

NAVIGATING CONSTRUCTION DISPUTES: Key Considerations for Your Project

*Presented by members of our
Infrastructure, Construction & Procurement Group*

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Construction Delays

A primer on notice and what can be claimed as damages for construction delays



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Triggers to Delay Claims

- Change in the conditions
- Unclear or change in scope of work
- Defective or insufficient plans or specifications
- Lack of co-ordination of drawings and specifications
- Information and design details not being provided in a timely manner
- Interference with contractor's operations
- Contractor's lack of manpower or poor performance

Impacts

Contract Time

- Extend duration of contract performance

Contract Price

- Business interruption
- Lost productivity
- Increased overhead costs
- Increased financing costs
- Acceleration costs

Contractual Notice Requirements

- CCDC
- CCA
- MMCD
- MOTI
- Municipal Contracts
- Supplemental Conditions
- Bespoke Contracts

CCDC 2 Notice

Delay Claims by Contractor

- GC 6.5.1
 - If caused by Owner or Consultant, then Contractors may claim extension of Contract Time and reasonable costs as a result of delay
- GC 6.5.2
 - If caused by “stop work order” issued by a court or other public authority, then Contractor may claim extension of Contract Time and reasonable costs as a result of delay

CCDC 2 Notice *(cont'd)*

- GC 6.5.3
 - If caused by
 - » labour disputes
 - » fire, unusual delay by common carriers or unavoidable casualties
 - » abnormally adverse weather conditions
 - » “any cause beyond the Contractor’s control”,
- then the Contractor may claim extension of Contract Time but no costs as a result of delay

CCDC 2 Notice *(cont'd)*

- GC 6.5.4
 - “No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay.”
- Query: Supplemental Conditions
 - May also require Notice in Writing to claim an increase to Contract Price

CCDC 2 Notice *(cont'd)*

- GC 12.2.6
 - To preserve a claim which would otherwise be waived under GC 12 [WAIVER] after Substantial Performance of the Work, the party must include the following in its Notice in Writing of its claim:
 - » a clear and unequivocal statement of the intention to claim,
 - » a statement as to the nature of the claim and the grounds upon which the claim is based, and
 - » a statement of the estimated quantum of the claim
- Query: Supplemental Conditions
 - Difficult to estimate quantum of delay claim damages

CCDC 2 Notice *(cont'd)*

- Requirements for Notice in Writing set-out in Article A-6
 - Notice delivered to person and address identified in Article A-6
 - Notice may be delivered by hand, courier, pre-paid first class mail, fax or e-mail
 - If by hand or courier, delivery deemed received on delivery date
 - If by mail, delivery deemed received 5 days after it was sent (and if that day is not a working day, then the following day)
 - If by fax or email, delivery deemed received on date of transmission (unless received after business hours, than deemed received the next working day)

Purpose of Notice in Writing

Heintzman and Goldsmith on Canadian Building Contracts:

“The purpose of the notice is to alert the other party to the alleged delay or changed conditions so that the other party has the opportunity to decide what cause of action to take on the job – whether to discontinue, change or proceed or accelerate the particular work – and to consider the increased compensation that the claimant will likely seek.”

Consequences

Consequences of a failure to provide Notice in Writing as strictly required by the Contract

Corpex (1977) Inc. v Canada (SCC)

- Leading case on notice from Supreme Court of Canada
- Notice requirements in the contract was a “condition precedent” to a claim for extra costs
- Because the Contractor failed to give notice as required under the contract, the Contractor’s claim could not succeed

Consequences *(cont'd)*

Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd. (BCCA)

- Leading BC case on notice in delay claims
- Contractor claimed impact costs for “inefficiency created by delays, interference, and changes of the sequence of the work” beyond what the Contractor had already claimed in its Change Orders
- The Contractor argued that each Change Order had an impact on costs, which was like a “ripple effect” on the project and the cumulative effect of these impact costs could not be determined until completion of the project

Consequences *(cont'd)*

Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd. (BCCA) (cont'd)

- The Owner rejected the claim on the basis that claiming impact costs without giving notice deprived it of the opportunity to assess the delays and explore methods of cost reduction
- The court sided with the Owner and rejected the Contractor's delay claim
- The complaints of the Contractor to the Owner regarding delays did not go beyond "mere grumblings to display an intention to claim"
- Further, the court stated that "not one of the 50 Change Orders contained a reservation or indication of the fact that further costs, direct, indirect or cumulative, could be attributable to the specific item being dealt with"

