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Chapter 8

Canada

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

There are a variety of project delivery methods and types of construction contracts. These delivery methods include: Design-Bid-Build, where the owner contracts with an architect/engineer to design before contracting with a general contractor for construction; Design-Build, where the owner contracts with one party to design and build the project; Construction Management, where the owner retains a construction manager to work with the design team and helps the owner retain subcontractors; Engineer Procure Construct is used for large projects where the owner contracts with a single party to deliver the entire project; Engineer Procure Construct Manage, where the owner retains a contractor to perform engineering, procurement and construction management services, and is usually retained before construction starts through project close-out and sometimes through the warranty period; and Public-Private Partnerships, where there is a partnership between a public owner and a private contractor to construct a project which may also be done in various delivery methods which can range in a variety of services including designing, building, financing, transferring, operating and maintaining.

Contracts for design only would arise when an owner retains an architect or engineer. The Royal Architectural Institute of Canada and the Association of Consulting Engineers of Canada have developed standard form contracts that are used in the industry.

Parties often use standard form contracts which have been developed by industry associations and include the Canadian Construction Document Committee (CCDC), the Canadian Construction Association, and other local organisations.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Most provinces in Canada require the elements of offer, acceptance and consideration as well as capacity of the parties to enter into contractual arrangements. The contract need not be in writing, though most construction contracts are and should be.

The province of Québec is governed by civil law. The Civil Code of Québec provides that "[a] contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form". There is no particular form required for construction contracts. There are laws that govern public bodies that require that such bodies follow certain formalities. For example, these formalities may be that the public body launch a tendering process.

1.3 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent are used and may be enforceable if the requirements of a contract detailed above are met. However, if the letter of intent is in substance an "agreement to agree", it is not enforceable.

In the construction industry, parties may enter into contracts for limited scopes of work where a project is at an early stage before the entire project has been determined.

1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

The three most common types of insurance policies include:

1. Builder's Risk/Course of Construction policies for physical loss or damage to property in the course of construction, installation or repair, which are typically obtained by the owner or contractor.
2. Wrap-up Liability policies, naming all or most of the participants in the project, which are typically obtained by the owner or contractor.
3. Errors and Omissions Professional Liability policies for design professionals' negligence, which are typically obtained by the engineers and architects.

Other insurance that is seen in construction contracts includes: General Liability Insurance; Automobile Liability Insurance; Tools and Equipment Insurance; and Subcontractor Default Insurance. If the construction project has environmental risks, supplemental polices may be required to cover such risks.

Some provinces in Canada have legislation which mandates new home warranty insurance. Also, each province has a statute regarding workers' compensation in which the employer pays a premium and employees are insured for the replacement of wages in the event of injury. The statute abrogates a worker's right to sue the employer, other employees, and other employers and their employees in industries to which the legislation applies. Employers' Liability insurance is necessary to cover anyone coming to the site not covered by workers' compensation.

1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?

Construction projects, and those working on them, must comply with applicable local legislation. Provincial employment legislation generally sets various minimum standards that employers must meet (e.g. hours of work, minimum wages, vacation, etc.).

Each province also has occupational health and safety legislation which imposes a duty on employers to ensure the health and safety of workers engaged in the work and those at the worksite. Workers have an obligation to take reasonable care to protect the health and safety of themselves and other workers on site, and to cooperate with the employer to ensure the health and safety of others on the site.

The Criminal Code of Canada also imposes criminal liability on organisations and individuals that do not take reasonable steps to prevent workers from being injured or killed on the job.

In many provinces, the occupational health and safety legislation requires a prime contractor or principal contract be designated (otherwise it will be the owner). The prime contractor is responsible for ensuring that health and safety requirements are being complied with.

Employers are required to withhold and remit to the government income tax, employment insurance premiums and Canada Pension Plan contributions on behalf of the employee.

