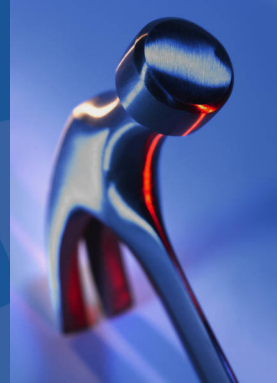


BCBEC Conference and AGM

## Understanding the Role of the Consultant – An Update on the Consultant's Legal Responsibilities

September 26, 2012

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### The Role of the Consultant

1. How is role of the consultant defined?
2. What is the consultant's role during each phase of the construction project?
3. What are the consultant's legal obligations?

## The Role of the Consultant, cont'd

### I. General Comments

- a) The role of the consultant is often underestimated
- b) A better understanding of the role of the consultant on construction projects benefits all parties, including the consultant

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## The Role of the Consultant, cont'd

### II. How is the Role of the Consultant Defined?

- a) The agreement between consultant and owner
- b) The construction contract between owner and contractor
- c) Applicable industry standards and professional requirements
- d) The common law and statutory requirements
- e) Consultant insurance requirements

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## The Role of the Consultant, cont'd

### The Consultant Agreement

- a) Standard form Document 6 or ACEC 31
- b) "Pro-Consultant"
- c) Expect supplementary conditions



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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect

- a) Bylaw 30.1 of The Code Of Ethics and Professional Conduct from the Architectural Institute of B.C. ("AIBC"):
  - In practicing architecture, an architect shall act with **reasonable care and competence**, and shall apply the knowledge, skill and judgment which are ordinarily applied by architects currently practicing in B.C.

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect, Bylaw 30.1, cont'd

- a) An architect shall remain informed with respect to the practice of architecture in British Columbia.
  - *This Bylaw approximates the "reasonable architect" test for negligence.*
  - *It is an architect's responsibility to recognize personal impairment to the ability to function competently and, when so impaired, to withdraw from practicing architecture until competence is restored.*

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect

- b) Bylaw 30.3 of The Code Of Ethics and Professional Conduct:
  - An architect shall undertake to perform professional services only when qualified, together with those whom the architect may engage as consultants, by education, training and experience in the specific areas involved

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect - Bylaw 30.3, cont'd

- An architect shall limit professional practice to areas of personal competence or shall engage others (including staff) who are competent in supplementary areas.
- Where so governed under Provincial statute, other professionals must be engaged to practice their professions.
  - ❖ *An architect is authorized to undertake architectural services for any project, but must recognize personal and professional limitations and must refrain from rendering service in those areas until such limitations are overcome.*
  - ❖ *An architect must be able to manage and coordinate the provision of other design professionals' services competently, whether the other professionals are engaged by the architect or the client.*

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect

- c) Bylaw 33.4 of The Code Of Ethics and Professional Conduct:
  - In practicing architecture, an architect shall take into account all applicable federal, provincial and municipal building laws and regulations

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 1. Architect – Bylaw 33.4, cont'd

- This Bylaw recognizes the increasing complexity of laws and regulations applicable to the practice of architecture. This Bylaw is complementary to 33.1 in that compliance is mandatory but permits the architect to rely on the advice of others qualified by education, experience or training to provide interpretation.
- In relying on the advice of others, it is incumbent on the architect to determine that such persons have the requisite credentials and responsibilities for providing that advice; to brief such persons properly relating to issues on which advice is sought; and to confirm such advice in writing.

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 2. Engineer

- a) Section 22 of *Engineers and Geoscientists Act* (“EGA”):
  - An engineer is not permitted to engage in the practice of a professional engineer or professional geoscientist unless a member of APEGBC and licensed

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## The Role of the Consultant, cont'd

### The Industry Standards

#### 2. Engineer

- b) Bylaw 14(a)(2) of the *Bylaws of the Association* requires that engineers undertake and accept responsibility for professional assignments only when qualified by training or experience
- c) Bylaw 14(a)(6) requires that engineers keep themselves informed in order to maintain their competence

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## The Role of the Consultant, cont'd

### Consultant's Legal Obligations

- If a consultant violates a bylaw(s) of his/her professional association, will the consultant be found liable at law?



