Looking Through Different Lenses: Tactical and Technical Concerns When Representing the Owner or the Contractor

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PART I  OVERVIEW

Owners and Contractors have divergent goals regarding many aspects of a construction project. The Owner wants to get the project built on time, on budget, with minimal changes and few defects. The Contractor wants to be paid on time for its work, including any extras, and move on to the next job. A construction lawyer giving advice on project issues is going to answer questions differently depending on whether the lawyer is representing the Owner or Contractor.

For purposes of this discussion, it is assumed that the lawyer is representing an Owner who is honest, has the willingness and ability to pay the Contractor on time for work performed, and a sincere desire to compensate the Contractor for the value the Contractor adds to the project. Similarly, this discussion assumes that the Contractor client is equally honest, has the skills, ability, and intention to construct the project on time according to plan and agreement, with an equally sincere desire to be paid the agreed price plus the reasonable value of any legitimate extras, and nothing more. We have all had clients who vary to one degree or another from the assumptions stated above. Representing those clients is the subject of another discussion for another day.

In practical and summary terms, the interests of the Owner and Contractor diverge at contract formation, during the execution of the project, and regarding claims and disputes. We will address each of these three stages in the life of a project, isolating and examining issues that are critical to the success of the Owner or Contractor, with recommendations on approaching what often become inflection points in the history of a project.¹

Many important issues that arise during a project are the subject of statutory mandate in various jurisdictions. These include lien rights, prompt payment requirements, statutory holdback, and statutory mediation or adjudication. Advising a client on those issues primarily involves
ensuring that the client is well-versed in the applicable statutory requirements and takes steps to address them. This includes, by way of example, giving proper and timely pre-lien notices (both Contractor and Owner depending on the jurisdiction),\(^2\) strictly complying with prompt payment deadlines (Owner and Contractor)\(^3\) and statutorily mandated notices of withholding (Owner),\(^4\) and being prepared with proper documentation and pre-selected counsel to timely respond to an adjudication or project mediation (Owner).\(^5\) For the most part, this paper will focus on the non-statutory issues where construction counsel is called on to advise the Owner or Contractor and the client is free to structure its rights and chart the course it wishes to pursue.

**PART II CONTRACT FORMATION**

**A. The Owner’s Perspective**

From the perspective of the Owner, the most important issues in contract formation (other than time, price, and scope) are insurance/indemnity provisions, change provisions, notice provisions, audit rights, the termination clause, and dispute resolution provisions. Because insurance/indemnity provisions are a mixture of statutory and non-statutory issues, with many jurisdictions heavily regulating the contents, consideration of insurance and indemnity provisions will be outside the scope of this note.

1. **Change and Notice Provisions**

Change and notice clauses go hand-in-hand. Reduced to its essence, a claim by a Contractor is an assertion that an Owner did or failed to do something that caused the Contractor to incur more time or more expense in performing the work. Given that, an Owner needs clearly drafted change and notice provisions. There are any number of ways to draft these clauses but the goals for the Owner should be as follows:

a. Give the Owner the right to direct changes (via change directive or site instruction) and a
mechanism for quickly establishing time and price so that the Owner retains the flexibility to modify the work with a known impact on time and cost. This can be accomplished via an Owner estimate with a Contractor obligation to timely object, or a Contractor obligation to provide an estimate within a fixed time, failing which Contractor is (i) obligated to accept any reasonable estimate provided by Owner and (ii) Contractor is obligated to bear the burden of proving that the Owner estimate is unreasonable.

b. Require the Contractor to timely notify the Owner of issues that Contractor believes increase the time or cost of the work and shortly thereafter provide Owner with an estimate of the time and price impact of the change, failing which Contractor will not be entitled to more time or more money.

Provisions imposing these rights and obligations are fair to the parties. A core reality in the relationship between Owner and Contractor is that the Owner has the money, but the Contractor has the information and expertise. When the Owner requires a change to ensure that the work is fit for the Owner’s purpose, it is reasonable to require the Contractor to timely provide a statement of the impact of the change both in cost and time. This gives the Owner an opportunity to make an informed business decision on whether to proceed with the planned change, to proceed with the change but in a different manner or with a different contractor (see Termination clause discussion in Section II(A)(3) below), or to forego the change. Whether the Owner issues a change directive or site instruction for an affirmative change in the work, or the Contractor asserts that the Owner has done or failed to do something that increases the cost or time for the work, the Owner needs to have enough information to make a decision on whether and how to proceed.

The legal principle at issue is estoppel. If the Contractor fails to provide sufficient timely information to allow the Owner to make an informed business decision, the Contractor should bear
the risk of its failure to do so. By including well-drafted change and notice provisions, an Owner can take these issues out of the realm of equity and provide a sound contractual foundation for shifting the risk of non-compliance and burden of proof to the Contractor who is, after all, in possession of the information and expertise.

Jurisdictions vary on how strictly change and notice provisions are enforced, ranging from a strict enforcement regime in Australia to the more liberal construction sometimes given in the United States where courts have gone to great lengths to find verbal compliance or construe an oblique reference in meeting minutes to satisfy notice provisions. But whatever the jurisdiction, well-phrased change and notice provisions backed up by Owner compliance with its contractual obligations will go a long way in persuading a court or arbitral tribunal to enforce the agreement of the parties regarding claimed extra costs or time as written.

2. Audit Rights

One of the most overlooked and underutilized tools to assist an Owner when faced with claims for extra compensation (whether or not for time-dependent costs) is a comprehensive audit clause. Contractors may argue that on a lump sum project the Owner has no business poking around in the Contractor’s books. And if there are no changes or claims or disputes on the project, the Contractor has a fair point. But a project like that is fairly rare and, in any event, has no need for construction lawyers, so is not very interesting for purposes of this paper. Anticipating a project that does have changes or claims or disputes, the Owner has a legitimate interest in knowing what costs are included in the Contractor’s pricing of changes. Typical audit clauses provide that at any time during the course of the project and for a stated period thereafter, usually coterminous with applicable statutes of limitation, the Contractor is obligated upon receiving seven days written notice from Owner to make all of Contractor’s books and records available for Owner’s inspection.
and copying at Owner’s expense. For lump sum projects Contractors sometimes insist on language that excludes requests for compensation based solely on an application for payment under a lump sum contract. That is fair so long as care is taken to provide that claims for extra compensation of any sort trigger the audit clause, whether the Contractor is seeking payment for extra work or to be compensated for time-dependent costs incurred due to a compensable delay.

The audit clause should also contain a provision that in the event of any dispute proceeding relating to the claims that were the subject of the audit, should Owner prevail, then Owner will be entitled to recover all costs of the audit as damages against the Contractor. Such a clause goes a long way toward encouraging fair pricing of changes by Contractors and early settlement of disputes as discussed in the Claims and Disputes section below.

3. Termination Clauses

Termination clauses come in two flavors: for cause and for convenience. Aspects of both can be important to the Owner, but the most interesting from the Owner’s perspective is “for convenience” termination.

“For Convenience” Termination

An effective “for convenience” termination clause should provide that the Owner can, upon seven days written notice to Contractor, terminate all or any part of the contract and, in the Owner’s sole discretion, not perform the work or perform the work with other forces. The clause should explicitly provide that Owner has the right in Owner’s sole discretion to perform any extra work, work subject to a change directive or site instruction, or work subject to a change proposal (proposal for cost and/or time for a change claimed by Contractor, but not explicitly directed by Owner), with other forces and, if Owner wishes, terminate for convenience any scope impacted by such decision. In these circumstances, Contractor should not be entitled to additional compensation
since by definition the work at issue was beyond the base scope of the contract.

