

LAW 502
CONSTRUCTION
Generic (Mavko)

CONSTRUCTION LAW

Course Outline:

- Contracts – focus on remedies, warranty issues, payment issues
- Tort – negligence
- Tendering
- Standard form of Ks (owner/contractor, contractor/sub, owner/architect/engineer)
- Differing site conditions
- Defects and deficiencies
- Changes in work
- Bonding and insurance
- Occupational health and safety

TERMINOLOGY

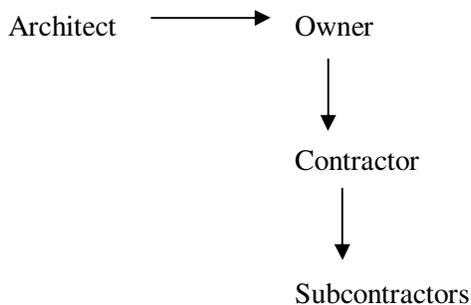
Construction sectors:

- **Residential** sector - homes
- **Commercial** sector – high-rises, commercial buildings etc. Includes **institutional** sector – schools, hospitals, municipal buildings, **MASH** sector (government-funded entities – relevant for tender and payment).
- **Industrial** sector – factories, process plants.
- **Civil** sector – dealing with moving earth, things on the ground, earth, roads, dams, sewers, basic infrastructure. Heavy civil = bridge building.
- ICI – Institutional, civil and industrial sector.

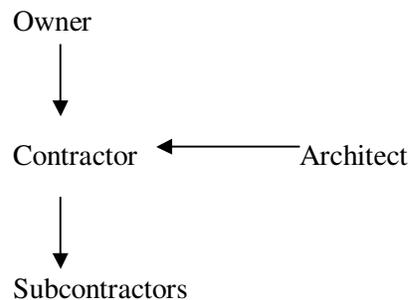
Design Bid Build process

- Owner hires architect to design project. Once project is designed the owner hires a contractor (through the tender or bidding process) who bases their price on plans that have been designed. Once K is signed the contractor carries out the work.
- Most construction is carried out under this process because of the certainty that it provides.
- Design-build process is slightly different – general contractor takes on responsibility of dealing with architect rather than the owner doing it.
- Also: design-build-finance, design-build-finance-operate.

Design-Bid-Build



Design-Build



THE LAW OF TENDERS

THE POSITION OF CONTRACTORS

- Public tenders – most public bodies are required to use this formal process, but most private bodies do it anyways.
- Tender package contains:
 - (a) **Complete design**
 - (b) **Invitation to tender** - rules of tender. This may include date, time, place, form of submission, also may include an opportunity to discuss or ask questions about the terms of the K – usually at a meeting. This is the only opportunity for a contractor to ask questions etc.
 - (c) **Form of contract** - if you win the tender, what the K will look like.
 - (d) **Bid security** - deposit required - usually it is refundable if your tender is not chosen – it is there in the case that the person who is chosen can't or won't perform the K). Can be bid bond, certified cheques, letter of credit, cash. For example, 10% of K price. Allows owner to claim against a contractor right away and then award the K to the next low bidder.
- Invitation to tender often includes a clause that says that if you put in a tender it is irrevocable for 60 days.
- CCDC – Canadian Construction Documents Committee – organization made up of architects, engineers, public bodies etc. They create standard form construction documents to be used in the industry. These Ks are generally balanced – not biased one way or the other. This may be good or bad, depending on who your client is.
- Common tendering issues:
 - What happens if one of the tenders is wrong/mistaken? (mistake in law). When can they pull their tenders? Can they be held to that tender?
 - How can an owner make a bid irrevocable?
 - When can an owner accept a mistaken tender that they have been told about?
 - What is the K analysis when an owner puts out a tender package – is that an offer or an invitation to treat?

The Law before Ron Engineering

McMaster University v. Wiltchar (1971 Ontario) – just before Ron Engineering.

- Project was health sciences centre. 5 bidders submitted tenders. Rules for tender said that there could be a wage escalation clause included to account for major inflation at the time. 4 of the bidders included the clause, the 5th bidder forgot. When tender opened up the 5th bidder figured out the mistake, then wanted to withdraw. Owner said no - it wasn't included in the tender.
- Court said that the owner was wrong – you can not accept a tender that you have been told is mistaken.
- Analysis was that tender package was not an offer but an invitation to treat. Low bid was an offer which was revoked before it was accepted, but only because it was a mistaken bid.

Belle River Community v. Kaufmann (1978 Ont. CA) – also before Ron.

- Project was an arena. Low bid was \$641,000. Second low was \$656,000. Low bid actually meant to bid \$70,000 higher. Low bidder wanted to withdraw b/c of error.
- Court again said that tender could not be accepted because of the mistake.
- Before Ron the rule was that a tender was an offer, not an acceptance of an offer.
- This is still the law in England.

R. in Right of Ontario v. Ron Engineering and Construction (1981 SCC)

- Facts: Ron (a contractor) submitted a tender to build a project for a price of \$2.7 mil. In accordance with the Information for Tenders, Ron also submitted as a tender deposit for \$150k. In addition, the Information for Tenders specified that should a bid be retracted the commission may choose to retain the deposit.
- Tenders for the project closed at 3:00 pm on July 4. Upon learning that their tender was \$632k lower than the next lowest bid, the contractor sent a fax requesting to withdraw the original tender without

- penalty, citing an error in estimate – they had forgot to include their own costs and profit in the amount of \$750k.
- In place of the original bid, Ron submitted a revised figure of \$3.5 mil.
 - When Ron declined to enter the agreement for the original amount, the city retained the deposit and accepted another tender. Ron brought an action to recover the deposit. City counter claimed for damages caused by refusal to carry out the K.
 - Analysis: Generally, offers are irrevocable at any time before acceptance because there is no consideration – once there is consideration (ie. money), or a bid is issued under seal, it is irrevocable.
 - This case has very convoluted reasoning to explain this.
 - Here tenderer tried to withdraw when they realized that they had made a big mistake. Can they withdraw their tender?
 - Ron is arguing that their offer has not yet been accepted – therefore they can withdraw. City is saying that they can't – once you have submitted your tender and the deadline passes you have entered into Contract A and can not withdraw.
 - Note that to trigger bid bond you have to send the bidder the contract and tell them that they have to sign it within a specified duration of time. If you don't do this you won't be able to make a claim on the security.
 - Court says:
 - o This is not a case of a mistake that is patent on its face – it is not immediately clear that there was a mistake. If it were, that bid could not be accepted. You can not accept a bid that you know is mistaken.
 - o There was no mistake in the sense that Ron intended to submit the bid as it was – not a case where they submitted something other than they intended to submit – here they made an error in calculation but submitted the bid that they intended to submit (unlike *Wilchar* case in which there was a page missing).
 - o Contract A/Contract B analysis –
 - **Contract A** – offer is the call for tenders. The terms of the K are those set out in the rules for tender. The offer is accepted by submitting a tender with the bid security (consideration) and the deadline passes. Where there are 5 bidders there will be 5 K As. The primary term of Contract A is the irrevocability of the offer.
 - **Contract B** – once a tender is selected, that bidder enters into the construction contract. Terms are those laid out in the form of contract (part of tender package). Contract B is formed when it is signed – not when the tender is accepted. In this case Contract B was never formed – Ron is refusing to enter into that K.
 - Held: Bidder is liable for breach.
 - Ratio: An invitation for tenders is a unilateral offer which is accepted when a contractor submits a bid (**Contract A**) and the deadline for tenders passes. This contract is an agreement by the parties to enter into a subsequent contract (**Contract B**). A bid may be withdrawn at any time before the deadline. Once the deadline has passed, however, the contract is binding and the parties are bound by the terms and conditions of the call for tenders.
 - SCC didn't deal with quantum of damages – only issue here was the bid security of \$150k, not the actual \$650k difference between the bids – but see later cases.

What if tender package fails to say that offers are irrevocable?

What are the rules that govern how the owner must make his choice?

Problems with Ron Engineering

- **Errors** - when is an error patently obvious?
 - Where the mistake is patent on the fact of the bid, there is still a contract A. The issue is that where the mistake is obvious, Contract B can not be formed.
 - This is easy where there are pages missing, etc, but less clear when there are clerical errors – at what point is a bid so low that it is obvious on the face that something is wrong?

- Graesser says that a 10% spread is common and probably wouldn't raise any eyebrows. There are lots of reasons that someone would submit a low bid (ie. just to keep working, to take on a big break project etc). Graesser's own personal "smell test" is 20% - but no rule.
- Sometimes an owner may want to make a phone call to a bidder as a courtesy and allow them to withdraw – but they can not re-submit a tender.
- **Unconscionability** – accepting the bid with a known mistake was not held to be unconscionable in Ron Engineering – but case did not discuss when conduct would be unconscionable and therefore allow a bidder to get out of entering into contract B.
- **Damages** – what happens if the bidder refused to enter into Contract B? In Ron Engineering the damages were the amount of the bid security. In subsequent cases damages for the difference in price / loss of profits were awarded. Awarding damages for loss of profits can be difficult – can be hard to quantify – have to prove that you would have made the profit but for the breach (see *MJB* for example – company who performed the work actually lost money).

Calgary v. Northern Construction (1986 Alta. C.A.)

- Northern submitted a tender for \$9.3 mil in response to city's call for tenders. The form of tender specified that all tenders would be irrevocable once the tenders had been opened until a K had been signed with the successful tenderer.
- D's bid was the lowest, but before being chosen the D discovered a clerical error of \$181k and disclosed it to the city – numbers had been transposed.
- Northern's revised bid was still the lowest - City tried to hold Northern to the bid, Northern refused to perform. City awarded the K to the next lowest bidder and is suing for the difference in the price of the two bids.
- Trial judge held that the city could not accept the bid because it was aware of a mistake going to a fundamental term of the contract.
- Here, C.A. disagrees.
- Same reasoning as Ron Engineering – there is no mistake because Northern submitted the bid it intended to submit.
- Northern's revised bid was still the lowest bid – they argued that the city had a duty to mitigate damages and should have accepted the revised tender instead of the next lowest. Court disagrees, saying that this would turn the tender process into an auction process instead - this would "allow any contractor who made a low bid to refuse to K but to offer to do the work for less than the second low bidder and then argue the city must accept such an offer in mitigation of damages".
- Difference between this case and Ron Engineering is that here the P is asking for damages in addition to the deposit.
- SCC dismissed a further appeal saying that this case was not distinguishable from Ron Engineering.

Gloge Heating v. Northern (1986 ABCA)

- **Facts:** Project was Calgary airport. Feds contracted with Northern – Northern subcontracted to Gloge (mechanical). General subcontractor needs the subcontractors to guarantee their numbers for the main tender.
- Gloge waited until 20 minutes before to submit their tender to Northern. Bid was 20% less than everyone else – Northern said that they asked to make sure – Gloge said they never did, and had a duty to inform them of the potential mistake.
- Gloge refused to perform the work - Northern hires another subcontractor and then comes after Gloge for the difference in cost.
- Gloge also said they could get out because it was a mistake.
- **Held:** you gave them the tender 20 minutes before – no ability to warn you. Also, the mistakes weren't on the face of the bid a la Ron Engineering – Northern could accept the tender.
- **Comments:** nobody really knows what contract A is all about in 1986 - they know it is irrevocable, but what are they getting out of this? – doesn't seem like there is any consideration

Toronto Transit v. Gottardo (2005 Ont. C.A.)

- TTC put out call for tenders. Gottardo was the lowest bidder. When tenders were made public, Gottardo advised TTC that there was an error worth \$557k. TTC maintained that Gottardo was bound by the bid price.
- When Gottardo refused to sign the K, TTC gave the K to the next lowest bidder and the work was carried out. TTC sued Gottardo for the difference in K price (\$434,000).
- Tender package stipulated that bids were irrevocable for 120 days, had to be accompanied by bid security and the form of tender (all of which were submitted).
- Form of tender included a clause stating that bidders would agree to submit certain additional documents within 48 hours of the closing deadline upon request by TTC.
- Trial judge held that Contract A never came into existence because additional paperwork required by call for tenders was not included. Therefore Gottardo was not bound to sign Contract B. In the alternative, trial judge held that the error was apparent on the face of the tender, therefore TTC could not accept the bid. If Contract A had been formed, the judge would have granted rescission on equitable grounds.
- Issues on appeal:
 - (1) Did Contract A come into existence?
 - (2) Was Gottardo's error apparent on the fact of the tender?
 - (3) Is the equitable remedy of rescission available on the facts of the case?
- **Issue 1:** Did Contract A come into existence? Yes.
 - Must look at the tender instructions to determine whether or not the parties intended to create contractual relations by submitting a bid.
 - Parties intended that contractual relations would be made at the time the tenders were opened. Therefore Contract A came into existence.
 - Gottardo was familiar with the bid process and understood that contractual relations had been created by its signature and submission of the form of tender.
- **Issue 2:** Was the error apparent on the face of the tender? No.
 - Gottardo failed to provide some of the additional documents upon request – they argue that this made the bid non-compliant after Contract A was formed.
 - Court held that failing to provide the documents as agreed was actually a breach of Contract A – not that the bid became non-compliant. Shot down!
 - Gottardo says that the cost breakdown provided on request showed a different total tender price than the bid itself – the error became patently apparent at this point.
 - Court held that the cost breakdown was supposed to show the breakdown for the *total tendered price*. Submitting an incorrect breakdown means that the form was non-compliant. You can't use a non-compliant document to show an error on the face of a tender.
 - Therefore Contract A was formed and then breached by G, causing damages of \$434,000.
- **Issue 3:** Is the equitable remedy of rescission available? No.
 - Rescission may only be granted in cases of unilateral mistake when the unmistaken party engaged in fraud or some other unconscionable conduct OR where the unmistaken party contributed to the mistake (general statement of the law).
 - As long as TTC knew of the mistake, without having caused it, TTC can not avoid a suit for rectification on the grounds of mistake. Also, if TTC was ignorant of the mistake, the contract will be valid and no rescission or rectification possible.
 - In tendering, Contract A forms when the tenders are opened. At that time the mistake was not apparent on the face of the tender.
 - There is no fraud or unconscionable conduct.
 - No rescission.
- Appeal allowed – damages of \$434,000 awarded to TTC.

OBLIGATIONS OF RECIPIENTS OF TENDERS

(A) OBLIGATIONS OF OWNERS

Terms and Compliance

- **Privilege clause:** Exempts liability in a contract. Standard privilege clause: “the lowest and any tender may be necessarily accepted.” So they didn’t have to accept any, including the lowest. Also – if it was over their budget, they could just say no.
- **Compliance:** a tender is compliant if they follow all the rules of the tender package
 - If there is something off – you have to decide if its non-compliant, or simply an irregularity
 - There are tons of little things you have to do in a package – like serial #'s for equipment that is going to be used.
 - Didn’t give you a bid security – probably non-compliant
 - Prior MJB, lawyers thought you had to reject non-compliant bids. For example, girl watches and sees the low tender was 3 minutes late. 2nd low sues owner for expected profit. Currently in litigation BC Case: 2:00pm means 2:00.00 ONCA: 2pm means 2:00.59pm. We can see that it doesn’t mean 2:01pm – pretty strict

MJB Enterprises v. Defence Construction (1999 SCC)

- Generally, an owner can not accept a non-compliant bid.
- Defence invited tenders for the construction of a pump house. 4 tenders were received, including one from MJB. The K was awarded to Sorochan Enterprises (the lowest tenderer), and the work was carried out. MJB was the second lowest tenderer.
- Tender Documents included a "privilege clause" that stated that "the lowest or any tender shall not necessarily be accepted".
- Sorochan’s bid was not compliant – MJB argues that the K must have been awarded to them as the next lowest bidder. They sued for loss of profits (damages for breach of Contract A).
- **Issues:**
 - (1) Did Contract A between MJB and Defence arise here?
 - (2) If so, what obligations does it impose on the owner?
 - (3) Does the inclusion of a "privilege clause" in the tender documents of a contract allow the person calling for tenders to disregard the lowest bid in favour of another tender, including a non-compliant one?
 - (4) What is the appropriate quantum of damages?
- Trial judge held that Sorochan’s bid was non-compliant, but the privilege clause allowed them to award the contract to any bidder – no obligation to award it to the next lowest bidder.
- **Issue 1:** Did Contract A arise? Yes.
 - Whether or not Contract A arises depends on whether the parties intended to initiate contractual relations by submitting a bid in response to a call for tenders. Here the court finds intention.
 - Remember that Contract A does not automatically arise in all situations – you always have to look at the intention of the parties and what was in the tender documents.
- **Issue 2/3:** What obligations does Contract A impose on the owner?
 - Court finds that there is an implied term in formal tender documents that only a compliant bid will be accepted – otherwise no one would bother to submit a proper tender. Therefore, an owner can not accept a non-compliant bid.
 - Here, the court also finds that it is expressly stated in the tender documents that only a compliant bid will be considered.
 - However, the court finds that because of the "privilege clause", the respondent is not obligated to accept the next lowest compliant bid.
 - Accepting a bid other than the lowest bid may mean that an owner is considering other factors than just price (ie. experience, reputation of the tenderer, timeline for completion etc.). Discretion is also important where unforeseen circumstances arise. Therefore an owner is not obligated to accept the lowest bid.
 - Defence breached its K (Contract A) with MJB (and the other tenderers) by accepting a non-compliant bid. It did not breach its duty to MJB by not accepting the lowest bid.

- A privilege clause allows an owner to choose any *compliant* bid.
- **Issue 4:** What is the appropriate quantum of damages?
 - In order to determine if there are actually damages for expected profit, we must determine whether or not MJB would have got the K.
 - Remember that Defence didn't *have* to award the K to the next lowest bidder.
 - On a balance of probabilities, the court finds that Defence would have awarded the K to MJB had Sorochan's bid been disqualified.
 - MJB gets damages for the amount of profit it lost by not being awarded the K (not amount of the bid) – case is referred back to trial to determine quantum.
- The extent to which a privilege clause will be honoured is still not entirely clear – when is a privilege clause too broad?

Impact of this case:

- A tender has no rules except for the rules set by the tender package.
- There are different types of tenders now (but remember its substance over form):
 - **Formal Tender** – creates formal legal contracts (Contract A/Contract B)
 - **Request for Proposal** – they did this for residence at Grant MacEwan. Usually done by removing the irrevocability clause. See *Mellco* case below. Creates no legal obligations.
 - **Beauty Contest** – absolutely no obligations. Like an interview.
- Requests for Tenders are becoming more common – this starts with the tenderers sending in packages – then the owner pick the top 4, then get them to RFQ.

***Chinook Aggregates v. Abbotsford* (1990 BCCA)**

- Municipality invited tenders for gravel crushing contract.
- Privilege clause: “the lowest or any tender will not necessarily be accepted”.
- Municipality has an unpublished policy of giving preference to local bidders whose bids were within 10% of the lowest bid. They gave no notice of this policy to bidders in the call for tenders.
- Chinook's bid was lowest, but they weren't local. K was awarded to a local contractor whose bid was within 10% higher than Chinook's. Chinook sued for damages.
- Trial judge held that the municipality breached an implied term in Contract A based on industry custom that the lowest bid was entitled to acceptance.
- Issue: is there an implied term in the call for tenders (and therefore Contract A) that the lowest qualified bid will be accepted?
- C.A. says that because the preference clause was not known to the bidders, the municipality had breached its duty to treat all bidders fairly and to not give any of them an unfair advantage over the others.
- If an owner attaches an undisclosed term that is inconsistent with the tendering process (that is, bidders submit their lowest bids), a term that the lowest qualified bid will be accepted should be implied in order to give effect to the tender process.

***Sound Contracting v. City of Nanaimo* (2000 BCCA)**

- One of the first cases heard after MJB – qualifier on the discretion awarded in MJB.
- Sound submitted lowest bid for a city construction K, bid was compliant in all ways. To their surprise, the second lowest bid was accepted for 6-7% higher. Sound sues for loss of profits.
- Privilege clause - “Owner reserves the right to reject any or all tenders. The lowest may or may not be accepted”. Also, “City reserves the right to waive informalities in or reject any or all tenders or accept the tender deemed to be most favourable in the interests of the city”.
- Local preference clause – awards shall be made on tenders that will give the greatest value based on quality, service and price. Preference shall be given to local suppliers where quality, service and price are equivalent.
- Sound Contracting was known as a particularly litigious and difficult contractor – city knew this and did not want to work with them – Sound was known for poor work and would have to be supervised

at a cost to the city - this was the basis on which they rejected their tender. City felt that awarding the K to Sound “may in fact not be the lowest overall cost to the city”.

- Is this a proper basis for denying the tender? Court says yes – “the privilege clause in the request for tenders releases the city from the obligation to award the work to the lowest bidder if there are valid, objective reasons for concluding that better value may be obtained by accepting a higher bid”.
- However, owners must exercise this discretion granted by the privilege clause in a fair and objective manner and in good faith.

Hughes Land Co. v. Manitoba (1998 Man. C.A.)

- Governments will be held to a duty of fairness in the tendering process.

Mellco Developments v. City of Portage la Prairie (2002 Man. C.A.)

