Construction Law

LAW 502

University of Alberta, Faculty of Law

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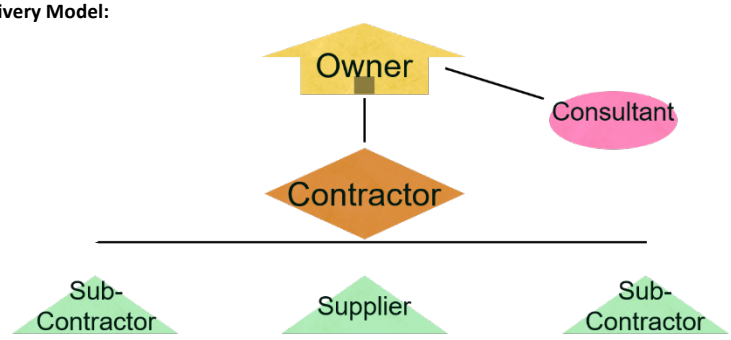
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1. DELIVERY MODELS

Terminology

- Owner
  - The person who has commissioned the work to be done; person getting the thing built
- Consultants/Engineers/Architects
  - Parties conceptually coming up with plans for development; design the project
  - Engineer:
    - Mechanical (heating, air conditioning, duct work)
    - Electrical
    - Geotechnical
- General Contractor/Construction Manager
  - Actually coordinating the work to get the thing built; enters into contract with owner
  - Will tell the owners the cost of construction
  - Think PCL = actually construct the thing – job is to higher companies that have the skills to construct it
  - Few general contractors actually build the thing themselves
    - They have experience in industry and hire subcontractors
    - Enters into contracts with subcontractors and suppliers.
- Subcontractors and suppliers
  - Those actually doing the work; enter into contracts with the general contractor
  - Suppliers supply materials
- Financers
  - Owner usually cannot come up with the money to build project upfront, so can look to financers to pay right away (commonly banks/ the city).
- Sureties and insurers
  - Insurance or bonds to mitigate the risk when bad things happen (i.e. General contractor going bankrupt, people getting paid, natural disasters, someone gets injured)
  - Surety – company that will issue bonds on a project; 2 main bonds:
    - (1) performance bonds secure performance of obligations; and
    - (2) labour material payment bonds. Insurers provide insurance during construction of project
- Multiple parties involved = legal relations between each party
- **Project Delivery Model:**
  - 

Steps in Construction Project

- 1. Design
- 2. Engineering
- 3. Financing
- 4. Selecting/Finding the Contractor
- 5. Enter into Contract
- 6. Build the Tower
    - Dig a hole to hand over of keys
- 7. Warranty Issues
- 8. Claims and Disputes

What Are Some Traditional Risks?

- Physical Risks
    - Unknown subsurface conditions
    - Environmental contamination
    - Weather, earthquake, tornado, flood, fire, explosion, terrorism, war
    - Design and Constructability
    - Damage to the work
    - Accidents and injuries
- Financial Risks
    - Cost escalation
    - Contractor/subcontractor default/insolvency
    - Owner insolvency
- Time Risks
    - Takes longer, so costs more
    - Things do not happen when they are supposed to, so costs more
- Legal Risks
    - Liability for the other risks
        - Personal injury
        - Traffic liability

Project Delivery Models

- Different types of contracts that can be used by the parties to organize themselves = **Project Delivery Models**
- Examples of Project Delivery Models
    - Lump Sum
    - Design-Build
    - Cost-Plus
    - Construction Management
    - Unit Price
    - Public Private Partnerships

Lump Sum

- Classic model; very common. Works when there is sufficient information allowing parties to determine price. One piece of info that is required is that the building must have been designed already
- Owner controls design and has design risk; usually design has already been completed
- There is a fixed price/fixed schedule based upon completed design
- Contractor says I will build the thing you drew on that picture for this amount of money and I'll be done by this date
- Provides cost certainty for the owner – owner knows exactly what he needs to pay
- Cost risk for contractor; but contractor will take this into account in fixing cost. Contractor will price-in contingencies, say cost is really higher than it is. Thus, owner has cost certainty, but may end up paying more

- Common for mid-sized projects, benefit for owner is that there is cost certainty, downfall for contractor if ends up costing more than fixed price (unless it is owner's own fault).
- Upside for contractor is that there is not risk for ensuring the building is "fit for purpose"
- Lack of flexibility, can't change or add to design after contract is signed, massive impact on parties
- Can put parties with adverse interests; contractor wants to spend least money to maximize profit, owner motivated to get quality product.
- **Can use Standard Form Contract CCDC 2 and ACA Form A** → standard form contracts between owner and contractor or contractor and subcontractor to perform the required work for a single, pre-determined fixed price or lump sum, regardless of the contractor's/subcontractor's actual costs.
- CCDC is oversight group comprised of a number of different interests; drafted a number of standard form contracts
- **CCDC 2** is standard form lump sum contract
    - CCDC: Canadian Construction Documents Committee
- **ACA Form A** is standard form subcontract
    - ACA: Alberta Construction Association
- **NOTE**: contracts are copyrighted by CCDC, must pay fee, if changes want to be made, must attach as a supplementary document.

Design-Build

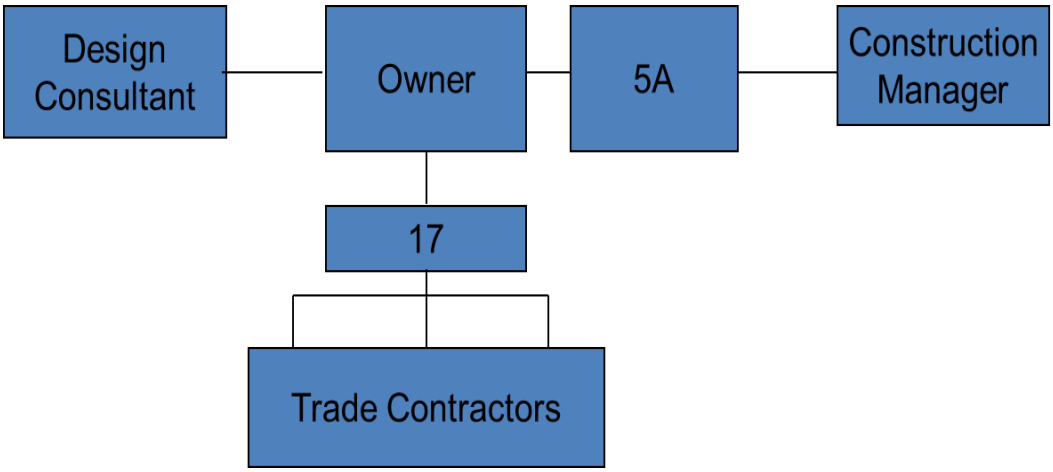
- Owner specifies requirements (says wants these features/kinds of requirements) and wants to find someone who will design and build for a fixed price (wants one party to design it and then build it)
- Design-Builder controls detailed design and has design risk (owner doesn't have design created yet; contractor usually hires consultants/architects etc.)
- Most rec centers in Edmonton are this model, if waterslide doesn't work then it is not on the owner, but the designer who designed and built it; civic buildings in Edmonton; warehouses; low to mid housing projects; schools
- Fixed price/fixed schedule based upon incomplete design (idea owner has put out there)
- Turnkey arrangement – owner has little involvement, designer designs, builds, and hands over key when done (allows for innovation by design-builder).
- Permits innovation by Designer-Builder
- Cost certainty for owner; Cost risk for contractor (same as lump sum)
- Owner has little control over project, there is flexibility for contractor but they carry the risk that the building is "fit for purpose" because they are the one designing it.
- Design-Builder often responsible for performance and fitness for purpose
- Owner only has contract with D-B (then Design-Builder enters into contract with subcontractors and consultants).
- **Main difference with lump sum: in Design-Build model, consultant and contractor become assumed into one party (they are not separate parties as they are in lump sum model)**
- Can use standard form contract **CCDC 14** → Standard prime contract between Owner and Design-Builder where the Design-Builder performs Design Services and Construction under one agreement, for a single, pre-determined stipulated or fixed price

Cost Plus

- Used when "fast tracking", examples like West-Ed, refineries, oil sands development, build foundation before 100% of design done to prevent delays.
- To manage risk can: 1) allocate risk; 2) owner taking risk, buffer with contingency against risk price
- Owner controls detailed design and has design risk (owner has complete control over design, BUT the price is uncertain so he has real substantial cost risk)
- Uncertain price/fixed schedule (basically giving your builder a blank cheque).
- Cost risk for owner, owner pays costs + overhead + profit
- For an owner who has experience in the construction industry
- Owner pays actual cost plus agreed upon fee or mark-up
- Open book, flexible
- **Owner knows actual cost of each component of work**
- **Costs can rise quickly**
- **There is a huge administrative burden, time consuming for owner to verify costs**
- **Owner accepts cost risk**, usually because contractor will not assume risk, there are too many uncertainties re costs
- Reasons to use cost plus – time concerns (allows you to start now), take advantage of fluctuating prices, the project is extremely complex (lots of risks) that no one is willing to give the lump sum cost (think oil sands development, custom homes)
- **Why do this model?** Risks are so great, no one is going to give a fixed price upfront, cause uncertain the cost when it is finished, design is not completed yet, usually large and sophisticated owners to monitor construction and challenge every penny, owner can see all costs and how much the contractors profit is); maybe there are too many uncertainties with project: either owner can accept risk (he will build risk into the price to protect himself); good for when the owner has a lot of experience in industry

- Standard form contract **CCDC 3** → Standard prime contract between Owner and prime Contractor to perform the required work on an actual-cost basis, plus a percentage or fixed fee which is applied to actual costs

Construction Management



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- Example: Rogers place, often done on a lump-sum or cost-plus basis
- Owner enters into direct contracts with the contractors or construction managers very early in process before design takes place; construction manager assists owner in finding good design consultant; construction manager assists owner in choosing subcontractors; owner enters into contract with subcontractors; construction manager takes a fee, but owner enters into the individual contracts
- Construction Manager basically acts as an agent or advisor for the owner, they get a fee for that, but don't actually enter into any contracts.
- **Construction Manager provides**: (1) pre-construction services (design development, costs estimates A-D, procurement); (2) construction services (arbiter at first instance, monitor work, process change orders, etc.); (3) post-construction services (occupancy review, warranty work)
- Will help with procurement of services, usually for creating pipeline or sewer system.
- C-M provides pre-construction services (design development, cost estimates A-D, procurement), construction services (arbiter at first instance, monitor work, process change orders, etc.) and post construction services (occupancy review, warranty work).
- Legally there is no relationship b/w C-M and trade contractors.
- Standard form contract is **CCDC 5A** → standard contract between Owner and Construction Manager for which the Work is to be performed by Trade Contractors
- C-M acts as a limited agent of the owner providing advisory services and administering and overseeing the contracts b/w the owner and trade contractors.
- Standard form contract **CCDC 17** → creates a CCDC 2 type relationship between Owner and Trade Contractors; acknowledges Construction Manager's authority as principal administrator and payment certifier; and acknowledges that both Construction Manager and Consultant can reject work
- Owner is usually not sophisticated, need someone who has a common interest with the owner, and who has experience/advice in that industry

Unit Price

- Owner pays a certain amount for each unit of material provided (extremely common in pipelines, highways/roads = you get this much $ per metre/square ft/ton
- Parties don't know how much of one thing will get built, we know we want to build a road from A to B. It is often more convenient to say, I will pay you $10 per square foot/ per meter/ etc.
- Price per unit is fixed; quantity is flexible
- Standard form contract **CCDC 4**

Public Private Partnerships

- Public entity (i.e. Gov't) hires private entity (often consortium of companies) to do some/all of:
    - Design
    - Build
    - Finance
    - Operate
- Key players

    - Owner
    - Concessionaire/Project Co
    - Lenders
    - Contractor(s)
    - Service providers
- Typically Involves Significant Design Elements
- Promotes Innovation
    - During Design/Construction Phase
    - During Life Cycle Phase
- Transfer of Risk to Concessionaire (Design/Life Cycle)
- No Standard Contract
- Incorporates Concepts of Lump Sum and Cost-Plus
- Complex and Time Consuming
- Costly to Set Up and Administer
- Likely Only Justified on Large-Budget Projects

Standard Form CCDC Documents Overview

- All CCDC documents have a similar cover page with the most recent revision date
- CCDC documents have a seal: Need copyright to use them (usually $10)
- CCDC drafts a number of standard form contracts; saves the parties legal costs
- Divided into a number of sections
    - 1. The agreement part is the first part of the contract, then attach further docs (incorporate by reference):
        - Parties
        - Important dates
        - List of things that make up the contract
        - Contract price
    - 2. Definitions
    - 3. General Conditions – Guts of the contract, rights and remedies, the applicable law, role of consultant (consultant is the initial decision-maker on disputes); payment provisions (every standard form contract will specify when something is to be said, when can it be disputed [basically outlines how the money in the project will be distributed]), what happens when there is a change, how to resolve disputes
- Note: For standard form contracts, you can add supplementary conditions that take precedent over general conditions
    - You must create a list of supplementary conditions
    - The wrong way to change them is to cross out sections and add new ones

2. TENDERING

Introduction

What is Tendering?

- "The process of choosing the best or cheapest company to supply goods or do a job by asking several companies to make offers for supplying the goods or doing the work" – Cambridge Business English Dictionary
    - It's an auction; a request for whoever wants to do the work to submit a price with an understanding that the owner will choose from those people
- Involves the law of contract; the goal is to arrive at a contract.
    - Offer and acceptance
    - Consideration
    - Mistake
    - Certainty of terms
- Other implied duties
- BUT – a constantly evolving concept
    - *Tercon*
    - *Bhasin*

The Tender Process

- Step 1: Prepare tender documents
    - Usually by owner or consultant
    - E.g. Owner wants to build a Highrise; wants to get a bunch of bids
        - Owner will prepare the tender documents
            - Package of documents: plans/specifications of the building you want, design concepts you want considered, rules of the tender process (certain dates, examples of previous projects you've worked on, list of subcontractors you'd use)
- Step 2: Distribute tender documents
    - ACTS, Bid Depositories, Privately
        - ACTS: Alberta Construction Tendering System
        - Bid Depositories: Forum/Method/Place where invitation to tenders are deposited or delivered; people who are bidding on these jobs deliver their bids here
- Step 3: Contractors prepare bids
- Step 4: Contractors submit bids
    - Can be done online, however even today you still may be required to deliver them at the owner's office
- Step 5: Owner reviews bids
    - Can be a simple or complex evaluation
- Step 6: Owner selects successful bid
- Step 7: Owner negotiates final contract with successful bidder
- Step 8: Owner and successful bidder execute contract

"Tender" vs "Bid"

- The word "tender" is ambiguous – could relate to the request/invitation by the owner to the world that they want a price; sometimes it could mean the response by the contractor to the owner with the price
    - Tender will be used as the request for bids
- The word "bids" is somewhat less ambiguous
    - Bids will be used as the bid itself

Common Contents of Tender Package

- 1. Plans & Specifications
    - Can include "here is what you will get if you get the job"
- 2. Form of Contract
    - Not necessary, but good to have
- 3. Tender Instructions
    - How to deliver the bid, when to deliver, how many copies, etc.
- The goal is to arrive at a contract between the parties

Common Contents of Bid Package

- 1. Bid
- 2. Insurance Certificates
- 3. Bid Bond and Consent of Surety

Contract A and Contract B Analysis from *Ron Engineering*

Contract A – Contract B: Convergence of Law

- Convergence of law of:
    - Contract

    - Mistake
    - Offer and acceptance and
    - Consideration
- This is a uniquely Canadian concept

Pre-*Ron Engineering* World

- Until ***Ron Engineering***, the law of contract was also the law of tender
- Traditional approach
    - Tender call = Invitation to treat
    - Bids submitted = Offers
    - Owner accepts a bid = 1 contract
- Summary of pre-***Ron Engineering*** law
    - 1. Bidder could withdraw bid at any time before acceptance
    - 2. If bid contained a mistake, and if known, bid could not be accepted (even after bid opening?)
    - 3. Tender Call – invitation to submit bids (contract only formed when offer accepted)

Problem According to SCC

- Sanctity of bidding process requires irrevocable tenders
    - Revoking allowed participants to circumvent their bid in an unfair manner; let people attack the bidding process in a way that was unfair to the parties

R v Ron Engineering (1981 SCC) – Law on Tenders; Contract A and Contract B

- **Facts**
    - The government issued a tender request. Ron Engineering submitted his tender accompanied by a certified cheque for $150k that was to be returned after the execution of the contract and receipt of the performance and payment bond. Ron Engineering had the lowest bid at $2.748M, the next lowest was $3.39M (which is SIGNIFICANT). After the tender deadline, Ron Engineering notified the owner that they had failed to account for its own labour price (~$750k) and wanted to withdraw its bid. Owner refused and accepted the bid, but Ron Engineering refused to enter into a contract. The owner then went with the second lowest bidder and declined to return the deposit (which was only returnable to unsuccessful bids). Ron Engineering sued for $150k deposit.
- **Issues**
    - Should Ron Engineering receive its deposit back? Was it possible for the tenderer to accept its offer after the notice of mistake was filed?
- **Previous Holding Law**
    - Prior cases allowed relief if mistake under seal and discovered before acceptance of the bid. If the Court followed this, then Ron Engineering would have been allowed to revoke bid and keep the deposit.
    - *ONCA* allowed the deposit to be returned – the bid could not be accepted because the owner knew it contained a fundamental mistake.
- **Decision**
    - A unilateral contract (**Contract A**) arose automatically upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a specified period of time. Essentially, the issuing of tenders by the owner is an OFFER of a unilateral contract that can be ACCEPTED by contractors submitting compliant bids. After this point, if the offer was not accepted by the owner, the deposit could be returned. The principal term of Contract A is the ***irrevocability of the bid*** and the corollary term was the obligation for both parties to enter into a construction contract (Contract B), upon acceptance of the tender. The deposit helps ensure that the contractor performs its obligations under Contract A to enter into Contract B.
    - In this case, there was no error in the sense that the contractor did not intend to submit the tender in its form and substance. As a result, there was no principle in law under which the tender was rendered incapable of acceptance by the appellant. There was an error in calculation, but that does not affect the overall operation of Contract A. **Ron Engineering decided to not enter into Contract B, and therefore, its deposit was correctly retained by the owner (stated penalty for Breach of Contract A).** None of the conditions under which Ron Engineering could retain the deposit were otherwise met
- **Ratio**

- Submitting documents for a tender automatically creates a unilateral contract that is irrevocable for a certain period of time until the tender is awarded (Contract A), which may prevent the recovery of a deposit if the tender was submitted with erroneous financial calculations.
- Tendering involves a Contract A-Contract B scheme. If a winning bidder refuses to enter or violates terms in Contract A, then they are in breach of contract.

- **Notes**
  - **SCC**
    - Overturned the ONCA and created the Contract A – Contract B analysis; this analysis is unique to Canada
    - "The core of the submission by the contractor is simply that a mistake by a tenderer, be it patent or latent, renders the tender revocable or the deposit recoverable by the tenderer, …so long as notice is given to the owner of the mistake prior to the acceptance by the owner of the contractor's tender."
    - "Here the call for tenders created no obligation in the respondent (Ron Engineering), or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a **bid** as it is sometimes called. The significance of the bid in law is that it at once **becomes irrevocable** if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide."
    - "The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders."
    - SCC thought that allowing a bidder to claim a mistake in its bid price after bids were opened would **threaten the integrity of bidding system**
      - If we allow Ron to withdraw because of a mistake, what's to stop anyone else from just saying "I made a mistake" too?
    - So, SCC held:
      - Ron breached Contract A when it refused to sign Contract B
        - Ron was subject to Contract A; had a legal obligation to enter into the contract; when it didn't it was in breach
      - $150,000 forfeited
  - This case altered the landscape of tendering in Canada ever since
  - Other bidders may not see what every bidder submitted, however they will usually see the successful bidder's bid amount

Terms of Contract A

- For bidders (implied terms that will be in Contract A regardless)
  - Bids, once submitted, are irrevocable
  - Bid submissions must comply with the tender documents
  - Bidder must enter into Contract B if bid accepted
  - There may be other terms of Contract A, as set out in Offer
- For owners (implied terms that will be in Contract A regardless)
  - Must act in good faith
  - Must treat each bidder and evaluate the bids "fairly"
  - In the absence of express terms to the contrary, must not accept non-compliant bids
  - Must not apply undisclosed criteria when evaluating bids
    - However, owners do have a lot of discretion

Terms of Contract B

- The terms of the Construction contract
- Once a bid is accepted, Contract B will be negotiated, and will be the contract that governs all relations between the parties (contract A irrelevant)

Post-*Ron Engineering* World

- Owner puts out Tender Call = Makes offer to enter into Contract A
- Bidder submits compliant bid = Enters into Contract A and makes offer to enter into Contract B
- Owner accepts compliant bid = Accepts offer to enter into Contract B

Requests for Proposals

Requests for Proposals and How They Differ from Tenders

- Requests for Proposals are different from tenders - RFPs are at an earlier stage in the process where the owner may not know what they want to do with a particular piece of land
  - Essentially, the RFP invites submissions on possible ways to develop a piece of property
- Not subject to the same rules as tenders under Contract A/Contract B
  - This is because the terms of Contract A would be impossible to determine - the proposals will be vastly different (costs, nature etc.), and they cannot be assessed on an objective basis
- **How do you tell the difference between a call for tenders and an RFP?** You need to look at the contract itself
  - Need to look at whether there was an intent to create a contractual relationship as soon as the winning bid is selected
  - If the terms indicate that additional negotiations are required, that may suggest that it is an RFP and not a call for tenders
  - If the major elements of the work and the content of the contract are certain once the bid is selected, that is indicative of a call for tenders, not an RFP

Mellco Developments v Portage La Prairie (2002 MBCA) – RFPs vs Tenders; Look at Document to Determine Parties' Intentions

- **Facts**
  - City issued a "request for proposals" for development of city-owned land. RFPs are not the same as tenders, and the City contended that the RFP should not be construed as creating legal obligations under Contract A (similar to tenders) and should instead be characterized as a "beauty contest." The city said the RFP process was intended to expedite the sale and development, and to allow the City to have greater control over how the development would proceed. The RFP document specifically stated that it was an RFP, and not a tender call. The city said that it would negotiate with the best proposal for a contract, but that the initial offer to submit would not create a binding commitment to enter into a contract with the firm submitting the best proposal at the outset. The winning bidder, Lions, did not comply with all of the technical requirements of the RFP, but its proposal was accepted anyways. Mellco is arguing that the city cannot accept an RFP that does not comply with all requirements.
- **Issues**
  - Are RFPs treated the same as tenders with respect to creating contractual rights at the outset to only accept compliant RFPs for consideration?
- **Decision**
  - The normal principles of contractual intention apply in determining the answer to this question. Commentary has suggested that it is possible to avoid the Contract A/Contract B analysis under tenders through RFPs. When applied to this case, it is clear that the RFP was never intended to create a binding contractual relationship between the city and the "winning bidder." Therefore, the law of tenders from Ron Engineering will not apply in this case.
  - Was there an implied term? No, in this case there is no basis to imply a term that non-compliant bids will be rejected before negotiations have even started. The only requirement is that the city select a contractor to start negotiations with that will help resolve difficulties inherent in the initial proposal.
  - Also, a duty of good faith cannot be implied here, because there is no contractual relationship with the parties that is created by the RFP. The RFP merely sets out a process to begin negotiations for the eventual signing of a contract. Therefore, there can be no breach of any duty of good faith.
- **Ratio**
  - RFPs are treated differently from tenders – RFPs do not lead to the same legal requirements as set out in ***Ron Engineering*** and ***MJB*** regarding the creation of unilateral contracts and fairness in the selection process.
- **Notes**
  - No intention by City to enter into legal relationship
    - Court will look at the document to determine the party's **intentions** – just because you call it a RFP or a tender does it mean it's one or the other

- Intention to negotiate (not to contract)
- There are 2 clear extremes
  - Request by an owner for a submission of a price under very clear terms that discloses a very clear intention to enter into a construction contract → Tender
  - Owner says "make me an offer, I may or may not accept it" → RFP
- Sometimes, you have a document that's in the middle; have to then decide

Non-Compliance

Non-Compliance

- Any bid that does not adhere to the tender rules
- Non-compliant bids (in theory):
  - Submitted late
  - Missing bond or other security
  - Missing other critical components
  - Missing information about names of subcontractors
  - Contain mathematical errors making bid price unclear

MJB Enterprises v Defence Construction (1999 SCC) – Privilege Clause Did Not Allow for Owner to Disregard the Lowest Bid and Select a Non-Compliant Bid; Implied Term to Select Compliant Bids

- **Facts**
  - Defence Construction invited tenders and awarded the contract to the lowest tender of the four received, notwithstanding the fact that the bid did not comply with the tender specifications. The tender documents included a "privilege clause" that stated that the lowest of any tender would not necessarily be accepted. The winning bid included a handwritten note outlining a schedule of final costs even though amendments to the tender documents required tenderers to submit only one price (this is what made the tender non-compliant according to the original tendering requirements). The second-lowest bidder (MJB) is suing, claiming that the winning bid should not have been chosen due to the non-compliance of the bid.
- **Issues**
  - Was Sorochan's handwritten note a "**clarification**" or a "**qualification**"?
    - If it's a clarification, that's okay
    - If it's a qualification, it won't be compliant
  - If a qualification, does the **privilege clause** allow Owner to disregard the lowest bid in favour of any other bid, including a non-compliant bid?
- **Decision**
  - Contract A arose in this case following the Ron Engineering decision. In submitting its tender, the appellant accepted this offer. **Contract A implies that the tenderer will only accept a compliant bid (because without it, the value of the contract would be completely eroded).** The explicit term of the contract stating that the lowest bid may not be the one that is accepted must be read as being limited to only compliant bids. This is because the privilege clause must be read in harmony with the rest of the tendering documents.
  - For damages, it is necessary for the victim of the breach of Contract A to prove, on a balance of probabilities, that they would have been awarded the contract. That is met in this case, if the Sorochan bid is excluded, that leaves MJB as the lowest, compliant bid. Therefore, it was awarded the profit that it would have earned under the contract had it been awarded to them. Was also awarded the costs of putting the bid together in the first place.
- **Ratio**
  - Contract A will include an implied term that only compliant bids will be considered for acceptance by the tenderer.
  - A bare bones privilege clause is not sufficient to protect an owner from accepting aa non-compliant bid.
- **Notes**
  - ***Ron Engineering*** doesn't mean that Contract A always arises; you must look at the tender documents and the intentions of the parties
  - Owners should disqualify all non-compliant bids
  - **In the face of a privilege clause, read in light of all other terms, there is no obligation on Owner to choose lowest bid but must choose a compliant bid**
  - In this case, **Sorochan bid** was **qualified, and therefore, non-compliant**
    - It was subject to a qualification that wasn't part of its original terms
  - "Bare bones" privilege clause was not sufficient to protect Owner

        - Just said “lowest”; still an implied term that they pick a compliant bid
    - Proof on a balance of probabilities that Defence Construction would have awarded to MJB
    - Damages for Breach of Contract A – loss of profits or thrown away costs

Chandos Construction Ltd v Alberta (Alberta Infrastructure) (2006 ABCA) – Too Many Significant Irregularities to Find Compliance

- **Facts**
    - Owner accepted a bid that had several problems (breached the bid rules in several minor ways). The owner (government) decided none of the problems were significant enough however to render the bid non-compliant
- **Decision**
    - The bid had too many irregularities and it was non-compliant and therefore could not be accepted. This case was appealed to the SCC, but sent back for a rehearing. Although the matter was settled before that
- **Ratio**
    - Owner cannot waive or correct irregularities that prevent substantial compliance. The owner must use an objective standard to determine whether is substantial compliance.
- **Notes**
    - Allowed the appeal and held that the bid contained too many significant irregularities and was non-compliant
    - Owner could not waive or correct the irregularities that existed
    - Further appeal to SCC which sent case back for re-hearing. Matter ultimately settled

Rankin Construction Inc v Ontario (2014 ONCA) – Contract A Arose Despite Non-Compliance; Ontario Had Right Not to Waive Non-Compliance

- **Facts**
    - Low bidder submitted their bid to MTO without the required declaration about amount of steel sourced domestically. MTO investigated and deemed that the low bid was non-compliant and chose the next lowest bidder (which was substantially more expensive). This was does despite their being a waiver clause which allowed MTO to waive minor non-compliance.
- **Decision**
    - Contract A arose, despite non-compliance. The tender document did allow the province to waive minor non-compliance, but did not require such waiver. The province validly chose to not waive minor non-compliance, even though it could likely could have waived.
- **Ratio**
    - A waiver clause allowing an owner to waive minor non-compliance does not require the owner to exercise its right to waive
- **Notes**
    - Upheld TJ, but **different approach**
        - Tender documents included language permitting Ontario to waive formalities
        - **Contract A did arise, despite non-compliance**
        - It was Ontario’s right not to “waive” non-compliance, and to consider the flaw serious
    - This case muddies the waters

Double N Earthmovers Ltd v Edmonton (City) (2007 SCC) – Owner has No Obligation to Ensure that Representations Made Were Accurate; Owner Can Rely on Representations; Any Obligations to Other Bidders Do Not Survive the Creation of Contract B with the Successful Bidder

- **Facts**
    - Edmonton issued call for tenders for supply of equipment and operators, and it stipulated that all equipment be 1980 models or newer. The Conditions of Tender indicated that serial numbers of all equipment had to be provided, or that "may" invalidate the bid. Sureway's bid listed two pieces of equipment, one as a 1980 unit, the other as a 1977 or 1980 unit. When the City awarded the contract to Sureway, it insisted that the 1980 model requirement be complied with. When Sureway confirmed that one unit was from 1979, the City did not pursue the matter further. Also, Sureway did not

provide serial numbers for its equipment. Double N Earthmovers, an unsuccessful bidder, is now suing for a breach of Contract A.

