GAR KNOW HOW CONSTRUCTION ARBITRATION

Canada

Peter D. Banks, Hugh Meighen
and Patricia (Trish) L. Morrison
Borden Ladner Gervais LLP

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Canada and its provinces and territories, excluding Quebec, apply the common law, initially developed in England. Quebec applies the civil law, and specifically the Civil Code of Quebec, derived from French law. The Supreme Court of Canada is the highest court in Canada for all provinces.

The Canadian Constitution divides legislative power and responsibility between the federal government and the provinces. Municipalities (including cities) derive their jurisdiction from provincially enacted legislation.

New laws of Canada are published in the Canada Gazette and new laws of the provinces are published in provincial gazettes and are generally available online.

Where legislative provisions affect vested or substantive rights, retrospectivity is undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (R v Dineley [2012] 3 SCR 272).

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

Construction contracts are subject to the common law requirements for contract formation: offer, acceptance of the offer, and consideration. Generally, a letter of intent is an agreement to agree, which is not a binding agreement under the Canadian common law. However, parties use letters of intent (or letters of award) to signify the awarding of a contract and allow the preliminary works to commence pending the final negotiations.

Tendering law in Canada recognises that a "contract A' is formed upon the submission of a compliant bid. The principal term of contract A is "the irrevocability of the bid and the corollary term [is] the obligation on both parties to enter into a construction contract, contract B, upon the acceptance of the tender" (R (Ont) v Ron Engineering [1981] 1 SCR 111).

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Parties are free to choose each of the above laws and rules for their arbitrations, subject to certain non-derogable terms in the applicable arbitration law (which typically relate to aspects of fundamental justice).

The domestic acts and international acts of the provinces include grounds for the set aside or non-enforcement of arbitral awards, which generally relate to public policy and procedural issues, such as the failure to abide by the applicable procedural rules or arbitration agreement.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

Terms may be implied in a contract:

- based on custom or usage, where the custom is "so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract";
- as the legal incidents of a particular class or kind of contract; or
- based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term that the parties would say, if questioned, that they had obviously assumed" (Canadian Pacific Hotels Ltd v Bank of Montreal [1987] 1 SCR 711).Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

When deciding an issue between an owner and contractor, a certifier has a duty to act impartially and fairly (Sutcliffe v Thackrah [1974] AC 727 (HL)). It must act judicially notwithstanding the fact that it derives its payments from one of the parties. Where the certifier does not exercise such power judicially, a party is entitled to payment based on the contract (Oshawa (City) v Brennan Paving Co [1953] OR 578). In the absence of a contract between the certifier and the contractor, a contractor may bring a claim directly against a certifier in tort if the certifier has breached its duty to the parties.

Interim payment certificates are generally open to adjustment, whereas the court cannot set aside the certificate of substantial completion and the related final payment absent a finding of fraud (Ram Construction Inc v JBLK Enterprises Inc [2010] BCJ No. 1866).

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Parties can cite concurrent delay as a potential defence to reduce or defeat a delay claim against them, even without asserting a delay claim themselves. In the scenario described above, depending on the apportionment of the time and responsibility for the claim, the employer could argue that the culpable delay of the contractor overrides any entitlement to recover damages and that the contractor is only permitted an extension of time.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

The court has found that there is an implied term in certain construction contracts that the owner will provide the contractor with a sufficient degree of uninterrupted possession to permit it to carry out his work unimpeded and in the way it chooses (ANC Developments Inc v Dilcon Constructors Ltd, 2000 ABCA 223).

A successful claim for disruption depends on the terms of the contract, but is likely to require proof of the breach, a loss, owner responsibility for the loss, and that the contractor attempted to mitigate its damages.

Where a claim is proven, courts and tribunals will attempt to quantify damages, even where it is difficult to do so; the court must "do the best it can in the circumstances" (Martin v Goldfarb [1998] O.J. No. 3403).

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

There is case law in Canada to suggest that an obligation to pay costs for a direction to accelerate requires an express direction in writing directing the acceleration. However, the concept of constructive acceleration remains underdeveloped in Canadian jurisprudence.

Where an employer acts in bad faith in refusing to issue an extension of time, there may be a distinct claim arising from the owner's breach of the duty of honest performance. See question 14.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

A force majeure clause will typically include a list of specified "triggering events," usually of an exceptional nature (such as earthquakes, floods or war), and may include a catch-all phrase designed to cover events not listed specifically in the clause.

Courts will uphold force majeure clauses, including any circumstances or conditions that the parties agree constitute force majeure (whether those circumstances are foreseeable or unforeseeable, and have permanent or temporary effects). A party cannot rely upon force majeure if it has brought upon the condition itself. In determining whether the factual scenario constitutes force majeure, the court will consider whether the issue is "so radical as to strike at the root of the contract" (Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co [1976] 1 SCR 580).

