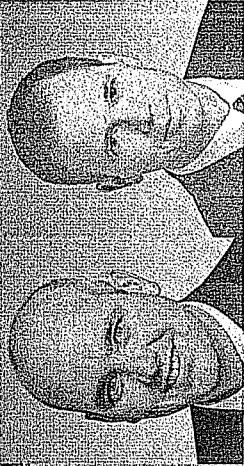


Professional Services

POINT COUNTER POINT With Norm Streu & Chris Hirst



Understanding the Waiver of Claims in CCDC2

The Waiver of Claims provisions of the old CCDC2 have always been problematic. The old clause provided a broad Waiver of Claims by the Owner except for those claims that the Owner had made in writing prior to Substantial Performance.

The only exceptions to that waiver were warranty claims, indemnification claims and claims with respect to "substantial defects and deficiencies."

With respect to these latter claims, the limitation period was six years. A difficulty with this provision from the Contractor's perspective was that it was invariably amended by way of Supplementary General Conditions.

More generally, the provisions were unclear and consequently were rarely relied upon. The new CCDC2 Waiver of Claims is far less ambiguous and includes some important amendments. The new clause now limits the waiver and release of both the Owner and the Contractor to claims which they had knowledge of or

putes as to whether a particular communication was a "notice in writing" pursuant to these provisions. It would thereby nullify the release that otherwise would have occurred.

The new CCDC2 seeks to correct this problem by clearly delineating what must be included in a "Notice in Writing of claim."

- The notice must include:
1. A clear and unequivocal statement of the intention to claim;
 2. A statement as to the nature of the claim and the grounds upon which the claim is based; and,
 3. A statement of the estimated quantum of the claim.

Another problem that frequently arose under the old language was created by the link of waivers and releases to the final certificate for payment.

Under the old CCDC2, claims made in writing prior to the issuance of the final certificate were never waived or released.

In situations where a problem arose at the end of a project and the final certificate was withheld, there was

an argument that there had been no waiver or release of any claims.

Under the new CCDC2, the trigger date for the release of claims is the sixth calendar day before the expiry of the lien period.

This provision provides greater certainty to the release date and ensures

that claims are brought forward before the holdback is released. Look for additional articles on other significant changes to the CCDC2 in upcoming editions of the Journal of Commerce.

Norm Streu and Chris Hirst are partners in the Construction & Engineering Group of the Vancouver law firm Alexander Holburn Beaudin & Lang LLP. Norm is a past chair of the Vancouver Regional Construction Association.

If you have any questions about this article, or any construction law related issue, please feel free to call Norm or Chris at (604) 484-1700.

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