

# Managing Risks from Below: Helpful and Problematic Clauses When Looking Up the Construction Ladder



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KCL Webinar Series – January 26, 2022

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## Managing Risks from Below

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- ❖ Contracts are all about allocation of risk
- ❖ Those above will try often try to push the risk down the ladder
- ❖ Those below need to know what to look out for
  - ❖ Especially in relation to new and emerging clauses
  - ❖ the types of delay and impact claims that might be asserted
- ❖ Both parties need to manage emerging risks

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## approvals and notice provisions

- ❖ Notice Provisions and other Conditions Precedent to Payment
  - ❖ *Re Chittick and Taylor* (1954), 12 W.W.R. 653 (Alta Q.B.)
  - ❖ *Peter Kiewit & Sons v. Eakins Construction Ltd.* [1960] S.C.R. 361
  - ❖ *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597
  - ❖ *Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205
  - ❖ *Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

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## notice provisions

- ❖ By Way of Example: Common CCDC clauses to consider:

\*These are from CCDC2-2020

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|-------|---|
| 6.5.4 | No extension shall be made for delay unless <i>Notice in Writing</i> of the cause of delay is given to the <i>Consultant</i> not later than 10 <i>Working Days</i> after the commencement of the delay. In the case of a continuing cause of delay only one <i>Notice in Writing</i> shall be necessary.  |
| 6.6.1 | If the <i>Contractor</i> intends to make a claim for an increase to the <i>Contract Price</i> , or if the <i>Owner</i> intends to make a claim against the <i>Contractor</i> for a credit to the <i>Contract Price</i> , the party that intends to make the claim shall give timely <i>Notice in Writing</i> of intent to claim to the other party and to the <i>Consultant</i> .   |
| 6.6.2 | Upon commencement of the event or series of events giving rise to a claim, the party intending to make the claim shall: <ul style="list-style-type: none"><li>.1 take all reasonable measures to mitigate any loss or expense which may be incurred as a result of such event or series of events, and</li><li>.2 keep such records as may be necessary to support the claim.</li></ul>   |
| 6.6.3 | The party making the claim shall submit within a reasonable time to the <i>Consultant</i> a detailed account of the amount claimed and the grounds upon which the claim is based and the <i>Consultant</i> will make a finding upon such claim.   |
| 8.3.2 | A party shall be conclusively deemed to have accepted a finding of the <i>Consultant</i> under GC 2.2 – ROLE OF THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 <i>Working Days</i> after receipt of that finding, the party sends a <i>Notice in Writing</i> of dispute to the other party and to the <i>Consultant</i> , which contains the particulars of the matter in dispute and the relevant provisions of the <i>Contract Documents</i> . The responding party shall send a <i>Notice in Writing</i> of reply to the dispute within 10 <i>Working Days</i> after receipt of such <i>Notice in Writing</i> setting out particulars of this response and any relevant provisions of the <i>Contract Documents</i> . |

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## **unforeseen conditions or circumstances**

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- ❖ The common law starting point: satisfy yourself in setting your price
- ❖ The starting point is often changed by contract:  
ex. *force majeure* and unforeseen conditions clauses
- ❖ Contactors and subcontractors need to understand and assess the risk allocations
- ❖ Particularly in relation to new and emerging risks:
  - ❖ O. Reg 406/18 for excess soils
  - ❖ COVID 19 for changes in circumstances and force majeure
  - ❖ Supply chain, labour shortages and price escalation issues

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## **payment provisions**

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- ❖ Unique or different payment certification clauses  
*Persaud v. Ramawad*, 2021 ONSC 5888 (CanLII)  
where the certifier had final authority on payments due
- ❖ ‘Pay when paid’ and ‘pay if paid’ clauses
- ❖ “Contract Equivalency” clauses  
  
Tying a subcontractor’s recovery to the contractor’s ability to recover from the Owner for Changes in the Work and Delay

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## ***Construction Act Risk Management***

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- ❖ Bringing Contracts in line with prompt payment provisions
  - ❖ Statutory Proper Invoice Requirements in Contracts
  - ❖ The 28 day payment timeframe (+ 7 for subcontracts)
  - ❖ Payment of Holdback upon the expiry of the lien period (mandatory)

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## ***Construction Act Risk Management***

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- ❖ Clauses to Better Manage *Construction Act* Issues
  - ❖ Specifying when the Contract was procured or entered into
  - ❖ Specifying how documents are to be “given”
  - ❖ Specifying how documents are to be “published”
  - ❖ Requiring Notices of Termination of Contract to be Given
  - ❖ Considering Early Release of Holdback
  - ❖ Clarifying if it is a “public project” and specifying the form of L&M Bonds to be provided

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## ***Construction Act Risk Management***

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- ❖ Clauses to Better Manage *Construction Act* Issues:
  - ❖ Processes which will allow an Owner to better assess a proper invoice within the 14 day time-frame  
... and being cautious of processes which perhaps go too far
  - ❖ the Act's prohibition on 'pre-approval' of a proper invoice  
being careful about draft or interim invoice requirements
  - ❖ specific time-frames for the submission of invoices
  - ❖ the scope of backup and processes required as part of the invoicing process

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## ***Construction Act Risk Management***

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- ❖ Clauses to Better Manage *Construction Act* Issues:
  - ❖ Allowing disputes which arise after the completion of the contract or subcontract to proceed to adjudication;
  - ❖ Allowing more than one matter to proceed to adjudication at a time?
  - ❖ Developing a process to select an adjudicator in advance
  - ❖ Developing adjudication processes
  - ❖ Developing more timely arbitration provisions to make the need for adjudication less likely?

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## **over-reaching provisions**

- ❖ Hold harmless and indemnification provisions
  - ❖ Tie indemnification to negligence and breach of contract
  - ❖ Avoiding clauses that too broad or too vague
  - ❖ Considering the scope of “indemnification”  
Who pays for lawyers, when, etc. ...
- ❖ Insurance provisions
  - ❖ Understand what you are to insure against  
Check with our broker and make sure you can provide it
  - ❖ If you are to insure the Owner against it, you can't claim  
against the Owner for it ...

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