For a force majeure clause to be effective, the "triggering event" must fall within the scope of the provision. In addition, other considerations often direct the proper operation of force majeure clauses. For example, the party seeking to rely upon the provision generally bears the burden of showing that the event has significantly affected its ability to perform its contractual obligations. Further, force majeure clauses generally pre-suppose and require that the "triggering event" not be caused by, or otherwise be within the control of, the party seeking to be excused from performance.

It may be more difficult for a party to invoke force majeure if the impact involves an inconvenience one would encounter in the ordinary course of business, such as higher operating costs or a recessionary market. Whether or not an event has affected the party's ability to perform a contractual obligation as a force majeure will be a fact-dependent analysis, with consideration of (amongst other things) the nature of the contract and the extent to which the "triggering event" has affected the locality of the invoking party. Any party attempting to invoke a force majeure clause should also strictly adhere to any required procedural steps set out in the relevant provision.

The doctrine of frustration may also apply in lieu of (or in addition to) a force majeure clause. Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract" (Naylor Group Inc v Ellis-Don Construction Ltd [2001] 2 SCR 943).

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

Parties may agree upon circumstances in which a party may be relieved from obligations under the contract due to increased expense or hardship.

The doctrine of frustration (discussed in question 9) will not apply where performance has merely become more onerous, more costly or different from what was anticipated (Fishman v Wilderness Ridge at Stewart Creek Inc, 2010 ABCA 345).

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

Courts will generally give effect to the contractual allocation of risk agreed between the parties. If a contractor cannot achieve a particular aspect of the specifications, but not due to external events that would potentially give rise to a force majeure or frustration defence, it may not be entitled to any relief. Additionally, the owner may be entitled to relief for the contractor's inability to meet its obligations under the contract.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

See question 11.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

The express obligation to construct a work capable of carrying out the duty or function in question overrides the obligation to comply with the plans or specifications. The contractor will likely be liable for the failure of the work notwithstanding that it carried out the work in accordance with the plans (Hudson's Building and Engineering Contracts, 8th ed, 1959). This is particularly the case where it had the requisite skill or experience to identify the improper design (Steel Company of Canada Limited v Willand Management Limited [1966] S.C.R. 746).

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

The Court has recognised an "organising principle of good faith" underlying many aspects of contract law (Bhasin v Hrynew [2014] 3 SCR 494). In Quebec, the Civil Code of Quebec sets out a general duty of good faith in articles 6, 7 and 1375 (Civil Code, SQ 1991, c 64, articles 6, 7, 1375):

- Article 6: Every person is bound to exercise his civil rights in accordance with the requirements of good faith.
- Article 7: No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.
- Article 1375: The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.

Parties must exercise discretionary powers under contracts in good faith and act honestly in contractual performance. The "organising principle" is not a pretext for scrutinising the motives of contracting parties, nor does it impose a duty of loyalty on

parties or require a party to forego advantages flowing from the contract. A duty to bargain in good faith has not been recognised to date in Canadian law (Martel Building Ltd v R [2000] 2 SCR 860).

In early 2021, the Supreme Court issued two decisions adding to the breadth and depth of good faith obligations in Canada. For instance, in Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District, the majority of the Court held that the duty to exercise discretion reasonably is a general doctrine of contract law, and is not an implied term of any particular contract. The implication is, therefore, that parties cannot contract out of this duty. The Court also rejected the notion that an exercise of discretion will be unreasonable only if the exercise of discretion "substantially nullifies" the benefit of the contract for the other party. On the other hand, the fact that a party's exercise of discretion causes a party to lose some or even all of its anticipated benefit – as happened in this case – is not dispositive in itself, as long as the exercise of discretion is within the bounds contemplated in the contract.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Construction contracts typically set out specific requirements for the proper notification of claims arising under specific provisions of the contract dealing with specific matters and issues. Canadian courts have held that the failure to provide notice in accordance with the contract can bar the claim (Corpex (1977) Inc v Canada [1982] 2 SCR 643; Ross-Clair v Canada (Attorney General), 2016 ONCA 205).

Each province of Canada has legislation setting out a limitation or prescription period. While limitation periods can be lengthened by contract (or their effects can be suspended), it is often not permitted to shorten limitation periods. See question 38.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

A contractor's failure to comply with interim performance obligations may entitle the owner to withhold payment (Standard Precast Ltd v Dywidag Fab Con Products Ltd [1989] 56 DLR (4th) 385 (BCCA)). Under many contracts, where the contractor fails to correct deficient work, the owner may be justified in temporarily withholding associated payments to the contractor. If the owner incurs additional costs due to the deficient work, it may also be entitled to set off those additional costs against payments to the contractor (PCL Constructors Westcoast Inc v Norex Civil Contractors Inc, 2009 BCSC 95).

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

An owner's power to omit work or "de-scope" is typically set out in the applicable contract, and is unlikely to be implied (see question 4).

