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An Overview of Contractual Notice Requirements and the Effect of Doctrines of Waiver and Estoppel in Cases of Imperfect Compliance

Phillip J. Scheibel and Peter A.K. Vetsch*

Editor's Note

Issues relating to contractual notice arise in a large number of complex construction disputes. The tension faced by courts is that on the one hand, there is a public interest in enforcing the terms of agreements voluntarily entered into, which include contractual notice provisions, and on the other hand, courts are loath to reject what would otherwise be a valid claim, and deprive a party of hard-earned money because of what might be described in some circumstances as a "technical breach".

Almost all construction lawyers have to prepare arguments or give advice, whether it is on behalf of (typically) owners seeking to reject a claim because of late or imperfect notice, or on behalf of contractors seeking compensation for extra work or delays where notice has been late or informal. This article, by CCCL Fellow Philip Scheibel and his law partner Peter Vetsch, will be of great assistance to construction litigators faced with this task. The article includes detailed discussion of many of the leading cases in Canada on this subject. The starting point is the 1982 decision of the Supreme Court of Canada in *Corpex*, followed by the decision of the B.C. Supreme Court in *Doyle Construction*. These two cases represent the high-water mark of strict enforcement. Of course, the article canvases various decisions that deviate from the principle of strict enforcement, providing context and detail to explain the reasoning of the various courts that have dealt with this issue.

The approaches taken by various courts in dealing with contractual notice have varied over time and geography. Some jurisdictions tend toward a stricter interpretation, and others allow greater flexibility. The authors have tried to reconcile, to the extent possible, the different approaches. They offer the following themes that run through the conflicting cases:

> The two principles relating to notice provisions on which the bulk of the case law is essentially unanimous are that (1) time limits in notice provisions will be respected, such that it is the parties' actions and correspondence within the notice time

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> period that must be examined to determine if notice has been provided, and (2) the content of any notice, in order to be considered sufficient, must include some mention of the party's intention of making a claim, or at least reference the possibility of a future claim.

The authors also explore the difference between notice of claim, and notice of intent to assert a claim in the future, which has been the subject of some of the decisions. Of course, the authors also discuss the issue of prejudice, or lack thereof, which underlies the reasoning in many of the cases.

Finally, the article discusses the doctrines of waiver and estoppel as they apply to notice defences. Again, the courts have been less than consistent over time and from one province to another regarding the circumstances under which a party will be found to have waived its entitlement to rely on strict notice provisions. This article provides a comprehensive analysis of these issues and should serve as a valuable resource to construction lawyers dealing with notice defences.

1. INTRODUCTION

Parties involved in construction projects regularly allocate responsibility and risk for project events in complex written agreements, attempting to account for the myriad of potential circumstances and occurrences that can arise during the performance of a given scope of work and proactively determine the extent of each party's exposure for each such event. Some portions of these construction contracts, particularly those provisions relating to indemnity, limitations of liability, consequential damages and warranty, tend to be heavily negotiated in almost all cases and are commonly focused on by contractors and owners alike as key contractual risk transfer points. However, there are other, less overt, risk transfer mechanisms in construction agreements that may not always receive the same level of negotiating attention but which can have similar and significant substantive effect. One such mechanism that has been the subject of considerable judicial attention in Canada in recent decades, though which may not have yet fully emerged in the minds of many contracting parties as a crucial component of contractual risk allocation, is the formal notice provision, a clause requiring that a party provide formal written notice within a certain time frame prior to the advancement of a dispute or a claim for entitlement. While the positive obligation to notify set out in the plain language of such provisions is clear, what tends to be less evident are the consequences of a failure to

do so, which can be extremely severe and can wholly deprive a contracting party of rights and remedies otherwise available to it.

In this article, we engage in a comprehensive review of the current state of the law in Canada as it relates to the necessity of strict compliance with notice requirements in contractual provisions (whether dealing with disputes, change orders, delays or other claims) to determine whether strict and formal compliance with notice obligations is in all cases a necessary precondition to a party's entitlement to compensation for cost and schedule overruns, deficiencies, extras or any other claims that are subject to a mandatory notice obligation. In addition, we review whether the failure of the recipient of any such claims to itself precisely abide by such notice requirements, either alone or in combination with the continued or regular payment of invoices or the approval of trends and other documentation on a project, can constitute a waiver or estoppel that precludes such party from relying on a notice defence in light of the particular circumstances of the case. While the case law has led to a variety of judicial results, much of the difference in outcomes is likely dependent on the specific factual matrix or contractual requirements in a given dispute, and some common threads can be found to help guide contracting parties in both the negotiation and litigation of construction contracts. To assist in comprehending the various judicial outcomes, we attach as Schedule "A" at the end of this article a summary of key notice cases setting out the relevant contract wording, the legal outcome and brief commentary.

2. OVERVIEW OF THE LAW

2.1 Contractual Notice Provisions — Key Cases

The law in Canada surrounding contractual notice provisions and the consequences of failing to strictly abide by them is convoluted, fact-specific and often difficult to reconcile. While the leading authorities are not in dispute, their cumulative effect and applicability to a given fact situation are not always clear. However, the overarching principles behind any analysis mirror the basic interpretive principles relevant to the interpretation of contracts generally, which require the plain meaning of negotiated contract terms to be given effect unless circumstances dictate otherwise. According to *Heintzman and Goldsmith on Canadian Building Contracts*, "a provision in a building contract specifying the formalities and procedures relating to extras [or other claims] will be read carefully to determine whether it properly applies to the particular circumstances".[1] If it does, "unless the [other party's]

conduct precludes it from relying on this requirement, substantive compliance with such a provision [will be] a condition precedent to payment [for a party for such extra or claim] even if compliance may be unrealistic in actual practice,"[2] and any such claim "may be denied if the [claiming party] fails to adhere to the formal requirements particularly if the claim is first asserted much later and without any prior knowledge of the [other party] that it would be made".[3] While some of the case law on this issue reflects such rigid adherence to the formal procedural requirements of a contract, other decisions indicate how this need for exact compliance may be relaxed on appropriate facts.

The starting point for any review of the judicial treatment of contractual notice provisions in construction agreements is the 1982 Supreme Court of Canada decision of *Corpex (1977) Inc. v. Canada*,[4] which concerned a claim by an excavation and construction contractor for additional compensation due to changed soil conditions at the project site. The contractor had agreed to construct a reinforced concrete dam but encountered significant delays and additional costs by virtue of the site soils being much more permeable than what was represented in the tender documents, which required significantly more pumping work and equipment than anticipated to keep the site dry. The contract between the parties contained a provision stating that no additional payment would be made to the contractor beyond the agreed contract price for any extra expense, loss or damage unless such expense or loss arose out of a "substantial difference" in soil conditions and "Contractor has given the Engineer written notice of his claim before the expiry of thirty days after encountering the soil conditions giving rise to the claim".[5] No notice was provided by the contractor within the 30-day period.

The Supreme Court reviewed the soil conditions clause in the contract and noted that it provided benefits to both parties: the contractor was "practically certain"[6] of getting some compensation for its additional costs if it suffered loss or expense and complied with the clause, while the owner received some assurance that the work would proceed in spite of the soil conditions claim and was given the opportunity upon receipt of notice to consider its position and decide whether to terminate the contract, pay the additional costs or take other steps. The court held that the contractor could not ignore its obligation to provide contempora-

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1 *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2014) at 6-41.
2 *Ibid.*
3 *Ibid.*, at paras. 6-42.
4 [1982] 2 S.C.R. 643, varied 1983 CarswellNat 537 (S.C.C.).
5 *Ibid.*, at para. 30.
6 *Ibid.*, at para. 59.

neous notice and then still claim for its additional costs after the work was complete, thereby seeking the benefits of the soil conditions clause (extra compensation) while denying the owner the corollary benefits of the clause (prompt knowledge of the claim and the ability to act on it):

> It is true that the Contractor did not know at the time all the causes which might have contributed to [the soil conditions] mistake or which could have prevented it; but he knew the consequences. . .. He had found a substantial difference between the information on soil conditions at the work site. . . and the actual soil conditions. In order to preserve his rights, he had to notify the Owner. . .. Without such notice, however, his claim in my opinion cannot succeed. . .because the parties were in exactly the position provided for by [the soil conditions clause] in the [contract's] general conditions.[7]

The court noted that the soil conditions provision in the contract was worded broadly to capture any kind of mistake or issue about the nature of the soil and acted to regulate the liability of the owner and the contractor's right to compensation in any such situation. "[T]he contractor may not take advantage of the compensation machinery established by [the provision] when he has not himself observed it".[8] Accordingly, the contractor's claim for additional pumping costs was dismissed and the contractor was required to bear all such costs itself. Even absent full information about the reasons behind the soil conditions discrepancy, strict compliance with its notice obligations was a threshold requirement to any ability to advance a claim.

The stringent approach taken in *Corpex* was softened and adjusted to the factual circumstances in the subsequent 1987 British Columbia Supreme Court case of *W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.*,[9] which concerned a delay and acceleration costs claim arising in relation to the construction of part of Vancouver's light rail transit system. The contractor, despite being promised complete control of the work and of all performance means and methods in the contract, was continually forced to adapt and adjust its planned approach by virtue of significant delays by the owner in making key portions of the site available to it and providing sufficient access to the workspace areas identified in the agreement. The contractor had made multiple verbal and written complaints to the owner with respect to these issues, and the problem had been documented in a series of meeting

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7 *Ibid.*, at para. 64.
8 *Ibid.*, at para. 67.
9 (1987), 27 C.L.R. 113 (B.C. S.C.).

minutes between the parties over the course of the project. However, the contract contained two separate strict notice provisions for delays and claims requiring the contractor to give the owner written notice within five days of the occurrence of any delay and within seven days of first becoming aware of any event giving rise to a claim. No formal notice had been issued by the contractor within these time frames.

The court distinguished *Corpex*, noting that in this case there was an ongoing series of project correspondence where timing and delay issues were raised, as well as the construction site minutes of meeting which highlighted the problem and documented the contractor's concerns. The meeting minutes were of particular relevance in this case because they were meticulously taken, sent to the executives of both parties and carefully read and revised for accuracy. ''A reading of the minutes is very revealing: they were obviously regarded by everyone as a method of formally communicating their concerns to the other party".[10] The court held that any contractor claims not covered by specific notices were covered by the meeting minutes, where ''the contractor carefully listed his concerns, asked for action and indicated his clear intention to claim or demand the appropriate remedy at one time or another",[11] which was considered to be sufficient to be compliant notice.

Interestingly, in *obiter*, the court in *W.A. Stephenson* noted that, even if any of the claims advanced by the contractor would not have been held to be fully captured by the content of the meeting minutes, the owner had waived its right to rely on the notice requirements in any event, even though the parties' agreement contained wording to the effect that any waiver had to be in writing and even though no written waiver existed:

> I have already said I consider the notices of claims given were sufficient. It is possible that a few ''claims" would not completely satisfy the [notice] sections [of the contract]. If that were so, notwithstanding the provision that a waiver must be in writing, it is my considered opinion, and I find as a fact, that because of its conduct under all the circumstances in this action, including keeping of the detailed site minutes, keeping of minutes of other meetings, the letters written by the contractor, . . .negotiations for settlement of some of the claims. . .and the fact that from beginning to end of this entire contract the question of formal notice was never raised by the owner at all, the owner has waived any more formal

[10] *Ibid.*, at para. 174.
[11] *Ibid.*, at para. 175.

> compliance with the notice provision that is in face evidenced by all the material in this law suit.[12]

This discussion highlights that the main distinction between the different rulings and approaches in *Corpex* and *W.A. Stephenson* is likely more factual than legal: in *Corpex*, no indication of a claim was given by the contractor until after the work was complete despite the soil condition problem being known early on, whereas in *W.A. Stephenson* there was evidence of a continual stream of specific complaints by the contractor regarding access and delays and of prior discussions between the parties on this exact issue. The court in *W.A. Stephenson* also found that the owner had committed a "deliberate, anticipatory breach of contract"[13] by deciding ahead of time not to extend the contract schedule under any circumstances, regardless of cause, which had significant impacts on the contractor and likely influenced the court's unwillingness to allow the owner to rely on a technical breach of a seemingly procedural provision in order to escape liability.

The year after *W.A. Stephenson* was decided in British Columbia, the courts of the same province (and, in fact, the same judge who wrote the decision declaring the notice sufficient in *W.A. Stephenson*, who had since been elevated to the British Columbia Court of Appeal) opted to uphold the need for strict compliance with a notice provision, albeit in a slightly different context. The 1988 Court of Appeal ruling of *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*[14] has become one of the most commonly cited cases in Canada on this issue. The *Doyle* case was different because it surrounded a contractor claim for the cumulative impact, or ripple effect, costs of multiple change orders; all such change orders had previously been granted and had compensated the contractor for all additional physical and performance costs of the extra work. Over the course of a contract to expand a bottling plant facility, partly due to a misunderstanding by the contractor that it would have exclusive possession of the work site when this was not in fact the case, there were a number of delays and changes that led to 50 change orders increasing the initial contract price by over 25%. The change orders themselves did not contain any reservation of a future right to claim for extra costs arising out of the change. When the work was over half completed, the contractor advised of its intention to claim for additional impact compensation, which was recorded in meeting minutes, although a formal claim was not provided

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12 *Ibid.*, at para. 176. Emphasis added.
13 *Ibid.*, at para. 193.
14 *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (C.A.).

until months later, just before substantial completion. The owner argued that the contractor had failed to comply with the notice provisions of the contract, which required a party claiming any reimbursement due to the other party's wrongful acts to make a claim in writing "within a reasonable time" after observing the damage suffered, but it also argued that any impact costs should have been caught and captured by the initial agreed change orders and not claimed subsequently, stating that the later addition of impact costs without notice deprived it of the opportunity to explore methods of cost reduction.

The British Columbia Court of Appeal held that the contractor had not complied with the notice provision with respect to its impact claim and noted that "the obligation on the contractor to give notice within a reasonable time of the events occurring which he considers may entitle him to additional payment under the terms of the contract is generally interpreted by the courts as a condition precedent to a claim and failure to give the notice may deprive the contractor of all remedy",[15] even though any such contractual denial of a cause of action must be accomplished by clear words. In this case, it ruled that the meaning of the notice provision was "obvious and comes patently within the 'clear words' principle"[16] and held that any conclusion not barring the contractor from proceeding with its impact claim unless it advanced the claim in writing within a reasonable time "would render [the notice provision] nugatory".[17] As such, it found that the contractor had not met the necessary notice precondition with respect to its ripple effect claim and was barred from proceeding with it. Unlike in *W.A. Stephenson*, the court in *Doyle* also found that the reference to the impact claim in the meeting minutes did not constitute notice:

> The provision for notice is useless unless it gives some particulars to the owner as to what the complaint is. It must surely also be given in enough time so that he may take the guarding measures pointed out in *Corpex* if he so desires. An early notice also leaves the owner free to negotiate [under] the contract which may assist in the resolution of the problem. From the standpoint of the contractor, he may not, of course, know precisely what the monetary effect of accumulation of delays might bring about, but an early notification of his concern will also enable him to get himself into a negotiating position as to the method of solution of the problem, and to raise his concerns under the contract.

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15 *Ibid.*, at para. 35.
16 *Ibid.*, at para. 39.
17 *Ibid.*, at para. 40.

> The grumblings of this contractor, recorded though they may be in site minutes, display no intention to claim until December 1983 [well over halfway to completion]. Even then, no claim was actually advanced, but intent was indicated. The purpose of the notice is to give the owner an opportunity of considering his position and perhaps taking corrective measures, and he is prejudiced by not being able to do it.[18]

It is important to note that the Court of Appeal in *Doyle* did not state that site minutes or other project correspondence could never satisfy the requirements of a formal notice provision (the same judge who wrote the primary decision had just decided that they could be satisfactory in the right circumstances in *W.A. Stephenson*), but merely stated that the particular "grumblings" of the contractor at issue did not rise to the level of notice because they provided no details and displayed no immediate intention to claim. This was likely influenced by the fact that (1) as the court noted, the contract in *Doyle* required the provision of a full written claim and not mere notice, (2) the impact claim in question was substantial, and (3) the trial judge had found the owner was prejudiced by the failure to provide timely notice. The scant notification of the impact claim provided in the *Doyle* site minutes pales in comparison to the orderly and ongoing presentation of project issues found in the meeting minutes in *W.A. Stephenson*, which is probably the primary area of difference between these cases; the contract in *W.A. Stephenson* also required only the provision of notice and not the provision of the full claim within the relevant notice period. The discussion of notice in *Doyle* was further impacted by the court's separate but vital finding in the case that the owner was entitled to expect the initial change orders formally agreed and paid over the course of the project to encapsulate all additional costs and expenses arising out of the covered changes absent language to the contrary, which by itself acted to bar the contractor's impact claim.