Employers are also required to charge GST on goods and services performed. In every province except Alberta, businesses are also required to charge Provincial Sales Tax or Harmonized Sales Tax on all taxable supplies provided by the business.

1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?

Most provinces have lien legislation which requires a certain percentage of the value of the work to be held back, which is typically 10% but differs between provinces. Outside of lien legislation, any right to hold back funds is entirely a matter of contract, and parties may agree to different amounts of holdback.

In some provinces, such as Alberta, only the owner is statutorily required to hold back 10% of the total value of the work rendered, but the parties lower down the contractual chain may agree that one party may hold back a certain amount of money from each payment. However, legislation in other jurisdictions, such as Ontario and British Columbia, requires the owner, the contractor and each subcontractor to hold back 10%.

Typically, the owner is required to hold back the applicable percentage of funds for a specific period of time after the work on the project is complete/substantially complete or, if a certificate of substantial performance is issued/posted. Assuming no liens are filed, the holdback funds can be released. In some provinces, the amount that must be retained is reduced to an amount for finishing the work. Some lien legislation provides for earlier and progressive release of holdbacks.

In Québec, the Civil Code also provides that a subcontractor or supplier may register a lien (construction hypothec) for improvements to land, even though they have no contract with the owner. However, the lien is limited to the work done after the subcontractor or supplier provides written notice of their contract to the owner. Consequently, the owner may deduct from the price of the contract an amount sufficient to pay their claims. The deduction is valid until such time as the contractor gives the owner a release from such claims.

Regarding deficiencies, construction contracts sometimes have a contractual amount held back on account of potential deficiencies. Typically, the statutory holdback cannot be applied on account of potential deficiencies.

In Québec, the Civil Code provides that, at the time of the payment, the owner may deduct from the price, until the repairs and corrections are made to the work, a sufficient amount to meet the reservations which he made as to the apparent defects or poor workmanship that existed when he accepted the work. The parties may, however, stipulate in their contract that a specific percentage of the value of the work be held back.

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

There are performance bonds on some projects. The bonds are typically a standard form and involve three parties: the surety; contractor; and owner. The surety and contractor guarantee to the owner that the loss event will not occur.

Typically, the owner will not be able to draw on the bond unless the contractor is in default, and the owner is not in default. The surety can then recover from the contractor after making payment on the bond for the benefit of the owner.

Guarantees may be given, for example by a parent company to guarantee performance of a subsidiary. Each bond and guarantee will be limited to what is contained in the instrument. Also, provincial legislation often provides that a person providing a guarantee must do so in the presence of a notary public or a lawyer.

1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?

The retention of title rights in relation to goods and supplies that are used in the work is included in some contracts. Sometimes the construction contract will explicitly provide for the precise time when title passes (e.g. delivery of goods, once the supplier is paid).

Under provincial Personal Property Security legislation, if a party to a contract has attached/perfected a security interest, it may retain title rights in relation to that good. If the contractor holds a security interest in the goods/materials supplied, it may be entitled to seize and sell the property to discharge the debt owed.

In Québec, a supplier of materials could benefit from a reservation of ownership in respect of the materials if it is stipulated in a contract and if it has been published in the register of personal and movable real rights. Then, the supplier of materials may take the property back or force the buyer or the owner to pay the sale price. If the materials have been integrated in the work, the seller can force the owner to pay, but may not take them back.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

Yes, the owner may retain an engineer, architect or engineering firm to act as a consultant. The contract will set out the role of the consultant.

A consultant owes a duty of care to the owner in administering the contract or authorising any alterations or additions to the project. However, a consultant also has a duty to be an impartial adjudicator when disputes arise between the owner and contractor. For example, in the CCDC 2, the consultant has the authority to resolve matters in regards to contract interpretation, performance of the work, or any other matters in which agreement is necessary but cannot be reached. The consultant's role as a first arbiter cannot be biased by its role as a representative of the owner. The consultant has a duty to adjudicate the dispute in a fair, unbiased, and professionally competent manner.

