

**CONSTRUCTION LAW:  
YEAR IN REVIEW**

Infrastructure, Construction & Procurement Group  
Webinar: November 13, 2024

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**CLARK WILSON**      **SPEAKERS:**  
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**Agenda**

- PART 1 – Builders' Lien Update*
- PART 2 – Construction Defects*
- PART 3 – Construction Safety*
- PART 4 – Bonds*
- PART 5 – Contract Interpretation*

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**PART 1:**

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**Builders' Lien Update**

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**Outline**

- ❑ **Abuse of Process**
  - ❑ *601 Main Partnership v Centura Building Systems (2013) Ltd.*, 2024 BCCA 76
  - ❑ *Darwin Construction (BC) Ltd. v PC Urban Glenaire Holdings Ltd.*, 2023 BCCA 436
- ❑ **Lienable Lands**
  - ❑ *JVD Installations Inc. v. Skookum Creek Power Partnership, et al.*, 2023 CanLII 8266 (SCC)
- ❑ **Payment of Holdback to Discharge Liens**
  - ❑ *Pinnacle Living (Capstan Village) Lands Inc. v Tarrler Group Inc.*, 2024 BCCA 172
- ❑ **Timelines to File a Lien**
  - ❑ *TDM Excavating & Contracting Ltd., v 1046416 B.C. Ltd.*, 2023 BCSC 944

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**Builders' Liens in BC**

- Builders' liens are "extraordinary tools" for unpaid contractors, subcontractors or suppliers to ensure that cost of unpaid labour and materials are secured.
- Liens can impede the sale of property, halt construction financing or put an owner (or persons with an interest in property) in default of other 3rd party agreements (financing agreements, leases).
- Lien claimants must strictly comply with the requirements under the **Builders' Lien Act, SBC 1997, c 45** (the "BLA").
- This past year, our courts continued to consider how liens operate in BC, including: abuse of process in lien claims, what lands are lienable, payment of the holdback to discharge liens, and timelines to file liens.

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**When will an inflated lien be struck for abuse of process?**

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**Abuse of Process**

- Several ways in which to remove liens:
  - S. 24 of the BLA allows a party to post security (cash or lien bond) to remove a lien, usually for the full amount of the lien, where the lien claim is in dispute.
  - S. 23 of the BLA allows a party to pay the holdback amount into court for a lien to be removed, where the party did not contract with the lien claimant.
  - S. 25(2) of the BLA allows a party to cancel a lien if the claim is vexatious, frivolous, or an abuse of process.
- The filing and maintaining of a lien for an amount utterly disproportionate to any amount the filing party could reasonably hope to recover through litigation may constitute an abuse of process: *A.H.H. Construction Services Ltd. v. Washington Properties (QEP) Inc.*, [2021 BCSC 1912](#) at paras. 91–97 [*A.H.H.*].

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Facts

- Owners contracted with Contractor to provide drywall, insulation, and steel-stud work for a project.
- Contractor fell behind schedule and Owners terminated the contract.
- Contractor filed a lien of \$1.136 million and Owners posted cash security pursuant to s. 24 of the BLA.
- Contractor's lien claim included damages for interference alleging that Owners delayed construction and thereby increased the cost of the work (the "**Interference Claim**").
- Owners counterclaimed for abuse of process.

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Facts

- BCSC awarded Contractor \$575,576 and dismissed Owners' claim for abuse of process, despite finding that Contractor's site foreman provided false evidence to support the claim of interference.
  - BCSC found the site foreman tended to exaggerate and based on a misleading memorandum he prepared to record problems he claimed interfered with the Contractor's work and based on an email that he altered to align with his narrative.
  - BCSC did not find abuse of process as it was not persuaded that the Contractor (the company itself) knew the site foreman's evidence was false.
- Decision was appealed.

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Issue

- Was the Contractor's lien claim an abuse of process?

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Key Findings

- The site foreman was held to have knowingly given testimony that was not truthful and tried to mislead the court.
- The site foreman's acts in identifying, quantifying, and testifying to the interference claim were undertaken within the scope of his authority and were for the benefit of the Contractor.
- Once the Owners established the extent to which the site foreman represented the Contractor, the Owner need not establish that the Contractor/company also knew or ought to have known that the site foreman's evidence was inaccurate or untrue.
- The Contractor's argument that the court should not find there was an abuse of process because the Owners did not establish a "bad" or improper motive was rejected.

