



Heal & Co. LLP LAWYERS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

Managing Claims, Avoiding Claims and Delay & Impact Claims

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Who are we?

- A boutique construction law firm
- Experienced construction litigators with respect to all aspect of construction claims, including the avoidance of claims altogether

Overview

- Not all eventualities can be planned for
- Changes are inevitable
- Successful claims management is knowing how to deal with changes effectively and inexpensively

Why Do Changes Occur?

- Owner changes
- Incomplete design
- Unforeseen conditions
- Inclement weather
- Labour strikes or shortages
- Changes to regulations

Pre-Contract

- Do pre-contract due diligence
- Know your client
- Who owns the property
- Who is financing the work
- Can you get a personal guarantee?
- Promises should be put in writing
- Clarify who is person giving instructions and their authority

Bhasin v. Hrynew

- Movement towards a modern view of commercial relationships
- SCC 2014
- Can-Am, despite complying fully with the express provisions of the contract, was nevertheless found liable because of its dishonest conduct in performing the contract
- Duty to act honestly in the performance of contractual obligations

Avoid Gaps in your Documentation

- Explain the limitations of the investigation
- State clearly the work of others that you will be relying on
- Ensure an accurate record of the drawings, specifications, or work undertaken by others that you will be relying on

Your Contract

- A set of promises which are legally enforceable
 - Sets scope of work
 - Sets out assumptions and limitations relating to the work
 - should include limitations of liability
 - Can incorporate other provisions by reference
 - Sets expectations of performance
 - Sets rates can limit price

Three Kinds of Contracts (Generally)

1. Standard form (eg purchase order, or CCDC, CCA forms)
2. Standard form, but modified special conditions
3. Contracts with custom terms

Contract terms impact Claims' Management

Claims within the parties' contemplation

Those outside the parties' contemplation

When Does a Change Become an Extra?

- Work which is in addition to that which is specified in the contract, assuming it does not substantially alter the nature of the work originally contemplated by the contract
- Not work that is necessarily implied

What to do When Your Monthly Draws Get Stale

Set a policy

- Consider a prompt payment discount
- After “x” days a call, after “y” days a letter
- Get post dated cheques
- Obtain an acknowledgment of indebtedness
- Check your timing for lien purposes, 45 days from date contract completed
- Why aren't they paying?
- Do I continue working, or do I stop working?

What does the Contract say

- Payment terms
 - CCA1 30 days after submission for payment or 10 days from certificate
 - “pay when paid”
- Delay
 - CCA1 damages for delay 6.5
 - “no damages for delay”

What does the Contract say

- Notice of change in price
 - CCA1 notice in writing then detailed account
 - “no extras, only additional time to complete”
 - “equitable adjustment”
- Termination
 - Default notice
 - Mutual
 - “or only unilateral”

What to do When There is a dispute about Payment

- Value the relationship
- Give a discount where appropriate
- Stop work
- Exercise legal remedies

Alternate Dispute Resolution

- Negotiation
 - Stepped negotiation clauses
- Mediation
- Arbitration

What Happens When its Too Late

- Each party has a responsibility to mitigate their losses.
- Specific performance is exceptional and ordered only when an award of damages would be “inadequate”.

Legal Remedies

- Injunction can be used in some breach of contract cases where damages are inadequate (unlikely here).
- Damages are an attempt by the court to compensate the innocent party to the contract, the party that suffers the breach.
- The purpose is compensation not punishment so only real, actual damages can be ordered by the court.

Legal Remedies (continued)

Generally, there are two main methods of calculating damages:

- The difference between what was contracted for and what was received. This is known as the “diminution of value” method.
- Whatever it costs to put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations. This is known as the “cost of performance” method.

The Construction Lien

- Is a charge upon all holdbacks required to be retained and all amounts owed in respect of the furnishing of supplies and material to an improvement
- Consequential right to sell the owner's property if insufficient holdback retained

The Construction Lien (continued)

- No Opting out of provisions of the *Construction Lien Act*
 - Holdback and Payment requirement
 - Trust Provisions
 - Lien Rights

Creation of the Lien

- A person who supplies services or materials to an improvement for an owner, has a lien upon the interest of the owner in the premises for the price of those services or materials
- It does not include interest
- The lien arises and takes effect when the person first supplies services or materials
- Does not attach to Crown land or First Nations lands but instead attaches to the holdback

Creation of the Lien (continued)

- Lien limited in value to the least amount owed by Owner (subject to set off)
- If lien attaches i.e. tenants work, landlord's interest not affected unless notice is given