Should Owner choose to terminate for convenience base scope (scope not the subject of a change directive, site instruction, or change proposal submitted by Contractor) Owner should be obligated to compensate for Contractor’s actual costs incurred to the time notice of termination is given plus any reasonable costs of demobilization for the terminated work, with Contractor required to provide an accounting of all such costs within thirty days of termination or forfeit its rights to recover such costs. It is fair to include in a termination for convenience clause a provision allowing the Contractor to recover an allowance for overhead and profit on the actual costs incurred prior to termination. Such an allowance should be included in the contract, expressed as a percentage of the actual costs incurred to avoid disputes over the allowance for overhead and profit. A “for convenience” termination of base scope provision should be written so that it applies to all or any part of the base scope of work. And Owner should ensure that the audit clause encompasses Owner’s right to audit the costs claimed in the event of a “for convenience” termination.

“For Cause” Termination

“For cause” termination necessarily means that a dispute resolution proceeding lies ahead. Accordingly it is important to anticipate in the “for cause” clause issues that have to be dealt with including the effective date of the notice, Owner’s right to finish the work by any means necessary with Contractor liable for all costs associated with the termination and completion of the project, Owner’s right to, at Owner’s sole discretion, assume the subcontracts and purchase orders of the terminated contractor, and Owner’s right to take control of the site and all materials stored thereon.

The wording of the notice provision is important. It is assumed that written notice will be required and it would be a mistake for an Owner to terminate a Contractor without a carefully
considered written notice. “For cause” termination clauses often include an opportunity to cure. It is best to limit the cure period to no more than seven days and provide that in cases where no cure is possible, e.g., abandonment of the project by Contractor, the termination takes effect immediately upon giving the notice. Termination for cause should not be undertaken lightly and if the Owner has come to the conclusion that there is no other course (which should be the standard the Owner applies in making the decision) then the Owner will want to take over the project immediately. The clause should not hold termination in abeyance because Contractor has “commenced” a cure. The clause should be explicit that the cure must have been successfully completed within the seven day cure period or the termination will be complete.

Language should be included to ensure that Owner has the right to take over subcontracts, any materials left on site and materials specially ordered for the project but stored off site. Contractors will sometimes try to hold special order materials hostage in the event of a “for cause” termination. A provision requiring the Contractor to provide such materials to Owner will, if nothing else, give Owner the possibility of obtaining injunctive relief and diminish the Contractor’s leverage.

4. Dispute Resolution Clauses

The choices made in drafting and negotiating the dispute resolution clause can dramatically affect the outcome of claims and disputes. Two separate sets of issues need to be considered: resolution of disputes during the job and resolution of claims after completion or termination.

Disputes During the Project

There are many forms of claims resolution procedures to temporarily resolve disputes which occur during a project. Two of the most common are the Dispute Adjudication Board (“DAB”) and Dispute Review Board (“DRB”). DRBs and DABs are established at the outset of
a project and consist of a standing panel of one or three lawyers and/or engineers or other construction professionals appointed for the life of the project. Contracts with DRB/DAB clauses typically provide that the board members visit the site quarterly to monitor progress and address potential problems. Procedures will be written into the contract for claims submissions to the DRB/DAB during the project.

From the Owner’s perspective, a dispute board is often a Contractor-friendly cash flow device which in practice is used by the Contractor to force the Owner to pay contested claims during the course of the project. Dispute boards are expensive and time consuming, with the cost of the dispute board effectively factored into the contract price, meaning that the Owner is paying for a device that is often misused by the Contractor. As such Owners are usually well-advised to refuse to include dispute boards in their construction contracts. If for some reason a dispute board cannot be avoided, Owners can improve their position by taking the following steps:

a. First, Owners should limit the power of the dispute board to making an interim recommendation as opposed to issuing an interim decision. An interim recommendation of a dispute board should be accompanied by language providing that the recommendation of the dispute board may be contested by arbitration or litigation (depending on the ultimate dispute resolution mechanism in the contract). Conversely, an interim decision, if permitted by the terms of the contract, will usually be accompanied by language making the decision binding and enforceable until overturned by a later arbitration or judicial proceeding. This can have enormous cash flow consequences. Like a statutory adjudication in jurisdictions that mandate those proceedings, a dispute board clause in a contract giving the dispute board members interim decision authority makes it more likely that a sophisticated Contractor can successfully pursue a claims strategy during the project.
that forces the Owner to pay claims based on a summary adjudication and then be forced to engage in full-blown dispute resolution proceedings to recover the money. As might be expected, this has a profound effect on real-world leverage and overwhelmingly favors the Contractor. If the Contractor makes a claim and the dispute board rejects it, the Contractor is no worse off than if it had had to wait until the end of the job to resolve its claims. But if the Contractor makes a claim and receives a decision in its favor, the Owner will likely end up paying the claim or some discounted version of it and living with the results, not having had the opportunity to fully test the claim by arbitration or litigation.

b. Second, Owners should include language in the contract providing that dispute board proceedings, recommendations, and any decisions be treated as privileged and confidential and may not be introduced into evidence in any arbitration or litigation for any purpose. The Owner should seek contractual language that offers the same protection to dispute board proceedings as are typically afforded to mediation proceedings; complete evidentiary exclusion from other legal proceedings. This will prevent the Owner from being held hostage to an incorrect finding made in favor of the Contractor following the summary proceeding of a dispute board which will rarely if ever provide the due process protections given in arbitration or litigation.

Claims After Completion or Termination: Final and Binding Resolution of Disputes

The key decisions to be made here are: arbitration or litigation, choice of law, and venue. The latter two, choice of law and venue, are usually straightforward. The Owner wants the law of a familiar jurisdiction, usually where the project is located or the Owner maintains its headquarters or a significant office. If the project is outside the United States or Canada, the Owner wants to ensure that the choice of law and venue provisions are calculated to permit a resolution that ensures
that the rule of law will apply and questions of “home-owning” or outright corruption will not be a factor working against the interests of the Owner.

The question of arbitration or litigation is more difficult. The popularity of arbitration has gone in cycles over the past fifty years with it sometimes being seen as a panacea for construction industry dispute resolution and periods where it has fallen out of favor, largely due to a perception of the time and expense associated with some arbitral proceedings and the questionable quality of decision making by tribunals. However, these perceived shortcomings of arbitration can be overcome by careful negotiation and drafting of the dispute resolution clauses. The benefits of having seasoned, trusted industry professionals decide complex and often arcane issues peculiar to the construction industry, rather than a judge or jury who comes to the process with no prior knowledge of the issues that arise in most complex construction disputes, are obvious.

The most cost-effective and efficient method of dispute resolution for an Owner with the highest likelihood of a fact-based outcome is ad hoc arbitration adopting the principles common to international arbitration. An arbitration clause to effectuate this should provide that each party appoints one arbitrator, with the two so chosen appointing the third who will serve as the chairperson for the arbitration. An administering authority is both unnecessary, time-consuming, and an added cost element. By contrast, it is important to provide for an appointing authority in the event that a party fails to timely appoint its designated arbitrator or the two cannot timely agree on a third. There are many organizations around the world that will serve in the appointing authority capacity, e.g., the American Arbitration Association (“AAA”), the London Court of International Arbitration (“LCIA”), or the Singapore International Arbitration Centre (“SIAC”).

There are many sets of arbitral rules that can be incorporated by reference including those of the AAA, LCIA, SIAC, or UNCITRAL. Depending on your venue and the nature of the project,
American and Canadian lawyers are fond of protracted discovery. It is rarely cost-effective. Once in a great while an exhaustive discovery regime will turn up a smoking gun document or result in a “gotcha” moment in deposition, but the costs usually outweigh the benefits. Provided that the arbitration clause or incorporated rules require the Contractor to produce all documents on which it will rely to support its claim well in advance of the hearing, and give the Owner the right to obtain any Contractor or third party documents reasonably necessary for the Owner to prove its defense or counter-claim, that should suffice.