On termination, Canadian common law allows parties to terminate contracts, including construction contracts, where a party has committed a repudiatory or fundamental breach that justifies termination of the agreement (1193430 Ontario Inc v Boa-Franc (1983) Ltee, (2005), 78 OR (3d) 81 (ONCA). Canadian courts have provided factors for assessing whether a breach is "repudiatory" or "fundamental" (Spirent Communications of Ottawa Ltd v Quake Technologies (Canada) In., 2008 ONCA 92), but have cautioned that an owner must exercise its right to terminate in "good faith" (Mohamed v Information Systems Architects Inc 2018 ONCA 428).

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

See question 17. Parties may agree on the conditions upon which termination is permitted. The practical and financial consequences of the termination will depend on whether the termination was proper and lawful. If a party properly terminates a contract based on an agreed condition for termination, there would be no breach or repudiation to justify relief beyond what is set out in the contract. Unlawful termination constitutes a repudiation of the contract, which would entitle the "innocent" party to terminate the contract and sue for damages.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

See questions 17 and 18. Unless the contract provides otherwise, the parties retain their common law rights (Hudson's Building and Engineering Contracts, 12th ed (London, UK: Sweet & Maxwell, 2010)). Accordingly, where a party repudiates a contract (ie, commits a breach that is so serious or fundamental as to go to the root of the contract and substantially deprives the innocent party of what it bargained for), the innocent party may either reaffirm the contract or treat the contract as terminated and seek damages.

20 What limits apply to exercising termination rights?

Canadian courts have held that termination provisions in a contract are subject to the organising principle of "good faith" (Mohamed v Information Systems Architects Inc, 2018 ONCA 428). Parties should take particular care to ensure that termination is justified, and not motivated by another "dominant motive". In a similar vein, the court has found that contriving notices of events of default to ground a subsequent termination is a violation of the duty of honest performance, thereby rendering invalid the notices of events of default (Urbacon Building Groups Corp v Guelph (City), 2014 ONSC 3641).

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Whether works are deemed complete varies based on the terms of the contract and the facts and circumstances of each case. While not a bright line test, completion may be achieved if the facts support that the work is completed in all essential and material respects and any defects can be easily cured or at a minor expense compared to the total contract price. (Pierre L. Morin Construction Ltd v Hitchcock, [1990] N.B.J. No. 947 citing Wagg v Boudreau Sheet Metal Works Ltd [1959] NBJ No. 19.

In addition, the legislative definition of substantial performance will apply, which varies by jurisdiction in Canada. For example, in Alberta, parties cannot contract out of the lien legislation, which defines when a contract is considered substantially complete. In Alberta, a contract is substantially performed where the project is being used or capable of being used for the purpose intended and the monetary portion of test for substantial performance has been met (Builders' Lien Act, RSA 2000, c B-7, section 2(a)(b)).

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Generally, most construction contracts state that payment, use or occupancy do not constitute acceptance of deficient work. Where a contract is silent on acceptance, payment by the owner with knowledge of defects will not necessarily constitute acceptance of the work (Strachan v Barton [1993] BCJ No. 1135). However, an owner may lose its right to claim damages for defective work it is aware of if the owner's conduct can reasonably be inferred to constitute a waiver/estoppel of the right to claim damages (Thompson v Vrielink [1982] AJ No 474 (ABQB)).

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

The extent to which liquidated damages for delay are treated as an exhaustive remedy will depend on the terms of the contract. For example, where a contract contains words "in addition to and without prejudice to any other remedy available to the vendor", the courts have found that liquidated damages are not an exhaustive remedy (Raymer v Stratton Woods Holdings Ltd (1988), 65 OR (2d) 16 (ONCA) followed in Passmore Gates Development v Chung, [1996] O.J. No. 1932.

Where a liquidated damages clause is enforceable and does not expressly reserve the owner's right to claim additional damages, the owner's damages will be capped by the agreed upon liquidated damages. However, a party is not allowed to benefit from a limitation of liability clause when it has engaged in unconscionable conduct such as deliberate misconduct (Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd, 2004 ABCA 309 referenced with approval in Tercon Contractors Ltd v British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 S.C.R. 69 and (1688782 Ontario Inc v Maple Leaf Foods In., [2020] S.C.J. No. 35). In such circumstances, the owner's claim may not be limited if its proven damages are greater.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

Courts have held that where the owner's conduct makes it impractical or impossible for the contractor to perform the work within the contractual deadline, the owner cannot enforce the liquidated damages clause. In such a case, the contractor's delay on other parts of the project is generally treated as irrelevant (N.B.C. Mechanical Inc. v. A.H. Lundberg Equipment Ltd. 1999 BCCA 0775)). However, if the contract includes an extension of time clause, and it is used properly, the owner may be able to set a new date from which the liquidated damages mechanism can operate.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

The law on liquidated damages (LDs) remains in flux. Since 1915, adopting the UK's approach, Canadian courts enforce LD clauses if they are not a penalty, but rather a genuine pre-estimate of the loss the owner would suffer if the project were delayed (or for such other category of loss as specified in the contract). In 2015, the UK Supreme Court developed a new test centring on whether an LD clause protects any legitimate business interest, and whether the provision is extravagant, exorbitant, or unconscionable. Elements of the new UK may form part of Canadian LD law in the future. Currently, Canadian courts continue to enforce LD clauses provided they are not a penalty or unconscionable (Graham v Imperial Parking Canada Corp, 2011 ONSC 991 (Div. Ct.)). LD clauses triggered by insolvency cannot be enforced, irrespective of whether it is a genuine pre-estimate of damages (Chandos Construction Ltd. v Deloitte Restructuring Inc., 2020 SCC 25).