In all provinces, architects and engineers must also follow their respective codes of ethics.

Sometimes contracts include a supplementary condition for a waiver of claims against the consultant's interpretations and findings in a dispute resolution.

In Québec, if an architect or engineer supervised the work and the loss of the work occurs within five years after the work was completed, the liability of the supervisor is presumed. The supervisor will have to prove that the defect is not due to its own acts to be relieved from liability.

2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

A construction contract may include a "pay when paid" clause. The validity of a "pay when paid" clause, by which the contractor does not have to pay a subcontractor until the owner has paid the contractor, has been recognised in Québec by the Court of Appeal. However, the contractor may be found to have a duty to collect the amounts owing.

Some clauses have been interpreted to be condition precedents to the legal entitlement to payment, whereas others have been interpreted as an intention to address the timing of the payment in the clause, not the actual right to payment.

Further, a pay when paid clause does not forfeit lien rights of subcontractors, and lien legislation typically provides for the ability of the subcontractor to obtain information about the status of payment on the project.

2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?

Construction contracts may provide for liquidated damages in the event of certain types of acts of default, such as delays in completion, by the contractor. Liquidated damages must be a genuine pre-estimate of loss arising from the delay (e.g. lost rent for apartment complex). Unreasonable amounts for liquidated damages (typically assessed at the time the amount was negotiated) are interpreted as a penalty and unenforceable. In Québec, the Courts have the power to reduce the amount of the penalty if the clause is abusive.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?

Construction contracts in Canada generally contain contract change provisions which allow the owner to vary or add to the scope of work or time to complete the contract. If there are no such provisions and there is a contract change, the Courts will look to the conduct of the parties to determine whether they have agreed to a change to the contract. Even where formal change provisions exist, if the change process has not been followed, the Courts may look to the conduct of the parties to determine whether the contract change provisions have been waived, and whether there has been a change to the contract.

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

Work can be omitted from the contract if the change provisions in the contract allow for it. Most template forms allow for changes upon appropriate notice provisions being met. If the owner has the ability to remove work from a contractor, the owner may find another contractor to perform the work or do it himself.

3.3 Are there terms which will/can be implied into a construction contract?

Courts may imply terms into a contract in order to establish the nature and scope of the contractual agreement. This is done in three main circumstances: when the term is necessary given the surrounding circumstances, for example to give business efficacy to the transaction; when there is a term of art used or notorious business custom that can be said to govern the relationship between the parties, so long as it is not contrary to the express provisions of the contract; or, when a statute implies a term into a contract, for example Sale of Goods legislation may include implied terms that the seller has the right to sell the goods, that the goods are reasonably fit for their purpose if the buyer makes known the purpose, etc.

There is a general duty of honesty in contractual performance which is implied into contracts and requires that parties not lie or mislead each other on matters linked to the performance of the contract. The principle of good faith is codified in the Québec Civil Code.

3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?

Construction contracts generally contain delay provisions. Where acts or omissions of the owner are the cause of the delay, delay provisions typically provide for a reasonable extension to the contract time, and the reimbursement of the contractor's reasonable costs incurred as a result. Notice in writing of the delay by the contractor is normally required as a condition precedent to an extension of time.

In situations of concurrent delay, the contract between the parties should first be examined to determine whether it provides an answer as to how the allocation of liability for any concurrent delay should be considered.

Otherwise, Courts may apportion, based the applicable contributory negligence legislation or by analogy to the legalisation, the various causes of the delay between the parties. If the Court finds there is contributory negligence on the part of the contractor and the owner, which contributory negligence affected the critical path to project completion, the Court will apportion the delay damages between the owner and contractor. Damages are often apportioned on an overall basis, or by way of estimate, because of the difficulty in quantifying the blame for delay. If the Court is unable to determine individual liability for the delay, then the apportionment is done on an equal responsibility basis.