The Holdback

Basic

- Each payer upon a contract or a subcontract under which a lien may arise shall retain a holdback equal to 10% of the price of the services or material as they are actually supplied under contract
- Personal liability of owner
- no set off
- (suppliers of material not subject to holdback)

The Holdback (continued)

Finishing

- 10% on all work done after contract has been certified

Notice Holdback

- A Payer who has received written notice of a lien must retain an amount sufficient to satisfy the lien plus the 10% holdback:
 - A payer may set off as against his payee in respect of the notice holdback an amount equal to the balance in the payors favour of all outstanding debts, claims or damages, whether or not related to the improvement

Written Notice of Lien

- Any written notice
 - must identify payer and premises
 - must state the amount that the person has not been paid and is owed
- Can include a claim for lien
- Must be delivered to payer and to everyone else who is to be put on notice including owner
- If notice of lien is not preserved and perfected it will expire. Therefore written notice must be given within the 45 day preservation period

Preserving The Claim for Lien

- On a project where there is substantial performance the earlier of 45 days after
 - publication of certificate completion; and
 - where the contract is completed and/or abandoned
- No certification – 45 days after contract is completed or abandoned

Preserving The Claim/Counterclaim for Lien

- Not possible if there is publication of substantial completion
- Warranty and repair work does not extend 45 day period
- If there is a series of separate POs and invoices relating to the same project all the POs will be looked at as one contract

How to Preserve a Claim for Lien

- Register claim for Lien on title to land where supplies and/or services were delivered
- If government land, “give” claim for lien to appropriate agency
- claim for lien will be invalid if:
 - It is not sworn
 - wrong legal description
 - fail to register against correct land
- Liability for exaggerated lien

Perfecting Lien

- If lien attaches to the premises and has not been vacated an action to enforce lien must be commenced and a certificate of action must be registered, both, within 45 days from the last day that the lien could be preserved

Effect of Preservation & Perfection

- All Payers who have notice of claim for lien, either through delivery or search must retain an amount sufficient to pay lien...usually it means no mortgage advances or other payments
- The lien claimant has right to share of holdback in each stream
- The lien claimant can cause the owners land to be sold if insufficient holdback

Discharging of Preserved or Perfected Liens

1. By Release and Consent executed by Lien Claimant usually when there is a settlement
2. By Court Order upon posting security by way of lien bond or cash equivalent to the full amount of the claim plus 25% for costs to a max of \$50,000

Discharging of Preserved or Perfected Liens

3. By Court Order if upon motion it is proved that:
 - the lien is out of time (either preservation or perfection)
 - the lien amount is incorrect...court, can reduce the lien amount or discharge it
4. By Court Order if lien claimant fails to set down the lien action for trial within two years of the date of issuance of Statement of Claim

Distribution of Proceeds after Judgment

- You want a valid lien
- Lien claimants have priority over all judgments, executives, assignments, attachments and garnishments and receiving orders in respect of holdback and trust funds (Sec 77)
- Lien claimants have priority over subsequent mortgages and subsequent advances in financing mortgages
- No priority between lien claimants in same class except lien of worker liens have priority

Summary

- Cross the “t”s and dot the “i”s
- Keep the lines of communication open
- Consider that there is more than one successful outcome of any dispute
- You cannot argue in the face of clear documents

Claims Avoidance

Traditional Approach to Claims

- Rights-based talk and rights-based solutions (win/lose outcomes)
- Does little to repair and preserve damaged relationships
- It also does little to resolve the problem

Traditional Approach (cont.)

- Forget about blame
- Do I have to deal with this subcontractor/contractor/consultant again, on this project, or on a future project?

How Do Claims Arise in the First Place?

- Ambiguous or incomplete contract documents
- Use of standard form of contract where the project isn't a "one size fits all"
- Shifting risk in the contract
- Unrealistic schedules

How Do Claims Arise in the First Place? (cont.)

- Stacking of trades
- Unrealistically low bids (leading to the inevitable claims for extras)
- Poor communication between project managers
- Poor management

How Do Claims Arise in the First Place? (cont.)

- Failure to deal promptly with change
- Adversarial mind set
- Passing on of responsibility and ownership

What can I do in the Short Term?

- Disclose my true interests and values
- Seek disclosure of the other parties' interests and values
- Communicate clearly and effectively, don't keep information to yourself simply to "surprise" others with it later

What can I do in the Short Term? (cont.)