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Key Findings

- BCCA overturned BCSC decision and held the trial judge erred in dismissing abuse of process claim.
- Contractor ordered to pay compensatory damages to Owners in an amount equivalent to interest on the portion of the value of the lien representing losses allegedly caused by interference.

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*601 Main Partnership v Centura Building Systems (2013) Ltd., 2024 BCCA 76*

Key Takeaways

- The filing of an exaggerated lien is an abuse of process.
- The knowledge and improper acts of a party's representative can be imputed to the party, so long as the representative is acting within the course and scope of their duties.
- Proof of an improper motive is not a prerequisite to establishing abuse of process.

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Facts

- Owners retained Contractor for construction of townhome project.
- Parties had a dispute about the work and Owners terminated contract.
- Contractor filed lien claim and Owners applied to cancel lien.
  - Lien claim totaled over \$3 million.
  - Owners submitted that the maximum possible lien claim would be in the range of \$1.6 - \$1.9 million.

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Facts

- Lien was cancelled upon Owners depositing a lien bond in the full amount of the lien pursuant to s. 24 of the BLA without prejudice to Owners' right to claim that the lien was improper or to apply for an order reducing the amount of the security.
- Owners made several requests for Contractor to provide an accounting but no response.
- Owners brought an application to cancel or reduce the lien.
- Contractor failed to file evidence nor a formal response to Owners' application, save for a letter delivered shortly before the hearing.
- Despite this, BCSC dismissed Owners' application for abuse of process but reduced security to \$500,000.

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Issues

- Should the lien be cancelled as an abuse of process pursuant to s. 25(2) of the BLA?
  - In the alternative, should the court reduce the security to a nominal amount?

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Key Findings

- *A lien claim is a powerful tool to protect contractors from being exploited but is also one that has significant consequences for those whose property or finances are tied up by the lien. Just as non-payment of a contractor can be used improperly to extract an advantage to under-pay a contractor, a contractor's excessive lien claim can also be used improperly to extract payment that is not due.* [para 108]
- *[The Contractor] had a burden to file some evidence in support of an arguable lien claim if it hoped to resist the [Owners'] application to cancel the lien. [The Contractor's] evidentiary silence despite the [Owners'] many requests to explain the basis of the lien claim, and the passage of time, colours the analysis of whether its excessive lien claim was an abuse of process.* [para 110]

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Key Findings

- Lien claim was an abuse of process as it was exaggerated.
- BCCA overturned BCSC decision and cancelled lien.

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*Darwin Construction (BC) Ltd., v PC Urban Glenaire Holdings Ltd., 2023 BCCA 436*

Key Takeaways

- Penalties for inflating lien claims are significant.
- Contractors should file timely and credible evidence in support of the right to any lien claim and the amount of the lien claim.

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**What lands are lienable?**

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**Lienable Lands**

- S. 2 of the BLA provides that a lien claimant who, in relation to an improvement, performs or provides work and/or supplies material can assert a lien against the land on which the improvement is located.
- **"improvement"** is defined as including "anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land".
- S. 16 of the BLA provides that if an owner enters into a single contract for improvements on more than one parcel of land, a lien claimant may choose to have the lien follow the form of the contract and be a lien against each of the parcels of land.

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*JVD Installations Inc. v. Skookum Creek Power Partnership, 2022 BCCA 81, leave to appeal to SCC refused, 2023 CanLII 8266 (SCC)*

Facts

- Lien claimant (“JVD”) performed concrete and mechanical work for the powerhouse and substation components of a hydroelectric project.
- Powerhouse and substation were located on unregistered Crown lands and therefore lands were not lienable.
- The transmission lines for the hydroelectric project were located on registered lienable lands and JVD filed a lien over those lands even though it did not perform work in connection with the transmission lines.
- BCSC upheld the validity of the liens, holding the transmission lines, powerhouse and substation constituted a “single integrated improvement”.
- Decision was appealed.

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*JVD Installations Inc. v. Skookum Creek Power Partnership, 2022 BCCA 81, leave to appeal to SCC refused, 2023 CanLII 8266 (SCC)*

Issue

- Could JVD lien lands on which they did not perform work?