In the event that the contractor would not have been able to perform the contract due to its own act of delay, regardless of the existence of an owner-caused delay, the contractor will be held liable for delay damages.

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

Where a contract specifies a contract time, or time for substantial performance of the work, the contractor may, regardless of the existence of a float, make use of the entire time period up to the specified contract time to perform the work. The owner may not interfere with the contractor's time for substantial performance of the work. Where the obligation to perform a contract is at large, the contractor is obligated to complete the work within a reasonable time. As in the case of a contract with a specified contract time, the owner is not entitled to prevent timely completion of the contract.

The jurisprudence in Canada does not establish who owns the float. However, Courts have held that, in the event of an owner-caused delay which consumes the float but which does not delay the date of completion, the contractor will not be entitled to damages on that account. If, on the other hand, the owner-caused delay consumes the float, and thereafter there is a contractor-caused delay which delays the date of completion, the contractor may be entitled to an extension of time equal to the duration of the float. The contractor has a duty to mitigate any owner-caused delay.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

Every province has a *Limitations Act* which governs the time limits for bringing an action. A two-year basic limitation period is typical and an action must be commenced within two years from when the party knew or ought to have known about the harm. The two-year limitation period begins based on an objective assessment of when the claimant knew or ought to have known of the claim.

Each province also has an ultimate limitation period which varies in length (e.g. 10 years in Alberta and 15 years in Ontario). The ultimate limitation period starts from the date when the act or omission occurred, not when the damage may have been suffered or discovered.

In Québec, an action must be brought within three years, and starts to run from the time when the cause of action is known (for instance, when the contractual amounts are owed). For an ongoing contract, the start point is when the work is completed. Where the right of action arises from a material injury appearing progressively or tardily, the period runs from the day the injury appears for the first time.

Contracts often contain clauses providing that the contractor must give notice to the owner if it intends to bring a claim.

3.7 Who normally bears the risk of unforeseen ground conditions?

Which party will bear the risk of concealed or unknown ground conditions depends on the contract. Absent contractual terms providing for compensation or extra time on account of materially different subsurface conditions, the contractor may be at risk. Many contracts provide for testing ahead of time, or contain a site inspection clause which requires the contractor to declare itself satisfied of the

ground conditions based on the information available. However, where there is a hidden risk known to the owner but not the contractor, the owner may be liable to the contractor regardless of the existence of a site inspection clause or any other contractual provision.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

Construction contracts often include a provision which identifies which party will be responsible if there is a change in law. These changes may include: environmental law changes; zoning changes; or building code changes. Ideally, the risk is placed on the person who is responsible for the particular portion of the risk (e.g. contractors typically bear the risk of a change in building code). Absent contractual allocation, a contractor is unlikely to be given relief for a change of law.

3.9 Who usually owns the intellectual property in relation to the design and operation of the property?

Unless restricted by the contract, the designer retains the intellectual property in the design. The owner typically retains copies of drawings, blueprints, models or other work, but cannot use them for other projects without the consent of the designer of the work, or unless it obtains a licence from the designer to use the work. Frequently, an owner will require the right to use the intellectual property for the purpose of operating or maintaining the project, and will also require an assignment of any intellectual property resulting from the use by the designer of any of the owner's confidential information in the design process.

Other intellectual property issues arise in construction projects; for example, with patented products, processes, devices or designs. If the owner does not obtain the intellectual property rights, the owner typically needs to obtain a licence to use the intellectual property, and potentially to have others maintain the equipment.

3.10 Is the contractor ever entitled to suspend works?

Construction contracts often contain provisions allowing the contractor to suspend the work if, for example, the owner has not paid it, or if the work is suspended for a certain number of days (not as a result of the contractor or its subcontractors). If the contract does not have a clause regarding suspension, Courts will consider whether the owner is in default of its obligations under the contract to a substantial degree in order to determine whether the contractor had the right to suspend the work (see also question 3.12).