Consequences *(cont'd)*

ANC Developments Inc. v. Dolcan Contractors Ltd. (Alta CA)

- Delay claims and claims for extra work asserted
- Contract required Notice in Writing to be delivered within a specific time and excluded damage claims for a failure to do so
- The court rejected the claims
- Requests the complaints made at site meetings recorded in meeting minutes and subsequent requests for compensation did not constitute sufficient notice
- Both the form and timing of the notice is important

Consequences *(cont'd)*

Technicore Underground Inc. v. Toronto (Ont CA)

- Contract set out a mandatory procedure for the filing of claims which stipulated claims are to be submitted no later than 30 days after completion of the work affected by the situation
- The Contractor submitted an initial claim which stated that “some costs have not yet been identified” and “reserve[d] the right to claim payment for work(s) not specifically mentioned herein.”
- The court rejected the Contractor’s claim
- The court concluded that the Owner did not clearly and unequivocally waive its right to rely on the notice provision and there was no pattern of conduct by the parties in carrying out the contract evidencing an intention not to be bound

Consequences *(cont'd)*

Ross-Clair v. Canada (Ont CA)

- Contract required notice to be in writing, submitted within a specific time period and contain sufficient information to describe the claim
- The court rejected the Contractor's claim
- The court found that the notice provided lacked "specificity", was "confusing in terms of identifying the parts of the project affected by the delay" and there was "virtually no information in support of the extra work done and the costs associated"

If No Strict Compliance – There are still Arguments

Constructive Notice

W.A. Stephenson Construction (Western) Ltd. V. Metro Canada Ltd. (BCSC)

- Contractor did not comply strictly with the contractual notice provisions
- Owner had actual or constructive notice of the claims throughout the course of the project and there were “meticulous” meeting minutes documenting the claims
- The court allowed the Contractor’s claims

Arguments *(cont'd)*

Constructive Notice

Centura Building Systems Ltd. V. Cressey Whistler Project Corp. (BCSC)

- The court refused to dismiss the claim even though there was technical non-compliance with the contractual notice provisions
- The court held that the notice provisions in the contract were a condition precedent for a successful claim but that it was the “substance rather than the form of the notice” that was important
- The notice provided “sufficient particularity to ensure the recipient understands a claim will be advanced against it for costs related to delays”

Arguments *(cont'd)*

Reservation in Change Documents

Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd. (BCCA)

- The court indicated that the rejection on the delay claim for lack of notice was in part due to a lack of any reservation of rights to make such a claim

Graham Construction & Engineering (1985) Ltd. v. La Caille Developments Inc. (Alta)

- The court held that the reservation of rights in a Change Order was sufficient notice for the claim

Arguments *(cont'd)*

Waiver

Clearway Construction Inc. v. Toronto (Ont CA)

- Owner denied Contractor's claim on the basis that it failed to bring its claim within 30 days from completion of the work
- The Owner had routinely deviated from the strict terms of the contract
- The court rejected the Owner's summary application to dismiss the claim
- It was open to the Contractor to argue at trial that a party may waive its right to rely on notice provisions in a contract if there is sufficient evidence of its intention not to be bound by its terms

Lessons Learned

- Read your contract. Better yet, get advice before signing your contract
- Contractual terms regarding notice for delays are conditions precedent to making such claims
- Strict compliance with contractual notice provisions is the safest course
- If you have not strictly complied with your contractual notice provisions, all may not be lost
- You may argue
 - Constructive Notice
 - Reservation of Rights
 - Waiver

Construction Delay Damages

Identification and Calculation



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Disruption vs. Delay



Disruption vs. Delay

Disruption:

- Actions or events that cause the contractor to complete the work in a different manner than contemplated at the time of the bid.
- For example: defective plans, owner-initiated changes, failure to approve shop drawings, unforeseen site conditions
- A “disruption” claim captures the cost of working less efficiently than planned. It is “productivity related”.

Delay:

- The extension of the completion date for the project, or part of it.
- A “delay” claim captures the cost of not being able to work, or not completing the work on time.
- Disruption may cause delay, and delay may cause disruption.