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*JVD Installations Inc. v. Skookum Creek Power Partnership, 2022 BCCA 81, leave to appeal to SCC refused, 2023 CanLII 8266 (SCC)*

Key Findings

- BCCA considered prior cases where lien claimants filed liens on lands related to improvements but on which the lien claimants did not perform work:
  - *Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd.* (1986), 26 DLR (4th) 422 (BCCA), valid lien against a road when the work performed (process gravel incorporated into the road) was undertaken at a pit three miles away - work was essential to and integrated into the road even though work occurred away from the liened road.
  - *Boomars Plumbing & Heating Ltd. v. Marogna Bros. Enterprises Ltd.*, (1988), 51 DLR (4th) 13 (BCCA), no lien against motel property for the cost of work done to install a sewage pump on City property that was meant to service the motel as well other purposes.

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*JVD Installations Inc. v. Skookum Creek Power Partnership,*  
2022 BCCA 81, leave to appeal to SCC refused,  
2023 CanLII 8266 (SCC)

Key Findings

- *Pedre Contractors Ltd. v. 2725312 Canada Inc and 360 Fibre Ltd., 2004 BCSC 1112*, valid lien for work and services to install conduits both inside and outside the boundaries of the liened property as the work benefitted a single improvement.
- *Sandhill Development Ltd. v. Green Valley Developments Ltd., 2008 BCSC 1646*, valid lien for all costs of work performed to construct roads even though only portion of roads were on liened property.

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*JVD Installations Inc. v. Skookum Creek Power Partnership,*  
2022 BCCA 81, leave to appeal to SCC refused,  
2023 CanLII 8266 (SCC)

Key Findings

- Only appropriate to permit a lien to be filed against property, where lien claimant did not perform work, if the improvement can be understood as a single improvement, to accord with the principle in BLA that land that receives benefit of improvement bears burden and risk of a lien claim.
- JVD did not perform work or services on the transmission lines therefore had no claim to a lien against those lands.
- Hydroelectric plant and the transmission lines were not a single improvement as they were: (1) functionally distinct; (2) physically remote from one another; and (3) constructed at different times (and by different constructors).

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*JVD Installations Inc. v. Skookum Creek Power Partnership,*  
2022 BCCA 81, leave to appeal to SCC refused,  
2023 CanLII 8266 (SCC)

Key Findings

- BCCA stated while not the case that a lien can never be filed in connection with work that are performed outside the boundaries of a parcel of property, there must be careful consideration where improvement itself extends beyond the boundaries of the property.
- BCCA overturned BCSC decision and held trial judge erred in upholding the lien claims.
- On February 9, 2023, the application for leave to appeal to the SCC was dismissed with costs.

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*JVD Installations Inc. v. Skookum Creek Power Partnership, 2022 BCCA 81, leave to appeal to SCC refused, 2023 CanLII 8266 (SCC)*

Key Takeaways

- Lien can be asserted over land where the claimants did not perform work so long as the work is for a single improvement that has benefited the land over which the lien is claimed.
- Lien claimants considering what property to lien should carefully consider the scope of the work they performed prior to filing their claim.
- If work performed is not connected to the lien land by a single improvement, lien claim may be invalid.

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**When can an owner pay in the holdback to discharge liens?**

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**Discharging Liens By Paying Holdbacks**

**The Holdback**

- S. 4 of the BLA says that the party responsible for payment on each contract or subcontract must retain a holdback equal to 10% of the greater of the value of the work done and the amount of any payment made pursuant to the contract or subcontract.

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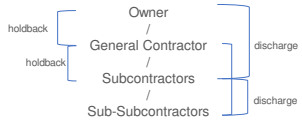
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### Discharging Liens By Paying Holdbacks

- S. 23 of the BLA allows for the discharge of lien claims by paying into court the lesser of:
  - The total amount of the lien claims, or
  - The amount owing from the applicant to the person engaged by the applicant, provided that amount is at least equal to the holdback applicable to the contract or subcontract between them.
  - Payment is usually distributed pro-rata among lien claimants.



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### *Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Facts

- Owner and Contractor engaged a subcontractor ("Tarrier") to provide work and materials for a project.
- Tarrier engaged a sub-subcontractor ("Fairway") and failed to pay its outstanding invoices.
- Owner and Contractor allegedly agreed to pay invoices in exchange for Fairway's agreement not to file lien claim (the "Payment Forbearance Agreement").
- Fairway liened anyway and Owner applied to discharge lien claims of Fairway and other Tarrier sub-subcontractors upon posting the holdback pursuant to s. 23 of the BLA.

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### *Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Facts

- BCSC dismissed Owner's application.
  - BCSC held that Owner created a direct contractual relationship with the Fairway, by way of the Payment Forbearance Agreement, therefore it could not rely on s. 23.
- Decision was appealed.