The first significant Alberta case on the issue of formal notice requirements may also be the high water mark of judicial strict compliance interpretation: the 2000 Alberta Court of Appeal decision in *Dilcon Constructors Ltd. v. ANC Developments Inc.*[19] *Dilcon* involved a productivity, delay and scope growth claim by the contractor in relation to the construction of a newsprint mill where the owner had failed to provide drawings, equipment and site access in a timely manner as required by the contract. With respect to delays, the contract provided

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[18] *Ibid.*, at paras. 77-78.
[19] 2000 ABCA 223.

that the contractor was required to immediately notify the owner in writing within seven days of the occurrence of any delay and then required to submit a written claim for any resulting schedule extension or additional costs no later than the earlier of six months after the commencement of the delay or seven days after the full extent of the delay or the claim could reasonably be determined, failing which such claims would be rejected. The contractor provided a single initial notice of delay with respect to a particular drawing release (which resulted in the implementation of an acceleration program on site) but gave no further formal notices for any subsequent delays, although it was held at trial that field meeting minutes over the course of the project "are replete with pleas by Dilcon for materials and drawings so that it might get on with its work".[20] The contractor never submitted a specific claim for delay damages or costs until commencing proceedings.

The Court of Appeal noted that the formal notice provisions of the contract were useful to the owner not only to allow it an immediate opportunity to deal with any delays, but also because they gave warning that the contractor might be seeking a time extension or additional compensation: "Written notice crystallizes the position of the parties on the issue of delay. Written notice informs the owner that the contractor considers that the delay warrants an extension of time and/or damages".[21] The court further confirmed that the express reference in the agreement that claims submitted outside of the notice period would be rejected made it clear that "[t]ime limits are. . .important".[22] It then made two critical findings, holding that the delay claim provisions in the contract (which contained the notice requirements) were the exclusive legal process for the parties to use to handle any delays and that the contractor, even considering its warnings in the project meeting minutes, had failed to meet the delay notice preconditions and was thus barred from advancing any form of delay claim.

The court stated that "clear language is required for an exclusion clause to be effective in precluding remedies other than those prescribed by the contract",[23] and the contractor argued that the delay provision in its contract did not extend to cover damages for breach of the owner's implied obligation to provide drawings in a timely fashion and meet certain schedules set out under the agreement. The court disagreed, holding that the contract not only provided detailed remedies for both damages and schedule extension in the event of a delay but also expressly

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[20] *Ibid.*, at para. 29.
[21] *Ibid.*, at para. 53.
[22] *Ibid.*, at para. 32.
[23] *Ibid.*, at para. 47.

excluded a right to damages if the notice and claim provisions were not complied with. "The delays in this case fall squarely within the types contemplated by the delay clauses of the contract. In our view, the rights and obligations set out in [these provisions] are inconsistent with an unlimited right to sue for common law damages for delay beyond those set out in the contract. . .. We conclude that the contractual provisions provide an exclusive method for claiming damages for delay".[24] As such, the contractor could not avoid mandatory compliance with the notice requirements by separately pursuing a cause of action at common law. It was clear that the contractor had not made any formal written claim for additional delay costs within the time limits set out by the contract, and the Alberta Court of Appeal concluded that its other attempts to communicate its concerns did not satisfy the contractual requirements for notice:

> To conclude that Dilcon complied with the notice provisions, we would have to conclude that the complaints Dilcon made at the site meetings, which are recorded in the minutes, are sufficient to constitute notice of delay as required under the contract. In relation to the requirement of a subsequent claim within stated time limits, we would also have to conclude that Dilcon's request for compensation [a letter which was submitted after the expiry of the notice period and made no mention of the delay provision] constituted a sufficient follow-up to the "notice" of delay.
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> Such an interpretation flies in the face of both the contract and the facts. The contract clearly stipulates not just that the notice be *recorded* in writing, but that it be *given* in writing. Dilcon was clearly aware of this, as it wrote letters of complaint giving notice of delay. Furthermore, [its subsequent letter requesting compensation] clearly focuses on compensation for increased scope of work, rather than for loss of productivity due to delay. . .. Therefore, we cannot accept an interpretation that Dilcon gave notice within the meaning of the contract. To hold that Dilcon has complied with the provisions makes a mockery of the clear time limits and notice requirements set out in the contract itself.[25]

It can be difficult initially to reconcile the approach taken to the use of site meeting minutes in *Dilcon* with the much more permissive and lenient approach taken in *W.A. Stephenson*, and even to the more fact-

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[24] *Ibid.*, at para. 55.
[25] *Ibid.*, at paras. 60 and 61.

based analysis employed with respect to such minutes in *Doyle*, as anything other than "a raw difference between the British Columbia and Alberta courts on the question of whether site meeting minutes can serve as notice of claim when the contract language refers to giving written notice of a claim",[26] as Ontario litigator Warren Mueller, Q.C. states in his article on the topic. However, this conclusion may be overly simplistic, and it should be noted that the Alberta Court of Appeal in *Dilcon* did not make any reference at all in its decision to *W.A. Stephenson* or *Doyle*, or even to *Corpex*, let alone specifically distinguish them. The contract in *Dilcon* was also more difficult to satisfy by way of less-than-formal compliance, as it required not only written notice but the full submission of a subsequent and separate written claim within set timelines, the latter of which proved too difficult to satisfy by more casual means. All that said, the *Dilcon* case does represent a stricter judicial result than the prior British Columbia decisions, as well as a decreased willingness by the court to look at the practical realities and actual states of parties' knowledge in a given situation when ruling on notice in light of the contractual requirements at issue.

Each of the British Columbia and Alberta courts had a further opportunity to rule on this same issue after *Dilcon*, and in each case the courts demonstrated greater flexibility and a more contextual application of contractual requirements, albeit with mixed results. In its 2001 decision of *Northland Kaska Corp. v. Yukon Territory*,[27] the British Columbia Supreme Court reviewed a soil conditions notice clause on a highway construction contract that was similar to the delay notice provision in *Dilcon*: it required written notice of an intention to claim for a substantial difference in soil conditions to be provided within 10 days of the contractor encountering such conditions, to be followed by a written claim for any resulting expenses or damage within 30 days of issuance of the final completion certificate for the work, failing which no additional payment would be made by the owner. The contract also stated that no payment for any extra expense, loss or damage would be made to the contractor other than as expressly stipulated in the agreement (and thus subject to the above notice requirements). The contractor was aware of wetness problems at the site from the time it commenced construction work in April 2012 but was able to relocate its forces and re-sequence its work to avoid them until July 17th, 2012. It provided oral notice to the owner on July 27th that it was concerned with the wet materials encountered on the project and provided a written

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[26] Warren H.O. Mueller, Q.C., "The Impact on Damage Claims of Contractual Requirements for the Giving of Notice of Claims" (2006) 48 C.L.R. (3d) 17.

[27] (2001), 10 C.L.R. (3d) 190 (B.C.S.C.).

letter to this effect on August 4th. The contractor argued both that the oral notice was sufficient and that the owner had prior constructive notice of the soil problem by virtue of daily consultation meetings and field reports at the site identifying the contractor's encounters with saturated soils; it stated that this complied with "the intent and spirit" of the notice provision.

The court in *Northland Kaska* reviewed *Corpex*, *W.A. Stephenson* and *Doyle* in detail and set out a measured approach for handling notice issues in construction claims. It stated that it was evident based on the prior case law that "notice must be given so as to enable the other party to decide what action it wishes to take in light of the change in soil conditions and the increased compensation that the contractor will be seeking pursuant to the change in soil conditions".[28] The contractor does not have to realize the full consequences of the change before the notice clock starts running, but "once the contractor is aware that the soil conditions might result in a claim. . .notice must be provided within the prescribed time period".[29] In terms of the form of notice, the court held that strict compliance with formal requirements would in some cases be "onerous and unrealistic"[30] in the context of the necessary complexity of establishing a claim and the limited 10 day window within which to provide notice, but it stated that the purposes underlying the notice provision "should be given effect in determining what constitutes sufficient notice".[31] In particular,

> it is my opinion that any notice of a change in soil conditions must be unequivocal in stating the contractor's intention that: (1) it has encountered what it considers to be a substantial difference in soil conditions. . .and (2) that it intends to make a claim under [the contract] for any extra expense, loss or damage resulting therefrom. This does not mean that the written notice must be overly detailed. . .[but it] should contain such particulars so as to enable the owner to appreciate the contractor's concerns, to consider its position, and to make an informed decision as to how to proceed. Timeliness and certainty of the notice is essential.[32]

The court found that the parties, as sophisticated entities, should be held to the negotiated notice period time frame to which they agreed, requiring sufficient notice to have been provided to the owner within 10

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[28] *Ibid.*, at para. 69.
[29] *Ibid.*, at para. 69.
[30] *Ibid.*, at para. 102.
[31] *Ibid.*
[32] *Ibid.*, at para. 103. Emphasis added.

days. It appeared willing to consider the possibility that verbal or constructive knowledge could satisfy this requirement, but only if such knowledge included specific knowledge that the contractor intended on bringing a claim in relation to the soil condition change. "Knowledge of the owner that the contractor is encountering difficulties is not equivalent to having knowledge, constructive or direct, that the contractor is intending to make a claim for compensation for extra work and costs incurred in relation to those problems."[33] In this case, while the parties' communications disclosed the owner's knowledge within the 10 day window (calculated charitably for the sake of argument as starting when the contractor could no longer work around the wet soil material) that the job was not going well and the contractor was encountering difficulty with soil conditions, these communications did not disclose within the required time period any knowledge that the contractor believed conditions differed from those set out in the contract and intended to make a claim in respect of them. As such, the soil conditions claim was dismissed.

A similar approach was taken by the Alberta Court of Queen's Bench in its post-*Dilcon* 2006 decision of *Graham Construction & Engineering (1985) Ltd. v. LaCaille Developments Inc.*[34] This was a delay claim in relation to the construction of a high-rise condominium where the notice provision mandated notice in writing of any claim not later than 10 working days after the commencement of the delay. No formal delay notice was provided by the contractor, but as in many of the cases above, it argued that it repeatedly informed the owner and its consultant verbally and in writing that their acts and omissions had led to project delays, which constituted sufficient compliance with notice requirements. There were over 250 change orders on the project, and after a certain date the contractor's quotation letters with respect to them began including a statement expressly reserving the contractor's right to bring a future claim with respect to any additional costs incurred as a result of the change. The court held that compliance with the notice provision was a condition precedent to any delay claim and concluded that the contractor had not provided any formal, official notice of delay. However, somewhat surprisingly in light of *Dilcon* but in line with *Northland Kaska*, it stated that this failure "is not fatal to [the contractor] Graham's claim for damages for delays."[35]

The Court of Queen's Bench held that the required notice contemplated by the contract was "written notice evincing Graham's present intention

[33] *Ibid.*, at para. 108.
[34] (2006), 70 Alta. L.R. (4th) 181 (Q.B.).
[35] *Ibid.*, at para. 217.

to pursue damages for an identified delaying act or omission not later than 10 working days after the delay's. . .commencement",[36] but stated that this notice did not have to be in any particular form. It concluded that the contractor first complied with contractual notice requirements when it began including the reservation in its change order quotation letters regarding its right to claim for additional costs incurred as a result of the change. Prior to this point, while the contractor had conveyed information to the owner about project delays, it either took the wrong form (not in writing) or took the right form but "failed to evince Graham's present intention to pursue damages for an identified delaying act or omission",[37] thus placing it within the realm of what *Doyle* labelled "grumblings". The express reference to a possible future claim for additional costs in the quotation letters, while not in any form that would be considered formal notice of delay under the contract, was sufficient to meet the necessary criteria for valid notice and satisfy the precondition to the contractor's right to claim, thus allowing the contractor some remedy for the damages it had suffered. The *Graham* case, even though it is only a trial decision whereas *Dilcon* is an appellate authority, arguably helps to soften the impact of *Dilcon* and to bridge the gap between it and the other notice authorities; like *Northland Kaska* (which was not discussed in *Graham*), it strictly enforced notice time limits but was flexible on the form of notice provided as long as the fundamental purposes of notice were satisfied.

The two principles relating to notice provisions on which the bulk of the case law is essentially unanimous are that (1) time limits in notice provisions will be respected, such that it is the parties' actions and correspondence within the notice time period that must be examined to determine if notice has been provided, and (2) the content of any notice, in order to be considered sufficient, must include some mention of the party's intention of making a claim, or at least reference the possibility of a future claim. Taking all of the above cases together, it would appear that courts generally will strictly enforce notice time limits imposed in a contract in respect of claims but are normally willing to consider alternative means or forms of notice within the stipulated time period, provided that they are not mere notice that a given event has occurred but also make it clear that the party affected is considering or intends on making some form of claim for additional compensation, and provided that further express contractual requirements as to the content of the notice or any subsequent claim do not defeat this possibility. Unfortunately for parties facing potential notice barriers to claims in

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[36] *Ibid.*, at para. 218. Emphasis added.
[37] *Ibid.*, at para. 219.

Alberta, the two cases at the highest levels of binding authority in that province — the Supreme Court of Canada decision in *Corpex* and the Alberta Court of Appeal decision in *Dilcon* — are also the two most stringent decisions in terms of enforcing a strict application of the relevant notice provisions. However, both cases are explained somewhat by their facts: in *Corpex* the contractor did not provide any contemporaneous notice at all even though it had awareness of a potential claim at an early stage of the work, while in *Dilcon* the contract required a full written claim submission in addition to initial notice, a requirement much more difficult to satisfy by something less than strict compliance. While *Dilcon* may pose a challenge to any argument that informal or constructive compliance with contractual notice provisions is sufficient, we would submit that, given the surrounding (and in particular the subsequent) case law on the issue, and given the detailed and onerous contractual requirements in that case, it may not be accurate to suggest that this decision completely forecloses the possibility of such arguments being successfully made in Alberta.

A trio of more recent Ontario authorities reinforce how seriously Canadian courts take notice timing provisions and any explicit associated content requirements set out in a construction contract, although they too do not foreclose the possibility of constructive compliance within the notice period window in the right factual circumstances (a point that will be illustrated further in many of the cases discussed below in this article). The first is *Ross-Clair v. Canada (Attorney General)*,[38] a 2016 decision of the Ontario Court of Appeal, which featured a content-heavy multi-step notice provision akin to the one featured in *Dilcon* and arrived at a similarly onerous result. Ross-Clair had entered into a contract with Public Works Canada for the construction of a series of management office buildings which provided that, subject to the notice provision, no additional payment would be advanced by Public Works for any extra expense, loss or damage suffered by the contractor. The notice provision mandated that if any such expense, loss or damage was suffered attributable to any neglect or delay by Public Works, Ross-Clair was required to first give written notice of its intention to claim within 10 days of the occurrence of the neglect or delay and then provide a written claim for the extra expense, loss or damage to the project engineer within 30 days of the issuance of the project's Final Certificate of Completion, which claim had to "contain a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified".[39] As in *Dilcon*, the court

[38] (2016), 51 C.L.R. (4th) 179 (Ont. C.A.).

noted: "As can be seen, the provisions contain two main requirements — time and the provision of information in support of a claim for extras".[40]

On December 5, 2008, prior to project completion, Ross-Clair sent Public Works a letter advising of its request for a schedule extension and of its intention to advance a claim in relation to delays by Public Works that had impacted construction. It advised that the additional costs incurred as a result of the delays would be quantified and forwarded to Public Works at a later date. In a series of additional correspondence and meetings, Public Works repeatedly asked for additional details of the claim, which Ross-Clair provided on March 2, 2009 in the form of a letter citing delays due to site conditions, weather conditions, changes and adjustments in construction sequencing and attaching a document called an "Additional Costs Summary" that listed a series of subcontractors and then the cost of their work, which totalled $1,437,976. Public Works responded requesting supporting documentation regarding who bore responsibility for delay and explaining how the bare subcontractor cost figures provided arose out of the delay and how they were substantiated. Other than a subsequent letter in March 2011 increasing the total value of its delay claim to $2,204,676 without further explanation, Ross-Clair did not provide any further material justifying its claim until submitting a formal claim report in May 2013, over a year after final completion of the project.

The application judge in *Ross-Clair* held that the contractor had complied with its obligation to provide a written claim sufficiently describing the facts and circumstances of its subject matter with respect to its initial claim for $1,437,976 (thanks largely to the attached Additional Costs Summary document) but not with respect to its subsequent increase (which was not explained or substantiated at all). On appeal, the Court of Appeal overturned this decision and found that Ross-Clair's submissions were wholly non-compliant with contractual notice obligations. The extent of those obligations was expressly spelled out in the contract: the claim information provided had to be sufficient to allow the project Engineer to determine whether or not the claim was justified. The court held that the bare subcontractor cost listing for the initial claim did not meet this threshold: "Without detailed information, it is difficult to see how the Engineer would be able to make a decision as to the validity of the claim. In my view, such a decision requires 'proof' that the claim is justifie".[41] Ross-Clair's letters had failed to include information relating to the nature and extent of Public Works'

[39] *Ibid.*, at para. 13.
[40] *Ibid.*, at para. 14.
[41] *Ibid.*, at para. 61.

responsibility for the delay, to confirm that the expenses claimed fell within the set of compensable expenses in the contract, or to confirm that no part of them had already been paid. The Additional Costs Summary did not contain any breakdown of the subcontractor cost figures or tie them to the facts of the claim asserted. That level of detailed information was not provided, despite numerous requests by both Public Works and the engineer, until the formal claims report was submitted well after completion and outside of the required notice period. As such, the court held that Ross-Clair's claim was barred in its entirety due to lack of compliance with notice provisions, despite the fact that the initial notice of intention to claim had been issued in proper form and in a timely fashion.

Similarly, in the 2017 Ontario Court of Appeal ruling of *Ledore Investments Limited (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.*,[42] the court held that a timely notice of intention to claim did not preserve Ellis-Don's right to advance a claim against its steel subcontractor for mid-project acceleration costs allegedly arising out of that subcontractor's delays because it did not comply with the content requirements of the contractual provision in question. Unlike the provisions in the cases above which dealt with procedures for providing notice of given events or claims, the clause in *Ledore Investments* was a full and final contractual release given by Ellis-Don to its subcontractor Ross Steel upon final payment of Ellis-Don's prime contract with the project owner, expressly waiving and releasing Ross Steel from all claims except for "those made in writing prior to the date of final certificate for payment of the prime contract and still unsettled".[43] Prior to this date, Ellis-Don had written a letter to Ross Steel advising that Ross Steel's delays had forced Ellis-Don to expend substantial monies to recover the schedule and that it was "currently assessing the financial impact that Ross Steel's slippages have had on Ellis-Don and we intend to recover the costs from you".[44] However, despite internal meetings where the issue was raised and meetings with Ross Steel prior to prime contract completion, Ellis-Don did not follow up on its letter or formally submit any delay claim before the release took effect.

An arbitrator ultimately ruled that Ellis-Don had not made a "claim in writing" for the delay and acceleration costs prior to prime contract completion and that it was therefore barred from doing so; with respect to Ellis-Don's prior letter, the arbitrator stated that "the intention to

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42 (2017), 71 C.L.R. (4th) 221 (Ont. C.A.).
43 *Ibid.*, at para. 9.
44 *Ibid.*, at para. 4.

claim is not the same as a claim".[45] This conclusion was initially overturned on appeal, where the Ontario Superior Court of Justice, citing *Doyle*, stated that the latter seminal case stood for the proposition that "provisions requiring claims to be made in writing should be treated as provisions requiring written notice of claims, contrary to the approach taken by the arbitrator",[46] and that therefore Ellis-Don's notice of an intention to bring a claim was sufficient to avoid the application of the release. (With respect, this seems to be a misreading of *Doyle*, where the notice provision in question required an actual claim to be advanced within a reasonable time, not only notice of an intention to claim; the British Columbia Court of Appeal specifically notes in *Doyle* that even after the "grumblings" of the contractor finally coalesced into a formal intention to claim midway through the project, no claim was ever actually advanced. While *Doyle* does discuss notice provisions generally, it does not stand for the principle that a contractual requirement to submit a full claim can be satisfied by the mere provision of notice of intent to claim.)

The Court of Appeal restored the arbitrator's ruling and expressly confirmed that his decision was not inconsistent with *Doyle*: "his dichotomy between 'intention to make a claim' and 'an actual claim' is similar to the distinction in *Doyle*. . .between 'grumbling display[ing] an intention to claim' and an actual claim".[47] The issue in *Doyle* was that the contractor's grumblings documented in site meeting minutes did not contain enough detail to inform the owner of a possible claim or display a sufficient intention to claim to be considered immediate notice, and were not the actual claim itself, which was provided much later; the issue in *Ledore Investments* was that the full and final release which activated on prime contract completion acted as a sort of limitation period for any and all claims that were not formally advanced before final payment occurred. Just as a communicated intention to bring a proceeding does not satisfy limitations legislation which requires the actual commencement of a proceeding within the limitation period, so too did the stated intention to advance a future claim by Ellis-Don fail to trigger the exceptions to the full release, which expressly mandated an actual claim made in writing. Like *Ross-Clair*, *Ledore Investments* confirms that any specified contractual content beyond the provision of mere notice can impact how a court assesses a notice issue and make it harder for substitute or constructive notice arguments to succeed.

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[45] *Ibid.*, at para. 6.
[46] *Ibid.*, at para. 10.
[47] *Ibid.*, at para. 22.

Finally, the 2018 Ontario Superior Court of Justice's ruling in *Urban Mechanical v. University of Western Ontario*[48] lands squarely in line with what might be expected through the application of the above core principles on notice provisions. Urban was the mechanical subcontractor to general contractor Norlon Builders and advanced a claim with respect to additional labour and material costs employed on the installation of piping in a school building because it was required to switch pipe coupling applications partway through the project due to its preferred coupling's non-compliance with contractual specifications. Part of Urban's subcontract with Norlon stated that Urban would be conclusively deemed to have accepted a decision of Norlon relating to the subcontract or its interpretation and to have waived and released Norlon of any claims relating to that decision unless within seven business days after receipt of the decision Urban sent notice in writing of a dispute to Norlon containing the particulars of the dispute. After Urban had sent its invoice to Norlon for the additional labour and material costs, Norlon had responded in writing six days later rejecting the claim for extra payment and reasserting its position that Urban's initial coupling method was contractually non-compliant. Urban continued with the work, though it advised two months later that it was continuing with the project "under protest". Norlon immediately advised that Urban had waived any right to claim against Norlon in relation to the additional costs due to its failure to issue a notice of dispute within seven business days.

The court agreed, stating that Norlon's response to Urban's additional costs invoice set out Norlon's position on the disputed specifications and advised that no amounts would be paid by it in relation to the coupling issue, which constituted its "decision" on that contractual issue. "Urban was then contractually obligated to send Norlon a notice in writing of dispute within seven working days. It did not take that step".[49] The court reviewed *Corpex*, *Doyle*, and the 2012 Ontario Court of Appeal decision in *Technicore Underground Inc. v. Toronto (City)* (which will be discussed in detail in the discussion on waiver below) and confirmed that the notice provision was a mandatory contractual requirement imposing a set time period for notification of a dispute and specifically setting out the consequences for a failure to do so. "The language is clear. Urban is bound. It did not serve the required notice within the applicable period. The subcontractor is deemed to have accepted Norlon's decision concerning the [pipe coupling] claim".[50]

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48 2018 ONSC 1888.
49 *Ibid.*, at para. 109.
50 *Ibid.*, at para. 115.

While the decisions above represent the key authorities on the issue of notice preconditions to contractual claims, there are a series of other cases which establish important supplementary principles that may be relevant to any analysis of a notice provision. In *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.*,[51] the British Columbia Court of Appeal held in 1997 that it was no bar to a contractor's claim for additional compensation due to owner-caused delay that the contractor failed to seek a formal extension of time under the contract, even though there was a separate contractual mechanism in place for it to do so. *Foundation Co.* is also interesting because the contractor was not penalized for proceeding under the more lenient of two potentially applicable notice provisions in circumstances when it likely would not have satisfied the more stringent provision. The contract in question stated that the contractor could seek a time extension for any owner delay by giving written notice within 14 days of the commencement of the delay, but also separately provided that any claim by a party for damages arising out of the wrongful act of the other party must be supported by notice provided "within a reasonable time". The contractor, despite being aware from early in the job about the delay problems, never sought a time extension but simply carried on with the work as best it could and then later sought additional compensation in the form of delay damages. The court stated that there was no obligation on the contractor to seek a time extension even though it was "obvious" that it was entitled to one and concluded that it had provided sufficient written notice within a reasonable time of its delay damages claim and was thus entitled to recovery.[52] This finding that a party's decision not to immediately pursue an available contractual remedy does not preclude that party from later access to other potential remedies under the same agreement is of potential significance because it suggests that parties can elect to enforce their contractual rights in different ways and at different times (where the contract does not expressly prohibit this) without barring themselves from all recourse.

2.2 Owner is Equally Required to Give Notice

The above cases all involve claims made by contractors against project owners for additional compensation arising out of the performance of work. On the whole, Canadian jurisprudence on notice provisions is far more commonly rooted in contractor claims, but the principles it sets out apply equally to owner claims (or owner responses to contractor claims or findings of entitlement). In fact, the trial decision in the *Foundation*

[51] (1997), 33 C.L.R. (2d) 159 (B.C. C.A.), additional reasons 1998 CarswellBC 308 (C.A.).
[52] *Ibid.*, at paras. 62 to 65.

Co. case just discussed[53] included a lengthy analysis by the British Columbia Supreme Court about a cross-notice provided by the owner with respect to its own delay counterclaim, which was ultimately found to be non-compliant with notice provision requirements that led to the owner's claim being fully barred. While the overall trial judgment was reversed on appeal, the findings regarding the owner's conduct and entitlement with respect to notice were left untouched.[54]

The notice requirement in question for the owner's claim in *Foundation Co*. was the same as the less strenuous contractor notice provision set out above, requiring notice of a claim "within a reasonable time". The owner, despite being aware of an economic loss claim against the contractor arising out of completion that was delayed for months, intentionally elected to hide any intention of advancing a claim from the contractor until a key part of the project was complete and ready for use, despite the contractor advancing its own claim in the meantime. There were clear internal meeting minutes documenting this "strategy of no response" to the contractor's claim, whereby the owner simply recognized that the project was "late" without raising any allegation of contractor fault. Until one month after substantial completion, when the critical piece of the project was finally completed, the owner simply advised the contractor that it was "reviewing" the contractor's claim (even though it was not in fact doing so), but immediately after the relevant portion of the project was fully completed, it sent written notice to the contractor of the "considerable damages" arising out of its late performance. The court held that this notice, issued months after the owner's awareness of the issue and consciously withheld until the most opportune time for the owner, was not sent "within a reasonable time" and that the owner's claim was therefore barred:

> This is not a case of oversight or omission. In September [the owner] made a decision to adopt a policy of "no response" to the CMI [subcontractor] overtime claims and this posture continued unchanged through the fall even after it received the formal CMI and FCC [subcontractor and contractor] claims in November. The motive was clear: it did not want CMI or FCC to leave the site. While this policy may have been open to [the owner] with respect to the FCC and CMI claims, it was clearly not open to it in respect of its own claim. GC 22 required written notice within a reasonable time. By electing to remain silent through the fall of 1989 until January 31, 1990,

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[53] *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.,* (1995), 25 C.L.R. (2d) 1 (B.C. S.C.), additional reasons 1996 CarswellBC 683 (S.C.).

[54] *Foundation Co*. Court of Appeal decision, *supra*, note 51 at paras. 67-68.

> [the owner] prejudiced FCC by denying to FCC the opportunity to mitigate [the owner's] claim.[55]

While the contractor provided both ample notice and detailed information of delay costs, the owner not only avoided giving any notice of its delay counterclaim but led the contractor to believe that its claim "would be fairly and equitably considered"[56] when it was already clear that it would be denied, thereby preventing the contractor from taking steps to refuse further extra work, complete its remaining scope more quickly and minimize the quantum of the owner's delay counterclaim.

> This is not a case of omission; rather it is a case where the owner made a deliberate decision not to put the contractor on notice until 5 months after the substantial performance date had passed and until after the contractor had virtually completed its work on the project. This is, in my view, the precise conduct which the courts in *Doyle* etc. have said runs directly contrary to the intent of contract [notice] language.[57]

The owner was therefore fully barred from advancing its counterclaim.

Similarly, in the 1999 British Columbia Supreme Court case of *West Shore Constructors Ltd. v. Sandspit Harbour Society*,[58] an owner's failure to provide timely notice disputing a formal finding by its project consultant resulted in the owner being contractually deemed to have accepted such finding and being prevented from later raising a defence to a summary judgment claim by its contractor based on the consultant's determination. The contract between the Sandspit Harbour Society and its contractor West Shore related to the construction of a portion of a marina by West Shore and mandated that all claims or other matters relating to the performance of the work be referred to the consultant for initial determination, further stating that each party would be conclusively deemed to have accepted a finding of the consultant unless that party sent notice in writing to the other party and the consultant disputing the finding within 15 working days after its receipt. The timing of West Shore's performance was dependent upon the timely completion of prior related scope by JJM, another contractor retained by the Society in relation to the marina project. It became quickly apparent that JJM's work was severely delayed, which resulted in West Shore having to split

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55 *Foundation Co*. BCSC decision, *supra*, note 53 at para. 559.
56 *Ibid*., at para. 562.
57 *Ibid*., at para. 564.
58 (1999), 48 C.L.R. (2d) 299 (B.C. S.C.), affirmed on appeal (on slightly different but consistent grounds) 2000 BCCA 663.

its work into two phases and delay its completion by over half a year, and which led the Society to inform JJM before West Shore's work even commenced that the Society would be pursuing JJM for any costs resulting from such delay.

West Shore submitted a formal claim for the additional costs arising out of the JJM delay to the project consultant shortly after the first phase of its revised scope had ended and prior to commencing work on the second phase. In the subsequent months it revised and updated its claim and provided a series of additional information requested by the consultant, after which the consultant prepared and issued a detailed report agreeing with the bulk of West Shore's claim and assessing its precise value. Upon receiving the consultant's report and quantum assessment, the Society did nothing at all, neither approving nor disputing any part of the finding (although it did contemporaneously notify JJM that it was setting off the exact quantum determined by the consultant from any amounts otherwise owing to JJM for its work). It was not until months later, after West Shore had commenced proceedings and filed its application for summary judgment, that the Society raised numerous arguments about the form and content of the claim and the subsequent finding. The court held that the finding clearly fell within the scope of the consultant's authority under the parties' contract and that the Society's failure to issue a notice of dispute within 15 days of receiving the finding was determinative: "I conclude that West Shore properly submitted its claim to the consultant as required, the consultant made certain findings with respect to the reasonable costs of the delay, and, when not disputed within 15 days, they became binding on the parties to the contract. This conclusion obviates the necessity of considering West Shore's proof of the quantum of its claim on the merits".[59]

Interestingly, the Society then went on to argue that West Shore was still prevented from recovering the amount determined by the consultant's finding because, even if the Society was in fact bound by the consultant's determination of West Shore's entitlement, West Shore had not provided any further notice in writing of its intention to make a claim in relation to that determination, as was required by a later provision in the parties' contract requiring any "claims for damage" to be made in writing to the responsible party within a reasonable time after the first observance of such damage. In an early echo of the Ontario Court of Appeal's distinction in *Ledore Investments* set out above, the British Columbia Supreme Court noted that the provision in question required a claim to be made within a reasonable time as opposed to notice of a claim: "It

[59] *Ibid.*, at paras. 15-16.

makes no mention of giving notice of an *intention* to claim".[60] Citing *Doyle*, the court then held that "what amounts to a reasonable time is to be considered in each case having regard for all of the relevant circumstances. What is reasonable is the time that will permit a party to consider and perhaps alter its position such that it will not be prejudiced by a claim being made that was not expected".[61] In this case, not only did all parties involved (even the delaying prior contractor JJM) know and expect that a delay claim by West Shore was forthcoming, but West Shore presented its claim as soon as it was in a position to quantify its costs and well before the work was complete, which the court considered to fall comfortably within the reasonable time requirement. The fact that the Society had never attempted to inquire about the inevitable claim either prior to or after its issuance and had unduly delayed any response whatsoever to it further tarnished its later insistence in the courtroom on the importance of timely notification of intention. While it was unnecessary for the court to consider this issue, it also seems highly unlikely that West Shore would have had to meet a separate, even if potentially overlapping, contractual notice requirement tied to damage claims generally when it had already referred its delay claim to the consultant in writing in accordance with a prior contractual provision and its entitlement to recovery for that claim had already crystallized when the Society failed to respond to the consultant's finding within the required notice period. This would seem to run afoul of the principle from *Foundation Co*. that a party can elect the contractual remedy (and its related notice requirements) under which to proceed, even if another potentially applicable remedy/notice requirement also exists in the contract.