Categories of Delay

- Owner-caused delays - contractor is entitled to extension of time and compensation for its delay costs
- Contractor-caused delays – contractor is not entitled to an extension of time or compensation and contractor may be liable to owner for owner’s delay costs
- Excusable delays (not attributable to either party) – contractor entitled to extension of time, but not compensation

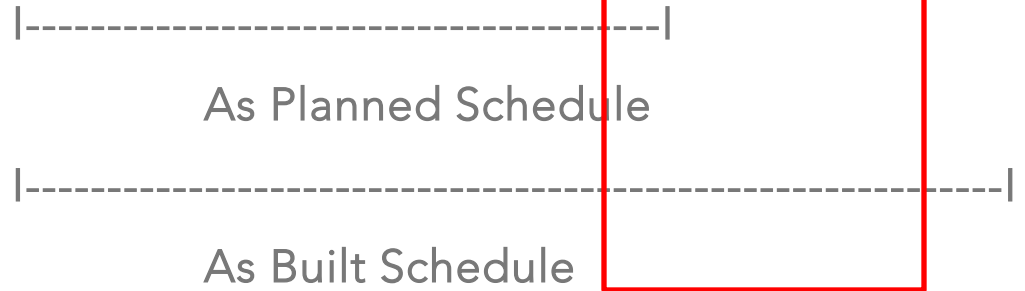
Identifying Delay

- Critical Path vs. Float
- Is the delay on the critical path?
- Has the delay been neutralized by acceleration?

