



Burnet,  
Duckworth  
& Palmer LLP  
Law Firm

# FROM THE GROUND UP

ISSUE 5, NOVEMBER 2007

## Know When to Stop Digging: Simple Reminders to Avoid Getting Buried in a Lawsuit

*by Henry Chan, Student-at-Law*

### INTRODUCTION

In the construction process, many projects start with the digging of a hole. However, from a legal perspective, it is all too common for engineers/construction managers to dig themselves into a hole of liability from which they cannot escape. Thus, sometimes the best advice to avoid a future lawsuit is to simply know when to stop digging!

*— continued on page 1*

in this issue:

Know When to Stop Digging: Simple Reminders to Avoid Getting Buried in a Lawsuit.....	Front Cover
The EPC Contract Aligning The Parties' Interests (or "Who Is On My Team?").....	3
What We've Been Up To .....	6
Prime Contractor, Principal Contractor and General Contractor: What is the Difference? .....	7
Engineers Pay Heavily: Caution Required in Drafting Limitation Clauses .....	8
BD&P's Construction Team.....	10
Contact the BD&P Construction Team .....	Back Cover

– continued from cover

The decision in *599294 Alberta Ltd. v. Luff*<sup>7</sup> provides some simple yet fundamental reminders that will help the engineer/construction manager avoid that hole. In this decision, the Court was asked to consider suppliers' liens that were filed against the owner and the engineer/construction manager and in that consideration, examines the relationship between the owner and engineer/construction manager that ultimately led to a number of problems.

#### FACTS

Hannes Luff (Luff) had a dream: to build an earth shelter residence. According to Luff's design guide, the project was far from ordinary:

The dwelling to be instructed as though one solid piece of fine furniture. Expectations of future archaeologists will one day marvel at this modest wonder. Components needed: architect with ability; contractor with integrity; eccentric with money. (at para. 1).

While the first and third components were met, problems with finding a "contractor with integrity" spelled disaster for the project before ground was even broken. After the architect had completed his designs, Luff and Kenneth Sorensen ("Sorensen"), an engineer, tried to find a builder or a general contractor to take on this unique project. When they were unsuccessful, they eventually agreed that Sorensen (through his company) would perform the structural design, site engineering and construction management for Luff.

Reviewing the events that followed, it is clear that both Luff and Sorensen encountered many warning signs telling them to "stop digging". For instance, the costs of the project grew higher throughout the project, beginning with the original estimate of \$300,000 and eventually reaching \$680,000 before construction was halted (one can only speculate how much higher the cost would have climbed had the project actually been completed). Unfortunately, both sides failed to recognize these warning signs and eventually found themselves buried in a lawsuit. What Went Wrong? (see sidebar below)

## What went wrong?

### ENGINEER ALSO ACTED AS THE CONSTRUCTION MANAGER

Although their subsequent problems are not completely attributable to this initial decision to have Sorensen, through his company, perform all of the structural design, site engineering and construction management; not having a separate set of eyes and ears to recognize the potential risks put the parties at a disadvantage from the outset.

### NO WRITTEN AGREEMENT BETWEEN THE PARTIES

To complicate matters further, the only written document between Luff and Sorensen was a short letter. Despite the magnitude of the project, there was no construction management contract and neither party obtained independent legal advice. This was particularly harmful for Luff, given the financial risks that he was about to undertake. Meanwhile, Sorensen's failure to provide the necessary contract documents put himself, his company, and Luff at risk. In the Court's words, "In short, what took place was a lawsuit waiting to happen; and here we are." (at para.6)

### ENGINEER PREPARED THE COST ESTIMATE WITHOUT ADEQUATE FACTUAL INFORMATION

As the engineer, Sorensen prepared the cost estimate. He did so in this case despite not having sufficient knowledge of the facts. Although Sorensen argued this was an "evolving project" that could not be costed, the Court disagreed. It determined that Sorensen's lack of diligence in preparing a cost estimate that Luff would be relying on in planning his finances, constituted negligence.

### ENGINEER STARTED CONSTRUCTION PRIOR TO COMPLETING A COSTS DETERMINATION

The court also found that Sorensen was negligent by starting work without notifying Luff about the true costs of the project. Prior to construction, Sorensen made no indications to Luff that his estimate was not realistic. Given that it was Sorensen's duty to get bids before construction commenced and to estimate the cost as accurately as possible, his failure to do so left him personally liable to Luff for amounts owing to suppliers.

### MANAGER DID NOT PROPERLY ADVISE CLIENT OF INCREASING COSTS

Lastly, Sorensen did not properly advise Luff when the costs of the project began to soar. Although it could be argued that Luff wanted the project built at any price—he pressed onward even after the costs had doubled—the Court did not accept this. It found that Luff was not adequately advised of runaway costs until it was too late.

However, Luff was not absolved of all blame, the Court holding him contributorily negligent in failing to get independent legal advice, not heeding any of the warning signs and continuing with the project for two years before finally pulling the plug due to costs.

“...it is clear that both Luff and Sorensen encountered many warning signs telling them to stop digging.”



## CONCLUSION

In the end, liability was apportioned equally between Luff and Sorensen for the amounts owing the suppliers. From the owner's perspective, it was a high price to pay for failing to get adequate legal advice from the outset. From the contractor's perspective, it is another reminder that having the appropriate written contracts in place and regularly communicating with your client can go a long way in preventing disputes. Otherwise, one can easily find oneself

compounding the problem by digging deeper and deeper into legal trouble. In the world of construction, this is one type of hole that should be avoided.

### *Footnotes*

---

<sup>1</sup>2005 ABQB 149.



# The EPC Contract

## Aligning The Parties' Interests (or "Who Is On My Team?")

by John K. Taylor and Arnie H. Olyan

In our April 2007 *From the Ground Up* Construction Newsletter we ran an article on the Preliminary Considerations impacting the allocation of risks and responsibilities as between the Owner and the Contractor. We continue in this Newsletter with the theme of Aligning the Parties' Interests. The more detailed original paper "*The EPC Contract and the Energy Lawyer*" from which this article is excerpted and summarized is available upon request.

### BACKGROUND

In a typical agreement for goods or services, the parties agree on the nature of the items to be delivered (size, quantity, technical specifications and the like), the timing of such delivery and what the implications will be of a failure to deliver in the manner prescribed in the contract. As a good or service becomes more specialized and tailored to the purchaser's specific needs, the causes and implications of a supplier's breach of contract are more problematic and difficult to assess. This is

particularly so in respect of EPC Contracts because they often entail the participation of numerous contractors, subcontractors and other participants whose views may vary as to their level of responsibility for a failure of a contractor to satisfy its contractual commitments.

To overcome the typical and often unproductive adversarial nature of contracts, owners and contractors have developed various techniques to "align" the parties' interests. While the parties would rarely be characterized as "partners" in a formal sense, they do attempt to recognize the interdependence between them and often provide for contractual terms to encourage behaviour that will increase the probability of satisfying the owner's goals of maintaining budget, ensuring a certain level of quality and completing the project within the expected schedule.

Some of the tools that have been incorporated in EPC Contracts are identified below. They are by no means exhaustive.

### COST CONTROL

#### a. Pricing

EPC Contracts must contain one or more costing/payment schemes. The scheme chosen should reflect the parties' views on whether the owner or the contractor should accept the cost risk on a particular project (or portion thereof). In descending magnitude of price risk to the contractor (the reciprocal being true for the owner) the following costing arrangements can be instituted:

- lump sum;
- unit price;
- target price; and
- reimbursable/cost-plus.

These categories are merely general descriptions of the common options available to parties and it should be understood that each of these four only generally characterize the compensation arrangements between the parties.

► **Lump Sum Pricing**

This pricing arrangement suggests that the owner will pay a set amount for all goods and services to be delivered by contractor, regardless of the contractor's out-of-pocket costs.

► **Unit Price**

Under this pricing arrangement, various elements in a basket of work are identified as "units" and priced accordingly per unit.

► **Target Price**

This somewhat more flexible pricing arrangement puts the shared burden of controlling costs on both the contractor and the owner, but not necessarily in equal measure. The parties must establish a baseline or budgeted value for the work to be carried out, and the parties agree that the costs in excess of the budgeted amount will be shared in some proportion as set out in the EPC Contract.

► **Reimbursable/"Cost-Plus"**

This costing arrangement (which is also characterized and known as "time and materials") typically provides that the contractor will work an hourly rate and will be reimbursed for all of its out-of-pocket expenses.

**b. Audit Provisions**

Owners will be anxious to ensure that amounts included in a project's costs are being properly accounted for so that amounts paid by the owner are not the result of "double counting" or mischaracterized entries for the inappropriate benefit of the contractor. Since a contractor will typically be incurring many of the initial project costs, contractors may have the opportunity, if not the intention, to manipulate amounts payable by owner. The use of audit provisions to oversee financial matters is particularly important when target price and cost reimbursable pricing arrangements are operative.