If it is determined that the liquidated damages clause is not enforceable, damages in an amount less than the liquidated damages may be awarded, as actual damages would be assessed. Some Canadian courts, however, continue to view the forfeiture of a deposit as an exception to the rule that the forfeited sums must present at genuine pre-estimate of damages so long as the forfeiture is not unconscionable (Redstone Enterprises Ltd v Simple Technology Inc, 2017 ONCA 282).

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

The liquidated damages clause will stipulate the maximum damages owing for delay or any other breach of contract that is specified as being covered by the liquidated damages clause. If the clause is determined to be enforceable, a court will not award more than the liquidated damages specified in the contract for those heads of claim (JG Collins Insurance Agencies v Elsley [1978] 2 SCR 913). However, generally, a liquidated damages clause will not bar claims for other heads of damages, where the contract clearly allows for other remedies.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

Compensatory damages are the usual measure of damages for breach of contract, the calculation of which is governed by the expectancy principle. It requires putting the claimant into the position it would have been in if the respondent had performed the contract as agreed (Bank of America Canada v Mutual Trust Co, 2002 SCC 43). The claimant must establish that the respondent's breach of contract resulted in the damages claimed and that the damages are not too remote – that is, that they represent a type of loss that was reasonably foreseeable to the respondent when the contract was entered into. Canadian courts permit recovery for certain categories of pure economic loss in negligence claims where it can be demonstrated that the economic loss was reasonably foreseeable and that the parties stood in a relationship of sufficient proximity to one another (688782 Ontario Inc v Maple Leaf Foods Inc, 2020 SCC 35).

Lost profits are recoverable if they were reasonably foreseeable at the time of contract execution. A claimant does not need to know or prove a particular lost opportunity that resulted from the breach of contract/tort but rather that the existence of some lost profits was reasonably expected (Houweling Nurseries Ltd v Fisons Western Corp [1988] B.C.J. No 306 (BCCA)).

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

Where a contractor has not met the technical requirements, the owner is generally entitled to damages incurred to rectify the defects and deficiencies (Miller v Advanced Farming Systems Ltd [1969] SCJ No. 52) unless the cost to remediate is found to be unreasonably high relative to the value to be gained by the expenditure (Nu-West Homes Ltd v Thunderbird Petroleums Ltd [1975] AJ No 345 (ABCA)). The parties may, through their contract, agree to a stricter remedy, as Canadian courts generally enforce the bargain made by the parties, if it is clear and unambiguous.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

The defects notification period (also called a warranty period) is addressed through the contract and, generally, the obligation is limited to defects for which notice is given during the warranty period. The owner may still have a claim in relation to defective work discovered following the expiration of the warranty period, subject to the expiration of the applicable limitation period, but the claim would be for damages incurred for the cost of rectification.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

There is a lack of consistency regarding the types of damages included in "consequential damages", it is generally understood that consequential damages are those that are not foreseeable without the disclosure of special circumstances at the time the contract is entered into.

In Tercon Contractors Ltd v British Columbia, 2010 SCC 4, the Supreme Court of Canada considered the enforcement of exclusion of liability clauses and set out the following three-part test:

This test requires that a court considering the validity of an exclusion of liability clause consider the following:

- Interpretation: Does the exclusion clause in question capture the type of breach alleged?
- Unconscionability: If the exclusion clause applies, consider will consider whether the clause was unconscionable at the time the contract was formed.
- Public Policy: If the exclusion clause is held to be both valid and applicable, courts should consider whether it should, nevertheless, refuse to enforce the valid exclusion clause because of the existence of an overriding (and very strong) public policy.

Subject to the test above, Canadian courts will generally enforce exclusion of liability clauses.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Exclusion and limitation of liability clauses are effective and generally enforced in Canada, if they are clear and unambiguous and meet test set out in Tercon (see question 30). In Canada, exclusion clauses must be expressed clearly, are narrowly construed by the courts. They are generally construed against the party benefitting from the exemption (Bauer v Bank of Montreal [1980] SCJ No. 46).

The applicability of such clauses to claims in tort will depend on the contractual language. If the clause contains language which expressly excludes or limits liability for tort, such a clause will generally be enforced. Where there is no express reference to claims in tort, the court will consider whether the language of the exclusion clause is broad enough, in its ordinary meaning, to include claims for negligence.