- Remember basic contract law principles.
- Formal tender process can be onerous on owners – not always in their best interests to do it that way.
- City issued request for proposals for the sale and development of city-owned land. Bidders were required to submit a completed offer to purchase and a security deposit. Documents said that “this is an invitation for proposals and not a tender call” and that the city would negotiate with the applicant who presented the “most attractive” proposal. Proposals were to remain open for 90 days and were to close within 90 days of written acceptance. RFP included the information required and the terms on which proposals would be evaluated. Mellco submitted a compliant proposal, but a non-compliant rival proposal was accepted. Mellco sued.
- Issues:
 - (1) Did the city’s request for proposals constitute a tender document intended to create contractual relations, or was it more of a “beauty contest” intended as a non-binding invitation to enter into negotiations?
- **Mellco argues** that the city (a) breached a K with Mellco in considering the competing non-compliant proposal, and (b) failing to evaluate the proposals based on their own set criteria.
- **City argues** that it expressly stated that the RFP was not a tender call, that the difference between tender calls and PFPs is well known in the industry, and that they deliberately left the process open so that they could consider all options to create an attractive and unique project.
- **Issue 1:** Is this a tender process? No.
 - From MJB – whether or not Contract A arose depends on whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender.
 - “The owner that wants submissions from interested parties but does not wish to create Contract A may choose to issue a request for proposals. Properly drawn, a RFP asks parties for expressions of interest and sets out the owner’s intention to consider those expressions of interests and then to undertake negotiations with one or more parties whose proposals appeal to the owner.”
 - Court held that the city did not intend to create a binding contractual relationship – no Contract A formed.
 - Remember substance over form – although it says “this is not a tender call” court still has to consider the bigger picture to determine intentions.
 - Where the terms of the final contract (Contract B) are contained in the bid without the need for further negotiation, courts will usually find that it is a tender situation. But here there are no terms – everything still needs to be negotiated.
- Duty of good faith etc. is not the same in non-tendering situations.
- Also remember that Canadian law does not generally recognize a duty to negotiate in good faith (*Martel Building, Watford v. Miles*).

(B) OBLIGATIONS OF GENERAL CONTRACTORS

Bid Depository – structured bidding process designed to achieve fairness on building construction projects where the owner requires a lump sum tender based on plans and specifications, and where a multitude of prime contractors, trade contractors and suppliers are expected to get involved in the tendering process.

- Bid Depository office is contacted by an owner.
- Subcontractors are to submit a breakdown of their prices on standard form documents by a specified date and time. Everyone is given the same information.
- On the due date, the bids are made available to interested general contractors who select the contractor they want to carry out the bid to the owner (don't have to select the lowest bidder).
- General contractor bids are then filed in the same way through the Depository office.
- Helps avoid “bid shopping” – the practice of soliciting a bid from a contractor that you have no intention of dealing with, then disclosing or using that bid to attempt to drive prices down among contractors that you do intend to use/

Naylor Group v. Ellis-Don Construction (2001 SCC)

- After MJB, good discussion of important tendering cases.
- “Carried subcontractor” situation.
- Ellis-Don wanted to put in a bid for a Hospital project – Naylor is an electrical subcontractor who gave a bid for the electrical work through a bid depository system. ED selected Naylor’s bid in preparing their tender, but after ED got the project, they decided not to use the Naylor because they belonged to the wrong trade union. ED knew all along about the union affiliation.
- Contract between ED and owner stipulated that “the contractor agrees to employ those subcontractors proposed by him in writing and accepted by the owner at signing of the contract”.
- ED decided to award the K to another electrical company for approximately the same price. That company had not submitted a bid through the depository.
- Naylor sues for breach of K and unjust enrichment, claims that ED shopped their bid.
- Trial judge held that the terms of this particular tender required ED to enter into the electrical subcontract with Naylor in the absence of reasonable cause to do so. SCC agrees. Issue Judge said no reasonable cause and awarded damages.
- **Issue:** is the general contractor required to carry out the project with the P?
 - (1) Was a Contract A formed between Naylor and ED?
 - (2) Did ED breach the terms of that contract?
 - (3) What is the appropriate quantum of damages?
- **Issue 1:** Was there a contract A? Yes.
 - Tender documents contemplate a situation where the subcontractor involved in Contract B is different from the one mentioned in the original tender (ie. where the owner objects to that subcontractor on reasonable grounds).
 - However, other provisions designed at eliminating bid shopping stipulate that the bid documents shall include the names of the subcontractors that the bidder would sign contracts with.
 - Contract B stipulates that the contractor agrees to employ those subs proposed in writing by him at the signing of the K.
 - Court holds that ED did intend to contract with Naylor and therefore had entered into Contract A.
- **Issue 2:** Was contract A breached?
- **Issue 3:** What is the appropriate quantum of damages?

Northern Construction v. Gloge Heating & Plumbing (1986 Alta. C.A.)

- P (Northern) is GC who invited subs to submit bids on a construction K.
- D (Gloge) is a mechanical subcontractor – submitted a bid by phone 20 minutes before closing – this was standard industry practice to avoid bid shopping by GCs.
- Gloge’s bid was lowest, Northern used it in calculating its bid price and named Gloge as the mechanical contractor it intended to use.
- After closing, Gloge noticed an error in its bid of \$180,000.

- Northern was awarded the K. Gloge refused to perform. Northern had to hire another mechanical contractor for \$341,000 more.
- Gloge argues that (a) it was free to withdraw at any time before the K was awarded to Northern, (b) Northern had a duty to alert Gloge that its tender was sufficiently low that it must be erroneous (it was 12% lower), (c) Northern could not accept Gloge's tender after it knew that there was a mistake.
- Second 2 arguments fail – Gloge purposely waited until the last minute to submit its bid. Northern didn't have sufficient time to analyze Gloge's bid or to make any meaningful comparison with other bids.
- Real issue is the first argument. Could Gloge withdraw before the K was awarded to Northern?
 - Court looks to Ron Engineering and holds that Gloge and Northern formed a Contract A when Gloge submitted its bid and Northern accepted it by using it in its own tender.
 - Gloge knew that Northern would select a mechanical tender and rely on it, and they knew that Northern's bid would be irrevocable.
 - Also, industry practice was that subs would submit last-minute bids by phone and that those bids were understood to be withdrawn before the close of tenders, but not after. Once the tender closes the subcontractor's bid becomes irrevocable for the same period of time as the GC's tender.
- Gloge was therefore obligated to perform the work – they are in breach of Contract A. Damages awarded to Northern.

Bate Equipment v. Ellis-Don Construction (1994 Alta. C.A.)

- Question – would it be decided the same way if it were litigated today in light of *MJB, Ellis Don v. Naylor*?
- P (Bate) is an elevator subcontractor. Bate and 3 other companies bid on a K. After the deadline for subcontracts, Bate learned that one of the other bidders (Dover) submitted a non-compliant (qualified) bid. Bate was 2nd lowest bidder. Bate made a complaint to the bid depository, who disqualified the bid. The depository sent notice to the GC, architects, and the disqualified bidder.
- GC then used Bate's bid in their tender, which closed on March 25. Under the K, ED had 35 days to choose which sub it would actually use. During that time ED decided to hear Dover's side of the story, and then decided to use them instead of Bate. They didn't agree that the bid was non-compliant and did not think that the bid depository's decision had any legal consequence. ED signed a formal K with the owner (Contract B) showing Dover as the subcontractor. Bate sued.
- **Argument 1:** Bate argues that it had a contract A with ED, and that they had accepted his bid by carrying Bate's name on the tender.
 - Was there a contract A between Bate and ED? Yes. It was formed when Bate submitted its bid.
 - Was ED obligated to select Bate's bid because they had carried Bate's name on the tender? No. There is no authority saying that the carrying of a subcontractor's name on a tender constitutes acceptance of that bid, conditional or otherwise.
 - So, there was a Contract A, but ED was not obligated to enter into Contract B with Bate.
- **Argument 2:** the rules of the bid depository and the decision of the management committee prohibited ED from entering into Contract B with Dover instead of Bate?
 - Bid depository rules are part of Contract A, but other rules (ie. those in the call for tenders) are paramount.
 - Call for tenders had a privilege clause.
 - Court held that ED could therefore select any subcontractor it wanted. This is totally contrary to *MJB* – remember that this is an earlier case.
- **Argument 3:** Damages. Just in case the court was wrong, they consider the appropriate quantum of damages.
 - Damages would be for breach of Contract A, if anything.
 - ED was never under an obligation to accept Bate's bid, even if Dover's bid had been excluded.

- Damages would be for the cost to Bate of preparing the tender.
- Here the P didn't claim any such damages, and they would get nothing even if there was a breach of Contract A.
- Remember that this case was decided before *MJB* – court didn't really contemplate at this point that damages could be for loss of profits.

Damages Generally

- If owner wins, they usually get damages for the difference between the price of the tenders.
- If contractor wins they may get:
 - Damages for loss of profit (not amount of K), if they can prove on a balance of probabilities that they would have got the K anyways (*MJB*).
 - Where you can't show that you would have got the K anyways, you may still get damages for the cost of preparing the tender, because they weren't going to get contract B – you can always seek damages for loss of a chance – even if you are the high bidder this may go through. So, technically you may have a situation where a non-compliant bid is accepted and all 5 other bidders sue for bid costs. There may be remoteness issues, but still it's possible. Remember however that a company may not want to get themselves blacklisted for only a few thousand dollars in damages.
- In order to claim damages a P bidder must establish that (a) they themselves were compliant – (within contract A), (b) they would, on a balance of probabilities, have been awarded the K.

Derrick Concrete Cutting v. Central Oilfield Services (1995 Alta. C.A.)

- Derrick is a concrete subcontractor – provided Central with a bid for cutting asphalt. Central used Derrick's name in its tender to Alberta Government Telephone. Central got the K. Derrick tried unsuccessfully to get a start date for the project.
- Central told AGT that it planned to do the concrete cutting itself, and Contract B was signed on that understanding.
- Derrick is suing for breach of K.
- Issue: Did Central accept Derrick's bid as to form a Contract A between them?
- Case distinguished from *Gloge* because that case dealt with the right of a contractor to withdraw a bid, not the acceptance of a bid.
- Court held that there was no acceptance (no Contract A). Even if there were a Contract A, Central was under no obligation to enter into Contract B with Derrick.

Derby Holdings v. Wright Construction (2002 Sask. Q.B.)

- Derby put out call for tenders. Wright submitted a tender that was significantly lower than the next lowest bid because they had forgotten to include 2 items.
- There was a lot of confusion over whether an addendum to the call for tenders, issued just before closing, was binding on the tenderers. As a result, some of the tenders included differing information – some included the electrical work as included in the first call for tenders, some did not, as included in the addendum.
- Wright notified Derby of the mistake. Even with the 2 items included, Wright was still the lowest bidder. Derby wants to hold Wright to the bid. Wright refused to perform.
- Derby is suing for the difference between Wright's bid and the next lowest bid.
- Wright says that it has no liability to Derby to perform the work because it did not comply with the instructions to bidders – essentially they are trying to use non-compliance as a shield rather than a sword.
- Usually a contractor will use non-compliance in order to have another bid disqualified and their bid chosen in its place. Here the contractor is trying to use their own non-compliance to get out of performing the work.
- Also, Wright argues that the error was patent on the face of its bid, therefore Derby could not accept it.
- Court agrees that the bid was non-compliant.

- Here the bidding process was so flawed by uncertainty as to what was to be included in the tenders that it could not give rise to a contractual relationship.

Good Restatement of general principles of tendering from major cases:

- (1) An invitation to tender by an owner may be characterized as an offer to consider a tender offer from a contractor (Contract A) to enter into a contract (Contract B) to perform the work in accordance with the terms specified by the owner in the invitation to tender at the price specified by the contractor in the tender. The submission of a tender that complies with the terms of the call for tenders constitutes acceptance of the offer and creates Contract A. The promise to enter into Contract B if the tender is accepted is the consideration.
- (2) Provided that parties intended to create contractual relations, Contract A arises upon the submission of the tender. Its terms are those set out in the invitation to tender. Usually when parties resort to the tendering process as the means to select a contractor, they intend to create contractual relations.
- (3) The terms of Contract A are case-specific. They are comprised of the express provisions in the invitation to tender and any other terms implied by the court. Usually the express terms provide that the tender is irrevocable for a period of time, and if accepted, the tenderer is obligated to enter into Contract B with the owner and perform the work. The court usually implies a term that the owner will treat all tenderers fairly and that only compliant tenders will be accepted.
- (4) Contractual terms may be implied by the court (a) based on custom or usage, (b) as the legal incidents of a particular class or kind of contract, or (c) based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract.
- (5) In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in what has clearly been agreed upon, and the precise nature of what, if anything, should be implied...
- (6) There is usually a privilege clause in an invitation to tender and in such cases it is unlikely that a term will be implied that requires the owner to accept the lowest compliant tender.
- (7) An honest mistake made by a contractor in determining its tender will not usually relieve the contractor from an action for damages for breach of Contract A. However, it will likely relieve the contractor of the obligation to enter into Contract B.
- (8) The measure of damages for breach of Contract A by the contractor is usually the difference between the amount of its tender and the next lowest tender. The measure of damages for breach of Contract A by the owner is usually the profit the contractor would have made had the owner accepted their tender.
- (9) The terms of Contract B are those set out in the contract contained in the tender package. Once the parties execute it, its terms determine the rights and obligations of the parties respecting that project.

***Graham Industrial Services v. Greater Vancouver Water District* (2003 BCSC)**

- Graham was the successful tenderer for the Capilano Pump Station project. Its bid was \$21.5 million. The bid was \$5 million lower than the next lowest bid – they had forgot to include the mechanical work worth \$2 million. Graham advised the city of the mistake. Also, they advised the city that their bid was actually non-compliant for a number of reasons. The city accepted the bid anyways.
- Important clauses in the call for tenders:
 - **Discretion clause** – “if a tender contains a defect or fails in some way to comply with the requirements of the tender documents, which in the sole discretion of the corporation is not material, the corporation may waive the defect and accept the tender”.
 - **Privilege clause** – the corporation may accept any tender, reject any or all tenders, accept a tender which is not the lowest, reject a tender even if it is the only one received, accept all or any part of a tender, award all or a portion of the work to any tenderer.
- Graham argues that the privilege clause is so broad that there is no intention to create contractual relations. Court shoots this argument down.

- This is another case like Derby where a bidder is trying to use non-compliance to get out of having to perform the work – remember that court says that you can't accept a non-compliant bid, regardless of who is asserting the non-compliance.
- Court held that the degree of non-compliance on a number of issues was immaterial (ie. the bid bond cheque was made out to the wrong person, the bid was not signed but had only printed names on it etc.).
- However, the bid was non-compliant in not including the required Environmental Protection Plan as outlined in the call for tenders.
- City had a bylaw that it would accept the lowest responsive bid. “Responsive” meaning that it conformed in all *material respects* to the invitation to tender.
- Court held that failure to submit the EPP made the bid so patently deficient that it could not be said to conform in all material respects.
- The discretion and privilege clauses must be exercised in good faith and in a matter which can withstand objective scrutiny – otherwise this would allow the city to deem a non-compliant tender to be compliant. This would undermine the fairness of the tendering process.
- The city could not accept Graham's tender – there was no Contract A.

(C) DUTIES OWED BY OWNERS TO CONTRACTORS

The Queen v. Martel Building (2000 SCC)

- Martel owned a building which it leased to the Government. As the lease was coming to a close, the parties entered into negotiations for its renewal. Martel gave the Government its proposed lease rates. The government set a date by which an agreement would have to be reached, or they would proceed with a call for tenders. The parties did not reach an agreement and the Gov issued a call for tenders.
- Martel submitted a bid, its lease rate was the lowest but its offer was not accepted. The government had a privilege clause, but evaluated the bids based on other undisclosed criteria than in the call for tenders (remember *Chinook Aggregates*). Here the government added an amount to each bid for renovation costs determined by a table calculation – this made Martel's bid higher than another bidder.
- Martel sued in contract and tort – claims that the Gov breached an implied term of the lease agreement that they would renew, and that the Gov breached their duty in tort to negotiate in good faith. Also, Martel claims that the Gov was negligent in the tendering process. Contract and good faith arguments were dismissed.
- Trial judge held that there was a duty of care (based on *Anns*) and that the Gov was negligent in evaluating the bids based on undisclosed criteria. However, causation was not made out and the claim was dismissed (Martel could not prove that the negligence caused them to lose the renewal).
- CA allowed the appeal – said that the Gov's negligence deprived Martel of a reasonable expectation of being awarded the K and that causation was made out.
- **Issues:**
 - o Given that one owes a duty of care not to harm those who might foreseeably suffer damage, does a similar duty of care exist with respect to negotiations?
 - *Anns* Test – there is a *prima facie* duty of care, but that duty is negated by policy considerations. “The primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial position”... etc. It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations.
 - This is different from duty to negotiate in good faith (court doesn't go there) – only dealing with whether or not tort liability for *negligence* should be extended to negotiations.
 - o Did the C.A. err in finding that the Gov owed Martel a duty of care in the tendering process, and that that duty was breached?

- There is an implied term in the call for tenders that all bidders are to be treated fairly – this means that the privilege clause must be exercised in good faith.
 - This means that the Gov had to tread all bidders consistently, applying assumptions evenly – which it did.
 - The Gov did breach its duty in adding an additional amount to Martel’s bid for a secured card-access. Adding the price was not problematic, only that it was not added to all bids, only Martel’s.
 - However, damage can not be established for lack of causation – the Gov’s breach did not cause Martel to lose a reasonable expectation of receiving Contract B – even with the addition to the price removed, Martel’s bid was not the lowest.
- Appeal allowed – trial decision restored.

(D) POST MJB PRIVILEGE CLAUSES

Elite Bailiff Services v. British Columbia (2003 BCCA)

- Ministry of the BC Attorney General called for proposals for a security contract for the BC Supreme Court. Elite submitted a proposal. Proposals were evaluated based on a rating guide.
- The RFP provided that if a proponent’s previous experience was in a related field, it would be assigned a pre-determined number of points. Elite had no prior experience in this type of security work and lost the K by a few points. Elite argues that the Ministry breached their duty to treat all proponents equally and that it had a reasonable expectation that similar experience would be assessed on its merits.
- Trial judge held that the criteria for evaluation were not fairly and reasonably disclosed in the RFP – therefore the Ministry breached its duty of fairness.
- C.A. held that it was not necessary for the Ministry to disclose the exact weight to be allocated to different criteria. However, the ministry breached its obligation of fair and equal treatment because it assigned a pre-determined number of points, regardless of past experience. This resulted in the selection process being arbitrary and unfair since proposals were not fully considered on their merits.
- RFP contained a limitation of liability clause, which was upheld. Damages were limited to the cost of preparing the proposal.

STANDARD FORM CONTRACTS

(A) CCDC 2 – CB p. 156

- Canadian Construction Documents Committee
- This version is from 1994 – most recent.
- One of the main reasons we don’t have an updated CCDC2 is because of issues surrounding toxic mold in contracts.
- Good standard checklist, starting-point for a construction contract.
- CCDC2 is a balanced contract – does not favour either party, tries to balance the risk.
- Follows the traditional design/bid/build model.
- Part 1 – General Provisions
 - Standard definitions.
 - Definitions make reference to a “consultant” who is *not* a party to the K – may be a 3rd party beneficiary. Sometimes a consultant may try to tag along with the owner in any exculpatory provisions in the K.
 - Section 1.1.9 – precedence clause - where there is a conflict between contract documents (ie. definitions, specifications, drawings etc.) this section gives a hierarchy of which documents trump the others. For example, where the specs call for air conditioners but the drawings don’t show them, the specs govern. This clause is very important because there is no general law on this.
- Part 2 – Administration of the Contract

- Sets the consultant up as the judge and jury for the contract – can act on behalf of the owner as provided in the contract documents.
- Dispute resolution provision at the end of the agreement to deal with disagreements between the consultant and owner – as a result CCDC disputes rarely go to court now.
- Section goes on to set out specific role of the consultant.
- General Conditions (GC) 3.8 (s. 3.8.1) – subcontractors and suppliers.

(B) ACA Standard Subcontract

(C) CCAC Canadian Standard Agreement between Client and Architect

CONSTRUCTION CONTRACTS

CHANGES AND EXTRAS

CCDC 2 Stipulated Price Contract

- See part 6 – changes in the work (CB p.179).
- How do you make changes –by change order (6.1) or change directive (6.2).
- Change orders should be signed by all parties, by people who have the authority to sign – it is a K and should be treated that way.
- Change order process is pretty straightforward – agree on the change and the new price before the work is carried out, changes are approved and change order issued.
- Change Directive – no agreement. Where the owner insists that they can't come to agreement otherwise. The owner or the consultant prepares a document that directs a contractor to do the change.
- Contractor gets same overhead and profits but has to do less work.
- This is one provision that can be very one-sided in some Ks.
- Contractor does not have the same mechanism to deal with changes – can not force owner/consultant to issue change order.
- Contractor can't do work under protest – often they are stuck – usually just hope that at the end of the day the owner will be reasonable.
- Only recourse is to stop work, get sued, then hope that they win. If they don't win, they will be liable for big damages for breach of K.

Peter Kiewit Sons v. Eakins Construction (1960 SCC)

- Graesser says that this is an evil decision.
- Kiewit entered into a K with the BC Toll Highways and Bridges Authority to do work on the Second Narrows Bridge for \$4.3 million. They had a subcontract with Eakins for pile driving. The main K required that piles be driven to a bearing capacity of 20 tons. After signing the subcontract, the engineer on the main K amended the plans for pile driving to include work that was outside the scope of the subK. Eakins protested but the engineer kept insisting that the work be done and threatened to put him off the job if he didn't do it.
- Despite further complaints and meetings, there was no agreement to pay Eakins for the additional work as an "extra". Eakins completed the work anyways - now wants damages based on *quantum meruit*.
- Court says that Eakins gets nothing. Why?