It is common for dispute resolution regimes to provide for tiered dispute resolution, first requiring management meetings of Owner and Contractor, then mediation, and only then arbitration. These are sensible but should have clearly expressed time frames for each precursor to arbitration so the parties can plan accordingly.

There are two additional clauses an Owner should insert into the dispute resolution regime: a flow down clause and a requirement that if the Contractor is providing a parent guarantee or equivalent, the Contractor has the obligation to ensure that the guarantor signs a document expressly agreeing to be bound by the provisions of the dispute resolution provisions of the contract. Complex construction projects necessarily involve multiple parties. The Owner does not want to have to fight on multiple fronts. The flow down clause obligates the Contractor to ensure that all subcontracts and vendor agreements (purchase orders) bind the subcontractor or vendor to the dispute resolution clause of the contract so that the Owner can have all relevant parties before the trier of fact. Similarly, the Owner does not want to have to pursue separate proceedings against a guarantor. Proper use of flow down and guarantee clauses (and disciplined follow-through to make sure that the subcontractors, vendors, and guarantors actually execute a
document binding them to the Owner-Contractor arbitration clause) can ensure that the Owner is able to resolve all aspects of a claim at one time in one forum.

B. The Contractor’s Perspective

1. Pre-Bid/Bid-Stage

Prior to making the determination that it is appropriate to bid on a construction project or to send a quote to an unknown Owner, particularly in the case of private, as opposed to publicly-funded Owners, time should be spent gathering pertinent information about the prospective Owner, including information about the Owner’s ability to pay. Corporate searches, bankruptcy searches, credit reports, and title searches, can provide a Contractor with knowledge about the project Owner and its ability to pay the required project funds. There may also be benefit in conducting litigation searches, in an effort to determine the types of disputes the Owner has been known to litigate. By doing these searches, the Contractor can make an initial and fundamental assessment of whether it wishes to get involved in the prospective project. Also, following the bid stage, in the same manner that the Owner may require a broad right to audit the Contractor’s books (as discussed in the previous section of this paper), a Contractor should consider contract provisions enabling it to request updates on the Owner’s financial wherewithal during the project and consider a request for project holdback, or retention funds to be segregated into a joint interest bearing account.

2. Overview of Contract Types

In Canada, the most commonly utilized standardized form of contract for construction projects is the Canadian Construction Documents Committee (“CCDC”) suite of contracts, which are in several respects similar to the American Institute of Architects (“AIA”) contract forms. There are currently twelve standardized contract forms published for purchase by the CCDC. Canadian Owners tend to regard the CCDC contracts as Contractor-friendly, and often spend great
efforts revising the CCDC contracts, through supplementary conditions and amendments, to remove some of the mutual provisions\textsuperscript{11} and transfer risk to the Contractor.

Another standardized contract form sometimes used in Canada is published by the International Federation of Consulting Engineers (“\textbf{FIDIC}”), although these contracts are more commonly used on international projects, or domestic projects that involve international Contractors. Though these contracts are commonly used outside the United States and Canada, additional or particular conditions may need to be added to bring the terms in line with the standard conditions familiar to Owners and Contractors accustomed to the CCDC and AIA contracts.

Depending on the Owner’s sophistication with construction projects and the complexity and value of the project, a customized or “bespoke” form of contract may be required. Contractors are cautioned to carefully review and consider the terms of customized Owner contracts, particularly at the bidding stage, in order to fully understand and appreciate the risks that the Owner intends to transfer to the Contractor. Having a lawyer review a contract before bidding, let alone execution, will be money well spent for most Contractors.

3. \textit{Key Contract Provisions for Contractors}

Regardless of the contract form, similar key provisions will need to be reviewed and considered by Contractors. In this section of the paper, provisions of the CCDC 2-2008 Stipulated Price Contract (“CCDC 2”), with cross-references to the AIA A201-2017 General Conditions of the Contract for Construction (“A201”) will be referenced to exemplify some of the provisions that are typically the subject of negotiation and negotiated amendments.

\textbf{The Change and Notice Provisions}

The Owner’s position, as stated above, is essentially that when a change occurs, the Contractor should forthwith assess the impact of the change on the project’s cost and time and
advise the Owner, accordingly, so that the Owner can determine whether to proceed with the change by assessing these risks. Practically speaking, it can be very difficult, if not impossible, for the Contractor to know the full extent of the cost and time impact when the change occurs or is requested, increasingly so in circumstances where the change in question is one of several changes to the project. As such, the Contractor has a dilemma when faced with the type of rigid notice provision often required by Owners. The Contractor will often contend that it is not fair and reasonable for it to provide a binding assessment of the full cost and time impact at the time the change arises and will attempt, with varying degrees of success, to reserve the right to supplement its initial assessment of the change at a later stage in the project, particularly where there are multiple changes having a potential cumulative effect.  

“For Cause” Termination

When it comes to the Owner’s right to terminate the Contractor for cause, having a third party “Consultant” certify the Contractor’s alleged default can be both a benefit and a potential burden. The potential burden arises from the fact that the Consultant under a CCDC contract is typically the Owner’s architect or designer of the Project – engaged and paid by the Owner. As such, the Consultant is often seen by the Contractor to be anything but impartial and often suspected of siding with the Owner in the event of a dispute. On the other hand, by requiring the Consultant to certify that a default has occurred, there is, at the least, something of a buffer between the Owner’s self-proclamation and a third party’s potentially objective finding that a default has, in fact, occurred. Moreover, cases have held that the Consultant has an ethical obligation to act impartially when called upon to declare that a Contractor’s conduct amounts to an actionable default. So, on balance, Contractors are probably better off agreeing to the requirement that a
contested default be certified by a Consultant, provided the Contract includes a reserved right to ultimately challenge the termination for cause.

However, when it comes to the Contractor’s right to declare the Owner in default, the requirement for the default to be confirmed in writing by a Consultant can be an impediment to the Contractor for the reason noted above; namely, the Contractor’s typical expectation that the Consultant will fail to act impartially. Further, the basis of a dispute that can lead to claims of default is often the result of a disagreement between the Contractor and the Owner as to whether a problem with constructability, delay, or a defect is the result of workmanship or design. Including a provision that requires the Consultant to be the arbiter of the dispute may be akin to placing the fox among the chickens. Further and from a practical standpoint, the Contractor’s only real basis for a termination for cause is often limited to an Owner’s failure to pay, which should be an event that can be empirically verified, without the need of a third party Consultant’s written confirmation.

Contractors also need to carefully consider the curative provisions of an Owner’s declaration of default. Pursuant to GC 7.1.2 of the CCDC 2, the Owner is required to provide the Contractor with a mere five working days to correct a default or to provide an acceptable schedule for the correction of the default. The Contractor needs to carefully consider whether this provides sufficient time to properly assess the alleged default; usually, it does not. The more time the Contractor has to assess and respond, the better off it will be in avoiding a termination for cause event, particularly if there is a realistic opportunity to get a project back on track.

“For Convenience” Termination

The counterpoint to the Owner’s desire to have a termination for convenience clause, with minimal financial exposure, is the fact that the Contractor will be invested in the project and will
likely have foregone other profitable projects to secure the contract in question. If the contract is terminated for convenience early on, the Contractor may not be in a position to make up for its lost revenue and profit. Contractors must consider these provisions very carefully and be comfortable with the potential outcomes. Compensation restricted to the value of the work performed and profit on the work performed may not be sufficient. The Contractor will want assurance that the Owner bears responsibility for all cancelled subcontracts and supply agreements, demobilization costs and possibly some lost profit on the unperformed work. After all, the decision to cancel the contract is the Owner’s, and as such, the Owner should bear the cost associated with that risk.

