

CONSTRUCTION CLAIMS

Defects, delay, toxic mould - avoiding and mitigating complex construction claims

participating organizations

Berkow & Cohen LLP
Blaney McMurtry LLP
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who should attend

Owners/Developers,
General Contractors,
Subcontractors and Suppliers,
Construction Project Managers/ Coordinators,
Architects, Design Professionals & Engineers,
Land Use Planners,
Government Representatives

School Board Representatives,
Financial Institutions,
Insurance/Surety,
Bond Company Representatives,
Municipal Environmental and Real Estate Lawyers,
Construction Finance Professionals,
In-house Counsel Construction Consultants

course highlights

Protecting yourself against construction defect claims
Avoiding liability in toxic mould cases
Dealing with construction liens
Construction arbitration: avoiding potential problems with standard contract clauses
Capacity, responsibility and claims: the latest on surety bonds and insurance markets
What not to do when conducting an arbitration
How to recognize and safeguard against unfair practices and improper claims in delay claims and change orders



Course Leader
W. Andrew
McLauchlin,
McLauchlin &
Associates



Kenneth W.
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Anna M.
Esposito,
Pallett Valo LLP



Geza R. Banfai,
Blaney
McMurtry LLP



Donald E. Short,
Fasken
Martineau
DuMoulin LLP



David Crocker,
Davis LLP

Jack B. Berkow,
Berkow &
Cohen LLP

COURSE LEADER

W. ANDREW MCLAUCHLIN

W. Andrew McLaughlin is a Partner at McLaughlin & Associates. He has practiced exclusively in the area of construction law for over 30 years and is certified as a specialist in Construction Law by the Law Society of Upper Canada. His day-to-day practice involves problem resolution and business practice strategies, contract negotiation and drafting, claim preparation, construction liens, occupational health and safety, product liability, and mediation, arbitration, inquests, and trial and appellate advocacy at all levels of court for public and private owners, developers, contractors, sub-contractors, equipment and material suppliers. He is recognized as a leading practitioner in the area of construction law, and he is a member of the teaching faculty of the Canadian Mechanical Contracting Education Foundation.

GEZA R. BANFAI

Geza R. Banfai is a Blaney McMurtry LLP partner and founding chair of the firm's Architectural/Construction/Engineering Services (ACES) Group. He has represented every participant in the construction pyramid, including construction lenders and owners, general contractors, subcontractors, material suppliers and workers, and design professionals and testing consultants. He has handled many contract and lien disputes including claims arising from unforeseen subsurface conditions, failures in foundations and roofs, walls and interior finishes, brick and exterior cladding, post-tensioned concrete structures and pavements, major electrical component failures and mechanical deficiencies. His experience includes delay and impact claims, deficient design, bid disputes and claims under bid, and performance and labour and material payment bonds. He is a Certified Specialist in construction law.

CO-LECTURERS

KENNETH W. MOVAT

Kenneth W. Movat is a Partner with Movat Eccleston, a construction law boutique in Toronto he founded with Ken Eccleston, forging an alliance after facing each other on opposite sides in court. Both principals brought a clear sense of the best and worst of what their previous firms had to offer. That sense formed the firm's commitment to dealing with clients directly and always placing client needs first. Ken's practice area is construction law, emphasizing litigation. He has provided legal counsel to owners, architects, engineers, contractors, subcontractors, material suppliers and surety bonding companies. Ken has been a member of the Ontario Bar Association Construction Law Executive since 1991 and is a past Chair of the section. He is a Certified Specialist in construction law.

DONALD E. SHORT

Donald E. Short is a Partner at Fasken Martineau DuMoulin LLP, where he chairs the Toronto Construction Law Group. He is engaged in the practice of commercial and construction litigation as well as a broad range of insolvency related matters. In addition, he has been actively involved in the implementation of ADR in the Courts of Ontario and presently serves as President of the ADR Institute of Canada. He is listed in the Euromoney Guide to the world's leading experts in arbitration, and he has been recognized by both LEXPERT and The Best Lawyers in Canada for his construction law and ADR skills. He is a Certified Specialist in both civil litigation and construction law.

ANNA M. ESPOSITO

Anna M. Esposito is Managing Partner and heads up Pallett Valo LLP's Construction Law Group. Her practice is exclusively concentrated in the area of Construction Law, acting for all the parties in the construction pyramid, including general contractors, subcontractors, material suppliers, owners, developers, sureties, mortgagees and trustees in bankruptcy. Her practical and timely advice is regularly sought in the areas of liens, breach of trust, performance bonds, labour & material payment bonds, contract preparation and the resolution of all types of construction disputes whether by way of litigation or by other dispute resolution mechanisms.