**c. Use of Progress Payments**

Contractors will prefer to schedule payments of their fees so that the compensation they receive from owners is well in excess of and in advance of contractor's out-of-pocket expenses (including payments to subcontractors). An owner who understands the contractor's cost structure and subcontractor payment schedule will conversely wish to minimize fees paid to the contractor that are effectively

financing the contractor's operations. The parties will need to establish a framework to overcome this tension. Although it would be more efficient to have the party with the lowest cost of capital financing purchases, it is more often the case that the party with the greatest bargaining power and information at a given point in time will establish a payment schedule that best suits its needs.

**In Alberta, provincial law permits the establishment of a coordinated labour strategy whereby contractors are requested to accept certain project-wide labour agreements.**

Owners can provide a measure of control by insisting that a contractor's invoices for work carried out by it correspond with the contractor achieving various contractual milestones. Such a cash neutral framework minimizes the cost of financing purchases and ensures that the contractor, or the contractor's supplier of goods or services, are not using the payments schedule as a profit centre.

A contractor might prefer a payment schedule based on monthly or quarterly instalments paid over the life of the contract. A smooth payment schedule over, for example, a two-year period, may not be a realistic reflection of the contractor's actual expenses, however, it may be that the owner would prefer a more simple, predictable and even series of payments over the life of a contract regardless of the connection between the amounts paid by owner and the costs incurred by contractor to satisfy the EPC Contract.

**DELAY**

**a. Milestone Payments**

An owner can attempt to coordinate its payment of costs with work progress via a milestone payment schedule. By the use of "milestone payments", an owner can more effectively encourage a contractor to stay on schedule by providing in the EPC Contract that payments otherwise then payable will be suspended until particular milestones are satisfied. While the owner would not intend to bankrupt the applicable contractor by the

use of such strategy, aligning the contractor's interests (in receiving regular and sufficient payment to cover its costs and earn profit) with the owner's needs (to maintain schedule) can be an effective tool to keep a contractor focused on matters of mutual concern.

**b. Bonus for Early Completion**

In a competitive market place, contractors may suggest that they should be rewarded for early completion of their activities. The value and trigger for such a "bonus" will be the subject of negotiation.

While early completion may seem like a desirable goal, early completion may disrupt the activities of other contractors associated with the project. Parties should therefore place parameters on a bonus such that it encourages delivery that is both timely and beneficial.


Some owners are resentful of the suggestion that a contractor should be rewarded for early completion of work for which the contractor is already being paid. However, the marketplace may dictate that contractors be motivated to stay on schedule. As well, in an overheated "contractors' market", owners may be faced with the need to offer early completion bonuses in exchange for the contractor agreeing to liquidated damages provisions for late completion.

**c. Coordinated Labour Strategy**

In Alberta, provincial law permits the establishment of a coordinated labour strategy whereby contractors are requested to accept certain project-wide labour agreements. Such agreements are an attempt to harmonize labour rates and work schedules and to minimize work disruption as a result of building trade or other disputes at the construction site. Division 8 of the *Labour Relations Code*<sup>1</sup> essentially provides for a legislative regime that supersedes current labour agreements with the various building trades.

**d. Directing Measures**

It is often the case that an owner will recognize that it is too important for the timing of a construction project to allow disputes between the owner and the contractor regarding price for a particular "extra" or "change" to hold up the actual required work. Consequently, the owner will often insist on the right to direct a contractor to carry out certain work under a change order regardless of whether the pricing for such change order



**EPC Contracts often require contractors to disclose in advance those subcontractors or sub-suppliers that may supply goods or services on behalf of the contractor.**

has been settled. At a minimum, the owner will insist that any other work not the subject of a change order continue as scheduled while the change order is priced.

## QUALITY

### a. Approval of Subcontractors

EPC Contracts often require contractors to disclose in advance those subcontractors or sub-suppliers that may supply goods or services on behalf of the contractor. Such provisions can assist both parties to an EPC Contract. Owner's approval in advance of at least the major subcontractors/sub-suppliers may allow owner to voice any reservations the owner may have regarding the quality of work or the reliability of supply. Similarly, if a contractor learns that a proposed

subcontractor is unacceptable to the owner early into the EPC Contract then the potential inconvenience to the contractor (and cost and schedule implications) can be avoided or minimized.