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*Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Issue

- Did the subsequent direct contract take Fairway out of the class of lien claimants under s. 23?

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*Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Key Findings

- BCCA distinguished between the two contractual arrangements:
  - Original agreement between Tarrier and Fairway for work and services to be paid by Tarrier;
  - Subsequent agreement between Owner and Fairway where Owner would pay for completed work and services in exchange for forbearance of the lien claim.
- Work forming the basis of the lien claim was not supplied under the Payment Forbearance Agreement.
- The Payment Forbearance Agreement did not change the obligations between Tarrier and Fairway under the original agreement.

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*Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Key Findings

- BCCA overturned BCSC decision and permitted Owner to discharge Fairway's and other sub-subcontractor lien claims on payment of statutory holdback into court.

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*Pinnacle Living (Capstan Village) Lands Inc. v Tarrier Group Inc., 2024 BCCA 172*

Key Takeaway

- A subsequent agreement between an owner and a subcontractor to pay for work in exchange for not filing a lien claim will not change the nature of any prior contractual agreement for the purpose of s. 23.

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**What is the timeline to file a lien in the absence of a head contract?**

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**Time Limits to File a Lien**

- S. 20 of the BLA provides that a claimant must file a claim of lien no later than 45 days after the earliest of the following dates:
  - certificate of completion for a contract or subcontract has been issued;
  - if no certificate of completion, head contract has been completed, abandoned or terminated; or
  - if no head contract, the improvement has been completed or abandoned.
- S. 22 of the BLA provides if a lien is not filed within the time prescribed by the BLA, the lien is extinguished.
- S. 25(1)(a) of the BLA provides that an applicant can apply to the court to remove the lien on the basis that the lien was filed out of time.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.,  
2023 BCSC 944*

Facts

- Contractor entered into an agreement to provide excavation and civil works to 1046416 B.C. Ltd. ("104") for a subdivision.
- 104 sold two distinct parcels to two Owners.
- Contractor filed lien claim against subdivided parcels.
- 104 and Owners submitted that the claim was invalid based on the following:
  - the contract between the Contractor and 104 was a "head contract"; and
  - the lien was filed outside the 45-day lien period.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.,  
2023 BCSC 944*

Issues

- Was the lien filed out of time?
  - Was the contract a "head contract"?
    - If so, was it completed more than 45 days before the lien was filed?
    - If not, was the "improvement" completed more than 45 days before the lien was filed?

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.,  
2023 BCSC 944*

Key Findings

- No certificate of completion was issued.
- Therefore, BCSC considered whether the contract was a "head contract".
  - "head contract" is not defined in the BLA.
    - "head contractor" is defined as a contractor engaged to do all of the work respecting an improvement.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd., 2023 BCSC 944*

Key Findings

- S. 1(2) of the BLA sets out the "3-2-1 Rule"
  - A contract is substantially performed where it is capable of completion at a cost of no more than:
    - 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.
  - The contract was not completed based on this rule.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd., 2023 BCSC 944*

Key Findings

- The "improvement" was not completed more than 45 days before the lien was filed.
  - S. 1(3) of the BLA provides that an "improvement" is complete when all "or a substantial part of it is ready for use or is being used for the purpose intended.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd., 2023 BCSC 944*

Key Findings

- *NR Excavating & Services Ltd. v Mand, 2013 BCSC 723*, excavation and civil services were not separate or distinct improvements under the BLA, but rather, properly understood as components of a larger improvement.
- *Stoneworks Marble & Granite Ltd. v Edgeline Construction Ltd., 2022 BCSC 1096*, "improvement" is to be understood as the specific work and services in a lien claimant's contract.
- BCSC declined to follow *Stoneworks* in favour of *NR Excavating*.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.,  
2023 BCSC 944*

Key Findings

- Neither the work nor the "improvement" were completed as the work was only part of the intended "improvement".
- Therefore, the "improvement" was not completed more than 45 days before the lien was filed and the lien was filed in time.

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*TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.,  
2023 BCSC 944*

Key Takeaways

- BCSC clarified the law on when the 45-day lien period will run for work in the absence of a "head contract".
- An "improvement" under the BLA is the entire functional structure of a project, not a specific scope of work.