3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

Construction contracts often provide for termination where, for example, the other party is bankrupt or insolvent, the work is suspended or delayed for a period of time, or the other party fails to perform certain obligations under the contract. These termination for cause provisions typically contemplate notice and a period of time for the party in default to cure its breach.

The contract may also include a termination for convenience clause which may permit one or both parties to terminate the contract "at will", and which sets out the compensation to be paid upon termination.

Under the common law, certain terms of the contract which are essential or sufficiently important may be found to be conditions, which, if breached, allow the innocent party to terminate the contract.

In Québec, two kinds of resiliation/termination may occur: 1) the owner may unilaterally terminate the contract even though the work or provision of service is already in progress, as long as he pays to the contractor in proportion of the agreed price, the actual costs and expenses, the value of the work performed before the notice of termination and, as the case may be, the value of the property furnished; or 2) any party may terminate the contract if the contractor fails to properly perform the work or comply to a substantial degree with the contract. In such case, the owner may finish the work itself or with another contractor, so long as termination was in accordance with the terms of the contract.

3.12 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Both *force majeure* and frustration are known. Contracts may contain *force majeure* clauses that define *force majeure* events, for example tornados, fires, labour strikes, acts of war, etc. In the clause, the parties may agree to notice provisions, and that, if such an event occurs, neither party is at fault nor entitled to damages. The *force majeure* event may suspend obligations under the contract, and, may lead to termination of the contract. Typically, the parties will not be permitted to rely on an uneconomical contract as a ground for *force majeure*. In the absence of a contractual term, there is no right to claim *force majeure*.

In Québec, if a contract stipulates which party will assume the risk of *force majeure*, the clause supersedes what is provided by the Civil Code. The Civil Code provides that a debtor is released where he cannot perform an obligation by reason of a *force majeure* event which occurred before he was in default. If the debtor was in default, a debtor is nonetheless released if the creditor could not in any case benefit from the performance of the obligation by reason of that *force majeure* event.

Frustration may occur if circumstances change such that it becomes impossible for one party to fulfil its obligations under the contract. If such a change occurs, performance will no longer be required, though it is not necessarily the case that all obligations under the contract will come to an end. The parties may address events of frustration, and allocate responsibility to the party in the best position to manage the risk of the event. Frustration only serves to end a contract in whole, it cannot be used to suspend performance or to partially terminate a contract.

3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?

In Québec, the subsequent owner can benefit from legal warranty obligations resulting from a contract to which they were not the contracting party.

At common law, a subsequent owner may claim in tort against the original contractor in relation to defects in the building which have the potential to cause harm to life. To do so, the owner must: meet

a common law principled exception to the third party beneficiary rule; claim negligence against contractors, designers, or engineers involved in construction of the building; or claim against an original contracting party under provincial legislation.

Third parties usually cannot enforce or rely on agreements to which they are not parties. However, Courts have recognised exceptions to this doctrine, including agency, trust, and assignment. If these recognised exceptions do not apply, a third party may benefit from contractual provisions to which they were not a contracting party under a common law principled exception to the third party beneficiary rule. Courts require clear language to find that parties intended to assume liability to a third party.

A third party may also bring a claim of negligence against contractors, designers, and engineers involved in the construction of a building. These people owe a duty to use reasonable care to prevent damage to parties who they should reasonably expect to be affected by their work. This duty is owed to subsequent building purchasers if it is foreseeable that a failure to meet the reasonable care standard would result in defects that create real and substantial danger to health and safety.

Also, most provinces have legislation regulating warranties on newly built homes, under which subsequent owners may have a claim. Warranty coverage varies across provinces.

3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Construction contracts may provide for contractual set-off in specific situations. In the absence of a contractual right of set-off, parties to a contract may, in certain circumstances, be entitled to legal or equitable set-off.

Legal set-off requires two conditions be fulfilled: first, that both obligations be debts which are for liquidated sums or money demands that can be ascertained with certainty; and, second, that both debts be mutual cross-obligations. The right to legal set-off is subject to statutory limitation periods in Canada.