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## The Role of the Consultant, cont'd

### Consultant's Legal Obligations

- If a consultant violates bylaw(s) of the professional association or applicable Act, then will consultant be found liable at law?
  - Definite maybe
  - Bylaws / Act goes to standard of care
  - Violation is often evidence of a breach of standard of care

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## The Role of the Consultant, cont'd

### Consultant's Legal Obligations

- Typical causes of action against consultants:
  1. Negligence (including duty to warn)
  2. Breach of contract (consultant agreement)
  3. Misrepresentation (qualifications, no defects)

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## The Role of the Consultant, cont'd

### III. What is the Consultant's Role?

1. **Pre-Design:** Project budgeting and management, site selection, space relationships and environmental studies
  - a) Budgeting is key



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## The Role of the Consultant, cont'd

### *Simkin v. Osburn*, [1998] B.C.J. No. 1484 (SC)

#### FACTS

- The plaintiff's budget for her house was \$600,000
- She hired an architect to design the home
- The judge found that the budget was part of the contract between the parties. In other words, a price condition had been established
- The plaintiff was very involved with the design process
- Even when cost estimates were higher than budget, the architect assured that plaintiff that costs would be reduced during construction. Yet, not a single estimate was under the budget
- The final cost of construction plus consultant's fees was \$1,177,369

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## The Role of the Consultant, cont'd

### *Simkin v. Osburn, supra*

#### Justice Parrett

- "...An Architect owes a duty to his client to ensure that his design will be such that it can reasonably be constructed within what, to his knowledge, is the client's budget. His contract is to design within the budget...The architect cannot predict exactly what the bids will be, but his estimate should be sufficiently close that the project from an expense point of view does not become substantially different from what the client expected": *Saxby v. Fowler* (1977), 2 C.C.L.T. 195 (Alta. C.A.)
- Some Canadian cases have held +/- 10% is the appropriate margin of error: *Cana Construction Company Ltd. v. Her Majesty the Queen*, [1974] S.C.R. 1159

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## The Role of the Consultant, cont'd

### *Simkin v. Osburn, supra*

#### Justice Parrett

- Although the client (Plaintiff) was very involved, the architect could not use this as an excuse. Justice Parrett said, "...the defence to such a client and such a situation is to fully inform the client of the necessity for changes and the consequences of not making them and if necessary to document that advice in writing. These things the defendants failed to do."
- The architect breached his duty of care to the Plaintiff by failing to design within budget, not accurately estimating the costs of building to design, and not reassessing the costs as the project went along. In addition, the architect did not properly supervise construction expenditures.

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## The Role of the Consultant, cont'd

### III. What is the Consultant's Role?

2. **Design Stage:** Project budgeting and management, site selection, space relationships and environmental studies
  - a) **Schematic design** – design concept/proposal for feasibility of the project
  - b) **Design development** – furthering design with consideration of building code/obtaining development permit
  - c) **Construction documents** – reducing design to specifications, plans and drawings

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## The Role of the Consultant, cont'd

### *Cohen v. Ostry*, [1994] B.C.J. No. 148 (CA)

#### FACTS

- The Plaintiff entered into an agreement to purchase an older building, with the intent of converting it into an artist's live/work studio
- The purchase was subject to the Plaintiff's "satisfaction as to the renovation requirements of the City"
- The Plaintiff retained the defendant architect to do a feasibility study and opine as to whether the project would be approved
- The architect was told by a City official that he should speak to the planning manager, as he made all the decisions
- The architect did not talk to the City planner and instead advised the plaintiff anyway that the project had a good chance of being approved
- The Plaintiff, therefore, proceeded with the purchase and afterwards was advised by the City that the plan was rejected
- The Plaintiff decided not to go through with the project and sold the property at a loss

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## The Role of the Consultant, cont'd