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**PART 2:**

**Construction Defects**

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**Outline**

- **Liability of Developers to Subsequent Purchasers**
  - *Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*
- **Delays in Remediation Work**
  - *Murray v Windsor Brunello Ltd., 2024 ABKB 281*

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**Who is liable for defective work?**

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

**Facts**

- Owners developed an apartment building in Langford, BC and after it was completed and occupied serious structural deficiencies were identified.
- Langford revoked the building's occupancy permit, and the building had to be evacuated.
- Owners contracted with Design Builder that, in turn, contracted with Structural Engineers. Each contract contained clauses that allocated risk and limited liability.
- Owners commenced an action in negligence against Structural Engineers for damages resulting from the repairs (no contract = no privity).

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

Facts

- BCSC dismissed Owners' claim in negligence against Structural Engineers on the basis that the Structural Engineers did not owe any duty of care to the Owners.
- Decision was appealed.

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

Issue

- Did the Structural Engineers owe a duty of care to the Owners?

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

Key Findings

- As between the Owners and the Structural Engineers, the circumstances were analogous to the relationship that gave rise to a duty of care in the seminal case of *Winnipeg Condominium Corporation No. 36 v Bird Construction Co*, [1995] 1 SCR 85.
- In that case the plaintiff strata discovered defects in the masonry work of their building that required the entire cladding to be replaced, and the strata was successful in a claim in negligence against the builder, subcontractor and architectural firm (strata had no contractual relationship with any of these party).
- The SCC held that parties have a duty to construct a building without dangerous defects and can be held liable in negligence independently of any contractual relationship.

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

Key Findings

- In this case, like in *Winnipeg Condominium*, the complained of defects gave rise to a foreseeable danger to health and safety of the occupants of the building. The "proximate relationship" between the owners of a building and the impact that a negligent contractor or consultant will have on the construction of the building gives rise to a duty of care owed by the contractor or consultant to the owner.
- Any contracts entered into between the parties allocating risk should not negate that duty of care.
- BCCA set aside the BCSC decision, finding that a *prima facie* duty of care did exist between the Owners and the Structural Engineers.
- On September 19, 2024, the application for leave to appeal to the SCC was dismissed with costs.

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*Centurion Apartment Properties Limited Partnership v Sorenson Trilogy Engineering Ltd., 2024 BCCA 25, leave to appeal to SCC refused, 2024 CanLII 88323 (SCC)*

Key Takeaways

- The dangerous defects exception to a claim for pure economic loss, established in *Winnipeg Condos*, is alive and well.
- Contract provision between certain parties limiting liability or waiving claims will not negate the duty of care.

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Can owners delay remediation work until liability is determined?

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*Murray v Windsor Brunello, 2024 ABKB 281*

Facts

- Owners engaged the Contractor to build a home.
- There were significant structural defects in the home.
- Owners sued Contractor for negligence (among other actions).
- As of the trial date, Owners had not undertaken any remedial work, submitting that they were waiting for the lawsuit to be resolved as remediation would require dismantling the residence.

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*Murray v Windsor Brunello, 2024 ABKB 281*

Issue

- Is the delay in remediation reasonable?

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*Murray v Windsor Brunello, 2024 ABKB 281*

Key Findings

- ABKB found it was not unreasonable for the Owners to delay undertaking any remediation work until liability was determined.
- Non-exhaustive list of the ABKB's considerations:
  - extensive nature of the remedial work;
  - absence of evidence that a failure to undertake the remedial work after the earliest reasonable date would have reduced the scope or cost of the work;
  - Contractor's vigorous declination of liability; and
  - substantial cost of remedial work.

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*Murray v Windsor Brunello, 2024 ABKB 281*

Key Takeaway

- A failure to mitigate may not reduce the quantum of damages where the time and cost of mitigation are significant, and the plaintiff is likely to undertake steps to mitigate at some point after the determination of liability.

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**PART 3:**

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**Construction Safety**

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*R v Greater Sudbury (City), 2023 SCC 28*

Facts

- City of Sudbury (the "City") entered a contract with Contractor to repair a downtown water main.
- Contractor agreed to serve as the "constructor" for the project, assume control over day-to-day management of the project, and assume full responsibility for ensuring that it – and all sub-trades under its control – were in full compliance with the Ontario *Occupational Health and Safety Act* ("OHS").
  - OHS is similar to the BC *Workers Compensation Act*.
- City's involvement was limited to monitoring progress of the work on the project by occasionally sending City employed inspectors to the job site.

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*R v Greater Sudbury (City), 2023 SCC 28*

Facts

- During construction, Contractor's employee struck and killed a pedestrian.
- Ministry charged the City as an employer in breach of s. 25(1)(c) of OHSA for failing to ensure that certain safety requirements under the *Construction Projects* regulation had been met.