Equitable set-off can be distinguished from legal set-off on the bases that it applies in the absence of mutuality, and where the cross-obligations are not for liquidated sums or money demands. While equitable set-off is not subject to statutory limitation periods, and the claim and cross-claim need not arise out of the same contract, the party relying on the set-off must show an equitable ground which goes to the very root of the other party's claim.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

Each party to a construction contract owes a duty of care to one another. A contract may be constructed to limit or exclude a party's contractual or tortious liability. If the contract specifies a limitation clause for liability for a specific matter or type of conduct, a party cannot sue in tort to circumvent the contractual clause. A party may bring an action under either contract or tort, but may not recover damages under both.

If a contract does not specify a standard of care, the parties are held to a reasonable standard of care of an ordinary person with similar expertise. For example, an engineer, contractor or subcontractor will be held to the standard of care of a person with similar knowledge and expertise.

3.16 Where the terms of a construction contract are ambiguous are there rules which will settle how that ambiguity is interpreted?

If the language of the written contract is clear and unambiguous, then no extrinsic evidence may be admitted to alter, vary, or interpret in any way, the words used in the contract. Construction contracts usually contain interpretation provisions, such as priority provisions, which clarify which document has priority in the event of a conflict between terms.

Where a term of a contract is found to be ambiguous, extrinsic evidence regarding the parties' objective intentions, and the facts leading up to the agreement, may be admitted to interpret the contract and to resolve the ambiguity.

As an interpretive tool of last resort, the Court may apply the doctrine of *contra proferentum*, and interpret ambiguous contractual terms *against the drafter*.

3.17 Are there any terms in a construction contract which are unenforceable?

Courts will generally uphold the right of freedom of contract – only in rare circumstances will they relieve a party from its bargain. As a general rule, a term of a contract will be unenforceable where it is unconscionable, or where it is contrary to public policy or statute (e.g. annual rates of interest over 60% will not be enforceable, and terms of contracts that purport to contract out of provincial lien legislation may be void).

Exclusion of liability clauses may be found to be unconscionable in certain circumstances, such as where there is a power imbalance between the parties. While exclusion of liability clauses are generally enforceable, they are strictly interpreted by the Courts (see also question 2.3).

In Québec, some warranties are created by statute, and, therefore, cannot be voided by contractual provisions (for instance, the warranty in the Civil Code for the loss of the work that occurs within five years after the work is completed). Also, an abusive clause, which is excessively and unreasonably detrimental to the adhering party, in a contract of adhesion may be reduced.

3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

A professional designer may have specific obligations to the client expressed in the contract. However, the contract may also include exclusion clauses which limit the liability of the designer. In the absence of the parties providing for the obligations in their contract, under tort law, a designer has a duty to act with the reasonable skill, care and diligence expected of a designer of ordinary competence.

Unless the contract provides otherwise, a designer is typically liable if the design was defective due to negligence. The standard of care for a design professional is not a guarantee that the work will be to the owner's complete satisfaction nor that the work will be successful, so long as the work was done competently and non-negligently.

The designer may have a duty to ensure the project is constructed in accordance with its plans, and satisfies the necessary specifications, building codes, and bylaws. These obligations are typically known

as field review services. Although the designer is responsible for ensuring that plans and specifications are generally complied with, it is usually not responsible for carrying out the work. Therefore, the designer's obligations do not provide an absolute guarantee of perfect compliance with the design, nor supervision of every single thing that is done on the project; however, designers are expected to supervise critical stages of the work.

4 Dispute Resolution

4.1 How are disputes generally resolved?

The dispute resolution provisions in construction contracts vary. Often there is a tiered process where disputes are resolved first by the consultant, then negotiation, then mediation and/or arbitration. These stages could be mandatory or permissive and have timelines in which they must be met before moving to the next stage. Where there is a mandatory arbitration clause, the Court will refrain from taking jurisdiction over the dispute. In some provinces, one party may apply to the Court for summary judgment of a matter which may otherwise be arbitrable, if the issues can be determined by way of summary judgment.