- **Issue**
  - Did Edmonton breach Contract A by allowing Contract B to proceed, even though one of the material terms had not been complied with?
- **Decision**
  - The City did not accept a non-compliant bid. When the City awarded the contract to Sureway, the company promised to supply a 1980 model, and this is what the city accepted when it awarded Contract B to Sureway. Sureway was obliged under the terms of Contract B to supply a 1980 unit, and that obligation was enforceable by the city. Also, the tendering documents clearly indicated that not every failure to comply with the tendering requirements would necessarily invalidate an entire bid. Failing to provide serial numbers is not a material term of Contract B, and is the type of minor deviation from the tendering requirements contemplated in the limitation of liability clause. Only Sureway's intentions at the time Contract B was signed are relevant - the fact that it was later found to be in breach of the contract does not invalidate the entire tendering process, but it does allow the city to sue for breach of Contract B. The owner's obligation to unsuccessful bidders, and its implied obligation to treat bidders fairly, does notsurvive the creation of Contract B with a successful bidder.
- **Ratio**
  - There is no need for owners to investigate all of bidders' representations. Owners can rely on representations made by bidders.
  - The owner's obligation to unsuccessful bidders, and its implied obligation to treat bidders fairly, does not survive the creation of Contract B with the successful bidder. The fact that it is later found that the successful bid was in breach of the contract does not invalidate the entire tendering process, but does allow the owner to sue for breach of Contract B. Note that it is permissible for the parties to Contract B to modify the terms of the agreement after it has been entered into, even if those modifications go against the original tender documents. Contract A dies as soon as the original Contract B is created.
- **Notes**
  - Upheld decision of lower courts
  - City had no way to know that Sureway's bid was non-compliant
  - The City as an Owner has no obligation to ensure that the representations made were accurate

Subcontractors – The Tender Process in More Detail

- On one level is the Owner and the Contractor
- However, contractors rely on **subcontractors** for parts of the work…
  - Contractors will seek bids from subcontractors – a whole other process of bidding going on regarding various aspects of the work
- What happens if the Contractor gets awarded the job using subcontractor B but then decides to go with subcontractor C?
- Using the subcontractor's price is called **carrying the sub**

Bate Equipment v Ellis-Don (1992 ABQB) – Mere Fact of Carrying a Sub Does Not Constitute an Acceptance of that Sub's Bid

- **Facts**
  - Bate Equipment was an unsuccessful bidder in a tendering process for construction of a school board building. The winning bid was the lowest, but it failed to quote the product in strict accordance with the project specifications in the provincial bid depository. The general contractor (Ellis Don) provisionally awarded the subcontract to Bate, but the lowest bidder appealed Ellis Don's decision to the architect, who ordered that the lowest bidder be reinstated.
- **Issues**
  - Was there a breach of Contract A when Bate was not awarded the contract?
- **Decision**
  - Contract A forms when the plaintiff submitted its tender to the general contractor. However, Contract B never formed since Bate's bid was not accepted. There was no fraudulent misrepresentation on the part of the general contractor that induced Bate to submit a bid. The successful bidder's disqualification from the bid depository after the fact did not give rise to an obligation to then accept Bate's bid.
  - Also, note that damages that can be awarded for breaches of Contract A are generally limited, especially if you cannot demonstrate that your bid would have been successful but not for the improper awarding of the contract to another bidder.

- **Ratio**
  - If a successful bid is later invalidated, or later does not meet the requirements of Contract B, that does not necessarily mean that the unsuccessful bidders now have a cause of action for breach of Contract A.
- **Notes**
  - "In my view, there is **no compelling authority that the mere fact of carrying the subcontractor's name and bid constitutes an acceptance, conditional or otherwise, of the bid**. In the present case there is in any event abundant reason to reject the application of such a rule. The contract documents on this issue would be as indicated earlier that no general contractor bidding to the owner would want to be under an obligation to enter into a contract B with a subcontractor before such an obligation, albeit condition, is against the best interest of a bidding general contractor."
    - Seems to say that ED can do whatever it wants, which is interesting…
  - "Accordingly, it follows that **while the plaintiff and Ellis-Don formed a contract A that there was no acceptance of Armor's bid by Ellis-Don either expressly or by virtue of Armor being carried in Ellis-Don's tender. As a result, Ellis-Don at no time ever became obligated under contract A to enter into a contract B with the plaintiff**. It should be added here that the same result would attain even if the bid depository rules and decision applied and were part of contract A."
  - Damages (if they had been awarded):
    - "Because the contract breached is a contract A and not a contract B, the damages are, of course, limited. But such a breach of contract A does not obligate Ellis-Don or anyone else to accept the Armor bid or to enter into a contract B awarding Armor the elevator contract. All such a breach of contract A means in this case is that Ellis-Don ought not to have entered into a contract with a disqualified bidder."
    - Ellis-Don was never under an obligation to accept the plaintiff's bid or the bid of any one of the other elevator bidders.
    - In short, the breach is at best a technical breach perhaps entitling the plaintiff to the costs it incurred in preparing its tender. Certainly nothing else appears and no evidence of even those damages was led at trial or pled."

Naylor v Ellis-Don **(2001 SCC) – Different Outcome than *Bate*, But Note that Naylor was Named by Ellis-Don, and That This Was a Bid Depository**

- **Facts**
  - The Oakwood Hospital called for tenders for the construction of an addition and renovation of the existing facility through the Toronto Bid Depository. Ellis-Don approached Naylor to bid for the electrical work on the project. At the time, Naylor's workers were not affiliated with IBEW, but Ellis-Don was in protracted litigation with IBEW, which claimed to be the exclusive bargaining agent for all of Ellis-Don's electricians. If it was found that IBEW was the main bargaining agent, then Ellis-Don would not be able to subcontract to Naylor as a non-unionized company. Ellis-Don did not tell Naylor about this. Ellis-Don bid on the contract with Naylor subcontracting the electrical work, and this allowed Ellis-Don to obtain the low bid for the project, which was accepted. One of the terms of the successful bid was that Ellis-Don subcontract with Naylor. When it was apparent that this was not possible due to conflicting portions of the IBEW labour agreement, Ellis-Don contracted with another company. Naylor is now suing for breach of contract. The tendering documents also indicated that subcontractors could only be substituted after a bid is submittedif the Owner objected reasonably to the subcontractor
- **Issues**
  - Did the subcontracting clause between Naylor and Ellis-Don create a binding legal relationship that required Ellis-Don to subcontract to Naylor in the event that it won the bid?
- **Decision**
  - When a bidder agrees, as part of a bid, to subcontract a portion of the work to another company, that creates a contractual obligation that can only be terminated through a reasonable objection. In light of Ellis- Don's conduct, it was not reasonable for it to object to Naylor's union status. It knew of a possible conflict that would prevent it from subcontracting to Naylor at the time that the agreement was entered into. This is essentially a "bait and switch" situation, where Ellis-Don used Naylor as the subcontractor in the tendering bid to win it, and then switched out Naylor with Comstock at a higher price to comply with its labour obligations.
  - Also set a new test for the doctrine of frustration: Only occurs when a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes something radically different than what was originally agreed. This test is met in this case.
- **Ratio**
  - When a bidder agrees, as part of a bid, to subcontract a portion of the work to another company, that creates a contractual obligation that can only be terminated through a reasonable objection.
- **Notes**

- "This appeal raises the issue of a prime contractor's legal obligations (if any) to a prospective subcontractor whose bid it has incorporated in its own successful tender for a construction project under the rules of a structured bid depository. The appellant's Project Manager testified that a bid depository "is just a fancy name for somebody collecting prices". This, as will be seen, is something of an understatement."
    - Note that ED had already named Naylor in its contract
- Bid depository
    - The Bid Depository's staff was notified of a new project by an owner who wished to make use of their services. A date was fixed by which the pre-qualified subcontractors were to submit on a standard form document (for ease of comparison) a breakdown of their prices. Identical project documentation was made available to all interested bidders in each of the subtrades. Their tenders were sealed and delivered to the Bid Depository office by a specified date and time and deposited in a designated locked box
    - On the due date, the subtrade bid documents were made available to interested prime contractors who selected the subcontractors (not necessarily the lowest bidder) they wanted to carry as part of their own bid to the owner. Prime contractor bids were required to be filed on a standard form on a fixed date (here, two days after the opening of the subtrade bids). The system offered conformity and comparability. The prime contractor bids were open for the owner's acceptance for a fixed period (here 90 days) and the subcontractor bids were open for acceptance by the prime contractor for a fixed period (here 90 days) and the subcontractor bids were open for acceptance by the prime contractor for a fixed period after the award of the prime contract (here 7 days). Each prime contractor was required to undertake "to place a Sub-Contract with one of the trade contractors who used the Bid Depository".
    - These were not informal arrangements for the convenience of prime contractors (i.e., "just a fancy name for somebody collecting prices"). Each participant in the tendering process bound itself by contract to certain obligations and acquired thereby certain rights. The content of those rights and obligations is the subject matter of this litigation."
- Bid shopping
    - The process is considered fair to all participants because all parties bid on identical information, and their bids are disclosed to the relevant parties at the same time. In particular, it assures subtrades that their bids will not be "shopped" by a prime contractor to competing subcontractors to lever a price advantage. "Bid shopping" was defined by the trial judge as "the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal".
- Issue 1: Was a Contract A formed between Naylor and Ellis-Don for this project, and if so, what were its terms?
    - Answer: Yes – it comes from the bid depository process and rules
        - We have a clear distinction between this and ***Bate***
            - 1. Naylor was actually mentioned in the contract
            - 2. This was actually a bid depository job – the rules are different
        - Here, a Contract A was formed
        - If there is a rigid process in place, ***Naylor*** shows that a Contract A could be formed
        - Also note that bid shopping is totally fine, unless there's explicit rules
- Issue 2: Was the contract frustrated by reason of the OLRB decision of February 28, 1992? (Ellis-Don argued that Contract A was frustrated)
    - Old test: If the contracting parties, as reasonable people, had contemplated the supervening event at the time of contract, would they have agreed to put the contract to an end?
        - Rejected because of artificiality of determining fiction and imputation.
    - **New test**: Frustration only occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes a thing radically different from that which was undertaken
        - Held: OLRB decision did **not** create IBEW rights – it merely affirmed them; outcome was foreseeable and so outside of doctrine of frustration
            - It was just a confirmation of existing facts
- Issue 3: If not, did Ellis-Don breach the terms of Contract A?
    - Held: Yes - Not proper for Ellis-Don to reject Naylor bid given Naylor's due diligence and Ellis-Don's knowledge of pending LRB decision.
- Issue 4: If so, what are the damages
    - Held:
        - Calculation of Naylor's profit reduced based upon Guild's actual losses as a result of job conditions (i.e. absence of previous as-builts)
        - But no reduction because Naylor would have had to employ IBEW workers or suffer picketing etc.
- **Difference between *Bate* and *Naylor*?**

- Both cases say that the parties had Contract A and complied with bid depository rules. *But note that in every case different depositary rules will apply and each time the court interpreted those rules.* So both cases follow the same legal principles, but the terms of Contract A just differed in each respect.

Privilege/Discretion Clauses

Privilege/Discretion Clauses

- "The lowest or any tender not necessarily accepted…"
  - Allows consideration of "nuanced view of costs"
- ***MJB*** says the "bare-bones" privilege clause doesn't allow owner to choose a non-compliant bid
- As a result, Owners often include beefed up Discretion Clauses in tender documents to deal with non-compliance
- Some privilege/discretion clauses are more thorough than others:
  - "The Owner has the right to waive minor errors, omissions or irregularities in the bid."
    - Wide discretion, but does this allow for non-compliance?
      - Probably not
  - "The Owner may, in its sole discretion, reject or retain for its consideration Tenders which are **non-conforming** because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers"
    - Much wider, however they can only be non-conforming for certain reasons

- Exam Analysis – Steps:
  1. Do the tender documents purport to allow non-compliance?
  2. If yes, what is the extent of the discretion (how strong and specific is the language of the clause)?
  3. If there is a discretionary clause, how substantial is compliance?
     a. How reasonable is the defect?
     b. How explicitly does the discretion clause allow this sort of non-compliance?

NAC Constructors v ACRW (2005 ABCA) – A Privilege Clause That Permits Accepting a Non-Compliant Bid Likely Won't Permit Accepting a Late Bid

- **Facts**
  - NAC was the unsuccessful bidder in a call for tenders by Wastewater. NAC claimed that the successful bidder did not submit its tender on time and should have been eliminated from consideration. NAC's witness claims that they saw the successful bidder's representative enter the building after the close of tenders. Wastewater argued that it recorded the time the bid was received as being one minute before the close of tenders. In the alternative, Wastewater contends that the tendering documents (and its privilege clause) allow it to accept non-compliant bids.
- **Issues**
  - Was the tender submitted late? If so, was Wastewater in breach of Contract A when it accepted that bid? Do the tendering documents shield it from liability for breaching Contract A?
- **Decision**
  - Affidavit evidence is insufficient to establish if the bid was submitted on time or not - viva voce evidence and cross-examination is required.
  - The tender call documents were not worded sufficiently broadly to allow Wastewater to accept late tenders. Fairness requires that the tender call documents specifically state that late bids may be considered, and this was not done. Therefore, the case will hinge on the timing of the bid - if it was submitted after the deadline, it cannot be accepted. If it was submitted prior, then it is compliant.
- **Ratio**
  - A broad privilege clause is unfair to other bidders because it does stipulate what it actually covers. **Lesson: Privilege clauses must be precise, specific, and not antithetical to the purpose of the contract. If you want to include a privilege clause it must include everything within the clause that you may want to act on because the Courts take a strict and narrow view.**
- **Notes**
  - Question: Can a very broad privilege clause that permits the owner to accept a non-compliant bid permit an owner to accept a late bid?
    - Answer:
      - Privilege clauses need to be precise, specific and not antithetical to the purpose of the contract and not unconscionable to public policy
      - In this case, clause did not permit acceptance of late bid

- Court of Appeal
  - You cannot accept a late bid
  - Even though you were allowed to accept a non-compliant bid, you can't waive non-compliance if the bid shouldn't have been in the pool of bids to pick from in the first place
- Principles to get out of case
  - If it doesn't look good, the court will make sure the parties bear the consequences
  - Courts don't love privilege clauses; if they can find a way to make it not count, they will
- Would a court ever allow a late bid?
  - Odds are, no; it is inherently unfair to the bidders
  - Prices of things could change drastically from the time the on-time bids were submitted

Sound Contracting v Nanaimo **(2000 BCCA) – More Nuanced View of "Cost"; Past Experience Went to Value of Bid**

- **Facts**
  - Nanaimo is appealing against a judgment for damages awarded for failure to award a construction contract to the lowest bidder for a project known as the Hamond Bay project. Sound Contracting was the low bidder on several projects before this one. The parties were in a dispute over another contract that went to arbitration and resulting in Sound getting a significant monetary award against the city. The effect of that award was to force the city to pay higher than the original contract price. The request for tenders included clauses allowing the city to reject any tender for any reason, the lowest bid may not be the one that is accepted, and that preference may be given to local suppliers where the bids are otherwise similar. The City did not award the contract to Sound due to the experience from the previous contract (i.e. they didn't like the fact that Sound has a propensity to enter into litigation, which would therefore require the city to assume greater costs supervising the contract).
- **Issues**
  - Does the privilege clause allow them to accept bids other than the lowest?
- **Decision**
  - In this case, the privilege clause clearly releases Nanaimo from having to accept the lowest bid. The tendering documents indicate that it is permitted to take other factors into consideration that may affect quality, price and value. The discretion that is granted by the privilege clause must be exercised fairly and objectively. In this case, previous experience with the same contractor is a relevant factor that the city was entitled to take into consideration when awarding the contract, since it would affect the price as enumerated in the tendering documents. Past dealings cannot be construed as an "undisclosed criterion" - it is reasonable for parties to expect that past experience between the same parties may inform decisions about awarding future tenders.
- **Ratio**
  - If privilege clauses allow the tenderer to award a contract to a bid that is not the lowest, the factors it relies on must be assessed fairly and objectively without prejudice to other contractors.
- **Notes**
  - Court of Appeal overturned Trial Judge
  - Quoting from ***MJB***: "The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause is a discretion to take a more nuanced view of 'cost'…"
  - Court also relied upon the expanded privilege clause
  - Court found that past experience went to value of bid, notwithstanding a bare bones privilege clause

Back to *Double N Earthmovers* – How Broadly Can You Define a Privilege Clause

- "The tender documents govern the terms, if any, of contract A (***MJB***). It follows that, if the terms so permit, a non-compliant bid may be acceptable, so long as there exists a clause explicitly allowing non-compliant bids. Such a clause would have to be very clear, and must be read restrictively when attempting to determine if non-compliant bids are permissible."
  - If you construct it carefully and is specific enough, you should be able to get away with it
- Overall Since ***Ron Engineering***, there are many exceptions to the case law

Graham Industrial Services Ltd v Greater Vancouver Regional District **(2004 BCCA) – Privilege Clause Couldn't Be Used Because Bid Was Withdrawn Before Being Accepted**

- **Facts**
  - Graham underbid by $5M on a $41M sewage facility. Similar to Ron Engineering, but instead of refusing to enter Contract B – they basically said their bid was non-compliant (and could not be accepted). This occurred prior to GVRD accepting and granting them Contract B. GVRD tried to force Graham to agree to Contract B under its privilege clause that allowed them to accept non-compliant bids
- **Decision**
  - A privilege clause is a shield and not a sword. You cannot use the clause to force Contract B onto contractors, you can only use them to protect yourself. The BCCA agreed with Graham that its bid was so non-compliant with various mathematical and other errors that it must be rejected by the owner.
- **Ratio**
  - An owner cannot accept a bid that clearly contains extreme mathematical and other errors
  - Privilege clauses are intended to be used as shield and not swords
- **Notes**
  - Owner could not use discretion clause contained in tender documents to waive non-compliance and force contract on bidder
  - Key fact here: They withdrew bid before it was accepted; there was nothing for the Owner to apply the privilege clause to

Kinetic Construction Ltd v Comox-Strathcona (Regional District) **(2004 BCCA) – Non-Compliant Bids are Considered "Counteroffers"; Don't Give Rise to Contract A; Compliant Bids Did Give Rise to Contract A; Arguably Conflicts with *Ron Engineering***

- **Facts**
  - Owner had an expensive discretion clause in its tender documents. It chose anon-compliant bid and a compliant bidder sued.
- **Decision**
  - The Court considered the non-compliant bid a "counter-offer" capable of acceptance by the owner, but not giving rise to Contract A. Contract A, containing a discretion clause, did arise with the compliant bidders (like the plaintiff).
- **Ratio**
  - If tender documents contain wide enough privilege clause to allow for acceptance of non-compliant bids, owner can rely on that clause as against compliant bidders, by virtue of Contract A.
- **Notes**
  - Court considered non-compliant bid a "**counter-offer**" capable of acceptance by Owner, but didn't give rise to Contract A
    - A new layer:
      - There's the obvious Contract A
      - If a non-compliant bidder prepares a bid and the Owner, who via a clause is allowed to accept non-compliant bids, has essentially accepted a counteroffer
        - In ***Graham***, they withdrew their bid; had they not and the Owner accepted that would have been acceptance of a counteroffer
  - Contract A containing discretion clause did arise with compliant bidders, like plaintiff
  - Discretion clause permitted consideration of non-compliant bid so no breach of Contract A by Owner by choosing non-compliant bid

Tercon Contractors Ltd v British Columbia **(2010 SCC) – New Test for Determining Whether Privilege Clause Applies**

- **Facts**
  - BC issued a "Request for Expressions of Interest" for the design and construction of a highway. Six teams responded including Tercon and Brentwood. Province then issued an RFP, and only the six original proponents were eligible to submit bids. The RFP also included an "exclusion of liability" clause providing that no Proponent shall have any claim for compensation whatsoever for damages arising from participating in the bidding process. Brentwood lacked expertise in drilling and blasting, so its proposal included EAC, which was NOT one of the original proponents, as a joint venture. Brentwood was selected for the project, and the Province took steps to obfuscate the nature of Brentwood's bid. Tercon is suing, indicating that the tendering process prevents EAC from participating.

- **Issues**
  - Did the province violate the terms of the RFP by awarding the contract to a non-qualified bidder? Does the exclusion of liability clause prevent Tercon from recovering damages?
- **Decision**
  - It is clear that the province breached the terms of the RFP when it awarded the contract to the Brentwood consortium.
  - The real question is ***whether the exclusion of liability clause will shield the province from paying any damages to Tercon***. The majority agrees that the Province breached express provisions of the tendering contract, and this egregious conduct also violated an implied duty of fairness to the bidders, and was an affront to the integrity and business efficacy of the tending process. **A big change arising from this case: the former analysis of "Fundamental Breach" is abolished - you no longer ask whether the breach speaks to the "heart of the contract" such that an exclusion clause could not be used to shield liability for the breach.**
  - **New Framework:**
    - **1.** Interpret the clause - what was the intention of the clause when the exclusion was drafted?
    - **2.** If the clause applies to the type of breach that occurred, is it patently unfair for it to apply (as determined at the time of the contract)?
    - **3.** If the clause applies and it is not unconscionable, is there some over-riding policy reason to avoid the clause (i.e. serious criminality, egregious fraud, etc.)?
  - The exclusion clause only applies to "damages arising from participating in the bidding process." This does not, if properly interpreted, exclude Tercon's claim for damages. All of the terms that were breached arose under Contract A, and Tercon's acceptance of Contract A arose outside of the tendering process itself. It would be unconscionable to allow the Province to induce bids under certain terms, then renege on those terms and hide behind a limitation of liability clause. The clause therefore does not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder from participating in the process (does not apply).
  - The minority felt that the exclusion clause met the requirement of step (1), in that there was no imbalance in bargaining power, freedom of contract means that the court ought to not rewrite a bad deal based upon an ex post facto analysis of unfairness. Felt that the exclusion clause should have been enforced.
  - Damages were equivalent to the profits that Tercon would have realized, since it should have gotten the contract if the process had been properly followed
- **Ratio**
  - Limitations of liability clauses will not shield an owner for selecting non-compliant bids
- **Notes**
  - Important Clause #1
    - Preferred proponent to negotiate in good faith an alliance agreement similar in form to attached agreement, which would include commercial and value engineering discussions
      - Preferred proponent = bidder selected
      - There would be an agreement negotiated between the parties in the proposed form
  - Important Clause #2
    - No Claims Clause: “Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.”
      - If you’re going to be a part of this, you can’t complain
  - All 9 SCC Justices agree:
    - 1. Contract A/Contract B Analysis applies;
    - 2. BC MOT breached Contract A by allowing unqualified EAC to be part of winning consortium
    - 3. Put to rest old contract law principle dealing with “Fundamental Breach” (i.e. to get around exclusion clauses)
    - **4. New Contractual Framework:**
      1) Interpret Clause: intention of parties. What did they mean when they wrote the clause; when was it supposed to apply?
      - 2) If clause applies, is it unconscionable (as determined at the time of contract)?
      - 3) If clause applies and is not unconscionable, is there some over-riding policy reason to avoid clause (i.e. serious criminality or egregious fraud)?
  - SCC Justices disagree (5/4)
    - Majority held that privilege clause did not, as a matter of interpretation, apply to protect BC MOT’s contracting with a non-qualified tenderer
    - Minority felt privilege clause was intended to apply to situation, was not unconscionable (no imbalance of bargaining power as Tercon a major contractor), nor did it offend public policy (freedom of contract means that court ought not rewrite a bad deal based upon an *ex post factor* analysis of unfairness)

Privilege/Discretion Clauses Review

- Difficult to reconcile a number of these cases
- There is real uncertainty as to when an Owner can waive non-compliance
- Owner must make a choice and live with the consequences

Non-Compliance Analysis

- Look at the tender documents to determine if discretion permitted and if so, the extent of the discretion
- If there is an appropriate privilege/discretion clause, determine whether there is substantial compliance
    - Assess importance of defect on tender
- Ask whether:
    - The defect undermines fairness?
    - Does defect affect the cost of the bid or the performance of Contract B?
    - What is the risk that other bidders may sue as a result?

Waiver Clauses

Elite Bailiff v BC (2003 BCCA) – Process was Unfair Since Point Allocation Process Was So Heavily Weighted Against Bailiff Companies Without Prior Court Experience

- **Facts**
    - The call for tenders document indicated that the proposal that is "deemed successful" will then commence negotiations with the owner for the final contract. If those negotiations fail, then an offer would be extended to the next bidder to commence negotiations etc. The call document indicated that past experience providing bailiff services was a significant consideration. It also indicated that the successful bidder would have to certify all of its bailiffs as a condition of being awarded the contract. The point allocation system was NOT described in the call document, and it heavily favoured companies with previous bailiff experience with the provincial Crown, such that it was practically impossible for a company to win the bid without having prior experience with the Crown. Elite Bailiff did not have any previous experience with the Crown. Elite is suing on the basis that it was unfairly discriminated against in the point allocation process, even though it was the "low bidder." Note that the tender call included a clause indicating that damages for any breach would be limited to reasonable costs in preparing the bid.
- **Issue**
    - Was the point allocation system discriminatory to Elite in violation of Contract A? If it is a breach, will the limitation of damages clause apply?
- **Decision**
    - Since bailiffs must obviously be trustworthy and exercise a considerable degree of skill and discretion, these factors will naturally play a role in determining which bid is accepted. Price is not the only consideration here. In a calling for tenders, all operative terms of Contract A must be disclosed, and a privilege clause will only allow the owner to select a bid other than the lowest if it has clearly disclosed the criteria that it will consider beforehand. In this case, no "secret preference" was awarded. Elite contends that a reasonable bidder would understand that previous experience with the Crown would be "a factor," but not necessarily the "dominant" factor to be considered in selecting the winning bid. The duty of fairness in Contract A does not require the owner to disclose how different factors will be weighted in its decision, it only requires that the owner disclose what those factors are. HOWEVER, the point allocation process here was so heavily weighted against bailiff companies without prior court experience, the process was unfair.
- **Ratio**
    - The duty of fairness in Contract A DOES NOT require the owner to disclose how different factors will be weighted in its decision, it only requires that the owner disclose what those factors are. However, the duty can still be breached if the process essentially pre-determines the outcome on the basis of a single factor, where that is not disclosed to all bidders in advance.
- **Notes**
    - Will a court enforce the following provision: "…the proponent by submitting a proposal, agrees that it will not claim damages in excess of an amount equivalent to the reasonable costs [of preparing bid], including no loss of profits"?