Such clauses often include express exceptions to the exclusion or limitation of liability when the damages arise due to fraud, wilful misconduct, recklessness or gross negligence. However, even without such express language, the courts will not allow a party to benefit from an exclusion or limitation of liability clause when it has engaged in unconscionable conduct such as fraud (Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd, 2004 ABCA 309; NEP Canada ULC v MEC OP LLC, 2021 ABQB 180).

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

Builders' liens are created by statute and are provincially regulated in Canada. Each province has its own legislation governing the timing and process for lien claims and the types of claims that are lienable. Since 2018, provinces and the federal government of Canada have been updating builders' lien legislation. Some of these updates are not yet in effect. As a result, the information below is subject to change.

Currently, in Alberta, a person who does or causes to be done any work on or in respect of an improvement, or furnishes any material to be used in or in respect of any improvement is entitled to register a lien, within 45 days from the day the last services or materials are provided or the contract is abandoned.

The amount of the lien claim is the value of the work performed that has not been paid. Damages for other claims, such as delay, are not lienable (Krupp Canada Inc v JV Driver Projects Inc, 2014 ABQB 259).

The lien claimant must take certain steps to perfect the lien claim, which varies in each jurisdiction. For example, in Alberta, a statement of claim and certificate of lis pendens (CLP) must be filed and the CLP must be registered against title within 180 days of the date the lien was registered.

Currently, in Alberta, where the work is performed for a tenant, a lien claim cannot be made against the owner's fee simple interest in the land unless written notice was given to the fee simple owner in advance of the work being performed and the owner has not given notice within five days that it will not be responsible for payment for the work.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

At common law, conditional payment provisions are enforceable if they are clear, unambiguous and are found to be a true condition precedent to payment (Timbro Developments v Grimsby Diesel Motors Inc [1988] O.J. 448 (CA)). Courts have made a distinction between clauses that impact the timing of payment versus entitlement to payment. Where a clause is determined to address the timing of the payment, the court will require that payment be made to the subcontractor within a reasonable amount of time (Arnoldin Construction & Forms Ltd v Alta Surety Co (1995), 137 NSR (2d) 281 (NSCA)). However, contractors cannot rely on such clauses to avoid payment to the subcontractor if non-payment is due to the fault of the contractor (Kor-Ban Inc v Pigott Construction Ltd [1993] OJ No 1414 (Gen. Div.)). Where there is a valid paid if paid clause, the contractor is required to make every effort to collect the money owing or negotiate a reasonable settlement, which will allow the subcontractor to be paid. What is reasonable is fact specific (6157734 Canada Inc v Bluelime Enterprises Inc [2016] O.J. No. 1418).

The common law may no longer be applicable as several Canadian jurisdictions have enacted or introduced legislation that make/will pay-when-paid provisions unenforceable. For example, Ontario made changes to the Construction Act (formerly the Construction Lien Act) that include prompt payment requirements that, functionally, render pay-when-paid clauses unenforceable and establishes a statutory pay-when-paid structure requiring a contractor to either pay or dispute submitted invoices within a specified time period. Alberta's Bill 37, if passed into law, contains similar prompt payment provisions and will have a similar effect on pay-when-paid clauses in Alberta.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

Generally, a subcontractor may claim only against a party with whom it has a contract and cannot sue the owner directly for breach of contract. Although rarely successful, a subcontractor may have a claim against the owner for unjust enrichment. Lien legislation creates a direct claim by the subcontractor against the owner for the lien fund, which is the statutory holdback fund that is created for the benefit of lien claimants. If the parties have agreed to the law of another jurisdiction, the lien legislation for the jurisdiction in which the project is located will still apply if the lien legislation cannot be contracted out of (for example, in Alberta).

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

An arbitration agreement only binds the parties to the contract. Prime contracts will often require that the subcontracts incorporate the terms of the prime contract, including the dispute resolution clause, which may allow the subcontractor to be brought into the same arbitration. However, if the subcontract contains a separate dispute resolution process, and unless the parties agree otherwise, the contractor will be required to arbitrate its dispute with the owner and address disputes with the subcontractor separately. Where a mandatory arbitration clause exists with the owner, the contractor cannot compel the owner to participate in litigation with the subcontractor. If the seat of arbitration is outside of Canada, the above issues must be resolved according to the arbitration law of the seat.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Third parties may be entitled to benefit from certain clauses in construction contracts, if two conditions are met: (i) the parties to the contract must have intended to extend the benefit in question to the third party; and (ii) the activities performed by the third party must be the activities contemplated as coming within the scope of the initial contract or provision (London Drugs Ltd v Kuene & Nagel International Ltd, [1992] 3 S.C.R. 299. In particular, subcontractors have been found to be beneficiaries of limitation of liability clauses that meet these factors (Swift v Eleven Eleven Architecture Inc, 2012 ABQB 764, overturned on other ground in Swift v Tomecek Roney Little & Associates Ltd., 2014 ABCA 49; British Columbia (Workers' Compensation Board) v Neale Staniszkis Doll Adams Architects, 2004 BCSC 1629). Future owners may have a negligence claim against the contractor for defective work (Winnipeg Condominium Corporation No. 36 v Bird Construction Co, [1995] 1 SCR 85).