**Safety**

Pursuant to GC 9.4 of the CCDC 2, the Contractor assumes responsibility for the project’s construction safety and for compliance with applicable construction health and safety legislation. Where the Owner has its own workers or has hired other contractors on the same project, this presents an increased risk to the Contractor. At the outset, the Contractor needs to clearly understand which workers it is responsible for and whether its health and safety program extends to trades, suppliers, consultants and others for whom it is not otherwise contractually responsible. If the Contractor is being asked to assume responsibility and the risk of everyone on the project site, it should consider whether it is being properly compensated for the same and ensure that everyone who sets foot on the site adheres to its health and safety program. In these circumstances, the Contractor should consider supplementing the health and safety requirements of the CCDC or AIA with an obligation for the Owner’s workers and other contractors to sign an acknowledgement and waiver that they will abide by the Contractor’s safety requirements. By adding an acknowledgment and waiver, the Contractor can minimize its responsibility for health and safety,
making it less likely that the Contractor will be required to indemnify the Owner from fines imposed by the governing authority in the case of a breach.

Liens

Any obligation on the Contractor to vacate or discharge liens from the property should be limited by, at the least, the following two qualifications. First, the Contractor should exclude its own obligation under the contract to vacate or discharge an encumbrance that is not a result of work performed by the Contractor or its direct subcontractors. For example, if the Owner retains its own forces to complete a particular scope of work on the project and a lien arises from one of the Owner’s own forces, it should not be deemed the responsibility of the Contractor to vacate or discharge the lien. Second, the Contractor should exclude any requirement to vacate or discharge a lien if the reason for the lien is non-payment by the Owner. Several Canadian statutes bar lien waivers. Contractors need to be aware of the risks and costs associated with removing liens registered by subcontractors and suppliers and should ensure that they have the financial capacity (whether through letters of credit, cash, or a surety bonding facility) to clear liens in order to facilitate payments under the prime contract.

Indemnification

Pursuant to GC 3.4 of the CCDC 2, the Contractor is required to review the contract documents and report any error, inconsistency, or omission it may discover to the Consultant. However, the Contractor should be able to rely on the contract documents without liability for damages or costs resulting from such errors, inconsistencies, or omissions that the Contractor did not discover. GC 12.1, the indemnification provision, should be revised to explicitly state that the Contractor will be indemnified from any claim arising from its reliance on the contract documents. For example, should the means of construction be based upon a Contractor’s review
of a soil or geotechnical report, the Contractor should not be held liable if information that is relied upon in the performance of that work is determined to be wrong. This factual scenario arose in *Corpex (1977) Inc. v. Canada*, referenced below.  

**Waiver**

Pursuant to GC 12.2 of the CCDC 2, upon substantial completion of the work, the Contractor waives and releases the Owner from all claims which the Contractor has or reasonably ought to have knowledge of as of that date. By including the test of “reasonably ought to have knowledge of,” the onus is placed on the Contractor to prove that it was not reasonable to know of a particular claim. By deleting these words and making the test the “actual knowledge” of the Contractor, the onus shifts to the Owner to prove that the Contractor had specific knowledge of the claims.

**Limitations and Exclusions of Liability**

The Contractor should be aware of two types of limitations of liability claims: one dealing with the amount of liability, and the other with the form of liability. Contractors should attempt to include provisions in the contract that exclude or limit their liability to the Owner, whether in contract, tort, or otherwise, for any special, indirect, incidental or consequential damage of any kind, including, loss of use, data, profit, income, business, anticipated saving, reputation or more generally, any losses of an economic or financial nature.

In addition, Contractors should attempt to negotiate a cap on their liability, with the limit tied to: (a) a fixed amount agreed between the parties; (b) a percentage of the value of the contract (or the full value); or (c) the maximum available insurance, the latter being a common provision in architect, engineer, and consultant contracts. The exclusion of indirect and consequential losses
and damages and a cap on a Contractor’s liability from breaches of contract and negligence are simple revisions that will result in limiting damages claims to direct quantifiable losses.

During contract negotiation, Owners will typically have greater bargaining power. To address this imbalance between the parties, Contractors should at a minimum, consider the impact of the above clauses, before agreeing to the engagement, or risk a potentially negative outcome that could outstrip the value of the contract itself.

PART III DURING THE PROJECT

A. The Owner’s Perspective

The steps an Owner can take to minimize the cost and time involved in dealing with and satisfying Contractor claims are or should be self-evident. They consist of following the contract, documenting contemporaneously any deviations from the contract, requiring Contractor compliance with the contract, promptly processing any claims or contractual requests such as RFI’s and the like, settling contemporaneously any claims that can reasonably be settled, and reserving all rights as to any that cannot.

Many Owners pay too little attention to claims during the course of the project which means they end up paying too much attention to them after the project. When a Contractor submits a claim for time or money or both, the Owner should immediately engage the necessary professionals to investigate, document, and assist in resolving the claim. Depending on the size and substance of the claim, this may include an internal claims manager, a construction manager, construction counsel, and third party subject matter experts such as scheduling consultants or forensic accountants.
1. Using the Audit Clause

Assuming that the Owner has included a properly robust audit clause in the contract, any material claim should be met with a demand for audit. The Owner should retain an experienced construction forensic accountant to conduct an audit of the Contractor’s books pertaining to the claim. Any money spent on retaining a construction forensic accountant will often be recovered in multiples through savings on claim settlements and, if possible, reduction or elimination of claims in arbitration. To the extent that a Contractor resists compliance with the provisions of the audit clause either by outright refusal or by providing only selected materials in response, the Owner should consider immediately invoking the dispute resolution provisions of the contract to enforce the audit clause. These dispute proceedings would be limited to enforcement of the clause and not include resolution of the underlying claims.

This approach generally results in one of two consequences, either of which will be beneficial to the Owner: in the face of an audit-focused notice of dispute, the Contractor is likely to settle the claim on reasonable terms or be required to comply with the audit clause, giving the Owner the opportunity to properly evaluate the claim and settle it on reasonable terms or prepare an effective defense for the resolution of the underlying claim. And, there is a third benefit to disciplined use of the audit clause: it materially decreases the likelihood of spurious Contractor claims.

B. The Contractor’s Perspective

1. Advising the Contractor During the Project

There are many moving pieces to a construction project. In order to be better prepared to confront the potential impasses and disputes that could arise during construction, Contractors
need to understand their obligations and rights as prescribed by the contract and by applicable law, which may include any or all of the following:

- rights and responsibilities associated with statutory prompt payment;
- timing associated with preserving and advancing statutory lien rights;
- timing for delay notices;
- the categories of claims that are excluded;
- the categories of claims for which damages are limited; and
- the timing of any deemed waiver of claims.

Prior to commencing work on the project, Contractors should review the key contract requirements, including the change order process, non-payment, delay events, and the timing and content of claim notice requirements. Several Canadian cases have provided guidance to Contractors and subcontractors on the approach to and treatment of these issues.

**Change Order**

Typically, work performed by a Contractor that is outside the scope of work contemplated in the contract requires the submission of a change order and the approval of that change by the payer in order for the Contractor to be reimbursed for the additional work. However, in the Ontario decision of *Kappeler Masonry Corp. (Receiver of) v. Carillion Construction Inc.*,\(^{21}\) neither the contractor nor the subcontractor strictly followed the terms of the subcontract when requesting, carrying out, approving, and ultimately paying for extra work. Rather, the subcontractor simply performed most of the work without authorization, which was subsequently reimbursed by the general contractor. The court considered whether this amounted to a “pattern of conduct” that vitiated the requirement of strict compliance with the contractual procedure for a change in the work, like was found in *Colautti Construction Ltd. v. Ottawa (City)* (1984).\(^{22}\) The court ultimately
ruled that it could not decide on this issue and ordered a mini-trial so that oral evidence could be presented on the issue of “whether the parties engaged in a course of conduct necessary to vary the terms of the subcontract relating to the procedure for approval and payment of extra work.”

In short, there may be consequences should parties stray from the strict terms of the contract.