- Yes, even though the government had preferred the existing bailiff company by pre-determining the number of evaluation points that would be given for past experience which gave the existing bailiff company an advantage
- But see ***Tercon***
    - In this case, there was no 3rd parties, so arguably this is why it's okay

Undisclosed Criteria

Chinook Aggregates v Abbotsford (1989 BCCA) – Owner Was in Breach of a Duty to Treat All Bidders Fairly and Not to Give Any of Them An Unfair Advantage Over the Others

- **Facts**
    - Appellant municipality invited bids on a gravel crushing contract by inserting an advertisement in a local newspaper. It also issued instructions on how the bids should be submitted. The advertisement included a privilege clause indicating that the lowest tender may not be the one that is accepted. Abbotsford adopted an internal policy where local contractors would be preferred provided they were within 10% of the lowest bid, and this policy was not disclosed as part of the tendering process. Chinook submitted the lowest bid, but a local contractor won. Chinook is arguing that Contract A was violated on the basis of the municipality failing to disclose its internal preference policy.
- **Issues**
    - Is the municipality required to disclose its internal selection policies to remain compliant with Contract A?
- **Decision**
    - By adopting an internal policy that preferred local contractors to outside contractors, the municipality essentially incorporated an implied term into Contract A without notice to the other party (Chinook). This is in breach of the implied duty to treat all bidders fairly and to not give any of them an unfair advantage over the others. The privilege clause did not provide Abbotsford with sufficient rationale to incorporate additional terms into the contract, and it cannot be used to save this selection process. Also, cannot rely on the argument that the policy reflects "common custom" as there is no evidence to support the existence of such a custom, and no evidence that Chinook or other bidders knew that the competition would be governed by such a custom.
- **Ratio**
    - Internal policies that, in effect, prefer one contractor over another in a tendering process must be disclosed to all bidders to meet the implied duty of fairness in the Contract A test.
- **Notes**
    - "By adopting a policy of preferring local contractors whose bids were within ten per cent of the lowest bid, the appellant in effect incorporated an implied term without notice of that implied term to all bidders including the respondent. In so doing it was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others."
    - Recall ***Sound Contracting*** though
        - City's previous experience with second low bidder was good
        - Standard Privilege Clause plus additional term that "awards shall be made on tenders that will give the greatest value based on quality, service and price."
        - Trial judge held the City was liable for having relied upon an undisclosed criteria
        - Overturned by Court of Appeal: ***MJB:*** "The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause is a discretion to take a more nuanced view of 'cost'…"

Fairness

Martel Buildings v Canada (2000 SCC) – No Duty of Good Faith in Pre-Contract Negotiations Or In Negotiations Prior to the Submission of Tenders

- **Facts**
    - Martel leased most of a building from the federal government. Martel CEO met with a subordinate to the government's Chief of Leasing to discuss renewing the lease. The Chief of Leasing was instructed to obtain a rental rate even though it intended to commence a tender process. Chief of Leasing led Martel to believe that a proposed lease rate was forthcoming. The CEO presented proposed rental rates that fell outside recommendations of the Chief of Leasing's appraisal. After the date to complete negotiations passed, the government began preparing a report to recommend next steps. The report first recommended a lease renewal, but proceeded to tender anyways. Upon hearing about this, the CEO met the Chief of Leasing, and they agreed to renew the lease for $220 per square meter. Two days after this

meeting, the Chief of Leasing advised that other terms of the lease would have to be settled that day to terminate the tender, and Martel was not able to meet that timeline.
    - Following this, Martel submitted a bid to the lease tendering process, which was the lowest. A privilege clause in the tender allowed the government to reject lower bids. The government added the cost of installing a security system to Martel's bid, and not to others, claiming that Martel's specific use of the space required a security system be installed.
- **Issues**
    - Did the government breach a duty of care in its conduct during negotiations?
- **Decision**
    - [Issue 1] The FCA ruled that a duty of care was breached in the lease renewal negotiations, and that Martel had a reasonable expectation that its bid (the lowest) would be the one that would be accepted by the tendering process.
    - Although common law traditionally does not allow for recovery for pure economic loss, there are now five enumerated categories where such losses can be recompensed. Anns test must be used to determine whether a new head of economic loss should be recognized based on breach of a new duty of care.
        - 1. There is a prima facie duty of care owed by the government to the lessee. Proximity is indicated by the pre-existing lease arrangement, the parties' communications, and evidence of genuine and mutual contracting intent.
        - 2. There are policy reasons to preclude extending a compensable duty of care to this type of relationship. Mainly, recognizing a duty of care would deprive parties of the ability to develop advantageous bargaining positions (economically useful conduct). Recognizing a duty of care here would essentially require negotiating parties to disclose their bottom lines and motives, which would chill economic activity. Also, this could transform tort law into a type of after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through the pursuit of alternative strategies or opportunities. Lastly, this would essentially transform the courts into regulators, scrutinizing the minutiae of pre-contractual conduct.
    - For the tendering process, the preparation of tendering documents and subsequent evaluation of bids involve different considerations. In this case, once a bid is submitted, that creates a legal contract where the express and implied terms of Contract A govern. The privilege clause in the tendering offer in this case conferred significant latitude on the appellant to evaluate and approve tenders. It allowed the appellant to add "fit-up" costs to the estimates provided by bidders, so this meets the expectations of the parties. There is no evidence of a colourable attempt to use the fit-up costs to achieve pre-determined result. **The process was fair.**
- **Ratio**
    - There is no duty of good faith in pre-contract negotiations or in negotiations prior to the submission of tenders. Contract A has an implied term of fairness for all bidders. A privilege clause does not except an owner from this duty.
- **Notes**
    - Issue 1: Does a duty of care exist in the conduct of pre-contractual negotiations?
        - Held:
            - 1. No recognized category
            - 2. Prima facie duty in this case (given previous lease relationship and ongoing discussions)
            - 3. But, policy rejects duty (one should not have to be mindful of commercial interests of counterpart in arms-length negotiations)
    - Issue 2: Is there any implied duty of fairness within the tender process?
        - Held:
            - “A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly.”
            - “Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment…A tendering authority has ‘the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents.’”
    - Issue 3: Did the federal government breach its duty of care to treat Martel fairly and if so, what are the consequences?
        - Held:
            - Feds did breach duty of fairness (i.e. by not adding security system costs to low bidder’s tender price)
            - However, Martel failed to prove breach caused damages (because low bidder would have still won)
    - Issue 4: Do owners owe bidders a duty of care to act fairly in the conduct of a tender?
        - Held:
            - Any tortious duty would be informed by contractual matrix
            - In this case, even if a coextensive duty of care was recognized, claim would fail for the same reasons as the contractual claim fails

Fairness Issues

- One of the issues
  - Is there any implied duty of fairness within the tender process?
- Answer:
  - The duty to treat bidders fairly and equally is a contractual duty of Contract A
  - "A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly."
- Fairness
  - Equal treatment of bidders on matters of price and performance
  - Even application of rules by Owner
  - No bidder can gain an unfair advantage
  - Fact driven
- But what if the rules or privilege clause are unfair?
- Will "fairness" or "privilege" govern?
  - ***Tercon***
  - ***Bhasin***

Torts and Tendering

Design Services v Canada (2008 SCC) – Owner Does Not Owe a Duty of Care to Subcontractors

- **Facts**
  - Public Works Canada launched a "design-build" tendering process for constructing a federal office building. Tendering documents indicated proponents could bid alone or as part of a joint venture with others. Public Works awarded the contract to a non-compliant bidder. The unsuccessful bidder settled with PW, but the subcontractors in that bid are continuing the proceedings. Those subcontractors DID NOT enter into a joint venture with the unsuccessful bidder
- **Issues**
  - Are subcontractors that are part of a joint venture with an unsuccessful bidder entitled to damages in contract if the bid lost to a non-compliant bid?
- **Decision**
  - The subcontractors' damages are purely economic. Of the five pre-existing categories of pure economic loss, relational economic loss could apply. This occurs where the defendant negligently causes personal injury or damage to a third party and the plaintiff suffers pure economic loss by virtue of some relationship (normal contractual) that is enjoys with the injured third party. However, this situation cannot fall under the economic loss category of relational loss, since no actual damage was caused to the main bidder (its damage was also purely economic).
  - For negligence, the recognition of a new duty of care between an owner and subcontractors in the context of a tendering process is not justified. The subcontractors could have entered into a joint venture with the unsuccessful bidder, and therefore have been parties to Contract A itself, but they elected not to do so. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs by contract in a certain way would allow for an unjustifiable encroachment of tort law into the law of contracts.
- **Ratio**
  - The owner does not owe a duty in negligence or in contract to subcontractors that are affected by accepting a non-compliant bid.
- **Notes**
  - Analysis
    - Step 1 – Has duty been recognized?
      - Held: Canadian jurisprudence had not yet recognized a duty of care between Owners and Subcontractors so issue is whether Court should recognize a new duty
    - Step 2 – Analogous to Recognized Ground
      - Held: Not analogous to recognized ground (e.g. none of 5 grounds of pure economic loss)
    - Step 3 – Recognize New Duty?
      - Anns test (proximity / policy reasons against)
      - Held: Failed on both grounds because (a) the "ordering of commercial relationships is within the law of contract" and; (b) indeterminate liability because many undisclosed subcontractors and suppliers
      - If bid had been submitted by joint venture or consortium, result may have been different as Contract A would exist
      - Result: No duty of care by Owners to Subcontractors

The New World

Bhasin v Hrynew (2014 SCC) – New Duty of Honest Performance Applies to All Contracts as a Manifestation of the Good Faith Principle

- **Facts**
  - Bhasin sold education savings plans for Can Am. His contract was for a three year term that was automatically renewable unless one party gave the other six months' notice before the end of the term. The contract also contained an "entire agreement" clause. Hrynew, who was also an enrolment director working for Can-Am, put pressure on Bhasin to merge their companies so that he could access Bhasin's client list.
  - Also, Can-Am was looking into restructuring its company which would essentially make Bhasin report to Hrynew, who would be appointed as a compliance officer for securities law. Can-Am did not disclose this to Bhasin. When Bhasin found out, he did not disclose any of his records to Hrynew for auditing purposes, Can- Am served six-months termination notice on that basis. Bhasin is suing, claiming a breach of a duty of fairness in contractual performance.
- **Issues**
  - Did Can-Am and Hrynew breach an implied duty of good faith in contractual performance with Bhasin?
- **Decision**
  - There is an "organizing principle" of good faith in contractual performance in Canadian common law. Must be performed honestly and with regards to the other party's interests. This is not the same as a general duty of good faith, but the parties must perform their contracts in good faith in order for the contract to have any meaning. In this case, Can-Am's and Hrynew's dealings with Bhasin breached the organizing principle of good faith by clearly undermining his business to force him into a different business relationship.
  - Commentary: How does this apply to tendering? Going forward, this will likely be applied in a significant way in tendering situations.
- **Ratio**
  - A general organizing principle of good faith compels the parties to a contract to perform their obligations honestly
- **Notes**
  - "Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance required so as to give appropriate consideration to the legitimate interests of both contracting parties."
  - "It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations."
  - What effect will ***Bhasin*** have on tendering?
  - Remember
    - Overriding duty of fairness
    - Owners often rely on onerous privilege/discretion clauses, including the right to accept a non-compliant bid

Tender Document Considerations

Instructions to Bidders

- Documents must be consistent
  - Definitions
- Delivery of Bid
  - Time – specify cut-off time and clock
  - Place – bids received at one location
  - Method of delivery
- Q&A process – all bidders must get same info
- Site visit – required?
- Bid security – required?
  - Cheque stapled to corner of tender in a specified amount
  - Returned if not successful
- Forms to be submitted – keep it simple
- Designate one contact person for inquiries to avoid confusion and ensure fairness
- Clearly state period of bid irrevocability
- Provide clear notice that confidential information may be disclosed in accordance with applicable legislation, if applicable

- Categorize which submission requirements are mandatory ("must/shall submit") and discretionary ("may/should submit")

Evaluation Process

- Disclose relevant criteria and only apply that criteria
- Be wary of putting too much detail into the evaluation criteria
    - Strike a balance between full disclosure and practicality
- Consider whether a "fairness commissioner" required?
    - Typically for larger projects

Contract Documents

- Be wary of onerous Supplementary Conditions that may change price competition into negotiation of contract terms and risk allocation
- Bidders may qualify bids by rejecting proposed contractual terms, which may be construed as a counter-offer
- Owner cannot force terms of Contract B on Bidder

3. CHANGES

Introduction

What is a Change?

- Legally, a change means something specific
    - A change = an **amendment**
- You can have changes to
    - Work
    - Schedule
    - Price
    - Anything else in the contract

Common Terminology

- **Change Notice**
    - Typically a directive given by an Owner to a Contractor
    - "We want to make this change"
- **Change Request**
    - From a contractor to an Owner
    - "We're entitled to a change; here's why"
    - Owner will then consider it
- **Change Proposal**
    - Either party making a proposal
    - "Here's an idea"
- **Change Directive**
    - When owner decides it wants to direct the contractor to do something before the parties have determined the impact on schedule or cost
    - "I want this done right away"; contractor will do it, and the parties will discuss the impacts at a later date
- **Change Order**
    - Something agreed to by the parties
    - "We're going to do this change, here are the associated costs and schedule"; parties will sign off on the change order
    - It's essentially a formal amendment to the contract
    - Usually numbered
        - E.g. Grand Prairie Hospital – 600 change orders

- **RFI (Request for information)**
  - Sometimes a contractor is looking at the design, but can't find all the information it needs
  - Rather than guessing, the contractor will issue a RFI to owner or architect
  - "We see this in the design, can you tell us what you mean"
  - The owner/architect will then respond
- **SI (Site instruction)**
  - Like a change directive
  - Given to a contractor to say "do this"
  - Less formal than a Change Directive
  - This is usually for something of a small scope
  - E.g. Moving light switches over a few inches
- **Contract Amendment**
  - All things agreed to that are changed in the contract
  - Usually is to the terms of the contract as opposed to the design of the project
    - More technical/legal than design-wise
- What these terms mean depends on one thing:
  - What the definitions mean in that specific contract – it's **whatever the contract says it is**
    - One contract may call something a change order, and another contract may call the exact same thing a change amendment

Handling Changes

- How to handle?
  - Oral instructions
  - Inconsistent instructions
  - Prevent disagreements later
- We build in specific rules in the contract to deal with these changes
  - This can include definitions, how parties are supposed to act
  - The key is to put things in writing

CCDC-2 and ACA Form A Change Provisions

- CCDC-2 (2008) – Part 6
  - 6.1: Owner's Right to Make Changes
    - Owner may make changes through consultant, along with contract time for the work
    - Contractor shall not perform change to the work without *Change Order* or *Change Directive*
  - 6.2: Change Order
    - Consultant will provide contractor with written description of proposed change
    - Contractor will promptly provide adjustments to time and price
  - 6.3: Change Directive
    - Owner can order change through consultant before owner and contractor reach agreement on Change Order terms (new price and time for changes)
- ACA Form A – subcontract condition 5
  - SC 5
    - Contractor can alter, add, or deduct work and accordingly adjust the contract's price and time period without invalidating the contract
    - Contractor cannot make changes without giving written order to that effect

Changes (Generally)

Kei-Ron v Coquihalla (1996 BCSC) – Both Parties Ignore Requirement of Extras Needing to Be Approved in Writing; Thus, Can't Rely on Contractual Terms

- **Facts**
  - Coquihalla hired Kei-Ron to build a motel. The contract said extras were to be approved in writing with agreed costs. Coquihalla originally to provide the lumber, later asked Kei-Ron to provide. There was no written approval of the extras (including the lumber). Kei-Ron believed that Coquihalla agreed to pay the extra cost of the lumber, but Coquihalla argues

that the agreement was that Kei-Ron would provide the lumber at no additional cost to Coquihalla. Kei-Ron sued for unpaid extras.

- **Issue**
  - Did the contract change despite the fact that neither party followed the contract change procedures set in the contract?
- **Decision**
  - Neither party followed the contractual provisions regarding contractual changes. Since both parties ignored the rule, neither party could rely on that provision of the contract. Therefore, Kei-Ron got its money.
  - Could argue that both parties waived their rights to insist on the contract change clause by their conduct. Could also argue that amendment, acquiescence or estoppel might apply. It's probably waiver.
- **Ratio**
  - If both parties, by their conduct, do not follow the procedures set in the contract to properly change it, and it is clear that they intend to change the contract, then they cannot later rely on the contractual terms - waiver will apply.
- **Notes**
  - Court found lumber was extra.
    - Initially, C was supposed to provide it; then K provided it
  - Both parties aware of, but ignored, requirement that extras be approved in writing
    - Their conduct waived the requirement of getting written approval of extras
  - Coquihalla liable.
  - Why?
    - Waiver?
      - Arguably
    - Amendment?
    - Acquiescence?
    - Estoppel?

Redheugh v Coyne **(1996 BCCA) – Project Manager Had Authority to Waive Pre-Condition**

- **Facts**
  - Kraft subcontracted some of its work (for BC who was the Owner) to Coyne, and Coyne in turn sub-subcontracted some of the work to Redheugh. The contracts between Kraft and Coyne and Coyne and Redheugh both indicated that any changes had to be in writing. The principal of Redheugh was also acting as Coyne's onsite project manager. As project manager for Coyne, he received written change order from Kraft. He did not then issue a further written change order (to himself) for Redheugh. This is technically required by the contract. Later, there was a falling out between Coyne and Redheugh. The principal of Redheugh (now fired as project manager for Coyne) tries to bill Coyne for the work Redheugh did as part of Kraft's change of work request. Coyne refused to pay on the basis that the change order had never been issued
- **Issue**
  - In this situation, was the contract properly amended in such a way that compels Coyne to pay Redheugh a higher price for the extra work that was done as part of the subcontract.
- **Decision**
  - The contractor must comply with pre-condition re writing (for changes to contracts) to be entitled to payment for extra work that is done. This common law rule will apply unless the pre-condition is waived. Here, the project manager had the authority to waive this pre-condition and did so. Since he properly waived that pre- condition, Coyne cannot now rely on the lack of a signed change order to refuse payment for the work to Redheugh.
- **Ratio**
  - If one party has the right to waive formalities regarding the change of contracts, then the parties cannot later attempt to rely on that provision if it was properly (and originally) waived.
- **Notes**
  - *Dunhill v. Ledcor*: Contractor must comply with pre-condition re writing to be entitled for extra work.
  - *Dunhill* applies, unless pre-condition waived. Here, project manager had authority to waive pre-condition, and did

Penvidic Contracting Co Ltd v International Nickel Co of Canada Ltd **(1975 SCC) – Whether or Not Something is a Change or Extra Depends on How the Work is Defined; Since this Wasn't a Change or Extra, Rules Regarding Changes or Extras Didn't Apply; This was Just a Case of Breach of Contract Damages**

- **Facts**
  - Penvidic entered into a contract with Nickel to lay ballast and track at a fixed sum per ton of ballast. Nickel wanted the work to be completed quickly, so the contract provided a completion date. Nickel did not complete the preliminary site preparation due to the cumulative failures of other subcontractors. Penvidic was therefore faced with significant problems and delays, and claims additional compensation for the extra costs incurred.
- **Issue**
  - Did Nickel breach the contract by failing to properly prepare the site? If so, is Penvidic entitled to additional consideration?
- **Decision**
  - There is clear evidence that Nickel was in breach of the contract. Penvidic suffered damages due to higher costs as a result of delays and problems caused by Nickel, and it is entitled to compensation for those breaches. The fact that the additional costs were partial estimates and cannot be calculated exactly does not relieve Nickel of liability. The claim was properly advanced as a breach of the existing contract, and not for a collateral contract. In this case, one party failed to perform its obligations under an existing contract, and the other party then experienced damages.
- **Ratio**
  - If the owner fails to follow through with certain conditions precedent regarding site conditions, and this causes losses and problems to the contractor, the contractor is entitled to damages.
- **Notes**
  - NOT a claim for extra.
    - All the extra stuff were not true "extras"
  - NOT a claim for payment under another contract.
  - Breach of existing contract: Inco did not perform its obligations.
    - Just because it costs more or takes longer **doesn't mean** there was a change
  - 2 important things to note
    - Whether or not a given situation is a change or extra under the contract **depends entirely on how the work is defined**
      - Here, P's work was defined as laying track
      - P's work was not defined by the methods it was going to use or how it was going to do the job
      - Thus, they don't form the definition of work and isn't a change
    - Since this wasn't a change or extra, no rules regarding changes or extras didn't apply; this was just a case of breach of contract damages

Marentette v Sudbury **(1974 ONCA) – Breach of Contract; Not a Claim for Extras; It was the Same Work, It Just Happened to Cost More**

- **Facts**
  - The contractor contracted to perform work and furnish materiel at a price calculable in accordance with its tender. The engineer failed to relocate utilities as required to enable it to properly complete the work. As a result, the contractor incurred significant additional costs to complete its task. The owner is trying to hide behind an exclusion of liability clause to prevent it from having to pay out extra costs, claiming that Marentette should instead seek recovery from the engineer.
- **Issues**
  - Can the limitation of liability clause be used to require a party to recover from the engineer and not from the owner that supervised the engineer's work?
- **Decision**
  - Where an owner fails, in breach of his obligation under a building contract, to facilitate the work for the contractor, and the contractor, in order to complete the project on time, is consequently compelled to make movements of men and machinery that would have otherwise been unnecessary, the owner, by requiring completion, incurs an implied obligation to pay the reasonable value of the additional work caused to the contractor by the owner's default. Just because the owner owes a duty to the contractor does not mean that the engineer must indemnify the owner to the extent of that duty. To succeed, the owner must demonstrate that the lack of coordination in the utility and road construction was as a result of the engineer's breach of its obligation to the owner.

- Note that, this was not a change of the contract. This is a situation where one party breached its contractual obligations, and the other party experienced damage as a result.

- **Ratio**
  - There must be a clear link between the third party's breach of duty and the owner's duty to the contractor to infer that the third party must indemnify the owner for the breach to the third party.
- **Notes**
  - City breached contract. Liable
  - NOT a claim for extras.
  - No change of scope, additions to work.
  - Marentette did same work, just did it differently and cost more.

Kiewit v Eakins **(1960 SCC) – Work or Walk; Don't Do Work Under Protest Unless Contract Allows for it**

- **Facts**
  - Kiewit took a subcontract from Eakins for a pile driving job for Second Narrows Bridge in Vancouver. Original contract indicated that piles had to be driven to certain specifications. Later, after Kiewit won the contract, the revised specification indicated that the specifications had to be changed to a higher (and more expensive and time-consuming) standard. Subcontractor protests that he is being asked to do more than what sub-contract asked for. Engineer disagreed, arguing that it forms part of the agreement.
  - Contractor ordered the sub-contractor to proceed with work with no promise of additional remuneration. Subcontractor completed work under protest and is now suing for damages for breach of contract and compensation on a quantum meruit basis.
- **Issue**
  - What did the parties initially agree to? If the work is extra, what remedy is appropriate?
- **Decision**
  - Having elected to do work in these circumstances, plaintiff can only recover under the contract itself. There was no consent, express or implied, regarding modifying the contract. The proper remedy for the plaintiff was to protest before the work was done and refuse to go on, and then elect to treat the contract as repudiated and sue for damages. The plaintiff could not proceed to do the work under the main contractor's interpretation of the contract and then sue to impose liability under a different interpretation of that contract.
  - **The ground shook when this decision was released, very significant departure from past legal understanding. This changed industry practice - you cannot do the work "under protest" any more unless the contract expressly allows for this.**
  - Today, most standard form construction contracts include clauses in contracts that allow for parties to continue working "under protest" when there is a dispute regarding the nature of the work being done, and this is done in a way that does not prejudice either party's legal position. "Change Directives" serve the opposite purpose - the contract will allow for the owner to order the contractor to proceed with a change in the project (will include formulae for how the price of this is calculated).
  - Note that you will not be able to plead quantum meruit if there is a valid contract in place.
- **Ratio**
  - If there is a disagreement between the parties on the scope of work required in the contract, the parties can treat the contract as repudiated and sue for damages. However, if they do not protest and complete the revised work, then they may not be eligible for a contract amendment retroactively. Continuing the contract means that the party has accepted the contract.
- **Notes**
  - SCC restored TJ (*their rationale caused some issues though*)
    - Eakins did work under original contract.
      - They drove piles
    - Eakins' recovery depends on terms of that contract.
    - Nothing in contract allowed Eakins to do work "under protest" (to work now and fight later)
    - "… the remedy of the Eakins company was to refuse further performance except on its own interpretation of the contract and, if this performance was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause in the contract enabling it to leave the matter in abeyance for later determination, it cannot go on with performance of the contract according to the other party's interpretation and then impose liability on a different contract. Having elected to perform in these circumstances, its recovery for this performance must be in accordance with the terms of the contract."
    - "Since the work done, if not covered by the sub-contract, was an extra which the engineer might have allowed under the terms of the main contract imported into the sub-contract, it was for Eakins to show that the sub-

contract had been terminated, either by its repudiation by the contractor and an election to treat the contract as at an end or that it had been abandoned or terminated by agreement between the parties."

- "If Eakins had asked the engineer for a written order for the performance of the work which it claimed to be beyond the sub-contract and that had been refused and Kiewit had persisted in its attitude, Eakins might have treated the contract as repudiated and sued for damages. Having failed to do this, and with the contract still open and un-rescinded, it is my conclusions that any claim based upon any theory of quasi-contractual recovery is excluded."

- Bottom Line:
  - E said: K is asking us to do something different; the engineer disagreed; at this point, E had a choice
    - You asked us to different work, so we have no obligations; or
    - Accept the engineer's determination and do the work assigned
  - Work or walk.
    - There was no opportunity to do the work and argue later; once you do the work you can't challenge it
  - Don't do work under protest unless the contract allows for it.

Sample Work Under Protest Clause to Deal with the Issue from *Kiewit*

- CCDC GC 8.1.3:
  - If a dispute is not resolved promptly, the Consultant will give such instructions as in the Consultant's opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have.
    - You can do work while preserving a right to make a claim at a later date
- CCDC GC 6.3 – Change Directive
  - Opposite – Allows for the owner to order the contractor to proceed with a change before they reach an agreement

Delays

What Are Delays?

- Project delivered late or took longer.
- Claims by Owner, for late delivery.
- Claims by Contractor, for increased costs.
- CCDC 2 – GC 6.5
  - If contractor delayed due to owner or consultant's act or omission, the contract time is reasonably extended

Park Avenue Flooring Inc v EllisDon Construction Services Inc (2015 ABQB) – Can Be Difficult to Determine Whether a Delay was Caused by a Party

- **Facts**
  - EllisDon subcontracted to Park to install flooring in the Calgary Airport. The work took longer and cost more. EllisDon eventually fired Park.
  - Each party blamed the other. Park claimed $5M for extras and delay. The trial took 128 delays over 11 months.
- **Decision**
  - Park was awarded $675k in damages and $200k in interest after the judge reviewed a detailed account of all activities of Park until they were fired.
- **Ratio**
  - It is very difficult for courts to determine, if any, why the project was truly delayed by either parties' delay or other reasons

ANC Developments Inc v Dilcon Constructors Ltd (2000 ABCA) – Written Notice Not Made, So Can't Have Any Contractual Remedies

- **Facts**

    - ANC hired Dilcon to build a pulp mill under a fixed-fee contract. Owner was to provide equipment, drawings, and piping in a timely fashion, but was late. The contract set out delay claim process: immediately notify engineer, notify owner within 7-days, submit claim within 6 months. Dilcon made it clear that the project was late at site meetings and that the delays were ongoing, but never provided written notice.
- **Issues**
    - Can Dilcon sue after the contract is complete for the additional work that was required to accommodate the project's expanded scope?
- **Decision**
    - Dilcon is arguing that ANC should be penalized for damaging Dilcon's productivity by changing the project's scope intermittently throughout the project. Also failed to provide drawings and materials on a timely basis. Since the contract specified what would happen when delays occurred, it is not possible to award remedies beyond those contained in the contract itself.
    - The contract clearly specified that ANC was to be notified of any delay which affects the construction schedule, and Dilcon may seek an extension and submit a written claim for reimbursement of additional field overhead costs resulting from the delay. Also, no claims are to be permitted if the contractor could have dealt with the delay by adjusting its workforce in a way that did not result in increased costs.
    - For the construction schedule, ANC's argument that there was no construction schedule that it should be bound to is bollocks. The original contract clearly contemplated the creation of a schedule that, once created, formed a part of the original agreement. Therefore, delays can be measured against the subsequent schedule that was agreed to by the parties.
    - Overall, the contract is clear that written notice had to be provided to ANC of any delays expected in Dilcon's work. Since written notice was not provided, Dilcon cannot avail itself of any of the contractual remedies.
    - Also, the contractual remedies are sufficiently comprehensive to eliminate Dilcon's right to sue under the common law instead.
- **Ratio**
    - If a contract requires a contractor to give the owner written notice of any delays in the project, those notices must be given for the contractor to avail itself of contractual or common law remedies.
- **Notes**
    - Dilcon may have given notice, but it did not make a claim in writing.
    - Some discussion recorded in minutes of meetings; this was not “notice”
    - “Written notice crystallizes the position of the parties on the issue of delay. Written notice informs the owner that the contractor considers that the delay warrants an extension of time and/or damages. If notice is given, an owner is able to take action to reduce the delay, or to alter the work plan to mitigate or allow for likely damage.” (para 53)
    - Hypothetical: What if they had signed off on the meeting minutes?
        - This would likely have been notice

Differing Site Conditions

Issues

- Conditions at building site different from what parties anticipated.
- Work costs more, or takes longer, or both.
- Who pays?