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*R v Greater Sudbury (City), 2023 SCC 28*

Facts

- Trial court acquitted the City because it was the Contractor, not the City, who had direct control over the workers, and therefore the City was not an employer. In the alternative, if the City was an employer, then it exercised sufficient due diligence to absolve itself of liability.
- Provincial offences appeal court upheld the trial court's ruling on the City's status as an employer but did not address the alternative argument.
- ONCA set aside the provincial offences appeal court's decision, found the City liable, and remitted the due diligence question.

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*R v Greater Sudbury (City), 2023 SCC 28*

Issue on Appeal to SCC

- Is the City an employer under OHSA?
  - What liability remains with the owner of a construction project site as an employer after the owner has properly appointed a constructor?

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*R v Greater Sudbury (City), 2023 SCC 28*

Key Findings

- Appeal to SCC was dismissed in a rare equal division – case remitted to trial for a determination of all outstanding issues, including the City’s due diligence defence.
- Three judges found that the City was an “employer” because it employed its inspectors, but that it was not the “employer” of the Contractor. Would have remitted the case to the trial judge to consider whether the City violated regulatory measures as an “employer” of the inspectors.

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*R v Greater Sudbury (City), 2023 SCC 28*

Key Findings

- One judge agreed with the trial judge that the City was not an “employer” and that, in the alternative, it had established a due diligence defence.
- Four judges found that the City was an “employer” both because it employed inspectors and because it retained the Contractor and the Contractor was employee. Would have remitted the case to the appeal court for a hearing on the due diligence defence.

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*R v Greater Sudbury (City), 2023 SCC 28*

Key Takeaways

- Significant disagreement between the SCC judges leaves unresolved issues and confusion over the application of OHS and similar legislation in other provinces.
- Owners should conduct due diligence when engaging a contractor to evaluate that contractor’s ability to ensure compliance with health and safety regulations.
- Owners should consider adding in further protection to their construction contracts to ensure that health and safety regulations are complied with, and to clarify that even if an owner does engage in a form of monitoring or quality control, the contractor agrees that such monitoring will not make the owner responsible for health and safety requirements.

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**PART 4:**

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**Bonds**

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**Bonds**

- Most common forms of bonds in context of construction projects are:
  - Performance Bonds
  - Labour and Material Payment Bonds
  - Lien Bonds

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*Wolverine Construction Inc v Trisura, 2023 BCSC 405*

Facts

- Wolverine became involved in a waste management project upon Contractor facing financial difficulties.
  - Capacity of Wolverine's involvement is disputed.

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*Wolverine Construction Inc v Trisura, 2023 BCSC 405*

Facts

- Trisura, a surety/bonding company, issued a labour and material payment bond in relation to the project with the Contractor as the "principal" and the Owner as the "obligee".
  - Bond provided that Trisura and Contractor would be jointly and severally liable for payments to "claimants".
    - Defined "claimant" as one having a direct contract with the Contractor for labour, material, or both.
- Contractor assigned into bankruptcy.
- Wolverine claimed over \$475,000 in respect of labour and materials against the bond.

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*Wolverine Construction Inc v Trisura, 2023 BCSC 405*

Issues

- Is Wolverine a "claimant" under the bond?
  - Did Wolverine enter a direct contract with the Contractor?
    - Would a reasonable bystander conclude the parties intended to contract?

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*Wolverine Construction Inc v Trisura, 2023 BCSC 405*

Key Findings

- BCSC considered the following factors:
  - no signed, written contract between Wolverine and the Contractor;
  - Wolverine issued invoices to the Owner, not the Contractor; and
  - Wolverine was unclear on whether the work was performed pursuant to an agreement with the Contractor.
- BCSC concluded that Wolverine failed to establish a direct contract with the Contractor.

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*Wolverine Construction Inc v Trisura, 2023 BCSC 405*

Key Takeaways

- Labour and material payment bonds protect parties that contribute to projects as a subcontractor or supplier.
- To collect pursuant to this bond, the subcontractor must meet the definition of "claimant" which will typically require that they have a direct contract with the bonded contractor.
- For construction contracts, parties must have agreed, at a minimum, on the subject matter of the work, the price, and a timeline for completing the work.

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PART 5:

Contract Interpretation

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Outline

- **Exclusion Clauses**
  - *Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc., 2024 SCC 20*
- **Failure to Address Contingencies**
  - *Ellicar Ventures Ltd. v MacLeod, 2023 BCSC 2095*
- **Cost-Plus Contracts**
  - *Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

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When will exclusion clauses apply?