DAVID CROCKER

David Crocker obtained a B.A. from York University in 1969, and an LL.B. from Osgoode Hall Law School in 1972; was called to the Ontario Bar in 1974; and studied from 1980 to 1981 at U.B.C. in the field of Advanced Studies in Environmental Law and Planning. From 1974 to 1990 David practiced law with the Ontario Ministry of the Attorney-General at the Ministry of the Environment and the Crown Law Office, Civil. He joined Holden~Day~Wilson as head of their Environmental Law Group in 1990, in 1996 Blaney, McMurtry, Stapells, Friedman and in March 2000, Power Budd LLP. David joined Davis & Company (now Davis LLP) in March of 2004. David's practice involves all areas of environmental law including waste management and disposal; compliance, environmental assessment and approvals; environmental, transportation and occupational health and safety litigation; due diligence for mergers and acquisitions and real estate transactions.

JACK B. BERKOW

Jack B. Berkow was admitted to the Bar of Ontario in 1975. He holds an LL.B degree (1973) from Osgoode Hall Law School. He is certified by The Law Society of Upper Canada as a specialist in Civil Litigation as well as certified as a specialist in Construction Litigation, and Harvard certified in Alternative Dispute Resolution. His practice focuses on all aspects of land based disputes and has a myriad of interests including owners, developers, purchasers, vendors, mortgages, joint venture participants, occupants, lessors and lessees. He has also acted as Arbitrator and Mediator on numerous occasions and has been involved in the resolution of many complex construction, real estate and condominium related disputes. Mr. Berkow is a former instructor in the Bar Admission Course administered by the Law Society of Upper Canada.

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COURSE PROGRAM

ASSUMPTION OF RISK: WHO IS ON THE HOOK FOR WHAT?

Effectively apportioning responsibility on a complex construction project is a difficult task, requiring a concise understanding of the law, of each party's contractual rights, of the construction process and of claims presentation. How responsibility is apportioned, however, will dictate the ultimate impact on the fortunes of owners, lenders, contractors, subcontractors and sureties. This discussion details who is responsible for what on complex construction projects, including:

- Who is in charge of what on the project?
- Identifying areas of responsibility
- For multiple contractors on one site: who is responsible for what?
- What are the roles and responsibilities of the design professional? Of the owners? Of the contractor?
- Tips for allocation of risk in standard form contracts for different project delivery systems

PROTECTING YOURSELF AGAINST CONSTRUCTION DEFECT CLAIMS

Litigation involving alleged construction defects is on the rise. Indeed, courts have been struggling with the definition of what constitutes a construction defect and whether or not they fall within the coverage of commercial general liability policies. With litigation costs continually rising, it is imperative for construction firms to be able to protect themselves against construction defect claims. This discussion details how to do it, including:

- What is the potential legal liability for defective design, defective workmanship and defective materials?
- Standards of care for design professionals: express and implied duties
- Obligations of an engineer for construction field review
- How can you limit legal liability?
- Understanding the contractual matrix and potential liability of:
 - Manufacturers
 - General contractors
 - Subcontractors
 - Specialty contractors
 - Architects and engineers
 - Construction managers
- Do's and don'ts of evaluating liability
- Making sure everyone is at the table: third-party actions

DELAY CLAIMS AND CHANGE ORDERS: WHAT TO DO WHEN YOUR PROJECT GOES OFF THE RAILS

Complex projects and complicated schedules time is of the essence on the building site. And when deviations in construction schedules occur as they invariably do for a variety of reasons all parties leave themselves open to delay, acceleration and cumulative impact claims. This discussion details each party's contractual rights as well as key claims presentation and defense techniques, including:

- Using "as-built" data in delay analysis: the latest trend?
- How to develop and respond to claims
- Proceeding in the absence of a signed change order: what are the risks?
- Strategies for requesting and proceeding with changes: valuations and payment
- Practical tips for dealing with clauses disclaiming responsibility for delay
- Update on what the industry is claiming and accepting
- How to recognize and safeguard against unfair practices and improper claims
- Mitigation of loss: what should you be doing?
- Dealing with tighter scheduling requirements
- Damage claims for head office overhead and direct and indirect costs

DEALING WITH CONSTRUCTION LIENS

Unforeseen problems in a construction project can often interrupt or block the flow of money down the construction pyramid. Construction liens are one way of dealing with lack of payment issues. Indeed, being able to react quickly with a lien claim can often mean the difference between obtaining payment and incurring substantial loss. This discussion details practical tips on conducting a lien action, including:

- An update on both trust claims and construction liens
- Application of trust rules
- Timing for asserting a lien claim
- Establishing priority for lien enforcement
- Obtaining damages for improper registration of construction liens
- Can you lien for management and other services?