CCDC-2 Provisions

- Most contracts deal with this – it’s open to the parties
- GC 6.4.1: Either party to notify other of:
    - Concealed (or subsurface), pre-existing conditions materially differ from Contract; or
    - Any physical condition that materially differs from those ordinarily found…then:
- GC 6.4.2: Consultant to investigate and decide if:
    - Conditions differ materially; and
    - Increase or decrease in cost or time
- If so, issue Change in the Work
- If not, advise parties. (GC 6.4.3)

Carman v CPR **(1982 SCC) – Non-Reliance Clause Shielded Owner from Liability**

- **Facts**
  - Carman contracted to construct a railway siding for CPR. Although the bidding documents required that the tenderer be acquainted with all conditions affecting the tender, the appellant sought information from a CPR employee authorized to give out that information. The employee did not inform the contractor of the extent of excavations required. The contract contained a limitation of liability clause indicating that Carman could not rely on any statement or information from outside the contract. CPR is refusing additional payment to Carman for the extra work on that basis.
- **Issue**
  - Can CPR hide behind the limitation of liability clause to insist that the contractor perform the extra work for no additional compensation?
- **Decision**
  - The existence of this clause, which provided that Carman did not rely on any information or statement made to it, precludes Carman from later declaring that a collateral warranty was given to it by CPR's employee. Collateral agreements cannot be established where such agreements would be inconsistent with the written agreement itself. The clause, essentially, establishes that CPR owes no duty of care to the contractor with respect to information provided by its employee to the contractor.
- **Ratio**
  - An exclusion clause can shield an owner from liability where it indicates that the contractor cannot rely on any representations made by employees of the owner.
- **Notes**
  - No express collateral warranty.
    - No warranty given by CPR at all
  - No implied collateral warranty:
    - No intent that C.P.R. intended to warrant information from “someone”.
    - What Carman is asking contradicts express terms of contract (i.e. contractor does not rely on info from C.P.R.)
  - Thus, Carman didn’t get any money
  - No negligent misrepresentation.
    - Express term of contract that contractor did not rely on info from C.P.R. means C.P.R. did not have duty of care.
  - Clause 3.1:
    - Was a “non-reliance clause”
    - Not a “exemption from liability” clause.
  - What’s the difference?
    - Don’t know if there is a difference
    - However, if there isn’t, then one wonders if the ***Tercon*** framework could then apply to non-reliance clauses

Catre Industries Ltd v Alberta **(1989 ABCA) – Can’t Imply Terms that are Inconsistent with or Vary Express Terms**

- **Facts**
  - The Crown and Catre entered into a road building contract. The work was not complete until three years after the original due date. Catre argues that it suffered because of the substantially greater haul distances it was required to use to find suitable material for a required embankment. This increased the unit haul cost significantly above what the contract paid Catre. The original tendering documents provided potential bidders with information to determine the cost of haul distances to the appropriate pits - Catre argues this information was inadequate to calculate a correct estimate. The contract also included an exclusion clause indicating that the information was provided for "information purposes only".
- **Issue**
  - Was the inaccurate information regarding the site condition sufficient to give rise to a claim by Catre for additional compensation for increased costs, or is this prohibited by the disclaimer clause?
- **Decision**
  - At trial, the judge implied a term that the soil information provided must at least not be erroneous. However, this is inconsistent with other terms of the contract, including the exclusion clause. The contract also clearly stated that it was the contractor's responsibility to conduct its own investigations regarding soil conditions, and could not rely on the general statements made in the tendering documents on that contract. All of this discloses a contract that is extremely onerous to Catre - but Catre voluntarily submitted to a tender process that clearly set out those terms in advance. Therefore, Catre is bound.
- **Ratio**

- If a contractor agrees to onerous exclusion clauses as part of a tender process, that is still enforceable provided those terms were made clear in the original tender documents.

- **Notes**
  - Terms may be implied into contracts if:
    - Parties had them in mind
    - Parties would have had them in mind
    - Should have had in mind (fairness, policy)
    - Implied by law
  - But terms cannot be implied that are inconsistent with or vary express terms.
  - Catre argued there were implied terms:
    - Alberta's information reasonably accurate
    - Design reasonably constructible
  - But these implied terms conflicted with express terms.
  - So, express terms unenforceable?
  - Catre then argued that the contract was more difficult than it expected
    - Court: "The fact that a contract turns out to be more difficult in execution than anticipated is not sufficient to serve as a release from its express terms."
  - Catre tried to argue then that the exclusion clauses were not enforceable (*Note this case is 20 years before* ***Tercon****, so the principles are slightly different*)
    - Court: Enforceability of exclusion clauses:
      - Rule of Law Approach
        - Fundamental breach is rule of law
        - Overrode exclusion clauses
        - Now discredited:
          - *Hunter Engineering v. Syncrude* (S.C.C.)
          - *Tercon v. B.C.* (S.C.C.)
      - Construction Approach
        - Did parties intend that exclusion clause applies to <u>*this*</u> breach; or
        - Is exclusion clause unconscionable
        - Accepted: *Hunter and Tercon*
    - Here, exclusions clauses enforceable
  - Catre argued finally Quantum Meruit:
    - Available where new contract substituted for old.
    - Here, old contract never altered or changed.
    - So, no claim on *quantum meruit*.

Summary

<u>Key Takeaway Points</u>

- Whether increased cost or increased work entitles a party to a "change" depends on the contract.
- Contractor cannot work under protest, then claim for an "extra", unless contract says so.
  - If he works, he accepts that the work was part of the contract.
  - If he walks, he better be right.
- Increased costs because of owner's breach are not themselves extras.
  - Such increased costs are damages
- Contract governs how extras are to be claimed.
- If contract requires approval in writing, lack of written approval will prevent claim for extra.
- Requirement for written approval can be waived, by words or conduct.
- An Owner who fails to perform, and causes delay, may be liable.
- The terms of the contract govern.
- If the contract requires notice, failure to provide may be fatal to the claim.

4. INDEMNITIES

What is an Indemnity?

- "A promise to pay for the cost of damage, loss or injury."
- Being paid to take on a risk
- I agree to indemnify Jeremy
    - In the event Jeremy suffers loss, I will pay for it
- Almost everyone pays insurance, which is an example
    - Indemnified the insured against loss arising from some specified risk
- These are common to put into contracts, where the parties agree to pay for the cost of something that may arise
- Almost every construction contract has an indemnity section, and most parties tend to ignore it

Example of an Indemnity Clause

- "The Owner and the Contractor shall each indemnify the other from all claims that arise out of their involvement in this Contract, provided such claims are caused by:
    - (1) Errors, omissions, or negligence of the party from whom indemnification is sought or anyone for whom that party is responsible, or
        - *If a party makes an error, omission, or is negligent, and another party suffers a loss, the party must pay for things that arise out of it – somewhat vague*
    - (2) A breach of this Contract by the party from whom indemnification is sought…"
        - *If one breaches the contract, that party promises to indemnify the other for any claims that arise out of that breach*

Three Important Aspects of Any Indemnity

- There are 3 important aspects of this indemnity and any indemnity. Different indemnities address these aspects differently…is it:
    - **1. One-way or reciprocal?**
        - **One Way:** No reciprocal obligation, the obligations flow one way.
        - **Reciprocal:** obligations flow both ways - if either side causes the other a loss, they must indemnify the other party for that loss.
        - Note, clause above: "each" – either party = reciprocal indemnity
        - Check who is getting it, and in what direction?
        - Clearly, reciprocals are fairer, but don't always happen
            - However, an owner's argument:
                - The contractor has many obligations under the contract and is doing a lot of stuff; there's many places that they could commit an error that could hurt the owner
                - The owner on the other hand only has one obligation: To pay on time
        - Sometimes, the content of the indemnity may be different in different directions
    - **2. Fault or non-fault based?**
        - **Fault-based:** Promise to indemnify for a loss caused or contributed to by that party
            - If you don't commit any errors or omissions, then you cannot be liable under a fault-based indemnity clause
        - **Non-fault-based:** Much broader - promise to indemnify the other party for ANY loss, whether or not that loss was contributed to by that party
        - Note, clause above: The indemnity was fault-based (since 1 of 2 things needed to happen to trigger)
        - Sometimes, indemnity amount may be based on the amount of insurance available to the person
        - Owners generally like to make it one-way, and non-fault based
    - **3. Scope**
        - Look at the type of claims that are covered, whether it is limited to a specific contract or element of the work

5. EXCLUSIONS AND LIMITATIONS OF LIABILITY

Exclusion Clause Example

- "Contractor shall bear no liability whatsoever for any consequential loss, injury or damage incurred by the Owner, including but not limited to claims for loss of use, loss of profits and loss of markets."
    - Contractor is not on the hook if the *contractor* makes a mistake for certain things
    - This is a very forgiving exclusion of liability clause

Limitation of Liability Clause Example

- "In consideration of the provision of the services by Contractor to the Owner under this Agreement, the Owner agrees that any and all claims against Contractor howsoever arising whether in contract or in tort shall be absolutely limited to the lesser of the fees paid to Contractor for the Work or the amount of insurance to be provided in accordance with Article 6 of this Agreement."
    - If the Contractor is liable, the amount they're liable for is limited to a specified amount

Business Reasons to Put in these Clauses

- Controls risks
- Gives certainty – know your liability and what you're protected from
- Reduces costs

Dow Chemical v Nova Chemicals (2018 ABQB) – Exclusion Clause Did Not Apply Since It Wasn't an "Excluded Damage"; Nova Therefore Liable

- **Facts**
    - Dow's job: To pay for some of the construction
    - Nova's job: To run it, and produce ethane every year
    - Contract
        - Section 14.1 of the OSA :
            - The Operator shall have no liability for damages incurred or suffered by either of the Co-owners, including:
                - a) For breach of contract...
                - b) For torts of any nature ...
                - c) Except when such damages result or arise from the Operator's "Gross Negligence" or "Wilful Misconduct;" and
                - d) Even if the Operator has been found to have acted within the definitions of Gross Negligence or Wilful Misconduct, the Operator shall not be liable for **Excluded Damages**.
    - Nova wasn't producing as much as Dow thought
    - Dow became suspicious that N was coming up with reasons to only meet N's needs, and not D's
    - D sues N for breach of contract, for close to $1B
    - N counter-claimed for $50M for things D did that were in breach of contract
    - In defence to the claims raised by D, N raised an exclusion of liability clause in the contract
        - "Maybe we did cause damages, but it doesn't matter. The only way we're liable is if we're grossly negligent or acted with wilful misconduct. Even if we are found to have been, the damages you suffered are excluded damages" (extra layer of protection)
    - The view of the parties diverged with respect to the meaning of "Excluded Damages"
        - "**Excluded Damages**" are defined in the OSA as:
            - (i) "indirect or consequential damages (including without limitation loss of profits and damages arising from loss of production) ... and
            - (ii) "loss of or damage to the Plant or the Products".
- **Decision**
    - "I find that **the loss of profit and loss of production damages claimed by Dow with respect to both the allocation claim and the optimization claim arise naturally from Nova's breach of contract, and, in the case of the allocation claim, conversion, and are direct damages**. The **limitation of liability provisions in the OSA and COA exclude loss of profits and**

damages arising in the context of indirect or consequential damages and do not clearly and unambiguously preclude liability for any kind of loss of profit.
    - It is only such loss arising from consequential or indirect damage under the *Hadley v Baxendale* rule as it has evolved, claims that would otherwise only be available upon the disclosure of special circumstances. Nova has not satisfied the burden of establishing that any of the damages claimed fall within the exclusion clauses in the joint venture agreements."
    - Therefore**,** Damages didn't fall within "excluded damages"; therefore, the exclusion clause does not apply to exclude liability, and Nova is liable for $1.6B
- **Ratio**
    - Need to look at the contract's wording and definitions to see if an exclusion clause will apply

6. TERMINATION

Four Ways to End a Contract

- 4 ways to end a contract
    - 1. Performance
        - You do all your obligations; you bring it to an end and naturally terminates
    - 2. Agreement
        - Parties before it ends to agree to end early – amending the contract
    - 3. According to the terms
        - Terms that provide for termination – built-in terms for termination
        - (For convenience or cause)
    - 4. Fundamental breach
        - One side repudiates the contract in a way that now the other (innocent) party can end the contract
        - Still exists despite ***Tercon***
- If you try to leave a contract in a way that isn't listed above, you've breached the contract

"According to the Terms"

Termination for Convenience

- Example of a clause:
    - *"Owner may terminate the Contract, in whole or in party, for Owner's convenience, without cause upon X-days' notice, in which case Owner shall pay Contractor as follows…"*
        - These are typical in construction contracts
- Why some contractors don't like these clauses
    - They lose the job and now they have so much equipment/labourers who don't have jobs either
- There is never really termination for convenience clauses **from a contractor to an owner**
    - This makes sense, when would a builder want to terminate for convenience?
- However, there could be termination for convenience clauses **from a contractor to a subcontractor** though

Termination for Cause

- Termination for cause, depends on the contract, but usually requires 3 things (all as defined in the contract):
    - 1. Default
        - E.g. Failure to perform, non-payment, bankruptcy
    - 2. Notice
        - As soon as someone breaches, the other side gives notice to that side, to give it a chance to cure its breach
    - 3. Failure to cure
        - Upon failing to cure, the contract can be terminated
- These are important because a simple breach of contract won't lead to termination

R v Persons (1967 SCC) – Crown's Notice Sufficient; Contractor Failed to Cure; Therefore, Termination Was Valid

- **Facts**
  - The Crown hired Persons to build a landing strip. Work was suspended for the winter, pursuant to the contractor, and the contractor failed to resume in the Spring. Contract said: "If contractor defaults or delays, engineer could give notice to put an end to such default. If not cured within 6 days, the owner could terminate." Crown gave notice, but the contractor's lawyer responded that they intended to resume work on the date that the contract was to be completed. On that day, the contractor sent ONE worker to the site. The Crown terminated. Contractor sued for wrongful termination. The Crown counter-claimed for costs for replacing the contract.
- **Issue**
  - Can the Crown terminate for cause?
- **Decision**
  - Notice was sufficient and termination valid. The contractor failed to cure, and the Crown was entitled to terminate as well as costs for hiring a new contractor to finish the project. The single worker was basically just there to look busy and avoid default.
- **Ratio**
  - Providing one worker or other insignificant amount of work in response to a Notice of Default will not cure the default or prevent the owner from terminating according to contractual terms. Contractors must substantively cure default.
- **Notes**
  - SCC held
    - Notice sufficient
    - Contractor failed to cure
    - Crown entitled to terminate
    - Crown entitled to damages for increased costs.

McMillan v Southern (1913 SCC) – Owner Didn't Provide Notice for Termination, Thus They Themselves Committed a Breach of Contract

- **Facts**
  - Southern hired McMillan to excavate a ditch. Work stopped for winter (per the contract), and completion set for July 1. The weather allowed work to resume on April 1, but the contractor did not do so until May 28. Southern cancelled the contract (before July 1) because they believed that McMillan did not intend to complete the project by then.
- **Issue**
  - Was Southern's termination valid?
- **Decision**
  - McMillan did not intend and could not complete the project by July 1. However, Southern **did not provide notice** of the contract's cancellation and therefore breached the contract by terminating it. Notice was a condition precedent to terminating the project. Southern found in breach and liable for damages.
- **Ratio**
  - A contract's requirement to give notice before terminating the contract is a condition precedent. The owner will be in breach for terminating if they did not provide notice (notwithstanding the contractor being in breach)

CCDC-2 Provisions

- GC 7.1
  - **Owner** can give notice of default
  - If not cured in 5 days, can suspend or terminate
- GC 7.2
  - **Contractor** can give notice of default
  - If not cured in 5 days, can suspend or terminate
- The right to terminate depends entirely on what the parties agree to in the contract, and what they define as "default"
  - Kinds of default that an owner would want to specify for termination
    - Material deviation from specifications
    - Contractor is not doing their job
    - Missed a deadline
    - The contractor doesn't have insurance

- Kinds of things the contractor may want, to escape a bad job
  - Owner is not paying
  - Perhaps a ***Dilcon*** situation – written notice had to be provided for any delays

Repudiation

Fundamental Breach

- Sometimes things go so bad, that the law allows the parties to walk away from a contract
- **Repudiation**: One party (bad party) acts in such a way that it treats the contract as if were at an end
- **Fundamental Breach**
  - Goes to the root of the contract
  - Shows intention not to be bound

Three Remedies for the Innocent party

- Three remedies:
  - Accept repudiation, quantum meruit
  - Accept repudiation, damages (resulting from the breach)
  - Affirm contract, damages
    - "I'm not accepting repudiation", then try to seek damages
- The party who thinks "the other side has repudiated" (innocent) has to make that call/gamble – they have to be right, because if they're wrong and walk away, **they** breached the contract
  - AKA, for the court to find valid repudiation, there must have been a fundamental breach

Alkok v Grymek (1968 SCC) – Not a Smart Gamble to Take by Owners; No Fundamental Breach by Contractor

- **Facts**
  - Owners hired contractor to build house. Contract required contractor to satisfy architect that subcontractors and suppliers had been paid. Contractor failed to satisfy architect. Owners also complained of defects and delays. Owners terminated, for fundamental breach
- **Issue**
  - Were the owners justified in claiming fundamental breach?
- **Decision**
  - Contractor in breach, **but** breaches did not go to root of contract.
    - At no point did the contractor indicate that it had no intention to fix the defect, or could not fix the defect
    - The defects were fairly minor given the scope of the project
    - The contract was for the construction of the house, and the owner was getting substantially what it bargained for
  - Wrong for owners to terminate.
  - Owners liable on a *quantum meruit* basis for work contractor had performed.
- **Ratio**
  - A fundamental breach requires the breach go to the "root of the contract"

Nu-West v Thunderbird (1975 ABCA) – Smart Gamble to Take by Owners

- **Facts**
  - Nu-West entered into contract with Thunderbird to build a house. There were numerous defects deficiencies (hump on floorboard, ducts not protected from water/covered in concrete, electrical work shoddy, roof improperly engineered, wrong fireplaces, etc.) and Thunderbird fired Nu-West "for cause". Thunderbird completed the house itself, and Nu-West sued for payment. Thunderbird counter-claimed for the cost of repairing the deficiencies and completing the house.
- **Issues**
  - Did Thunderbird have the right to sue for fundamental breach?
- **Decision**

- The construction was very bad, and there were many deficiencies. Not every breach of a building contract will allow the owner to dismiss the contractor. Where the work has been carried out partially, the contractor is still entitled to be paid for the work done, but the owner is entitled to deduct an amount sufficient to right the deficiencies from the amount owed under the contract. **Breaches that go to the heart of the contract, such as abandoning the work, will allow the owner to withhold payment.** In this case, the contract was not substantially performed, so payment can be withheld for incomplete portion. The deficiencies and defects were of such a magnitude (SO EGREGIOUS) that the owner was justified in concluding thatthe contractor had no intention of completing the contract as agreed.
- For damages, the owner is entitled to damages measured by the cost of making good the defects and omissions, unless that cost is unreasonably high in relation to the value to be gained by the expenditure. However, the owner should be given deference by the court in deciding whether to remedy the deficiencies themselves. If it is not possible to remedy the defect, then damages can be assessed based on difference in property value between the expected product, and the actual product.

- **Ratio**
  - Damages for breach of contract are the costs required to put the party back into the position it had been in had the contract been performed.
- **Notes**
  - Court held Nu-West fundamentally breached contract:
    - "*… They were not attempting to build in accordance with the specifications, had no plans and failed to use good construction methods*"
    - Breaches went to root of contract, amounting to a repudiation, and entitling Thunderbird to treat contract as ended.
  - Good gamble for Thunderbird to take

Hunter v Syncrude **(1989 SCC) – More of a "Judgment Call" Gamble; Ended Up Being Not a Fundamental Breach**

- **Facts**
  - Syncrude bought gearboxes from Hunter and A under separate contracts. Both contracts provided express warranties of 1 or 2 years. Both gearboxes failed shortly after contractual express warranties had expired. Syncrude claims breach of contract for providing gearboxes that do not work.
    - As part of its claim, S sued the Ds on the basis that they fundamentally breached their contracts, in the way they designed and manufactured the gear boxes, and in the way they failed to repair them during the warranty period
- **Issues**
  - Did A fundamentally breach contract with Syncrude?
- **Decision**
  - Hunter is responsible for the design flaws, since it was solely responsible for the design under the contract. Although the contract warranty period had expired by the time the flaws were discovered, the statutory warranty of fitness in the Ontario Sale of Goods Act applied via the forum selection clause. It is clear that Syncrude informed Hunter of the design requirements, and relied on Hunter's expertise to design gearboxes that met the requirements.
  - **There was no fundamental breach because the purchaser got a poor, but nonetheless repairable, version of what was contracted for. The gearboxes were not shoddy enough that substantially the whole benefit of the contract was lost.**
- **Dissent (Dickson CJ)**
  - Fundamental breach should be entirely abandoned. Unconscionability should be the only available remedy, and only available if there is unequal bargaining power.
- **Ratio**
  - Fundamental breach is an available remedy where the parties have equal bargaining power and substantially whole benefit of the contract is extinguished. Unconscionability is only available when the parties have unequal bargaining power. A fundamental breach deprives a purchaser of the entire benefit of what is purchased.
- **Notes**
  - SCC
    - *"It seems to me that the present case is more akin to … where the purchaser got a poor, but nonetheless repairable, version of what it contracted for."*
      - Here, the breach was not a fundamental breach
        - Although the boxes were important, the cost of repair wasn't that much, and they worked for a period of time
        - The breach didn't go to the root of the contract

- Court seems to apply fundamental breach when behavior is really egregious. When one side is being difficult and causing deficiencies, the other side will want to walk or stop work – but the contract will stipulate what you can and cannot do. Before walking or stopping work, a party must consider if it is fundamental work and if they want to be liable for that thing. If it is in fact a fundamental breach, that party will be the one found in breach.
- There is ALWAYS a risk of fundamental breach, but this must be weighed against how bad the situation is.

7. DAMAGES, PENALTIES, AND LIQUIDATED DAMAGES

General and Specific Damages

Overview

- Generally, in contract, the injured party is entitled to damages to put them in the position they would have been had the contract been performed if the other party breaches it
- However, there are some unique features of damages in the construction context
  - The contractor is still entitled to be paid for the work they did perform ***(Nu-West)***
  - If the cost to remedy defects is disproportionate to the good to be attained, then the damaged party will not be entitled to remediation – instead, damages based on *difference in value* ***(Nu-West)***
- If not possible to quantify specific damages, general damages can be awarded (estimated by the Court)
- Should be careful not to pre-emptively remediate defective work as you may be on the hook if the damages are calculated using another method

Damages for Breach of Contract

- Aims to restore victim to the position that they would be in if the contract had been performed
  - *But how do we quantify this?*

Nu-West v Thunderbird (1975 ABCA) – Damages for Breach of Contract Should Put the Innocent Party Back in a Position Had the Contract Been Performed, Unless Where Grossly Unfair and Out of Proportion to the Good to Be Attained

- **Facts**
  - Thunderbird hired Nu-West to build a house. Part way through construction, Thunderbird fired Nu-West "for cause": numerous defects and deficiencies. Thunderbird then completed house itself. Nu-West sued for payment.
  - Thunderbird counter-claimed for the cost of fixing deficiencies and completing house.
  - **Court held Nu-West breached contract:** "… they were not attempting to build in accordance with the specifications, had no plans and failed to use good construction methods"
- **Issue**
  - What damages should be awarded?
- **Decision**
  - The construction was very bad, and there were many deficiencies. Not every breach of a building contract will allow the owner to dismiss the contractor. Where the work has been carried out partially, the contractor is still entitled to be paid for the work done, but the owner is entitled to deduct an amount sufficient to right the deficiencies from the amount owed under the contract. Breaches that go to the heart of the contract, such as abandoning the work, will allow the owner to withhold payment. In this case, the contract was not substantially performed, so payment can be withheld for incomplete portion.
  - **Thunderbird (Owner) entitled to complete the contract itself or with new contractor and recover costs in excess of original contract price.** *This puts the owner back into their original position if the original contract would have been properly executed.*
  - **EXCEPTION:** Where the cost of correcting the defect or completing the contract is *"grossly unfair and out of proportion to the good to be attained"* – some other determination of damages will be ordered instead
- **Ratio**
  - Damages for breach of contract are the costs required to put the party back into the position it had been in had the contract been performed, unless where the cost is grossly unfair, then another determination of damages will be ordered (e.g. difference in value)
- **Notes**

- Breaches went to root of contract, amounting to a renunciation, and entitling Thunderbird to treat as at an end.
- Damages:
  - Thunderbird entitled to complete, then recover costs in excess of contract price.
  - i.e. Put in the position as if Nu-West had performed the contract
  - i.e. The cost of completing the work and correcting the defects which is over the contract price.
- Exception: where the cost of correcting the defect or completing the contract is "grossly and unfairly out of proportion to the good to be attained."
- Then, damages are measured in the difference in value.
- Plaintiff to act reasonably, but not perfectly, in correcting defects and completing the work.
- General damages are allowed for defects not corrected and difficult to value

Nominal Damages

Overview

- If the damages are more akin to loss of personal preference or amenity, then nominal damages are awarded (estimate by Court, see ***Diotte***)

Consolidated v Diotte (2013 NBCA) – Weighing Exercise to Determine What the Awarded Damages Are Based On; No Evidence on Decrease in Value so Only Nominal Damages Awarded

- **Facts**
  - Parties entered into contract where builder agreed to erect an office building and garage for owner in accordance with specifications of government department that would be leasing the building. The builder failed to construct a garage that met the "square footage" requirements (deficiency was 6.5 square meters). Owner brought action for damages in the amount that was required to remedy the deficiency. Contractor is appealing on the grounds that the cost to remedy is too high for the minor violation it represents.
- **Issues**
  - Can the Owner remedy the defect and demand payment for the remedy even if the advantage gained is minimal?
  - Is Consolidated entitled to damages equal to the cost of reinstatement or the diminished value of the building?
- **Decision**
  - If the decrease in value was **less** than the cost of reinstatement, the Court would have awarded damages based on the decreased value. If the cost of reinstatement was **lower** than the decreased value, court would have awarded damages based on cost of reinstatement.
    - Same principle as a car accident
      - If damage to car is more than the value of the car – write off
      - If it is less, they'll give you the amount
  - This is not a case where reinstatement was an appropriate measure. No evidence was led to establish that the fair market value of the property was less than it would have been had there been no breach; it is therefore unknown whether the breach of contract diminished the value of the garage. Therefore, only nominal damages are appropriate since it is impossible to accurately quantify the damages resulting as a result of the failure to meet the design requirements.
  - Since there is no evidence on decrease in value, then nominal damages are only remaining option.
- **Ratio**
  - Must lead evidence that the breach materially affects the fair market value of the premises to demonstrate that the remediation costs are reasonable. If the cost of remediation is grossly disproportionate to the good achieved, then remediation is unavailable as a damages remedy.
- **Notes**
  - Theories of damages
    - 1. Put party in same position as if contract performed
    - 2. Damages for diminution in value of the property
    - 3. Nominal damages for loss of amenity or personal preference
    - 4. Disgorgement of profits resulting from the breach
  - If decrease in value was less than cost of reinstatement, the court would have awarded damages based on decreased value
  - If cost of reinstatement was lower than decreased value, court would have awarded damages based on cost of reinstatement
  - Owner should be put in same economic situation it would have been in had the contract been performed

- No appraisal evidence to establish fair market value of building. As a result, it cannot be assumed that damages awarded for the cost of reinstatement
- Instead, Consolidated entitled to nominal damages for lost expectations or presumed diminishment in value

Tompkins v Home Depot **(2009 ONSC) – Must Prove a Causal Link Between Deficient Construction and Harm Caused to Claim Damages; Must Be Reasonable**

- **Facts**
  - Plaintiff homeowners purchased vinyl windows and a door from Home Depot, including installation. Condensation, moisture, and eventually mold developed over the next four years. Home Depot blamed this on the house's humidity, not on its installation. Later expert inspection found that installation was deficient and recommended reinstallation, but also found that toxic mold was growing throughout the house. Testers recommended further testing, but the homeowners instead gutted the house to the studs and rebuilt, at a cost of $550,000. Homeowners are suing Home Depot for this amount.
- **Issues**
  - Is Home Depot liable for damages for its improper installation of windows and a door? If so, should it be required to pay for the full rebuilding of the moldy house?
- **Decision**
  - Home Depot's installation was faulty, and it breached its duty of care to the homeowners. However, the homeowners have failed to prove a causal link on a BOP that the breach caused the harm suffered. The homeowner's theory is found to lack scientific foundation (improper installation of windows does not lead to massive mold problems, on its face).
  - If the Court is wrong, and the windows and door DID cause the mold problem, the mold could have been remediated instead of gutting the entire house ($550,000). This is grossly disproportionate to the actual cost of remedying the defect. Damages are only awarded for the cost of testing and reinstalling the defective windows and door ($15,000).
- **Ratio**
  - The claimant must prove a causal link between the deficient construction and the harm caused in order to claim damages in negligence.
- **Notes**
  - Home Depot and installer not liable.
  - Also, Tompkins actions not reasonable.
  - Even if HD had caused the mold, it could have been fixed for $15,000
  - Damages (provisional): $15,000.
  - Case dismissed
  - You need to prove your damages, and that they were the result of the P's breach, and they have to be reasonable