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Generally speaking, affiliated individuals connected to the contractor could face claims in respect of delays, defects and payment if they owe a duty of care to the impacted party and breach that duty. A duty of care may be found to exist if it is reasonably foreseeable that the affiliated individual's negligence could cause damage. For the extension of limitations of liability to affiliated individuals, see question 36.

However, absent fraud, intentional conduct or gross negligence, employers are generally liable for the actions of their employees through the doctrine of vicarious liability. As a result, and practically, individuals are not named in claims for delays, defects and/or non-payment.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

Common law jurisdictions in Canada create limitation periods for legal claims through legislation. In Alberta, the Limitations Act sets out that a claimant must seek a remedial order within the earlier of:

(a) two years from the date on which the claimant first knew or ought to have known:
(i) the injury had occurred;
(ii) that the injury was attributable to the conduct of the defendant, and
(iii) that the injury warrants bringing a proceeding; or
(b) 10 years after the claim arose.

In Alberta, the law with respect to limitation periods applies to arbitrations and an arbitration must be commenced within the applicable limitation period. Filing a lawsuit may not stop timing running where a contract contains an arbitration clause (Lafarge Canada Inc. v Edmonton (City), 2013 ABCA 376).

Acknowledgement of a claim or partial payment in respect of a claim, before the expiration of the limitation period, restarts the limitation period on the date of the acknowledgement or part payment. In Alberta, the limitation period can be tolled or extended by agreement that expressly provides for it, but it cannot be reduced (Limitations Act, RSA 2000, c L-12, section 7).

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

All common law jurisdictions in Canada govern payment disputes in the construction context through builders' lien legislation. In Alberta, parties to a construction contract cannot agree to exclude the application of theBuilders' Lien Act (section 5). Similar provisions also exist in the lien legislation in British Columbia, Ontario, Manitoba and Saskatchewan, for example.

In certain provinces, such as Alberta, the statutory limitation periods cannot be shortened by agreement.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Generally, parties are permitted to choose the governing law of their contracts. However, where a choice of law or seat of arbitration clause makes resolving disputes realistically unattainable or unconscionable, Canadian courts will intervene and invalidate such provisions (Uber Technologies Inc v Heller, 2020 SCC 16). Accordingly, the operation of the substantive provisions of the FIDIC Silver Book 1999 depends on the selected governing law, the nature of the dispute, and any potential burdensome or insurmountable procedural barriers raised as a result of the selected governing law. The provisions of the FIDIC Silver Book 1999 are likely enforceable as drafted under Canadian law. However, local counsel should be consulted, as various standard terms may operate differently across provinces.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

The Federal Prompt Payment for Construction Work Act (not yet in force) requires payment of an award from an adjudicator within 10 days.

Likewise, Ontario introduced similar prompt payment provisions to the Construction Act, which came into force on 1 October 2019. For some contracts, a party is required to pay an adjudicator's award no later than 10 days after notice of such award, and it is enforceable as if it was a court order. Nova Scotia and Saskatchewan passed similar legislation in 2019.

In Alberta, prompt payment and adjudication legislation was announced in 2020 (not yet in force). Unlike Ontario's prompt payment scheme, monthly billings are mandated through invoices issued at least every 31 days, unless any contractual requirements for testing and commissioning are not met.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

There are generally no courts that specialise in construction or arbitration matters. However, in Ontario there are designated construction lien masters who address these matters. Also, the adjudication regime in Ontario is being administered and overseen by a new entity called the Ontario Dispute Adjudication for Construction Contracts.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

Matters related to construction projects or arbitration matters will typically be addressed in provincial superior courts. The decisions of these courts are published and the doctrine of stare decisis binds courts to follow legal precedents set by previous decisions of higher level courts within the jurisdiction.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

The principle of "party presentation" is recognised in Canada's judicial system, which stands for the proposition that the definition of the dispute should be determined by the parties to the dispute (Condessa Z Holdings Ltd v Brown's Plymouth Chrysler Ltd, 1993 CarswellSask 332 at paragraph 24). Where a trial judge wishes to raise an issue that has not been put forward by the parties, the parties must be given a chance to address the issue (Canada Trustco Mortgage Co v Renard, 2008 BCCA 343 at paragraph 42).

The Supreme Court of Canada has confirmed that appellate courts have a discretion to raise a new issue, but this should only be done with caution and where failing to do so would risk an injustice (R v Mian, 2014 SCC 54 at paragraphs 30 and 41).