EMERGING ENVIRONMENTAL LIABILITIES

Increasing political and public awareness of environmental problems, together with pressure from lobbyists, is leading the Canadian Government to introduce a growing and wider range of environmental legislation for the construction industry. The result is a net of liability waiting to snare the unwary contractor. To the fullest possible extent contractors, builders and owners need to take precautions before each project to avoid getting caught in this net. This discussion details the potential risks and pitfalls in environmental claims, including:

- When are you personally liable for environmental problems?
- What are your statutory obligations to report and remediate?
- What happens if you avoid your duties?
- Critical strategies for protecting against potential liability
- Identifying responsibilities of owners, developers, constructors, consultants and contractors
- Due diligence for contractors
- Water and air environmental issues: what is changing and why?
- Overlap between federal and provincial regulations and requirements

CONSTRUCTION ARBITRATION: AVOIDING POTENTIAL PROBLEMS WITH STANDARD CONTRACT CLAUSES

Arbitration has long been the dispute resolution method of choice in the construction industry and indeed, most construction contracts contain an arbitration clause. This discussion details key requirements of an effective arbitration clause, including:

- Inclusion of necessary parties: who are they?
- What are the appealability thresholds?
- What is the breadth of jurisdiction of arbitration?
- What are the choice of law, venue and procedural protocols?

ACHIEVING SUCCESSFUL RESOLUTIONS IN ARBITRATION AND MEDIATION OF CONSTRUCTION DEFECT CASES

Despite increasing legislative and judicial support for arbitration as a dispute resolution forum, parties in construction defect litigation with enforceable arbitration agreements may fail to consider arbitration of disputes. Instead, these parties unintentionally waive the right to arbitration, sometimes out of a lack of understanding of the process. Understanding the arbitration process and its application in construction defect litigation is essential before the right to arbitration is waived by any party.

- Is arbitration a viable alternative to traditional litigation and under what circumstances?
- Is the mediation process working for construction defect cases?
- Preparing for mediation: key strategies
- What not to do when conducting an arbitration
- Avoiding the hidden pitfalls of complex arbitration
- What is a sound ADR contract provision?
- Pro-active dispute prevention at the front end of a construction job

CONSTRUCTION LIENS

CURRENT STATE OF THE INSURANCE MARKET: STRATEGIES FOR COVERAGE IN DIFFICULT TIMES

Contractor's commercial general liability insurance coverage is currently in crisis mode for construction. Contractors are seeing significant premium increases for this coverage and significant policy exclusions are prevalent. Understanding the current insurance market is essential, as mistakes here can have disastrous consequences to the contractor. This discussion details the current state of the market and how to maintain coverage, including:

- Present state of the insurance market: how to get the coverage you need
- Who's responsible for what? What type of coverage is required and what is available for owners, general contractors and subcontractors?
- Critical advice for dealing with denial of coverage post-award of contract on basis of:
 - No property damage, no accident or occurrence
 - Impaired property exclusion, sisterhood exclusion
 - Concurrent causation
- Practical risk management strategies for effectively dealing with challenges:
 - What are the options?
 - What are the legal issues?
 - What policies and programs ensure coverage?

CAPACITY, RESPONSIBILITY AND CLAIMS: THE LATEST ON SURETY BONDS

The surety bond industry, having suffered major losses in recent years due to an increase in the number of claims, has increased rates and tightened underwriting policies. Public projects require performance bonds and more owners of sizable private projects now require bonds. This discussion details how to overcome the challenges in the current surety bond market and obtain the much-needed protection, including:

- Obtaining sufficient capacity: what are the difficulties?
- How can they be overcome?
- Practical suggestions for dealing with lack of capacity
- Other ways to obtain equivalent protection
- How the latest trends will affect the construction industry
- Dealing with the allocation of responsibilities
- Necessary steps to follow to claim under surety bonds
- Update of CCDC revisions for surety bonds, bid bonds, performance bonds and labour and material payment bonds

LIABILITY OF TRUST PROVISIONS

Failing to comply with the Construction Lien Act trust provisions governing trust funds can create a substantial personal financial liability for the violator. What are the obligations of the trustees and the rights of the beneficiaries under trust funds created under the Act? This session will examine the issues, the repercussions and the practices required to avoid financial liability.

- The types of trust funds created by the Act
- The obligations of the trustees of the trust funds
- Who are the beneficiaries of the trust funds
- Liability for 'breach of trust', including personal liability of officers, directors and persons with effective control
- What are permitted deductions from the trust funds
- Breach of trust and bankruptcy

Registration: To reserve your place, call Federated Press toll-free at 1-800-363-0722. In Toronto, call (416) 665-6868 or fax to (416) 665-7733. Then mail your payment along with the registration form. Places are limited. Your reservation will be confirmed before the course.

Location: Toronto Hilton Hotel, 145 Richmond Street West, Toronto, Ontario, M5H 2L2

Cost: The attendance fee for the course is \$1725 per person and covers attendance for one person and the lecturers' presentation material. The fee further includes lunch on the first day, morning coffee on both days and refreshments during all breaks. You may purchase a Proceedings CD-ROM containing edited actual proceedings and materials from the course.

Time: Course registration begins at 8:00 a.m. The morning sessions start promptly at 9:00. The second day ends at noon.

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