- Clear and detailed communication reduces the likelihood of people reaching conclusions quickly and erroneously, then ignoring or filtering out contradictory information
- Is an impediment to settlement

Partnering as a Dispute Avoidance Technique

- What is partnering?
- Partnering is a procedural overlay to the contract which has dispute prevention as its goal
- The contracting parties get together at the beginning of a job to identify common interests, mutual objectives and to agree on procedures to expedite the resolution of problems that are likely to arise

Partnering as a Dispute Avoidance Technique (cont.)

- Is a non-binding document which commits to the party to the partnering procedures and goals
- Is an attitude based upon good faith to foster an environment in which disputes can be resolved
- Conflicts are usually escalated step-wise to pre-designated higher representatives of each party.
- Can avoid frustration of cost and delay which can exist in other means of dispute resolution

Partnering as a Dispute Avoidance Technique (cont.)

Partnering does not:

- Change the legal obligations of any of the contracting parties
- Rewrite the provisions of the contract
- Involve a sharing of risk or profit

Project Pressures

Incomplete Design - Economic pressure rarely affords owners the luxury of a “100% design solution” for the projects they undertake. Construction typically begins following a pre-contractual investigation and design that is necessarily incomplete to some degree. It is inevitable that the work originally specified will vary somewhat as a design becomes realised during the construction because of conditions different than assumed or anticipated in the design.

Change in Owner’s Requirements - From initial conceptualisation through to the completion of the project, the owner’s requirements may change. The building can expand or shrink, internal layouts can fluctuate, and systems can be added or deleted. All these changes will cause a variation in the scope of work.

Project Pressures (cont.)

Unpredictable Job Site Conditions - As construction gets underway, problems in the site condition may arise. In the field, a complex design may become unbuildable in some of its elements. Other factors such as the weather, the performance of other trades, and the capabilities of the consultant team can result in unanticipated extra work.

Emergencies - Emergencies that arise during construction can result in the need for additional work. Although the possibility of an emergency is often considered in the pre-contract stage, it is not possible to predict with any certainty the nature or the extent of the change in work.

Project Pressures (cont.)

Regulatory Authorities - Regulatory authorities can require the performance of different work from that originally specified, or the same work performed in a different fashion.

Make use of the Design Professional

- Preparation of specifications and a coordinated plan is the single most important task of the design professional
- The best dispute avoidance technique is quality
- Identify externally imposed requirements (can be undefined in a catch-all phrase requiring the contractor to perform work that may be implied as incidental)

Make use of the Design Professional (cont.)

- Fix a schedule or timelines for the receipt of detailed drawings and instructions
- Ensure that all changes are in writing
- Part 8 of the General Conditions of the CCDC2 contract recognize the need to find alternatives to costly, slow and adversarial litigation process
- This provision incorporates the ADR concepts set out above
- Read in conjunction with the Rules for Mediation and Arbitration of CCDC Construction Disputes (incorporated by reference)

Make use of the Design Professional (cont.)

- The requirement that all disputes be first referred to the consultant for a finding or determination helps focus the parties on the importance of resolving disputes quickly.

Alternative Dispute Resolution

What is it?

- Negotiation
- Partnering
- Mediation
- Conciliation
- Expert determination
- Trial on expedited timelines, or trial of an issue

Alternative Dispute Resolution (cont.)

What should I ask myself?

- Is there a fair process and chance for a tangible outcome?
- Will ADR help to reach a quicker, cheaper and more durable outcome of my construction dispute?

Alternative Dispute Resolution (cont.)

What should I ask myself?

- Or will ADR only create more problems and force a nuisance compromised settlement?
- Who am I dealing with? The bully? The staller? The empty pocket? The reasonable person?
- What are the power dynamics? Can these be changed (i.e. view power as fluid and not fixed)

Alternative Dispute Resolution (cont.)

What should I ask myself?

- What are the most important interests I want to protect?
- How can I prevent the dispute from arising in the first place, or, if it has already arisen, how can I prevent it from growing?

Alternative Dispute Resolution (cont.)

What should I ask myself?

- Am I prepared to take a leap of faith?
- Am I prepared to address interests and values of all parties, not just my rights?

Alternative Dispute Resolution (cont.)

- Don't let ADR become private litigation
- Consider that sometimes litigation is better, particularly if the matter is case managed
- For every one way to speed a matter up, there are ten ways to slow it down

Alternative Dispute Resolution (cont.)

- Is the “wild west”, but not necessarily in a bad way
- Be imaginative and creative, explore lateral solutions – can I buy this company? Can it buy me? Can we partner on this project, or on the next one?