Therefore, if an arbitrator makes an award based on an issue that had not been addressed by the parties, that award is at risk of being set aside for a breach of procedural fairness.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Article 9 of the UNCITRAL Model Law permits a party to seek interim measures before a dispute is sent to arbitration, or during the arbitration proceeding itself. This article has been widely incorporated into the provinces' respective arbitration legislation.

Courts will generally stay a court proceeding in favour of arbitration, but they also have the discretion to refuse to grant a stay in certain circumstances (TELUS Communications Inc v Wellman, 2019 SCC 19 at paragraphs 56 and 63).

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

No, a contractor should not lose its right to arbitrate if it applied to a foreign court for interim or provisional relief.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

In Canada, party-appointed experts are commonly used in arbitrations. As well, tribunals generally have the ability to appoint their own experts.

Experts owe a duty to the court or tribunal to provide fair, objective, and non-partisan opinion evidence. Experts must be impartial, independent, and have an absence of bias (White Burgess Langille Inman v Abbott and Haliburton Co, 2015 SCC 23 at paragraphs 10, 26–32).

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

The specific limitations or requirements that apply when the employer is a state entity or public authority depend upon the type of activity in question and the type of land on which the project is carried out. These factors determine whether federal or provincial legislation applies, whether certain trade agreements come into effect, and what regulations, policies, and directives apply.

The general principles governing the law of tendering, which were established in cases such as R v Ron Engineering & Construction, [1981] 1 SCR 111 and MJB Enterprises Ltd v Defence Construction (1951) Ltd, [1999] 1 SCR 619, apply to parties generally. Public procurement rules can impose further limitations as to the manner in which procurement is to take place. For example, federal procurement regulations require open bidding for construction contracts with a value over C$100,000. Provincial governments can also have limitations, such as the Ontario government procurement policies, which require that any construction contracts valued at C$100,000 or more must use competitive tendering.

Various Canadian jurisdictions have different requirements or limitations that must be considered when dealing with the issue of lien rights or interests in public lands. In some jurisdictions within Canada, an estate or interest in Crown lands cannot be subject to a lien. In other jurisdictions, there are several procedural requirements for filing against such an interest. For constitutional reasons, it has been held that provincial lien legislation cannot apply to an essential part of a federal work or undertaking. This includes a leasehold interest on Federal lands which could impair an essential part of a federal undertaking (Campbell-Bennett Ltd v Comstock Midwestern Ltd, [1954] SCR 207; Comstock Canada Ltd v Atomic Energy of Canada Ltd., 2001 CarswellOnt 1149; Vancouver International Airport v Lafarge Canada Inc, 2011 BCCA 89)

The Federal Commercial Arbitration Code applies when at least one of the parties to the arbitration is Her Majesty in Right of Canada, a departmental corporation, or a Crown corporation. Many of the provinces have also enacted provincial arbitration legislation that binds the Crown.

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

It is well established that a settlement offer may not be put before the tribunal until costs are to be decided. Many provinces have further incorporated express prohibitions into their arbitration legislation.

Privilege

50 Does the law of your jurisdiction recognise “without prejudice” privilege (such that “without privilege” communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Yes, “without prejudice” settlement privilege is recognised as a class privilege in Canada.

Three conditions must be met:

(a) a litigious dispute must be in existence or within contemplation;

(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

(c) the purpose of the communication must be to attempt to effect a settlement.

(Sopinka, SN Lederman and AW Bryant, The Law of Evidence in Canada, 5th ed. (2018) at §14.348).

It is the substance of the communication that matters. Simply marking a document as “without prejudice” is not on its own determinative (Bellatrix Exploration Ltd v Penn West Petroleum Ltd, 2013 ABCA 10 at paragraph 25).

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Solicitor-client privilege can apply to communications with in-house lawyers. The test for solicitor-client privilege is whether

- the communication is between a client and a solicitor;
- the communication is for the purpose of seeking or giving legal advice; and
- it is intended to be confidential (Pritchard v Ontario (Human Rights Commission), 2004 SCC 31 at paragraph 15).

However, communications with in-house counsel for matters other than seeking legal advice, or in other capacities, will not be privileged.

The Supreme Court of Canada has elevated solicitor-client privilege from a rule of evidence to a substantive rule of law (Descôteaux v Mierzwinski, 1982 CarswellQue 291 at paragraph 23; R v McClure, 2001 SCC 14 at paragraph 24).

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Throughout the common law provinces, the requirements for a guarantee mirror the requirements for a valid contract. That is, one requires an offer and acceptance, sufficient certainty of terms, valid consideration for the promise, a voluntary assumption of the obligations by the parties to the guarantee, and an intention to create a legally binding agreement.

The guarantee must be evidenced in writing and signed by the guarantor (or a person authorised by the guarantor) in compliance with theStatute of Frauds. In Alberta, a guarantee given by a natural person has no effect unless the person entering into the obligation appears before a lawyer, acknowledges that they executed the guarantee, and signs a certificate (Guarantees Acknowledgement Act, RSA 2000, c G-11).

