

Construction Law

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The New CCDC 2 – 2008: Uncertain Times For Claims

It took 14 years, but in 2008 the Canadian Construction Documents Committee finally released an updated version of the Stipulated Price Contract, a contract widely used in the industry. However “newer” does not always mean better.

The CCDC 2 - 2008, like its predecessor, CCDC 2 - 1994, is not a contract that applies in all circumstances to all construction projects. Nor is it a contract that should be used without serious thought being given to adding Supplementary Conditions to modify the General Conditions. This newsletter focuses particularly on GC 12.1 - Indemnification and GC 12.2 - Waiver of Claims, provisions that have been dramatically modified from the 1994 version.

Indemnification

Indemnification means that a party undertakes to be financially responsible for specified claims or losses which the other party may incur. GC 12.1 is a contractual risk allocation mechanism. In the 1994 version of the CCDC 2, indemnification was unilateral; the Owner had no obligation to indemnify the Contractor except for specific claims related to title matters. Indemnification by the Contractor was in respect of negligence only and restricted to third party claims for bodily injury or property damage. Indemnification under the 2008 version is much broader. Indemnification obligations are now mutual, with the Owner and Contractor indemnifying each other. Plus, the Consultant is no longer expressly indemnified.

Under the 2008 version, the obligations extend to both “third party” and “first party” claims. This means that in addition to indemnifying each other in respect of third party claims, Owners and Contractors must now indemnify each other in respect of their own negligence or breach of contract. The types of claims that can be the subject of indemnification are no longer limited. A claim for indemnification can be made for both direct losses, such as bodily injury or destruction of property, and indirect losses, such as consequential damages or loss of future earning capacity.

The 2008 version has introduced limits of liability for first party claims and third party claims (other than claims related to bodily injury and property damage). Different monetary caps now apply to different types of indemnification claims.

Owner - Contractor indemnity claims respecting matters for which insurance is provided under the contract are limited to the general liability insurance limit for one occurrence. Owner - Contractor claims for matters for which no insurance is required under the contract are limited to the greater of the contract price or \$2 million and cannot exceed \$20 million.

With respect to third party direct losses (for bodily injury or property damage), the obligation to indemnify is unlimited. However, indirect losses of third parties are subject to the same monetary caps as Owner-Contractor claims. The monetary caps include legal costs and interest.

Because GC 12.1 specifically provides that the parties waive the right to indemnity for claims other than those provided for in the contract, Owners and Contractors need to be cognizant of the added significance of the contractual risk allocation imposed by the new indemnity provisions. If the provisions are modified by Supplementary Conditions, Owners and Contractors should ensure this does not result in uninsured risks or an unintended waiver of the right to indemnity.

Waiver of Claims

In the 1994 version, the Owner waived all claims against the Contractor as of the date of the final Certificate for Payment except for:

- (a) claims made in writing prior to the date of the final Certificate for Payment;

- (b) claims arising out of the indemnification and warranty provisions of the Contract;
- (c) claims arising from the toxic and hazardous materials provisions; and
- (d) claims in relation to substantial defects and deficiencies made in writing within six years from substantial performance of the work (in Ontario the shorter period of two years from discovery of the claim is prescribed by limitations legislation).

The CCDC 2 - 2008 effects major changes to the old waiver provisions. The waiver date is no longer tied to the date of the final Certificate for Payment and Notice in Writing (a new defined term) of the claim is required to be given within prescribed time frames. The 1994 version did not prescribe a particular form of notice and no time limits applied.

Unless the Owner and the Contractor give Notice in Writing no later than the sixth calendar day before expiry of the lien period then, as of the fifth day before the expiry of the lien period, both parties waive and release each other from all claims based upon acts or omissions which occurred prior to or on the date of substantial performance:

- (a) which they have or reasonably ought to have knowledge of;
- (b) that could be advanced by one against the other; and
- (c) arising from their involvement in the work, including claims arising from negligence or breach of contract.

This waiver does not apply to the following:

- (a) indemnification from claims made against the Owner or Contractor by third parties;
- (b) claims for which a right of indemnity could be asserted by the Contractor or Owner pursuant to 12.1.4 (i.e., toxic and hazardous substances);
- (c) claims for which a right of indemnity could be asserted by the Contractor pursuant to 12.1.5 (patent fees and defect in title);
- (d) claims of the Owner arising from GC 12.3 – Warranty;

- (e) damages arising from the Contractor's actions which result in substantial defects or deficiencies in the work (i.e., those defects which affect the work to such an extent or in such a manner that a significant part or the whole is unfit for the purpose intended); and
- (f) claims resulting from acts or omissions of either party which occur after the date of substantial performance.

If the Owner or Contractor receives a Notice in Writing of a claim under GC 12.2 on the sixth or seventh day before the expiry of the lien period then, the period within which the other party must give Notice in Writing of a claim is extended to two calendar days before the expiry of the lien period. This provision was clearly intended to eliminate the situation where one party "lies in the weeds" to make a claim at the latest possible time.

For the purposes of GC 12.2, the Notice in Writing of a claim must include (1) a clear and unequivocal statement of intention to make a claim; (2) the nature of the claim and the grounds for which it is based; and (3) the estimated quantum. Then the person who gave Notice in Writing of the claim must submit a detailed account "within a reasonable time."