### b. Common Site Services

Owners of larger projects have more recently begun identifying the benefits of the owner making available to contractors the services and supplies of other contractors at or near the construction site. Such common services provide contractors with the opportunity to source materials, equipment and expertise from onsite providers, often on a short-term basis, and directly from the provider with little or no involvement from owners. Pricing and other contractual terms would be pre-arranged between the third party

provider and the owner. The benefit to the owner is that owner will be aware of the likely providers and standardization of certain essential services or goods at the site. Contractors on site may benefit from lower prices and suppliers who are presumably more dedicated to the project.

### c. Assignment of Owner Agreements

Depending on the sufficiency of initial engineering and design carried out by an owner, an owner may wish to mitigate risk by pre-purchasing "long lead components" or services in advance of entering into more central EPC Contracts for the project. For example, significant pieces of machinery may be readily identifiable and ordered early on in the procurement process for early delivery to and installation at the construction site. Such purchases may be procured by the owner directly, thereby allowing the owner to ensure that the counterparty is a quality supplier and able to satisfy the delivery, quality and pricing terms of an initial purchase agreement. Once the EPC Contract is executed, the owner would assign the purchase agreement to the contractor, thereby ensuring that the long lead purchase agreement is being managed by the contractor as the person best able to manage the quality, delivery and other requirements under the applicable purchase agreement.

### d. Site Activities

An efficiently organized construction site may lead to higher levels of work efficiency and quality of the end product. If distractions and delays resulting from logistical impediments persist, the contractor's on-site workers may be less motivated to ensure the quality of their work. Such concerns can be exacerbated by the tensions that may exist between union, non-union and alternate union personnel carrying on activities at the same construction site (an "open site"). If owners and their contractors can develop a project site work agreement under applicable labour legislation, there should be greater likelihood that the end product will be delivered on time and in compliance with applicable specifications.

### e. Bonus Compensation

An owner whose primary or secondary goal is work quality may be willing to compensate the contractor for satisfying certain safety,

durability, reliability or efficiency targets. In recent years, the construction industry has become increasingly sensitized in respect of safety and an EPC Contract linking a successful safety record to a compensation scheme will further incent contractors (and owners) to ensure the highest safety standards. Similarly, it is now increasingly common for bonuses to be paid to contractors (or their staff) who remain engaged on the same project to its conclusion, instead of being enticed to join another project (or contractor) prior to completion of the first initiative.

### ANALYSIS OF LIQUIDATED DAMAGES

Owners may link reliability or efficiency of a facility or meeting the completion date with liquidated damages provisions. Ideally, liquidated damages would be triggered upon the occurrence, or more accurately, the non-realization of, quantifiable criteria. In a robust construction environment, contractors may request that liquidated damages provisions be matched with bonuses to further align the parties' interests and satisfy collective goals. As with bonus arrangements, liquidated damages for quality shortfalls are most common and

particularly useful when design, engineering, procurement and construction are linked quite closely so that one contractor can identify and manage all aspects of a facility's ability to meet the initial design criteria.

When liquidated damages are proposed for inclusion in an EPC Contract, the general legal principles associated therewith will govern. The amount of liquidated damages to be awarded is to be a genuine pre-estimate of damages agreed to in advance by the parties<sup>2</sup>.

On occasion, parties may be willing to stipulate an amount (or formula) to approximate the anticipated and logically flowing losses in the event of the particular breach of contract triggering liquidated damages. The formula need not be the eventual result of the costs or losses incurred as a result of the breach of contract but should be a reasonable approximation of the anticipated losses to be incurred.

### PROCUREMENT STRATEGY AND PROCESS

A party's procurement strategy should be identified and articulated before that party enters into negotiations with a counterparty. Without a clear strategic understanding, the party's position on certain commercial,

risk and administrative matters and the party's ability to negotiate a contract that will satisfy the party's goals will be significantly compromised. Internal harmonization among a party's negotiators is essential and positions must be well coordinated on large projects to allow that party to recognize and seize commercial opportunities.

### ALLIANCE AGREEMENTS

Mega-projects provide ample opportunity for contractors and owners to enter into "alliance agreements". Such agreements are intended to align the interests of owners and all material EPC contractors on the project to the greatest degree possible, thereby ensuring that all contractors and owners benefit from or pay for the successes and shortcomings of the work being carried out on a project. The terms of such agreements can be as complicated or as simple as the parties may consider appropriate, but "line of sight" between risk/reward and project outcome are essential.

