

**JOURNAL OF THE  
CANADIAN COLLEGE  
OF CONSTRUCTION  
LAWYERS**

**2016**

Cited as (2016) 1 J.C.C.L.



**THOMSON REUTERS®**

## Summary Table of Contents

Preface .....	v
Table of Contents .....	xi
Table of Cases .....	xvii
<b>Quebec's Voluntary Reimbursement Program: Looking for a Few Volunteers</b>	
<i>Yvan Houle</i> .....	1
<b>The Evolution of Builder's Risk Insurance in Canada: A Brave New World for Resulting Damages?</b>	
<i>Sharon Vogel</i> .....	11
<b>Autopsy of a Default Situation: A Review of Recent Québec Case Law Evaluating Decisions to Terminate or Not to Terminate a Construction Project Following a Default of a Party to the Contract</b>	
<i>Nicolas Gagnon</i> .....	43
<b><i>Winnipeg Condo v. Bird Construction</i> — Two Decades of Flightless Claims Since <i>Bird</i></b>	
<i>David I. Marr and Ambre K. Anjoubault</i> .....	63
<b>Construction Delay Claims in Canada: A Survey of the use of Delay Experts and Analysis Methods</b>	
<i>Christopher J. O'Connor and Lauren E. Kristjanson</i> .....	71
<b>Arbitrator Questioning: Sphinx or Skeptic?</b>	
<i>Duncan W. Glaholt and Markus Rotterdam</i> .....	81
<b>Advanced Tendering</b>	
<i>W. Donald Goodfellow</i> .....	105

**Dead or Alive? The Future of Entire Agreement Clauses in Construction Disputes**

*Nicholas Reynolds* ..... 155

Index ..... 179

## Table of Contents

### Quebec's Voluntary Reimbursement Program: Looking for a Few Volunteers

Editor's Note .....	1
1. INTRODUCTION.....	2
2. THE REIMBURSEMENT PROGRAM.....	3
3. CIVIL RECOURSE.....	8
4. CONCLUSION.....	10

### The Evolution of Builder's Risk Insurance in Canada: A Brave New World for Resulting Damages?

Editor's Note .....	11
1. INTRODUCTION.....	11
2. BACKGROUND.....	13
2.1 IBC Wording.....	13
2.2 Interpretation in <i>Canadian National Railway</i> .....	13
2.3 Resulting Damage Under the IBC Wording.....	17
3. A CHANGE IN EXCLUSIONARY CLAUSE WORDINGS: THE UK WORDINGS.....	22
3.1 "DE" Clauses.....	23
3.2 The "LEG" Clauses .....	24
3.3 "Defective Condition" .....	25
3.4 <i>Blackwell</i> — DE3 Clause .....	25
3.5 <i>Acciona</i> — LEG2 Clause .....	27
3.6 Divisibility.....	29
3.7 <i>Ledcor</i> and the "Connected" Approach .....	30
3.8 <i>PCL Constructors</i> and the "Divisible" Approach.....	33
3.9 Divisible or Connected? The Importance of Wording .....	35

4. CONCLUSION.....	37
APPENDIX "A" .....	38
APPENDIX "B" .....	40

**Autopsy of a Default Situation: A Review of Recent Québec Case Law Evaluating Decisions to Terminate or Not to Terminate a Construction Project Following a Default of a Party to the Contract**

Editor's Note .....	43
1. INTRODUCTION.....	43
2. THE RIGHT TO TERMINATE A CONTRACT FOR DEFAULT .....	44
3. AN UNJUSTIFIED TERMINATION OF A SUBCONTRACT BY A CONTRACTOR .....	46
4. AN UNJUSTIFIED TERMINATION OF A CONTRACT BY AN OWNER .....	50
5. AN UNJUSTIFIED DECISION BY A CONTRACTOR TO ABANDON ITS CONTRACT UPON AN ALLEGED BREACH OF CONTRACT BY THE OWNER .....	54
6. A DECISION BY THE OWNER TO SUPPORT AN AILING CONTRACTOR .....	57
7. ALTERNATIVE SOLUTION IN CASE OF A DISPUTE ARISING DURING AN ONGOING PROJECT .....	59
8. CONCLUSION.....	62

***Winnipeg Condo v. Bird Construction* — Two Decades of Flightless Claims Since *Bird***

Editor's Note .....	63
1. INTRODUCTION.....	63
2. DOES THE REAL AND SUBSTANTIAL DANGER HAVE TO BE IMMINENT? .....	64
3. WHAT IS REQUIRED TO MEET THE THRESHOLD OF "REAL AND SUBSTANTIAL DANGER"? .....	64
4. DOES <i>BIRD</i> RESTRICT THE RECOVERY OF ECONOMIC LOSSES ARISING FROM THE NEGLIGENT SUPPLY OF	

	SHODDY GOODS OR STRUCTURES STRICTLY TO LOSSES INCURRED WITH RESPECT TO DEFECTS WHICH ARE DANGEROUS IN NATURE?.....	65
5.	ARE ECONOMIC LOSSES INCURRED IN RELATION TO NON-DANGEROUS DEFECTS CAUSED BY THE NEGLIGENT SUPPLY OF GOODS OR STRUCTURES RECOVERABLE IN CANADIAN TORT LAW.....	65
6.	WHAT ARE THE POLICY REASONS FOR WHICH CANADIAN COURTS HAVE CHOSEN TO PRECLUDE RECOVERY OF ECONOMIC LOSSES ARISING OUT OF NON-DANGEROUS DEFECTS .....	67
7.	CONCLUSION.....	68
	<b>Construction Delay Claims in Canada: A Survey of the use of Delay Experts and Analysis Methods</b>	
	Editor's Note .....	71
1.	INTRODUCTION.....	71
2.	PARTICIPANTS IN THE SURVEY.....	72
3.	SCHEDULE CONSULTANTS AND METHODOLOGY.....	73
	3.1 Time Impact Analysis .....	74
	3.2 Collapsed As-Built.....	74
	3.3 As-Built Critical Path.....	75
	3.4 Impacted As-Planned .....	75
	3.5 As-Planned Versus As-Built/Total Time .....	76
4.	COMMENTS ON SCHEDULE CONSULTANTS.....	76
	4.1 Consultants and Methods Used .....	76
	4.2 Costs of Schedule Consultants and Overall Satisfaction....	77
	4.3 Acceptance by the Trier of Fact .....	78
5.	CONCLUSION.....	78
	<b>Arbitrator Questioning: Sphinx or Skeptic?</b>	
	Editor's Note .....	81

1.	INTRODUCTION.....	82
2.	JUDICIAL QUESTIONING.....	82
3.	ARBITRATOR QUESTIONING.....	94
4.	IS IT SAFER FOR AN ARBITRAL TRIBUNAL TO LEAVE RELEVANT QUESTIONS UNASKED?.....	101
5.	WHAT IF LEGITIMATE TRIBUNAL QUESTIONING RAISES NEW ISSUES?.....	101
6.	WOULD PARTY-APPROVED WITNESS CONFERENCING CHANGE THIS ANALYSIS? .....	103
7.	CONCLUSION.....	104

**Advanced Tendering**

Editor's Note .....	105	
1.	THE LAW OF TENDERING APPLIES TO ALL AREAS OF COMMERCE.....	105
2.	INTEGRITY OF THE TENDERING SYSTEM .....	107
3.	DUTY OF FAIRNESS .....	116
4.	DAMAGES .....	120
5.	MISTAKE .....	125
6.	BID SHOPPING.....	131
7.	WHAT IF THE LOWEST TENDER IS OVER-BUDGET ...	141
8.	DUTY TO INVESTIGATE.....	144
9.	GENERAL SUMMARY OF OBLIGATIONS AND RIGHTS UNDER THE TENDERING PROCESS.....	151

**Dead or Alive? The Future of Entire Agreement Clauses in Construction Disputes**

Editor's Note .....	155	
1.	INTRODUCTION.....	155
2.	A BRIEF HISTORY OF ENTIRE AGREEMENT CLAUSES IN CANADA .....	157
3.	<i>BHASIN</i> AND THE DUTY OF GOOD FAITH.....	159

4. *SATTVA* AND SURROUNDING CIRCUMSTANCES ..... 162

5. ENTIRE AGREEMENT CLAUSES AND RETROSPECTIVE SCOPE ..... 165

6. COLLATERAL AGREEMENTS..... 168

7. *TERCON* AND TESTING EXCLUSIONARY CLAUSES..... 170

8. CONCLUSION ..... 173

**Index** ..... 179