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**Exclusion Clauses**

- Exclusion clauses restrict or limit the rights of a party to a contract and can place a restriction or limitation on an otherwise available statutory right.
- In order for an exclusion clause to be valid, the intent of the contracting parties to restrict or limit otherwise available rights must be clear.

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc., 2024 SCC 20*

Facts

- Contractor ("**Pine Valley**") entered into a purchase order with a topsoil subcontractor ("**Earthco Soil**") for the construction of a dry pond.
- The purchase order contained the following exclusion clauses:
  - "[Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. Please contact Richard Outred to arrange.
  - If [Pine Valley] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the quality of the material once it leaves our facility."
- These clauses are an exclusion of the implied condition of goods under section 14 of the Ontario *Sale of Goods Act* that the goods purchased will correspond with any description of made by the seller.

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc.,  
2024 SCC 20*

Facts

- Pine Valley did not test the soil before it was shipped.
- After the topsoil was used on the project, flooding occurred and testing showed topsoil contained more clay than original test results, making it less permeable to water.
- Pine Valley was forced to remove and replace the topsoil.
- Pine Valley commenced a cost recovery claim against Earthco Soil.

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc.,  
2024 SCC 20*

Facts

- ONSC dismissed Pine Valley's action.
  - ONSC found the exclusion clause was valid, and that Pine Valley accepted the quality-related risks.
- ONCA allowed Pine Valley's appeal and substituted a judgment requiring Earthco Soil to pay damages.
  - ONCA concluded that the exclusion clauses did not contain "explicit, clear, and direct language".

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc.,  
2024 SCC 20*

Issue on Appeal to SCC

- Did the purchase order validly exclude the "implied condition" requirement under s. 14 of the *Sale of Goods Act*?

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc., 2024 SCC 20*

Key Findings

- *Sattva Capital Corp. v Creston Moly Corp., 2014 SCC 633*, contracts are to be interpreted using a "practical, common-sense approach".
- *Tercon Contractors Ltd. v British Columbia (Transportation and Highways), 2010 SCC 4*, set out a three-part test to follow when assessing the validity of an exclusion clause:
  - Did the parties mutually intend to include an exclusion clause?
  - If so, was the exclusion clause unconscionable at time of contracting?
  - If not, are there public policy reasons not to uphold the clause?

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc., 2024 SCC 20*

Key Findings

- SCC affirmed the ONSC ruling.
  - Parties' stated intentions and surrounding circumstances supported the conclusion that the Pine Valley clearly accepted the risk that the soil may not be consistent with test results.
  - Exclusion clause was valid.
- Factors considered:
  - Pine Valley was a commercial purchaser experienced with topsoil;
  - both parties were aware of dated test results; and
  - Pine Valley was in a rush to receive the topsoil.

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*Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc., 2024 SCC 20*

Key Takeaways

- For exclusion clauses to be valid, the intent of the contracting parties to restrict or limit otherwise available statutory rights must be clear.
- The court will look at circumstances of the contract and the intentions of the parties as established by available evidence.
- The *Tercon* framework continues to operate as the primary tool to assess the enforceability of exclusion clauses.

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**What if a contract does not address contingencies that impact the contract scope, price, and time?**


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*Ellicar Ventures Ltd. v MacLeod, 2023 BCSC 2095*

Facts

- Owner and Contractor entered an agreement for the construction of a custom-build home.
- Extra work arose during construction, and it cost more than expressly anticipated in the agreement.
- Owner refused to pay final invoice due to extras, arguing that the contract was a fixed-price contract.
- Contractor stopped work and sued Owner for payment.
- Owner countersued for deficiencies and delay.

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*Ellicar Ventures Ltd. v MacLeod, 2023 BCSC 2095*

Issue

- Who should bear the cost of extras?
  - What did the contract cover in scope and cost?

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*Elcar Ventures Ltd. v MacLeod, 2023 BCSC 2095*

Key Findings

- On a plain reading, the contract was not a strict, fixed-price contract.
  - Contract price did not capture extras.
  - Extras were necessary, unforeseen, or completed at the Owner's request.

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*Elcar Ventures Ltd. v MacLeod, 2023 BCSC 2095*

Key Findings

- Owner impliedly waived reliance on signed change orders and agreed to extras.
  - Requested several changes that were unsigned but executed at the Owner's direction and under her supervision.
  - Due to implicit waiver, Owner could not rely on contract requirement for signed change orders.