Liquidated Damages

Overview

- Genuine pre-estimate of damages – **not** a penalty.
- These are enforceable provided there are
  - 1) A genuine pre-estimate of the damage
    - What was a likely loss to incur?
  - 2) Not for the purpose of imposing a penalty
    - Parties cannot enter into contracts that provide punishment
- Is specified in a contract to make it easier to calculate
- If liability for a particular issue is proven, damages are already determined
  - For example, specified damages for late completion of the contract ($1,000 per day, as in ***Perini***)
    - Note, though, that the Courts can invalidate these penalties if they are grossly unreasonable
    - Liquidated damages are not intended to be punitive and result in a windfall to the damaged party - the entire goal should be to rectify the specific damage caused to the damaged party without going overboard
  - The overall intent is to save everyone time in calculating damages down the road, should they occur. This helps foster certainty and create incentives to complete the work on time and in accordance with requirements
- Why would a contractor sign a contract that contains a liquidated damages clause that can be used against them?
  - It depends on the nature of the contract. If damages caused by a delay are uncertain, and could be significant (i.e. delay in building a factory), then it might be advantageous to sign a contract with a liquidated damages clause to protect against higher damages

- It also gives greater cost certainty - can decide to not meet the deadline if it would otherwise be too expensive to accelerate the construction (i.e. if the cost of overtime for contractors exceeds the liquidated damages, you'll take the liquidated damages)
- Liquidated damages also limit the owner's remedies - for example, owner cannot terminate the contract for late delivery if there is a liquidated damages clause that specifies the damages that are owed
- Smart contractors will build in a contingency in the price of the contract to account for potential liquidated damages

Dunlop v New Garage **(1914 UKHL) – Differentiating a Penalty from Liquidated Damages**

- **Facts**
  - Dunlop entered into a contract to sell tires and other accessories to New Garage. The contract had terms to ensure that the tires were not sold below the manufacturer's listed price. New Garage agreed to pay Dunlop "the sum of 5 pounds for each and every tire… sold in breach of this agreement, as and by way of liquidated damages not as a penalty". New Garage sold tires in breach of the agreement.
- **Issue**
  - Is the agreement a penalty or liquidated damages?
- **Decision**
  - A penalty is a payment stipulated *in terrorem* of the offending party and is not enforceable. Liquidated damages are a genuine covenanted pre-estimate of damage and is enforceable.
  - The words "penalty" or "liquidated damages" are not conclusive. Must be determined upon the terms and inherent circumstances, judged at the time of making the contract and not at the time of breach.
  - **Relevant circumstances** (which may indicate a penalty):
    - Is the amount extravagant or unconscionable in comparison with the greatest conceivable loss?
      - Assume biggest loss to Dunlop
    - If the breach is only failure to pay, is stipulated sum greater than unpaid sum?
      - Are you getting more than the failure to pay than what you're paying, that's a penalty
    - Same amount for any of a number of breaches (each with different effect)?
      - Is it the same amount – if everything is the same, this seems more like a penalty
  - But, impossibility of accurately pre-estimating damages does not necessarily mean a penalty.
    - Parties could make a genuine pre-estimate; as long as you get effort, that's enough – you don't have to be perfect
  - Here
    - The agreement is **not** a penalty, but a genuine pre-estimate of Dunlop's potential loss (LDs)
      - 5 pounds was reasonable
- **Ratio**
  - Relevant circumstances which may indicate a penalty
    - Is the amount extravagant or unconscionable in comparison with the greatest conceivable loss?
    - If the breach is only failure to pay, is stipulated sum greater than unpaid sum?
    - Same amount for any of a number of breaches (each with different effect)?
  - However, impossibility of accurately pre-estimating damages does not necessarily mean a penalty
  - Plus, need to look at parties' intentions; calling something a penalty doesn't mean it's a penalty

Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District **(1966 BCCA) – Not Entitled to Damages if You Were the One Who Caused the Other Party's Delay**

- **Facts**
  - Contract was for the construction of a sewage disposal plant. Contract provided for extensions of time at respondent's (city's) discretion, and for payment by the appellant (Perini) of $1000 per day as liquidated damages for each day's default in completing. Time was extended by the respondent, but due to the respondent's own delay in installing essential machinery, the contract was not completed until long after the extended completion date.
- **Issue**
  - Is the appellant still required to pay late fees since the respondent's actions contributed to the lateness?
- **Decision**
  - Evidence shows that, on balance of probabilities, the appellant could not have completed the work on time without the respondent meeting its obligations to fully install the required machinery. Defaults of the respondent cannot be included within the ambit of the clause that allows the respondent to claim liquidated damages for delays in completing the work. This would lead to the respondent becoming the judge in its own default, which is ridiculous.

- Vancouver not entitled to liquidated damages, where it was cause of the delay, even where there was concurrent delay by Perini
    - In my opinion the defendant's default, although preventing the completion by the due date of only one unit of several covered by the entire contract, **disentitles the defendant to liquidated damages for the plaintiff's failure to complete the whole plant by the due date.**
- **Ratio**
    - Clauses giving a party unilateral authority to set timelines and claim damages for failing to meet timelines should be construed narrowly so that the party cannot benefit from that clause if the delay is caused by their own default.

8. WARRANTY

What is a Warranty? – Overview

- Apple warranty example
    - Provisions
        - "If during the Warranty Period you submit a claim to Apple or an AASP in accordance with this warranty, Apple will, at its option:
            - (i) repair the Apple Product using new or previously used parts that are equivalent to new in performance and reliability,
            - (ii) replace the Apple Product with the same model (or with your consent a product that has similar functionality) formed from new and/or previously used parts that are equivalent to new in performance and reliability, or
            - (iii) exchange the Apple Product for a refund of your purchase price."
        - TO THE EXTENT PERMITTED BY LAW, THIS WARRANTY AND THE REMEDIES SET FORTH ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED. APPLE DISCLAIMS ALL STATUTORY AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES AGAINST HIDDEN OR LATENT DEFECTS, TO THE EXTENT PERMITTED BY LAW. IN SO FAR AS SUCH WARRANTIES CANNOT BE DISCLAIMED, APPLE LIMITS THE DURATION AND REMEDIES OF SUCH WARRANTIES TO THE DURATION OF THIS EXPRESS WARRANTY AND, AT APPLE'S OPTION, THE REPAIR OR REPLACEMENT SERVICES DESCRIBED BELOW. SOME STATES (COUNTRIES AND PROVINCES) DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY (OR CONDITION) MAY LAST, SO THE LIMITATION DESCRIBED ABOVE MAY NOT APPLY TO YOU.
    - When you have a contract, there are obligations at common law
        - Additional remedies can be provided for as well in the contract
        - And, potentially they can be limited by the contract (like here)
            - The contract provides for a remedy in the event of breach (fix, replace), and then also says these are the only remedies you have
    - Almost every construction contract will have a warranty provision
        - Most have a clause say "there are remedies in addition to the common law"
- Warranty:
    - A promise
        - To provide a specified remedy (usually repair, replace, or refund)
        - Within a specified time
        - For a specified failure or defect.
    - Adds certainty to contractual dealings
    - Shifts the problem
        - Breach of contract: Requires damages to be quantified
        - Include a warranty: Damages specified and burden shifts to the contractor
- A warranty does not itself limit your remedies, the limiting provision is likely elsewhere
    - Eg. What's in the warranty is the "sole and exclusive warranty"

Levy v Elmer Lohnes Lumbering Ltd (2004 NSSC) – In the Absence of an Express Provision, You Still have Common Law Rights to Damages for Breach of Contract; Implied Warranty

- **Facts**

- Levy hired Elmer to install siding. The contract had a 1-year warranty. Problems arose with the siding after 6 years and Levy sued. Elmer used the 1-year warranty defense.

- **Issue**
  - Is Elmer liable for siding problems?
- **Decision**
  - In the absence of express provision, the remedy under clauses like this one are "in addition to and not in substitution for common law rights". The clause, as drafted, has NOTHING to do with limiting the common law rights of Levy to damages for breach of contract.
  - Elmer is liable – Levy still has common law rights
- **Ratio**
  - If you want to limit the common law rights, you must be EXPRESS in your contractual language

Hunter v Syncrude **(1989 SCC) – Example Where One Party Excluded Any Other Warranty, and Another Did Not; Other Party Liable Under Implied Warranty**

- **Facts**
  - Syncrude bought gearboxes from H and A, under separate contracts.
  - Both contracts had express warranty (12-24 months).
    - Warranty period of 12 months for some and 24 months for other parts
  - Gearboxes from both H. and A. failed after express warranties expired.
- **Issue**
  - Is either H or A liable for the defective gearboxes?
- **Decision**
  - Both contracts governed by Ont. law.
  - S.15 of Ont. Sale of Goods Act created implied warranty (term) of reasonable fitness for buyer's purpose.
  - A's contract expressly excluded any other warranty "statutory or otherwise".
    - The clause restricted the warranty to whatever it said in the contract
  - **H's contract did not.**
  - Therefore, H liable under implied warranty; A not.
- **Ratio**
  - Must look at the construction of the warranty to determine whether it EXPLICITLY disclaims any statutory warranties that might otherwise be available. Interpreted the same as any other contractual term.

Steel Co of Canada v Willand **(1966 SCC) – Contractor Liable for Agreeing to What the Owner Wanted**

- **Facts**
  - Steel Co hired Willand to supply and install a roof. The owner required "Curadex" to be used to attach insulation to roof, although it had never been used by either party in this type of application. The contract required the contractor to provide a 5 year-guarantee that roof would remain weather tight and that all materials and workmanship would be first class and without defects (never use this language). The Curadex failed and the roof was damaged. Owner claimed breach, but the contractor claimed that it performed the contract insofar as the plans and specs would allow.
- **Issues**
  - Can the contractor sue for the cost of repairs that were incurred as a result of the roof failing?
- **Decision**
  - The respondent's guarantee included using this particular material, and the respondent agreed to guarantee it as "without defect" even though it was supplied by the appellant. The terms of the contract are clear and unambiguous, so the Court is bound to give effect to them without considering how far they might be reasonable or not. Accordingly, the respondent was liable for the failure of the roof and is not entitled to extra payment for repairs made.
- **Ratio**
  - If the contract contains a clear and unambiguous warranty as to the condition of materials used, courts will enforce it even if the defect in the materials is caused by the other party. General advice: if you are not the one providing the material, you should not be giving warranties regarding its quality.
- **Notes**
  - S.C.C. held Willand accepted risk when it accepted terms of guarantee, despite fact that Steel Co. specified product:
    - "… any risk involved in the undertaking was accepted by those who were prepared to tender in accordance with [the] specifications …"

CCH Canadian Limited v Mollenhauer Contracting Co **(1975 SCC) – Bookend to *Willand*; Contractor Not Liable Since There Wasn't a Clear and Unambiguous Warranty as to the Condition of the Materials**

- **Facts**
  - Mollenhauer (contractor) was required by contract to produce and incorporate into building bricks of the kind and quantity described in the contract. The bricks were later found to be unsuitable, and resulted in significant repairs. There is **no explicit guarantee or warranty provided regarding the quality of the materials specifically**, unlike in ***Willand***. The warranty only covered condition of the construction generally.
- **Issues**
  - Is Mollenhauer liable for using defective bricks in its construction?
- **Decision**
  - There was no guarantee or warranty provided by the contractor as to the suitability of the materials used that were prescribed by the owner. Therefore, the contractor cannot be found liable for using unsuitable materials that were prescribed by the owner. At no point did the owner rely on Mollenhauer's expertise as to the suitability of the materials, so it cannot claim unfair reliance to its detriment.
- **Ratio**
  - In the absence of a clear and unambiguous warranty as to the condition of materials used, the contractor cannot be held responsible if those materials that were prescribed by the owner are ultimately found to be defective or unsuitable.
- **Notes**
  - Brick turned out to be unsuitable.
  - Mollenhauer did not guarantee performance of Brick.
  - Distinguished from *Steel Co. v. Willand*
    - Mollenhauer did not guarantee the performance of the brick, and therefore did not take on liability for the brick
    - Wording of the warranty was different (didn't say anything like "first class")
  - Mollenhauer not liable for failure.

9. DISPUTE RESOLUTION

What is a Dispute?

- Claim + Denial = Dispute
- Examples
  - Delays, changes, breach, etc.

How to Resolve a Dispute?



-
  - Typically, the parties want to set out a process to deal with disputes
    - Most simple – negotiate
    - Most aggressive – litigate
- The spectrum:
  - Informal Discussions
    - Formal Discussions
      - Consultant
        - Referee
          - Mediation
            - Arbitration
              - Litigation

Informal Discussions

- Parties work it out
- Most common way for things to be settled
- Contracts may call for this to occur before anything else happens

Formal Discussions

- Structured meeting between senior management.
- New eyes.
- Removed from players directly involved
- Helps parties understand the larger picture

Consultant

- First level of adjudicator, is often built into contractual dispute resolution clauses
- Very common.
- See, for example, CCDC 2, GC 2.2.8:
    - "Matters in question relating to the performance of the Work or the interpretation of the Contract Documents shall be initially referred in writing to the Consultant by the party raising the question for interpretation and findings and copied to the other party."
        - Provides that all disputes must first be referred to an agreed consultant (e.g. an architect or engineer), and the party raising the question shall copy the other party on the response

Referee

- Role similar to consultant.
- Common in Government contracts.
    - E.g. The city and contractor will agree on a referee who they will bring disputes to
        - The idea is to make it quick and to not impact the overall schedule
- May be binding or non-binding.
    - The parties decide this

Mediation

- "In the middle" or "In between"
- Not a decision maker
- Assists the parties negotiating
    - Focus
    - Identifies issues
    - Keeps on track
- Requires considerable skill

Arbitration

- Decision maker, adjudicator
- Single or panel
- Jurisdiction requires agreement
    - Jurisdiction: What power or authority are you giving them
- Rules:
    - Arbitration Act
    - Or as agreed by parties
    - Custom or standard form (e.g. CCDC-40)
        - CCDC-40 gives detailed rules on file dispute processes

- Expertise – Technical v legal
    - You're engaging with someone who already knows the subject matter
- Quick but costly – need to pay for the arbitrator
- Private and confidential
- No third parties
- Limited right to appeal

Litigation

- Rules of Court
- Full discovery
- Third parties
- Public
- Judge has no technical expertise
- Very lengthy

Choosing the Process

- When contract made vs. When dispute arises
    - The worst thing you can do is having to choose when the dispute arises
    - A good contract will have a DR clause already
    - CCDC 8.2 – Negotiation, Mediation, and Arbitration

10. LIABILITY IN TORT

Pure Economic Loss

Types of Loss (In Tort)

- Personal injury
- Property damage
- Economic loss

Economic Loss

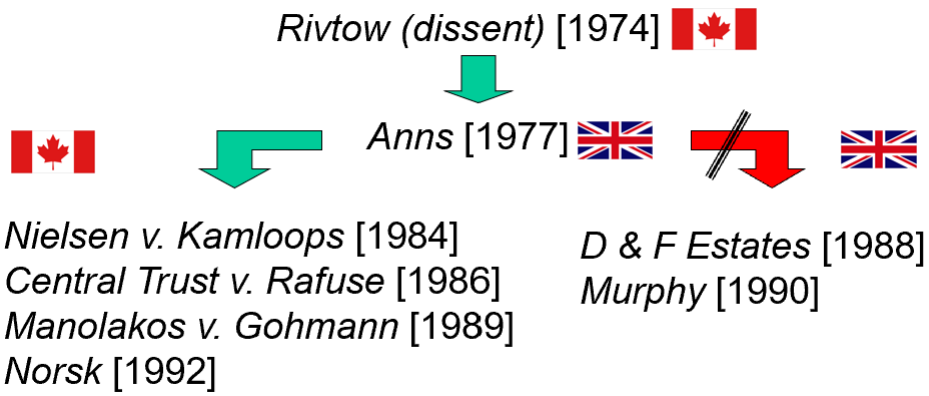
- Examples
    - Lost income or profit
    - Lost benefit
- Historically, most economic loss was not recoverable (in tort).
- Exceptions:
    - Negligent misrepresentation,
    - Economic losses related to personal injury or property damage,
    - Cost to remediate defective equipment or structures that pose threats of injury (dissent in ***Rivtow Marine***),
    - Cost to remediate a defective structure that should have been flagged as defective in an inspection but was not so flagged due to a negligent inspection (***Nielsen***)
    - Successors in title suing builders to remediate defective buildings (***Winnipeg Condominium Corp***)

Judicial History of Economic Loss

- ***Rivtow Marine*** (1974 SCC)
    - Facts
        - Defective barge cranes. Owner repaired cranes after another crane failed and killed operator
        - Sued for:
            - Lost profit while cranes being repaired,

            - Cost of repairs.
    - SCC
        - Allowed lost profit, based on duty to warn
            - Arose out of manufacturer failing to warn about defects
        - Disallowed cost of repair, based on negligence
            - It was a pure economic loss – not recoverable
    - *Laskin Dissent*
        - "Should it then be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane from service so that it could be repaired?"
            - If the crane had actually failed and hurt someone or damaged the property it would've been recoverable – this is dumb that we have to wait for this to happen
- ***Anns v London Borough of Merton*** (1977 England)
    - Found dissent in ***Rivtow*** "persuasive"
    - Two-stage test for negligence:
        - Proximity and foreseeability
        - Limitations on scope of duty, class of persons, or damages
            - E.g. Too broad a class, floodgates argument
    - *Anns* test
        - 1. Sufficiently close relationship between parties so that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the other?
        - 2. Any considerations which ought to negate or limit
            - (a) Scope of duty
            - (b) Class of persons owed duty
            - (c) Damages?
    - In this case
        - Found that there was a DoC/could be a DoC
        - And, it could give rise to a claim in negligence, which allow for damages based on pure economic loss
- ***Kamloops v Nielson*** (1984 SCC)
    - Facts
        - Son began construction of house on hillside. Father was alderman of City. City approved plans on condition that footing taken down to solid bearing. Son ignored condition, constructed on piles set in loose fill. City inspector realized foundation improper, issued stop work order. Son hired engineer, got remedial plan, and had stop work order lifted. Son ignored remedial plan and continued as before. City issued second stop work order. Son ignored second order. City took no steps to enforce order. Father took title, moved in, then sold it two years later. New purchaser found house structurally unstable. Sued father and City.
    - SCC
        - Applied the new ***Anns*** test (for negligence → allows you to recover for pure economic loss)
            - 1. Sufficiently close relationship between City and new owner? (i.e. proximity and foreseeability)
            - 2. Policy reasons to limit duty?
        - Anns test creates **distinction** between:
            - **"Policy" decisions**
                - "Policy" decision is whether or not to inspect.
                - "Policy" decisions do **not** give rise to liability; i.e. no duty of care.
            - **"Operational" decisions**
                - "Operational" decision is how the inspection is conducted
                - "Operational" decision **DO** give rise to liability: inspection must reasonable and prudent.
        - Here, City made "policy" decision to require inspections. Passed bylaw. Purpose of bylaw was to protect owner from negligent construction. So, City had duty to properly enforce bylaw.
            - "The purpose of the by-law in this case was to prevent the construction of houses on defective foundations. The duty of enforcement which the by-law imposed on the building inspector required him at the very least to determine the scope of the measures that were necessary to achieve the end and, if required, to attempt to obtain the approval of the city for them."
        - Allowed for recovery for pure economic loss
            - New owners sued for cost of fixing the foundation- no harm therefore pure economic loss
            - Distinguished ***Rivtow*** – accepted the ***Anns*** test
    - Ratio
        - No liability will attach to policy decisions, but liability may be found for negligent operational decisions

        - If a municipal bylaw requires a municipality to inspect construction projects (policy decision), municipalities must then conduct those inspections with due diligence, reasonableness, and prudence (operational decision). The failure to conduct the inspection reasonably can lead to negligence claims.
- All followed ***Anns***:
    - ***Nielsen*** (1984)
    - ***Central Trust*** (1986)
    - ***Manolakos*** (1989)
- ***D&F Estates*** (1988 England)
    - Facts
        - Flats built 1963-65. Subcontracted plastering work was negligent. 1980 plaster on ceilings and wall loose and falling. Subsequent owners sued in tort. Suing for cost of repairing
    - Court
        - Criticized ***Anns*** [1977]
        - Duty in tort only for personal injury or property damage
        - No concurrent liability in tort & contract (can only sue in one or the other, but not both)
        - No liability for cost of repair (economic loss) – no recover for pure economic loss
- ***Murphy v Brentwood*** (1990 England)
    - Repudiated ***Anns*** – it is no longer the law in England
- ***CNR v Norsk*** (1992 Canada)
    - Endorsed ***Anns*** – still applies in Canada
    - Revisited ***Rivtow***, commented favourably on Laskin's dissent
- Summary



    -
        - The law in Canada is what is stated in ***Anns*** – DoC can give rise to recovery for pure economic loss
            - In England, it does not

Winnipeg Condominium Corp No 36 v Bird Construction Co (1995 SCC) – Contractor Can Owe Tort Duties to New Owners in Addition to Contractual Duties to Old Owners; Can Recover for Pure Economic Loss Where Negligent Construction Poses a Real and Substantial Danger to Occupants

- **Facts**
    - In 1974, a 15-storey apartment building was built. In 1978, it was converted into condos by a new owner. In 1982, there were cracks in mortar and stonework that were inspected by an engineer and minor repairs were made. In 1989, a section of cladding fell off the 9th floor.
    - Owner had all cladding removed and replaced for $1.5M. Owner sued contractor, engineer, and architect to recover the repair costs. There was no claim for personal injury or property damage. Bird sought summary dismissal (no cause of action, pure economic loss not recoverable).
- **Decision**
    - SCC reviewed history and development of economic loss. Law in Canada is now different from the UK – based on ***Anns*** through ***Norsk***. Economic loss recoverable in proper cases.
        - UK law (per ***D&F Estates***) not to be followed in Canada
    - "*In my view, where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain* ***defects resulting from that negligence which pose a real and substantial danger to the***

***occupants of the building**, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants*."
        - Bird can have tort duties (to new owners) in addition to contractual duties (to original owners).
        - Where negligent construction leads to a serious safety issue, the cost of putting it back in a safe manner is recoverable → **limiting recovery for pure economic loss**
    - Applying ***Anns***:
        - (1) It is reasonably foreseeable that a negligently constructed building will cause damage or injury.
        - (2) There are no policy reasons to limit or negate scope, class, or damages in this case. There is no risk of liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.
- **Ratio**
    - Anyone who takes part in the design and construction of building will owe a duty in tort to subsequent purchasers if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants.
    - Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they can be held liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.
- **Notes**
    - Duty of care in tort may arise coextensively with contractual duty: ***Rafuse***.
        - So Bird can have tort duties (to new owners) in addition to contractual duties (to old owners).
    - Applying *Anns* 2-part test:
        - Proximity and foreseeability: Reasonably foreseeable that a negligently constructed building will cause damage or injury; i.e. foreseeable danger.
        - No policy reason to limit or negate scope, class or damages in this case: no risk of "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class."
    - Good policy #1: Allowing recovery for cost of repair encourages prevention; disallowing recovery encourages reckless and hazardous behaviour.
    - Good policy #2: Encourages good construction and deters poor workmanship.
    - Duty (in tort) to third party not limited by contractual obligations.
    - Corollary: Builder may be liable in tort even if built as contract required.
        - Liable even if they did everything right (but in situations where they should have known better)
    - After this case: Contractors could be sued for repair by somebody they had never dealt with

Edgeworth Construction Ltd v ND Lea & Associates Ltd (1993 SCC) – Tort Liability Based on Negligent Misrepresentation Even Though No Contract Between Contractor and Engineer; Owner's Exclusion Clause Did Not Cover Engineer

- **Facts**
    - Edgeworth successfully bid on a road building contract, entered into a contract with the province for the work. It alleged that the engineering firm, ND Lea, made errors in the specifications and construction drawings, which caused them a loss via negligent misrepresentation. There was no contractual relationship between ND Lea and Edgeworth (the contract was between those two and the province). Interlocutory judgment found that Edgeworth had a prima facie cause of action. Note that the contract with the province included a limitation of liability clause that disclaimed liability for misrepresentations.
- **Issue**
    - Does the engineering firm owe a duty of care to the construction firm, and should that duty of care be recognized as sufficiently proximate to warrant tort liability?
- **Decision**
    - Liability for negligent misrepresentation arises where a person makes a representation knowing that another may rely on it, and the plaintiff in fact relies on the representation to its detriment. Therefore, there is a prima facie duty owed by the engineering firm to the construction firm. Negligent misrepresentation is one of the recognized grounds for allowing claims in tort for pure economic loss. Therefore, this fact situation meets the test for finding tort liability. Permitting the engineering firm to be sued does not circumvent any contractual promise. The engineering firm should be held responsible because it made the misrepresentation, and it knew that the contractor would rely on its work. No good policy reason under the Anns test to deny recognizing a duty of care - the contractor should be able to rely on representations made by the engineering company (otherwise, what value does the engineering company bring?).
    - The province (owner) never assumed liability for errors or omissions by the engineers (indeed, the tender document included a limitation of liability clause exempting the Crown from liability for misrepresentations of others). The

engineers were not a party to the tender contract, so therefore, they cannot benefit from the exclusion clause. The exclusion clause must be drafted broadly enough for it to apply to employees or subcontractors, that was not done here.
    - **Important point - the presence of a contract does not bar the right to sue under tort except where the parties to the contract have themselves defined their obligations by contract so that the contract must prevail over a different duty which tort law might impose.** People are free to determine their own civil rights and responsibilities, and modify these by contract. Again, this was not done here
- **Ratio**
    - Liability for negligent misrepresentation arises where a person makes a representation knowing that another may rely on it, and the plaintiff in fact relies on the representation to its detriment.
    - If the exclusion clause does not explicitly indicate that a party cannot be sued under the law or tort (or specify some other contractual remedy), then it is possible to sue the other party for economic losses arising out of negligent misrepresentations that were relied on.
- **Notes**
    - S.C.C. found Edgeworth had *prima facie* cause of action.
    - May have become Owner's representations, but remained engineer's too.
    - Exclusion of liability clause in contract protected Owner, not engineer.
    - No good policy reason for denying duty of care:
        - Would force contractors to do own engineering
    - Engineer could protect itself:
        - Disclaimer on specifications
        - Contractual provisions
    - Engineers/architects may be liable in tort to contractors to the extent that they screw up in the design and thereby cause the contractors to suffer pure economics loss/cost of repair

Building Codes, Inspections, Liability of Consultants

The Safety Codes Act, RSA 2000

- Applies to (s. 2):
    - Buildings
    - Electrical Systems
    - Elevators
    - Gas, Plumbing, and Sewage
    - Pressure Equipment
- Must comply with the Act (ss. 5-9)
    - Owners
    - Designers
    - Manufacturers
    - Contractors
    - Vendors
- Comprehensive regime for:
    - Standards
    - Inspections
    - Permits
    - Prosecutions
- *Building Code Regulation* AR 117/2007 – under the *SCA*:
    - "The Alberta Building Code, as established by the Safety Codes Council and published by the National Research Council of Canada, is declared in force…"
        - There is national body of safety code officers who create a national code; in AB, under the SCA, they've adopted this document and modified it with this Regulation

Holtslag v Alberta (2004 ABQB) – Building Code Does Not Create a Proximate Relationship to Create a Duty of Care; Alternatively, there is No Duty Because the Building Code is a Matter of Government Policy (Policy Decision)

- **Facts**

- A large number of plaintiffs are suing the province for its decision to approve using untreated pine shakes for roof covering materials from 1986-1998. The pine shakes deteriorated quickly, causing structural problems and requiring homeowners to pay for repairs and replacements. Nevertheless, the building standard code was not amended for some time. The plaintiffs allege that the province knew or ought to have known that the materials were defective, but did not act anyways. The province has brought an application of non-suit to dismiss the lawsuit on the basis that there is no evidence adduced by the plaintiffs to disclose any valid cause of action against the province.
- **Remember: Test for non-suit is, even assuming that all of the Plaintiff's evidence is true, there is no chance that it will be successful at trial.**

- **Issue**
  - Should the province be held liable for its decision to approve the use of a building material that is later found to be defective?
- **Decision**
  - ***Anns/Cooper*** test must be followed. Potential damage to the plaintiffs is foreseeable – the only way that the pine shakes could be installed is if they are approved by the government under the Building Code Act. Must then look at policy reasons to negate a duty of care that is otherwise foreseeable. Must look at the legislative scheme to determine if it creates a duty of care.
  - In this case, no Court has held that provincial Building Codes constitute a representation of the durability or service life of a product listed or approved for use**. The purpose of the Building Code is to ensure minimum standards for SAFETY – not quality or durability. Therefore, the only thing that was relevant with respect to pine shakes is whether they are SAFE to use.** Also, there is no implied representation that pine shakes will have similar durability to other approved materials under the Code. There is no evidence of a direct relationship between the plaintiffs and the defendant – there is no contract between them. This could lead to unlimited liability and implied warranties under the provincial building code, which suggests that a duty of care should not be recognized in this situation.
  - Also, implementation of building codes is a matter of government POLICY, for which no liability can be found.
- **Ratio**
  - Building Codes do not create a duty of care between the provincial government and landowners if the Code allows for materials to be used that are later found to be inadequate for the purpose they are used for.
- **Notes**
  - Court applied *Anns* test:
    - Proximity and foreseeability
    - Any contrary policy reasons
  - Foreseeability accepted (conceded).
  - Proximity must arise from relationship between parties.
  - Building code does not create relationship between Gov't and individuals.
  - Building code creates health and safety standards, not durability or fitness or service life.
  - No proximity, so no duty of care.
  - Even if duty, there are contrary policy reasons:
    - Building code matter of gov't policy, not gov't implementation, so no liability
    - No limits on potential liability: gov't would face claims for all products approved under Building Code.