### *Cohen v. Ostry, supra*

#### Justice Southin

- The architect was negligent in not approaching the City planner for his opinion on feasibility
- The plaintiff would have acted differently had he known the City planner's views because the renovations would have been too costly. The plaintiff would not have continued to spend money on a "forlorn hope"
- The plaintiff was awarded damages for the steps he took after purchasing the home, such as incorporating a company and seeking tax advice. In addition, the plaintiff received a refund of fees paid to the architect

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## The Role of the Consultant, cont'd

### III. What is the Consultant's Role?

3. **Bidding & Tendering**: The consultant represents the owner and acts as the owner's agent in preparing and issuing tendering documents and supervising the tendering process
  - a) Beware of the very low bid
  - b) Use supplementary conditions to reduce risk

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## The Role of the Consultant, cont'd

*Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206

### FACTS

- The plaintiff (Edgeworth) successfully bid a contract to build a section of highway near Revelstoke for the province of British Columbia
- Edgeworth alleged that it lost money on the project due to errors in the specifications and construction drawings, which were prepared by N.D. Lea & Associates Ltd., and were included in the tender package
- Edgeworth sued N.D. Lea & Associates Ltd. for negligent misrepresentation

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## The Role of the Consultant, cont'd

*Edgeworth Construction, supra*

### Justice McLachlin

- N.D. Lea & Associates Ltd. knew that the purpose of supplying the information was to allow bidders to submit a price
- Edgeworth relied on the accuracy of the design in submitting their bid
- If Edgeworth could not rely on the engineering firms design and specifications, the result would be that it would need to hire its own engineers to double check the design and specifications. Each bidder would be required to do this. This would lead to adverse economic consequences.

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## The Role of the Consultant, cont'd

### III. What is the Consultant's Role?

#### 4. Construction Contract Administration:

- a) Field reviews
  - Substantial or general conformance?
- b) Change orders

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## The Role of the Consultant – Field Review

### *Roco Developments Ltd. v. Permasteel Engineering Ltd.* (1983), 46 B.C.L.R. 103 (S.C.)

- The floor in plaintiff's new building failed due to inadequate design
- Before construction, a neighboring building had settled because the floor was floated on an unpiled foundation
- Plaintiff hired the defendant soil engineer to do a soil investigation (\$400). Defendant engineer prepared a preliminary report that appeared to recommend partially-piled foundation with a floated slab floor on preloaded grade
- Builder converted preliminary report into specs without defendant engineer's knowledge or agreement
- Defendant assumed site was inspected by supervising engineer with knowledge of preloading. Not true.

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## The Role of the Consultant – Field Review

### *Roco Developments Ltd., supra*

- Plaintiff ends up doing a “self preload” by dumping X amount of Y material based on defendant preliminary report
- The municipal inspector became concerned because of the settling that had occurred with the neighboring building. The inspector told the builder to ensure that the floor would not settle when poured. Builder asked defendant to “visit the site to see if there was any reason for concern”
- The defendant engineer did a visual inspection and concluded that there were no concerns as there were no visible signs of distress on the building. He made no report to the builder
- The floor settled

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## The Role of the Consultant – Field Review

### *Roco Developments Ltd., supra*

#### Decision:

- Defendant was called to inspect the building before the floor was poured. The defendant should have made inquiries to ensure that the preloading had been properly carried out. It was not enough to conclude that there were no visible signs of distress. Silence implied no concern
- If it did not want to conduct an inquiry, then defendant should have told builder he could not address municipality's concerns with only an inspection
- The floor settled because the preload was improperly performed
- Engineer found 25% liable for insufficient field review & failing to advise those concerned of the nature and result of inspection

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## The Role of the Consultant – Field Review

### *Roco Developments Ltd. , supra*

#### Risk Management Lessons:

- Law is clear that a “look see” is insufficient for a field review
- If a consultant takes on a task, then ensure you do what it takes to provide the opinion sought
- If what is required to give an opinion is beyond scope of services, communicate with owner
- Be careful with the use of reports generally, but particularly preliminary reports. Have clear language restricting use of your report

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## The Role of the Consultant – Field Review

### APEGBC BYLAWS – SECTION 14(b)

- Under this section entitled “Quality Management”, members are required to establish and maintain documented quality management processes for their practices, including:
  - ❖ documented field reviews; and
  - ❖ documented independent review of structural designs prior to construction to evaluate the construction documents to determine if the structural systems appear complete.
- Requirement for retention of complete projection documentation for minimum of 10 years.