Dryden Construction v. Hydro Electric Power Commission of Ontario (1960 SCC)

- Dryden undertook to construct a road for Hydro Ontario. Time was of the essence. Work was slow, and in order to complete on time the road was shortened and built to lower grades than originally agreed upon. Dryden eventually abandoned the work entirely, arguing that Hydro Ontario was in default of the K in refusing to award its claim for deficiencies in payments due.
- Basically the contractor stopped work because of dispute – like should have been done in Kiewit.

- Here Dryden is found to be wrong, ends up being liable for breach of K.

***Penvidic Contracting v. International Nickel* (1975 SCC)**

- Contractor (Penvidic) entered into K with IN to lay ballast for a railroad track at a certain sum per ton of ballast. Work was to be completed by July 15. As it turned out, Penvidic could not carry out the work because the part of track connecting to the new site was not built until August and he could not get any machinery in to the site. Penvidic revised its construction plan and made other arrangements, which caused delay in completing the work and a huge additional cost to Penvidic.
- Penvidic asked IN for a 25 cent increase per ton to cover this additional cost. IN refused and told Penvidic that it had to complete the work as per the contract.
- More delays came later because of IN's failure to do a bunch of crap like get permission for the track to cross the highway. Penvidic lost more time and money.
- Penvidic is suing for damages for breach of K of \$250,000, or for damages based on *quantum meruit*.
- Trial judge held for Penvidic, awarded damages of \$140,000. CA also held for Penvidic but reduced the amount of damages.
- This case is distinguished from Peter Kiewit (above) – in that case the P was complaining about changes to the original K which resulted in greater cost to him. Here, the P is complaining of a breach of both the express and implied terms of the original K, not a change to it (ie. owner did not have the site ready for them, failure to do a bunch of crap). In *Kiewit* there was no such breach.
- Penvidic gets damages determined by trial judge – there was an issue with quantifying damages – this is always difficult. This case recognized that just because damages are difficult to value, it doesn't mean that they won't be awarded. That is, once a breach is established, judge must do as best as he or she can in assessing quantum of damages. A party shouldn't lose just because they can't prove a specific item of damages on a balance of probabilities.
- Does this case mean that *Kiewit v. Eakins* is dead? No. This case was characterized differently, but the differences are very subtle between the 2 cases – this is not a change in scope of the K, but a change in the method used to perform the K.

***Marentette Bros. v. Sudbury* (1974 Ont. C.A.)**

- Where an owner fails, in breach of his obligation under a binding K, to facilitate the work for the contractor, and the contractor, in order to complete on time, is consequently compelled to make movements of men and machinery that would have otherwise been unnecessary, the owner incurs an implied obligation to pay the reasonable value of the additional work to the contractor by the owner's default.
- That is, owner doesn't make the site properly available to the contractor; contractor incurs additional expenses as a result; owner pays.
- This can also happen where owner is supposed to supply materials and doesn't, or is late. Also, where owner takes a long time in making change orders etc. – anything they are supposed to do that they don't do, resulting in cost to the contractor.
- These are breach of K cases.

Common Implied Terms – from Kieran

- Site availability / possession – access not condition of site.
- Owner to supply materials
- Approvals and permission
- Owner's facilities – ie. in a camp job.

***Boulder Construction v. City of Calgary* (1985 Alta. Q.B.)**

- Boulder had a K with the city to renovate a pool. K contained a provision that the contractor would provide sewer, water and gas services to a point beyond the exterior wall of the building. Neither the contractor nor the mechanical SC included the cost of carrying those utilities past that point and connecting to the existing mains. Dispute arose over whether or not this was included in the bid.

Boulder asked for a change order to authorize the additional work as an extra. Owner etc. said no, the work is included in the price. Boulder carried out the work after informing the City that it intended to charge the work as an extra.

- Boulder is SOL, can not recover from the City.
- The fact that the work was carried out under protest makes no difference – there was no clause in the K allowing such disputes to be left open and in abeyance while the disputed work was carried out (application of *Kiewit v. Eakins*).
- Also, court says that when you read the K carefully as a whole, the exterior services were actually included.

***Kei-Ron Holdings v. Coquihalla Motor Inn* (1996 BCSC)**

- Kei-Ron had K to build a motel. K included price, date for substantial completion. All extras were to be approved in writing in advance with agreed costs.
- Construction was substantially complete 2 weeks after set deadline. Owner wants 25% interest per day since the due date. Kei-Ron wants unpaid portion of the K plus a specified amount for extras.
- Both parties were aware of the requirements for change orders and both chose to ignore them. The owner was aware that the work was being carried out and had agreed verbally. Therefore the owner has to pay.
- Delay in completion was caused by the owner, not Kei-Ron, therefore they can not ask for a per diem penalty.
- Remember CCDC2 – Changes in the work (part 6) – these are changes initiated by the owner. There is no process for the contractor to give a notice of change.
- 6.4 – deals with concealed or unknown conditions – big area for dispute.
- Owners will try to use notice periods as a defence against contractors.
- Where delay is caused by an owner, they are estopped from insisting on the original completion date and can not refuse to extend the time for completion.

THIS IS A CASE OF WAIVER / ESTOPPEL

From Contracts CAN

- Waiver of a party's rights under a contract may be found where the party waiving (a) has full knowledge of their rights, and (b) clearly and consciously intends to abandon them.
- A waiver may be retracted at any time. However, where the other party has relied on that waiver, reasonable notice must be given.

***Redheugh Construction v. Conye Contracting and BC Building Corp.* (1996 BCCA)**

- K between contractor (Conye) and SC (Redheugh). K stipulated that changes were to be made in writing. Also, extras had to be approved in writing by the contractor before the work was carried out.
- Owner (BC) issued several change orders to Conye during the project, which meant that Redheugh had to perform extra work. Redheugh received the change orders from Conye, but not in writing. After completion, Redheugh claimed a lien against Conye and the owner.
- Trial judge awarded Redheugh damages for the extra work and admin costs.
- C.A. dismissed.
 - Where extra work has been carried out on a construction project without regard to a contractual provision, the party who performs the work will generally be unable to recover the extra expenses it incurs. For example, if the K has a precondition to claim for an extra in the form of a change order or written notice, the contractor must comply with that precondition before being entitled to be paid for the extra work.
 - However, in certain circumstances, contracting parties may be excused from strict compliance with the terms of the K.
 - A requirement for a written authorization for extra work may be waived by an owner (or contractor to subcontractor) by conduct or acquiescence.

- A project manager has general authority to waive preconditions on behalf of the contractor in reasonable circumstances (agency).
- Here the PM did not issue a written change order, therefore waiving the requirement.

DIFFERING SITE CONDITIONS

- CCDC2 General Conditions 6.4

Carman Construction v. CPR (1982 SCC)

- Carman entered into a K with CPR to remove rock from a work site. Carman relied on CPR's survey of the land for the amount of rock to be removed, and submitted tender accordingly. After completion, Carman had removed way more rock than was estimated and submitted an additional claim to CPR for \$32,000.
- Tender docs/contract contained exculpatory clause - each contractor was to be familiar with the site, and would not rely in any way on information given or statements made by CPR.
- Trial judge dismissed – did find negligent misrepresentation, but said that the exemption clause precluded him from finding for Carman.
- CA dismissed, said that Carman was aware of the exemption clause, therefore he was bound by it.
- Carman argues it is entitled to damages for (a) breach of K, for a breach of collateral warranty, and (b) tort – negligent misrepresentation.
- **Issue 1** – Breach of K
 - A collateral warranty is a K collateral to the primary agreement. Must be proved by an intention to contract.
 - Court does not find intention that there be a collateral K stipulating how much rock was to be removed. In fact, to find otherwise would be in contradiction with the exemption clause.
 - No damages for breach of K.
- **Issue 2** – Tort
 - SCC disagrees with lower court's characterization, but agrees in result.
 - No duty of care arose because of exemption clause (lower courts had found that duty did arise, but it was negated by the exemption clause).
 - Court compares this case to *Hedley Byrne* – ack!
- Carman is SOL on both grounds.

Catre Industries v. The Queen in Right of Alberta (1989 Alta. C.A.)

- Catre had a K with the province to build part of a highway. K stipulated that the province had no responsibility for the correctness or completeness of the data supplied – bidder was required to investigate and satisfy himself of everything and every condition affecting the work to be performed.
- Project was not completed on time. Catre claims that soil tests done by the government before the K were misleading and that the K could not have reasonably been performed in the time agreed.
- Province wants damages for almost 3 year delay in completion.
- Trial judge read implied terms into the K and held that government was at fault but Catre was contributorily negligent – apportioned loss 50/50.
- On appeal, city argues that implied terms are inconsistent with the express terms of the K – namely the disclaimer clause.
- In other cases where there was no disclaimer, contractors have been able to succeed where there are differing site conditions.
- Here, however, there *were* exclusion clauses, which must prevail unless they are unenforceable for some other reason.
- Are the exclusion clauses unenforceable? No. Court says they stand.
 - Catre was an experienced and fully qualified road builder, albeit lacking in experience in the particular region.
 - There is no evidence of unequal bargaining power between the parties.

- Catre had access to, and had used expert advice along the way and knew it was available to them.
 - This all indicates a high level of sophistication in dealings.
 - It is not reasonable to conclude that Catre did not fully comprehend and accept the stringent terms of the K.
- Court finds that the terms implied by the trial judge are unenforceable, and that there is no breach of any express term of the K.

How to get around exculpatory clauses:

- **Argue uncertainty** – if the meaning of the clause is clear, it will be given full force and effect. Ambiguities will be resolved against the one seeking to enforce the clause. However, the clause will still be enforced – as opposed to historically, where the clause would be declared of no force and effect.
- **Argue were not sophisticated** in business and did not understand the term, power imbalance etc.

CNR v. Volker Stevin Contracting (1991 C.A.)

- VS entered into a K with CNR to tunnel through and embankment and install a culvert beneath a train trestle. The K stipulated that the work was to be done without interrupting train service, but other than that the contractor could use any method he liked to get the job done as long as the soil's structural integrity was preserved.
- K also said that the contractor had to make his own assessment of conditions and not rely on CNR's information. Contractor was to bear all risk from unforeseen site conditions.
- VS subcontracted the job. The sub's method of tunneling failed, so VS entered into a K with a different subcontractor to do the work by another, more expensive, method.
- VS is suing for the difference in price. CNR counterclaims saying that VS breached the K by failing to maintain the structural integrity of the soil.
- Are these unexpected circumstances not contemplated by the parties at the time of signing the contract?
- Trial judge held for CNR – said that because the method used was a chemical one, the integrity of the soil had not been preserved.
- C.A. says:
 - The K did not stipulate the method of tunneling to be used – in fact it specifically left it up to the contractor.
 - The K actually encouraged the use of chemical methods.
 - Maintaining the structural integrity of the soil referred to its shape or cohesion perhaps, but not is geological nature. "Maintain" does not mean to avoid *all* change.
- VS can not recover any damages for the increase in cost because of the specific provisions of the K.
- Trial judge's finding for CNR is reversed (basically nobody gets anything).
- Duty to disclose issue – does an owner have a duty to disclose any and all information pertaining to the work? Here, the owner was under no obligation to pass on their knowledge because the reports did not give any information that was "crying out" to be disclosed. Really, you have to get to fraud in order to be successful here.
- Generally, there is no duty to disclose. The exception is where a reasonable inspection would not turn up the defect – you knew and you didn't tell – basically this is getting to fraud.

IMPOSSIBILITY AND DELAY

- CCDC2 – General Conditions 6.5.
- Generally, if the delay is the owner or consultant's fault, the contractor gets time and money. If it's the contractor's fault he shouldn't get either. If there are 3rd party interventions (ie see 6.5.2) where it is neither party's fault, the contractor generally will get time and money.

- 6.5.3 – *force majeure* – an act outside of the control of the parties – like frustration – performance is made impossible at least for the time being by some intervening act (ie labour disputes, fire, natural disasters etc.). Contractor gets time only but not money. This at least protects the contractor from getting sued for delays.

***ANC Developments v. Dilcon Constructors* (2000 Alta. C.A.)**

- Dilcon entered into 4 Ks with ANC for the construction of a paper mill. 2 major problems arose in the execution of the Ks:
 - Delays – work started before the design was completed and the engineer was regularly late in releasing drawings, machinery and equipment was regularly late, scope of work of the mechanical was underestimated.
 - Growth in scope – as the K matured it was clear that the scope of the piping work had been severely underestimated. ANC and the engineer had relied on Dilcon’s expertise in making estimates from the outset.
- After completion, Dilcon asked for payment for increase in scope of work. ANC refused and also refused to pay outstanding invoices.
- Dilcon sues for unpaid invoices, extra work, growth in scope of work, loss of productivity due to delay.
- Trial judge held for Dilcon generally:
 - Extras - engineer was agent for ANC, therefore ANC was bound to pay extras approved by the engineer.
 - Loss of productivity due to delay – ANC had agreed contractually to a construction schedule (this was a term implied by the trial court). By failing to fulfill its obligations (provide necessary equipment, piping, drawings, site access etc) it had breached its obligations under the K. ANC was responsible for the delay that caused the loss of productivity – awarded Dilcon 3.8 mil.
 - Growth in scope – court found against Dilcon - there the K for piping was a fixed price with no reference to estimates – Dilcon was bound to complete the K including all piping that was required.
- Court of appeal says:
 - Loss of productivity due to delay – ANC says that there was no agreed schedule and that the trial judge erred in implying it as a term of the K. CA says that trial judge did not err in finding that ANC breached an implied term by failing to provide materials etc. However, he did err in disregarding the provisions of the K that set out a resolution process and specifically barred damages for loss of productivity where Dilcon didn’t follow those provisions. Dilcon was supposed to give notice and a bunch of other stuff when there were going to be delays, whether its fault or not etc, which they didn’t do. Award for 3.8 mil is reversed.
- This is the latest judgment in this area of law, very owner-friendly.

Notice / Relief Against Forfeiture

- If you fail to give notice on time, you have forfeited your right to sue under the K.
- Can always ask for relief against forfeiture.
- General principle: relief against forfeiture will be allowed unless the owner can show that the absence of notice caused them harm or prejudice. If they can prove that they would have taken different actions had they been given notice, relief will not be available.
- This commonly comes up under delay issues because notice is hard to catch.
- If the delay is caused by you, you get nothing.

Article: Changes, Extras and Delays – D.C.I. Lucky

- In a perfect world, all extras, changes or accelerations in work would be carried out with the prior written approval of the consultant and owner, and would set out the precise scope of the new work and the terms of payment.

- In reality, this doesn't happen – nothing would get built.
- Usually the issue to be resolved is whether the lack of strict compliance with the notice requirements in a given case are significant enough to disentitle the contractor to recovery.
 - Owner will argue that the black letter of the law applies
 - Contractor will argue waiver or acquiescence.
- There is case law in support of each side. Sometimes the black letter will apply, other times less than perfect compliance is held to be acceptable.
- Decisions in this area are very fact-driven.
- Often decisions are a reflection of how the court feels about each party – good guy / bad guy. How have they handled themselves?

The Law Before *Dilcon*

(a) Owner Friendly Decisions:

- ***Corpex v. The Queen in Right of Canada*** (1982 SCC) – Corpex sued the government for costs stemming from a mistake as to the nature of soil conditions. Project was construction of a dam in Quebec. K stated that gov't would be liable for costs incurred by Corpex if the soil conditions were “substantially different” than originally represented, *if written notice was provided within 30 days*. Corpex did not provide notice within the 30 day time limit. Court dismissed their claim. Corpex didn't know when they discovered the conditions were different that it would cost them more money, but when they discovered it they still had to give the government notice in order to preserve their rights.
- ***Doyle Construction v. Carling O'Keefe*** (1988 BCCA) – Doyle (contractor) had to process and undertake 50 changes in work over the course of the project – they were paid for each change but they are suing for impact damages and costs associated with the delay they caused and the costs incurred as a result. On 5 occasions Doyle expressed concern over this to the Owner. K stipulated that notice had to be made in writing “*within reasonable time* after the first observance of such damage”. Court said that notice was not given within a reasonable time and recovery was denied. Doyle had made “grumblings” early on, but provided no real notice or intention to claim until way later. Here the court said that the purpose of the notice provision is to allow the owner the opportunity to deal with the problem. The lack of notice therefore prejudiced the owner in this case.
- ***Keiwit v. Eakins*** (1960 SCC) – Not a lack of notice case – instead deals with a situation where a contractor gives timely notice but the owner disagrees that the work gives rise to further compensation under the K. If the contractor carries out the work, even under protest, he may be precluded from arguing after the fact that he was not required to perform the work. Unless a K has an express clause allowing matters to remain in abeyance for later determination, you may be foregoing your right to obtain further compensation by performing work “under protest”.

(b) Contractor Friendly Decision

- ***Colautti Construction v. City of Ottawa*** (1984 Ont. CA) – Provisions of the K required that all additional costs be duly authorized in writing – heavy burden placed on contractors. Over the course of the K there were several changes made and paid for that hadn't been in writing – therefore the court held that the City had varied the terms of the K by its conduct. As a result, the city can not rely on the provision to escape liability to pay extra costs.
- ***Woollatt Fuel v. Matthews Group*** (1981 Ont CA) – Similar case. Owner wanted to rely on clause in the K that stipulated that all changes were to be in writing and signed. Contractor had requested materials for a change, which the owner provided on the agreement that the price would be adjusted

upon completion of the work. The court held that the owner had waived the requirement of the clause and could not rely on it to avoid paying for the extra.

- ***TNL Paving v. British Columbia*** (1999 BCCA) – good summary of the law respecting notice requirements. Important principles: (1) Failure to give notice of a claim can, in the appropriate circumstances, be fatal to a claim. (2) The purpose of notice provisions is normally to enable the owner to consider its own position, including gathering information or taking mitigating steps. (3) The form of notice is not the governing factor, rather the issue is whether the notice contains enough information to satisfy the purpose for which notice is required. (4) A party may waive notice, or be estopped, by its conduct, from raising a notice defence.

(c) Analysis of *Dilcon*

- *Dilcon* is the most recent judicial statement on this area of law.
- It is a very owner-friendly case – upheld the “black letter of the law” approach.
- Court says that it is not up to the courts to rewrite Ks for the parties – here there were specific provisions for notice and dispute resolution.
- Written notice crystallized 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.
- *Dilcon* did give notice, but here the court felt that it was insufficient.
 - To conclude that *Dilcon* complied with the notice provisions we would have to conclude that the complaints *Dilcon* made at the site meetings, which are recorded in the minutes, are sufficient to constitute notice of delay as required under the K.
 - Such an interpretation flies in the face of both the K and the facts. The K clearly stipulates not just that the notice be recorded in writing, but that it be given in writing.
 - To hold that *Dilcon* has complied with the provisions makes a mockery of the clear time limits and notice requirements set out in the K.

(d) Other issues in *Dilcon*

- **Owner’s Claim of *Dilcon*’s Threats**
 - Shows how *Peter Kiewit* principle can be used in reverse – here ANC argued that it has been forced to pay an overtime premium because *Dilcon* had threatened to not do the work. ANC claims that it had made payments “under protest” and therefore they should be refunded to them.
 - Court rejected the claim – ANC was not under duress in that there was no “illegitimate pressure”. *Dilcon* was entitled to refuse to do extra work without further compensation – the overtime was outside of the scope of the K.
- **Authority of the Engineer to bind ANC**
 - In this case, extras were approved by the Engineer. ANC claimed that they were not liable to pay those extras because the Engineer did not have authority to bind them.
 - Court rejected this argument – Engineer had extensive authority under the K, including a bunch of powers set out in the K itself. Court looks at the K and the practice of the parties and holds that the Engineer was agent for ANC and therefore had the authority to bind them. Here there was implied authority.
 - Also, conduct of ANC suggests that it accepted the Engineer as its agent – had an ongoing system of acceptance of “extra work”.
 - In order to succeed on this claim, ANC would have had to make it clear from the outset that it did not consider itself bound to the Engineer’s approvals.

Important Principles in this area:

- (1) Most cases dealing with notice turn on the facts
- (2) Failure to give timely notice may be fatal to a claim for additional compensation.
- (3) Notice means *meaningful notice*. It must be sufficient to allow the owner to consider the claim and its financial consequences, and to take steps to protect its own position, such as information gathering and mitigating steps.
- (4) Statements or grumblings made verbally or in minutes of site meeting by contractors about problems on site, about the need to get more money because of problems about delays, or about the fact that a claim will be coming may not be sufficient notice.
- (5) An owner may waive notice, or be estopped, by its conduct, from raising a notice defence. Therefore, it is not only the contractor that must be concerned about sloppy paperwork on site. Occasions where changes, extras or payments for delay are made during the course of construction where the formal paperwork is not complied with may estop owners from attempting to raise the lack of notice in other occasions.
- (6) Contractors should avoid performing work under protest and owners should avoid making payments under protest. They should only be done if the construction K at issue contains a clause similar to CCDC 2 GC 8.3.1.