Ingles v Tutkaluk **(2000 SCC) – The Inspector Accepting the Builder's Assurances Without More Was Not Reasonable, Therefore the Inspection was Negligent, and the City is Liable in Tort; Homeowner Also Guilty of Contributory Negligence**

- **Facts**
  - Ingles hired Tutkaluk to renovate basement. Project required installation of underpinnings under existing foundation to prevent the walls of the home from cracking and collapse. The contract specified that the contractor would obtain a building permit before construction commenced, but the contractor later convinced the homeowner to dispense with this requirement. Once the inspection was done, the underpinnings were impossible to inspect due to subsequent construction. The building inspector relied on the contractor's assurances that the underpinnings conformed with requirements. Flooding occurred after construction, and the homeowner's later inspection revealed that the underpinnings were completely inadequate. Sued both the city and the contractor for negligence.
- **Issues**
  - Can Ingles sue the city for negligence, in spite of his contributory negligence? Note that the contractor's liability is not being appealed – they are liable
- **Decision**

- For the city's liability, the ***Anns/Cooper*** test must be applied to determine whether a public body owes a duty of care towards individuals. Inspection schemes fall within a category of legislation that creates a private duty of care between the public body and the citizen if the inspection is performed negligently (operational, as opposed to policy, decision), and the citizen relies on that to their detriment. To avoid liability, the government must exercise due care in inspections.
- In this case, there is clearly a prima facie duty of care owed by the city to Ingles. It is sufficiently foreseeable that a deficient inspection by the city could cause losses to Ingles. **Ingles' contributory negligence DOES NOT on its own negate the duty to care owed by the city of him. The City must still show that it exercised the standard of care required in completing its inspection to avoid liability.**
- Note that municipalities are not to become de facto insurers under this test, or to discover every latent defect. However, in this case, it was completely unreasonable for the inspector to rely on representations made by the contractor, especially when actions could have been taken to properly inspect the underpinnings. Therefore, the city can be held jointly liable for the loss.

- **Ratio**
  - For inspection schemes, the municipal authority must show that it exercised reasonable diligence and due care in the inspection process to avoid tort liability. Otherwise, there is a sufficiently proximate relationship between city inspectors and homeowners to warrant imposing tort liability where inspections are deficient or negligent.
- **Notes**
  - SCC applied tests from *Anns* and *Kamloops:*
    - Sufficiently close relationship?
    - Policy considerations limiting duty?
  - Close relationship easily established.
  - Real issue was second part: policy considerations.
  - "Policy" vs. "Operational" distinction
  - City had discretion to inspect: "Policy"
  - Once City chose to inspect, it owed duty of care to take reasonable steps.
  - Accepting builder's assurances without more, not reasonable.
  - Homeowner guilty of contributory negligence for authorizing work to proceed before getting building permit

The Safety Codes Act – Liability Exemption for Inspectors

- Sections
  - **12(1)** No action for anything done in good faith.
  - **12(2)** No liability for system or manner of inspections.
  - **12(3)** No liability for negligence or nuisance.
- **BUT…**
  - **12(4)** "Subject to this section, nothing done pursuant to this Act affects the liability of any person for injury, loss or damage caused by any thing, process or activity to which this Act applies."
    - **What does this mean?**
      - Possibly: Except for inspectors, the rest of the world remains liable

Concurrent Liability in Contract and Tort

Damages: Contract vs Tort

- **Contract**: put the plaintiff in the position he would have been in had the contract been performed.
- **Tort**: put the plaintiff in the position he would have been in had the tort not happened.

BG Checo v BC Hydro (1993 SCC) – Tort Action Available Unless Expressly Excluded; Must Look at the Wording of the Contract to Determine if the Right to Sue Has Been Waived or Modified Or if it's Co-Extensive with Breach of Contract; Damages Calculation Under Contract are Different than Under Tort

- **Facts**
  - Hydro called for tenders to erect transmission lines. Checo inspected the area before submitting a tender and noted that the province was working on clearing the area. Tender documents stated that clearing would take place outside of the scope of the resulting Contract B. Submitted a low bid which assumed that clearing would be completed outside of the scope of the tender. Tender also included a clause indicating that it was Checo's responsibility to inform itself about all

aspects of the work prior to submitting a tender. Checo was awarded the contract, and the province ceased working on clearing the area, causing Checo massive losses and delays. Checo sued for breach of contract, negligent misrepresentation, and fraud.

- **Issues**
  - Can the exclusion clause be used to shield the province from liability for failing to perform part of its obligations under the contract? Can Checo also successfully sue for negligence?
- **Decision**
  - The contract required Hydro to clear the right of way as specified, and that duty was not negated by the more general exclusion clauses related to errors and misunderstandings in tendering. The contract required BG Checo to inform itself of any misunderstandings - this does not extend to require it to ensure that the other party is performing its part of the contract. Hydro is liable for breach of contract if it fails to perform a material obligation under the contract. **Under contract law, the damages they would receive are the costs to remediate the site, leaving BG Checo with the same amount of profit they would have earned apart from the breach.**
  - Notably, Checo can also sue for negligence. The tort claim is not excluded because the contract provides "the contract expressly deals with the matter". It is always open to parties to a contract to limit or modify private law duties between them. This must be done clearly in the contract - implied terms should be scrutinized heavily. The vast majority of commercial contracts will fall into this class. It is also possible for contracts to be drafted to allow for contractual remedies AND tort remedies concurrently. In this case, the contract did not limit the duty of care owed by Hydro to Checo, nor did Checo expressly waive its common law right to bring such tort actions as might be open to it. Therefore, Checo can also sue in tort.
  - **The damages in tort are higher than for breach of contract - would give them profit for the extra work that was conducted.** If no misrepresentation had occurred (i.e. had the right of way clearing been part of the original contract), BG Checo would have submitted a different bid that reflects the increased costs (and profits + overhead).
  - Also alleged fraud. This was overturned by the Court of Appeal (there was a misrepresentation, but not to a level that rises to fraud). SCC agreed and did not find fraud.
- **Ratio**
  - Must look at the wording of the contract to determine if the right to sue in tort has been waived or modified, or if it is co-extensive with breach of contract.
  - **Always explore both contractual and tort claims.**
- **Notes**
  - SCC – Contract
    - Contract clear and not inconsistent.
    - Required BC Hydro to clear right of way. BC Hydro did not clear right of way.
    - BG Checo's obligation to inspect and clarify misunderstandings did not extend to BC Hydro's failure to clear.
      - You have a right to assume that the other party will perform its contractual obligations
    - BC Hydro liable for breach of contract.
    - Damages measured by what was required to put BG Checo in the position had BC Hydro properly cleared right-of-way.
    - Increased construction costs plus overhead (but no profit).
      - For a claim of breach of contract → costs to remediate the site, leaving Checo with the same amount of profit they would have earned apart from the breach
        - Original scope of work – costs + profits
        - Extra costs – costs
  - SCC – Tort
    - Tort claim not excluded merely because contract "expressly deals with matter".
    - Tort claim might be excluded by express exemption or exclusion clause.
    - No such clause here.
    - Where duty in contract and duty in tort are co-extensive, plaintiff can sue for each.
    - "We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intend otherwise."
    - BC Hydro not liable for fraud (evidence did not support this).
    - BC Hydro liable for negligent misrepresentation.
    - Damages to be measured by plaintiff's position had misrepresentation not been made.
      - For a claim of breach of tort – costs + profit → would give them profit for the extra work that was conducted, since they would have submitted a different bid
        - Original scope –
        - Extra costs (which would have formed part of the bid) –
    - Accepted that if no misrepresentation, BG Checo still would have bid, but at higher price.
    - Sent back to trial to determine higher price

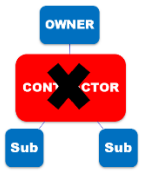
11. BUILDERS' LIENS

Problem: Defaulting Owner



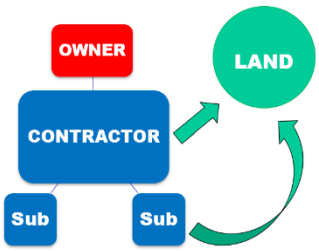
- Contractor has no remedies at common law if the owner defaults… → basic unfairness that contractors face
- For example, the Bank/Creditors are the ones that now own the building should that happen

Problem: Defaulting Contractor



- Contractor defaults; subs are diligently performing the work but the contractor can't pay them; what remedies do the subs have?
- As well, it's not the owner's fault – so should have the owner have any/limited liability for the contractor's default?

Solution: Builders' Lien



- In addition to rights the parties have between themselves (in personam), need to recognize the value is in the land – we should figure out a way to give protection to those who've done work/performed services, by giving something in the land

What is a Builders' Lien?

- A security interest in the land, that gives the lienholder the right to sell and share in the proceeds.
  - Legislation creates the lien
  - A "charge" against the land itself

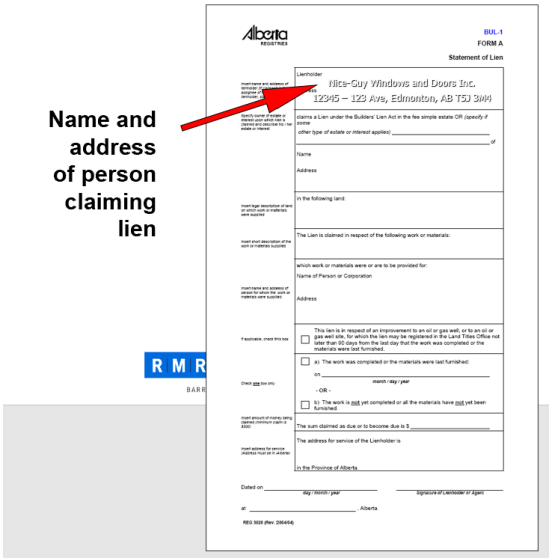
Legislation

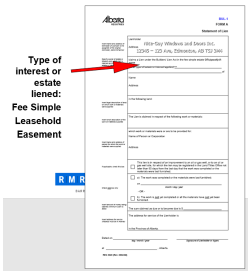
- Builders' Lien Act
  - **Grants to or confers upon anyone who does work, supplies materials, or performs services on a project, a lien in the** land **upon which that project is being built**
  - No common law
  - Specific to Alberta
  - Different in other provinces

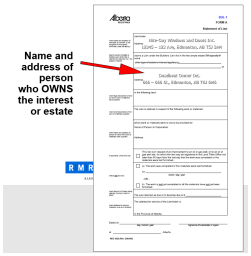
How to Lien?

- Register a Statement of Lien at Land Titles (or Alberta Energy) in order to perfect this right
- Forms are prescribed in the Builders' Lien Forms Regulation

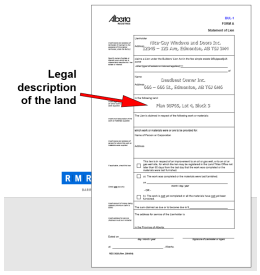
Statement of Lien – Parts

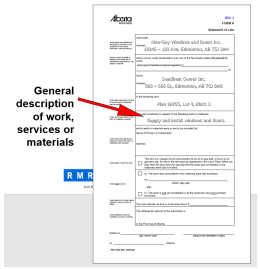
- Note: These are important to fill out, because if you make a mistake, you may lose all the rights you're trying to preserve
- Parts
  - 

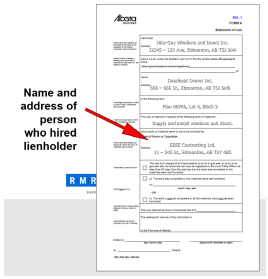
    - Should be the legal name of the entity
  - 

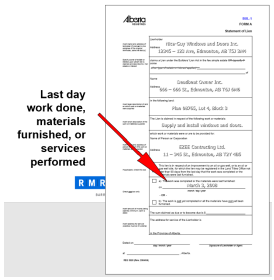
    - There are different kinds of interests in land – the same piece of land can have many different types
  - 

    - Legal name of entity here is important here too

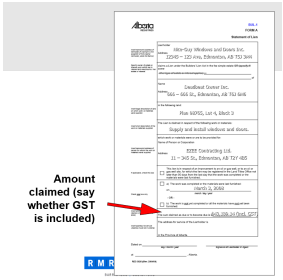
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  - In AB, every parcel of land has a unique legal description
    - This has no bearing on its “address”, which isn’t needed
- 

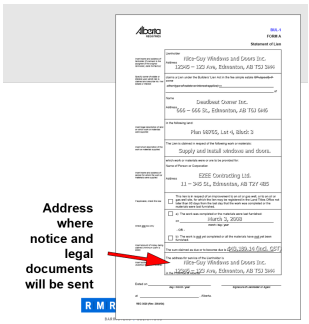
  - Would put some specificity describing the work you are doing to improve the land
- 

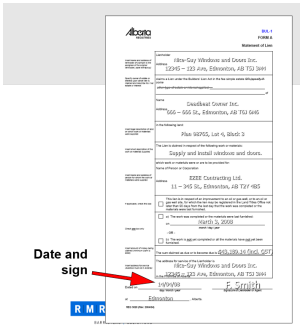
  - A lien can be accrued to anyone in the food chain (Owner, General contractor, Subs) – you need to identify who hired the lienholder (person immediately above the lienholder)
- Checkbox if applicable to improving an oil/gas well site
  - You have 90 days from the last day the work was complete/materials were last furnished to register that lien (any other project is 45 days; so you get double for o/g exception)
- 

  - Check box if (assuming work is completed/materials were last furnished), OR
  - Check box that work hasn’t been completed
    - So, you can register a lien before the lien is completed



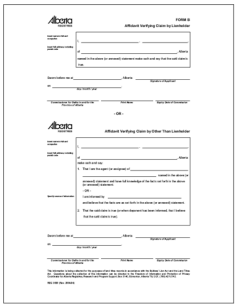
- The amount that is owing today or will become owing under the contract
- Always say the number includes GST (not + GST)





- Note: Agents can be used to sign
  - I.e. for corporations

- Affidavit – bonus page



- Also complete:
  - Affidavit verifying lien
    - The party that signs the first page (lien) has to swear an affidavit
    - Sign top half if same individual. Second half if you're doing it for a corporation
    - Swears that they know the information to be true - this creates legal liability if there is a misrepresentation, since the affidavit is sworn to
    - Problem can arise if a lawyer signs the lien on behalf of a client; they're now a witness → likely will need a new lawyer
- At the same time
  - Discharge of Lien

        - Good practice to also have your client prepare a discharge of lien form at the same time as they sign the original documents creating the lien
        - You then keep this with you until you need to discharge the lien.
        - Why? Very strict rules around who can file the discharge - has to be the same person who filed the original affidavit (which could be a pain)
    - Affidavit of Execution
- Once a lien is registered, effect?
    - Under Torrens system, any interest is subject to prior registered interests
    - All payments get frozen too (owner can no longer pay the contractor)

Who Can Lien?

- s.6(1) A person who
    - (a) does **work** or
    - (b) furnishes **material**

  in respect of an **improvement**, for an **owner**, **contractor** or **subcontractor** has, for so much of the price of the work or material as remains due, a lien on the **estate or interest** of the owner in the land improved.
    - Note the bolded terms are defined terms
- Defined terms
    - s.1(d) "**improvement**": anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land
        - Thus, If you do work on a chattel then you can't register for a lien
        - Note: Nothing that says that the land has to be more valuable from an improvement
    - s.1(p) "**work**" includes the performance of services on the improvement.
    - s.1(b) "**contractor**" a person contracting with or employed directly by an owner to do work on or to furnish materials for an improvement, but does not include a labourer;
    - s.1(n) "**subcontractor**" a person other than
        - (i) a labourer,
        - (ii) someone only furnishing materials, or
        - (iii) someone only performing services,

      who is not a contractor but is under a contract
    - s.1(e) "**labourer**" a person employed for wages in any kind of labour;
        - Someone who is an employee essentially
        - Labourers are singled out because they are given extra remedies
    - s.1(j) "**owner**" is person having an estate or interest in land at whose request, express or implied, **and**
        - (i) on whose credit,
        - (ii) on whose behalf,
        - (iii) with whose privity and consent, or
        - (iv) for whose direct benefit,

      work is done on or material is furnished for an improvement.
        - This is a conjunctive statement – There are 2 parts with an "and"
            - To be an owner, you have to satisfy both parts of the statement
            - The second part is disjunctive – you have 4 options, any one of which will satisfy the second part
        - E.g. Tim having fibre optics installed
            - If someone had liened Tim's interest, the first part is met, however arguably the second part isn't
        - Overall, this definition means there needs to be some connection to the owner
- s.6(4) A **person who rents equipment** to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.
    - Special shoutout to people who rent out equipment and how they have a lien for the rental equipment

Hett v Samoth Realty (1977 ABCA) – Strict Interpretation of Who Can File a Lien; "Work" Limited to Services Rendered to the Process of Construction

- **Facts**
    - Owner retained Samoth as agent to:
        - Assemble the land

        - Obtain municipal approvals
        - Negotiate development agreement with the City,
        - Arrange financing,
        - Hire a general contractor,
        - "General overseeing" of construction
        - Tying up tag-ends
    - Samoth not paid, so liened for $75,000.
    - Owner applied to strike Samoth's lien.
        - "Samoth didn't do anything to improve the land"
- **Issue**
    - Did Samoth perform work "in respect of an improvement"?
        - Was the registration of the builder's lien proper and appropriate?
- **Decision**
    - Section 4(1) of the Act indicates that builder's liens may be registered if there is work that has been done but not paid by a builder. The Act must be given a **strict interpretation over what types of work may qualify for a lien**. In this case, "work" can include the performance of services upon an improvement (according to the definitions section of the statute). However, to apply the strict interpretation, "work" should be limited to services rendered to the process of construction. This may not require that physical services be provided upon the improvement, but accounting services, legal services, etc. do not fall within that definition. In this case, the work by Samoth in laying the groundwork for the land sale transaction does not qualify as "work performed upon or in respect of an improvement" given a strict interpretation of that statutory clause. Preparatory work dealing with land sales and subdivisions do not have anything to do with construction, and therefore are beyond the type of claims that are intended to be included under builders' lien legislation.
    - **Distinguished this work from the work done by architects - architectural work that is done prior to construction DOES fall within the definition of "work" in the Builders' Lien Act**
- **Ratio**
    - Builders' liens can only apply to work done on or in respect to an improvement on the property, and this is strictly construed
        - I.e. Directly related to the process of construction
- **Notes**
    - Court of Appeal used "proper approach" from *Clarkson Co. Ltd. et al v. Ace Lumber Ltd. et al:*
        - Builders' liens unknown in common law.
        - "Abrogates" common law: creates charge against land and give priority to one class of creditors.
        - Liberal interpretation of the rights the act confers.
        - Strict interpretation in determining who can lien.
    - Lien struck:
        - "Although … services need not be physically performed upon the improvement to fall within the meaning of the Act they must … be **directly related to the process of construction**. Surely inspiration, the development of concepts, logistics, applications for zoning, legal services, or accounting services, do not fall within 'services upon the improvement'…"
        - "… the services of an architect are as they affect the construction process is distinguishable from the services performed by the appellant. They are an integral and necessary part of the actual physical construction of the project. They are set out in the plans and specifications which are to be followed by those persons doing the actual construction and they are, therefore, related directly to it. The appellant's services, although they undoubtedly contribute to the total project are not … so directly related to the construction process as to fall within 'services upon the improvement' as those words are used in the Act."
            - There are various levels of a project, and some won't rise to that level
            - S was arguing they were like an architect
                - Court: Not quite. Their work is more closely related. What S is doing is not truly construction-related
        - "Unless some limit is put upon the meaning of 'services' in the Act it would be open to any person, such as a lawyer, an accountant, a sociologist or a statistician, whose work contributed in any way to the total project to file a lien under the Act. This result is certainly not the intent of the Act nor does it stand the test of strict interpretation."

Peter Hemingway v Abacus Cities (1980 ABCA) – Actual Construction Not Needed; Architects Can Register Liens

- **Facts**
  - Hemingway as architect entered into a written contract with Abacus to perform services for an intended development near Kingsway park. By March 1979, a net claim of $218,000 was owed. Abacus later abandoned the project, and has not paid the invoice. Hemingway has tried to file a lien, the validity of which is disputed by Abacus. Note that physical construction of the property had not yet commenced, only the preliminary architectural work was being completed.
- **Issue**
  - Is the lien filed by Hemingway appropriate and in conformity with the statutory requirements?
- **Decision**
  - The respondents submit that the physical construction process must have commenced in order for builders' liens to be filed on real property. This is not the correct interpretation - the performance of services (which includes the services of an architect) for the purpose of an intended construction within the statutory meaning qualifies as "work" in respect of an improvement, thus allowing architects to register a builders lien on title for unpaid amounts on architectural work even if the actual construction has not yet commenced (or, indeed, may not ever commence).
- **Ratio**
  - Actual construction does not have commence in order for it to become possible to file builders' liens. It is possible to use architecture work to lien lands
- **Notes**
  - Lien upheld
    - "In the course of his reasoning, Lieberman J.A. [in Hett] referred to architectural services as the foundation of a lien and reviewed a number of authorities. The point here in contention requires further consideration of some of them. In *Inglewood…*, Milvain J. later (C.J.T.D.) held that architectural services sufficiently founded a lien: in that case, construction of the improvement in accordance with the architect's drawings and specifications has progressed well towards completion."
    - "Such inspection is to safeguard the interests of the owner as a measure of assurance that the drawings and specifications that resulted from the architect's services are being properly followed and that the construction work of the contractor is being adequately performed and that the payments on account are justified. The policing of the construction contract is merely ancillary to the architectural services which were directly and essentially related to the work under construction, and which remain whether or not there is inspection by the architect, or by a clerk of the works or anyone else. This point must be resolved against the respondents."
    - "Our Act speaks of the future as well as the present in its definition of an improvement in respect of which a lien may arise by the operation of s.4. Section 1(1)*(d)* provides:
      - "2. (1) In this Act, . . . *(d)* 'improvement' means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land."
    - "Thus … the performance of services (which by the interpretation of this court includes the services of an architect) for the purpose of an intended construction … is work in respect of an improvement …"

IBI Group v Leduc Estates (aff'd 1994 ABCA) – Work to Obtain Subdivision Approvals Does Not Qualify as "Work" under the BLA; Work Must be Actually Connected to the Construction on the Land; the Stage of Work at the Date the Lien was Filed Wasn't Sufficient to Constitute Work "On or In Respect of an Improvement" Yet

- **Facts**
  - Appeal of an order denying the ability of a party that did work to obtain subdivision approval from filing a builder's lien on the property. The party did a bunch of work to secure subdivision approval, but the municipality of Leduc denied the subdivision application. This included designing and preparing an area structure plan, drainage ponds, sewage disposal, access routes and roadways.
- **Issue**
  - Does work to secure a subdivision approval qualify as "work" that can sustain the filing of a builders' lien?
- **Decision**
  - No. Subdivision approval is not a physical thing, and it is clearly not an "improvement" under the builders lien Act. The work of a lien claimant must be an integral and necessary part of the actual physical construction, as distinguished from "mere development work." Obviously no work was going to be done physically on the land if the subdivision approval failed, which is what happened in this case. **The work must be actually connected to the construction on the land.** In this case, the stage of the work at the date that the lien was filed was not sufficient to constitute work on or in respect of an

improvement (leaving open the possibility that, if the work had progressed to a later stage, it would be sufficient to qualify for a lien)

- **Ratio**
  - Work to obtain subdivision approvals does not qualify as "work" under the Builders Lien Act.
- **Notes**
  - "It is imperative that IBI Group physically contributed in a direct and essential way to the construction or intended construction of an improvement. The work of a lien-claimant must be an integral and necessary part of the actual physical construction …, as distinguished from mere development work … effecting of the zoning change and the meetings with municipal authorities would not entitle IBI Group to its lien. … The contention really arises when one looks beyond the basic pre-development work to the next stage involving preliminary drawings and design."
  - "The ABCA in ***Hett*** has stated that a line must be drawn; not everyone who does work connected with the land is necessarily entitled to file a lien. That work must be directly related to the actual process of construction. Solicitors, accountants and sociologists may all perform services that somehow benefit the land, but they cannot validly assert a lien for those services. Given the very preliminary sketches in this case, … **IBI Group has failed to meet the threshold set out in *Hett* ... Had the designs and drawings been completed to a more advanced stage, then perhaps it could validly assert its lien claim. However, the stage of the work on the date the lien was filed was not sufficient to constitute work on or in respect of an improvement ..."**

What Interests Can Be Liened?

- **Private lands?**
  - Yes
- **Provincial lands?**
  - Crown interest – No
  - Private interests on Crown land (e.g. lease of Crown land)– Yes
- **Federal lands?** (e.g. National parks, military bases, airports, reserves)
  - Crown interest – No
  - Private interest on Crown land – **No**
    - This is due to the doctrine of federal paramountcy: The BLA is an AB statute; the provincial government can't enact legislation that affects lands of the federal government
- **First Nation lands?**
  - No, **but** you can lien private interests (e.g. leases) on FN lands
- **Municipal lands?**
  - Yes (remember municipalities are private entities/corporations), **except** public highways/irrigation districts
- **Leasehold interest of tenants?**
  - Yes, if tenant meets definition of "owner" under the legislation
  - E.g. a commercial tenant who hires workers to improve the storefront can be subject to a builders' lien if those workers are not paid. In that case, the lien will apply to the LEASEHOLD interest only
- **Interest of landlord?**
  - Yes, if
    - Landlord meets definition of "owner" under the legislation
    - **OR,** notice given to landlord under s. 15 (shortcut)
      - **S.15(1)**: "When the estate on which a lien attaches is a freehold estate for a life or lives or a leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or that person's agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or that person's agent, within 5 days after the receipt of the notice, gives notice that the person holding that estate will not be responsible for the doing of the work or the furnishing of the materials."
        - If you're concerned you won't be paid, maybe you want to tag the owner however you don't know if you can prove all the elements of the "owner"; so give a notice under s. 15 of the BLA. They have 5 days to give you a reply saying "nope". If they don't, they are **presumed to be an owner**

K & Fung v Reykdal **(1998 ABCA) – Definition of "Owner" Not Met; Test for "Request"; Lessor Not an Active Participant to the Construction; Therefore, Lien Can't Be Registered**

- **Facts**
  - Respondent (Reykdal) is the registered owner of restaurant in Calgary, lease agreement was entered into between the Respondent and the operators of the restaurant (No Name Café). The Lessee contracted with a construction company (K&F) to renovate the premises, and did not pay the invoices. The contractor company is now trying to file a builder's lien against the land title (that is, both against the landlord and the tenant). Note that the lessee worked with the owner on approving the plans for the renovations.
- **Issue**
  - Is the Respondent the "owner" under definition of who a builder's lien can be applied against?
- **Decision**
  - The Builders Lien Act creates a statutory charge upon a person's property. The circumstances in which such a charge can arise must be construed strictly. In this case, the owner of the land was a participant in the process for deciding how the renovations were to proceed. The Landlord clearly intended an arrangement whereby considerable control might be exercised over the tenant's improvements to the property. For example, the Landlord required that money be deposited in a trust account for operations and improvements at the location of the restaurant. However, this trust account's value was later allowed to be lowered, and the trust conditions do allow for it to be used as operations - this is all indicative of the fact that the Landlord was not exercising a significant degree of control over the renovation efforts. Indeed, it was later confirmed that the trust conditions only represent "capital contributions to the company to be incorporated to run the premises." There is evidence that, otherwise, the Landlord did not actively participate in the renovation process (did not request that the work be done, did not supervise construction, did not approve plans etc.). Therefore, the builder's lien was improperly registered, because the Landlord was not an "owner" under the Act's definition - the lien could only be registered against the leasehold interest.
- **Ratio**
  - You cannot register builders' liens against a lessor if the lessor was not also **an active participant** to the construction, and therefore could be held liable for any shortfall in payments to the contractor
    - Pat of the test in finding an "owner"
- **Notes**
  - Recall first half of "owner" definition:
    - "Owner" is person having an estate or interest in land at whose request, express or implied…
  - Test of whether a request, express or implied, that materials furnished, or work performed from *Royal Trust v. Bengert*:
    - "It must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor, it does involve something more than mere knowledge or consent. In ordinary language the word 'request' indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with 'ask' and 'solicit', synonyms which agree in meaning 'to seek to obtain by making one's wants or desires known.' 'Request' he says has a suggestion of greater courtesy and formality in the manner of asking. . . . In all of those cases, there was an **active participation** by the entity eventually held to have made a "request" and so to be within the definition of 'owner'."
    - "Whether or not active participation is established is a question of fact. The learned Master held as follows:
      - The applicant's participation in the substantial renovations consisted of
        - (a) approving concept plans and;
        - (b) approving the selection of paint for the exterior of the building.
      - The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection, did not receive any participation rent, in summary there is **not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials**."
    - "In addition to the foregoing, there is evidence in the examinations on affidavit upon which the Master was entitled to rely to support the conclusions that the tenant was not contractually bound to construct movements to any standard or of any specified scope (A.B. 230, lines 17-21) and that, in any event, the Respondent did not actively participate in the renovation project (A.B. 145, lines 7-14). It follows that there was no "request" by the registered owner, express or implied, and the lien was properly struck by the Master as confirmed in the Court of Queen's Bench.
    - For these reasons, the appeal must be dismissed."