### Footnotes

<sup>1</sup> R.S.A. 2000, c. L-1

<sup>2</sup> *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79 32262 B.C. Ltd. v. *See-Rite Optical Ltd.*, 1998 ABCA 89

## What We've Been Up To

The Construction Team conducted two seminars in May 2007, entitled "A Day in the Construction Trench with BD&P", including such topics as the elements of a construction contract, builder's liens, insurance and bonding and legal risk management during a construction project.

John Taylor represented the firm at the Construction Owners Association of Alberta's Annual Best Practices Conference in May 2007 in Edmonton and John Taylor and Simon Lee attended the AGM of the Association in October 2007.

John Taylor and Simon Lee presented Topical Issues on the Law of Tendering to staff of an Oil Sands mine developer in the spring of 2007.

Simon Lee gave two presentations to clients in October 2007, one on "Professional Negligence: How Engineers Get in Trouble... And How to Avoid It!" and the other on the "Importance of Maintaining Proper Field Notes".

Arnie Olyan, is Chair of the Southern Alberta Construction Subsection of the Canadian Bar Association ("CBA") and a member of the Planning Committee for the CBA's National Construction Subsection Conference to be held in Banff, AB from April 10-12, 2008. Arnie reminds all construction lawyers to reserve these dates for the conference.

The Construction Team would be pleased to customize any of our presentations or seminars to meet the needs of any of our clients who have sufficient interest to make a private seminar useful to them.

# Prime Contractor, Principal Contractor and General Contractor:

## What is the Difference?

by Morella M. De Castro

### INTRODUCTION

Project owners, contractors, subcontractors and many others in the construction arena have long used the terms *General Contractor*, *Principal Contractor* and *Prime Contractor* interchangeably. This is done without a clear understanding of the difference in the meaning of the terms. This failure to differentiate is common and confuses even those who are well informed and knowledgeable of the construction business. The confusion is partially attributable to early legal definitions of two of the terms, which were very similar to each other, and the customary use of *General Contractor* as a “catch all” term.

### GENERAL CONTRACTOR

The generic term *General Contractor* describes an individual or entity in charge of managing construction of a particular project, thus ensuring that the work is performed in accordance with the owner’s instructions and scope. The *General Contractor* is typically the “go to” guy to whom those working at a site would look for instructions and an understanding of the overall plan. The *General Contractor* would probably have most of the leadership and oversight responsibilities at a work site, however such responsibility may or may not include overseeing the health and safety of workers and ensuring compliance with applicable laws. The *General Contractor* may or may not be the *Prime* or *Principal Contractor* as defined below.

### PRIME CONTRACTOR

The Alberta *Occupational Health and Safety Act*, (“the OHSA”), defines *Prime Contractor* in Section 3(1)(a) as follows:

[in respect of a work site] *the contractor, employer or other person who enters into an agreement with the owner of the work site to be the prime contractor, or (b) if no agreement has been made or if no agreement is in force, the owner of the work site.*

In addition to defining *Prime Contractor*, the OHSA also establishes the occupational, health and safety obligations and duties for which the *Prime Contractor* is responsible—fundamentally to ensure workers and employees comply with the legislation. The OHSA essentially eliminates doubt as to where the responsibility for worksite safety should rest, either under contract or by law, when there is more than one employer/contractor working at the same time and place. The responsibility will lie with the *Prime Contractor*; who is either appointed by contract or is the owner of the work site.

Confusion and doubt arouse under the 1988 *Occupational Health and Safety Act*, which used the term *Principal Contractor*, and failed to assign the safety responsibilities to the owner, the contractor, employer or other person when a contract or agreement was absent. The 1988 *Occupational Health and Safety Act* is no longer in force in the Province of Alberta.

## PRINCIPAL CONTRACTOR

*Principal Contractor* is defined under Alberta's *Labour Relations Code* (the "Code"), and its definition and scope is narrow and specific to the negotiation of collective bargaining agreements for major projects. Section 194(1)(b) of the Code describes *Principal Contractor* as follows:

*the person, corporation, partnership or group of persons primarily responsible for the construction of a plant or the alteration of or addition to an existing plant, and may include an owner of the plant or a person contracting with the owner for the construction, alteration or addition.*

The *Principal Contractor* definition is exclusively used in Part III Division 8 of the Code, which pertains to "Collective Agreements Relating to Major Construction Projects". Division 8 provides that once a major project is considered by the Minister to be of benefit to the Alberta economy (pursuant to an application), the Lieutenant Governor in Council will authorize, or appoint, a *Principal Contractor* for the purposes of conducting the collective bargaining (for the project), on its own behalf and on behalf of the other employers

engaged in the project, with the appropriate building trade unions. To be clear, the responsibilities of the *Principal Contractor* are unrelated to the day-to-day safety and health obligations that the *Prime Contractor* undertakes at the work site.