WARRANTY PROBLEMS

Steel Co. of Canada v. Willand Management (1996 SCC)

- Willand (contractor) entered into a K with Steel Co. to build several buildings. The specs required the contractor to furnish a 5 year guarantee that the work would remain “water tight” and that all material and workmanship would be first class and without defect. Also, the contractor was to make good on any repairs during that period of time without charge.
- The roofing work had been done as per the specifications provided by the owner – contained materials to be used, method of construction. Insulating boards were to be attached to the steel sheeting on the roof using “Curadex, or approved equal”.
- Willand ended up having to do repair work to the roofs – damage had been caused by the failure of the Curadex adhesive to properly adhere as it was supposed to – product had not held up in a series of (reasonably foreseeable) windstorms.
- Willand is claiming damages for the cost of the repair work.
- There is not argument that the work was carried out properly, as per the specs, and the workmanship was not defective. The issue is whether or not the warranty covers this situation.
- Willand argued that it had guaranteed that the roof would be weather tight *in so far as the plans and specifications with which it had to comply would allow*.
- Trial judge held for Willand, CA upheld.
- SCC disagreed, allowed the appeal:
 - When a contractor expressly undertakes to carry out work which will perform a certain function in conformity with plans and specifications, and it turns out that the work so constructed will not perform the function, generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty.

- Here the express provision was “all work above specified will remain weather tight for 5 years”.
- Also, all parties here were sophisticated in the business – court does not want to read anything into the express provisions of the K.

***CCH Canadian v. Mollenhauer Contracting* (1975 SCC)**

- Under the K, M was to incorporate bricks of a certain kind and quantity into the building. M supplied the brick and did the work as per the specs. The brick turned out to be defective for its purpose and had to be replaced.
- Where a building contract specifies a particular kind of material, the builder is not liable to the owner for complying with the specifications, even though the material proves to be unsuitable for its purpose, unless the owner relies on the skill and judgment of the builder with respect to the suitability of the material.
- This case is distinguished from Willand because here there was no express guarantee that the work would be without defect.

***Hunter Engineering v. Syncrude Canada* (1989 SCC)**

- Syncrude bought gearboxes from H. The gearboxes were manufactured by a company called ACO. S provided specifications to ACO detailing the intended purpose of the gearboxes but not how they were to be constructed.
- K contained express warranties with a time limit.
- Gearboxes failed after the expiry of the warranty – failure was due to a defect in how the gears were welded.
- S repaired the gearboxes at its own expense, now wants to claim against H.
- Action was successful at trial, upheld on appeal.
- SCC held:
 - Welding design details were the responsibility of H, and the failure of the gearboxes was a breach of the implied warranty of reasonable fitness for the buyer’s purpose (*Sale of Goods Act*) – this is a statutory warranty separate from the express warranty in the K.

DAMAGE ASSESMENT, PENALTY AND LIQUIDATED DAMAGES

Quantum Meruit

- There are 3 categories of cause of action:
 - Tort
 - Contract
 - Restitutionary Remedies (based on trying to prevent unjust enrichment).
- *Quantum meruit* claim is not a contract claim, but a Restitutionary remedy
- It is a claim to prevent unjust enrichment
- If you are suing on QM basis, you only have to prove 1 thing: that the other party made a request for services. If they make a request for services, and you perform, you are entitled to sue for the reasonable amount for your services.
- Where there is a K, the action is in contract, not *quantum meruit*.
- Where a K stipulates that the price will be a “reasonable amount for services”, it would be void for uncertainty. But, there would still be a remedy in QM.

Damages

- What does “damages” mean? It is not a cause of action in itself.
- When do damages flow and why? Damages are the remedy for breach of K, breach of duty of care, unjust enrichment.
- When the issue is unjust enrichment, damages may be based on *quantum meruit*.

***Nu-West Homes v. Thunderbird Petroleums* (1975 Alta. C.A.)**

- N entered into K with Thunderbird to build a house. K provided that where there were discrepancies between the plans and the written specs, the specs would govern.
- Disputes arose over certain materials to be used in the building. N decided to stop construction until the disputes were settled.
- Parties agreed to terminate the K, provided that N carry out a few specific jobs on the house first. No work was done. T had to finish the house themselves and repair defects at their own cost.
- Trial judge awarded damages of \$4100 to T.
- **Issue #1: Is N in breach of the K?**
 - Here the construction was really shitty and there were a lot of serious deficiencies.
 - It is not every breach of a building K that will entitle the owner to discharge the contractor – it would be monstrous to allow an owner to get substantially what he bargained for and yet not have to pay for it.
 - Where the work is carried out, but deficiently, the contractor is still entitled to be paid for the work. However, the owner is also entitled to deduct an amount sufficient to right the deficiencies from the amount owed under the K.
 - Only breaches that go to the heart of the K, such as abandonment of the work when it is only half done, will allow an owner to withhold payment.
 - What constitutes substantial performance is to be determined on a case by case basis.
 - Here, court holds that the K was not substantially performed – these were not minimal defects.
- **Issue 2: Damages**
 - Where a builder is in breach of his obligation under a building K, 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 its expenditure.
 - In judging the reasonableness of the owner’s decision to rectify the defects in such a case, the court should not be over critical, since the necessity of making the decision is occasioned by the builder’s own breach of K.
- Not a whole lot of guidance as to where the dividing point is.
- Grasser says that you can have appraisers establish diminution in value.

***Perini Pacific v. Greater Vancouver Sewage and Drainage* (1966 BCCA)**

- K was for construction of a sewage disposal plant.
- P is claiming damages for unreasonable delay caused by GVSD – asking for \$50,000 (amount of overhead at \$738 per day for 69 days delay).
- NEED NOTES ON THIS CASE.

Bank of Portugal v. Waterlow – about duty to mitigate damages.

TORT LIABILITY IN A CONTRACTUAL SETTING

Handout: Tort Liability Objectives

Issues to tackle:

- What are the principles that govern whether or not a P can sue in both K and Tort in the Construction Law Setting?
- Why would a P want to sue in tort if they can sue in contract?
- When can a GC in a construction law setting sue one of the owner’s design professionals directly? What are the limitations on this – ie where the owner has disclaimed liability?
- Can an owner sue in tort for pure economic loss?
- When can an owner sue a public body for faulty building inspection?
- Are there any statutory restrictions?

- How is the law different in Canada and the UK regarding (a) the test for duty of care, and (b) pure economic loss?
- What is the difference between an action in negligence and an action in negligent misstatement?

History of Concurrent Liability

- *Donahue v. Stevenson* – before this case you could not sue in negligence, except if you fit within a very narrow category. Generally you would sue in contract. Court created “neighbour” principle, which is generalized.
- *Hedley Byrne* – a professional can be sued not in just regular negligence, but in negligent misstatement. Also, the court says that you can recover for pure economic loss in such cases (otherwise you wouldn’t be able to recover anything).
- *Anns v. Merton* – building inspection case. P wanted to sue a public body. This case did 2 things: (1) it said for the first time that you can sue a public body for breaching a private law duty of care. (2) widened neighbour principle and set out 2 stage test for establishing duty of care. This was also a pure economic loss case.
- *Kamloops v. Nielsen* – Canadian court following *Anns* for the first time and overturning the *Rivtow Marine* case, which was the previous statement on the law – said that tort law does not give you rights for pure economic loss, only property damage or injury. In England, this is still the law – they have gone back from the *Anns* principles.

Pure Economic Loss

- When you are suing for dollar bills – cost of repairing something, for example (not injury or damage to property).
- How far does liability under this heading extend down the contractual chain? SCC is concerned with this right now – it is a big scary issue.
- The law in Canada is that if someone has made a “shoddy good”, it is unclear if you can sue in pure economic loss. But, see *Bird* case (below) – “dangerous goods”.

Kamloops v. Nielsen (1984 SCC)

- H Jr. is idiot son / builder. H Sr. is the idiot father / alderman.
- Son sets out to build his dad his dream house. They were building on a hill, got plans approved by the city. Footings had to be sunken down to a “solid base”.
- Dec. 18, 1973– construction starts.
- Inspector comes out, says that the house has not been built in accordance with the plans – tells H Jr. H Jr. keeps working anyways.
- Same happens on 2 further occasions.
- City issues stop work order – order says that you can’t continue working until you produce a plan that shows how you are going to solve the structural problems – must go to an engineer.
- H Jr. goes out and hires professional engineer, gets new plan, plan is approved and stop work order is approved.
- Son continues building under the old plan.
- Engineer sees that the plan is not being followed – turns H Jr. in to the city.
- Feb 27, 1974 – inspectors come out, another stop work order is issued.
- H Jr. disregards the 2nd stop work order.
- Inspectors keep coming out, note that work is continuing.
- April 9 – H Sr. buys the incomplete house from the son.
- April 22 – Another stop work order issued, delivered to father.
- Matter goes to council chambers where H Sr. pleads his case – says there is no problem, leave him alone, he is fine with the house.

- Municipal strike broke out – municipal planning branch is all on strike until July.
- Stop work order is basically forgotten.
- Feb 75 – house is completed, father moves in.
- H Sr. sells the house to the Nielsen family.
- N family gets an inspection, but inspector does not go down into the basement to see the defects in the house.
- Years later, a plumber figured out that there was a problem.
- Feb 79 – N sues H Sr. for fraudulent misrep, breach of K, negligent misrep. Also sues City of Kamloops for failing to enforce the stop work order.
- H Sr. was 75% liable, city 25% liable - This is important because of joint and several liability – if you are 1% liable, you are on the hook for 100% - then must turn to the other tortfeasors to collect. This means that the P will try to enforce against the party with the most money.
- When did the cause of action in tort arise? When the damage is done (when you knew about the damage, or ought to have known), not when the duty of care occurs. Limitation period in Alberta is 2 years from the date of discovery, to a max of 10 yrs.
- SCC was divided on this case – 5 member panel, split 3/2.
- Up to this point, there was no case in which a party successfully sued a city for negligence.
- Issues:
 - Does the city, as a public body, owe a duty of care?
 - Does that duty of care extend to any purchaser down the line?
 - What is the limitation period?
- **Issue 1: Duty of Care**
 - SCC cites *Anns v. Merton*.
 - Distinction between policy vs. operational decisions – can't attack policy decisions. Difficulty is in deciding what decisions are policy decisions and which are operational – can be very grey area.
 - Court sets out duty of care test - establishes a duty of care.
 - City comes back and says: (1) the breach of the duty didn't cause the loss – it was the Hs that caused the loss. Court doesn't buy this – said that they apportioned the loss based on degrees of liability. (2) tried to create a distinction between nonfeasance and misfeasance – if they did something wrong, it was that they didn't do anything. Usually you are only on the hook in tort when you have actually done something wrong. Court says no – the distinction is of no consequence.
 - Floodgates argument – court considers indeterminate liability, says that there is enough built-in restrictions in the way that they have identified the policy.
 - Note that HL totally ripped *Anns* apart after this case – agreed with floodgates argument and backed away from *Anns* principle completely.
 - Pure economic loss – up until this point, you could not recover for pure economic loss (*Rivtow* case – above). Court says that it doesn't understand the distinction between allowing someone to repair an obvious problem before there is damage to persons or property, and allowing someone to recover after the damage is done.
 - Court distinguishes *Rivtow* – it is a case between private parties – basically court is saying that when you sue a public body you can recover for pure economic loss.
 - Also, remember that *Hedley Byrne* said that you could recover for pure economic loss when you are suing a professional.

***BG Checo International v. BC Hydro* (1993 SCC)**

- BGC enters in to K with BC Hydro to erect electrical towers in the mountains. BGC had never done work in the BC mountains before.
- BGC inspects the site by helicopter before entering into the K, sees that the path has not been cleared the whole way, but that work seems to be underway.
- BC Hydro was to be responsible for clearing the path under the K.

- Bidders had a responsibility to inspect the site, was to inform themselves of all aspects of the work.
- Once parties entered into K, BGC found out that the clearing had still not been done.
- BGC sues BCH in contract and tort.
 - Contract – contract was breached when BCH failed to clear then land as required and BGC had to do it themselves, at their own expense.
 - Tort – negligence.
- Why sue in tort? Measure of damages is different.
 - K looks to the future – “expectation damages”... where would you have been in the future if the breach had not occurred. Damages are awarded based on what position the party would have been in had the K been performed as agreed.
 - Tort looks to the past – “reliance damages” - tries to restore the parties to their original position. Here damages are awarded based on the position that the party would have been in had the misrepresentation not been made.
- Here, BGC had way underbid the project to break into the market – it is better for them to sue in tort so as to get all the money that they actually spent back, instead of get damages for loss of profit – they never made a profit.
- SCC held that BCH had a duty to clear the path under the K.
- Issues with regard to tort:
 - Can a pre-contractual representation that becomes a term of the K found liability in negligent misrepresentation? – referring to clearing.
 - If yes, did the terms of the K operate to limit liability/preclude them from suing in tort?
 - If no, is Hydro liable for negligent misrepresentation?
 - Is Hydro liable for breach of K?
 - What is the appropriate quantum of damages?
- Court goes through history of the law in this area.
- **General rule of concurrent liability** – where a wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort.
- Example – K expressly says “don’t rely on this information” – disclaimer – limit on liability.
- The rule applies because it is always up to parties to limit or waive their duties that the common law would impose on them for negligence.
- Here, the court reads the K as not limiting H’s right to sue in tort.
- Damages – see above.
- Here the primary action was in tort – Contract action was an alternative. This is because damages in tort would have been better.
- Court says that generally, in situations of concurrent liability in tort and contract, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen.
- Calculation of quantum of damages referred back to lower court, to be decided on the principles discussed in this case.
- **HOW DO YOU ACTUALLY CALCULATE DAMAGES HERE?**

Edgeworth Construction v. ND Lea (1993 SCC)

- BC Govt project. BC hired ND Lea (engineers) to create the tender package. Edgeworth is a road builder – entered into K with BC to perform work on a BC highway near Revelstoke.
- Tender docs included a clause that specifically said that bidders couldn’t sue BC for errors in the bid package.
- There was a mistake that ended up costing Edgeworth a lot of money.
- E can not sue BC because of limitation of liability provision in the K, but can they sue the engineering company?
- BCCA said no.
- SCC said yes – E can sue ND Lea in tort. Disclaimer of liability only protected the government. Court held that the elements of negligent misstatement were made out against ND Lea.

- Now, engineers include a disclaimer clause for themselves in the tender package.
- Issue of the seal – prof. engineers seal documents to show that they have reviewed them and they are appropriate. People used to think that if there was a problem with the design docs you could sue the company and individual engineer who sealed them. SCC said no – in order to sue individual engineers you have to show that they were individually negligent.
- In reality, this is hard to do – party would have to show that they were relying on the particular expertise of an individual engineer without any regard for the corporate character of the engineering firm.

Auto Concrete v. South Nation River (1993 SCC)

- Came out same day as Edgeworth – twin cases.
- South River Conservation Authority is the owner. Auto Concrete is the contractor.
- K is to dredge a river.
- Generally, there are 2 ways to do this – with a back hoe – this is expensive, or another cheaper method.
- AC bid the job, thought they could do it the cheap way. Later, after they got the job, they found out that they couldn't do it the cheap way because in the province you needed a special permit for it.
- AC sued engineering company on the basis that they should have made it clear in the tender docs that that method was not available without a permit.
- SCC rejected the claim, said that construction means are always the decision of the contractor – there is no duty of care to advise contractors how to do their work.

Winnipeg Condominium Corp v. Bird Construction (1995 SCC)

- 1974 - Tuxedo Properties (owner) builds 15 storey apartment building with Bird (GC).
- 1978 – building is condominium-ized. Condo assn is Winnipeg Condos.
- 1982 – cracking appears, costs \$8100 to fix.
- 1989 – a huge ass chunk of concrete fell from the 9th storey. Cost to fix is \$1.5 million.
- WC sues everyone in sight, including the GC.
- Remember that there is no privity of K between WC and Bird.
- Complex structure theory – p. 349. Court rejects it.
 - *The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure as a dangerous defect liable to cause damage to “other property”.*
- Court held that this is a case of pure economic loss.
- Can the P recover for pure economic loss here? Yes.
- If you manufacture something that you ought to realize might create a danger, you can be held liable for repairs of those things (pure economic loss).
- Basically, you can recover for pure economic loss in the case of dangerous goods – this means that you can sue when the defect is discovered – you don't have to wait until it actually causes damage to persons or property.
- This duty of care arises separately from any contractual obligation.
- Court directly overturns *Rivtow* when it comes to safety.
- **Ratio:** Contractors, subcontractors, architects and engineers who take part in the design and construction of a building will owe a duty of care to subsequent purchasers of the building if it can be shown that it was foreseeable at the time that a failure to take reasonable care in constructing the building would create defects that posed a substantial danger to the health and safety of the occupants.
- Where that duty of care is breached, the contractor will be liable for the reasonable cost of repairing the defects and putting the building back in a non-dangerous state.

*** Does this mean that generally you can not recover in tort for pure economic loss, but an exception has been made for dangerous goods? What are the general principles around pure economic loss?*

Ingles v. Tutkaluk Construction (2000 SCC)

- Courts seem to be backing off from the duty of care principle from *Anns* – but one exception is in area of building inspection.
- Mr. and Mrs. I own an 80 year old home. They decide that they want to build a back patio. In order to do so they need to lower their current basement – must get some underpinnings into the existing foundation.
- K is with Tutkaluk to do the work. They specifically agree that T is going to get the building permit for an extra \$500.
- T says they want to start right away – usually takes 2 weeks to get a permit, but don't worry, this is common.
- Ultimately they get the permit, which requires that a building inspector inspect the work before the backfill is done, also that underpinnings had to be 24 inches wide.
- By the time the inspector came out the backfill had been done. It was a rainy day – the inspector didn't want to dig a hole to check the work, which he could easily have done.
- T assured the inspector that the work was done properly. Inspector said fine.
- Within a couple of weeks of completion, the basement flooded. The Is find out that the underpinning work was only 6 inches wide and not 24 inches wide, contrary to the building permit.
- Is sue both Tukaluk and the City of Toronto.
- T had gone broke. City's main defence was that under Ontario law you are required to get a permit and follow the condition. You knew that work had started before the permit had been issued. You are the author of your own misfortune.
- Court reviews 2 cases: *Rothfield, Hospitality Investments* – left the law in limbo.
- Court deals with issue of allocating responsibility – said that very rarely are they going to find that an owner can't successfully sue a public body in a building inspection case – they have to do very bad things before the court will say that they lose entirely – since this case some provincial legislatures have passed statutory protection for public bodies – including Alberta. In Alberta, there is no case law interpreting the provisions, however.
- Standard of care:
 - *To avoid liability, a municipality must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances.*
 - *The measure of what constitutes reasonable inspection will vary, depending on the facts of each case, including (a) the likelihood of a known or foreseeable harm, (b) the gravity of that harm, and (c) the burden or cost which would be incurred to prevent the injury.*
 - *Municipalities will not be held to a standard of insurers for the work – nor are they required to discover every latent defect. What is required is a reasonable inspection in light of all the circumstances.*
- City (inspector) was negligent in relying on the contractor's advice.
- Court held T 80% responsible, City was 20% responsible, the Is were 30% contributorily negligent against the city. This means that T was on the hook for 80%, city for 14%, Is for 6%. The Is can therefore recover 94% of the damages from the city (Remember that city and T are joint tortfeasors – liability is joint and several).

The negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care in exercising its powers of inspection. A municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of care in rare circumstances, when the conduct of the owner-builder is such as to make it impossible for the inspector to do anything to avoid the danger.

Statutory Provisions

- p. 403 – s. 12 of the *Safety Codes*, s. 529, 530, *Municipal Government Act* – new statutory protections in building inspection cases that have not yet been tested.

Hollstag v. Alberta (2006 Alta CA) – “pine shake” case – handout.

- Case is only 4 weeks old – great review of the law. Case will be going to SCC.
- In 1986, you could use pine shakes in Alberta. In 1998 they were withdrawn from the product listing.
- This is a class action by consumers who purchased untreated pine shakes between 1986 and 1998, who had not got warranties from the roofing company/builder.
- Had to prove that Alberta government owed a duty of care to those people.
- First, court looks at legislation dealing with building codes – government actually had statutory duty to put out lists of materials that were good products to use.
- Problem – paragraph 10 – CA said that looking at all of the cases on building codes, case law establishes that the purpose of provincial building codes is to set minimum standards for health and safety. That’s all – when you put out a materials list you are simply stating the minimum standard.
- Para 11 – good summary of the law in Canada on duty of care.
- Court finds that this is a novel area – therefore must look at policy at step 1 of the *Anns* test – as per *Cooper v. Hobart*.
- In considering policy, court looks at a bunch of cases – *Kamloops*, *Rothfield*, *Ingles* etc.
- Court found policy reasons to negate the duty at stage 1 of *Anns*.
- In any event, they also find that step 2 would not be satisfied.
- Court is not dealing with a health and safety case – different from the ones talked about above.
- Para 46 – good statement of what the case is about.
- **READ THIS ON HANDOUT!!!**

p. 405 – summary of building inspection cases.

Article: Municipal Liability for Building Inspections – D. C. I. Lucky

- Prior to *Kamloops v. Nielsen*, municipalities were largely immune from tort liability arising from building inspections or plan review.
- Most recent application of principles from *Kamloops – Ingles v. Takaluk* (2000 SCC).