**Notice of Delay**

In an effort to be reimbursed for delay that is not the fault of the Contractor, contracts will typically require that written notice of the delay be given to the Owner either within a reasonable time of the delay or within a specified time period. In *Acme Masonry Ltd. v Bird Construction Ltd. et al.*, Bird Construction subcontracted the masonry work on a project to Acme Masonry, but the work was delayed between six months and one year due to labour unrest and unavailability of material. Bird provided Acme with revised construction schedules, which prompted Acme to advise by way of written notice and change order that the delay would increase the cost of the subcontract work. Pursuant to the contract, detailed claims were required to be made in writing before the time of the final certificate. Because Acme did not stringently comply with these terms, the court dismissed the subcontractor’s appeal and found that the claim was filed out-of-time.

However, in *Mar-King Construction Co. v Peel (Regional Municipality)*, the court held that strict compliance may not be required where there has been some “timely notice ... to enable the Owner to consider the claim and take steps to conduct its own investigation.” Though the court provides no explanation of what “timely notice” entails, the court suggests that it is “not perfect notice as required by the contract.” In *Limen Structures Ltd. v Brookfield Multiplex Construction Canada Limited*, the court relied on *Mar-King* to suggest that a trial was necessary to hear evidence of the surrounding circumstances and the conduct of the parties in order to determine whether the notice requirements of the contract were satisfied. Though surrounding circumstances may be
considered influential for a court in determining whether a notice of delay is binding, Contractors should always err on the side of caution and make a conscious effort to submit written notice of delay pursuant to the explicit contract terms.

2. *Taking Stock of Prompt Payment / Trust Provisions*

Delayed payment is a significant issue for Contractors in the construction industry. Prompt payment advocates across the globe have lobbied to improve cash-flow throughout the construction pyramid, so that subcontractors and suppliers who are dependent on payment further up the chain are not without recourse. Recently, in Ontario, the Government appointed a committee to review this perceived problem and subsequently enacted legislation to provide for and promote prompt payment. As a result of this review, a new *Construction Act* was introduced into force in Ontario on July 1, 2018, with the prompt payment provisions applicable commencing on October 1, 2019. The new regime of prompt payment and adjudication is based primarily on the current practice in the United Kingdom.

In the late 1990s during a recessionary period, pay-when-paid clauses were considered to be the cause of bankruptcy amongst small and medium sized businesses in the United Kingdom. As a result, the *U.K. Construction Act* was introduced in May 1998, which explicitly prohibited conditional payment provisions in construction contracts, whether for public or private projects. Although this improved the flow of payments on construction projects, a further review found that it was not far-enough-reaching. Consequently, in 2011, the *U.K. Construction Act* was amended to introduce prompt payment, whereby a payment notice must be delivered within the period specified by the contract, providing the amount due and the basis for the calculation.

Under the new prompt payment regime, once a Contractor (whether on a public or private project) has submitted a “proper invoice” to an Owner, the Owner is mandated to pay the invoice
within 28 (calendar) days of receipt, unless a notice of non-payment, in a prescribed form, is given to the Contractor. In turn, the Contractor is required to then pay its subcontractors within fourteen days of receipt of payment from the Owner, while subcontractors are required to pay their sub-subcontractors and suppliers within seven days of receipt of payment from the Contractor.33

This new Canadian model for prompt payment, while influenced by similar statutes in the United States, differs from the system employed in the United States in that the prompt payment provisions are being introduced in tandem with a newly-created and mandatory dispute resolution process known as adjudication, discussed later in this paper. One of the biggest criticisms of the prompt payment system employed in the United States appears to be that unresolved payment disputes are often relegated to slow and costly litigation, rather than a more timely and cost effective dispute resolution process.34 New Hampshire appears to be the only state that has not introduced any form of prompt payment legislation, while some other states have restricted statutory prompt payment to public sector projects.35

Pursuant to Section 8 of the Construction Act, all amounts owing to a Contractor or subcontractor constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the Contractor or subcontractor.36 As of July 1, 2018, these trust funds are required to be deposited into a bank account in the trustee’s name, whereby the trustee has an obligation to maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfer made for the purposes of the trust, and any other prescribed information.37 Though this places an increased obligation on a Contractor to maintain more detailed accounting records of funds received from the Owner for the benefit of its subtrades, this also means that the Owner will be required to maintain proper and up-to-date accounting records. This will be of assistance
to a Contractor if payment is stalled at the top of the construction pyramid and a Section 39 information request is delivered to the Owner.\textsuperscript{38}

This revision to the Ontario statute is similar to the segregation required under the \emph{Builders Lien Act} in British Columbia, whereby an Owner must establish a separate holdback account for each contract under which a lien may arise. All holdback funds required to be retained must be paid into the holdback account, which is administered jointly by the Owner and Contractor.\textsuperscript{39} A Contractor must review the legislation in force in the appropriate jurisdiction to determine whether a segregation of its accounts is required.

3. \textit{Proper Invoicing}

The oldest trick in the Owner’s playbook to delay payment is the never ending request for “further backup” or “additional support” for or correction of a Contractor’s invoice. The new Ontario \emph{Construction Act} attempts to address this problem by introducing the concept of a “proper invoice.” A “proper invoice” means a written bill or other request for payment for services or materials in respect of an improvement of a contract containing the following:

1. the Contractor’s name and address;

2. the date of the proper invoice and the period during which the services or materials were supplied;

3. information identifying the authority, whether in the contract or otherwise, under which the services of materials were supplied;

4. a description, including quantity where appropriate, of the services or materials that were supplied;

5. the amount payable for the services or materials that were supplied, and the payment terms;
6. the name, title, telephone number and mailing address of the person to whom payment is sent; and

7. any other information that may be prescribed.\footnote{40}

A “proper invoice” containing all the above information is to be provided to an Owner on a monthly basis, unless the contract provides otherwise (though the timing cannot be shortened). Importantly, and to some rather surprising, a provision in a contract for construction in Ontario that makes the giving of a proper invoice conditional on the prior certification by a third party payment certifier (such as an architect or engineer) or on the Owner’s certification and sign-off, is deemed of no force or effect.\footnote{41} Under the \textit{Construction Act}, prompt payment becomes inextricably linked to the provision of a proper invoice. If a Contractor client is not being paid promptly, the first inquiry to make is whether the invoice is “proper.” Once a proper invoice is provided by the Contractor, an Owner shall pay the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the Contractor.\footnote{42} If the Owner fails to pay the Contractor on time, the Contractor is required to give its subcontractors notice of non-payment:

- stating that some or all of the amount payable to the subcontractor is not being paid within the time specified due to non-payment by the Owner (the copy of the Owner’s notice of non-payment must be provided);
- specifying the amount not being paid; and
- providing an undertaking to refer the matter to adjudication (discussed below), 21 days after giving the notice to the subcontractor.\footnote{43}

4. \textit{Adjudication}

The Ontario \textit{Construction Act} was prepared following a review of the existing legislation of the United States, United Kingdom, and other western countries. As noted, the drafters of the
legislation concluded that prompt payment, alone, would not address complaints with slow payment in the construction industry. Consequently, the Ontario Act introduces companion provisions for an interim dispute resolution process known as adjudication, designed to quickly resolve single issue disputes during construction projects without usurping the jurisdiction of the courts or arbitration for final determinations. Though the intended focus of the adjudication process is to resolve short-term mid-project payment disputes, the Construction Act explicitly lists a number of the issues that can be decided through adjudication. These include:

- valuation of services or materials;
- payment (including disputes about change orders);
- disputes over “notices of non-payment” (a mechanism employed under prompt payment);
- amounts retained as set-off, payment and non-payment of holdback; and
- “any other matter that the parties to the adjudication agree.”