## SUMMARY

In summary, *Prime Contractor* is the owner of a work site, or the person who has the contractual responsibility for the health and safety obligations at the work site, when there are multiple employers conducting work simultaneously. *Principal Contractor* is the responsible party (under the Code) for a major construction project and is appointed by the Provincial Cabinet to conduct the negotiations for a Collective Agreement that will apply to that major project. The *General Contractor* is the one running the project and ensuring that the work and services are performed at the site according to the owner's plan.

There are indeed situations where the three terms or combinations thereof, happen to be the same entity, however this will not always be the case. The terms are distinct in meaning and are best given distinctive treatment.

# Engineers Pay Heavily: Caution Required in Drafting Limitation Clauses

by Simon J. Lee, P.Eng.

## INTRODUCTION

**S**askPower *International Inc. v. UMA/B&V Ltd.*<sup>1</sup>, a recent decision by the Saskatchewan Court of Appeal highlights how courts will attempt to interpret a contract not just by a plain reading of the words of the document, but also by looking to the broader commercial context to indicate the intent of the parties.

## FACTS

SaskPower and Atco Power Canada (the "Owners") retained UMA/B&V Ltd. (the "Engineer") to provide engineering services in connection with the planned construction of a \$750 million cogeneration power plant at a potash mine in Saskatchewan. The Owners paid the Engineer approximately \$10 million for the services. However, the Owners subsequently alleged that the Engineer's work was substandard and had resulted in delays to the project and increased construction costs. The Owners commenced an action for breach of contract and negligence, claiming \$18 million in damages.

As part of a procedural issue prior to the main trial, both parties jointly applied to the Court of Queen's Bench for a determination of the *potential* extent of the Engineer's liability<sup>2</sup>, if the Engineers were ultimately found to be at fault.

**The Court of Appeal identified the tension that courts face when trying to interpret a contract and provided an interesting discussion as to how this should be done.**

The contract between the Owners and Engineer required the Owners to maintain professional liability insurance against errors and omissions by the Engineer, with \$10 million coverage and a \$500,000 deductible. Importantly, the Engineer (and not the Owners) was the insured party to the policy.

The contract purported to limit the engineer's liability with the following clause:

## 11.4 Limitation

Notwithstanding any other provision of this Agreement, Engineer's aggregate limit of liability for any and all claims arising or allegedly arising as a result of the Engineering Services, whether based in contract, tort, negligence, strict liability or otherwise shall not exceed:

(a) in cases where and to the extent that [the E&O insurance provided by the Owners for the Engineer] applies, the amount of the applicable insurance deductible(s) [i.e. \$500,000]; and

(b) in all other cases, the aggregate amount of all payments and compensation received by the Engineer from the Owners for the Engineering Services under this Agreement.

## DISCUSSION OF TRIAL AND COURT OF APPEAL DECISIONS

At first glance, paragraph (a) would appear to limit the Engineer's liability to \$500,000, the amount of the deductible. However, both

the Saskatchewan Court of Queen's Bench<sup>3</sup> and the Saskatchewan Court of Appeal found otherwise.

At trial in the Court of Queen's Bench, Mr. Justice Laing first found that 11.4(a) allows the Owners to recover from the Engineer up to the limits of the insurance policy (\$10 million) *in addition* to the \$500,000 deductible. He found that to limit the Engineer's liability to \$500,000 was commercially unreasonable and untenable. If this was the case, because the Engineer was the insured party, if the Engineer's liability was limited to only \$500,000, the \$10 million policy could *never* be accessed and it could never benefit the Owners, who were paying for the coverage. The court decided that it was the intent of both parties to allow the Owners access to the insurance policy. Therefore, contrary to first appearances, if the Engineer was ultimately found liable, 11.4(a) allows the Owners to claim \$10.5 million (the limit of the policy plus the deductible) from the Engineer.

Mr. Justice Laing also found that because the Engineer's liability exceeded the amount of insurance coverage, the Engineer would also be liable for any amounts above the limit of the insurance up to the limit imposed by 11.4(b). As the Engineer had received \$10 million

in compensation, this effectively made the engineer liable for an additional \$7.5 million (the difference between the amount claimable under 11.4(a) and the total amount claimed).

In other words, despite 11.4(a) stating on the face of it that if the insurance policy applied, the Engineer was only liable for \$500,000, the Court found the Engineer was actually liable for \$18 million, only \$10 million of which was covered by the project insurance policy maintained by the Owners<sup>4</sup>.

The Engineer appealed to the Saskatchewan Court of Appeal. It argued that 11.4(a) was clear and unambiguous and that 11.4(a) was a "stand alone" clause that clearly limits the Engineer's liability to \$500,000. The Owners on the other hand argued that this interpretation led to an unreasonable and absurd result, as it meant the Owners could never benefit from the policy for which they had paid the premiums.

The Court of Appeal agreed with the Owners. In doing so, it broadly followed the reasoning of the lower court. The Court of Appeal identified the tension that courts face when trying to interpret a contract and provided an interesting discussion as to how this

should be done. On the one hand, the Court of Appeal acknowledged courts must follow and give effect to terms of a contract that are plainly worded and free from ambiguity. On the other hand, courts should also have regard to the surrounding circumstances or "commercial purpose" of the contract, and avoid interpretations that lead to "an absurdity, repugnancy or inconsistency, which reasonable people cannot be supposed to have contemplated under the circumstances". The Court of Appeal also relied on the general principle of law that states that a clause limiting or excluding a party's liability should in general be strictly construed, and any ambiguity in such a clause should be interpreted against the party seeking to rely on it. In this case, the Court of Appeal found that both parties intended the Owners to have access to the insurance policy and that it would be absurd to find otherwise.

The Engineer unsuccessfully applied for leave (permission) to appeal the case to the Supreme Court of Canada<sup>5</sup> so that the Court of Appeal's decision is the final word in the matter.

## SIGNIFICANCE OF THE CASE

The lesson to be learned in this case is that when drafting a contract, and particularly limitation provisions, the parties should carefully consider not only the specific words utilized, but also the overall operation of the contract and the commercial context in which it will operate.

Additionally, this case provides a good example of circumstances where, despite the apparently unambiguous nature of one individual clause of a contract, a court will reach a different conclusion based on broader considerations of the commercial context of the bargain.

## Footnotes

<sup>1</sup> 2007 SKCA 40

<sup>2</sup> This was an application under Rule 188 of the Saskatchewan *Queens Bench Rules*. This rule allows a court to determine a point of law prior to the main trial if both parties can agree to a statement of facts, and if the determination would dispose of (or simplify) the main action. A similar (albeit not identical) rule in Alberta is Rule 221 of the *Alberta Rules of Court*.

<sup>3</sup> 2007 SKQB 40

<sup>4</sup> The case report notes that it is unknown whether the defendants carried professional liability insurance generally which may cover a claim in excess of \$10 million

<sup>5</sup> 2007 CarswellSask 523

**Mr. Justice Laing also found that because the Engineer's liability exceeded the amount of insurance coverage, the Engineer would also be liable for any amounts above the limit of the insurance up to the limit imposed by 11.4(b).**





# BD&P's Construction Team

**B**D&P's Construction Team is comprised of 15 dynamic litigators and solicitors who offer full service representation in all facets of the construction industry.

Our Team represents owners, contractors, sub-contractors, engineering firms, developers, banks, and other financial institutions on a wide-range of construction issues ranging from the straight forward to the complex. We review, negotiate and prepare terms and conditions and other documentation for varied construction and engineering projects; provide practical, timely and expert legal support throughout the construction process; and provide experienced litigation services when required.

BD&P's Construction Team represents a diverse range of client interests from those of small local contractors to developers of large-scale energy and infrastructure projects. Whether our clients require the review of a contract, the arbitration of a construction dispute, or the coordination and preparation of the multi-faceted and complex series of transactions demanded by a major project, BD&P is able to provide the individual lawyer or assemble a team with the appropriate depth and experience.

For your easy reference, we highlight both our Significant Areas of Service and examples of Major Projects in which either individual firm lawyers or the firm were involved, which include some of the largest projects carried out in Canada.

## Significant Areas of Service:

- Negotiation and preparation of tender packages and joint venture, confidentiality, consulting, engineering services, and architectural services agreements
- Negotiation and preparation of construction, construction management, sub-contract, supply and mining services agreements
- Negotiation and preparation of Engineering, Procurement, & Construction (EPC) and design/build contracts
- Negotiation and preparation of Engineering, Procurement, & Construction Management (EPCM) contracts
- Delay claims
- Industrial design disputes

- Construction and contract disputes
- Tender disputes
- Engineering claims
- Lien claims
- Insurance issues including liability, builder's risk, errors and omissions, and professional liability coverage
- Regulatory and municipal planning approvals
- Preparation of construction security documentation
- Representation at arbitrations and mediations
- Service as arbitrators and mediators in construction disputes

## MAJOR PROJECT EXPERIENCE:

- **Hibernia Project** – offshore oil production platform off coast of Newfoundland
- **Terra Nova Project** – floating production, storage & offloading facility in oilfields on Grand Banks
- **Sable Island Project** – offshore natural gas recovery project off coast of Nova Scotia
- **Horizon Oil Sands Project** – oil sands project in northern Alberta
- **Muskeg River Oil Sands Project** – oil sands project in the Athabasca oil sands region of northern Alberta
- **Long Lake Oils Sands Project** – development project of heavy oil infrastructure in the Athabasca oil sands region of northern Alberta
- **Tanguh Project** – a liquefied natural gas project in Indonesia
- **Confederation Bridge Project** – fixed link bridge across Northumberland Strait
- **Sakhalin Island Project** – large scale oil and gas development project on Sakhalin Island in Russia
- **Husky Oil Upgrader** – development of Lloydminster Heavy Oil Upgrader
- **MEGlobal** – worldwide joint venture for manufacture and sale of ethylene glycols

## Contact the BD&P Construction Team

R. Bruce Brander	Litigator/Solicitor.....	260-0165	rbb@bdplaw.com
Donald J. Chernichen, Q.C.	Litigator .....	260-0101	djc@bdplaw.com
Morella M. De Castro	Solicitor.....	260-0253	mmd@bdplaw.com
Louise Novinger Grant	Litigator/Arbitrator.....	260-0163	lng@bdplaw.com
John C. Goetz	Solicitor.....	260-0110	jcg@bdplaw.com
David A. Grout	Solicitor .....	260-9469	dag@bdplaw.com
David R. Haigh, Q.C.	Litigator/Arbitrator .....	260-0135	drh@bdplaw.com
Mark T. Houston	Solicitor .....	260-0375	mth@bdplaw.com
Cal D. Johnson, Q.C.	Solicitor .....	260-0203	cdj@bdplaw.com
Simon J. Lee, P.ENG.	Solicitor.....	260-0868	sjl@bdplaw.com
Robert O. Millard	Litigator .....	260-5719	rom@bdplaw.com
Melissa D. Moulton Tennison	Litigator.....	260-9471	mdm@bdplaw.com
Arnold (Arnie) H. Olyan	Solicitor .....	260-0249	aho@bdplaw.com
Ray E. Quesnel	Solicitor .....	260-0262	req@bdplaw.com
Jeff E. Sharpe	Litigator.....	260-0176	jes@bdplaw.com
David H. Strand	Litigator/Solicitor .....	260-0259	dhs@bdplaw.com
John K. Taylor	Solicitor .....	260-0386	jkt@bdplaw.com
Robert D. Wood	Litigator.....	260-0125	rdw@bdplaw.com

*If you would like any further information on any members of our team, such as a more detailed resume, please feel free to contact the team member or the writer directly. You may also refer to our website at [www.bdplaw.com](http://www.bdplaw.com).*

# o n r e c o r d

FROM THE GROUND UP AND OTHER ISSUES OF ON RECORD ARE AVAILABLE ON OUR WEB SITE  
[WWW.BDPLAW.COM](http://WWW.BDPLAW.COM)

**From the Ground Up, Editors-in-Chief**

David H. Strand, dhs@bdplaw.com (403)260-0259  
 John K. Taylor, jkt@bdplaw.com.....(403)260-0386  
 Arnold (Arnie) H. Olyan, aho@bdplaw.com .....(403)260-0249

**From the Ground Up, Managing Editor**

Rhonda Wishart, rwishart@bdplaw.com.....(403)260-0268

**Contributing Writers:**

John K. Taylor, Arnold (Arnie) H. Olyan, Morella M. De Castro, Simon J. Lee and Henry Chan.

*For a complete list of authorities used in drafting these articles please contact the Managing Editor.*

**Contact**

For additional copies, address changes, or to suggest articles for future consideration, please contact our Catherine Leitch in our Marketing Department at (403) 260-0345 or at [cat@bdplaw.com](mailto:cat@bdplaw.com).

**General Notice**

**On Record** is published by BD&P to provide our clients with timely information as a value-added service. The articles contained here should not be considered as legal advice due to their general nature. Please contact the authors, or other members of our construction team directly for more detailed information or specific professional advice.