(a) *Kamloops v. Nielsen* (1984 SCC)

- See facts above – alderman and dumb ass son building a house.
- Issue: should the City of Kamloops, as a public body, be subjected to a private law duty of care?
- Arguments against duty of care:
 - People already have contract and tort remedies that they can pursue against contractors/vendors.
 - There is a scarcity of municipal resources and, frequently, decisions as to how and when inspections will be conducted are dictated by budgetary considerations.
- SCC rejected total immunity – but instead tried to balance competing policy considerations, adopted the ***Anns* test**:
 - (1) Is there a sufficiently close relationship between the parties (the public body and the person who suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part would cause damage to that person?
 - (2) If so, are there any considerations which ought to negate or limit (a) the scope of the duty, and (b) the class of person to whom it is owed, or (c) the damages to which a breach of it may give rise?
- In *Anns*, the court distinguished between policy and operational decisions. This can be reduced to 2 propositions:

- A local authority can decide not to fulfill a power to inspect, provided that the decision not to inspect constitutes an exercise of a bona fide discretion, and
- If the local public body decides to inspect, then it must exercise reasonable care and skill in doing so.
- Applying these principles, the SCC held that the City owed a private law duty of care to the P.
- Here the City had a by-law that outlined how inspections were to take place and stop work orders were to be issued. It also imposed a duty on building inspectors to enforce the provisions. This was central in the SCC's decision that we were dealing with an operational decision, not policy.
- City was 25% liable.

(b) **Ingles v. Tukuluk Construction (2000 SCC)**

- Most recent statement on duty of care for building inspections.
- See facts above – underpinnings on a basement renovation built improperly.
- SCC began analysis with the *Anns* test.
- Upon reviewing the provincial building code legislation, the court held that the legislative scheme was designed to ensure that uniform standards of construction safety were imposed and enforced by municipalities – requirements that plans be inspected before permits issued, inspectors had power to ensure all work was properly completed, broad range of powers to enforce safety standards.
- Court held that municipalities owe a duty of care to all who it is reasonably concluded might be injured by the negligent exercise of their inspection powers.
- Building Code Act gave the city discretion to decide to inspect.
- City of Toronto had decided to inspect even where a permit was received late. Once they chose to implement that decision, it owed a duty of care to take all reasonable steps in conducting those inspections.
- Court said that the contractor's failure to post the permit as required, failure to notify the inspector that the underpinnings were being installed etc. meant that the inspector should have conducted an even more thorough inspection than usual, especially because the underpinnings were so crucial to the structural stability of the home – basically he should have been more diligent given the circumstances.
- The inspector's failure to conduct a vigilant inspection meant that he failed to act as a reasonable and prudent inspector would. Therefore the city was liable.
- Tukuluk is 80% liable, city 20% liable.
- Court also held that owners were 30% contributorily negligent against the city in allowing the work to go ahead without a permit – this means that damages ended up being 80% Tukuluk, 14% city, 6% owners.

(c) **The Floodgates Argument**

- In Kamloops, SCC had to deal with the floodgates argument – the potential that the court was creating “open season” on municipalities.
- SCC said that the *Anns* test has safeguards built into it to avoid the floodgates problem. Specifically, that the principle applies only to operational decisions and not to policy decisions. At the same time, the test ensures that public officials are exposed to the same liability of other people if they fail in discharging their duty to take reasonable care to avoid injury to their neighbours.
- Problem comes in making the distinction between policy and operational decisions.
 - *Laurentide Motels v. City of Beauport* (1999 SCC) – municipal firefighters failed to properly maintain fire hydrants. A fire occurred at a hotel complex, fire dept. was unable to attach the hose to the hydrant for 40 minutes. Court said that the city could have, as a matter of policy, established a scheme of regular inspection and repair, but they didn't. However,

court held that the decision was operational insofar as it constituted “the practical execution of the policy decision to establish a water system and allocate personnel and money to maintain the system”. The acts and omissions of the firefighters themselves were also held to be operational.

- ***Just v. British Columbia*** (1989 SCC) – A boulder rolled down a slope onto a BC highway onto a car, killing a young girl. The BC department of highways had a system of inspection and remedial work on rock slopes – this involved engineers providing inspections and recommendations as to when remedial work needed to be done. The department decided on a system in which they would visually inspect the slopes and then conduct further inspections where safety measures were warranted. Court held that this was an operational decision. Court said “once the policy decision to inspect is made, the court may review the scheme of inspection to ensure that it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care. **DISSENT** – the number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and balancing the needs and priorities throughout the province. Therefore, policy not operational.

(d) **Nonfeasance vs. Misfeasance**

- One of the arguments in *Kamloops* was that the *Anns* principle only applied to misfeasance, not to nonfeasance. City argued that its failure to take steps should not give rise to liability.
- SCC doesn't buy the distinction – where there is a duty to act, there is no difference between nonfeasance and misfeasance.

(e) **Owner - Builder**

- It has been argued that where an owner-builder wants to sue a public body, the o/b's own negligence should disentitle it to recover for damages against the public body.
- Case law shows that this argument will usually fail.
 - ***Rothfield v. Manolakos*** (1989 SCC) – the Ms owned a house on a steep slope in Vernon. They entered into a K with G to build a retaining wall. G subcontracted to B, who prepared some sketches. Neither G or B were qualified engineers. The Ms called the city to ask about a building permit. By the time an inspector came out excavation had been done and footings were in place. The inspector did not actually inspect but told the Ms that they needed a permit. That day, G and B went to apply for a permit. They showed the sketches to the head inspector, who decided to exercise his discretion and not insist on a professional engineer's plan for the wall. Work was carried out, but inspections were not conducted at the times when they were supposed to be done – as a result the inspector could not actually see what had been done at previous stages of work. When a crack appeared, the inspector was called out. He told the contractors to monitor the situation. No further cracks appeared after 20 days, so work went ahead and was completed. Later the city decided that the retaining wall created a danger and had to be removed. Ms sues the city. SCC had to decide whether the Ms had disentitled themselves from bringing a claim because they had failed to properly notify the city of the stages of construction as required. Majority held that an owner-builder who acts negligently can successfully bring an action against a public body unless it can be shown that the owner-builder “knowingly flouted the applicable building regulation or the directives of the building inspector”. City was 70% liable, Ms 30% contributorily negligent.
 - ***Hospitality Investments v. Lord Building Construction*** (1996 SCC) – court held that the owner-builder had completely flouted the building bylaws, or was completely indifferent to

the responsibilities placed on it by the bylaw – therefore *had* disintitiled itself from being able to sue the city of St. Andrews.

- O/B had prepared his own floor plans even though he had not professional qualifications.
 - O/B indicated on his application for permits that he had retained an architect when he hadn't.
 - When he later did consult an architect, he was advised that he needed professional advice on the floor plan, and ignored it.
 - When asked to provide specs for the plan, he provided info from a textbook that had nothing to do with what he had been asked to provide.
- These cases were both considered in *Ingles*. There, the court focused on *Manolakos* and downplayed *Hospitality Investments*.
 - In *Ingles*, the court held that it will be the rare case where a P would disintitle himself from being able to sue a public body – where an o/b is negligent, that will usually just go to contributory negligence and reduce damages.
 - *Papadopoulos v. Edmonton* (2000 Alta QB) – P was not disintitiled to sue the city, but was held to be 35% contributorily negligent. Here the Ps built a promontory jutting out over a creek even though their land was under building restrictions. Later part of their yard collapsed into the creek. Mr. P did a bunch of bad stuff:
 - Failed to advise his geotech engineer of the true nature of the project.
 - He ignored warnings from the engineer after he found out what the true nature of the project was.
 - He installed an underground irrigation system in direct violation of the permit and the caveat on his property.
 - Allowed an extraordinary amount of tree watering on an unstable area of land.
 - Failed to provide the city with a certification by a professional engineer, as required.

(f) Standard of Care

- A public body must exercise a standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances.
- The nature of what constitutes a reasonable inspection varies depending on the circumstances, including: (a) the likelihood of a known, foreseeable harm, (b) the gravity of that harm, and (c) the burden or cost which would be incurred to prevent the injury.
 - *Ingles* – ... a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection may be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the home. It was, however, required to conduct a reasonable inspection in light of all the circumstances.
 - *Kirby v. City of Coquitlam* (1996 BCCA) – A foundation was build on organic fill. The P claimed that the city had negligently inspected the forms for the foundation, negligently issued a permit, failed to ensure that the foundation was on solid ground. The inspection was done in 1966. Case was dismissed on the basis that a reasonable inspector in 1966 would not have been alert to the possibility of fill on the site, or aware that a creek had been relocated from the property.

- *Hilton Canada v. Magil Construction* (1998 Ont SC) – Action was dismissed against the city of Mississauga on the grounds that deficiencies in the plans were not capable of being detected upon visual inspection by the city.

(g) **Legislative Modifications to the Common Law**

- **Building Codes**

- S. 1.5.1.14
 - (1) Neither the issue of a permit, nor inspections made by the authority having jurisdiction, shall in any way relieve the owner of a building from full responsibility for carrying out the construction or having the construction carried out in accordance with the requirements of the Uniform Building Standards Act and regulations made pursuant to that Act, this code, by-laws of the local authority made pursuant to s. 5(2) of the Uniform Building Standards Act, or the permit, including compliance with any special conditions required by the authority having jurisdiction.
 - (2) The owner shall ensure that the materials and things used in the construction of the building meet the requirements of this code.
 - (3) The constructor shall ensure that the materials and things used in the construction of a building meet the requirements of this code
 - (4) Every vendor or supplier of materials and things used in the construction of a building shall ensure that the materials and things he advertises, displays, sells, leases or otherwise disposes of meet the requirements of this code.
 - S. 1.5.1.15 - The owner shall ensure that the plans, modifications and specifications, on with the issue of the permit was based, are available continuously at the construction or demolition site during working hours for inspection by the authority having jurisdiction.
 - S. 1.5.1.16
 - (1) The owner shall give notification to the authority having jurisdiction (a) of the intent to undertake construction that has been ordered to be inspected, (b) of intent to cover construction that has been ordered to be inspected before covering, and (c) when construction has been completed so that a final inspection can be made.
 - (2) If required by the authority having jurisdiction, an owner shall have uncovered and replace at his own expense any construction that has been covered contrary to an order, or condition of a permit, issued by the authority having jurisdiction.
 - S. 1.5.1.17 – An owner shall provide in writing a verification letter from persons engaged to review construction that the construction was in compliance with this Code and with any permits issued.
- **Safety Codes Act s. 12** – *seems to provide immunity from actions where a building inspector has performed an operational function in a negligent fashion.*
 - 12(1) No action lies against the crown, the council, members of the council, safety code officers, accredited municipalities or their employees or officers, accredited regional services commissions or their employees or officers, accredited agencies or their employees or officers of Administrators for anything done or not done by an of them in good faith while exercising their powers and performing their duties under this Act.
 - 12(2) The crown, and accredited municipality, an accredited regional services commission and an accredited agency acting in good faith under this act are not liable for damages caused by a decision related to the system of inspection, examinations, evaluations and investigations, including but not limited to a decision relating to their frequency and the manner in which they are carried out.
 - 12(3) The crown and an accredited municipality and an accredited regional services commission that engage the services of an accredited agency are not liable for any

negligence or nuisance of the accredited agency that causes an injury, loss or damage to any person or property – *provides immunity where the city delegates inspection powers.*

- 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.
- **Municipal Government Act**
 - S. 529 – A municipality that has the discretion to do something is not liable for deciding not to do that thing in good faith or for not doing that thing.
 - S. 530 – A municipality is not liable for damage caused by (a) a system of inspection, or the manner in which inspections are to be performed or the frequency, infrequency or absence of inspections, and (b) a system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.
- BC government has enacted even greater protections for municipalities. For example, *Vancouver Charter* s. 294(8) – huge, detailed exculpatory clause. In *Kaiser v. Vancouver* (1995 BCCA) the P’s claim failed because of the “plain meaning of the language” of the section.

(h) Summary

Principles that come out of the case law in this area:

- (1) The determination of whether a public body owes a private law duty of care rests upon an application of the *Anns* test.
- (2) Where a statute confers a power that leaves the manner in which the power is to be exercised to the discretion of the local authority, the authority can decide not to exercise its power to inspect as long as the decision not to exercise its power is a *bona fide* exercise of discretion. However, if the local public body decides to exercise its power to inspect, it must exercise reasonable care and skill in doing so.
- (3) Public bodies owe a private law duty of care in the exercise of operational decisions but not in the exercise of policy decisions. What constitutes a policy decision may vary infinitely, however, once the policy decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the gov’t agency has met the requisite standard of care.
- (4) The courts do not recognize a distinction between public body nonfeasance and misfeasance.
- (5) Except in the rarest of circumstances, the negligent conduct of an owner-builder will not disentitle it from successfully bringing an action against a public body for failure to inspect. In such cases, however, damages will be apportioned pursuant to the relative negligence of the parties. In the “rare” case where an owner-builder is shown to have “knowingly flouted the applicable building regulation or the directives of the building inspector”, it will be completely disentitled from suing. This is a complete defence, and may encompass those situations where an o/b never applied for a building permit, or never notifies the inspector of the need for inspection, or those situations where the inspector receives notification so late that it would be impossible, upon full exercise of the powers granted under the governing legislation, to discover any hidden defects.
- (6) The public body is to exercise a reasonable standard of care in the building inspection that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances. The measure of what constitutes reasonable inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. Municipalities will not be held to a standard where they are

required to act as an insurer for the work, nor will they be required to discover latent defects in the construction error.

- (7) In Alberta, it is presently unclear how effective s. 12 of the *Safety Codes Act* and ss. 529 and 530 of the *Municipal Government Act* will be to immunize local bodies from tort actions. While it is clear from the provisions that the legislature has attempted to transfer risk from municipal bodies to vested participants (ie owners and contractors), we will need to await court consideration of the sections to determine how provisions will be interpreted.

BONDS AND SURETIES

Handout – sample exam question.

Liquidated damages clause – *per diem* amount of damages for being late on completing work.

What is a Bond?

- Bonds make it possible for the principal to provide the obligee with the guarantee of a responsible surety that the principal will satisfactorily perform his obligations under the contract, provided that the obligee performs his obligations.
- A bond is a three-part undertaking under which the surety agrees to indemnify the obligee against loss arising from the failure of the principal to perform his obligations.
- Also, if the surety suffers monetary loss as a result of fulfilling its obligations under the bond, it will look to the principal for reimbursement of that loss.
- A bond is not an insurance policy.

Parties to Construction Bonds

- **Principal** – the person, firm, or corporation that is bonded. This could be a GC, Trade Contractor, Subcontractor or supplier.
- **Obligee** – the party to whom the bond is payable (ie. an owner or GC, or sometimes a subcontractor)
- **Surety** – the party who issues the bond which guarantees the performance of the principal's obligation under the contract within the financial and time limitations expressed in the bond.

Bonds vs. Insurance

- **Type of relationship** - bond is a 3 party relationship (principal, surety, obligee), Insurance is between 2 parties (insured and insurer). For example, in a performance bond the principal is the construction company (contractor), surety is the bonding company, obligee is the party that the surety company owes the obligation to (in this case, the owner).
- **Determination of premiums** – insurance premiums are set by statistics – how often will we have to pay out? Bonding companies never want to pay out – rule is not to pay out but to make sure that if they ever pay out they can get it back. Bonding company will either (1) get the financial statements of the company asking for the bond to make sure that the bond will never be needed – company knows that there is money there if needed, or (2) entering into indemnity Ks with owners of the company personally to guarantee the bond.
- **Everyone hates bonds** – they never pay out without a massive fight. As a result, owners may not ask for bonds anymore.

Common Types of Construction Bonds

- (1) **Performance Bond** – owner asks contractor to give performance bond – there to benefit the owner (subcontractor doesn't care if there's a performance bond). Why does an owner ask for this? It guarantees performance. Basically it means that if a contractor can't perform the K, the owner has the money to perform it.

- Basic function is to provide indemnity to the obligee up to the amount of the bond in the event of default on the part of the principal.
- Provided that the obligee has met his obligations under the contract and the bond, he will be able to claim against the surety and will be expected to be indemnified within the amount of the bond for any loss suffered by reasons of the principal's default.
- Here the contractor is the principal and the owner is the obligee.
- Not intended to cover payment of labour and materials. If you want to cover this, you should also get an L&M bond.
- Must file a claim under a performance bond within 2 years from the date on which final payment under the contract becomes due, therefore the standard 1 year warranty period is automatically covered.
- Claims under performance bonds:
 - Failure by the contractor to perform must be declared in writing by the owner to the contractor and the surety. At this point, the surety may remedy the default to ensure completion of the contract, if the K is still in the hands of the contractor. If the K is no longer in the hands of the contractor, the surety can also (a) complete the K, or arrange completion of the K by others, or (b) indemnify the obligee up to the penalty of the bond.
 - Where a surety opts to have the K completed by another party, the obligee and the surety must agree to accept a responsible bidder if normal bid procedures are adopted
 - If the work is taken out of the contractor's hands, the surety will make additional funds available over the balance of funds left in the K for the completion of the K as the work progresses in accordance with the terms of the K
 - The performance bond covers the cost of completion of the K and other costs for which the surety may be liable – the total amount being limited to the amount of the bond. Where the K is a CCDC2, "other costs" include all reasonable obligations under the K, including architectural or engineering costs arising because of the default of the contractor.
 - An obligee must initiate a suit within 2 years from the date on which final payment under the K falls due.
 - The obligee/owner should avoid taking unilateral action following default by the contractor and should keep the surety informed, in writing, of his intentions with regard to continuance of the K.
 - If completion is to be undertaken on a cost-plus basis, there should be complete understanding and concurrency with the surety regarding the terms of such a K.
 - Obligees are cautioned to maintain contact with the surety whenever there is cause for concern regarding the performance of the principal.

(2) **Labour and Material Payment Bond (L&M)** – benefits the people who provide labour and materials (subcontractors). People who provide L&M and don't get paid can collect on the bond. Why would an owner make a contractor pay for this kind of bond? To avoid liens (which is sometimes effective, sometimes not), but also in public jobs to make sure that subs are looked after (for political reasons – good business).

- Function is to ensure that all claimants will be paid for labour and materials furnished to the principal for use on the project described in the bond.
- Under the standard form CCDC L&M bond, a "claimant" is one who has a direct contact with the principal for the provision of labour and/or material (which includes equipment rental), as defined in detail on the bond, used or reasonably required for use in the performance of the K.
- Where the GC is the principal and the owner is the obligee, the potential claimants would be subcontractors and/or suppliers of material or labour having contracts directly with the GC.

- Subs are not actually party to the bond – here the obligee (owner) would be trustee, BUT bond has to have trustee clause. Where there is such a clause, subs can sue directly on the bond because they are the beneficiaries of the trust relationship.
 - In other cases, the subs may be actually named as a party to the bond.
 - Must give notice of a claim.
 - Must file a claim within the time stipulated in the bond.
 - Claimant will have to show that the materials and/or services were in fact supplied to the particular project in connection with which the bond was issued – this would be done through payroll records, signed delivery tickets, approved extras or material orders etc.
 - Claims under an L&M bond:
 - A claimant must have a direct contract with the principal
 - The bond covers only the obligation of the principal to claimants incurred before his default.
 - Claimants must send written notice to the principal, the surety and the obligee by registered mail within the time limits required by the bond.
 - A claimant must institute a suit within the 1 year period as indicated in the bond – but can be stipulated in the bond.
 - Unless the bond specifically provides otherwise, you can lien or call on the bond in any order – no requirement to do one first – this is a general rule.
 - See *Citadel* below.
- (3) **Bid Bond** – type of bid security. These bonds benefit the owner – protects him from bidders walking away in the bid process. Allows owner to collect when a chosen bidder refuses to enter into the construction K.
- If a tender is accepted, the tenderer is obligated to enter into a formal K with the owner and to provide bid security (either a bid bond or other type of security).
 - In such cases the bidder/contractor is the principal and the owner is the obligee.
 - If the contractor fails in his obligations under the K, he is obliged to pay the owner the difference in money between the amount of the tender and the amount for which the owner legally contracts with another party to do the work, up to the amount of the bond.
 - If the contractor can not meet the obligation, the surety will be obliged to do so and will charge the costs back to the contractor.
 - Any suit under a bid bond must be commenced within 6 months.
 - Basic checklist for bid bonds:
 - The bond should identify the principal, obligee, the tender closing date, and a brief description of the work and location of the project.
 - Amount of the bond should not be less than the amount specified for bid security. It should be a fixed amount, however in cases where it is a percentage amount of the tender price, it should have a maximum dollar limit.
 - The bond must be properly executed (ie. requirements for execution and sealing).
 - If the tender is not accepted within 60 days of the closing date of the tender, the bond becomes null and void.
 - If the tender can not be accepted within 60 days, consent to extend that period should be obtained in writing from the principal and surety. This should be done under seal (because of lack of consideration).
 - Written notice must be given by the obligee to the principal and the surety if the bid bond is called upon, and the obligee must protect his claim by instituting suit within 6 months from the date of the bid bond.
- (4) **Maintenance Bond** – like a performance bond but for the warranty period. Some Ks have a warranty built in on the work. Performance bond is over when work is complete, but maintenance bond secures performance of the maintenance obligations.

