

**Construction Litigation:  
How to stay in the black  
and out of the Courtroom**



**Kenneth W. Movat**

**Certified Specialist in Construction Law**

# Session Overview

Part 1: Construction claims: How to manage risks and prevent lawsuits

Part 2: Liability for Damages:

- Indemnification Clauses
- Consequential Damages
- Joint and Several Liability

# Construction Claims Management

## Construction claims can:

- increase project costs
- delay the completion of construction projects
- negatively affect corporate relationships

However, it is virtually impossible to avoid claims occurring on a construction project

# Construction Claims Management

## Rule number 1:

- Embrace the reality of construction claims

## Claims are like water

- Just as you cannot make a construction project water-proof
- You can't make it claims-proof

# Construction Claims Management

So, what do you do?

Rule number 2:

- Develop a Claims Strategy

What does that mean?

- Remember the 5 Ws?

# Construction Claims Management

- Who
- What
- Where
- Why, and
- When

In a slightly different order ...

# Construction Claims Management

## “What” are construction claims?

- Cost escalation
- Extended duration and construction delays
- Changes in project scope
- Geotechnical and site-related problems
- Weather and *force majeure* conditions
- Negligence in design, engineering and construction

## Construction Claims Management

- “Who” do we need?
  - The “client” (owner, G.C., sub, supplier, etc.)
  - The client’s in-house counsel
  - The individual responsible on the project
  - The internal “experts”
  - The claims consultant (external “experts”)
  - And, of course, me (Ken Movat the lawyer)



# Construction Claims Management

- The External Team (“Experts”)
  - Legal analysis
  - Engineering
  - Construction techniques
  - Scheduling and critical path analysis
  - Forensic cost analytics
  - Damages quantification
  - Data management and e-Discovery
  - Negotiation and dispute resolution

## Construction Claims Management

- “When” is the claims strategy developed?
  - As Soon As Possible!
  - At the time of developing the project

## Construction Claims Management

- “Where” is the claims strategy developed?
  - At the lawyer’s office
  - At the client’s office
  - At the consultant’s office

And then it is reduced to writing so that all members of the claims management team are aware of it.

## Construction Claims Management

- “Why” develop a claims strategy?
  - It saves money
  - It allows projects to finish on time
  - It preserves business relationships

# Construction Claims Management

- Another “What”:

We now know what construction claims are, so ...

**What** is a claims strategy?

# Construction Claims Management

## The strategy begins with

- Identifying project objectives
- Identifying potential risks
- Developing a claims strategy with counsel and other stakeholders
- Ascertaining the validity and magnitude of claims
- Devising a claims resolution strategy with time frames and budgets

# Construction Claims Management

- Claims Training
- Claims Recognition
- Claims Avoidance
- Claims Resolution

# Construction Claims Management

## Claims Training

- Identify the team
- Start early
- Formalize the training where possible
- Educate new members when they join the team



# Construction Claims Management

## Claims Recognition

- Assign responsibilities among team members
  - Internal
  - External
  - Professionals
  - Administrative
- Track claims systematically

# Construction Claims Management

## Claims Avoidance

- Implement a process for making claims
- Contractually establish the process
- Implement measures for early resolution
  - Investigation
  - Analysis
  - Quantification

# Construction Claims Management

## Claims Resolution

- Negotiation
- Mediation
- Arbitration
- Litigation

# Construction Claims Management

## Just like taxes and your in-laws

- You can't make construction claims go away
- So, learn to manage them

## Limitation of Liability for Damages

- Who is responsible for damages?
- How far does responsibility go?
- When can other parties contract out of their liability?

# Indemnification Clauses

- Contracts with indemnification clauses: risks and danger signs
- What are the limits to indemnification?

# Consequential Damages

- Direct vs Consequential Damages
- The danger of signing contracts that require the engineering firm to take responsibility for consequential damages

# Joint and Several Liability

- Sharing the blame does not always mean sharing the financial liability
- The right of a successful plaintiff to collect from the defendant of their choice
- How to protect yourself and your assets



# Construction Litigation: How to stay in the black and out of the Courtroom

## Thank You!

Kenneth W. Movat

Certified Specialist in Construction Law

***Fogler, Rubinoff LLP***

416-365-3720

[kmovat@foglers.com](mailto:kmovat@foglers.com)