Oral guarantees not evidenced in writing are not enforceable by the operation of the Statute of Frauds, but are not void, thereby preventing the bringing of an action or a counterclaim (KP McGuiness, The Law of Guarantee, 2nd ed (Toronto: Carswell, 1996) at 255). Notably, a "wider interest exception" to the writing rule has been contemplated by the courts, which recognises the pursuit of an objective beyond that of simply guaranteeing the debt, and in other words, treating a guarantee as incidental to a larger purpose sought to be accomplished by a promisor (Pullano v Yellowhead Timber Ltd, 1994 CarswellBC 272 at paras 15-22).

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

A guarantor's liability will be limited to that of the party to the underlying contract, unless the guarantee provides otherwise.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

A guarantor may be released from liability on a guarantee where the creditor and the principal agree to a material alteration of the terms of the underlying contract without the consent of the guarantor. The guarantee's wording may affect this position as the parties may contract out of the protection (Manulife Bank of Canada v Conlin [1996] 3 SCR 415 at paragraphs 2–8).

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

An on-demand bond, letter of credit or a performance guarantee in the nature of a documentary form of security, is payable on demand. The documents must be presented in strict compliance with their terms. Proof of the actual default by the principal

on the underlying contract is not usually necessary. The obligation to pay is a separate duty that is triggered by presentation, and there is generally no opportunity for a legitimate dispute as to entitlement to payment on the underlying contract. A fraud exception has been recognised by Canadian courts (KP McGuinness, The Law of Guarantee, 2nd ed (Carswell: 1996) at 12.89–12.101, 12.1–12.88; Angelica-Whitewear Ltd v Bank of Nova Scotia [1987] 1 S.C.R. 59).

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The law on this issue is evolving in Canada. The case law indicates that it might be possible for an employer to be enjoined from making a call where an express contractual term restricts the call and a strong prima facie case exists that the employer is in breach of the restriction or making the call itself is a breach of the restriction (430872 BC Ltd v KPMG Inc, 2004 BCCA 186; Veolia Water Technologies Inc v K+S Potash Canada General Partnership, 2019 SKCA 25 at paragraphs 6 and 52).

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.

Our submission is intended to build upon past contributions to maintain continuity and consistency. In addition to the authors and contributors of prior Canada chapter submissions, we wish to acknowledge the contributions of Marin Leci (associate), Graham Splawski (associate), and Grace Shory (associate) who assisted in preparing this submission.

Peter Banks

Borden Ladner Gervais LLP

Peter Banks is a partner at Borden Ladner Gervais LLP. Peter practises commercial and construction arbitration and acts in disputes arising from large scale construction and engineering projects. These cases include significant claims involving breach of contract, deficiency claims, delay claims, liquidated damages claims, warranty and tendering issues. Peter has also appeared before the Court of Queen's Bench of Alberta, the Court of Appeal, and the Supreme Court of Canada. Peter clerked for Mr Justice Major at the Supreme Court of Canada and has since appeared as counsel at the Supreme Court on three significant cases, including one of the leading cases in Canada on the law of tendering. Peter graduated from the University of Alberta with an LLB (with distinction and gold medallist) and from the University of Oxford with a BCL (with distinction).

Patricia (Trish) L. Morrison

Borden Ladner Gervais LLP

Patricia (Trish) Morrison is a partner in and the National Practice Group Leader of BLG's construction group. Trish's practice focuses on all facets of the construction industry – acting for owners, contractors and sureties in the litigation or arbitration of large-scale construction disputes arising out of commercial, industrial and infrastructure projects, as well as front-end project matters such as tendering and contract drafting, including P3 agreements. Trish also provides advice on environmental matters and acts as counsel in commercial litigation involving fidelity claims and product liability disputes. She has appeared before all levels of court in Alberta and has acted as counsel in numerous arbitration proceedings and mediations. Qualified to practise in Alberta (1998) and Manitoba (2015). Fellow, governor and officer of the Canadian College of Construction Lawyers. Past chair of the National Construction Law Section of the Canadian Bar Association. Former director of the Calgary Construction Association. Frequent speaker and writer on construction industry topics. Recognised as a Leading Lawyer in Construction by Chambers Canada; by *Who's Who Legal – Construction*; by *Best Lawyers in Canada* (construction law); by *Lexpert®/ROB Special Edition – Canada's Leading Infrastructure Lawyers*; and, as a litigation star by *Benchmark Canada* (Construction and Environmental).

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Centennial Place, East Tower
520 3rd Avenue S.W.
Suite 1900
Calgary, AB, Canada
T2P 0R3
Tel: 403.232.9500
Fax: 403.266.1395

www.blg.com

Peter Banks
pbanks@blg.com

Patricia (Trish) L. Morrison
pmorrison@blg.com