- (5) **Hold Back Bond** – contractors have an obligation under statute to hold back 10% of payments to the contractor for the benefit of the sub contractors. This bond allows contractors to pay out 100% without breaching their obligation. This is something that the contractor would want.
- (6) **Consent of Surety** – not really a bond. Consent document from the bonding company that says that it guarantees to post the performance and L&M bonds for a contractor if they are the successful bidder. Allows owner to know that bonds will be secured if that bid is chosen.

* Making a claim on a bond is way easier than registering a lien.

Main Types of Construction Insurance

- (1) **Liability Insurance** – better called 3rd party liability. Kicks in when a 3rd party sues you. For example, a fire started and some 3rd party was hurt. That person now wants to sue everyone. Usually policies say that they will cover the holder against any 3rd party liability, unless the damage falls within one of the set out exceptions.
- (2) **Property Insurance** – Kicks in when there is damage to your own property. For example, the same fire that hurt the 3rd party also burned down your building.

Other Types of Insurance

- (a) **All Risk Insurance** - Aka “Course of Construction” or “Builders’ Risk” Insurance. Type of property insurance that covers damage to the property that happens during the course of construction (ie. one of the welders set a fire with a torch and burned the place down).
- (a) **Errors and Omission Insurance** - Aka “Professional Liability Insurance”. Architects and Engineers might have this kind of insurance. Similar to other professional liability insurance (like lawyers, doctors etc), but it is not required like it is for other professions. Policies are very expensive and many architects and engineers simply take the risk because they can’t afford the policy.
- (b) **Wrap Up Liability Insurance** - Protects everyone on site against against everything. Owner pays for this type of insurance (either directly, or through the contractor).

Form of Bonds

- Bid Bond – example on CB p. 481. Bond number on top, dollar value (called penal sum) – usually 10%, must sue on it within 6 months.
- Performance bond – CB p. 482. Sum is usually 50% of the contract price, all parties are named specifically. Owner must declare the K to be in default in order to collect on the bond, must sue within 2 years.
- L&M bond – CB p. 526. Note the words “trustee form” – we will see that this is important in one of the cases below. Includes a bunch of limitation periods – this example you must make a claim within 120 days – but see SCC case (Falk) that says that even if you are late you may still get to make a claim.

Common Bonding Company Defences to a claim on a Performance Bond

- (1) **Material prejudice** – “we’ve been materially prejudiced by your conduct, and therefore we no longer have any bond obligations”. Minor changes in either the terms or the work will have little consequence to the surety – in such circumstances no notice needs to be given. However, if you are unsure whether the change is material and prejudicial, you should notify the surety and obtain its written consent.
 - Prejudice #1 – you have *substantially* increased the work and the contract price. When you do this without the bonding company’s consent they will say that that wasn’t the deal – the scope of work has now changed – fairly high threshold. If you are going to make major changes, you should have the bonding company consent.
 - Prejudice #2 – early payment. Bonding company doesn’t like it when you make early payment to the contractor because they want to make sure that the owner has money to give

the bonding company to do the work. This is because early payment to the contractor means that there will be less money available for the surety to fix the problem upon default.

- Prejudice #3 – change in work where the contractor is now doing something that they're not skilled at doing. Bonding company will say that the risk has changed.
- Prejudice #4 – you have been unreasonable in extending the contract time to the contractor. It takes a lot for the bonding co. to be able to rely on this one.

(2) Failure to comply with the strict terms of the bond

- Didn't declare the principal to be in default.
- Failed to provide notice to the surety that you are declaring the principal to be in default.
- Oblige went and completed the work on their own – happens where instead of claiming on the bond the obligee just goes and completes the work.
- Failed to sue on time as stipulated in the particular bond.

Procedure to enforce bonds

- (a) Declare principal in default
- (b) Notify bonding company that principal is in default, in compliance with the bond.
- (c) Sue on time
- (d) In response, surety has 4 options
 - Remedy the default by hiring someone else to do it (go to tender).
 - Take over the K and complete it themselves
 - Obtain a bid and give it to the owner for completion of the K – in that case the owner enters into a new K with the new contractor, but it is the surety who pays the contractor by getting money from the owner. The surety is then responsible for performance of the K, cost overruns etc – the owner only pays out the remainder of the original K price.
 - Pay out the bond directly to the obligee

Citadel General Assurance v. Johns-Manville (1983 SCC)

- L&M bond case – diagram in CB.
- SCC talks about difference between accommodation surety and compensated surety.
- Ontario Ministry of Environment is the owner. Contractor is John Carlo Ltd. Contractor got an L&M bond from Citadel. Johns-Manville is a subcontractor supplier of pipe and was owed \$80,000.
- Paragraph 3 of the bond said that no suit or action is to be commenced unless the claimant gives written notice in a specific time period (120 days) to specific people (owner, surety and contractor) in a specified form (registered mail).
- Here John-Mansville sent registered letter to bonding company, notice to owner was by ordinary mail, oral notice given to principal (John Carlo).
- Owner had lien hold back of approx. \$81,000, but John-Mansville never made a claim against it.
- 3 issues in this case:
 - (1) Did Johns-Manville have a right to sue the bonding company directly even though there was no **privity of contract** between them? Yes. On these particular facts, there is a trust relationship between the bonding company and Johns-Manville that allows them to sue directly.
 - (2) Does **failure to provide proper notice** mean that Johns-Manville can not sue? No. SCC says that traditional view in favour of protecting guarantor doesn't apply here. All of the case law over the past 400 years involves accommodation surety – basically where the guarantor is helping someone in achieving their plans – like family or a helping hand. This is not one of those cases. Here we are dealing with compensation surety – professional bonding company whose business is guaranteeing payment in return for a premium. The court does not favour the guarantor in the same way in these cases. Here, a mere technical breach will not mean that a bonding company can avoid paying out – the surety must have experienced some kind of prejudice. This is because the courts don't want to let the bonding company off the hook when they have made a profit off providing the surety. Here, none of

the parties suffered prejudice because of the failure to comply with the strict provision – everyone knew what was going on and had been given some kind of notice.

- (3) Does the fact that Johns-Manville didn't **make a claim on the lien** mean that it can not collect on the bond? No. There is no requirement in the bond that a claimant must exhaust other available remedies before it can realize on the bond. Unless the bond specifically says that you have to make a claim on a lien first, then you don't have to make a claim on it.

Fraser Gate v. Western Surety (1998 BCCA)

- Performance bond case – diagram in CB p. 459
- 45 unit apartment. Owner is Fraser Gate Apartments, contractor is a company called Ericksdale. Contract is worth \$3 million. Western Surety was the bonding company – issued \$1.5 million performance bond.
- There was to be a second phase after completion of the first 45 units. Ericksdale really wanted the second phase so they way underbid the first phase – initial problem with the contract.
- Owner has \$329,000 hold back and \$112,000 left in the K. There are only minor deficiencies to worry about (worth about \$12,000). Owner went out and fixed the deficiencies themselves instead of claiming on bond.
- FG figure that they wouldn't be able to claim on the bond for the deficiencies, but there also appeared to be a problem with the foundation – FG was going to want to claim on the warranty, so they needed to find out if the bond was prejudiced for everything, including the warranty.
- Issue: Did the fact that the owner performed the work themselves mean that they can no longer claim against the bond for all purposes?
 - Did the owners' completion of the work result in the bonding company not being required to pay the owner the money that they spent? Yes. The bonding company was not required to pay the money that the owner spent on fixing the deficiencies. The owner doing the work materially prejudiced the surety – the surety was deprived of the opportunity to decide what it thought was the most effective way to remedy the breach.
 - Did the owners' completion of the work void the bond for all purposes, including the warranty work? No. While sometimes if you do something as the owner to prejudice the bond, the bonding company will be off the hook forever, this is not one of those cases. The company will only be off the hook where the owner's conduct results in a long lasting prejudice. *Here the prejudice is to the warranty, which is something that you do over time. If you basically if you can trace the warranty problem back to the principal, the surety will be off the hook because the principal caused long lasting prejudice.*

Paul D'Aoust v. Markel Insurance (1999 SCC)

- Diagram in CB p. 483
- Roman Catholic School Board is the owner. They entered into a construction management K with Paul D'Aoust, became agent for the owner. PD entered into a K with Preston & Leif, who was required to get a performance bond. They went out and got the bond. They were then supposed to send it to the contractor, who is supposed to sign the bond and hand it over to the owner.
- P&L took their time sending the bond to the contractor because they knew they might go under, which they did in the end.
- In order to become effective, a bond is supposed to be signed, sealed and delivered.
- Issue: does the principle of "signed, sealed and delivered" still apply in this situation? Yes,
 - The bond itself does not say that it has to be signed, sealed and delivered – that comes from common law.
 - A bond is a special type of instrument – the act of delivering crystallizes the legal obligation.
 - The bond was not properly delivered, therefore it never came into effect.
 - What does "delivered" mean – it is a matter of intention which may be manifested by acts or words – question of fact. Usually determined by industry norms and the reasonable expectation of the parties.

- The point of delivery is that it shows that the parties intended to be immediately and unconditionally bound by the terms of the bond.
- Lesson – make sure the bond is actually delivered to you and you know where it is!

**First step on EXAM will be to ask if the bond actually came into effect – was it “signed, sealed and delivered?”

Whitby Landmark v. Mollenhaure (2003 Ont CA)

- This case and the next one are known as “sticks and bricks cases” – question is “what does it mean to perform a construction contract?”
- This case deals with liquidated damages.
- Bonding companies had said that damages that occur outside of the scope of work are not their business – therefore they are not responsible for delays and liquidated damages – they will only make sure the project itself is complete.
- Whitby is the owner. K is for 12 storey condo building. Mollenhaure is the contractor. K is worth \$17.6 million. Performance bond is secured through Zurich.
- Mollenhaure goes bankrupt after substantial completion of the project. Interesting thing is that the project actually came in substantially under budget. Under a cost savings arrangement, the contractor actually owed money to the owner, but of course they were bankrupt.
- Owner makes a claim on the bond for the money that M owed it.
- 4 issues decided at trial:
 - (1) Was the bond responsible for this unique cost saving arrangement? Yes.
 - (2) Was the bond nullified by a material change (early payment)? No.
 - (3) Was there a failure to declare Mollenhaure to be in default? Yes.
 - (4) Was the bond company prejudiced by this failure? Yes.
- What does CA say?
 - (1) Surety is arguing that the bond is only intended to cover the costs of completing the physical construction work under the K, including correcting defective work, but does not extend to collateral obligations such as the cost saving arrangement. Court has to interpret the words “cost of completion” in the bond, holds that there is no evidence to suggest that the cost saving arrangement should not be covered by the bond.
 - (2) Whitby did not declare M to be in default in a timely manner. Here the failure was to declare the very default that it is now relying on – that is, failure to pay money that it owed to W. This is not a case of an obligee failing to acknowledge and alert the surety to other earlier minor defaults upon which it does not rely.
 - (3) The surety was prejudiced by the failure to give notice – were not given a reasonable opportunity to protect the obligee or itself against the consequences of default.

Fiona says: If the bond references the construction contract, it is bonding everything in the contract, including completion of the work AND any other business-end provisions (ie. cost saving, liquidated damages). This is how you distinguish Lac La Ronge – in that case, on the particular, facts, the bond was limited only to the performance of the work and did not include all of the terms and conditions of the contract. *IT IS ALL ABOUT INTERPRETATION OF THE TERMS OF THE BOND.*

So, whether or not a bonding company will be liable for liquidated damages / cost savings will depend on the court’s interpretation of the wording of the bond.

Lac La Ronge Indian Band v. Dallas Contracting (2004 Sask CA)

- Lac La Ronge was building a new sewer. 3.2 mil contract with Dallas Contracting. Western Surety was the bonding company – gave performance bond of 50%.
- Dallas declared in default – given until a set date to remedy. The defaults weren’t remedied on time, so the band terminated the construction K, gave notice the bonding company.
- Bonding company has several options at this point:

- Step in and remedy specific default
- Complete the K
- Go out to tender and find someone prepared to complete the work by way of new K with the owner
- Write a cheque for the penal sum of the bond (here about 1.6 mil).
- About 6 months later, the bonding company finally acknowledged the default, decided to have Dallas complete the work under the supervision of a company called Golder. This is not one of the options listed above.
- LLR said that they didn't want Dallas back, even under supervision, because they were the ones that screwed up in the first place.
- Golder also wasn't to be contractually linked to LLR.
- LLR tendered the K out to another company (K&T) and makes \$600,000 damage claim for the difference in contract price.
- LLR sues both Dallas and Western Surety.
- Dallas found liable at trial and has not appealed.
 - Work Dallas performed did not meet the specs of the K.
 - Dallas failed primarily because of one of their contractors.
 - Default was significant enough for the owner to terminate the K.
- Trial judge held that Western didn't respond properly or responsibly. Under the terms of the bond, they were responsible for liquidated damages.
- CA says:
 - The Dallas/Golder situation was not appropriate – paragraph 35, 36.
 - Western did act promptly – paragraph 41 - 44
 - You can not sue under a performance bond for liquidated damages – it is there only to guarantee construction – paragraph 58 on. This is contrary to what the Ontario CA held in *Whitby Landmark* (above). **THIS MAKES A GOOD ESSAY QUESTION ON AN EXAM!!!**
 - Here court interpreted the wording on the face of the bond – “complete the contract” meant “complete the work” and not “perform all of the terms of the contract” – sticks and bricks only.
 - Court looked at standard CCDC2 standard form – in that form it says “complete the contract”. Court interpreted this as meaning “completing the work”.
 - So, if on the EXAM you get the CCDC2 standard form, you can argue that the court in LLR interpreted that wording as meaning “complete the work” – unless of course parties stipulate otherwise in the bond.

Falk Bros. v. Elance Steel (1989 SCC)

- Involves claim on L&M bond.
- Falk posts L&M bond from Canadian Surety for the benefit of SubKs.
- Elance was sub, wasn't getting paid by Falk.
- Bond said that a claim had to be made within 120 days.
- Claim was made on 148th day.
- Surety company denied the claim.
- SCC looked at s. 109 of the Saskatchewan *Insurance Act* – calls for relief from forfeiture. This is an equitable term.
- Failure to give notice gets treated differently than failure to sue within a set time.
- If you are 1 day late in issuing a statement of claim, you always lose. But, when you are dealing with insurance product or bond where you didn't give notice on time, you can apply to the court for relief from having the policy forfeited, if you can show that the surety wasn't prejudiced by the delay.

Review

- Insurance policies generally – need to know (1) limit, (2) deductible, (3) aggregate.
 - Limit – the max you can sue for – pretty clear. But, does this include legal costs?

- Deductible – if the deductible is high the policy might essentially be useless. For example, you take out policy for your architect for 1 mil. If deductible is \$250,000, architect either has to pay the deductible, or fight the claim, which can also be extremely expensive.
- Aggregate – how many times in one year you can be sued on your own policy.
- Remember difference between bonds and insurance.

BUILDERS LIENS

Handout: Builders' Lien Summary

Generally

- Aka “mechanic’s lean”
- A builders’ lien is an interest in property.
- Lien is security in land to guarantee repayment of a debt (like a mortgage).
- Liens must be registered against title.
- It is a statutory creation – statutory right under the *Builders’ Lien Act* – not so with all types of liens. Some liens are created at common law (ie solicitor’s lien).
- Law says that if you are alleging a statutory lien, you have to bring yourself squarely within the four corners of the act – courts will be very strict. This means that limitation periods will be strictly construed – don’t even be a minute late!
- On the title, the date of registration of the interest indicates priority – therefore in the example of a mortgage with draws, any advance made prior to the lean registration takes priority for payment, but any advances made after the registration of the lien come second.

Who can file a builder’s lien?

- Anyone involved in building on the land
- GC, subcontractors, suppliers, labourers.
- What about engineers, architects, lawyers?
- *Builders Lien Act* s. 6 - in handout. Any person who does work or causes work to be done in respect of an improvement, furnishes material in respect of an improvement.
 - What is an improvement? Look to s. 1(d) – anything constructed, erected, dug, drilled etc. Very broad definition. Just about anything construction wise that happens on land will qualify as an improvement.
 - “What does “work” mean? S. 1(p) – performance of services.
- S. 6(4) – a person who rents equipment to an owner or GC is considered to be providing a service, during the time that the rental equipment is on the site – therefore they can lien.
- Architects and engineers can sometimes lien, sometimes not – all comes down to whether or not they can fit themselves within the definition in s. 6. Courts will consider a number of indicia to make their determination.
- Lawyers generally can’t lien the property – but do have option of solicitor’s lien.

What lands can you lien?

- **Federal lands** – No. Why? Because the builders’ lien act is a statute of Alberta – government of a province does not have the constitutional authority to encumber federal lands.
- **Provincial lands** – No. Not in *Builders Lien Act*, so you can’t lien under this Act. However, you can make a “claim” under the *Public Works Act*.
- **Indian lands** – No.
- **Municipal lands** – Yes. You can lien a school, for example. However, it is interesting to think about what happens if you foreclose on a school – not really a big market for schools.
- **Public highways / irrigation districts** – no. Applies to *all roads*.

Why would you want to lien?

- To bug the owner by encumbering his land.
- What if the owner doesn't plan to sell the land?
- Big ticket reason is that it allows you to foreclose on the property.

Landlord/Tenant Interests

- Example: WEM has a lease with sport check. You act for a contractor doing work on the sport check site. Contractor is not paid and is fighting with sport check. Contractor wants you to file a lien.
 - You can file a lien against the **leasehold interest** of Sport Check – for sure.
 - What value is that lien? Is there a market to foreclose on leases? Sometimes yes, if the terms of the lease are good.
 - However, what you really want to do is lien WEM's **fee simple interest**.
 - 2 times when you can lien both the leasehold and the fee simple:
 - (1) **S. 15 notice** to the owner – before contractor starts work he can write a letter to WEM indicating that he is starting work, is looking to be able to lien the FS interest if he is not paid. If WEM does not respond within 5 days, the contractor could lien the FS interest if he is not paid. Lucky says that lots of times big companies don't bother to respond to these kind of notices.
 - (2) **Bring owner within the definition of "owner" in the Act – s. 1(j)** – a person having an estate or interest in land... in handout.

3 branch test:

- (1) Does the alleged owner have an "estate or interest" in the lands?
- (2) Did the alleged owner expressly or impliedly request that materials be furnished or the work be done?
- (3) Was the work done on the alleged owner's credit, on their behalf, with their privity and consent, OR for their direct benefit?

K & Fung v. Reykdal

- K was the registered owner of a restaurant premises in Calgary. The premises were leased to No Name Café. As part of the lease agreement the tenant was to make improvements to the premises. N contracted with R to do the work. R was not paid and filed a lien.
- Court looks at 3 part test under s. 1(j).
- Main issue was whether or not K had "requested to work".
 - This is a finding of fact, determined on a case-by-case basis. Usually the more heavily involved the owner is, the more likely they will be held to be an "owner" – court is looking for "active participation".
 - The documentation suggests that the owner wanted to have significant exercise of control over the tenant's improvements.
 - Here K approved the concept, approved the exterior paint colour.
 - K *did not* select the GC, did not prepare or approve plans, control funding, provide on-site supervision or inspection, receive any participation rent.
 - Court says that there is not enough evidence to show "active participation".

Condo Owners

- What if condo association doesn't pay for work? Can the contractor lien an individual unit?
- **General rule:** if the condo association requests the work, you can lien the common property and every single unit. If an owner requests work to be done and doesn't pay, the contractor can lien that particular unit, along with their percentage of the common property.
- First ask who is requesting the work.

Land owned by Married Persons

- Where one spouse requests work to be done on property owned by their spouse, can the contractor lien that property? Yes. One spouse can bind another.
- This is in the Act s. 14(1).

Mineral Interests

- Can you lien a mineral interest? Yes. But, where do you file the lien?
- Generally, you register a lien on a mineral interest at the Land Titles Office, except where the lands come under s. 36 of the Act, then register with the Ministry instead.
- Test: s. 36 of the *Builders' Lien Act* – register the lien with the Ministry where (a) the mineral interest is held by the Crown, (b) the estate or interest is less than a fee simple interest, and (c) it is not registered under the Land Titles Act. if the mineral claim is from the crown on lands not registered in the land titles system, you register the lien with the Ministry and not with the land titles office.
- When in doubt, register against both.

When do lien rights begin?

- You can lien from day one of the project – lien rights begin when you start doing work.
- Remember, however, a lien only secures a debt – if you only have \$10 worth of work, the lien is only for that amount.
- Why not file a lien on the first day if you think that the builder is not going to be reputable? Mortgage company won't release funds.
- Any time a contractor says they are going to put a lien on a property everyone freaks out – lots of pressure not to lien.
- Lucky says that you should file the lien, and say that the split second you get paid the lien will be removed. You can get a lien off title very quickly. There are lots of situations where one guy doesn't lien and everyone else did – then he ends up with nothing.

When do lien rights expire?

- General rule is 45 days from...
 - o 41(1) For **materials** 45 days from the day that the last of the materials is furnished, or from the abandonment of the contract.
 - What does “furnished” mean? s. 9(1) – *material is considered to be furnished when it is delivered either to 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 subcontractor.* Delivery to a storage facility, warehouse etc. doesn't count.
 - Did you know where the materials were going? You have to know that the materials are going to the particular project.
 - What kind of K is it? Is it 1 K for many deliveries, or many Ks for many deliveries?
 - o 41(2) For **the performance of services** – 45 days from completion of the service, or from the date the K is abandoned.
 - Where you think there might be a need for a lien, some contractors will deliberately find deficiencies with their own work to prolong the work. However, the act says that it is the last day of completion of the work in the K, not the last day of fixing deficiencies.
 - o 41(3) For **wages** – 45 days from the day the work for the wages is done.
 - o 41(4) For **subcontractors** – 45 days from the day that the subcontract is completed or abandoned.