A Contractor who wishes to refer a dispute to adjudication must provide the other party with a written notice of adjudication specifying the names and addresses of the parties, the nature and a brief description of the dispute, the nature of the redress sought, and the name of a proposed adjudicator to conduct the adjudication. Unlike the United Kingdom model, an adjudicator cannot be named in advance as a term of the contract. Only those adjudicators who are listed by the to-be-created “Authorized Nominating Authority” of the Ontario Ministry of the Attorney General can conduct adjudications.

Though an adjudication determination is only binding on an interim basis, the process has been introduced in an effort to create an increasingly efficient “pay now, fight later” model. Within thirty days of the adjudicator receiving the relevant documents from the party that served the notice of adjudication, the adjudication determination must be rendered in writing.
Contractor’s perspective, the introduction of adjudication provides the opportunity to resolve disputes quickly and relatively inexpensively (as compared to liening and/or litigating), and provides smaller Contractors with an increased opportunity for access to justice.

5. **Time at Large**

   Time at large is a term used in the construction industry to refer to situations where there is “no specific time for completion of a contract,” or the specified time has lapsed and has not been replaced with a revised completion date. Establishing that the parties were operating in a time at large situation can prove to be beneficial for a Contractor who seeks to avoid exposure to liquidated damages. Retroactive extensions of time – that is, extensions “granted” after the time for completion of the contract has already lapsed – where the delay is caused by the Owner, may not preserve an Owner’s right to claim for liquidated damages. In this situation, the Owner will be faced with the problem that the original time for completion lapsed, and no new date for completion was established. As such, time is said to be “at large.”

   Time at large can arise in the following scenarios: interference by the Owner or the consultant preventing the Contractor from completing its work; a failure by the Owner to stipulate a revised date in response to a request for a time extension; waiver by the Owner of the completion date or where there is agreement that the completion date is not applicable; and when no completion date is identified in the contract. However, a Contractor should take care when deciding whether to place the Owner on notice when time at large is triggered. Such notice might prevent an Owner from recovering liquidated damages, but the Contractor could still be found liable for damages from the delayed completion of the project within a reasonable time. The determination of what a “reasonable time” entails is open for interpretation.
6. **Default and Termination Provisions of the Contract**

   As referenced above, most contracts require the Owner to provide the Contractor with written notice of a default as a precondition to terminating a contract. Barring correction of the default, the Owner will be entitled to terminate the Contractor following the expiration of any prescribed curative provision. Similarly, the Contractor may have a right to declare the Owner in default. As previously noted, the Contractor’s right to terminate is typically restricted to the ground of non-payment, although it could extend to other material breaches of the contract by the Owner, or a significant suspension of work period, depending on the provisions of the contract. While a Contractor may have legal grounds to challenge an Owner’s termination, this could take years for a court or tribunal to rule on. Accordingly, it is imperative that a Contractor move quickly upon receipt of an Owner’s default notice to take the required steps to cure the default (e.g. accelerating work to bring it back on schedule), or to commence curing the default.

   A Contractor should take special care to review the required notice provisions, abiding by them as strictly as is possible to ensure that its right to make a claim against an Owner is not lost. Even where the Contractor’s claim arises from erroneous information supplied by the Owner, it is possible that failure to abide by the notice provisions will bar the Contractor’s claim.\(^{53}\) Notice provisions, and the timelines for complying with them, should be treated as conditions precedent to the Contractor’s ability to advance a claim.\(^{54}\)

   In the case of an Owner’s termination for cause, an Owner must be precise in its notices of default and termination. Where an Owner fails to include: (i) an accurate and clear description of the acts or omissions of the Contractor that gave rise to the alleged default; and (ii) a description of the conditions of the contract for which the Contractor is deemed to have defaulted,\(^{55}\) Contractors can be comforted that such notices have been found not to afford the Contractor
sufficient opportunity to rectify or cure the alleged default.\textsuperscript{56} As a result, subsequent termination by the Owner may be held to be wrongful and unenforceable.\textsuperscript{57}

Where an Owner seeks to rely upon a notice of default containing a cure provision to terminate a contract, action must be taken to terminate the contract within a reasonable time following passage of the specified rectification period. If the Owner takes no such action within a reasonable time and allows the Contractor to continue working, it could be deemed to have acquiesced in the Contractor’s performance and a subsequent termination could be found to be an unlawful repudiation of the contract.\textsuperscript{58}

\textbf{PART IV \hspace{1em} CLAIMS AND DISPUTES}

\textbf{A. The Owner’s Perspective}

If the Owner has protected itself by including a sound audit clause, dispute resolution provisions as outlined above, and followed the contract in a disciplined manner, the Owner will be well-positioned to defend itself from Contractor claims or prosecute backcharge claims against the Contractor. Should it appear during the project that dispute resolution of material claims is likely, the Owner should prepare itself by sending out a document preservation demand early enough to capture documents being created by the Contractor, subcontractors, and vendors. Admissions against interest by the Contractor and claims made by subcontractors and vendors against the Contractor provide compelling evidence in an arbitration, but not if they have been destroyed “in the normal course of business” during the job. (Owners should include a provision in the contract, usually in the audit clause, that requires the Contractor to maintain and preserve all project records during the course of the project and for a period thereafter co-terminus with the relevant statute of limitations. Note though, that the sanctions associated with spoliation of evidence require a
reasonable anticipation of litigation or some similar judicial or statutory formulation. Proving when litigation was reasonably anticipated can be obviated by a document retention demand.)

If the audit clause has not been invoked on the claim during the project, or if much time has passed since the audit was performed, a demand for audit should be given prior to or in conjunction with initiation of dispute resolution. Note that the audit clause gives the Owner a contractual right to conduct the audit. If the Contractor refuses to comply, that itself is a breach giving rise to a claim by Owner in any dispute proceeding.

1. **Mediation**

   The construction industry was an early adopter of mediation as a means of resolving disputes. Used properly it can be an effective tool for doing so. Unfortunately, first in the United States and increasingly in other jurisdictions, mediation has become such a knee-jerk response to disputes that it is often just a waste of time and money. For a mediation to be successful both parties need to have an interest in and motivation to compromise their claim or defense. Owner’s counsel can usually gauge the sincerity and motivation of the Contractor prior to any mediation being scheduled. Pre-arbitration mediations as part of a tiered dispute resolution provision in a contract are only likely to result in a settlement if the parties have spent the time and money to thoroughly evaluate each other’s claims and defenses during the project. Successful mediations require both Owner and Contractor to be well-informed about their own strengths and weaknesses and those of the opposing party. That is why successful mediations of complex disputes are more likely to occur after the dispute process has proceeded far enough to permit a thoughtful risk assessment. Given that, if a mediation happens early on in a dispute proceeding (or as precursor to arbitration) counsel for Owner should carefully consider what issues to explore so that the mediation does not devolve into a discovery exercise for the Contractor.
2. Arbitration

If the recommended ad hoc procedure is being followed, or a set of rules is being used which also provides for each party to appoint an arbitrator and the two so chosen to appoint the chair, careful attention to the choice of a party arbitrator is critical. The best candidate will differ depending on the nature of the dispute and the subject matter. Selection of subject matter experts is next in order of importance. And early and comprehensive gathering and evaluation of the evidence is both obvious and often honored in the breach, particularly as to the calculation of Contractor’s claimed costs or damages. Liability is, of course, critical, but too often counsel ignore the damages case until late in the proceeding. Understanding how the costs were calculated often demonstrates flaws in the Contractor’s entitlement case. Additionally, adequate attention to the procedural order for the arbitral proceeding is important. The Owner should seek an order requiring the Contractor to both state its claims and produce its evidence at the earliest possible time so that the Owner will have an opportunity to evaluate the claims that will be decided and the testimony or documents on which the Contractor will rely. Assuming good choices have been made as set out above, the Owner will have maximized its chances for a favorable outcome.