What Interests Can Be Liened? (Continued)

- **Condo owners?** (Depends; Remember, there are two levels of ownership in condo corporations: You own both the unit itself, plus a share of the common property)
    - If contractor retained by Condo Association, **can lien every unit and all common property;**
    - If contractor retained by unit-holder, **can lien unit** (which includes unit's percentage of common property).
- **Interests of married persons?**
    - Yes, see s. 14
        - S.14(1): "When work is done or material is furnished in respect of land which a married person has an estate or interest, if the work is done or the material is furnished with the privity of the spouse of the married person then, for the purposes of this Act, the spouse shall be conclusively presumed to be acting as the agent of the married person as well as for himself or herself."
            - Your spouse acts as your agent, so you are bound by any construction contracts entered into by your spouse
- **Mineral interest?**
    - Yes, see s. 6(2)
        - s.6(2): for work or materials preparatory to, in connection with, or for abandonment operations for the recovery of a mineral
            - Note: Abandonment – it's not just the collection, but all the stuff after when you're cleaning it up
    - Against all estate and interests in the mineral, and the mineral itself when severed from the land.
- **Crown mines and minerals?**
    - Sometimes, see s. 36
        - S.36(1): "When a lien attaches to an estate or interest in minerals held directly from the Crown in right of Alberta and the estate or interest
            - a. is less than a fee simple estate, and
            - b. is not registered under the Land Titles Act,

          the statement of lien **shall be registered with the Minister of Energy and not with the Registrar** and this Act applies to all claims of lien so registered with the Minister of Energy."
    - You have a lien in mines and minerals from the point you do "work" and on
- **Against a pipeline?**
    - Yes, **but** may need to lien at **both** Land Titles Office and with Minister of Energy
    - Procedure:
        - 1. Identify all of the relevant lands.
        - 2. Identify if Crown or private lands.
        - 3. Determine interests that allow pipeline to cross lands: leases, right of way, easement, etc.
        - 4. Lien interests at appropriate registry: Land Titles, Alberta Energy.
        - 5. If pipeline runs from an oil gas well, oil or gas well site or oil sands extraction site, consider registering a mineral lien against the mineral interest of the originating site.

When Do Lien Rights Expire?

- **Section 41** states:
    - (1) A lien for **materials** may be registered at any time within the period commencing when the lien arises, and
        - (a) subject to (b), terminating 45 days from the day that the last of the material is furnished or the contract to furnish the materials is abandoned; or
            - Terminates within 45 days unless a statement of lien is registered
        - (b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned.
            - 90 days for materials provided to a o/g well site (slightly longer)
        - Notes
            - Lien for materials
            - Time to register a lien naturally arises when the person supplies materials first furnishes materials to the site/work is first done, and continues until 45 days after the work is completed/abandoned.
            - If its clear that there's abandonment, the 45 days runs from that point, whether or not you've completed the work or not
    - (2) A lien for the performance of **services** may be registered at any time within the period commencing when the lien arises, and
        - (a) subject to clause (b), terminating 45 days from the day that the performance of the services is completed or the contract to provide the services is abandoned; or

        - (b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the services is furnished or the contract to furnish the materials is abandoned.
        - Notes
            - Lien for services
    - (3) A lien for **wages** may be registered at any time within the period commencing when the lien arises, and
        - (a) subject to clause (b), terminating 45 days from the day that the work for which the wages are claimed is completed or abandoned, or
        - (b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the work for which the wages are claimed is completed or abandoned.
        - Notes
            - Lien for labourers who perform work/labour
- All 3 of these sections (materials, services, wages) have a period of 45 days (or 90) within which the statement of lien must be registered against the title.
- The question that needs to be asked though is what does "completed" mean so as to make the clock start?
- **Q**: **What is the deadline for registering against a pipeline?**
    - **A:** 45 days (not 90 days), usually
        - A pipeline is not a o/g well site, unless perhaps in some unique circumstances
- **Q: Does repair of deficiencies extend lien period?**
    - **A:** No – S.41(5): "Notwithstanding subsections (1) to (4), the time limited by this section for registering a lien is **not** extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date."
        - Even if you're on site performing services, if you're simply fixing things that were done wrong the first time, this doesn't give you more time
- **Q. When has a supplier "furnished" material to site?**
    - **A:** S.9(1): "Material is considered to be furnished to be used within the meaning of this Act **when it is delivered either on the land on which it is to be used or on such land or in such place in the immediate vicinity of that land as is designated by the owner or the owner's agent or by the contractor or the subcontractor**."
        - Captures some issues: At times, parties who supply materials never actually go onto the land; they still could be "furnishing" though.

How to Enforce a Builders' Lien?

- **To Preserve the Lien: Section 43(1):**
    - A lien that has been registered ceases to exist unless, within 180 days from the date it is registered,
        - a) an action is commenced under this Act (file SOC with the courts)
            - i. to realize on the lien, or
            - ii. in which the lien may be realized, AND
        - b) the lien claimant registers a certificate of lis pendens (CLP: notice to world that there is something on this land in dispute) in respect of the claimant's lien in the appropriate land titles office.
    - Notes
        - Lienholder has to start a lawsuit within 180 days of the registration date, and prepare CLP
        - Need BOTH: 1) File SOC with court AND 2) register CLP at land titles.
- **Require Lienholder to Commence Action: Section 45(1) – Notice to Commence Action:**
    - Start action and register Certificate of Lis Pendens within 30 days, or lose lien
    - Notes
        - Owner or another affected person serves written notice on the registered lienholder to commence an action to realize on the lien. This essentially forces the lienholder to get moving quicker (180 → 30)
        - As lienholder, if you receive notice to commence action from owner you have to start action within 30 days otherwise the lien ceases to exist
- **Continuing the Lien: S. 46(2):**
    - Notwithstanding subsection (1), if no trial has been held within 2 years from the date of the registration of the certificate of lis pendens, any interested party may apply on notice to the court to have the certificate of lis pendens vacated and the lien to which it relates discharged
    - Notes
        - Scary provision! Never seen it brought though due to courts being so backed up and the fact that nothing is really mandatory here
        - But it does give court good reason to create orders and deadlines to move the action along

Substantial Performance

- "Substantial performance", not substantial completion or mechanical completion
    - Very important concept within the BLA; a defined term with a specific meaning…
- **Section 2 – Substantial performance**
    - a. ready for use or is being used for the purpose intended, **and**
    - b. remaining work cost no more than
        - i. 3% of the first $500,000
        - ii. 2% of the next $500,000, and
        - iii. 1% of the balance of the contract or subcontract price.
    - Notes
        - When a project reaches this point, under the BLA, it has been deemed to have achieved substantial performance
        - This does not mean completed, but "almost completed"
- Examples
    - If $500,000 contract, will reach substantial performance if remaining work is less than $15,000 worth of work to be done (3% x 500,000)
    - If $700,000 contract, less than $19,000 worth of work to be done (3% x 500,000 + 2% of 200,000)
    - If $5,000,000 contract, less than $65,000 worth of work to be done (3% x 500,000 + 2% of $500,000 + 1% of 4,000,000)

Holdback

- How security is created such that if something goes wrong, there is something to go after for the lienholder
    - E.g. When an owner makes a payment to a contractor, the owner must withhold a portion of the money
- There are 2 parts: 18(1) and 18(2)
    - **18(1)** Owner shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from
        - a) the date of issue of a certificate of substantial performance on the contract, in a case where a certificate of substantial performance is issued, or
            - Contractor doesn't have to file a CSP though, they could just finish the work...
        - b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued
        - Notes
            - Basically, you pay 90% of the invoices, and retain 10% as a holdback (on every payment you're making) of the value of the work. The 10% is to be held for a period of 45 days from the date that the certificate of substantial performance is issued, or the date of completion of the contract, where a certificate is not issued
            - Applies to EVERY construction project, technically even to small residential renovation projects (not optional)
    - **18(2):** In addition to the amount retained under subsection (1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in subsection (1).
        - Notes
            - Under section 18(2), once a lien is registered, the owner must withhold any amount **under the contract** above the 10%
            - Basically, the moment the builders' lien is registered, the owner cannot pay ANYTHING more for that contract to ANYBODY; all payments must stop
- After CSP
    - **23(1)**: Hold back 10% of the value of work done after CSP for 45 days after completion of contract
    - **23(2)**: If lien filed, holdback all amount payable after CSP

Major/Minor Liens Funds

- **Section 24**
    - **24(1):** When a certificate of substantial performance is issued,
        - a) any lien arising out of work done or materials furnished before the date of issue of a certificate of substantial performance is a charge on the major lien fund, and
        - b) any lien arising out of work done or materials furnished on and after the date of issue of a certificate of substantial performance of the contract is a charge on the minor lien fund.
        - Notes
            - The BLA creates 2 different holdbacks if a CSP is issued:

- **Major Lien Fund** - from work before the issuance of the CSP (majority)
- **Minor Lien Fund** - from work after the issuance of the CSP (the little bit afterwards)

- **24(2):** When a minor lien fund does not arise under section 23, any lien arising out of work done or materials furnished is a charge on the major lien fund.
  - Notes
    - If there is no CSP, there is only 1 lien fund: Major Lien Fund

- **Section 25**
  - "An owner is not liable under this Act for more than
    - a) the total of the major lien fund and the minor lien fund, or
    - b) the major lien fund, where a minor lien fund does not arise under section 32.
  - Notes
    - Section 25 limits the owner's liability to the aggregate of the major and minor lien funds. Therefore, instead of seizing and selling the property, the owner will have this fund that can be used to pay out claims
    - Their maximum liability is that fund; as long as you properly hold it in the lien funds, that's all the owner has to pay out
- **Section 27**
  - 27(1) On the expiration of 45 days from the day that the contract is completed, payment of the major lien fund may be validly made so as to discharge the owner's liability in respect of all liens that are a charge on the major lien fund, unless a statement of lien is registered.
    - Notes
      - The owner is to maintain the lien fund unless a statement of lien is registered within 45 days of completion
      - If after 45 days after completion there's no statement of lien, the owner can now pay out the lien fund (since nobody can register a lien; the time for doing so has expired)
  - 27(2) Notwithstanding subsection (1), on the expiration of 45 days
    - a) from the date of issue of a certificate of substantial performance, payment of the major lien fund may be validly made, and
      - If no liens are filed once the CSP is filed, then the owner needs to pay the major lien fund out within 45 days of filing the CSP
    - b) from the date that the contract is completed, payment of the minor lien fund may be validly made,
      - If no liens are filed before Total Completion, then the owner needs to pay the minor lien fund out within 45 days of Total Completion

    so as to discharge the owner's liability in respect of all liens that are a charge on the lien fund in respect of which the payment was made, unless a statement of lien is registered."
    - Notes
      - Staggered release under (2) when there's a CSP

- Example

Q. How does an Owner protect itself on payment?
e.g.: Assume Contract Price of $500,000:

	Value of Work at end of Month		Holdback
Month 1	100,000	Pay 90,000 if no lien registered	10,000
Month 2	200,000	Pay 180,000 if no lien registered	20,000
Month 3	185,000	Pay 166,500 if no lien registered	18,500
Certificate of Substantial Performance			
46th day after Certificate of Substantial Performance			Pay 48,500 if no lien registered (Major Lien Fund)
Total Completion	15,000	Pay 13,500 if no lien registered	1,500
46th day after Total Completion			Pay 1,500 if no lien registered (Minor Lien Fund)

  - 3 months of work
    - Month 1 – 100,000 billed; withhold 10%
    - Month 2 – 200,000 billed; withhold 10%
    - Month 3 – 185,000; withhold 10%
  - Owner can release the (major lien) holdback (48,500) to the contractor, since no lien registered after 45 days from issuance of CSP
  - Contractor issues one more invoice of 15,000 (total completion)
    - Owner pays 90% of this and holds back 1,500
    - 45 days after completion of work, minor lien holdback of 1,500 can be paid out since no lien registered

- **What happens if you do not holdback 10%?** You are still liable to pay the major and minor lien funds. Every dollar you pay in the face of a lien is a dollar you may have to pay again
    - **Question:** Assume $1,000,000 payment is owed. Assume $5,000 lien registered. Why is it unsafe to pay $895,000 (i.e. 10% x $1,000,000 less $5,000 lien)?
    - **Answer:**
        - **Because of s. 18(2):** In addition to the amount retained under subsection (1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under that contract that is over and above the 10% referred to in subsection (1)
            - When there's a lien registered, the owner cannot pay anything. An owner who pays money in the face of a lien might be at risk of just having to pay it again
        - **Golden Rule:** Never pay a dime in the face of a lien. Why?
            - Because 1st lien registered "freezes" the lien fund. What happens if a whole series of liens are registered after the pay out?
                - All of those liens would attach to the lien fund which the owner was supposed to have maintained (i.e. the entire $1,000,000).
        - What should the Owner do?
            - Require the contractor to get the lien off of title and pay out $900,000 on the same day that it has a clear title. Enables the small subcontractor to leverage the contractor

Setoffs

- **Q:** When can an Owner setoff against the lien fund?
    - **A:** The notion of setoff is **unclear** in AB law

Getting Liens Off of Title

- There are two ways to get liens off of title: ss. 27 and 48
    - **Section 27(3)**
        - When a statement of lien has been registered, the owner or a mortgagee authorized by the owner to disburse the money secured by a mortgage may
            - a) by interlocutory application in any proceeding that have been commenced to enforce a lien, or
            - b) on application by originating notice,

          give security for or pay into court the amount of the major lien fund, the minor lien fund, or both, as the case may be."
        - Notes
            - Owner can take the holdback and pay it into court, thus removing the lien
            - All the lienholders can fight over and bring applications against the lien fund but in the meantime the lien is off of my title
            - However, the lien fund cannot be set until we know total amount owed, so this application cannot be made until at the end of the project – Cannot do this until work is done because until then will not know the amount of the lien fund
            - Fund of money going to court is the lien fund (owner's holdback)
    - **Section 48**
        - **(1)** The court may, on application by originating notice, order that the registration of a lien be removed from the title to the land concerned
            - a) where security is given or payment is made into court for
                - i. the amount of the claim;
                - ii. the maximum amount for which the lien may properly attach under section 18(3) or (4) or 23(3) or (4), or
                - iii. such lesser amount as the court determines, and any costs that the court may fix,
            - b) where the relevant lien fund has been paid out under this Act, or
            - c) on any ground not referred to in clause (a) or (b) as the court considers proper.
        - **(2)** Money paid into court or any security given under subsection (1)
            - a) stands in place of the land,
            - b) is subject to the claims of the person whose lien has been removed, and
            - c) shall not affect the amount required to be retained under section 18(1) or 23(1)."
        - Notes

- Allows an owner to go to court and get an order to pay to the court a fund of money that is **security** for the lien (**this is not the lien fund**)
    - This is a pot of money that is equal to the value of liens at the time + extra amount for costs
    - This money is held by the court, and takes the place of the land
    - Lien gets discharged, and the lien is now attached to the money sitting in court
- This technically protects the lienholder, as instead of land as security now it is cash as security. However, they still have to take all the same steps, but now in court (not in the land)
- You cannot use the holdback money as security to the court
- Creates a way of removing the lien before the lien fund has been determined
- This fund of money could be paid in by **anybody**

Two Non-Builders' Lien Remedies

- **1. Unpaid Vendors Lien**
    - **Section 17(2):**
        - "Material actually delivered and to be used for an improvement
            - a. is subject to a charge in favour of the person furnishing the material until incorporated in the improvement, …
        - Notes
            - What if you delivered material that hasn't been incorporated into the land itself?
            - Unpaid vendors lien
                - There's no 45-day period – as long as the material is sitting there unincorporated, the person maintains a lien (against the goods). You **don't need to register this interest**
                - This also means that if you're a supplier and providing a material not incorporated/haven't been paid, you **still have the ability to pick that stuff up**
            - This is separate and apart from a builder's lien – so an unpaid vendor could have **2 liens**
            - The unpaid vendors lien will **exist no matter what**
- **2. Trust Remedy**
    - **Section 22(1):**
        - "Where
            - a) a certificate of substantial performance is issued, and
            - b) a payment is made by the owner after a certificate of substantial performance is issued

          the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.
        - Notes
            - Where CSP has been issued and payment is made by the owner after a CSP is issued, the person who receives the payment holds the money in trust for anyone that is owed money
                - E.g. If the contractor receives payment after the CSP has been issued, but it owed money to the subcontractors underneath it, the contractor holds that money in trust for the subcontractors
                - **NOTE: This runs independent of the lien provisions.** Protects subs if they have not been paid even if they failed to file lien within 45-day limitation.
            - This gives those people who need to be paid a trust claim, which is easier to enforce
                - Significance of having creditor debtor relationship (e.g. SUB-CON relationship) = unsecured in terms of ranking of priority
                - Transforms the creditor debtor relationship to a trustee-beneficiary relationship i.e. get priority
                - Time limit for registering lien, but no time limit within for posting CSP
    - **Section 22(2):**
        - When a person other than a person who received the payment referred to in subsection (1)
            - a) is entitled to the money held in trust under this section, and
            - b) receives payment pursuant to that trust, the person to the extent that the person owes money to other persons who provided work, or furnished materials for the work or materials in respect of which the payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons
        - Notes
            - Trust remedy goes down the chain.

- **Section 22(3):**
  - A person who is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to
    - a) the person for whom that person holds the money in trust, or
    - b) another person for the purposes of having it paid to the person for whom the money is held in trust.
  - Notes
    - Released from obligation when you pay the person down the chain the money

Mistakes

- **Section 37(1)** (the "curative provision")
  - A substantial compliance with [the registration requirements in 34] is sufficient and a lien shall not be invalidated by failure to comply with any requirements…unless, in the opinion of the court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.
  - Notes
    - If you tried to register a lien but did something wrong, you might try to rely on this provision to cure it. This depends though on the type of mistake that is paid – it doesn't apply to all mistakes
- **Late claims**
  - S. 42 – if a lien is not registered within the time limited by s. 41, the lien ceases to exist
  - Court cannot relieve from this error
- **Wrong lands**
  - General rule: Lien registered against the wrong title is dead
  - E.g. Getting the legal description wrong

Electric Furnace v Quality Rentals (1991 ABCA) – The Importance of the Requirement of Registration

- **Facts**
  - Section 25 sets out the various procedures that must be complied with to register a builder's lien. Section 27 states that the failure to comply with all of the requirements under section 25 will not invalidate the lien unless the errors would otherwise cause prejudice to a party. Quality rented scaffolding to a contractor.
  - Contractor used scaffolding to do work for the appellant Union Carbide, and the contractor did not make all required payments to Quality for the use of the scaffolding. Quality then filed a lien against what it thought was Union Carbide's lands where the scaffolding had been used - the lien documents were in order with one exception, they charged the wrong lands. Actual title to the lands was held by Electrical Furnace, Union Carbide was a mere lessee. Because Quality liened incorrectly, it did not get paid. Quality replies that the address for service for both Electrical Furnace and Union Carbide was the same address, so Union Carbide had effective notice of the lien and therefore is required to pay.
- **Issue**
  - Does Quality's mistake in charging the wrong lands leave it unable to enforce its lien?
- **Decision**
  - Section 27 will prevent a party from registering a lien if it fails to do within the 45-day time limit from the day the work was completed. The Builders Lien Act should be interpreted as a complete code fully defining their creation, registration, enforcement and lapse. In the Torrens land system, effective notice does not matter - all that matters is the quality of the registration. Registration did not take place here. The entire point of the Torrens system is to allow people to rely on certificates of title - in this case, the error charged the wrong lands, and therefore failed to live up to this basic expectation of the Torrens system. Electrical Furnace relied upon the Torrens system, and it cannot be faulted for doing so.
- **Ratio**
  - A major defect in registration that makes it impossible to rely on the certificate of title will mean that the registration cannot later be cured by "effective" notice of the builder's lien.
- **Notes**
  - "There is no doubt that the [Act was] structured to secure to the workman payment for his work by encumbering the lands he improved by that work…But the act is inhabited by another objective. It is that an owner is assured that his property will not be liened after the expiration of 45 days from the day that the work is completed and that the major lien fund can be paid out to those lien claimants who have registered during the time limited by the Act. The builder's lien is a statutory remedy supplementing the normal remedies available to a subcontractor and the Builders' Lien Act should be regarded as a code fully defining their creation, registration, enforcement or lapse. Lien claimants may have no contractual relationship with an owner, only his contractor. Indeed they may even be unknown to the owner until they

register. The importance of the requirement of registration must prevail so titles can be cleared and the flow of construction funds maintained."

The "Common Benefit Exception"

- *Wyo-Ben v Wilson Mud (1985):* Can a supplier claim a lien on a mineral interest in a parcel tapped by a well if the well-head is located on adjoining lands and the supplies were delivered to the adjoining lands?
    - Yes. Because the liened land had been improved by the work on the adjacent land (common benefit)

Mistakes (Continued)

- **Defective statement of lien**
- **Wrong interested liened**
- **Landlord and tenant**
    - *Empire Drywall v Kim* - Lien against fee simple interest rather than leasehold interest of tenant (lien against right property but wrong interest).
        - S. 37 (curative section) saved lien against leasehold interest.
            - If you've liened the wrong interest, you may have a chance to try to save it
- **Naming only 1 of 5 registered owners**
    - *Re Tarsands:* Registered Owners were 5 tenants in common. Lien only named 1 of the Registered Owners.
        - Lien saved because no prejudice to other 4 owners.
- **Wrong owner**
    - *Canadian Patent Scaffolding v Capton*: Romulus sold lands to the City of Leduc by Agreement for Sale, but R still showed as registered owner. Statement of Lien stated that Romulus was owner.
        - Held, lien valid as no prejudice to City of Leduc.
            - Leduc couldn't get out of a lien because of a technicality
- **Wrong lien claimant**
    - *482851 v Canadian Cabinet*: Lien was filed by agent who did not describe agency relationship in statement of lien.
        - Held, lien valid.
- **Wrong amount**
    - *Elcor Elevator*: There is no jurisdiction to amend a statement of lien to include a higher amount.
        - If you're within the 45 days, register a different lien with a different amount
        - If outside 45 days, you can't change the lien amount
        - Also, if you get paid a partial amount, you cannot change the lien

Wil-ton Construction v Amerada (1989 ABCA) – Wrong Procedure After Liening; Lien Cannot Be Revived by Amending the Statement of Claim If Time Was Up

- **Facts**
    - Wilton caused a builders lien to be registered against the mineral interests of Amerada. Wilton commenced an action to enforce its lien within the statutory time limit, but did not name Amerada at the time. Later, Wilton applied to amend the Statement of Claim to add the appellants as defendants to enforce its lien against their interests.
- **Issues**
    - Can the registered owners of a mineral interests be added as a party after the time limit for enforcing a lien on mineral interests has expired?
- **Decision**
    - When the lien was registered against the mineral interest, it attached to Amerada's interest in the minerals. The people who were not named were not sued within the limit of 180 days. Therefore, upon the expiry of the 180 days, the lien ceased to exist with respect to those claimants. Therefore, court has no jurisdiction to revive the lien.
- **Ratio**
    - The owner of an interest must properly be named in the Statement of Claim before 180 days expire, or the lien against those interests disappears
- **Notes**
    - "The appellants were not sued by Wilton within 180 days from the date the lien was registered against their mineral interests. The statement of claim made no mention of any interests in the minerals. I conclude that the lien ceased to

exist in respect of the appellants' interests upon the expiration of 180 days from the date the lien was registered against those interests."

- Can a lien be revived by amending the statement of claim?
  - No. "A builders' lien is a statutory right conferred by the Act. The Act is a code unto itself…There is nothing in the Act expressly or impliedly authorizing revival of a lien which has ceased to exist by reason of failure to commence an enforcement action in time."
  - Once it ceases to exist, the lien is dead

Koppang v Siddiqui **(1997 ABQB; Master Funduk) – The Rules Can Be Stringently Enforced**

- **Facts**
  - Statement of Claim and Certificate of Lis Pendens were filed within 180 days, but the lien claimant did not use the form of Certificate of Lis Pendens prescribed in the Regulations to the Act.
- **Held**:
  - Lien ceased to exist
- **Notes**
  - Shows how stringent the rules can be

Contracting Out of the Act?

- "Can we just agree to ignore all of these lien rules?"
- It is **not possible to contract out of the Act**:
  - **S. 5**: "An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void."

12. INSURANCE AND BONDING

5 Things to Know on Insurance: Background

Introduction

- Insurance is a contract of indemnity
  - One party has undertaken to make whole/pay/fix/restore another party when they suffer a loss
- 3 things you need to consider
  - Direction of indemnity
    - Who is giving the promise to fix
    - Is it reciprocal?
  - What is the scope/type of loss that the indemnity covers?
    - Is it broad, narrow?
  - What is the event that triggers the event to claim indemnity?