What does “abandoned” mean?

- Usually means that you find out that the contractor is insolvent – 45 days will often start from that day, depending on what trustee in bankruptcy decides to do.

Deficiencies

- s. 41(5) Notwithstanding subsections (1) to (4) [above], 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.

How to file a lien

- There is a prescribed form for liens in the *Land Titles Act*.
- Someone has to swear an affidavit to say that in their view the claim is valid – never do it on behalf of your client.
- If you are delivering a lien on the 45th day (which happens all the time), don't hand it to the runner in the office to take it down – do it yourself – you only have one chance to get it right – you can have an examiner look at the lien to see if there's anything visibly wrong.
- Discussed above – make sure you file it in the right place.
- Make sure to get the right legal description for the property – don't just trust what the client gives you – look it up for yourself.
- This is a big area for professional trouble!

After you register the lien, you need to do 3 things within 180 days:

- (1) File a **statement of claim** at the courthouse – sue on the lien. This is not the normal limitation period of 2 years - here you have to sue within 180 days.
- (2) File a certificate of *lis pendens* at the courthouse – notice that there is a law suit in relation to the property. Register that certificate of *lis pendens* at the land titles office – notice gets registered on title.

***Be careful not to miss this limitation period – it is very problematic for lawyers. Again, limitation period is construed very strictly. However, if you miss the limitation period you lose the lien – BUT this doesn't mean that you lose your debt claim – can still sue – lien is only security.*

Therefore: 3 limitation periods in the Act

- (1) Register lien within 45 days (s. 41)
- (2) Sue within 180 days (s. 43)
- (3) Trial within 2 years (s. 46) – this is not really a true limitation period – all the courts will want to see is that something is happening (ie discoveries or something) – usually takes about 3 – 3 ½ years to actually get to trial.

Also, an owner can force the person who registers the lien to sue within 30 days (s. 45)

The Effect of Holdbacks

- Mandatory holdback of 10% in Alberta – purpose is to protect all builders on site, including general contractor and subcontractors, sub-subcontractors, suppliers, labourers.
- Owner must hold back 10% from every payment under the contract and put it into an account (at least notionally) for the benefit of all of the contractors – doesn't mean that there has to be an actual account, just that the owner is liable to pay for it.
- Usually money gets released when the entire contract is finished.
- Now in Alberta:
 - o **Major lien holdback** (10% of 97% of the total contract price – up to substantial completion, whatever that is – depends on the example/K price) - owner can release this after 45 days after the project is substantially performed, if no liens are filed during that period. What does substantially performed mean? Includes a utility test and a financial test – see below. At substantial completion, either the GC or the owner will issue a certificate of substantial completion, which needs to be posted “in a conspicuous place” on the job site –

BLA s. 20. Posting the certificate starts the 45 days running for release of the holdback. After the 45 days, owner can release all of the major holdback to the contractor.

- **Minor lien holdback** – (remaining 3% of the work – in this example) -

*You don't have to issue a certificate of substantial completion – if you don't, as the owner you just have to hold back 10% of the entire contract price. So, it benefits the owner to issue a certificate – then they can pay out and are no longer statutorily obliged to hold the money. Plus, owners like to keep their contractors happy where they can by giving them money.

Substantial Performance

- Complicated shit.
- *Builders' Lien Act* s. 2 – a project is “substantially complete” when it is (1) ready for use or is being used for the purpose intended, and (2) when the work to be done under the K is capable of completion or correction at a cost of not more than...
 - 3% of first \$500,000 of the contract price (for a \$500,000 K this would be \$15,000)
 - 2% of the next \$500,000
 - 1% of the remainder of the contract price.

Examples:

- (1) K of \$100,000 – “substantially complete” at \$97,000 (\$3000 worth of work left)
- (2) K of \$600,000 – “substantially complete” at \$15,000 (3%) plus \$2000 (2%) = \$17,000.
- (3) K of \$10 million
 - First \$500,000 = \$15,000
 - Next \$500,000 = \$10,000
 - Remaining \$9 million = \$90,000
 - “Substantially complete” at \$9,885,000.

What happens when K increases?

- The Act works off of the value of the improvement – this means that you are supposed to hold back 10% of the value of the improvement.
- So, total holdback is including all work that is done – regardless of whether it is done as part of the K or as a change or extra etc.
- Basically every time an invoice goes in or a payment is due, 10% of that price gets held back.

**Get more info on the stuff we talked about in class re: paying out before the 45 days, checking title etc.

- Proper way:
 - Check title – if it's clean pay 90%. *NEVER PAY OUT MONEY IN THE FACE OF A LIEN.*
 - Wait until the 46th day, check title, pay out remaining 10% if it's clean.
- What can owner be liable for if they pay out the full 100%?
- See BLA s. 18(2).
- The most an owner will ever be on the hook for is the value of the improvement.

Example:

- K of \$500,000
- At the end of month 1, the value of the work completed is \$100,000.
- Owner checks title, finds no lien, pays out \$90,000 – hold back \$10,000.
- In month 2 they do another \$200,000 – check title, pay out \$180,000, hold back \$20,000
- Month 3 - \$185,000 of work – check title, pay out \$166,500, hold back \$18,500
- See handout for the rest...

The Effect of Set-Offs

- When somebody (ie. GC) breaches a K on a construction site, it is almost inevitable that the owner will incur damages.

- Lien Fund (amount of the money that the owner is required by statute to hold) = 10% of the value of the work completed OR the amount owing under the K when the contractor went bankrupt *minus* set-offs, which ever is greater.
 - o You act for owner, GC went bankrupt.
 - o K price is \$2 million.
 - o When GC goes broke, they have done \$1.3 million worth of work.
 - o Owner has paid \$900,000 to date – good – there is still \$400,000 to play with.
 - o Assuming there is no set off (you can get someone to complete the job for the same K price – the remaining \$700,000 worth of work), the lien fund is 10% of the 1.3 million (\$130,000), OR \$400,000, which ever is greater.
 - o Lien fund = \$400,000.
 - o Owner may want to pay lien fund into court, let lien holders fight over it.
 - o Assuming there is a set-off of \$100,000 (completion cost is \$1.2 million rather than \$700,000). Here you would be getting your \$2 million building for \$2.1 million in the end because you have only paid out \$900,000. Lien fund is 10% of 1.3 million (\$130,000) OR \$400,000 minus \$100,000 (\$300,000).
 - o Lien fund = \$300,000.

**What the hell does this *mean*? Argh!

Remedies

- (1) Unpaid Vendor's Lien – BLA s. 17(2)
 -
- (2) Trust Remedy – BLA s. 22.
 - When does it arise? – when certificate of substantial completion is issued.
 - Once a certificate is filed on site, any monies paid by the owner to the GC are received by the GC in trust for the benefit of subs/suppliers.
 - Good remedy for when lien period has expired – subs can sue individuals in GC for breach of trust if they spend that money or pay anyone else.
 - GC can discharge the trust obligation by paying everything to the one subcontractor they like – don't have to pay out *pro rata*.

Hett v. Samoth Realty (1977 Alta CA)

- S is a realtor, was supposed to acquire the property for a development, tend to the zoning, get financing, engage professionals to start design work etc.
- S wants to file a lien against the property for \$75,000 for services rendered.
- Reinforces the principle that the wording of the Act should be given strict interpretation (*Clarkson*)
- Issues:
 - o Were the services performed “services upon the improvement” as defined in s. 2(1) of the Builders Lien Act?
- S. 2(1)(i) – “work” includes the performance of services upon the improvement.
- Although it is clear that the 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.
- This would *not* include things like inspiration, the development of concepts, logistics, applications for zoning, legal services, accounting services – these are beyond the scope of what the definition was intended to cover.
- The services of an architect *would* generally fit this definition.
- Here, the court says that the services performed by the realtor contributed to the project, they are not so directly related to the construction process as to fall within the meaning of “services upon the improvement”.
- Court is trying to stick with the principles of strict construction – doesn't want to expand the definition too far – says that if it is opened up it could end up including people like lawyers, sociologists, statisticians etc. who were never intended to be covered by the act.

Peter Hemmingway v. Abacus Cities (1980 Alta CA)

- P is an architectural firm. A is owner.
- P provided drawings, did preliminary studies, prepared preliminary estimates, helped with drafting forms etc. but the project did not proceed past the drafting and planning stage.
- K for services was for approx \$850,000
- \$275,000 worth of work had been done, \$60,000 had been paid when A abandoned the project.
- P liens for the outstanding \$215,000.
- A is arguing that construction of the “improvement” would have had to start in order for the services to come under s. 4(1)(a) of the Act – “does or causes to be done any work upon or in respect of an improvement”.
- Here, doing working drawings was enough to allow the developer/architect to lien.
- Just because no supervision had been done and no construction had actually started did not mean that monetary value could not be placed on the work done.
- Whether or not a developer/architect can lien is case specific – ultimately want to show that construction occurred, unique plans for the project were drawn up, that they supervised the work.

Problems in Filing Liens

Article: Common Problems in Lien Claims – D.C.I. Lucky

- In order to assert a lien claim, claimants must register a statement of lien in accordance with s. 25 of the Builders’ Lien Act.
- S. 27(1) provides a cure for some mistakes – a substantial compliance with s. 25 is sufficient and a lien shall not be invalidated by failure to comply with any requirements of section 25 unless, in the opinion of the court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.
- Common errors:
 - Late claims
 - Wrong lands
 - Defective statement of lien
 - Defective procedure after lien.

(a) Late Claims

- S. 31 – if a lien is not registered within the time limited by section 30, the lien ceases to exist.
- This is an absolute limitation. Court has no power of remedy here – the statute deems the lien to cease to exist.
- The person asserting the lien bears the burden of establishing that they fall under the Act and that they have a subsisting lien – court will be very strict in their interpretation in this area.
- However, once it is established that a valid lien exists, courts will take a very liberal approach to attempt to cure irregularities and preserve the lien.

(b) Wrong Lands

- **General rule:** a lien registered against the wrong title will be fatal to the lien claimant’s rights.
- ***Electric Furnace v. Quality Rentals*** (1991 Alta CA) – A scaffolding company liened the interest of Union Carbide in an industrial plant. However, the scaffolding had been used in an adjoining quarter section where UC operated a plant. Court had to decide whether the curative provision under s. 27(1) could be used to save the lien. Court said no – it could not be applied where a lien was invalid.

Owners needed to be able to search title after the expiry of 45 days so that they could know whether they can release the holdback funds.

- ***Wyo-Ben v. Wilson Mud*** (1985 Alta CA) – “Common benefit” exception – work was done on one quarter section, lien was placed on the adjacent quarter section. Here, however, the lien was valid because the work actually benefited *both* pieces of land.
- Generally, you will lose if you register against the wrong property, unless you can bring the case under the exception in *Wyo-Ben*.

(c) Defective Statement of Lien

(i) Landlord/Tenant

- ***Empire Drywall v. Kim*** (1982 Alta) – statement of lien filed against the fee simple owned by the City of Edmonton rather than against the leasehold interest of the company whose interest was to be charged. The lien was against the right property but the wrong interest. Court applies s. 27 to save the lien.
- ***Morguard Investments v. Hamilton’s Floor Coverings*** (1986 Alta) – lien filed against the fee simple interest of the landlord. Landlord was successful in having the lien discharged because it was clear that the landlord was not an “owner” within the meaning of the Act. Claimant didn’t try to lien against the tenant’s interest.
- ***K & Fund v. Reykdal*** (1998 Alta CA) – similar to above case. The lien was invalid in relation to the landlord and the lien claimant apparently did not assert a lien claim against the tenant.
- ***655888 Alberta v. Purchase Oil & Gas*** (1999 Alta QB) – lien was declared invalid because it was filed against the fee simple interest as opposed to the mineral interest.
- **Generally** – failure to properly identify the tenant’s interest in property may not render a statement of lien invalid if the claimant is asserting a lien right against the tenant’s interest.

(ii) Naming only one of 5 registered owners

- ***Re Tarsands Machine & Welding*** (1982 Alta) – registered owners were 5 tenants in common. Statement of lien only named one of the registered owners. Lien was valid because none of the other 4 owners had been substantially prejudiced and there had been substantial compliance with the Act (as per s. 27).

(iii) Wrong “owner”

- ***Canadian Patent Scaffolding v. Capton Holdings*** (1985 Alta) – lien filed against the title to a water reservoir owned by the city of Leduc. The land was in the process of being sold to the City, but it was actually still owned by Romulus Holdings. Romulus had no interest in the improvement, but had still not been paid for the land and title had not been transferred. Lien was upheld because there had been no prejudice to the City.

(iv) Wrong “lien claimant”

- **482851 Alberta v. Canadian Cabinet** (1994 Alta QB) – lien filed by an agent of the lienholder. Statement did not disclose the agency relationship. It was said that the lien did not identify the proper lien claimant pursuant to s. 25. Court applied s. 27 to save the lien.

(v) Corporate lien claimants

- **Harka Holdings v. Chinook Roofing** (1983 Alta QB) – lien registered in the land titles office in the form proscribed by the Act. However, the affidavit was not signed by an officer of the corporation, no corporate seal etc. Court held that s. 27 did not apply and the lien was invalid. The provisions of the *Land Titles Act* overrode the curative provision of the *BLA*. Court held that “registration” under the *BLA* meant “valid or proper” registration.

(vi) Wrong amount

- **Elcor Elevator v. 624149 Alberta** (1997 Alta QB) – parties are not entitled to obtain a declaration of the validity of a statement of lien in excess of the value stated within the lien. There is no jurisdiction to amend a statement of lien to include a higher amount.

(d) Wrong Procedure After Liening

- **Wilton Construction v. Amerada Minerals** (1989 Alta CA) – claimant failed to sue within 180 days. Bond was invalid.
- **Toews Construction v. Jun** (1985 Alta QB) – certificate of lis pendens filed at the land titles office on the 180th day but was not registered in the day book until the following day. Lien was invalid because registration does not occur until an entry has been made into the daybook.
- **Hallmark Construction v. Darcy Schram** (Alta QB) – lien was filed within 180 days but was missing several paragraphs that were not mandatory. Court upheld the lien, said that it could be amended.
- **Kippang v. Siddiqui** (1997 Alta) – party file a proper statement of claim within 180 days but the certificate of lis pendens filed was not the right one. Failure to use the proscribed form rendered the lien invalid.

GUEST LECTURE: PUBLIC/PRIVATE PARTNERSHIPS ETC.

Handout: Notes from lecture, March 27/06

(1) Terra Nova Project - Alliance

- Deposits of oil found off Newfoundland.
- Hibernia – large tower sits on the ocean floor, designed to withstand the impact of an iceberg – oil deposits are in an area known as “iceberg alley”.
- Area next to Hibernia is called Terra Nova – owned by six companies. They decided to try a different approach – would use a ship rather than a tower, that way the ship could move if icebergs came along.
- Ship is the length of 2 football fields, 18 storeys high. Holds a crap load of oil. Lines run down from ship to ocean floor where there is well head equipment to drill holes into the ocean floor. Produces about \$150,000 barrels per day at about \$60/barrel.
- All of the oil companies involved had experience with conditions in the north sea – somewhat different from NFLD area, but also difficult conditions.

- In the north sea, there would be engineers brought in to design projects. This is an extreme risk area for engineers given the enormous cost of building these things and repairing them. If engineers make a mistake, they face bankruptcy.
- Nobody wanted to be hands-on when something *did* go wrong – if you take action you may be held to have some responsibility – it is almost like an admission of liability. Owner, engineer, contractor, supplier, will all point fingers at each other.
- Insurance costs were extremely high.
- Companies decided to try something different on this project – based on something called CRINE – Cost Reduction in the New Era.
- Instead of lining up all of the participants in a potentially adversarial way, each of the parties having their own separate interests, they tried to put together a contractual structure where the interests of all of the players would be aligned.
- There is 1 K among all of the owners, the engineers, the contractors and the major equipment suppliers. Collectively all of them covenant to develop the facility.
- Then, under the K they all agree to establish a single and integrated management team. This means that this work is going to be managed by a group of people drawing on the resources of all of the players. Here, chairman of the team was from Petro Can, vice chair was from Haliburton etc.
- Alignment of economic interests was really a novel concept. Usually interests of owner and contractor are directly opposing. Here, the parties set a target price. Any variation up or down from that target price would be split 50/50 – therefore everyone has an interest in keeping costs down.
- Also, parties agreed on target completion date. They also set a further date – contractor was to get a certain price per barrel on all production between completion date and the end date – therefore the faster they finished the more money they would get. Owners benefit because they are able to produce oil sooner.
- How do you align quality interests? Where the goal is quickness, quality might fall by the wayside. However, the fact that the facility had to actually work at full capacity in order for the contractor to get money from oil production was a guarantee on quality. If the facility doesn't work, they make no money.
- What happens if something goes wrong? The system can only operate in a blame free environment – this is fundamentally different from traditional liability/fault. It does not matter under this structure who is at fault, or who deserves credit for good decisions. You have to understand here that notwithstanding breach of K, willful wrongdoing, gross negligence, the parties would share liability.
- This will only function where economic interests are aligned.
- The parties absolutely have to trust each other.
- This is like a corporate entity – it does not matter who is at fault, the entity will win or lose depending on the collective efforts.
- Theoretically, if there is a problem, the parties are motivated collectively to fix it.
- Insurance – owners took out a policy and agreed to indemnify everyone for everything – including 3rd party claims and damages to the facility.
- Each party agreed to take responsibility for their own equipment and personnel regardless of fault.

7 Parties to the K, 6 Owners.

- Haliburton – vessel – subcontracted to Daewoo, engineering, drilling wells
- AMEX Engineering
- Doris Engineering
- FMC Corporation – tourit and well head equipment
- Technique – flexible lines etc.
- PCL construction – top side equipment

What went wrong?

- problems with well-head equipment
- Ice bergs can be enough to scrape the ocean floor – if it came along and knocked off the well heads on the ocean floor, it would be a disaster. Solution: dig a hole and put the well heads in them so the

ice berg can pass over. Parties find a machine capable of digging the holes under water, but in the end the rough seas made it impossible.

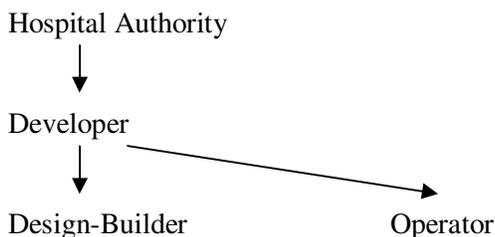
- Daewoo went bankrupt
- Project ended up 1 billion over budget and 1 year late.
- No adversarial proceedings of any kind among the consortium.

Was this a good idea?

- Hard to know how it would have turned out under a different K strategy.
- All of the technical problems would have happened nonetheless – we know this for sure.
- Probably would have taken longer and cost more under a traditional setup.
- But, would the parties have actually have been better off? Maybe, for the person who sued successfully.
- Setup was brilliant in terms of problem-solving.

(2) P3 Projects

- Have become quite popular in recent years.
- This guy first got involved in this kind of project on the confederation bridge.
- Idea is that a government entity (hospital, infrastructure etc.) goes to a private developer and asks them to finance, design, construct and operate the facility.
- Government pays for every year of operation
- Developer goes out and sells bonds based on that covenant – can now say that he has an income stream available from a government entity for say, 30 years.
- From the government's perspective, it gets them out of a bunch of business they were involved in before, also they don't have to come up with a bunch of money up front.
- Developer (often a European bank) then contracts with a design-builder and an operator.
- Called public/private partnerships, but they are not actually partnerships – government tries to transfer as much risk as possible to the developer, has little say in design, build, operation.



- Tremendous costs, just like on terra nova project, for the whole group to put together their proposal.
- Schedule is everything in a 3P. Developer is going out and selling bonds on the basis that there will be an income stream starting on a certain date – it only starts when the hospital is ready. If the hospital is not ready, the developer will still have to pay on those bonds from that date – can lose a lot of money.
- Developer will try to pass that risk down to the design/builder and operator.
- There has to be some mechanism for resolving disputes while the project continues on.
- This allow for some efficiencies in the sense that an end user (Ie hospital authority) can go to a 3rd party and get the facility it needs with many of the traditional risks passed on to the 3rd party, and costs only starting to run when the project is finished.
- In the downloading of risks, everyone is going to want to be fairly compensated for the additional risk that they take on.
- P3s tend to be expensive.

GOOD EXAM QUESTION – DIFFERENCE BETWEEN P3 AND ALLIANCE

(c) Mega Projects

- Est. that in Fort Mac there will be \$10 billion in projects constructed over the next 10 years.
- Issues with mega projects in rural areas:
 - o Labour availability/productivity – how do you find people, get them to the site, house them, feed them etc. Logistics can end up being very expensive. Also, productivity declines as the need for labour increases. The more the workers, the less productivity. This makes it difficult to predict how long the project it will be and how much it will cost.
 - o Infrastructure – housing, schools, health care, support businesses etc.
 - o Physical movement of materials –
 - o Organization of trades – when you get multiple contractors with hundreds or thousands of workers, organization gets very difficult.