B. The Contractor’s Perspective

1. Pre-Mediation

It is a standard clause in many contracts for the parties to attempt to resolve disputes through a stepped approach, commencing with on-site meetings, moving to head office negotiations, followed by mediation, and then litigation or arbitration, if the mediation is unsuccessful. The CCDC 2 provides that prior to proceeding through mediation or arbitration, the parties shall make all reasonable efforts to resolve their dispute by amicable negotiations. Should
these negotiation efforts fall short, Contractors may be best advised to consider some form of alternative dispute resolution process prior to commencing a formal claim.

Contractors are advised to tread carefully when it comes to contractual tiered or “stepped” dispute resolution provisions. In some contracts, the Contractor’s failure to provide the required notice of claim or notice for the next level of claim review may result in a waiver/abandonment and the loss of compensation in respect of the claim.\textsuperscript{59}

While, in principal, a tiered approach would seem to promote a reasonable and orderly means by which to force the parties to engage in discussions that could lead to a resolution of disputes, without the need for the nuclear option (trial or arbitration), these types of provisions can be subject to abuse by Owners if they are too protracted. Some Owner-prescribed contractual tiered dispute resolution steps can end up extending over many months, with each step a precondition to the next.

For example,\textsuperscript{60} the first step may require the Contractor to submit an initial written notice of dispute to the Owner, followed shortly thereafter by a detailed breakdown of the claim. This sets up the first “tier” of the dispute resolution process: a formal request by the Contractor to have the dispute reviewed by the Owner’s project manager who will deliver his or her opinion within a specified amount of time. If the Contractor is not satisfied with the result from the Owner’s manager, the Contractor may be entitled to have the dispute reviewed by the Owner’s senior management or executive team, who would once again deliver an opinion to the Contractor. Only then, if the Contractor remains unsatisfied with the outcome, can the matter be referred to non-binding mediation. All the while, the Contractor’s time limits within which to register a lien or commence an action may be slipping away.
In some cases, where mediation proves to be unsuccessful, it may still be mandatory, pursuant to the contract, for a Contractor to, in good faith, continue to explore alternative dispute resolution methods prior to litigation. It is typically in the Contractor’s interest to marshal disputes along to resolution, so that resources can be spent on the project, instead of a boardroom. A tiered approach, as per the example above, doesn’t always facilitate the process to a quick resolution.

2. **Tolling Limitation Periods**

Disputes on construction projects are so frequently occurring that Contractors must continually diarize upcoming limitation period deadlines. Contractors need to be aware of these deadlines and consult with lawyers in advance of the expiration dates prescribed by statute or by the parties’ contract.

Contractors should also consider utilizing tolling agreements, so as to park claims until the project work has been completed, to avoid the parties becoming distracted with the dispute and expending time and money on litigation, rather than the work at hand. Unfortunately, the new adjudication provisions of the Ontario *Construction Act*, if overused or abused, could result in the parties’ energies being diverted from the work. Generally speaking (and this may change somewhat from jurisdiction to jurisdiction), tolling agreements need to contain a clear and unambiguous request by one party to toll a statutory limitation period and an equally clear and unambiguous affirmative response by the other. A mere promise to forbear by one party may not suspend a limitation period unless the promise is given in exchange for some consideration from the debtor.\(^6\)

3. **Retaining Experts**

Experts are frequently retained to evaluate claims on a project once it is much too late and the dispute has proceeded through to litigation. Though the cost of hiring a delay expert, cost
consultant, engineer, or architect is substantial, considerations should be made as to whether an expert would be useful prior to the commencement of mediation.

With the introduction of statutory adjudication in Ontario in October 2019, experts may need to be engaged far earlier in the dispute resolution process than they were previously. The introduction of adjudication has raised some concern amongst construction lawyers that the procedure allows a claimant to ambush a respondent. This risk will be elevated if a claimant has hired cost consultants or other experts to assist in the preparation of documents that a party intends to rely upon.

4. Mediation

Mediation may be made mandatory pursuant to a construction contract, or by some statutes. Mediation may also be agreed upon at any stage by the parties, with the cost of the process equally shared between them. Upon the introduction of adjudication in Ontario, the frequency of mediation may actually increase, as the process may be deemed an important non-binding and exploratory precursor to adjudication.62

Mediators are commonly agreed upon by the parties. Where a mediator is not named in the contract, each party will typically make a short list of mediators based upon reputation and choose one that they mutually agree is best suited to make a determination on the project.63 While lawyers and retired judges often serve as mediators, in some cases, a non-legal professional, such as an engineer, architect or quantity surveyor may be a more appropriate choice for the parties because the disagreement demands specialized expertise. Important considerations in choosing a mediator include their familiarity with relevant legislation and the construction industry, thoroughness, perseverance, people skills, and the level to which they are respected by the parties.64
Timing of a mediation may be agreed upon by the parties in the construction contract. Mediation can occur before, during, or after discovery. Successful mediation that occurs before the oral examinations will result in fewer costs for the parties and while parties typically require some degree of documentary production as a precursor to a productive mediation, it may be to a Contractor’s or an Owner’s advantage to engage in an early-stage mediation, to avoid the disclosure of unfavourable information that would be produced during the course of discovery. The advantage of engaging in mediation after discovery is that each of the parties should have a better understanding of their respective case. As well, parties are more likely to experience litigation fatigue and associated costs following exhaustive documentary and oral discovery and be somewhat more motivated to settle and avoid the further cost of a trial or an arbitration.

A mediation brief should include all significant issues and information that the parties wish to raise at trial. Any issues and information not included in a mediation brief will be given less importance during the mediation. These briefs are written primarily for the opposing party. Information that the Contractor believes will compel the Owner to settle or pay before trial, such as evidence of delays not caused by the Contractor, should be included in the mediation brief.

In preparation for mediation, a Contractor should engage in efforts to particularize its damages claim. The more detail the Contractor can provide with respect to its damages, the better chance it has of success. Prior to mediation, the Contractor should quantify its extended duration costs, lost profit, unpaid amounts for work complete, lost opportunity, or any other reasonable expenses caused by the defaults of the Owner.

The goal of mediation is to avoid the costs in time and resources that litigation demands, while working to achieve a settlement that is mutually agreed upon by the parties. A mediation is more likely to be successful where the following elements are present: both parties are willing to
settle; the key decision makers of the parties are engaged and in attendance; the mediator is skilled and experienced; the mediation is without prejudice; the discussions are deemed confidential; and each party is prepared to recognize the weaknesses and strengths of its own case.\textsuperscript{67}

5. \textit{Pre-Litigation / Arbitration}

Where a Contractor has engaged in negotiation with an Owner in an attempt to resolve a dispute and proceeded unsuccessfullly through mediation, arbitration may be the next reasonable step. Arbitration can be mandatory under the contract, or it can be agreed to by the parties in lieu of litigation. An agreement by the parties to arbitrate can take varied forms. For example, some contracts contain an “opt-in” arbitration clause, whereby arbitration becomes mandatory once one party elects to proceed through that process.\textsuperscript{68} These types of provisions are typically upheld by Canadian courts so long as any preconditions to the “opt-in” are satisfied. Where the parties have contractually agreed to arbitrate, Canadian courts are even less likely to intervene.\textsuperscript{69} There is strong public policy for parties that have agreed by contract to proceed through arbitration, instead of resorting to the courts, that the parties should be held to their contract.\textsuperscript{70}

Before deciding to proceed through arbitration or litigation, a Contractor should take into account the following strategic considerations:\textsuperscript{71}

\textbf{Cost:} Though arbitration may be more expeditious than litigation, there is risk that the process will be equally as expensive. Albeit, the arbitrator or tribunal has the discretion to direct the arbitration to the needs of the parties. If cost is a concern, that should be communicated upfront, especially because there is no one-size-fits all procedure as exists in litigation. Rather, the parties are able to help direct the process.