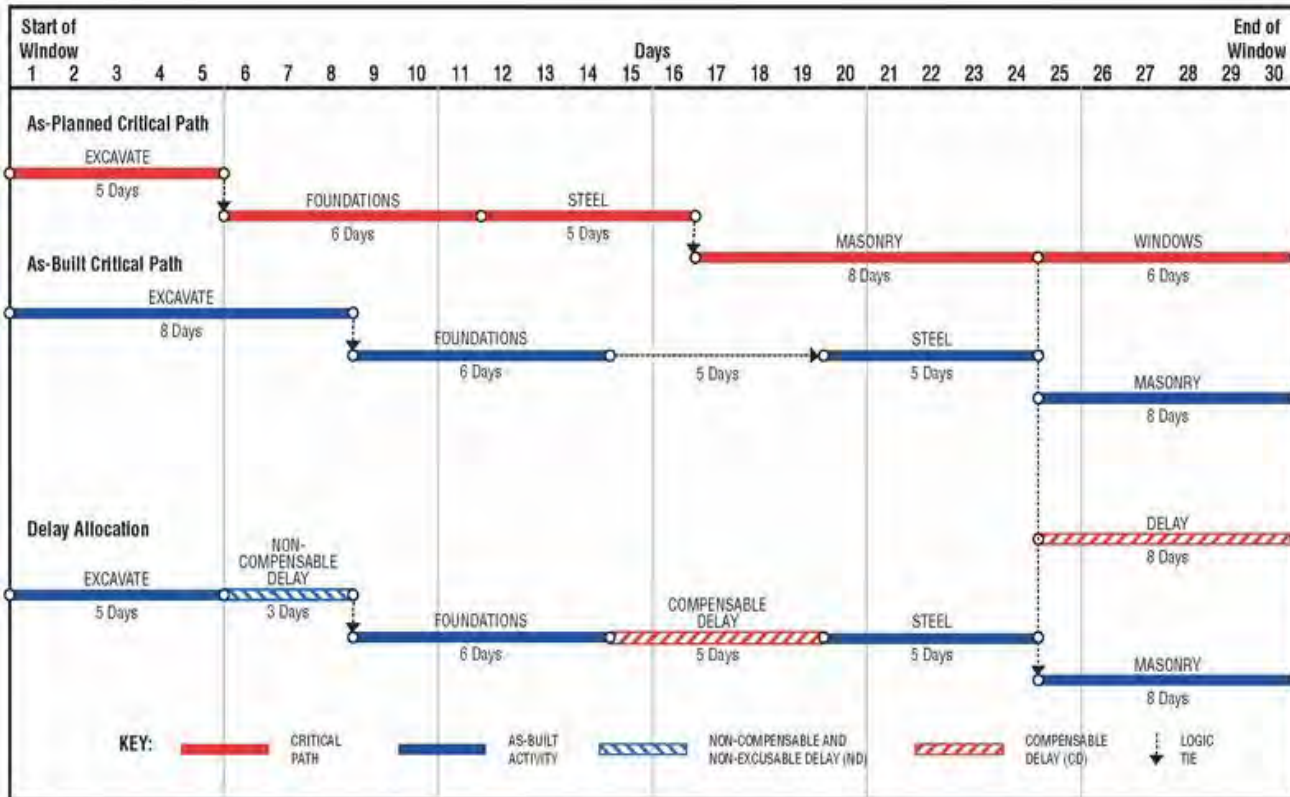


Identifying Delay

- Multiple valid methods of determining compensable delay period:
- Total Time Approach
- Impacted As-Planned Schedule
- But-For Approach/Collapsed As-Built
- Contemporaneous Time Method
- Time Impact Analysis
- Windows Analysis
- Expensive to prove



Identifying Delay – Windows Method



Calculating Delay Damaged - Contractors

- Head office and site overhead costs
- Equipment rental costs
- Labour and material costs
- Business interruption
- Financing costs
- Insurance and bonding costs
- Lost productivity
- Acceleration costs



Calculating Delay Damages - Owners

- Loss of rent
- Loss of revenue and profits
- Financing costs
- Insurance costs, depending on the contract
- Materials and labour inflation costs



Preparing for Delay Claims

Contractors

- Ensure contract contains adequate provisions for extension of time due to delay
- Ensure that the contract contains specific provisions allowing for the resolution of delay related issues within the scope of the contract;
- Ensure that sufficient float is built into the schedule
- Keep records of delay-related costs

Owners

- Ensure that the contract contains specific provisions allowing for the resolution of delay related issues within the scope of the contract
- Essential to provide sufficient notice under the contract of the delay(s)
- Consider providing notice of delay along with a genuine pre-estimate of damages for that delay, prepared by an expert consultant

Liens, CPLs and Other Charges

*An analysis of liens, CPLs and other charges –
how to register, remove and manage them*



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COVID-19 Context to Liens and Other Charges

- In today's times:
 - Many trades are claiming for extras/ delays
 - Owners are paying more than anticipated, or preparing to deal with disputes later on
 - Likely more disputes regarding payments/ delays due to COVID-related requirements
- Important to understand how liens and other charges on land work to ensure payment (contractor)/ protect your rights (owner)

What is a Builder's Lien?

- Secures a claim for payment for work or materials supplied to a property or an improvement (eg building)
- Creates an "*in rem*" (latin: "in the thing itself") claim against land and improvement – attaches to land/improvement itself
 - vs. "*in personam*" claim in contract
- Created by filling out a form and registering it in the Land Title Office
- Governed by the BC *Builders Lien Act* (the Act)
- Prevents the owner from dealing with the property:
 - Development
 - Financing – new or existing
 - Sales/transfers

Builders Liens – Strict Compliance Required

- As claim of lien is created by a statute, must strictly comply with requirements of the Act
 - Timing requirements
 - Information required on the lien form
 - Enforcement of claims of lien
- Courts have no discretion to correct the parties' non-compliance with requirements of the Act
 - Eg. Filing a lien late – courts cannot extend deadline

Builders Liens – Strict Compliance Required

Case Comments

- ***Yongfeng Holdings Inc v Zheng, 2019 BCSC 1534***
 - Y Holdings built a house for Mr. Zheng
 - Y Holdings filed a lien, mistakenly inserted Mr. Zheng's (owner's) address instead of its own (lien claimant's) address
 - Court found the mistake extinguished the lien
- ***581582 B.C. Ltd. v. Habib, 2013 BCSC 378***
 - 581582 B.C. Ltd. doing business as ANE Consulting contracted to build a house
 - Lien filed by "ANE Consulting Ltd."
 - Claimant not a proper legal entity, lien extinguished

Timeline for Filing a Lien Against Land

A lien must be filed (s. 20 of the Act):

1. If a Certificate of Completion was issued, 45 days after issuance; or
2. If there is no Certificate of Completion, 45 days after the head contract has been completed, abandoned or terminated; or
3. If there is no head contract, 45 days after the improvement has been completed or abandoned.