Example

- Imagine a construction project. Office tower is mostly built. Next to it is some materials that are going to be installed. A cyclist rides by the construction site.
- A worker is not careful, and pushes an object off the side of the tower, falling and crashes into the units next to the tower
- A piece of debris flies out of the rubble and hits the cyclist
- One of the bad things that's happened: The units have been destroyed
- Also, someone has been injured
- We have different insurance to cover these events

1. Types of Insurance

- Property Insurance
  - "Course of Construction", or "Builders' Risk" insurance
  - Purpose: To cover the insured, the owner of the property, and to protect them against losses to that property
  - There are all sorts of valuable property on a construction project: Materials, the building itself
  - Key: It's protecting the property – the things in the care of whoever has the insurance
- Liability Insurance
  - Protects you against liability as a result of your wrongful acts/negligence
  - People or things can be damaged as a result of someone's wrongful acts, and therefore suffer liability
  - To protect yourself, you get liability insurance
  - 2 kinds we'll see
    - General Liability ("CGL") – Commercial General Liability
      - Covers the insured against general liability for being sued
    - Design Liability ("E&O") – Errors and Omissions
      - Protects the insured who designs something (building, brackets, panels)

2. Risks, Limits, Exclusions

- There is no such thing as universal unlimited insurance. There are limits/boundaries
- Specified risk vs. All risk
  - The first thing a policy will have is specify the risks it will insure against
  - Can be narrow (specified risk) or general
- Policy limits
  - Maximum $ value it will pay out
- Express exclusions
  - Own work (from CGL)
    - Most liability policies will not protect someone from their own bad work and the cost of repairing their own bad work
  - Design (from CGL)
    - Often expressly excludes design errors
    - Separate kind of policy
  - Pollution
    - Loss due to pollution

3. Parties Insured

- Who is insured?
- Named insured
  - Person who is insured
- Unnamed insured
  - There may be people who are also covered who aren't explicitly named
  - People who are described by their class or membership
- Wrap-up policies
  - Sometimes, these 2 groups get grouped together in a larger insurance policy
  - There could be overlapping insurance policies between the owner and contractor, so it makes more sense to just have 1 policy of property insurance and 1 policy of liability insurance. This is a wrap-up policy

4. Notice and Claims

- When something bad happens, one or more people may want to make claim
- Timely notice
  - There will be strict requirements for notice, like time limits
- Time of occurrence
- Time of claim ("claims made")
- There are 2 ways in which insurance is structured

    - Some policies cover a claim so long as the event occurred during the term of insurance – time of occurrence policies
    - Other policies only cover claims which are made during the term of insurance – claims made policies
- By insured vs against insured
    - Insurance, whether property or liability, covers an insured, and only insured – it doesn't indemnify the 3rd party
        - Liability insurance is therefore not for the person who gets injured. That person doesn't have a claim against the insurer, only against the tortfeasor. The tortfeasor has a claim against the insurer to get the money

5. Subrogation

- Insurers' right to recover
    - When an insurer pays out insurance, they are out money.
    - Subrogation: Once they pay, the insurer can step into the shoes of the insured and assume all the rights of the insured
- But NOT against own insured
    - Insurer has right to recover, however they cannot subrogate against their own insured
- Waiver of subrogation
    - Each party waives their right to subrogate against other parties

Insurance

Construction Risks

- Parties will need to think "how are we going to mitigate these issues?"
    - Poor Design
    - Poor Construction
    - Cost Over-runs
    - Weather, Strikes, Concealed Conditions
    - Property Damage/Personal Injury (caused by workers, acts of God, vandals)
    - Insolvency (Contractor/Subs/Owner)

Address the Risk

- There are 2 ways to address the risks:
    - Insurance – a contract of indemnification
    - Bonds – different; a promise to pay a specified price

Insurance – Types of Insurance

- Property insurance (e.g. "Builders Risk")
- General Liability insurance (e.g. CGL)
- Professional or Design Liability (e.g. "Errors and Omissions")

Builders' Risk Policy

- **What is covered**
    - Often called "Course of Construction"
    - Property in the course of construction
    - All materials destined for the project
        - Shipped to construction project
    - Materials in transit to the project
    - Materials temporarily stored offsite
    - Includes fixed equipment (e.g. boilers)
- Note: This only covers losses to the **work itself/scope of the project**, and not anything existing
- **What is not covered**
    - Faulty workmanship

        - This is very important
    - Wear and tear, or gradual deterioration
    - Missing or mysterious disappearance of inventory
    - War
    - Loss due to a pollutant
    - Construction delay/impact
        - If there is a delay, this isn't a loss to the work itself
        - Not covered under the builders' risk policy
    - Design Error
        - Would be covered under an E&O policy if present

Ledcor v Northbridge (2016 SCC) – Builders' Risk Policy Construed Broadly; Faulty Workmanship Exclusion Clauses Limited to Cost of Re-Doing the Faulty Work, Not Other Related Damage

- **Facts**
    - Ledcor was general contractor for construction of EPCOR Tower in Edmonton. Ledcor retained subcontractor to clean the windows of the building while under construction. Subcontractor scratched windows and they needed to be replaced. Builders Risk policy contained a standard exclusion for "the cost of making good faulty workmanship" **but** this exclusion was subject to an exception for "physical damage not otherwise excluded by this policy … in which event the policy shall insure such resulting damage". Owner and Ledcor made a claim under the builders' risk insurance policy. Insurers denied coverage based on "costs of making good faulty workmanship" exclusion
    - Trial Judge (exclusion doesn't apply)
        - Found that the scratches were faulty workmanship
        - However, applied contra proferentem rule against insurers and found that exclusion did not apply
            - The "making good" wording in the exclusion was ambiguous
    - Court of Appeal (exclusion applies)
        - Overturned Trial decision and found that the scratches were excluded from coverage as the "damage was physically or systematically connected to the very work the contractor had performed"
        - Held that the damage that occurred was to the very thing that was the subject of the faulty workmanship, and therefore the cost to replace the windows was excluded
- **Issues**
    - Was the window cleaning part of initial construction (workmanship) or was it an action after construction of the windows was complete?
- **Decision**
    - The wording of the exclusion clause was ambiguous, so the court looked to the policy and purpose of the Builders Risk policy, which was to give broad coverage to protect against damage to the project during construction but not caused by the faulty workmanship itself.
    - The subcontractors work was only cleaning the windows, and not installation. The exclusion clause should not apply.
- **Ratio**
    - Builders Risk Policies should be broadly construed. Ambiguous exclusion clauses should not apply unless the damage is truly part of the direct workmanship, or according to whatever language the contract includes
- **Notes**
    - SCC overturned CA and rejected the CA's "physical and systemic connectedness" test
    - Found that the exclusion clause was limited to the cost of re-doing the faulty work (i.e. re-cleaning the windows)
    - Both the insured's interpretation and the insurer's interpretation of the 'faulty workmanship' exclusion and the 'resulting damage' exception were plausible on the wording of the policy, and therefore the exclusion was ambiguous
    - The purpose of builder's risk policies was to:
        - Provide broad coverage for projects while under construction,
        - Broad coverage for all those involved in the project

      in order to avoid disputes over responsibility for repair or replacement of components of the project
    - To exclude coverage for the damage resulting to the part of the project being worked on would undermine the purpose of builder's risk policies and would be contrary to the reasonable expectations of the parties
    - The standard 'faulty workmanship' exclusions in builders risk policies will only operate to exclude the cost of re-doing the faulty work, not other related damage
    - Had the subcontractor's scope of work included installing the windows in good condition, as opposed to merely cleaning them, damage to the windows themselves during the installation process would have been excluded

General Liability Insurance/CGLs

- **Covers liability for**
  - Injury to non-employees (3rd parties)
    - [Note: Employees on the other hand are covered under the WCB]
  - Causing damage to property of others (including loss of use)
  - Some exclusions apply
- **What is not covered**
  - Professional Services (e.g. design – architects, consultants)
  - Pollution Incidents
  - Injury arising from automobiles
    - We already have a good individual system for automobile system, so there's no good reason to have it also under construction CGL

Wrap-Up Liability Policy

- Project policy that provides liability policy for Owner, GC, SC's and Design Consultants
- Ensures that all parties are insured (reduces prejudice), reduces overall premiums (saves money) and includes waiver of subrogation which avoids lawsuits

Professional Liability Policy/E&Os

- Commonly called "Errors and Omissions" or "E and O" insurance.
- Covers liability for professional services (not the actual construction work):
  - Design
  - Inspection
  - Consulting
- This pertains to engineers and architects - protects them from liability regarding errors and omissions

Who Obtains Insurance?

- Owner, contractor, or subcontractor?
  - Depends on the contract
- See CCDC 2 – GC 11

Bonds

Bonds vs Insurance

- Parties
  - Insurance – 2 parties → Insurer/Insured
  - Bonds – 3 parties → Principal/Obligee/Surety
- Financial Difference
  - **Insurance** funded by premium (i.e. insurer needs pool of money to fund risks)
  - **Bonds** not funded by premium – surety does not expect to lose money (contract of guarantee – looks to principal and contract of indemnity to recoup payout)
    - Principal is the one who pay the surety in the first instance, but this can be passed on
- Sureties issue bonds based upon financial viability of contractor (unlike insurers who mostly base decisions on risk):
  - 1) Technical qualifications
  - 2) Adequacy of equipment
  - 3) Financial capacity in working capital and net worth
  - 4) Strength of Indemnity

Standard Bonds

- Based on a contract of **suretyship.** A bond, unlike a contract of insurance, is not a promise to indemnify in the event of a specified loss. It is a promise to pay in the event of a specified occurrence (broader than a loss).

- **Bond terminology**
  - **Principal**
    - Party that is bonded
    - Party that gets the bond
    - The party whose participation and obligations are being protected by the bond
  - **Obligee**
    - Party to whom the bond is owed
    - Could be owner/general contractor/subcontractor
  - **Surety**
    - One standing behind the bond
    - Party who makes the promise under the Bond; generally a bonding company, which can be a bank or insurance company
    - Like an "insurer"
  - **Consent of surety**
    - Document that a surety issues that consents to issue a bond if the contract is entered into (in anticipation of surety)
    - E.g. Something that an owner will ask for when tendering a project. Wants to know that contractor could get a bond if required to do so
      - Letter from the surety: If X gets the job, we'll issue them a bond
- **How it works - overview**
  - If you (the principal) aren't able to fulfill the terms and conditions of your contract, a surety can make sure that your client isn't left in the lurch; the remaining and consequential costs of the project will be paid on your behalf, so the financial loss doesn't fall on your client.
  - In the event of such a default, the surety comes to the rescue with two types of bonds: first, they employ a Performance Bond to complete the work you had started, and then a Labour and Material Payment Bond is used to pay the subcontractors who had been hired. Although these bonds take care of your costs, you're not out of the woods yet – unlike insurance, you'll eventually have to pay back the entire amount of the bond to the surety provide
- **Forms of bonds**
  - **Bid Bond:** Owners protect themselves in a tendering process from the eventuality that the winning bidder of Contract A decides to not enter into Contract B. This indemnifies the owner for the breach of contract of Contract A. The problem is, the bidding company may not have any assets to realize with
    - As a result, most tendering processes require contractors to post a Bid Bond. If the contractor fails to enter into Contract B, then the Bid Bond is forfeit to the owner
    - Advantage to bidder: Doesn't have to tie up as much of his own money
  - **Performance Bond:** Covering/protecting/ensuring the performance of the work by the general contractor.
    - If the contractor does not perform under the contract, the bonding company promises the owner (obligee) the to either perform the contract/get someone else to step in/pay out the contract
    - I.e. bonding to ensure performance of the work (owner gets this bond – principal; obligee)
    - The owner can require the contractor to post a Performance Bond at the beginning of the work, saying that, if the Contractor defaults on the contract, the surety will guarantee the performance of the obligations of that contractor up to a set maximum (typically set as a percentage of the overall contract, usually around 50% of its total value).
      - Contractor gives to a person above them; that person is the obligee
    - Upon the contractor defaulting, the owner can give notice to the surety, and the surety will assist the owner in getting the work completed. The owner must pay the remaining value of the contract to the new contractor, but if it costs more to complete the contract as a result of the original contractor pulling out, that additional amount will be covered by the surety
  - **Labour and Material Payment Bond:** Prevents against someone going broke and not paying for the work. Bonding co money owing to suppliers and sub contractors down the chain (contractor gets this bond – principal; obligee – owner)
    - Obligee is owner because it is the owner that tells the contractor to get the bond and because subs/suppliers may not be known when the bond is issued therefore cannot be named
    - Owner acts as a trustee under this bond for third party claimants – holds the obligations for payment in trust
    - Created in case law to get around the idea of privity
    - Big difference between this and the Performance Bond:
      - Performance Bond is a 3-party contract between Principal, Surety and Obligee
      - L&M Bond is intended to pay out to third-party Claimants (subcontractors). These parties aren't actually signatories to the contract, so the Obligee acts as trustee for the Claimants
      - Important: For some L&M bonds (like our example), a Claimant is defined as a party with a direct contract with the Principal. "Sub-subs" can't make claims on the bond
      - In other cases, the bond can more broadly define a Claimant
      - A claimant technically has to wait 90 days before claiming under an L&M bond, but it's good practice to claim sooner than that

        - **Notice**: Claimant must give notice to Obligee, Principal and Surety in order to claim under the bond
            - Notice must be by registered mail
            - Notice must be given within 120 days of the earlier of
                - a) the date when the Claimant last did work under its contract with the Principal, or
                - b) the expiry of the term of the contract
            - Note: Any material change in the contract between the Principal and Obligee shall not prejudice a Claimant's rights under the bond
    - Every bond is different – read the contract!
    - Unlike insurance, sureties can go after anyone to get their money back once they pay out, **including** the principal
- **Bond structure**
    - Will set out an unconditional promise made by the Principal and the Surety to the Obligee to pay the Obligee if certain specified eventualities transpire
    - The structure usually says that the promise to pay is null and void, **unless** certain obligations are met
        - Essentially, if the Principal does everything it is supposed to do, then the Surety cannot be sued to pay. It is only if the Principal fails to perform its obligations that the Surety's liability is engaged
    - The Bond will set out what the Surety will do
        - Whenever the Principal shall be, and declared by the Obligee to be, in default under the contract
            - Must be ACTUALLY in default, and must be declared by the OBLIGEE to be in default (both must be met separately)
        - The Obligee must also perform the Obligee's obligations (otherwise, cannot rely on the Surety)
        - These are conditions precedent that must be fulfilled
    - The Surety may then have several options for what they can do in the event that the Principal defaults on an obligation owed to the Obligee
        - The Surety has the exclusive option on which one to select - does not matter what the Obligee wants
        - I.e. remedy the default themselves (fix the specific problem that put the contract into default - contractor then proceeds to complete the work under the contract's normal terms and conditions), complete the Contract in accordance with its terms and conditions, obtain bids for the completion of the contract, pay the Obligee the lesser of (1) the Bond Amount, or (2) the Obligee's proposed cost of completion less the balance of the Contract Price
    - The Bond will also contain a limitations clause - claims against the Bond must be made within 2 years of the Certificate of Substantial Performance being completed
    - All sureties will include a statement that the Surety shall not be liable for any amount greater than the Bond Amount
    - Remember, bonds are three party contracts. Consideration must bind all three.
        - Surety makes promise to Principal to pay out - that is consideration
        - The Principal makes promise to Surety (pays for the bond), and makes promise to the Obligee (enters into a contract with the Obligee)
        - But what about as between the Surety and the Obligee?
            - No consideration passed from the Obligee to the Surety. The document is signed under seal between the Surety and the Obligee, which is legally binding.
                - MUST produce the original copy of the bonding document, otherwise, nothing you can do.
                - **Old English Common Law. Crazy Business.**
    - For Labour and Material Payment Bonds, trust relationships are established as between the Obligee and the workers that are entitled to payment under the bond (this gets around the privity of contract problem)
        - Define the employees as "Claimants" - May limit who can apply (for example, specify that it is only for employees that have a direct relationship with the Principal, so would not extend to employees of subcontractors).
        - Will also often indicate that claims cannot be made on the bond until payments to employees are in default for more than a specified period of time (i.e. 90 days)

Bond Defences

- There are different reasons why a bonding company will refuse to pay out a claim
- **Failure to comply with strict terms of the bond**
    - Principal not declared in default
    - Obligee fails to provide notice to Owner
    - Obligee completing work on its own; and
    - Obligee failing to sue on time.
- **Material prejudice**
    - Significant increase in work and contract price
    - Early payment
    - Changes in work which involve contractors doing work that they are not experienced; and

- Obligee failing to sue on time.

Citadel General v Johns-Manville (1983 SCC) – A Surety Cannot Escape Liability on the Bond Because of a Minor Violation of the Contract's Conditions

- **Facts**
  - Last materials were shipped on October 28, 1977. Johns-Manville (sub, obligee) supplied a pipe to John Carlo (contractor, principal). Johns-Manville was owed $80,068.16 from John Carlo
    - L&M Payment Bond stipulated that three formalities had to be met: (1) written notice given within time limits to Principal, Surety, and Obligee, (2) notice had to be served in a prescribed manner (registered mail or process server), (3) notice had to be given within 120 days of the date the work is completed.
  - Before commencing proceedings,
    - Johns-Manville gave notice to the CAN Surety Company by *registered mail* within 120 days; and
    - Provided notice to the Minister of the Environment within 120 days but by *ordinary mail*; and
    - Did not provide written notice to the principal (however, the Court found that the principal had in fact notice of the claim).
  - The Minister of the Environment had held back $81,264.12 pursuant to the Ontario Mechanics Lien Act which sum was paid into Court dated February 26, 1979 and which has been distributed.
    - Johns-Manville had received notice of these proceedings but did not pursue this matter and did not participate in the distribution of the holdback monies
- **Issue**
  - Is it necessary for a claimant to strictly comply with all notice requirements to be entitled to claim from a bond?
- **Decision**
  - The surety cannot escape the liability in the bond merely because of a minor violation of the contract's conditions. The object of the notice provisions in the bond was fully achieved within the time limit imposed, and the appellant surety company suffered no prejudice. Failing to send notice via registered mail is too technical a requirement to relieve the surety of obligations under the bond.
  - What about the lien?
    - To impose on a claimant an implied obligation to exhaust all other remedies before claiming under the bond would defeat the very purpose that the bond was entered into.
- **Ratio**
  - Minor deviations from notice requirements will not invalidate entitlement to claim under a bond held by a surety company for unpaid work in construction projects.
- **Notes**
  - Issue 1: Right to sue?
    - Yes – beneficiary of a trust
  - Issue 2: Failure to provide notice?
    - A type of notice had been provided to all of the parties and non had suffered prejudice
    - "Where, as here, the object of the notice provisions in the bond has been fully achieved within the time-limits imposed and where there has been no prejudice whatever to the appellant, the whole purpose for the obtaining of the bond would be defeated if the appellant were to be discharged."
  - Issue 3: Must claimant (sub) pursue mechanics' lien first?
    - "To impose on a claimant an implied obligation to exhaust all other remedies before claiming under the bond would be to defeat the very purpose for which the bond was entered into."

Fraser Gate Apartments v Western Surety (1998 BCCA) – Surety Not Required to Repay Money Since Owner Completed Rest of Work; Surety Must Have Opportunity at Outset to Determine What Must Be Done; However, Performance Bond Not Null and Void for All Matters

- **Facts**
  - Apartment project – 45 units. Work Substantially Complete. Owner discovers deficiencies; contractor does not correct. Owner notifies contractor and surety that it intends to fix and claim under performance bond. Surety warned that bond would be void if Owner did fixes, but the Owner did them anyways.
- **Issue**
  - **(1)** Did Owner's completion of work result in Surety not being required to repay money spent pursuant to terms of Performance Bond? Yes.
  - **(2)** Did Owner's completion of work render Performance Bond null and void for all matters, including warranty work? No.

- **Decision**
  - At trial, the Court held that, although the company remedied the deficiencies in the work, presumably bringing it to Total Completion, this building may have serious flaws in its construction which may give rise to claims by the appellant against the contractor under the warranty terms of the contract. The performance bond can be claimed against.
  - Court of Appeal reverses this. Equity has developed two related doctrines governing how sureties must be paid out in construction contracts. First, sureties should not be liable for obligations that they did not, in fact, guarantee. Second, the surety was entitled to have the obligee retain all the "weapons" that the obligee had to obtain performance from the principal so that, if necessary, the surety could step into the obligee's shoes and do all they could possibly do to reduce the surety's liability under the bond. Importantly, sureties are a form of insurance where the principle of *uberimmae fidei* governs.
  - If a company does remedial work, it cannot later call on the surety to pay for the work that was done and remedy other defects. The surety should have the opportunity at the outset to determine what must be done. Likewise, a surety company cannot claim to have not received notice if the owner of a building repairs what appears to be a minor structural defect that later ends up being the outward manifestation of a much larger problem. The warranty obligations will continue under the performance bond – that obligation has not been prejudiced by the actions taken by the Obligee.
- **Ratio**
  - If remedial work is required, the surety company must be notified immediately and have an opportunity to assess the situation for itself before repairs are conducted.
- **Notes**
  - "… equity developed two discrete, albeit related, doctrines: first, that the surety should not be liable for an obligation he did not, in fact, guarantee; and, secondly, the surety was entitled to have the obligee retain all the weapons, so to speak, the obligee had to obtain performance from the principal so that, if necessary, the surety could step into the obligee's shoes and do all that could possibly be done to reduce the surety's liability on the bond. In that respect, the rights of sureties resemble the rights of insurers although a performance bond is not a form of insurance and is therefore not a contract *uberrimae fidei*."
  - "It is easy enough to postulate a case in which repairs done by the obligee will prejudice the surety. If, for instance, the foundation of a building under construction is deficient, the surety will want its own engineers to access what must be done to ensure proper performance. For the obligee to do remedial work and later call on the surety not only to pay for such work but also, perhaps, to remedy other defects to which the original faulty work had contributed, would be prejudicial."
- Q: Did Owner's completion of work result in Surety not being required to repay money spent pursuant to terms of Performance Bond?
  - A: Yes.
- Q: Did Owner's completion of work render Performance Bond null and void for all matters, including warranty work?
  - A: No. The owner's mistake in performing the work itself voided the bond in regards to that part of the contract, but didn't void the bond for all matters

Paul D'Aoust v Markel **(1999 ONCA) – Delivery of the Bond is Required in Order to Make a Claim Under it**

- **Facts**
  - Contractor (principal) obtained a bond, but never delivered it to the Obligee. Obligee knew that a bond was required under its contract with the contractor, and claimed under the bond after the contractor defaulted
  - Surety said, "show us a copy of the bond." Owner/obligee was unable to do so, as it had never gotten the bond. Surety denied payment under the bond.
- **Issues**
  - Did Principal debtor **execute** the bond?
  - Must a bond be **delivered**?
- **Decision**
  - Common law requires delivery of the bond, and there is nothing in the signed contract to indicate that the parties did not intend to apply this law. Therefore, delivery of the bond is a prerequisite to enforce the surety company's obligations under the bond. Since this was not done, the bond cannot be claimed against.
  - A bond is simply a deed that is signed, sealed and delivered whereby one party undertakes to pay a specified sum to another, either immediately or at a future date. Remember, it is signed, sealed AND delivered - all three must be legally met via the common law.
- **Ratio**
  - Delivery of a bond is required (unless this is abrogated by contract) in order to make claims against the bond company.
- **Notes**

- Execution
  - "A bond is simply a deed (a deed being a document in writing on paper which is signed, sealed, and delivered …) whereby one person undertakes to pay a specified sum of money to another, either immediately or at a future date."
- Delivery
  - "… the common law required delivery of the bond and there is nothing in the contractual relationships to indicate that the parties did not intend this law to apply. To the contrary, the various agreements all contemplated delivery of the bond. The delivery requirement is also consistent with the reasonable expectations of the parties and industry practice generally."

Whitby Landmark v Mollenhauer **(2003 ONCA) – The Performance Bond Covered Financial Obligations in this Contract; Surety Must Be Given Ample Notice of a Potential Claim**

- **Facts**
  - Whitby (owner) hired Mollenhauer (contractor). Mollenhauer obtained performance bond from Zurich. Mollenhauer went insolvent but owed Whitby money from costs-savings under contract. Whitby did not immediately declare Mollenhauer in default or call on bond. Whitby later claimed under performance bond, for payment of the remaining savings.
    - The surety claimed that this type of relief was not included under the obligations of the bond, which dealt only with the completion of construction work.
- **Issue**
  - Does the bond cover the contractual entitlement to 75% of contract savings?
- **Decision**
  - In this case, yes, the bond covers financial terms of the contract between the parties. It is not limited to construction obligations between them. (That is, the bond protected "performance obligations of the contract", which was read to include financial obligations)
  - However, the owner's failure to declare the contractor in default in a timely fashion prejudiced the surety. The surety was not given timely opportunity to take advantage of whatever leverage may have been available to it with contractor. The surety could, with timely notice, at least have had the opportunity to call on the contractor to pay the developer while the contractor still had funds from the holdback. Since it was not notified until after the holdback funds had been paid out, it did not have an avenue to limit its liability, which is prejudicial.
- **Ratio**
  - The surety company must be given ample notice of a potential claim so that the surety company can take steps to limit its liability.
- **Notes**
  - 1. Does performance bond cover financial obligations?
    - A: Yes – depending on terms of bond and contract.
  - 2. Did Whitby breach bond by not declaring Mollenhauer in default and claiming under bond right away?
    - A: Yes – prejudiced Zurich.

Lac La Ronge Indian Band v Dallas Contracting **(2004 SKCA) – Surety Not Liable for Anything Until They are Notified of the Breach; Western Not Liable for Failing to Act Promptly (Since Default Declared too Late, Liquidated Damages, or Extra Costs Incurred**

- **Facts**
  - Dallas (contractor) engaged by Indian band (owner) for construction project and surety granted a performance bond for that project. The contractor did not complete the project by the specified date. The band refused an extension, and had other contractors complete the project instead; remaining funds weren't sufficient though. The surety company refused to pay for the work done by other contractors, and the band argues that the surety company had consistently taken the general contractor's side in the dispute to their detriment.
  - Contract required Dallas to pay liquidated damages
  - Lac La Ronge sued Dallas for damages for breach of contract
  - Lac La Ronge sued Western for:
    - Failing to act promptly
    - Failing to pay liquidated damages
    - Failing to pay extra cost of completion
  - A trial, Dallas found liable. They abandoned their appeal

- **Issue**
  - Was the surety company in breach of its performance bond?
- **Decision**
  - The relationship between the surety, the band, and the general contractor was such that it would have been unreasonable for the band to assume responsibility for supervising the completion of a project that continued to involve the general contractor as the sole contracting party. The surety's obligations under the bond were conditional upon the principal being in default and having been declared to be so. The general contractor was not declared to be in default until October 29. Prior to then, the surety had no obligations under the contract. By the time the contractor was declared to be in default, no work could be done on the project due to the onset of winter. The surety company did not cause or increase the losses to the band.
  - Damages are awarded based on what is required to remedy the breach of contract. The surety had two means to fulfil its obligations – it could have completed the contract itself, or find someone else to complete it. The bond did not permit the band to deduct the amount of the liquidated damages from the amount available to pay the contract price. The surety was not liable for the general contractor's obligation to pay liquidated damages (note difference with ***Whitby***).
- **Ratio**
  - Must look at when the surety company was notified of the breach – until then, it cannot be liable for anything that is done. Therefore, the surety company will not be liable for remedial work conducted before it is notified.
- **Notes**
  - **Western was not liable for failing to act promptly:** "In order for a surety to breach its obligation to act promptly, there must be some steps that it can take to remedy the default and complete the contract or obtain a bid for completing the contract." In this case, the default was declared in October, and by then there wasn't anything Western could do to get the lagoon completed because the ground was frozen
  - **Western was not liable for liquidated damages**: "The wording of the bond limits the surety's liability to the amount established [for completing the work], therefore the contract would be inconsistent with the bond to impose the obligation on the surety to pay liquidated damages."
  - **Western was not liable for extra costs incurred:** "A surety's obligation can be no greater than if it had completed the contract or had found a responsible bidder to complete it. If either of these options had occurred, Western would not be liable for the band for the extra costs incurred by it."

Falk Bros Industries v Elance Steel **(1989 SCC) – Failure to Give Notice Within the Period of Time was Imperfect Compliance; Therefore, Relief from Forfeiture Can Be Granted**

- **Facts**
  - Respondent claimed on a debt owed by Falk together with interest under a bond issued by the Canadian Surety Company. Notice of the claim was given 28 days after the expiry of the 120-day period for notice set out in the bond. Chambers judge found that the Insurance Act (s. 109) empowered him to grant relief against forfeiture because of this breach of the bond's time limitations.
- **Issues**
  - Is "relief against forfeiture" a remedy available in surety contracts?
- **Decision**
  - Recall that relief from forfeiture is a remedy available for imperfect compliance with conditions that may not allow the other party to terminate the contract. The Insurance Act extends the equitable relief against forfeiture doctrine to contractual as well as statutory conditions. The failure to give notice within the time prescribed by the bond constituted "imperfect compliance" within the meaning of the statute. It is a less serious breach than failure to bring an action within a stipulated time. Therefore, relief from forfeiture can be granted in respect of delayed notices of claims.
- **Ratio**
  - The relief from forfeiture provision of the Insurance Act is available for technical breaches of notice periods defined in surety contracts.
    - RFF = legal excuse from the strict application of penalties or forfeitures which would otherwise operate against a party
- **Notes**
  - Is section 109 confined to statutory conditions as opposed to contractual conditions?
    - No – s. 109 – remedial section – interpret broadly.
  - Is failure to give timely notice imperfect compliance or non-compliance?
    - Imperfect compliance – relief available.

Valard Construction v Bird (2018 SCC) – Obligee/Trustee Under an L&M Bond May Have Duty to Tell Beneficiaries of the Existence of the Bond in Certain Situations; In Industries Where Bonds are Not Typically Obtained

- **Facts**
  - Bird (contractor) subcontracted to Langford (subcontractor). Langford obtained L&M bond from GCNA. Langford sub-subcontracted to Valard. Langford didn't pay Valard. Valard learned of L&M bond late, and made a claim. GCNA denied claim as out of time.
    - Valard sues Bird – Bird knew about L&M bond and didn't tell sub contractors. Argues Bird as trustee had obligation to tell them about bonds
- **Issue**
  - Does an obligee/trustee (Bird) under an L&M bond have a duty to tell beneficiaries of the existence of bond?
- **Decision**
  - QB/CA:
    - No. (Not if they don't ask.)
  - **SCC**:
    - Yes, in certain situations (i.e. If the project is in an industry where bonds are not typically obtained). Here, Bird should have notified Valard since oil sands projects typically don't have bonds….
- **Ratio**
  - Obligee is obliged to inform beneficiaries about an L&M bond, if the project is in an industry where bonds aren't typically obtained.
- **Note**
  - This was an oil sands project. It is somewhat odd to suggest that bonds are not typical in oil sands projects.