\textbf{Privacy:} Arbitration provides parties with increased privacy, as the final decision is not published and the arbitrations themselves are not open to the public.
Right to Appeal: A party’s right to appeal may be more limited in arbitration, as many arbitration clauses deem the arbitration proceedings “final and binding.” Limited rights of appeal may be available on errors of law. The chance to appeal in litigation provides parties with the opportunity for a second kick at the can (and sometimes even a third).

Expertise: Choosing arbitrator(s) with construction experience, or with specialized knowledge of the issue in dispute can help make the process increasingly efficient. Where a sole arbitrator is retained, both subject matter expertise and process expertise will be required. Some jurisdictions have courts that specialize in construction project disputes. Where a specialized court is not available to the parties, the ability to choose an arbitrator may be of assistance in deciding whether to proceed through arbitration as opposed to litigation.

Proceeding through arbitration or litigation will require the support of a litigation team. Both processes will require the crafting of legal positions, the exchange of documentation, and evaluation of evidence. A lawyer can help weigh the advantages and disadvantages of proceeding through arbitration or litigation, as the determination will be case specific. The litigation team may also be comprised of cost consultants, geotechnical engineers, delay experts, or other specialized construction personnel, who may need to be retained to help craft and assess the case.

Spoliation is the “destruction or material alteration of evidence or ... the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” A Contractor should make every effort to preserve all documentation and any materials that have relevance to potential litigation. This obligation applies equally to the Owner and every other interested party and applies to the work itself, not just documents. Where an Owner retains another Contractor to complete deficiency work without providing the Contractor with an opportunity to examine the alleged deficiencies, the Contractor may be able to make out a case for spoliation.
Where a dispute arises between a Contractor and Owner, there is a need for Contractor’s counsel to consider every potential party that needs to be involved in the arbitration and/or added to the litigation; for example, the design professional. Pursuant to GC 3.4 of the CCDC 2, a Contractor is not liable to an Owner for damage or costs resulting from errors, inconsistencies or omissions in the contract documents (prepared for or provided by the Owner), which the Contractor did not discover. If the Contractor performs its work pursuant to the contract documents and a deficiency arises, the Contractor may find itself engaged in litigation with the Owner. Contractors need to consider whether the design professional(s) ultimately responsible for these errors, inconsistencies or omissions should be brought in as a third party.

PART V CONCLUSION

Though the Contractor and the Owner have divergent interests, the same issues in contract formation, project execution, and dispute resolution are critical to each. Jurisdictions vary regarding statutory requirements, but the same core issues can be outcome determinative in virtually any common law jurisdiction. Thoughtful attention to the change and notice provisions, termination clauses, and dispute resolution scheme at contract formation will give either the Owner or the Contractor an edge in a project that strays off course. Unfortunately, far too often, Owners and Contractors put a great deal of time and energy into negotiating a contract, put it in a drawer, and do not consult it again until the project is in serious trouble. Disciplined attention to contract requirements during the project and careful consideration and implementation of the provisions discussed in this paper, including the dispute provisions when all else fails, can often result in a favorable outcome for the party exercising that disciplined and careful approach.
Matthew Alter thanks Mark St. Cyr and Robyn Blumberg, associates at Cassels Brock & Blackwell LLP, for their assistance with the research and preparation of the Contractor’s perspective portions of this paper.

Readers of this paper should take note that the author of the Owner-focused discussion is a California-based lawyer and the author of the Contractor-focused discussion is a Canadian-based lawyer.

1. CAL. CIV. CODE § 8260 et seq.
3. NV. REV. STAT. § 338.525; Ontario Construction Act, s. 6.5(5), 6.5(6), 27.1.
5. Ralmana Pty Ltd. v. BGC Contracting Pty Ltd. [2016] WASC 131, para. 80; CMA Assets Pty Ltd. v John Holland Pty Ltd. [2015] WASC 217, para. 376 (“John Holland were entitled to insist on the strict contractual position and deny liability for the delay”).
6. Gill Constr., Inc. v. 18th & Vine Auth., 157 S.W.3d 699, 713 (Mo. Ct. App. 2004) (finding 21-day notice provision waived by parties’ failure to follow change procedures); Welding, Inc. v. Bland Cty. Serv. Auth., 261 Va. 218, 227 (2001) (finding that written notice requirement was potentially satisfied by reference to claim in architect’s meeting minutes, for the purpose of determining whether plaintiff’s pleading stated a cause of action and could survive demurrer); Gilmartin Bros., Inc. v. Kern, 916 S.W.2d 324, 329 (Mo. Ct. App. 1995) (holding oral notice effective when parties’ practice was oral communication of changes); Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill, 652 A.2d 440, 447 (R.I. 1994) (finding timely letter regarding subject of claim was sufficient despite lack of formal notice of change).
7. GC 5.1 of the CCDC 2 Owner-Contractor Stipulated Price Contract imposes a requirement on the Owner, during the project, upon request, to provide the Contractor with “reasonable evidence” of its financial capability.
8. A statutory requirement in British Columbia: Builders Lien Act, s. 5.
10. Examples include GC 12.1 (Indemnification) and GC 12.2 (Waiver of Claims) in the CCDC 2-2008 Stipulated Price Contract.
12. GC 7.1.2 of the CCDC 2 requires the Consultant’s statement of default as a precondition to noting the Contractor in default and termination.
14. 14.2.2 of Article 14 of the A201 is similar.
15. 10.1 of Article 10.1 of the A201 is similar.
16. 3.2.2 of Article 3 of the A201 is similar.
17. 3.18.1 of Article 3 of the A201 is similar.
19. 11.3.1 of Article 11 of the A201 is similar.
22. Kappeler, 2016 ONSC 1354, para. 35.
24. Id. at para. 23.
29 Id.
30 Id. at 172.
31 Id.
32 Id. at 173.
33 Ontario Construction Act, Part I.1 PROMPT PAYMENT.
34 REYNOLDS & VOGEL, supra note 29, at 169.
35 Id. at 164.
36 Ontario Construction Act, s. 8.
37 Id. at s. 8.1.
38 Id. at s. 39.
39 British Columbia Builders Lien Act, S.B.C. 1997, c 45, s. 5.
40 Ontario Construction Act, s. 6.1.
41 Id. at s. 6.3(3).
42 Id. at Part I.1 PROMPT PAYMENT.
43 Id. at s. 6.5(5).
44 Id. at s. 13.5.
45 Id. at s. 13.7.
46 REYNOLDS & VOGEL, supra note 29, at 209.
47 Ontario Construction Act, s. 13.3.
48 Id. at s. 13.13.
50 Id. at 72 (citing Hawl-Mac Constr. Ltd. v. Campbell River (District), [1985] B.C.W.L.D. 527, 21).
51 Id. at 73-81.
52 Id. at 72.
53 Corpex, 2 S.C.R. 643.
54 Technicore Underground v. Toronto (City), 2012 ONCA 597, para. 30.
57 Id. at paras. 161-62.
60 Id.
61 Hamilton (City) v. Metcalfe & Mansfield Capital Corp., 2012 ONCA 156.
62 Bruce Reynolds & Sharon Vogel, Innovative Dispute Resolution for Ontario Construction Projects, Society of Construction Law North America (June 12, 2018).
64 Id. at 518-20.
66 Id. at §7A.5.
67 Reynolds & Vogel, supra note 62.
69 Id. at 259.
70 Id. (citing Automatic Sys. Inc. v Bracknell Corp., [1994] O.J. No. 828, 302-03 (Ont. C.A.)).
71 GLAHOLT, supra note 63, at 522-24.
72 See Weisz v. Four Seasons Holdings Inc., 2010 ONSC 4456, where the arbitration was “final and binding” and the court would not grant the right of appeal.
73 GLAHOLT, supra note 63, at 523.
76 3.2.4 of Article 3 of A201 is similar.