NOTE 1: A lien can still be filed after the deadline, but will be invalid

NOTE 2: If there is a head contract, lien filing deadline is determined with reference to completion/ termination of this head contract

Certificate of Completion

- Is issued by a “payment certifier”, defined as (s. 7(1) of the Act):
 - an architect, engineer or other person identified in the contract as the person responsible for payment certification; or
 - The owner re payments to contractor, or owner and contractor jointly re payments to subcontractor
- If requested by a contractor, a payment certifier must assess whether a contract has been completed, within 10 days from the date of such request (s. 7(3) of the Act)
- If the contract has been completed, payment certifier must issue the certificate of completion and, within 7 days (s. 7(4)):
 - Deliver a copy to the owner and the head contractor; and
 - **Post a notice of certification of completion in prominent place on the improvement**

Timeline for Filing a Lien

“Completion” Defined

- “Completed”, if used with reference to a contract or subcontract..., means substantially completed or performed, not necessarily totally completed or performed (s. 1 of the Act)
- A contract is substantially performed if the work to be done under that contract when the work to be done under that contract is capable of completion or correction at a cost of not more than (s. 1(2) of the Act):
 - 3% of the first \$500,000 of the contract price;
 - 2% of the next \$500,000 of the contract price; and
 - 1% of the balance of the contract price

Which Lands Can You Lien?

Lienable Lands	Non-lienable Lands
<ul style="list-style-type: none">• Lands registered in the land title office or gold commissioners office	<ul style="list-style-type: none">• Lands that are NOT registered in the land title office or gold commissioners office
<ul style="list-style-type: none">• Provincial crown lands	<ul style="list-style-type: none">• Federal lands (including Indian reserve lands)
<ul style="list-style-type: none">• Municipal lands	<ul style="list-style-type: none">• Highways / certain ferry properties
<ul style="list-style-type: none">• Schools and other public facilities	<ul style="list-style-type: none">• Improvements by the Minister of Forests and forest service roads

What Can One Lien For?

- 2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement, performs or provides work, supplies material, or does any combination of these things, has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
 - the interest of the owner in the improvement;
 - the improvement itself;
 - the land in, on or under which the improvement is located;
 - the material delivered to or placed on the land.
- **Cannot lien for:**
 - Interest, lost profit, work not yet performed
 - Damages/delay claims – except components including actual work

If Payment is not Received

How to Enforce a Lien?

- A lien becomes invalid within one year from filing unless enforced by a court action
- To enforce, within 1 year from filing of a claim of lien:
 - File a Notice of Civil Claim in the BC Supreme Court (even if claim under \$35K - Small Claims jurisdiction)
 - File a Certificate of Pending Litigation (CPL) in the Land Title Office
- Along with the lien, CPL will appear as a charge on title to the subject property

How to Enforce a Lien Against the Land?

- CPL creates further restrictions on dealing with title to the property
- Above enforcement process can be sped up from 1 year to 21 days by delivering a “21 Days Notice” under the *Builders Lien Act*
 - If Notice of Civil Claim and CPL not filed within 21 days, lien will be extinguished
 - Useful when: small claim, questionable merits

Removing Liens/CPLs

Clearing Title to the Property

- Some reasons to remove liens and CPLs from title:
 - Development of land/financing
 - Sales/transfers
 - Deferral of taxes
- Usually done by court application, but can be done by security agreement with lien claimant's lawyer if providing as security the full amount of lien
- If a CPL is filed in relation to the lien, both charges are removed with same application
 - See *4HD Construction Ltd. v. Dawson Wallace Construction Ltd.*, 2020 BCSC 1224 for related discussion

How to Remove Liens Against Land?

Disputed Liens – S. 24 of the *Builders Lien Act*

- Can discharge a lien by paying into court OR lawyer's trust account the full amount of lien
- In order to receive the money posted as security, lien claimant must prove its claim/ negotiate a settlement
- **Pros:** quick resolution, usually unopposed, can dispute the validity of lien later, can pay money into lawyer's trust account under agreement (without court application), can post a lien bond instead of cash
- **Cons:** money posted can be "locked up" for the duration of the dispute/ litigation

How to Remove Liens Against Land? *(cont'd)*

Undisputed Liens – Section 23 of the Act

- Owner/GC can discharge a lien by paying into court the lesser of:
 - the total amount of lien claims, or
 - the amount owing by owner/GC to the person hired by them, provided that amount is at least equal to the statutory builders lien holdback (usually 10% of payments made)
- **Pros:** final resolution of claim of lien
- **Cons:** holdback amount may be disputed

