to the contractor (and thereby gaining certainty in, but increasing the price of the contract), and assuming risk under the contract (and thereby increasing the financial exposure and uncertainty but reducing the price of the contract).

(b) An owner should inquire about the contractor’s knowledge of the geographical area, its general experience, and the general character of the work:

- If it appears that the contractor is unfamiliar with the geographical area or lacks experience, then an owner should reconsider entering into a contract with that contractor; and

- If it appears that the contractor is knowledgeable and skilled, then subject to other factors, the owner may ultimately save on the contract price by assuming more risk under the contract.

(c) Differing site conditions often cause delay, resulting in contractors requesting extensions of the contract time. All parties will do well if differing site condition clauses provide for an adjustment of contract time if certain unexpected conditions affect the ability of the contractor to complete the work on time.

(d) An owner should learn as much about the site conditions as possible before entering into the contract (generally in the planning stages) by conducting adequate site or subsurface investigations through its geotechnical consultant. A contractor should conduct its own investigations if necessary to confirm the information provided by the owner and its consultants to ensure accuracy.

(e) An owner should ensure there is sufficient time in the planning stages of the construction project to conduct the necessary investigations.

(f) An owner should avoid including “disclaimer clauses” or “liability limiting clauses” in the contract which contain exculpatory language and require that the contractor assume most, if not all, of the risk of differing site conditions. These clauses unfairly assign risk which should normally be borne by the owner to the contractor, will usually increase contract price, and engender bad relationships between the contract parties. Instead of trying to control risk with the use of such
clauses, an owner should ensure it does what is necessary to investigate the site conditions properly.

(g) An owner should realize that where the contractor is required to undertake its own investigations but such investigations are limited by cost or other factors, the contractor may be entitled to rely on the information provided by the owner notwithstanding the inclusion of a “disclaimer clause” or “liability limiting clause”.

(h) An owner employing a “liability limiting clause” should realize that including such a clause may cause the contractors to increase the contract price or include excessive contingency amounts in their bids or both. Such clauses should therefore not be used, unless circumstances indicate that differing site conditions may be present.

(i) Ensure fair and complete disclosure of information at an early stage of the construction project.

VII. CLAIMS

A. INSUFFICIENT PLANS AND SPECIFICATIONS

Having adequate plans and specifications is a fundamental requirement for construction project. Insufficient plans and specifications result in uncertainties in the work which generally lead to remedial work prior to completion and an increase in the number of changes in the work. Increased changes in a construction project generally reduce productivity and efficiency, and increase the chances of construction claims, especially delay claims. As such, parties should do what they can at the outset to ensure that there are proper and adequate plans and specifications for constructing a project.

1. What Are Plans And Specifications?

Please refer to the document entitled “Referenced General Conditions” which is attached as Appendix “A” to this paper.

GC 1.1.6 defines specifications as “that portion of the Contract Documents, wherever located and whenever issued, consisting of the written requirements and standards for Products, systems, workmanship, and the services necessary for the performance of the Work”. In essence, specifications describe, in words, the project being built.

Plans, on the other hand, form a part of the “drawings” and are defined by GC 1.1.7 as “the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location, and dimensions of the Work, generally including plans,
elevations, sections, details, schedules, and diagrams”. Plans are thus the graphic and pictorial descriptions of how the project should be built.

Plans and specifications form a part of the “contract documents” forming the contract between the contractor and the owner, and are important not only to specify and define the project to be built, but are also important in any claim for breach of contract when the building built is not built in accordance with the specifications.

2. **Disputes Over Plans And Specifications**

GC 2.2.6 specifies that should there be a dispute over the interpretation of plans and specifications or, for that matter, any of the “contract documents” as defined by GC 1.1.9, the consultant will be the interpreter of the requirements of these documents in the first instance. The consultant is supposed to remain neutral, fair and unbiased as between the owner and the contractor.

3. **Shop Drawings**

GC 3.11.1 states that shop drawings are “drawings, diagrams, illustrations, schedules, performance charts, brochures, Product, and other data which the Contractor provides to illustrate details of a portion of the Work”. Shop drawings form a part of the “Contract Documents” as defined by GC 1.1.9.

The contractor is obliged, pursuant to GC 3.11.2, to provide shop drawings which are consistent with the work specified by the other “contract documents”. Once submitted, the consultant has the obligation under GC 3.11.3 to review the shop drawings for design concept and for general arrangement. The contractor remains responsible for any errors or omissions in the shop drawings and for meeting all of the requirements of the “contract documents”, unless the consultant expressly provides acceptance of a deviation on the shop drawings.

4. **Architects And Engineers**

**Duty**

The preparation of plans, drawings and specifications is one of the principal duties of an architect or engineer. The basic duty of architects or engineers in all their work is to use the reasonable care and skill of such persons of ordinary competence, measured by the professional standard of the time. If they fail to do so, they may be found negligent and liable to pay damages to the project owner. Additionally, if the error renders the design useless, the owner may not be obliged to pay their fee.

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19 See GC 1.1.9, the definition of “contract documents”.
20 With the one exception of financial information required by the owner, as per GC 2.2.6.
21 GC 3.11.5.
Not all design error is actionable. To be actionable, the deficient performance by the designer must fall below the standard of performance of the design industry. Even in contract actions, the court may evaluate the contractually required design performance in terms of the negligence standard for the performance required by the design industry.

The effect of insufficient plans and specifications first affects the contractor, who may or may not have a claim against the consultant depending on the circumstances and whether negligence can be established. Frequently, the owner must accept the design errors committed by design professionals and pay the contractor. However, the owner may in turn be able to claim against the consultant for breach of contract and negligence.

The consultant under the contract is required to conduct site visits at appropriate time intervals to ensure that the work is proceeding in general conformity with the contract documents (GC 2.2.2). The consultant is also the interpreter of the requirements of the contract documents (which include plans and specifications) in the first instance (GC 2.2.6). If plans and specifications are insufficient somehow, the consultant is the first party to determine this issue, and this puts the consultant in a conflict of interest as the drafter of those documents.

**Delay**

One result of insufficient plans and specifications is delay. Design delays are often considered only after the design has been completed and construction begins. However, in design-build projects, design preparation is part of the contract duration that may delay completion. Delays that occur because of additional time needed for creating the design, working with the owner, and then working with the general contractor can have severe consequences on the overall success of the project.

Insufficient plans and specifications due to defects in design often cause delay. Design defects include errors and omissions, as well as lack of coordination among the various aspects of the design. Any element of the design – architectural, structural, mechanical, electrical, or site plan – may be flawed and lead to delays in the project completion. Site engineering and soil condition, and relatively simple aspects of the site plans, such as surveys, are frequent causes of dispute and delay.

Where a design error on a construction project is exacerbated by the consultant’s slowness in the correction of the design error, the claim of delay may expand. A consultant’s tardiness in providing the contractor with needed details for continuing with the work may result in

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24 See my discussion on negligence claims below.
compensable delay for the contractor\textsuperscript{28}. Finally, note that a consultant’s delay in reviewing shop drawings may result in a delay claim by the contractor.

5. **The Contractor’s Responsibility**

Insufficient plans and specifications are generally attributable to the fault of the consultant who prepared them. However, the contractor is obligated to inquire about patent design errors prior to submitting its bid. If the contractor fails to do so it may be barred from making a claim in respect thereof at a later date, should insufficient plans and specifications cause damages to the contractor. Unfortunately, normal estimating practices and bidding periods do not allow for a careful review of either plans or specifications before the contractor submits its bid.

6. **Owner’s Responsibility For Design**

In a typical construction project, the consultant has no direct contractual relationship with the contractor. Consequently, when insufficient plans and specifications give rise to a claim, the contractor who suffers damages will and must look to the owner for compensation. The damages which may be awarded to a contractor for a claim of this nature include damages for additional costs and losses for a number of items, including delay. In order to succeed, the contractor must prove that the insufficient plans and specifications caused the loss and prove the losses associated with design defects. Note, however, that an owner may be able to avoid liability for design errors which the contractor discovered or should have discovered before submitting its bid\textsuperscript{29}.

**B. RECOMMENDATIONS FOR AVOIDING CLAIMS ARISING FROM INSUFFICIENT PLANS AND SPECIFICATIONS**

(a) An owner should hire a reputable design consultant to reduce the likelihood of insufficient plans and specifications.

(b) An owner’s contract with the consultant should contain provisions which require and ensure sufficient plans and specifications, and which will give the owner recourse if plans or specifications are insufficient.

(c) An owner should include in its contract with the consultant an indemnity clause in the event that a contractor claims for damages in respect of insufficient plans and specifications or deficient or late review of shop drawings by the consultant.

(d) You get what you pay for. Many developers, especially those involved in the development of condominium complexes, will try and save money by obtaining the bare minimum from design consultants. The developers should keep in mind

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\textsuperscript{29} *Construction Delay Claims*, 3rd Ed., Barry B. Bramble and Michael T. Callahan, 2000, Aspen Law & Business, at p. 3-16.
that should construction claims arise, they will need to show that the plans and specifications were sufficient and did not cause or contribute to the loss.

(e) Contractors should ensure that they adequately review plans and specifications for obvious deficiencies and to alert the owner and consultant in respect of any such defects.

(f) To avoid design-caused delays in a design-build arrangement, a detailed binding schedule such as the critical path method (CPM) schedule for both design and construction will alert all parties to their responsibilities and to the potential adverse consequences of the failure to perform in a timely manner\(^\text{30}\).

VIII. CLAIMS

A. FAILURE TO SCHEDULE AND COORDINATE

Improper scheduling and coordination of the trades leads to a disorganized construction project prone to disputes, claims and considerable losses for all involved. Proper scheduling and coordination is thus required for a successful and profitable construction project.

1. Scheduling Clauses

Scheduling clauses are intended to do the following:

(a) Assure the owner that the contractor has a rational schedule and plan for construction;

(b) Alert the owner and its agents to dates by which the contractor may expect owner-required actions;

(c) Provide a standard for measuring the contractor’s progress; and

(d) Document the contractor’s actual progress.

2. Coordination Clauses

Delay often results as a result of the lack of coordination of various parties, activities and events on a construction project. Properly drafted coordination clauses allow for coordination of these issues and reduce the likelihood of delay resulting from failure to coordinate. Most coordination clauses afford the contractor the right and duty to coordinate, supervise, and direct the work, in addition to the means, methods, techniques, sequences and procedures of construction.

3. **The General Conditions - Scheduling**

GC 3.5 in the CCDC 2 – 1994 relates to construction schedules. Under this provision, the contractor is required to:

(a) provide the owner and the consultant with a construction schedule that indicates

(i) the timing of the major activities of the work, and

(ii) provides sufficient detail of the critical events and their inter-relationship,

(b) prior to the first application for payment\(^{31}\).

As such, and expectedly so, a contractor is contractually required to plan and schedule the work early on in the project. In addition, the contractor has an ongoing obligation to do the following:

(a) Monitor and ensure that the work is proceeding in accordance with the construction schedule\(^{32}\);

(b) Update the construction schedule monthly or as otherwise required by the contract\(^{33}\); and

(c) Advise the consultant of any revisions required to the construction schedule as a result of any extensions in the contract time due to changes in the work\(^{34}\).

Contractors should therefore be conscious of their contractual requirement to update the construction schedule should any remedial work be done which results in changes to the work and an adjustment of the contract time\(^{35}\).

4. **The General Conditions - Coordination**

In the context of contract documents, GC 1.1.8 references the contractor’s right to divide the work among the subtrades. In other words, the contractor decides the extent of work to be performed by each subtrade.

The general conditions under GC 3.8 for “Subcontractors and Suppliers” state that the contractor is to enter into contracts with the subtrades in respect of the work described in the “contract documents”, as it is defined in the general conditions.

Note that the owner has a right under GC 3.8.3 to make a reasonable objection to a certain subtrade conducting work on the project. By the same token, contractor cannot be forced to hire a subtrade to which it has a reasonable objection\(^{36}\).

\(^{31}\) GC 3.5.1.1 of CCDC 2 – 1994  
\(^{32}\) GC 3.5.1.2 of CCDC 2 – 1994  
\(^{33}\) GC 3.5.1.2 of CCDC 2 – 1994  
\(^{34}\) GC 3.5.1.3 of CCDC 2 – 1994  
\(^{35}\) GC 3.13.3 of CCDC 2 – 1994  
\(^{36}\) GC 3.8.3 of CCDC 2 – 1994
5. **Government Entities**

Most standard form construction contracts do not have detailed scheduling clauses. The CCDC 2 – 1994 is fairly standard in terms of its requirement for the contractor to submit a progress schedule shortly after the contract award and for the required updates to the schedule.

Some government agencies have included more detailed and sophisticated scheduling requirements in their construction contracts to deal with their particular circumstances, such as the following:

(a) A preliminary network diagram indicating work activities for the first 60 days;

(b) A detailed network diagram depicting the order, interdependence, and sequence of construction, procurement and submission activities and showing, for example, milestones, government activities affecting progress, activity durations of 30 days maximum, and differentiation of construction areas;

(c) Time-scaled summary network diagrams;

(d) A detailed activity report including activity identification numbers, description, duration, early / late start and finish dates, manpower, float, and dollar value;

(e) Detailed updating requirements;

(f) Requiring contractors to maintain their own CPM\textsuperscript{37} schedules during construction; and

(g) Requiring only the contractor to report data in a form that would allow the owner to monitor the contractor’s work through a network schedule.

6. **Delay And Failure To Schedule And Coordinate**

Failure to properly schedule and coordinate a project results in disorganization and disruptions which often lead to delay claims. As such, ensuring proper schedules is key to any project.

Schedules are an important part of proving or refuting delay and other impact claims because they provide a detailed medium for comparing and measuring time and intent. The use of a detailed method to present a time claim is important to carry the claimant’s burden of proof for its entitlement to both delay and other additional costs a delay may have caused. In the United States and other countries, schedules are increasingly used to prove a delay. Schedules are thus important not only to avoid delay, but for evidence to be used in any delay claim.

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\textsuperscript{36} GC 3.8.5 of the CCDC 2 - 1994.

\textsuperscript{37} CPM means critical path method.
Finally, schedules serve as an early warning signal to problems in the construction. If the work is not proceeding in accordance with the intended schedule, immediate action should be taken by the parties to determine the cause.

B. RECOMMENDATIONS FOR AVOIDING CLAIMS ARISING OUT OF A FAILURE TO SCHEDULE AND COORDINATE

(a) Some scheduling experts recommend the use of scheduling clauses that focus less on specific technical aspects and more on the goals and purpose of the schedules.\(^{38}\)

(b) Parties should realize that when using the schedule to independently document the contractor’s actual progress, specific technical aspects may be necessary if contractor submissions are to conform to the owner’s computer software and hardware.

(c) Owners should be aware that if the bid package includes a CPM or other detailed schedule for the proposed work, the contractor may later succeed at a claim that the owner assumed liability for, by including such a schedule in the bid package.

(d) Government or other public entities with idiosyncrasies which may affect the scheduling and coordination of a construction project should ensure that they obtain the necessary advice to include additional scheduling and coordination clauses which protect them from scheduling disruptions.

(e) If delay is an issue, a specific clause can be added to the scheduling provisions requiring the CPM schedule submission to deal with identifying and quantifying delays.

(f) Contractors should ensure the proper flow and coordination of the scheduling and supply of information (such as time extensions) to subcontractors to avoid incompatible completion times between subcontracts and the contract.

(g) Contractors should be aware that the radical or unreasonable re-sequencing of the work may constitute a breach of the subcontract and may expose contractors to subcontractor claims.

\(^{38}\) Construction Schedules, Callahan Hohns, at 56, 64.
IX. CLAIMS

A. FAILURE TO COOPERATE

There is no specific term requiring “cooperation”, *per se*, in the general conditions of the CCDC 2 – 1994. There are, however, terms which require the contractor to carry out certain duties.

1. The Owner’s Duty To Cooperate

An owner generally does not have many obligations under the contract, but are generally required by the contract to:

- (a) Provide the contractor with access to the site;
- (b) Providing adequate information and instructions in order for the contractor to carry out the work; and
- (c) Pay the contractor in accordance with the terms of the contract.

A fundamental contractual duty of the owner is to provide the contractor with the project site. This duty to provide access to the project site is often an implied warranty, as opposed to being an express term of the contract. An owner may interfere with the contractor’s access to the site and fail to cooperate by:

- (a) Denying access to the project;
- (b) Imposing restricted work areas;
- (c) Using the site in a way that impedes the contractor’s work at the site; or
- (d) Allowing other contractors to work on the project site in a way that interferes with the contractor’s work.

It is, therefore, important for the owner to be conscious of the ways in which it may impede the contractor’s access to the project sites, and ensure that it avoids doing so. Impeding the contractor’s access to the project site will often result in construction claims and, especially, delay claims.

Providing access to the project site requires the owner to have legal ownership or rights to the property on which the project to be built. This point is especially worth mentioning for public entities involved in highway or transportation construction. Disruption in the work and resulting delay often occur in such construction because of the failure of the owner in that circumstance to provide the contractor with necessary rights of way to proceed over the land of others. Similar problems can occur in the erection of power transmission lines or communication towers. Note

that the coordination of construction operations with adjacent activities, such as railroad operations, may also be the owner’s responsibility under the terms of the specific contract documents.\(^{40}\)

2. **The Contractor’s Duty To Cooperate**

Generally speaking, the contractor has the obligation to complete the work in accordance with the contract documents and in the time frame specified by the contract. As a subset of those duties, the contractor must coordinate all aspects of the construction work through its control of the means, methods, techniques, sequences, and procedures for completing the work. The failure to cooperate by the contractor often results in a breach of the contract and resulting subcontractor and other claims.

### B. RECOMMENDATIONS FOR AVOID CLAIMS ARISING OUT OF FAILURE TO COOPERATE

1. All parties should ensure that they have the ability to cooperate and carry out their duties under the contract prior to entering into the contract to avoid breach of contract claims. This may require that certain steps be taken in advance, such as an owner ensuring that it has the title to the land in question and the ability to provide access or a right of way.

2. If you anticipate a problem or if you question another party’s ability to cooperate under the contract, then either:
   1. Do not enter into a contract with the other party; or
   2. If you enter into a contract with the other party in any event, ensure there are express terms in the contract on which you can rely for when the other party fails to cooperate during the duration of the project.

### X. LIABILITY AFTER COMPLETION

#### A. NEGLIGENCE CLAIMS

In addition to contractual obligations, parties owe each other duties in the law of tort. This area of law is expansive and historical. I will outline some general principles pertaining to the law of negligence, and then concentrate on the duties of the consultant.

\(^{40}\) *Ibid*, Bramble and Callahan.
1. **What Is Negligence?**

Negligence is conduct that falls below a standard established by the law for protection of others against unreasonable risk of harm. In order to prove negligence, a party must prove the following:

(a) Duty of care – the party at fault owes a duty or obligation to the complainant, recognized at law, requiring that party to conform to a certain standard of conduct;

(b) Breach of the duty of care – a failure on the part of the party at fault to conform to the standard required;

(c) Causation – there is a sufficiently close causal relationship between the breach of the duty of care and the resulting loss;

(d) Foreseeability – it was reasonably foreseeable that the breach of duty of care would cause the loss; and

(e) Actual loss of damage resulted from the breach of duty of care.

Negligence can arise from action or inaction. Inaction is essentially an omission, or a failure to do something which is required at common law or by the contract. Negligence also includes a failure of a party to warn another party about a defect, potential loss or danger.

2. **Duty of Care**

A duty of care exists where there is a proximate relationship between the parties, such as a contractual relationship or a fiduciary relationship.

The duty owed to a contracting party exists independently from the contract and thus gives rise to a separate cause of action. The Supreme Court of Canada has discussed the interrelationship between tort and contract in these circumstances:

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.41

Where the cause of action is available, parties may sue in contract or in negligence or both, unless the parties have specifically contracted away part or all of the ability to sue in negligence. This latter point is important for parties to consider when entering into contracts. It is important for parties to know what duties exist at law in order to determine whether they should contract out of such duties.

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41 *Central Trust Co. v. Rafuse and Cordon*, [1986] 2 SCR 147, at p. 149.
3. **The Standard of Care - Reasonableness**

The standard of care applicable to parties is one of reasonableness and not perfection. The questions asked in this regard are:

(a) What would the reasonably prudent owner, contractor or consultant do in the circumstances? and

(b) Does the conduct in question fall below that of the reasonably prudent owner, contractor or consultant in the circumstances?

4. **Generally Accepted Construction Standards**

In consideration of whether certain actions fall below the accepted standard for the industry and whether a duty of care has been breached, the courts consider the generally accepted construction standards for the work at issue - courts consider what is normally done in the industry. Note however, that what is generally accepted in the industry may still be negligent. The determining factor is whether the acts or omissions at issue fall below an accepted standard, and not whether it is common in the industry.

5. **Building Codes And Regulations**

Breach or compliance with the applicable building codes or regulations does not necessarily exculpate a party from liability in negligence. Breach or compliance is merely one factor in determining whether or not a party has met its duty to use reasonable care in the circumstances.

6. **Duty Of Care**

**Between The Parties**

In general, a party owes a duty of care to all those whom the party can foresee will suffer harm if the party does its job improperly. In construction, the owner, the consultant, and the contractor each owe the other a duty of care to act reasonably in their respective roles in the construction of the project. However, our courts have determined that a subcontractor does not owe an owner a duty of care for claims in pure economic loss or for delay as the relationship is not sufficiently proximate.42

**The Consultant**

The courts have determined that the consultant on a construction site owes the following duties:43,44:

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(a) The duty to make inquiries as to the specific purpose of the project;

(b) The duty to warn the owner of possible adverse consequences or difficulties that may arise from the owner’s instructions;

(c) The duty to retain additional advice on new techniques or products;

(d) The duty to prepare a design that meets the client’s requirements;

(e) The duty to revise the design when the consultant becomes aware of defects or other problems during the construction of the project or structure;

(f) The duty to provide a reasonable estimate of the cost of construction. Where there are design changes or inflation, the consultant remains under a duty to advise the owner of increased costs in the form of a revised estimate;

(g) The duty to subcontract design work where the consultant does not have the sufficient expertise or capacity to properly design the entire project;

(h) The duty to use reasonable care in the selection of further design consultants; and

(i) The duty to supervise the work and inspect it sufficiently often to ensure that the project is being constructed in conformity with plans and specifications. Responsibility for how the work is performed lies with the contractors.

Contractors and owners should include any of the above-cited common law duties of the consultant in the contract if they anticipate an issue or problem in that regard. A contractual term is the strongest basis of a claim against another party. Alternatively, if a common law duty does not exist for a particular need or issue, then contractors and owners should ensure that a contract term is created to cover what common law fails to ensure.

7. **Contracting Out of Tort Law**

Any duty or obligation under the contract is in addition to any duties or obligations at law, unless you specifically indicate otherwise in the contract documents. Therefore, you must be aware not only of what the contract requires you to do or not to do, but also of your obligations at law, no matter what your role in the project may be.

If you anticipate needing some flexibility at law, you should incorporate the necessary terms into the Contract to provide for such flexibility. This is an important step in your risk management. In that regard, lawyers play an important role in risk management at an early stage.

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45 Note that if a dispute arises over the reasonableness of an estimate, the consultant has the burden of proving that the estimate was reasonable.

46 GC 1.3 of CCDC 2 - 1994
8. **Other General Conditions**

The general conditions of the CCDC 2 provide that the contractor is responsible to the owner for the acts and omissions of the subtrades as if the subtrades were employed by the contractor via the principle of vicarious liability. This is an important provision for the protection of the owners since subcontractors owe owners a limited duty of care at law and in certain circumstances owners must claim against the contractor for any deficient work or product by a subcontract.

9. **Notice Requirements For Making A Claim And Default Provisions**

When a dispute arises on the construction site, the general conditions set out a number of notice requirements which must be complied with.

GC 2.2.7 states that whenever a dispute or other matter in question arises relating to the performance of the work or interpretation of the contract, a party must refer the problem to the consultant first by:

- (a) providing notice,
- (b) in writing,
- (c) to both the consultant and to the other party,
- (d) within a reasonable time.

The consultant is in theory an unbiased adjudicator rights between the contractor and the owner pursuant to the terms of the contract. I say “in theory” because the consultant is being paid by the owner and is thus in an inherent conflict of interest situation whenever an adjudication of rights under the contract is required. Nonetheless, the consultant’s duty is to act fairly and in an unbiased manner.

If the consultant finds that the contractor is not doing the work properly, in compliance with the contract, or at all, and is not following the consultant’s instructions, then the consultant will provide a written statement to the owner and the contractor that sufficient cause exists to justify a finding of default. The owner may then provide written notice to the contractor that the latter is in default of the contract and require that the contractor correct the default within 5 working days of receiving the notice.

If the contractor does not correct the default within 5 working days or does not take the steps required by GC 7.1.3, then the owner may, pursuant to GC 7.1.4.1, correct the default and

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47 GC 3.8.1.3 of CCDC 2 - 1994
48 GC 7.1.2 of CCDC 2 - 1994
49 Where the contractor cannot correct the default within 5 working days it is required to take the steps set out in GC 7.1.3.
complete the work and deduct the cost of such work from any amounts which the owner may thereafter owe the contractor under the contract.

Invoking the general conditions for terminating the contract is often a last resort for an owner. The cost of terminating the contract with the existing contractor, stopping the work, finding another contractor who will no doubt charge a hefty amount for completing the work, is often not the best or most cost effective method of resolving a dispute and finishing the work. Furthermore, the owner should also give notice to the bonding company of the default. The surety is then entitled to a reasonable period of time in order to investigate the situation and then make a decision on whether to (1) complete the contract in accordance with the terms and conditions of the contract or (2) obtain bids from contractors for completing the work. In the meantime, the work on site is stopped and the owner is forced to wait.

From the contractor’s perspective, it is not profitable to be terminated off a project. There are provisions in the contract permitting an owner to retain the balance of the contract monies for the incomplete work50, to charge the contractor for additional costs associated with completing the work51, and to claim a set-off for any claims made by the contractor for the monies owing under the contract52. There are also concerns as to any damage which may be done to the contractor’s reputation in the industry.

What should be clear is that all parties benefit from properly drafted contract containing adequate provisions for alternative dispute resolution, so that disputes can be resolved without having to resort to the termination provisions under the contract.

10. **Indemnification Provisions Under The General Conditions**

To indemnify means to guarantee against any loss which another might suffer. For example, two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.

To hold another party harmless is to promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them.

GC 12.1 provides that the contractor shall indemnify and hold harmless the owner and the consultant for any claims by third parties that arise out of or are attributable to the contractor’s performance of the contract. Note, however, the following:

(a) This indemnity provision is limited to the situations set out in GC 12.1.1, GC 12.1.2, and GC 12.1.3;

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50 GC 5.8.1 and GC 7.1.5.2 of CCDC 2 - 1994
51 GC 7.1.5.3 and GC 7.1.5.4 of CCDC 2 - 1994
52 Swagger Construction Ltd. v. U.B.C., 2001 (BCSC – Hood J.)
(b) What is noticeably excluded from the indemnity provisions is a claim by a subcontractor against an owner for delay or for lien holdback monies;

(c) The indemnity has a built-in limitation period of 6 years;

(d) There is a claims limit of $2,000,000.

11. **Waiver Of Claims Provisions Under The General Conditions**

Owners should note that once the final certificate of payment is issued by the consultant, the owner is deemed to have expressly waived its right to claim against the contractor in contract and in negligence, except for the three exceptions set out in this general condition\(^{53}\). Those exceptions are:

(a) Claims for which notice has been given in writing prior to the date of the final certificate of payment;

(b) Claims arising from the indemnity provisions or the warranty provision under the contract; and

(c) Claims arising out of the toxic and hazardous substances provisions of the contract.

Similar provisions for waiver of claim by the contractor against the owner are found in GC 12.2.2.

It is extremely important for an owner to give notice in writing of any disputes or problems with the contractor’s work prior to the issuance of the final certificate of payment and, in any event, as soon as the dispute arises as set out in GC 2.2.7. This especially true since warranties under the contract are limited, as I will discuss below.

XII. **LIABILITY AFTER COMPLETION**

A. **WARRANTY**

1. **What Are Warranties?**

Warranties can be express or implied.

Express warranties are written or oral statements of fact or promises that relate to the subject of the contract made by one of the parties to a contract. I will discuss the express written warranties contained in the general conditions below. Owners often make specific representations about the conditions of the site and about schedules. Such representations may be construed as warranties

\(^{53}\) GC 12.2.1 of CCDC 2 –1994
that are breached if the conditions are materially different. The contractor may succeed at a claim in respect of such misrepresentations if they can prove, among other things, reliance on such representations.

Implied warranties are those which the law derives by implication or inference from the nature of the transaction or the relative circumstances of the parties. For example, when a contractor agrees to complete a particular project according to plans prepared by the owner, the court may find the owner to have impliedly warranted that the plans and specifications are possible to perform, are adequate for their intended purpose and are free from defects.

2. **The Warranty Provision In The General Conditions**

Under the contract, the contractor is responsible for providing the necessary warranties to the consultant, who will review them to ensure sufficiency and then provide them to the owner.54

The express warranty provision of the contract are contained in GC 12.3. Points to note are:

(a) The express general warranty under GC 12.3.1 for any matter arising out of the contract is for one year from the substantial performance of the work or for specific periods specific in the contract for certain of the work;

(b) The contractor expressly warrants the proper performance of the work and must promptly correct any deficiencies in the work if defects are found55;

(c) If an owner notices any defects, it must give prompt notice in writing to the consultant of such defect.

For certain of the work, the contractor may be required to and often does obtain extended warranties. Some typical work which have extended warranties include:

(d) Architectural woodwork;

(e) Fluid applied waterproofing;

(f) Air barrier membrane;

(g) Roofing and sheet metal;

(h) Aluminum skylights;

(i) Glass canopies;

(j) Structural glass wall system;

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54 GC 2.2.14 of CCDC 2 – 1994.  
55 GC 12.3.2 and GC 12.3.3 of CCDC 2 – 1994.
(k) Aluminum windows;
(l) Wood doors;
(m) Finish hardware;
(n) Aluminum curtain wall;
(o) Insulated sealed glass units;
(p) Carpeting;
(q) Seamless elastomeric flooring;
(r) Painting;
(s) Chalkboards and tackboards; and
(t) Dock lift.

Extended warranties are important to owners because deficiencies relating to certain parts of the work may not be evident or appear or occur until *after* the expiry of the one year general warranty. In that circumstance, written notice of the deficiency within one year of substantial performance of the contract is simply not possible. Owners should obtain advice from their consultants as to which portion of the work may be an issue in this regard, and then consider obtaining an extended warranty for this work.

**XII. CONCLUSION**

Disputes will inevitably arise on any construction site. While it is not possible nor realistic to expect that all claims can be avoided or will be properly resolved, understanding the nature of these claims, what gives rise to them and conducting an effective risk management analysis early on in the project will hopefully assist all parties to a contract, and to profit and benefit from the construction project.

**SAMANTHA IP**

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