Make use of the Project Dispute Resolution Process

The basic steps are:

1. Claims, disputes and other matters in question are initially referred to the Consultant in writing for finding an interpretation;
2. Where such claims, disputes and other matters in question are not resolved in the first instance, then staged negotiation is imposed where the parties must attempt to reach a settlement within a fixed time frame on their own or with the assistance of a neutral third party mediator;
3. If mediation fails, then the parties have the right to seek binding arbitration in accordance with the law of the place of work by serving written notice within certain specified time frames;
4. If neither party elects arbitration within the specified time frame, either is free to pursue litigation or to further agree on another ADR process.

The Benefits are Clear

- The parties identify in advance potentially problematic areas that may lead to disputes
- Use of the design professional can lead to an amicable and productive result

Delay & Impact Claims Overview

- Project completion can be delayed for various reasons
- The conditions encountered at the project site may be materially different than expected (or disclosed on drawings)
- Multiple change orders may impact completion of the project (or a contract)
- A delay for one part of a project often leads to other delays

Delays caused by the owner

- failure to provide site access to contractor
- insufficient plans and specifications
- design deficiencies
- excessive design changes
- changes in the scope of work
- failure to obtain municipal permits
- changes to laws, regulations

Delays caused by a contractor

- failure to coordinate or properly supervise subcontractors
- failure to have adequate equipment and materials on site
- project management problems
- unforeseen site conditions
- inclement weather
- strikes by trades

What is a delay claim?

- A claim to recover time-related costs from the party (or parties) liable for causing a project to be delayed past its scheduled completion date
- Typically commenced by a contractor against an owner, or by an owner against a contractor
- the owner's consultant, architect and/or engineer are usually involved

Impact claims (other than delay)

1. Lost productivity claims – claimant seeks compensation for losses in the productivity of labour or equipment
2. Acceleration claims – claimant seeks to recover costs for mitigating or attempting to mitigate the effects of delays and/or productivity loss after additional resources used to meet original schedule

Obtaining compensation for delay and other impacts

- Delay claims / impact claims are difficult to prove
- Damages are notoriously difficult to quantify accurately
- The party asserting the delay claim must establish a link (i.e. causation) between the delay “event” and the effect on lost time / lost productivity

Delay analysis

- What are the delay events?
- How many?
- Did the delay events affect the critical path of the project schedule or just eliminate the float?
- Who is liable for each delay event?
- Was the delay caused by the owner, the contractor or both (concurrent delay)?

Delay analysis (continued)

- If concurrent delay, to what extent is each party responsible?
- Are there any notice requirements in the contract; were they complied with; if not, can the delay claim succeed nonetheless?
- What is the proper quantum of damages (compensation) for delay?

Categories of delay events

1. **Excusable Compensable**

- Delay events for which the claimant is entitled to time extension, compensation, or both
- A delay that could have been avoided by due care of one party
- Examples include inaccurate / untimely drawings or specifications; numerous change orders

Categories of delay events (contd.)

2. Excusable non-compensable

- delay events for which the claimant is only entitled to a time extension – no additional compensation
- examples include: labour strikes, extreme weather, floods and other *force majeure* events

Categories of delay events (continued)

3. Non-excusable Non-compensable

- events within a party's control which delay planned completion and for which that party assumes the risk of cost consequences, not only for itself but for others
- in these non-excusable situations, a party may be liable for damages under its contract, or may be sued for delay

Legal requirements for a successful delay claim

2004 decision in *Bemar Construction* set out what a contractor must show to recover damages for delay:

1. Cause of delay must be isolated and defined.
2. Delay must be analyzed to determine whether it is excusable and compensable
3. If delay is excusable, the extent (amount) of the delay must be determined
4. Notice of the delay claim must be given, if required by the contract
5. Did the delay affect critical path items or merely reduce the float
6. Quantum of damages/compensation must be determined

Defining and analyzing the cause(s) of delay

- supporting documents are crucial
- what do the relevant letters, emails say?
- for large construction projects, there will be site meeting minutes, daily logs and diaries, equipment-use logs, etc.
- contemporaneous written evidence is key to advancing a successful delay claim.

Determining the extent (amount) of delay

As-planned vs. As-Built

- All delay events are added up and depicted on the as-built schedule.
- Difference between *as-planned* vs. *as-built* completion dates is the amount of time for which claimant will request compensation (usually for extended site establishment costs and overheads).

Determining amount of delay (contd.)

Impacted As-planned

- Measure the impact of each delay on the as-planned critical path schedule.
- Amount of delay equals the difference in completion dates between the schedules between and after the impacts.
- The limitation of this method is that the as-planned schedule may not have been viable

Determining amount of delay (contd.)