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*Elcar Ventures Ltd. v MacLeod, 2023 BCSC 2095*

Key Takeaways

- Pay close attention when drafting and executing contracts.
- Where possible, include terms to address contingencies that impact the contract scope, price, and time.
- Document progress in writing, including all communications.
- **Follow your contract.**
  - If not, you may not be able to rely on key terms.

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When is a contract cost-plus?

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Facts

- A subcontractor (“**Sjostrum**”) reached an oral agreement with its contractor (“**Kelson**”) to return to a construction project to carry out work after Sjostrum had previously walked off the project.
- The oral agreement included an estimate for the cost of the work.
- Sjostrum filed a claim of lien for unpaid invoices which Kelson disputed as being beyond the estimate in the oral agreement.

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Issue

- Could Sjostrum claim for the amount on the basis of its oral contract with Kelson?

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Key Findings

- ONSC found a binding oral contract between the parties.
  - Kelson admitted as such in its pleadings in the litigation.
  - Evidence supported a finding of contract formation.
- ONSC considered the contract similar to a cost-plus contract because the claimed amount was based on hours spent on labour at a set rate.

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Key Findings

- *Infinity Construction Inc. v Skyline Executive Acquisitions, 2020 ONSC 77*, set out the following principles for analyzing a cost-plus contract based on a budget estimate:
  - There is an obligation on the party carrying out the work to exercise due diligence so that they do not incur costs significantly higher than the estimate without prior approval.
  - The final price should fall somewhere near the estimate although the degree of variance will depend on the fact-specific "bounds of reasonableness".
  - The party carrying out the work must promptly notify an owner if there are cost overruns to the budget estimate.

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Key Findings

- *Infinity Construction Inc. v Skyline Executive Acquisitions, 2020 ONSC 77*, set out the following principles for analyzing a cost-plus contract based on a budget estimate:
  - Where the party carrying out the work seeks to recover on a cost-plus basis, there is a heavy evidentiary burden of proving those costs.
  - However, where the party carrying out the work proves it has kept proper accounts with supporting documentation, the onus shifts to the other party to provide evidence that the amounts claimed are incorrect or unreliable.
  - If the amounts claimed are proven incorrect or unreliable, the onus once again shifts to the party carrying out the work to prove the amount of the claim.
  - If the Court is in doubt, the claim of the party carrying out the work fails.

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Key Findings

- ONSC found on the facts that the only supporting documents for the amounts claimed by Sjostrum were weekly time summaries which were unsigned, did not include a specific description of the work charged out during the hours claimed, and were not sent to Kelson each week.
- ONSC dismissed Sjostrum's action and discharged the lien.

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*Sjostrum Sheet Metal Ltd. v Geo A. Kelson Company Limited, 2023 ONSC 4959*

Key Takeaways

- Ensure all key terms of a contract are committed to in writing and signed by the parties.
- Cost-plus contracts are not a blank cheque for parties carrying out work.
- Proper supporting evidence for claims for work done is always required.

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**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.

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## Biographies



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Scott Lamb is a partner at the law firm of Clark Wilson and a senior member of Infrastructure, Procurement and Construction practice group. He is also the Co-Chair of Clark Wilson's Higher Learning practice group. Scott is called to the Bar in Ontario and British Columbia. He has practiced in the area of construction law for over 25 years acting for clients throughout the construction chain: large owners (both institutional public sector and private sector clients), general contractors, specialized contractors, suppliers, architects, engineers and consultants. Scott's practice encompasses all aspects of contract drafting and negotiations, dispute resolution and litigation. He has appeared as counsel in cases at the trial and appellate level. Scott has been repeatedly recognized by Best Lawyers in Canada for public procurement and commercial litigation, as well as Doyle's Guide, Leading Construction Litigation Lawyers, 2021.



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Satinder Sidhu is a Partner and Co-Chair of the firm's Infrastructure, Construction & Procurement Practice. Satinder advises her clients on a wide range of complex construction related services including construction contracts, builders' lien claims, contractual disputes, construction delay and deficiency claims, and insurance coverage. Satinder has provided legal services on a variety of projects in B.C. and Alberta, representing owners, general contractors, design professionals, sub-contractors, material suppliers, and insurers. Satinder is strategic and pragmatic in her approach to construction contracts and claims and has been recognized for her expertise in both construction and insurance law by Best Lawyers in Canada.

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