CAN

CONSTRUCTION CAN

TENDERING

Analysis for formal tenders should always be:

- (a) Is this a formal tender process?
- (b) Was there a contract A? When did it arise? What were its terms?
- (c) Was that contract breached?
- (d) If so, what is the appropriate quantum of damages?

(a) Is this a call for tenders rather than just a request for proposals or beauty contest?

- **Mellco Developments** – this is always a case of substance over form, based on the intention of the parties to create a contractual relationship.
- Where the terms of the final contract are contained in the tender package or RFP without the need for further negotiation, courts will usually find that the situation is one of a formal tender process. However, where the terms of any contract need to be negotiated, a court will likely find a RFP.

(b) Was there a contract? Contract A/Contract B analysis - **Ron Engineering**

- Before *Ron Engineering*, a tenderer could withdraw a bid at any time before it was accepted by the owner. That is, the call for tenders was seen in law as an invitation to treat and the submission of a bid by a contractor was seen as being an offer that could be accepted by the owner. With its decision in *Ron Engineering* in 1981, however, the SCC significantly changed the format of the law of tenders.
- In *Ron Engineering*, the court set out what is now known as the contract A / contract B analysis.
- Under this analysis, an invitation for tenders is a unilateral offer by the owner which is accepted by a contractor when they submit a bid before the deadline for tenders passes (**Contract A**). This contract is an agreement by the parties to enter into a subsequent contract (**Contract B**) to perform work in accordance with the terms specified in the invitation to tender. The consideration for Contract A is the promise to enter into Contract B should the tender be chosen. The primary term of Contract A is usually that tenders are irrevocable for a set period of time. This indicates the parties' intention to enter into a contractual relationship upon submission of a tender.
- Furthermore, *Ron Engineering* stands for the proposition that an owner can not accept a bid where there is a mistake patent on the face of the tender at the time the tenders are opened. Where there is no mistake in the sense that parties submitted the bid that they intended to submit, however, the tenderer will be bound by contract A. In *Ron Engineering*, therefore, a mistake in calculation was not sufficient to release the contractor from its obligation to perform the work under the terms of contract B. On the other hand, in *Wilchar* a missing page was held to be a sufficiently apparent mistake to allow the contractor to withdraw its bid. In each case, however, Contract A is formed – the issue being that an owner can not enter into Contract B with the tenderer when there is a mistake patently obvious on the face of the bid.
- A common issue in this area arises, however, in determining when an error is in fact patently obvious. The law is unclear at what point a low bid will be said to be so low that the mistake is

patently obvious. Although there is no hard and fast rule, a spread of 20% or more *may* be sufficient to meet the patently obvious standard.

- An honest mistake made by a contractor in calculating its tender will not usually relieve the contractor from an action for damages for breach of Contract A. However, it will likely relieve the contractor from entering into Contract B.
- In addition to *Ron Engineering*, the law of tenders has been informed by a number of significant cases:
 - *Calgary v. Northern Construction* – where a bidder submits a mistaken bid, and their revised bid is still the lowest bid, the owner is not obliged to accept that revised bid. To do so would turn the tender process into an auction.
 - *TTC v. Gottardo* – where a call for tenders stipulates that additional documentation is to be submitted within a specified period of time after the close of tenders, Contract A nonetheless crystallizes at the point in time when the parties intended a contractual relationship to arise. Here, at the time that tenders were received.
 - *MJB Enterprises* – there is an implied term in formal tender documents that only a compliant bid will be accepted. That is, an owner can not accept a non-compliant tender. In addition, the existence of a “privilege clause” in the tender documents allows an owner to choose any compliant bid, not just the lowest bid.
 - *Chinook Aggregates* – where an owner attaches an undisclosed term that is inconsistent with the tendering process (that is, bidders submit their lowest bids), a term that the lowest qualified bid will be accepted should be implied in order to give effect to the tender process. This is especially important with regard to so-called “local preference clauses” where the owner is a municipal body.
 - *Sound Contracting* – Although a municipal body owes a duty of fairness to tenderers in the tender process, the existence of a privilege clause in the call for tenders will release that body from the obligation to award the work to the lowest bidder so long as there are valid, objective reasons for concluding that the better value may be obtained by accepting a higher bid.
- These same principles apply to “carried subcontractors”. That is, where a contractor carries the bid of a subcontractor in their tender to an owner.
 - *Gloge* – where a contractor carries a subcontractor’s bid in their tender, the parties enter into a contract A. That contract crystallizes when the subcontractor submits a bid and the contractor accepts that bid by including it in their tender to the owner. Tenders are revocable until the main tender closes, however once the tender closes, the subcontractor’s bid becomes irrevocable for the same period of time as the contractor’s tender (industry practice).
 - *Naylor* – where the tender documents indicate that a contractor will employ those subcontractors it lists on its tender and approved by the owner, the contractor must enter into the subcontract with the named subcontractor in the absence of a valid, objective reason not to do so.

(c) Was the contract breached?

- Generally you will be dealing with a breach of contract A – either:
 - Refusal by contractor to enter into contract B.
 - Owner selecting a non-compliant or invalid bid.

(d) What is the appropriate quantum of damages?

- Where the court finds that Contract A has been breached by the contractor, the quantum of damages will usually be equivalent to the difference in the price of the tenders.
- Where the court finds that Contract A has been breached by the owner, damages will be equivalent to:

- Loss of profit, if (a) their bid was compliant, and (b) they can show on a balance of probabilities that they would have been awarded the contract but for the non-compliant bid (*MJB Enterprises*).
- Where a P contractor can not show that they would have got the contract anyways, they may still collect damages in the amount of the cost of preparing the tender.

CHANGES, EXTRAS, DELAYS

CCDC2 General Condition 6.1 - changes can be made either through a change order or change directive.

Change Order – GC 6.2

Consultant provides notice to the contractor detailing the proposed changes in the work, the adjustment in the contract price, and the adjusted timeline. When the owner and contractor agree on the changes, the agreement becomes effective immediately and is recorded in a change order, signed by the owner and contractor.

Change Directive – GC 6.3

Where the owner requires the contractor to proceed with a change in the work prior to reaching an agreement with regard to change in contract price and time, the owner can issue a change directive through the consultant. The contractor must keep a record of the extra expenses or cost saving resulting from the change directive. What is to form part of the “costs” is set out in GC 6.3.4. Where the owner and the contractor disagree as to the value of the work, the consultant will make the determination.

*** Start by looking at the wording of the contract to discern the obligations of the parties and the procedure for changes and extras.*

Kiewit v. Eakins – A contractor can not perform extra work “under protest” and later seek compensation. Where a contractor is required to perform extra work, they must do it pursuant to either a change order or a change directive or face the loss. The proper course of conduct for a contractor in such a situation is to stop work until the dispute is resolved. Likewise, an owner who makes payments “under protest” will be unable to recover those payments unless they were made under duress or “illegitimate pressure” (***Dilcon***).

Dryden – Where a contractor stops work pending the resolution of a dispute and are subsequently held to be wrong, they will be liable for damages for breach of contract.

Penvidic – There is an implied term in construction contracts that the owner will have the site available for the contractor to perform the work. Where the failure of an owner to have the site available results in increased cost to the contractor, the owner will be in breach of the terms of the contract and liable for damages in the amount of the increase.

Marentette Bros. – Where an owner fails, in breach of his obligation under a binding contract, to facilitate the work for the contractor, and the contractor, in order to complete on time, is consequently compelled to make movements of men and machinery that would have otherwise been unnecessary, the owner incurs an implied obligation to pay the reasonable value of the additional work to the contractor by the owner’s default. This principle applies not only to the requirement that the owner make the site available, but also to any failure to perform an obligation under the contract that results in additional expense to the contractor (ie. delivery materials, delays in issuing change orders).

Kei-Ron Holdings – where a delay is caused by an owner, they are estopped from insisting on the original completion date and can not refuse to extend the time for completion.

Redheugh – Where extra work has been carried out on a construction project without regard to a contractual provision, the party who performs the work will generally be unable to recover the extra expenses it incurs. However, a contractor may be excused from strict compliance with the terms of the contract where the owner (or an agent of the owner, such as an architect (***Dilcon***), or project manager) waives the requirement either through conduct or acquiescence.

DIFFERING SITE CONDITIONS

CCDC2 General Condition 6.4 - If the owner or contractor discover conditions at the site that are materially different from those indicated in the contract, that person must notify the other party in writing, before the conditions are disturbed, within 5 working days after the observance of the condition.

The consultant will promptly investigate the condition and make a finding. Where the conditions differ materially and would cause an increase or decrease in the contractor's cost or time to perform the work, the consultant, with the owner's approval, shall issue a change order or change directive.

Where the conditions do not differ materially from the contract, or where no change in the contract price or time is justified, the consultant shall report the reasons for this finding in writing to the owner and the contractor.

Carman – Where the terms of a construction contract contain an exculpatory clause, the contractor will be unable to recover damages incurred as a result of the site being in a different condition than described in the contract. Where there is no exculpatory clause, however, a contractor may recover damages in tort, through negligent misrepresentation, or in contract, where a collateral warranty can be proven.

Example: It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company.

Catre – Where parties are experienced in business and there is equal bargaining power between the parties, the court will reasonably conclude that the parties fully understood and accepted the terms of the contract and will uphold even a stringent exculpatory clause.

To get around an exculpatory clause:

- (1) Argue vagueness or uncertainty – if the meaning of the clause is clear, it will be given full force and effect. However, ambiguities in the clause will be resolved in favour of the party seeking protection under it.
- (2) Argue that the parties were not sophisticated in business and did not understand the term, or that the power balance between the parties requires that the provision not be enforced.

CNR v. Volker Stevin – Where a construction contract contains an exculpatory clause, the owner is under no duty to disclose information relating to the condition of the site. However, an owner must disclose any condition that a reasonable inspection by the contractor would not reveal.

IMPOSSIBILITY AND DELAY

CCDC2 General Condition 6.5

Where a contractor is delayed in performing the work as a result of an action or omission by the owner, consultant, contrary to the provisions of the contract, the contract time will be extended for such reasonable time as the consultant recommends. The contractor will be reimbursed by the owner for reasonable costs incurred as a result of the delay (time and money)

Where the contractor is delayed as a result of a stop work order issued by a court or public authority, the contract time will be extended for such reasonable time as the consultant recommends, so long as the order was not issued as a result of an act or fault of the contractor or his employees. The contractor will be reimbursed by the owner for reasonable costs incurred as a result of the delay (time and money)

If the contractor is delayed by labour disputes, strikes, lockouts, fire, or any other cause beyond the contractor's control, the contract time will be extended for such reasonable time as the consultant recommends. However, the contractor will not be entitled to be reimbursed by the contractor for costs incurred as a result of the delay, unless the delay is the result of the owner's actions (time only)

The contractor must notify the consultant of any delay within 10 working days of the commencement of the delay.

Notice – Failure to give timely notice may be fatal to a claim for additional compensation. However, relief against forfeiture will generally be available to a contractor who fails to provide proper notice, unless the owner can show that the absence of notice has caused them to be materially prejudiced.

TNL Paving

- The form of notice is not the governing factor. Rather, notice must be sufficient to allow the owner to consider the claim and its financial consequences, and to take steps to protect its position, such as gathering information and/or taking mitigating steps.
- A party may, by its words or conduct, waive a notice requirement or be estopped from requiring strict compliance with a notice provision.

Dilcon – Statements or grumblings made verbally or in minutes of site meetings by contractors with regard to changes, extras or delays may not be sufficient notice.

WARRANTY ISSUES

CCDC2 – General Condition 12.3

The warranty period with regard to the construction contract is 1 year from the date of substantial completion of the work, or as otherwise specified in the contract for certain portions of the work.

The contractor shall be responsible for the proper performance of the work to the extent that the design and contract documents permit such performance.

The contractor shall correct defects or deficiencies in the work which appear prior to and during the specified warranty period, at his own cost. Furthermore, the contractor is liable to pay for any damage resulting from corrections made.

The owner, through the consultant, shall promptly give the contractor notice of observed defects and deficiencies, in writing.

Steel Co. of Canada – When a contractor, *under an express warranty provision*, undertakes to carry out work which will perform a certain function in conformity with plans and specifications, and it turns out that the work so constructed will not perform the function, generally the express obligation to construct a work capable of carrying out the function in question overrides the obligation to comply with the plans and specifications. The contractor will be liable for the failure of the work, notwithstanding that it is carried out in accordance with the plans and specifications. Now will he be entitled to extra payment for amending the work so that it will perform the stipulated function.

Mollenhauer – Where a building contract specified a particular type of material to be used, the builder is not liable to the owner for complying with the specifications, even though the material proves to be unsuitable for its purpose, except where the owner relies on the skill and judgment of the builder with respect to the suitability of the material.

Hunter v. Syncrude –

CONCURRENT LIABILITY IN TORT AND CONTRACT

As a general rule, where a wrong *prima facie* supports an action in both contract and tort, the party may sue in either or in both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort (*BG Checo*).

Hedley Byrne – A plaintiff can recover in negligent misstatement against a professional for pure economic loss. **GET TEST FOR NEG. MISREP. AND PUT IT IN HERE.**

Edgeworth – A contractual provision that limits or negatives the right of a party to the contract to sue in tort is enforceable against the party it was intended to protect. Separate actions may exist against other parties, such as engineering firms (as opposed to individual engineers) where the tender package does not indicate that they are to be protected under the limitation clause.

Auto Concrete – It is not the duty of an engineer to indicate what method is to be used in carrying out the work. A contractor can not sue an engineer for failing to indicate which method ought to be used, or for failing to indicate that additional requirements, such as permits, may be necessary to carry out the work using a particular method.

Winnipeg Condos

- Contractors, subcontractors, architects and engineers who take part in the design and construction of a building will owe a duty of care to subsequent purchasers of the building if it can be shown that it was foreseeable at the time 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 that duty of care is breached, the contractor will be liable for the reasonable cost of repairing the defects and putting the building back in a non-dangerous state, whether or not the damage is to the building itself (pure economic loss) or to persons or other property.

Kamloops v. Nielsen

- Where a public body exercises its discretion to make policy decisions dealing with the allocation of scarce resources, it will be immune from liability in tort, provided that that discretion was exercised in a *bona fide* manner. However, where a public body makes an operational decision, that body owes a duty of care to all those who it is reasonably foreseeable may be harmed by a failure on its part to take all reasonable care. Therefore, a city or municipality is immune from tort liability in its decision whether or not to inspect. Once it chooses to inspect, however, it must do so in accordance with the requisite standard of care.
- In exercising its powers of inspection in building permit cases, a municipality must exercise the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances. Inspectors are not required to discover every latent defect. What is required is a reasonable inspection in light of all the circumstances (*Ingles*).
- The measure of what constitutes a reasonable inspection will vary depending on (a) the likelihood of a known or foreseeable harm, (b) the gravity of that harm, and (c) the burden or cost which would be incurred to prevent the injury (*Ingles*).
- This duty of care may be breached through both misfeasance and nonfeasance on the part of the public body.
- Where a public body breaches its duty of care, a plaintiff may recover in pure economic loss.

Ingles v. Tutkaluk – The negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care in exercising its powers of inspection. A municipality will only be absolved completely of the liability where the conduct of the owner-builder is such as to make it impossible for the inspector to do anything to avoid the danger. In such cases, damages will be apportioned pursuant to the relative negligence of the parties.

Legislative Protection – In Alberta, recent amendments to the Safety Codes Act and the Municipal Government Act are an example of the legislature’s attempt to immunize local bodies from tort action. These provisions aim to transfer risk from municipal bodies to owners and contractors. They have not yet, however, been interpreted by the courts.

ASSESSMENT OF DAMAGES FOR BREACH OF CONTRACT

Damages are a remedy for (a) breach of contract, (b) tort liability, or (c) unjust enrichment. Where the cause of action is unjust enrichment, damages will be based on *quantum meruit*.

Quantum meruit – where a party requests that a service be performed, and that service is in turn performed, the party performing the service will be entitled to recover the reasonable value of those services.

Nu West Homes

- It is not every breach of contract that will entitle an owner to discharge a contractor from performing the work and recover damages incurred to complete the work through other means.
- Where a contract is substantially performed, albeit deficiently, the owner must pay the contractor for the work under the contract, minus the amount of any deficiencies.
- Where a contract is not substantially performed, the contractor will be in breach of contract and the owner will be entitled to withhold payment of the contract price.
- What constitutes substantial performance must be determined on a case-by-case basis.
- Where a builder is held to be in breach of his obligations under a construction contract, the owner will be entitled to damages equal to the reasonable cost of making good on the defects.

Perini Pacific –

Bank of Portugal v. Waterlow –

ASSESSMENT OF DAMAGES FOR TORT ACTION

As opposed to contractual damages, which aim to compensate a party for profit that would have been made but for the breach, damages in tort aim to restore parties to their original position.

Where a contractor has underbid a project, damages for breach of contract may be significantly less than the amount of damages recoverable in tort (**BG Checo**).

BONDS AND SURETIES

A bond is a tri-party instrument that makes it possible for the principal to provide the obligee with the guarantee of a responsible surety that the principal will satisfactorily perform his obligation under the contract, provided that the obligee also performs his obligations.

Common types of construction bonds:

- (1) Performance bond
- (2) Labour and Materials bond
- (3) Bid bond
- (4) Maintenance bond
- (5) Hold back bond

Paul D'Aoust – in order for a bond to come into effect, it must be “signed, sealed, and delivered”. What constitutes signed sealed and delivered is determined by industry norms and the reasonable expectations of the parties. It is a question of fact to be determined by a trial judge.

Where (a) the work and contract price have substantially increased without the consent of the bonding company, (b) an owner makes early payment to a contractor, (c) the contractor undertakes work that they are not skilled at doing, or (d) the owner has unreasonably extended the contract time, bonding company may be materially prejudiced and therefore relieved from their obligation to make good on the bond.

Fraser Gate

- Where an owner chooses to complete the work, the bonding company will have been materially prejudiced in that it was deprived of the opportunity to decide what it thought would be the most effective way to remedy the breach. In such cases a surety will be relieved of the obligation to pay out the bond.
- **Need to insert stuff about warranty issue.**

Citadel v. Johns Manville

- Although there is no privity of contract between a surety and a subcontractor in a L&M bond, a subcontractor may sue the bonding company directly given the trust relationship that arises between the surety and the obligee.
- Where a surety is compensated, a mere technical breach of the notice provisions of the bond will not mean that a bonding company can avoid paying out. A compensated surety will only be able to avoid paying out where they have experienced material prejudice.
- An obligee is not required to exhaust its other available remedies, such as making a claim on a lien, before it can realize on the bond, except where the bond specifically provides for this requirement.

Whitby Landmark –

Lac La Ronge -

How to enforce a bond:

- (a) The obligee must declare the principal to be in default.
- (b) In doing so, the obligee must notify the bonding company of the default, in the manner prescribed by the bond documents.
- (c) The obligee must sue within the prescribed time period.

Falk Bros. – If a bond claimant is 1 day late in issuing a statement of claim, they will invariably be barred from suing on the bond. However, a party who does not give timely notice may apply to the court for relief from forfeiture, provided that the surety was not prejudiced by the delay.

In response, the surety may:

- (a) Remedy the default to hiring another party to complete the work
- (b) Take over the job and complete the work itself
- (c) Put out a call for tenders and enter into a new contract with a new contractor
- (d) Pay out the bond directly to the obligee

BUILDERS' LIENS

Builders' Lien Act s. 6

(1) Subject to subsection (2), a person who (a) does or causes to be done any work on or in respect of an improvement, or (b) furnishes any material to be used in or 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 to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

BLA s. 1(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.

BLA s. 1(p) – “work” includes the performance of services on the improvement.

BLA s. 6(4) - For the purposes of this Act, 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 and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

- Federal lands – No.
- Provincial lands – No.
- Indian lands – No.
- Municipal lands – Yes.
- Public highways / irrigation districts – No.

- Fee simple
- Mineral interests
- Leasehold interests
- Condominium interests

Where a person wishes to lien the fee simple interest rather than the leasehold interest, they have 2 options:

- (1) *BLA s. 15* - When the estate on which a lien attaches is a fee simple 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.
- (2) *BLA s. 1(j)* – A claimant will be able to lien the fee simple interest of an owner where (a) the owner has an “estate or interest” in the lands, (b) the owner expressly or impliedly requested that the materials be furnished or the work be done, and (c) the work was done on the owner's credit, on their behalf, with their credit, privity and consent, or for their direct benefit.

Fung v. Reykdal – Whether or not an owner “requested the work” under s. 1(j) of the Act is to be determined on a case-by-case basis. As a general rule, the more actively involved the owner is in the process (that is, the more control they exert), the more likely a court will be to hold them to be an “owner”

Condominium interests – Where a condominium association requests the work and fails to pay, a claimant can lien the common property and all units in the condominium association. Where an individual owner requests the work and fails to pay, a claimant may lien the particular unit, as well as the corresponding percentage of the common area.

Mineral interests – *BLA* s. 36 - Where a claimant wishes to lien a mineral interest, that lien must be filed with the Minister of Energy and not with the Land Title Office where (a) the interest is held by the Crown, (b) it is less than a fee simple interest, and (c) it is not registered under the *Land Titles Act*.

Lien rights begin...

Lien rights end...

How to file a lien: