

# CONSTRUCTION CLAIMS

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

## course highlights

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

## participating organisations

Jenkins Marzban Logan LLP  
Clark Wilson LLP  
Watson Goepel Maledy LLP

Alexander Holburn Beaudin & Lang LLP  
Harper Grey LLP  
Borden Ladner Gervais LLP

## who should attend

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

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

### Course Leader

Andrew N. Epstein,  
Watson Goepel Maledy LLP



### Course Leader

Robert W. Jenkins,  
Jenkins Marzban Logan LLP



L. Neil Matheson,  
Harper Grey LLP



Hannelie G. Stockenstrom,  
Clark Wilson LLP



Michael Skene,  
Borden Ladner Gervais LLP



John S. Logan,  
Jenkins Marzban Logan LLP



# DELAY CLAIMS & CHANGE ORDERS

## COURSE LEADER

### ANDREW N. EPSTEIN

Andrew Epstein's experience includes professional liability, products liability, personal injury, class actions, construction liens and delay claims, shareholder disputes and injunctions. He has appeared before all Court levels, as well as at arbitrations and numerous mediations. He is a frequent and popular speaker on a number of legal issues at professional and industry-specific seminars. He has also written extensively on a number of topics within his practice areas.

### ROBERT W. JENKINS

Robert Jenkins' practice has been devoted for many years to the practice of law as it relates to the construction industry. His practice has focused on the law of Builders Liens, construction litigation and disputes, arbitration, insurance, the law of surety, tendering, construction contracts with particular emphasis on the resolution of construction disputes. He and the other construction law lawyers at Jenkins Marzban Logan LLP have primarily represented contractors and subcontractors on many diverse projects, working with national and international clients on many complex projects. In recent years, he has encouraged the development of alternate dispute resolution techniques in the industry including mediation, project-oriented means of mediating and arbitrating disputes during the project. He has acted as counsel, arbitrator and mediator on many major local, national and international construction and commercial disputes, often involving many parties and issues. Bob also lectures regularly on construction law and dispute resolution methods and tactics at many construction and professional organizations in British Columbia and other jurisdictions.

## CO-LECTURERS

### L. NEIL MATHESON

Neil Matheson is a senior litigation partner at Harper Grey. He maintains an extensive insurance and civil litigation practice with an emphasis on Construction Law and Aviation Law. Neil is recognised by the Canadian Lexpert Legal Directory as a leading lawyer in the areas of Construction Law, Commercial Insurance and Aviation Law. He is also an inactive member of the Law Society of Alberta and an active member of the Yukon Bar.

### HANNELIE G. STOCKENSTROM

Hannelie Stockenstrom is a partner at Clark Wilson and the Chair of its Construction Law Group and Co-Chair of the Municipal Law Practice Group. She practices in the area of Construction Law, Insurance Litigation, Municipal Law, Higher Learning and Public-Private Partnerships. She assists clients with all facets of construction related issues, including claims. She advises on issues relating to procurement, including bidding and tendering, requests for qualifications and requests for proposals. She negotiates and prepares consultant and construction contract documents. She resolves disputes during and post-construction, including contract disputes and claims involving liens, delays, professional negligence, and construction deficiencies. She advises with respect to bonding, insurance coverage and risk management, including steps to avoid claims. She has extensive experience in complex multi-party product liability and construction claims.

### MICHAEL SKENE

Michael A. Skene is a partner in the Construction and Engineering Practice Group at Borden Ladner Gervais LLP's Vancouver office. Michael obtained a B. Comm. (Hons.) from U.B.C., an LL.B. from the University of Toronto, and an LL.M. from the University of Cambridge. Called to the bar in 1993, he has published a number of papers and given numerous presentations regarding construction law. He represents owners, developers, contractors, sub-trades, sureties and lenders in all types of construction disputes, including lien claims, surety and indemnity actions, and delay, impact and productivity claims.

### JOHN S. LOGAN

John Logan was called to the Bar in 1983 (British Columbia) and 1986 (Nova Scotia). His practice is restricted to commercial and construction litigation. He is engaged in all aspects of construction litigation with particular emphasis on the law of builders' liens, priorities, tendering, surety, trusts and Consultant's liability. He has written numerous articles on topics including priorities, tendering, surety, builders' liens, trusts and civil litigation. He is a frequent lecturer at conferences organized by construction industry associations, Continuing Legal Education Society of British Columbia and British Columbia Professional Legal Training Program. He is committed to the use of alternative dispute resolution and pragmatic, business oriented approaches to the resolution of disputes.

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## COURSE PROGRAM

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

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

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

### PROTECTING YOURSELF AGAINST CONSTRUCTION DEFECT CLAIMS

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

- What is the potential legal liability for defective design, defective workmanship and defective materials?
- Standards of care for design professionals: express and implied duties
- Obligations of an engineer for construction field review
- How can you limit legal liability?
- Understanding the contractual matrix and potential liability of: manufacturers, general contractors, subcontractors, specialty contractors, architects and engineers, construction managers
- Evaluating liability
- Making sure everyone is at the table: third-party actions

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

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

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

### DEALING WITH CONSTRUCTION LIENS

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

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

### EMERGING ENVIRONMENTAL LIABILITIES

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

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

### CONSTRUCTION ARBITRATION: AVOIDING POTENTIAL PROBLEMS WITH STANDARD CONTRACT CLAUSES

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

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

### ACHIEVING SUCCESSFUL RESOLUTIONS IN ARBITRATION AND MEDIATION OF CONSTRUCTION DEFECT CASES

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

- Is arbitration a viable alternative to traditional litigation and under what circumstances?
- Is the mediation process working for construction defect cases?
- Avoiding the hidden pitfalls of complex arbitration
- What is a sound ADR contract provision?
- Pro-active dispute prevention at the front end of a construction job

# CONSTRUCTION LIENS

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

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

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

## CAPACITY, RESPONSIBILITY AND CLAIMS: THE LATEST ON SURETY BONDS

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

- Practical suggestions for dealing with lack of capacity
- Other ways to obtain equivalent protection
- Dealing with the allocation of responsibilities
- Necessary steps to follow to claim under surety bonds
- Update of CCDC revisions for surety bonds, bid bonds, performance bonds and labour and material payment bonds

## LIABILITY OF TRUST PROVISIONS

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

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

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**Location:** Metropolitan Hotel, 108 Chestnut Street, Toronto, Ontario, M5G 1R3

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

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