If the parties do not agree to the alternative dispute resolution methods described above, they can have their dispute resolved by the Court.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

There is no specific adjudicative process in Canada that is focused on construction.

4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

Many construction contracts have arbitration clauses. They may be mandatory or permissive. If the clause is permissive the parties must subsequently agree to arbitrate.

Arbitration clauses vary in complexity and may be an agreement to arbitrate, or set out details like the number of arbitrators, the selection process, the seat and any rules that apply to the arbitration.

If the parties chose arbitration rules, those rules typically provide the framework for the arbitration. Otherwise the parties may agree to the procedure or the arbitrator will determine the process (e.g. document exchange, witnesses, timing, etc.). The arbitration hearings also depend on the type of dispute being heard. In Québec, if there is no specific procedure to follow stipulated in the contract, the rules codified in the Code of Civil Procedure (CPP) will apply.

Each province has arbitration legislation, but the legislation does not set out the detail of the arbitration procedure set out in the rules of arbitration the parties may choose, as mentioned above.

4.4 Where the contract provides for international arbitration do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.

Yes, in 1986, Canada ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and each province has enabling legislation for the New York Convention as well as the Model Law on International Commercial Arbitration.

Other than the provisions of Article V of the New York Convention, one recent obstacle to enforcement is that the arbitral award must be brought for enforcement within the applicable provincial limitation period (see question 3.6).

4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?

The judgment of a foreign court may be upheld in Canada. A prerequisite to enforcement is that the foreign court had a real and substantial connection with the parties or subject of the dispute, or another basis of jurisdiction was satisfied. There need not be a real and substantial connection between the dispute or the defendant and the province in which recognition and enforcement is being sought.

Several provinces have statutes that govern the reciprocal enforcement of judgments that may allow a party to apply to the Courts for an order registering the foreign judgment. However, recognised reciprocal jurisdictions may vary across provinces.

4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The process is governed by the Rules of Court of each province which set out the requirements to, *inter alia*, start a proceeding, respond, bring third party claims and cross claims, exchange documents, conduct discovery/questioning, and retain experts. Some Rules of Court have mechanisms to encourage settlement, like mediation, and rules relating to settlement offers which impose enhanced cost consequences if the offer to settle is better than the final award by a judge.

The timing of Court proceedings varies. Large complex cases may take several years to get to trial. If an appeal is possible, one party may appeal the decision to the provincial Court of Appeal. The decision of a Court of Appeal may also be appealed to the Supreme Court of Canada; however, the party seeking to appeal will need to seek leave of the Court before having their appeal heard.

For simpler cases, the case may be resolved summarily which allows for a faster decision. If the claim is below a threshold amount, each province has a small claims court which has a simplified procedure and shorter time frame in which a trial of the matter is heard. Decisions from the small claims or provincial court can also be appealed.

The CPP of Québec codifies the obligation for the parties to consider private prevention and resolution processes before referring their dispute to the Courts. The CPP also codifies that the Courts are to facilitate conciliation when required, the parties request it, circumstances permit, or if a settlement conference is held. The parties may agree to settle their dispute through a private dispute resolution process or judicial conciliation, and they may also otherwise terminate the proceeding at any time. The CPP provides rules for settlement conferences before a judge, mediation and arbitration.

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Leanna helps clients at the initial stage of projects by reviewing contracts, contract negotiations, and drafting custom built contracts. When disputes arise, Leanna assists with reviewing and advising on the issues, and helps navigate through negotiation, mediation, arbitration or litigation, as necessary.

Leanna has worked on various lien claims, deficiency claims, negligence claims and contract disputes. She has experience in small claims trials, questionings, negotiations, mediations and large litigation matters.

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