The 2002 British Columbia Supreme Court decision of *Centura Building Systems Ltd. v. Cressey Whistler Project Corp.*[62] is a further illustration of the importance of reasonable notice on both sides of a construction project. *Centura* is another owner notice case that considered the identical "within a reasonable time" claim notice provision at issue in *Foundation Co*. arising out of the same type of standard form contract. It is of somewhat limited precedential use because it is a summary dismissal case where the court determined that summary determination was not possible given the complexity of the factual details involved, but the court did hold that compliance with the notice provision constituted a precondition to the owner's claim, stating: "GC 9.2.2 is the only provision in the Contract that provides for timely notice of delay from

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60 *Ibid.*, at para. 19. Emphasis added.
61 *Ibid.*
62 (2002), 19 C.L.R. (3d) 142 (B.C. S.C.).

an owner or consultant to a contractor. It makes sense that a contractor should not be prejudiced by late notice of such a claim. Instead, it should be made aware of the concerns in time to ameliorate them, and take steps to limit further delay costs".[63] Left undecided was whether the overall course of dealings between the parties provided adequate notice to the contractor of the owner's intention to bring a delay claim. The owner had stated informally through the course of the job that as long as the contractor "showed good motivation and an effort to perform to the best of its ability they would not pursue a claim"[64] but continually raised concerns about delays in correspondence, letters, discussions and minutes. The court concluded that oral testimony and more extensive documentary evidence was required to determine whether the parties' dealings constituted notice of sufficient particularity to satisfy the contractual requirements. However, *Foundation Co.*, *West Shore* and *Centura* all make clear that owner notice obligations are construed and considered in the same way, and are rooted in the same judicial authorities, as contractor notice obligations.

2.3 Notice Requirements May be Applied Leniently where Facts Allow

Heintzman notes that while contractual notice obligations can often affect a party's ability to advance a claim, lack of formal compliance with such obligations will not always have this result, depending on the factual circumstances with which the party is faced:

> A building contract may state that a party is obliged to give notice to the other party in various circumstances. This sort of provision may affect the right of the first to assert that there has been a breach of contract.
>
> For instance, the contract may require that notice be given of delay. . .[or] that a notice of default, or a notice requiring the other party to cure the default within a specific period. . .be given before any right of termination is exercised. Failure to provide such a notice may disentitle the party which ought to have given the notice from asserting that a breach of contract has occurred or otherwise complaining about the default. . .. But the failure to give such notice may not be required if the relationship between the parties has totally broken down, if a cure was in fact impossible, if the notice was in fact given even though informally, if the giving of the notice was effectively waived because the defaulting party knew full well the nature

[63] *Ibid.*, at para. 41.
[64] *Ibid.*, at para. 51.

> of the default or if on a proper interpretation of the contract the failure to give the notice does not bar the assertion of a damage claim.[65]

There are a series of additional cases which, although not as commonly cited in the jurisprudence on notice provisions, further illustrate how the law surrounding notice is applied in a variety of factual situations and how courts can relax the application of formal notice requirements in the right factual scenarios. The first is the 1991 Newfoundland Supreme Court decision of *Nordic Construction Ltd. v. Hope Brook Gold Inc.*,[66] which related to a contract for concrete work on a facility at the owner's gold mine. The work faced challenges from the beginning involving late release of drawings by the owner, substantial revision of drawings post-release, scope and schedule changes and site access problems which cumulatively resulted in massive cost overruns and delays. The contractor brought a breach of contract claim for damages based on the additional costs arising due to the owner's actions, and the owner defended in part on the basis of non-compliance with contract notice provisions. The contract included a change order clause covering changes within the general scope of the contract which required the contractor to provide notice of any intention to claim for an equitable adjustment arising out of any potential change within 10 days of determining that a change had occurred and which expressly stated that no claim would be allowed if the requisite notice was not provided on time. The contractor failed to comply with the notice requirement, which the owner argued was a complete bar to its claims.

The court agreed, but only in part: it held that those claims which could be considered to relate to scope changes, such as revisions to drawings and the resulting delays and ripple effects, were subject to compliance with the notice precondition and could not proceed. The contractor had sent a series of letters and other correspondence to the owner with respect to the problems experienced and had expressly reserved its right to advance a claim in relation to them, but the contractual notice provision specified that any claim notice had to include the impact and monetary extent of such claim, which information was not present in any of the correspondence within the 10-day notice window. However, the two primary allegations made by the contractor in the action related to the owner's failure or delay in providing drawings at the start of the work and its failure to provide site access, and the court held that neither of these failures "constitute a change in the activities to be performed to

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[65] *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2014) at 7-6, citing in part *Centura*.

[66] 1991 CarswellNfld 156 (T.D.).

complete the facility"[67] and as such were not captured by the change order clause or its notice obligations. "The owner has no right, in the absence of agreement between the parties. . .to make changes in the work or the timing of performance after the contract has been executed. [The change order clause] does not clearly include delay in issuing drawings and in providing work sites. These are therefore breaches of contract".[68] The bulk of the contractor's claims were therefore allowed to proceed. This illustrates that the subject matter of the scope of a notice provision may be construed narrowly where a claiming party's substantive rights are at stake.

The 1995 British Columbia Court of Appeal decision in *Fox v. Rindje*[69] is illustrative of the principle set out in *Heintzman* that the failure to deliver a proper default notice with a cure period will not deprive the owner of a remedy "if no remedial schedule could have cured the default".[70] In that case, a standard form construction contract required the owner to give the contractor a notice of default and a time period of five days within which to cure the default, or to commence to cure the default and provide an acceptable schedule for curing the default, before the owner could terminate the agreement. The contractor was many months late in the completion of construction of the owner's home, revised completion schedules had not been adhered to, many weeks had passed without progress, and the home was still not near completion, at which point the owner issued a notice purporting to terminate the contract immediately. The Court of Appeal concluded that, in the circumstances, the owner had lost confidence in the contractor "due to his continual delay, his failure to pay his sub-trades, his inattention to the project and the deficiencies in the quality of the work",[71] as such, there was no remedial schedule or other contractual cure possible within the mandatory cure period that would have been acceptable to the owner:

> Given the deterioration of the relationship between the parties, the [trial] judge correctly concluded that if the required notice had been given the [owner] would nevertheless have been entitled to terminate the contractor's right to continue with the work [as the contractor would have been unable to remedy or provide an acceptable schedule to remedy within the cure period].

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67 *Ibid.*, at para. 48.
68 *Ibid.*, at para. 49.
69 1995 CarswellBC 470 (C.A.).
70 *Heintzman*, *supra*, note 65 at 4-19.
71 *Fox*, *supra*, note 69 at para. 28.

> The evidence showed that there was a loss by the defendants of the fundamental factor of confidence which must underlie a contract of this type. To oblige an owner in this particular situation to comply with the requirements of [the notice provision] when there had been what amounted to a fundamental breach of the contract would be an unworkable conclusion.[72]

While the facts of *Fox* are highly influential on its result, the ultimate decision remains noteworthy: the court completely declined to enforce strict notice requirements that were clearly not followed because the required cure period would not have led to a material difference in the state of the owner's claim or of the parties' positions in light of the overall history of the project. This case involved a more personal type of contract, for home construction, and may not be as persuasive in a large industrial construction contract between two sophisticated business entities, but it serves to illustrate some of the inherent flexibility available to the courts to alleviate the impact of an onerous notice provision where the facts merit such an approach.

In *Campbell-Cox Inc. v. Photo Engravers & Electrotypers Ltd.*,[73] a 1996 decision of the Ontario Court of Justice, General Division, the owner challenged an arbitral award of change impact costs to the contractor arising out of the performance of an agreement to install a printing press that featured 147 change orders which significantly increased the lump sum contract price, as well as delays in provision of owner drawings and information and late and out-of-sequence deliveries of owner materials. The contractor brought a breach of contract claim for cost overruns over and above the various change order amounts. The court noted that "in a stipulated sum contract, the contractor is entitled to construction drawings and specifications which are essentially complete at the outset of the work".[74] The owner raised a notice defence and the court agreed that the provision of notice in accordance with the contract was a condition precedent to the contractor's claim.