Collapsed As-Built

- Take the as-built schedule and then remove the delays caused by each party
- The perceived advantage of this method is that it is based on actual events at the project
- Perceived disadvantage is that this method ignores the circumstances at the time of delay and the dynamic nature of the critical path

Notice Requirements

- In a 2012 decision, *Technicore v. Toronto (City)*, the Ontario Court of Appeal upheld a motion Judge's dismissal of a contractor's (Clearway's) claim against the owner due to contractor's failure to provide notice of its claim "***no later than 30 Days after completion of the work affected by the situation***"
- It is critical to know and understand the notice requirements in your contract

Other standard contract terms regarding delay claims

CCDC-2 Clause GC 6.5 provides:

6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. **The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.**

Amendments to standard contract terms

GC 6.5.1 - Amend by deleting all the words in the fourth line following the word “for” and substitute the following:

“....reasonable direct costs flowing (directly) from the delay but excluding any consequential, indirect and special damages.”

- Does the contract only provide for an extension of time (i.e. no compensation)

Implied contract terms

- Canadian courts have held that it is implied in every fixed price contract that the owner (or general contractor) will not unreasonably delay execution of the work
- implied term that Owner will provide contractor with access to the project site to complete the work

Did delay events affect the critical path?

- not sufficient that delays simply occurred
- delay events must extend date for substantial completion of the project, not just eliminate the “float”
- e.g. delays in installation of electrical wiring may not affect critical path
- delays in excavation or structural work may delay project completion

Proving causation

- claimant must establish a link between delay event and lost time
- one method for proving causation is to use the critical path method (CPM)
- CPM compares the as-planned schedule with the as-built schedule
- CPM analysis determines whether or not delays occurred on the critical path

Damages arising from delay

- difficult to prove
- additional construction costs
- labour and equipment costs
- Loss of productivity - Differential Cost Method is used - compare rate of productivity achieved on unimpacted work vs. impacted work.

Damages arising from delay (contd.)

- daily overhead costs – site personnel, project managers, site supervisors.
- office overhead costs – various formulas to calculate damages (*Eichleay Formula*)
- E.g. an owner may incur lost rents
- expert evidence typically required to prove quantum of damages

Mitigation of delay damages

- the claimant / innocent party can't just sit back and let damages accrue
- positive duty to mitigate and ensure that damages resulting from delay are minimized
- failure to mitigate could result in minimal or no recovery

How to ensure your rights are protected?

Before your contract is signed:

- ensure that contract contains specific provisions for delay
- contractor should ensure that contract provides for both extension of time and additional compensation for owner-caused delay
- owner should ensure contract contains properly drafted (i.e. enforceable) exclusion clauses where appropriate

How to ensure your rights are protected?

If delays arise during the project:

- ensure that you establish, maintain and update a project/contract schedule
- document the progress of construction (or lack thereof) in writing
- do not perform changed work without a signed and authorized Change Order
- comply with all contractual notice requirements

How to ensure your rights are protected?

Defending a delay claim:

- were the Notice requirements met ?
- exclusion clauses in the contract ?
- was the contractor's as-planned schedule realistic ?
- was there concurrent delay on the part of the party claiming delay ?

Exclusion clauses

- limit or exclude liability for certain types of damages or in respect of certain events
- “no damages for delay” clauses must be properly drafted by party seeking to rely on the clause
- “the contractor shall not have, nor make any claim ... for any damage which he may sustain by reason of any delay or delays, from whatever arising in the progress of the work.”
unenforceable – *Westcounty* (N.S.)

Exclusion clauses (contd.)

- No “damages, costs, expenses, loss of profits or otherwise howsoever because or by reason of any delay in the fulfillment of the contract within the time limited therefor occasioned by any cause or event within or without the contractors control, and whether or not such delay may have resulted from anything done or not done by [the owner] under this contract.” enforceable – *Perini* (SCC) [broader]

Concurrent delay

- Two or more parties are responsible for or cause delays (or multiple delays)
- Concurrent does not mean simultaneous.
- Consecutive or sequential delay events are considered concurrent
- Courts will apportion liability for concurrent delay amongst the various delay-causing parties

Concurrent Delay (contd.)

- Alleging concurrent delay is frequently used by parties to defend delay claims
- Courts have reduced a claimant's damages for delay if that claimant was responsible for some concurrent delay
- Concurrent delay claims can be used both as a sword and shield

Summary

- Review wording of contract terms carefully before signing
- Accurate documents, schedules, site logs, etc. are critical to support delay claims or defences
- It is difficult to resile from clearly worded documents
- When faced with delay and/or a delay claim, retain knowledgeable legal counsel

Questions?