Mutual waiver and release provisions also apply to claims resulting from acts or omissions which occur after the date of substantial performance (except for the following):

- (a) claims for which there are third party indemnification obligations (GC 12.2.1.2 and GC 12.2.3.2);
- (b) claims in relation to toxic and hazardous materials (GC 12.2.1.3 and GC 12.2.3.3);
- (c) Contractor's claims in relation to patent fees and defects in title (GC 12.2.1.3);
- (d) Owner's claims in relation to warranty obligations (GC 12.3); and
- (e) claims for which a Notice in Writing of claim has been received within 395 calendar days following the date of substantial performance.

It is important to note that GC 12.2.2 and GC 12.2.5 give the Owner and Contractor a period of only 395 days following the date of substantial performance to make a

claim relating to acts or omissions occurring after the date of substantial performance.

GC 12.2 is lengthy, difficult to understand and contains concepts that were foreign to the 1994 version. Several critical issues arise with respect to this provision that should be addressed by Supplementary Conditions.

Firstly, although the new waiver and release provisions were intended to be mutual, it has been suggested that waiver and release of claims by a Contractor may not necessarily be enforceable in Ontario where those claims are correctly included within a properly preserved Claim for Lien. The opening words "*Subject to any lien legislation applicable to the Place of Work*" of GC 12.2.1 could be interpreted to mean that the parties are purporting to contract out of the Ontario *Construction Lien Act*, something that is expressly prohibited by s.4 of that Act. Because the claims of Owners are not regulated by lien legislation, waiver and release of claims by Owners may remain unaffected.

Secondly, as previously noted, the critical date for the Notice in Writing is tied to the expiry of the lien period rather than the date of the final Certificate for Payment. Undoubtedly, issues of proper notice will arise in those cases where the expiry of the lien period is uncertain. Where a Certificate of Substantial Performance is published, calculation of the Contractor's lien expiry date is relatively easy. Where it is not, determination of lien rights may rest on the difficult factual determination of when a contract was actually completed or abandoned.

Thirdly, the parties are only releasing claims of which they have or reasonably ought to have knowledge. The phrase "reasonably ought to have knowledge of" is reminiscent of language in limitations legislation which defines discoverability of claims for limitations purposes. The "discoverability" principle has given rise to much litigation. Similarly, the courts will have to define what claims an Owner or Contractor "ought to have knowledge of" for CCDC 2 - 2008 waiver purposes on a case by case basis. Such a concept was not found in the 1994 version.

Fourthly, a Notice in Writing (in addition to being delivered by hand, registered mail or regular mail) may now also be

delivered by courier, facsimile or other form of electronic communication, including email, provided that a "failure of receipt" is not communicated to the sender. Sending a Notice in Writing by email may be convenient but does give rise to concerns about "receipt." Undelivered emails do not always "bounce back." Emails may be received but not opened. Emails may automatically be diverted to "junk mail" by spam filters. Email access may be restricted within the office of the recipient to that particular individual. There may not be a fail-safe system for managing email flow when that individual is absent. If properly establishing receipt of a Notice in Writing has the potential to pose risks, Supplementary Conditions will be necessary.

What does this mean for your construction contracts?

Perhaps the most critical issue arising out of the new indemnification and waiver provisions for Owners and Contractors alike is the tying together of waiver of claims to expiry of the lien period. The industry practice has often been to release the holdback on the understanding that, even in the absence of a formal claim, legitimate claims would be dealt with after the holdback release. But to take this approach under the new CCDC 2 presents considerable risks. Parties failing to provide proper Notice in Writing six days before the expiry of lien rights may find their claim is now barred.

The tight time frames that must be met to avoid waiver of claims will require parties to implement a detailed system for monitoring and making potential claims. In addition, commencing a potential claim at the time required by the new CCDC 2 could inject unnecessary acrimony into the Owner/Contractor relationship.

The tight time frames for giving proper notice of claims under the new CCDC 2 must always be viewed in conjunction with limitations legislation. For example, the new GC 12.2.4 has the potential to cause particular difficulties with respect to latent defects. The *Limitations Act, 2002* provides that a claim must be commenced within two years of its discovery. The *Limitations Act, 2002* also provides for an ultimate 15-year period from the date on

which the act or omission giving rise to the claim took place. GC 12.2.4, however, provides that the Owner waives and releases the Contractor from all claims for damages arising from substantial defects and deficiencies in the work except claims for which the Contractor has received Notice in Writing of claim from the Owner within six years from substantial performance.

In practical terms, this may mean that claims for latent defects that would normally be subject to the 15-year “drop-dead” statutory period could be restricted to a much shorter period of six years. Although the *Limitations Act, 2002* permits statutory limitation periods to be shortened by commercial agreements, it is uncertain whether the language of GC 12.2.4 sufficiently and clearly demonstrates an intention to reduce the 15-year ultimate limitation period prescribed by the *Limitations Act, 2002* to six years.

The language of GC 12 suggests that the drafters envisaged a more objective claims process. Claims will now have to be asserted and quantified in a clearer fashion. For

example, in a delay claim, arguing that the entire course of dealings between the parties constitutes sufficient compliance with the contractual notice requirements may no longer be possible. Courts may no longer overlook a party’s failure to give formal notice and it is unclear whether a party could waive compliance with the notice requirements by their conduct in the face of these explicit contractual notice requirements.

Although it was far from perfect, the industry was comfortable with the CCDC 2 - 1994. However, seals can no longer be purchased for its use. For better or worse, CCDC 2 - 2008 has arrived.

While in some instances, a party will be bound by the new contract without the ability to negotiate Supplementary Conditions, it is still important for both parties to understand their rights and obligations, especially as they pertain to Indemnification and Waiver of Claims. These provisions should be given serious consideration when negotiating a contract. A contract that fails to permit the assertion of valid claims cannot be remedied after the fact.

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