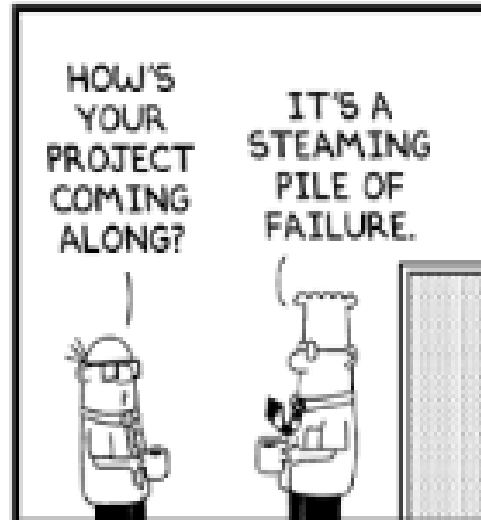
How to Remove Liens Against Land? *(cont'd)*

Improper/ invalid Liens – Section 25 of the Act

- Apply to the court to remove a lien on the basis that:
 - Lien was filed out of time; or
 - Lien is vexatious, frivolous or an abuse of process (filed against wrong land, for amounts not lienable, etc.)
- **Pros:** final resolution
- **Cons:** often opposed – turns into a substantive hearing – must have a strong case to succeed

Early Advice

- Have a lawyer prepare/ review your agreement – ensure the contract includes provisions re delays and extras/ changes
- Document extras/changes in writing
- Negotiate, compromise and settle disputes if possible
- If payment not received, act quickly and file your lien
- Diarize deadlines to enforce a lien (1 year after filing)
- **Liens are complicated – seek legal advice to ensure your interests are fully protected**



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Bond Basics



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What are Bonds?

- Redistribution of risks associated with construction projects
- Written agreement between:
 - surety
 - principal
 - obligee
- Surety guarantees that the principal will full its obligations to the obligee

Performance Bonds

- Provide security to owners (the obligee) where a contractor (the principal) defaults under the construction contract
- Three requirements for performance bond:
 1. Owner has performed its obligations under the contract. (The owner is not in breach.)
 2. Contractor is in default of its obligations under the contract.
 3. Contractor is declared by the owner to be in default under the contract.

Performance Bonds: Surety's Perspective

- If these requirements are met, then the surety will (subject to conditions) be obliged to remedy the default, complete the contract, put out bids for completion of the contract, pay the penal amount of the bond
- Surety has duty to both owner and contractor
- Surety has duty to investigate alleged default
 - if surety completes work / makes payment to the owner where the contractor had a legitimate defence, surety has breached its duty to the contractor
- Surety has duty to respond to bond claim “promptly”

Performance Bonds

- What counts as default?
 - fails to perform work / meet project schedule
 - default on obligations around performance of work / remediating deficiencies
 - insolvency
 - failure to pay subcontractors and material suppliers

Performance Bonds: Owner's Perspective

- Consider what information to be given to Surety:
 - copy of the contract
 - change orders
 - applications for progress billings / approved applications for progress billings
 - payments made / current accounting
 - records of contract default (liens / notices of liens / claims / default notice / termination notice)

Performance Bonds: Surety's Perspective

- Surety may be liable for all of contractor's obligations under the contract, including liquidated damages so will carefully investigate
- Surety will seek:
 - access to the project site
 - assistance in determining status of project
 - information about any special or urgent project circumstances

Performance Bonds: Surety's Perspective

- Surety may have defences to a performance bond:
 1. Contractor not in default;
 2. Contract has been materially altered since surety issued the bond;
 3. Bond was not executed properly / was not delivered to the contractor prior to the alleged default;
 4. Owner prejudiced surety; and
 5. Surety was misled as to risk it was undertaking when bond was issued.

Labour and Material Payment Bonds

- Labour and Material Payment Bonds (“L&M Bonds”) provide security for the contractor’s subcontracts and suppliers in the event they are not paid.
- Intent to make less likely that liens will be filed – **subcontractors and suppliers can pursue bond claim and lien simultaneously**

Labour and Material Payment Bonds

Who Can Claim?

- Look to language of L&M Bond:
 - direct contract with the contractor (no sub-subs)
 - contract is for labour or material or both
 - labour or material is used or reasonably required for use in performance of the contract between the contractor and owner
- Claimants are not a party to the L&M Bond. Owner is the trustee of the claimants rights under the bond

Labour and Material Payment Bonds

Who Can Claim?

- Claims typically arise where subcontractor or supplier is not paid.
- Claimants will be required to give notice of claim **as required by the L&M Bond**
- Claimants will be required to commence an action **as required by the L&M Bond**

Labour and Material Payment Bonds

Who Can Claim?

- Claimants are typically required to provide:
 - copy of contract with contractor
 - copies of all change orders
 - copies of all invoices / progress billings / statements of account / amounts due not yet billed
 - copies of all payments received
 - last day work or materials provided
 - any claim of lien

Labour and Material Payment Bonds

Subrogation

- After paying a claim on an L&M Bond, surety is subrogated to the claimant's right to recover as a lien claimant to the holdback fund

Labour and Material Payment Bonds

Disclosure

- 2018 decision of the Supreme Court of Canada, [*Valard Construction Ltd. v. Bird Construction Co.*](#) found that the obligee to a labour and material payment bond may be required to disclose the existence of the bond to subcontractors.

NAVIGATING CONSTRUCTION DISPUTES

DISPUTE RESOLUTION OPTIONS FOR CONSTRUCTION PROJECTS



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Overview

- In this presentation we examine the spectrum of dispute resolution options for construction claims. These options are usefully laid out in the commonly used CCDC documents as follows:
 - Negotiation
 - Consultant Intervention
 - Mediation
 - Arbitration
 - Litigation
- We will consider the arbitration and litigation processes in BC in further detail and we will consider statutory adjudication systems mandated in other jurisdictions and likely to become law in BC.

Step 1: Negotiation

CCDC 2 - Stipulated Price Contract

- The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant information and documents to facilitate these negotiations (GC 8.2.3).

Step 2: Consultant Intervention

CCDC 2

- Matters relating to the performance of the Work or interpretation of the Contract Documents shall be initially referred in writing to the Consultant (GC 2.2.8).
- If a dispute is not resolved promptly, the Consultant will give instructions for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to the Consultants instructions but in doing so neither party jeopardizes any claim it may have (GC 8.1.3).

Step 3: Mediation

CCDC 2

- A party shall be deemed to have accepted the finding of the Consultant unless, within 15 days after receipt of that finding, the party sends a Notice in Writing of dispute to the other party and Consultant (GC 8.2.2).
- Within 10 days after receipt of such Notice in Writing, the responding party shall send its own Notice in Writing in reply to the dispute (GC 8.2.2).
- After a period of 10 days following receipt of a responding party's Notice in Writing of reply to a dispute, the parties shall request the Project Mediator to assist the parties to reach an agreement (GC 8.2.4).

Step 3: Mediation *(cont'd)*

CCDC 2

- The parties shall appoint a Project Mediator within 20 days after the Contract is awarded (GC 8.2.1).
- If the parties neglected to appoint a Project Mediator when the Contract was awarded, then a Project Mediator shall be appointed within 10 days of either party's request that the Project Mediator be appointed (GC 8.2.1).
- If the dispute is not resolved within 10 days after the Project Mediator was requested (or such further period agreed by the parties) the Project Mediator shall terminate the mediated negotiations (GC 8.2.5).

Step 4: Arbitration

CCDC 2

- 10 days after termination of the mediated negotiations, by Notice in Writing, either party may refer the dispute to be finally resolved by arbitration (GC 8.2.6).
- Unless a party requests that the dispute be arbitrated immediately, all disputes referred to arbitration shall be held in abeyance until substantial performance, termination or abandonment, whichever is earlier (GC 8.2.8).

Step 5: Litigation

CCDC 2

- If a party does not refer the dispute for arbitration within the requisite timeline, the parties may refer the dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use (GC 8.2.7).

CCDC 5A

Construction Management Contract for Services Only

- The parties shall make all reasonable efforts to resolve their disputes by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant information and documents to facilitate these negotiations (GC 7.1.2).
- If the parties agree, the dispute shall be submitted to mediation or arbitration.
- If no agreement made for mediation or arbitration, unresolved disputes may be referred to the court or any other agreed form of dispute resolution.

CCDC 5B

Construction Management Contract For Services and Construction

- Same as CCDC 2.

CCDC 14

Design Build Contract

- Similar to CCDC 2 but without the intervention of the Consultant.

CCDC 17

Contract between Owner and Trade Contractor for Construction Management Projects

- Similar to CCDC 2 but disputes in the first instance to be resolved by the findings of the Consultant or the Construction Manager based on the roles assumed by each under GC 2.2.

The Arbitration Process in BC

- Arbitration is a forum where parties may have their dispute resolved by the decision of a third party arbitrator outside of the confines of the courtroom.
- Unless mandated by the terms of the agreement between the parties, arbitration is a voluntary process requiring the parties' consent and agreement to participate in the hearing.
- The arbitrator will impose a final and binding decision subject to the narrow jurisdiction of our courts to set aside or allow an appeal of the decision.

The Arbitration Process in BC *(cont'd)*

("New") Arbitration Act SBC 2020 c2.

- Provincial laws regarding limitation periods for commencing court proceedings apply to arbitration proceedings.
- Parties may opt out of any right to appeal an arbitral award by agreement.
- Parties may apply to the BCSC to recognize and enforce arbitral awards made in another Canadian jurisdiction.
- BCSC has jurisdiction to set aside arbitral awards on certain enumerated grounds related to procedural unfairness (i.e.: where the arbitration agreement is void, the award deals with a dispute not within the terms of the arbitration agreement, or, where a party was not given a reasonable opportunity to present its case).

The Arbitration Process in BC *(cont'd)*

Appeal of an Arbitral Award

- An arbitral award can be appealed to the BCCA. The test for leave to appeal remains a high bar. The party seeking leave must show:
 - the determination of the point of law at issue may prevent a miscarriage of justice;
 - the point of law is of importance to a class or body of persons; or
 - the point of law is of general or public importance

The Arbitration Process in BC *(cont'd)*

Arbitration v. Court

- cost effective
- early resolution
- confidentiality
- choose decision-maker with expertise in construction
- more informal process

BUT

- additional costs – arbitrator's fee
- interim relief
- lack of jurisdiction over non-parties to arbitration agreement
- extensive discovery may still be required

The Arbitration Process in BC *(cont'd)*

Parallel Court Proceedings

- Mandatory stay of court proceedings ordered if valid and enforceable arbitration agreement in place: *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (CA), leave to appeal to SCC refused.
- If the parties have agreed to arbitrate, but one party has issued a statement of claim and has not commenced arbitration within the limitation period, then the Court must strikeout the claim: *A.G. Clark Holdings Ltd. v. HOOPP Realty Inc.*, 2014 ABCA 20, leave to appeal to SCC refused.

Litigation in BC During the Pandemic

- Courts are open with modified procedures in response to the pandemic.
- Court services continue by telephone conferences, videoconferences, and in person appearances where it is safe and necessary to do so.
- Courts continue to hear trials by judge alone.
- Mandatory limitation periods remain suspended, ending 90 days after the date on which the last declaration of a state of emergency expires or is cancelled.
- Affidavits can be sworn using video technology.

Looking Ahead: Statutory Adjudication

- Statutory adjudication is a legislated dispute resolution process by which a party to a construction contract has the right to have the dispute decided expeditiously by a neutral adjudicator.
- The federal government and several provinces have proposed or enacted legislation to create a mandatory “interim” adjudication process for construction disputes.
- The legislation often includes a “prompt payment” regime - setting tight timelines for the payment of trade contractors.
- In BC Bill M-223 (the *Prompt Payment (Builders Lien) Act*) was introduced on May 28, 2019 to amend the existing *Builders Lien Act* to create prompt payment and mandatory adjudication rules in BC. Bill M-223 has not been enacted as law in BC to date.

Looking Ahead: Statutory Adjudication

(cont'd)

- A party to a construction contract will have the statutory right to refer disputes (payment issues, valuations, change orders, certification issues, set-offs, deductions, delays claims etc.) to an adjudicator for determination.
- If one party is not satisfied with the adjudicator's decision, the party can proceed with a court action or arbitration to reverse the adjudicator's decision but in the interim, the adjudicator's decision must be followed.
- In Ontario, the adjudicator must be selected from the registry of qualified adjudicators. The adjudicators are required to have 10 years or greater of construction industry experience and do not need to have a legal background.

Questions?



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These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.