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## The Role of the Consultant – Change Orders

*Pacific Coast Construction Co. v. Greater Vancouver Regional Hospital District*, [1986] B.C.J. No. 1210 (SC)

### FACTS

- The Plaintiff, Pacific Coast Construction Co., was the general contractor on a project to build an emergency care unit at Shaughnessy Hospital
- There were long delays in completing the project, which Pacific Coast Construction attributed to the soil conditions encountered on site
- As such, Pacific Coast Construction sued the Hospital District for its extra work and delay costs
- The Hospital District claimed contribution from the consultant, Cook, Pickering & Doyle, as well as others

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## The Role of the Consultant – Change Orders

*Pacific Coast Construction Co. , supra*

### Justice Wallace

- **North Wing** – Pacific Coast Construction failed to notify the architect of changed soil conditions before it carried out its remedial work (as per the terms of its contract)
  - As a result, the architect could not determine the cause of the condition, or the nature, extent and possible costs of the extra work required
- This portion of the claim was dismissed

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## The Role of the Consultant – Change Orders

*Pacific Coast Construction Co. , supra*

### Justice Wallace

- **East Wing** - Where the extra work was authorized by the architect, the contractor was entitled to the extra costs
  - It did not matter that the architect verbally approved and then later confirmed with a change order
- In *obiter*, the Court noted that if the architect exceeds his or her authority in the change order procedure, he or she may be liable to the owner. However, if the contractor has reason to believe the architect has authority, the contractor will be able to collect payment from the owner

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## The Role of the Consultant

### III. What is the Consultant's Role?

#### 4. Construction Contract Administration:

- c) Impartial adjudicator of disputes under CCDC 2



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## The Role of the Consultant – Impartial Adjudicator Of Disputes

- Defined by consultant agreement:
  - ❖ ACEC Article 3.3
  - ❖ Doc 6 GC 1.5.5
- CCDC GC 2.2.7



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## The Role of the Consultant – Impartial Adjudicator Of Disputes

*Kamlee Construction Ltd. v. Oakville (Town)*, [1960] S.C.J. No. 1, 26 D.L.R. (2d) 166

- The engineer and the contractor began to disagree over methods of construction
- Under the contract, the contractor was to abide by the decisions of the engineer
- Against contractor's wishes, the engineer ordered a backhoe operator to widen a trench. This process broke a sanitary sewer and water rushed from the trench
- The contractor was pissed off and withdrew its equipment from the job site. It said it would not return until a new engineer was appointed

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## The Role of the Consultant – Impartial Adjudicator Of Disputes

### *Kamlee Construction Ltd., supra*

- Owner demands that the contractor return to site and continue work or else it would take steps necessary to complete the work. Owner hired another company to complete the work.
- The contractor then sued the owner claiming that the cancellation of the contract and the employment of another contractor to complete it was without cause or justification and seeking payment for work and labour done and certain extra costs and damages for loss of profits and breach of contract.

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## The Role of the Consultant – Impartial Adjudicator Of Disputes

### *Kamlee Construction Ltd., supra*

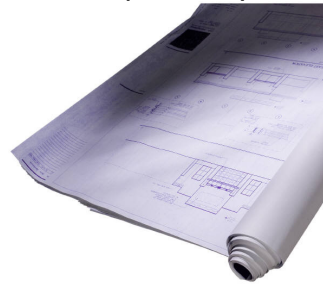
- An engineer is required to act judicially. The engineer's decisions must be dictated by his or her best judgment of the most efficient and effective way to carry out the contract. He or she must not be influenced by extraneous considerations and, particularly, that his judgment must not be affected by the fact that he is being paid by the owner.

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## The Role of the Consultant

### III. What is the Consultant's Role?

5. **Post-Completion Inspection:** Inspections to ensure the work was constructed as required by the contract documents



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## THANK YOU

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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