There were two relevant notice provisions in the agreement which echoed the provisions in *Foundation Co.*, one stating that no time extension would be made for delay unless written notice of claim was provided within 14 days of the commencement of the delay, and the other applying generally to all claims for damage or reimbursement and requiring such claims to be made in writing within a reasonable time

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72 *Ibid.*, at paras. 28-29.
73 1996 CarswellOnt 4412 (Div. Ct.).
74 *Ibid.*, at para. 11.

after the first observance of such damage. No formal notice of claim had been made by the contractor, but it had expressed concerns about delays and cost overruns in job meeting minutes, in correspondence and over the course of negotiation of a significant omnibus change notice that had intended to cover all drawing changes up to the point of the notice. In those discussions, the contractor had calculated the actual cost of all such changes and had proposed the application of a set productivity factor markup from that point forward to cover future overruns; this was never agreed and applied, but the parties did agree to reconsider the issue once the contract was completed. The court held that, while the meeting minutes themselves may have only constituted "mere grumblings" as per *Doyle*, the negotiations surrounding the omnibus change notice and the correspondence arising out of it made known the nature of the claim in writing, quantified the cost, projected the ongoing financial impact of the owner's breach and led to an agreement to defer the matter and deal with these costs at the conclusion of the contract. In the circumstances, the court concluded that all such correspondence as a whole constituted sufficient compliance with the contractual notice requirements, and it agreed with the arbitrator that impact costs were properly awardable given the owner's delays and the extent of project changes.

The British Columbia Supreme Court displayed a series of flexible approaches to avoid the potentially harsh application of a number of different notice defences in its 1999 decision of *TNL Paving Ltd. v. British Columbia (Ministry of Transportation & Highways)*[75] in order not to deprive a paving contractor of its remedy for additional costs incurred in the performance of a government contract where both parties were clearly aware of the issues giving rise to the costs during the course of the work. The contractor's claim related to, among other things, significant quantity increases, changed conditions with respect to two different types of soil materials (referred to in the action as Type A and Type C) and delay costs. The government owner took the position that even if the contractor had an entitlement to a remedy under its agreement, its claim was nonetheless defeated by the contractor's failure to comply with notice requirements. Each type of claim involved different provisions and notice considerations, but the court eventually found that none of them precluded the contractor's ability to recover on its claim, even though it agreed with the general principle that a failure to give notice can, "in the appropriate circumstances, be fatal to a claim".[76]

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[75] (1999), 46 C.L.R. (2d) 165 (B.C. S.C.), additional reasons 1999 CarswellBC 2443 (S.C.).
[76] *Ibid.*, at para. 332.

With respect to the quantity increase claim, the owner argued that the contractor could not recover for additional quantities because it did not provide notice of such increases at the time, arguing "that the plaintiff was required to give reasonable notice, while the work was ongoing, of any such change".[77] The court found that argument to be "clearly flawed"[78] because the provision of the parties' agreement dealing with quantity adjustments contained no provision for notice at all and set no time limit for making a request for a compensation adjustment. Further, any such adjustment was necessarily to be based on the final actual quantities performed, so the claim was not fully crystallized until the work was completed. "Consequently, given no contractual terms with respect to notice concerning changes in quantity, I find no merit to any 'notice defence' to any of the plaintiff's claims associated with change in quantity".[79]

With respect to the changed conditions claims for Type A and Type C soil materials, the contract did require the contractor to provide notice of such a change within seven days of the contractor's detection of the change, and it precluded any payment to contractor if such timely notice was not provided. However, the contract did not specify the form and particulars of the required notice. The owner argued that the lack of any formal notice had severely prejudiced its ability to react to the changes discovered by the contractor. However, the owner's documentation, including contemporaneous site diaries kept by its personnel, indicated that it had full knowledge of the changes with the Type A material at the time of its discovery and was engaging with the contractor as to how to deal with it. The court held that "[t]here can be no prejudice to the defendant [owner] with respect to the Type A material, given that they were fully aware of the Type A material. I would not give effect to a notice defence in this regard",[80] even though no written notice was ever provided. Similarly, the owner's personnel were fully aware of the changes with respect to the Type C material although the contractor only gave verbal notice of it, and had discussed it with the contractor at a site meeting. Even though the owner's representative did not receive written notice in compliance with the contract of the change, "given that he was on notice, he could have taken steps to have his employees monitor the work, observe the nature of the materials, and do anything else which may have assisted him with respect to changed conditions. . .I would not give effect to a notice defence with respect to the Type C".[81]

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[77] *Ibid.*, at para. 338.
[78] *Ibid.*
[79] *Ibid.*, at para. 339.
[80] *Ibid.*, at para. 345.
[81] *Ibid.*, at para. 348.

Lastly, with respect to the delay cost claim, the court found that the contractual notice provisions were far more strict, requiring written notice within seven days of any delay, a further written notice within seven days of the resumption of work after the delay, and a fully detailed written claim within 30 days of resumption of work. The evidence was clear that the contractor had not complied with these provisions at all and the court held that the delay cost reimbursement provision in the agreement was therefore unavailable to the contractor in advancing its claim. However, similar to the Court of Appeal decision in *Foundation Co*., the court stated that the failure to meet the notice precondition in the delay provision did not preclude the contractor from accessing other contractual and legal remedies to recover similar damages:

> Although I would not allow a claim pursuant to [the delay cost reimbursement] provision of the Construction Agreement based on the plaintiff's failure to give notice, I am satisfied that [it is] not the only remedy available to the plaintiff arising from the events of reimbursable delay which I have found, and which I conclude were well known to the defendant as and when they occurred. Further, I have already concluded that the defendant, knowing of the plaintiff's claims for an extension of time and internally recognizing the validity of at least some of them, wrongfully refused to grant any extension of time. I do not find that the terms of the Contract preclude either an award for damages with respect to the events of reimbursable delay or an award founded on the wrongful deduction of [liquidated damages] based on the plaintiff's failure to meet the completion date.[82]

While the court's decision on the contractor's delay claim was motivated in part by the owner's unreasonable conduct in handling other delay and scheduling issues (another example of ancillary facts playing a role in determining legal outcomes), *TNL Paving* remains illustrative that notice preconditions can be interpreted with some flexibility in the right circumstances, particularly where the party facing the claim had full knowledge of the issue at the time, so as not to entirely preclude access to remedies. It also illustrates that the precise text of the notice provision in question, and any content-based requirements set out within it, can be determinative of the success or failure of an argument for less-than-formal or constructive notice, a point which assists in reconciling the seemingly harsher approaches taken by the courts in *Dilcon* and *Ross-Clair* when faced with content-heavy formal notice obligations with the

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[82] *Ibid*., at para. 354.

more lenient or forgiving approaches taken by other courts reviewing provisions that required mere notice only, without any further details as to form or content.

Finally, although its precedential value is unclear, a case where the court simply declined to enforce a clear notice provision that would otherwise have deprived the plaintiff contractor of remedy was the 2007 Ontario Superior Court of Justice decision of *Bianchi Grading Ltd. v. University of Guelph*.[83] In *Bianchi*, the contractor had been retained to perform excavation work as part of the development of a student residence and brought a claim for delays and additional costs due to late owner permitting and approvals and unknown site conditions. With respect to the delay claim, the university argued that the contractor was barred from proceeding due to its lack of compliance with a contractual provision mandating written notice of any delay claim within 10 days of commencement of the delay, which the contractor had not provided until months later. Citing *Doyle* and other decisions, the university claimed that the contractor had thus failed to comply with a condition precedent to any claim and was no longer entitled to compensation. The court agreed that *Doyle* stood for this proposition and held that the contractor was at least partly at fault for any delays in any event. Then it stated:

> However, the defendant [university] is not blameless in this regard. Clearly this Project could have been planned better from the beginning. The numerous design changes [made by the university] posed a challenge to all involved. Before a contractor set foot on the site, the location of the trees and the elevations for the site should have been known. . .. The decision to pay for fill to be trucked in so that the construction equipment did not submerge in mud could have been made a lot earlier. As a result, I find that the parties should share equally the responsibility for the delay.[84]

The court cited no case law in support of its conclusion to apportion liability in this fashion and took no steps to distinguish *Doyle*; it appeared simply to disregard the contractor's technical non-compliance with the notice provision in light of the owner's blameworthy behaviour. It is difficult to understand how it could have done so without further analysis shortly after citing jurisprudence confirming that notice compliance was a precondition to the advancement of a claim, which may open the decision up to further scrutiny if it is considered by

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[83] (2007), 61 C.L.R. (3d) 199 (Ont. S.C.J.).
[84] *Ibid*., at paras. 190 and 191.

another court (which it has not yet been to date, except as a proxy for the *Doyle* principle that it ultimately disregarded).[85] However, *Bianchi* remains an example of a court's ability to make a wide range of rulings in notice cases based on its outlook on a set of given facts, and it confirms that even a strong notice provision is not an automatic guarantee of success in litigation.

More recently, the British Columbia Supreme Court took a similarly sympathetic approach to a contractor's predicament against the grain of existing notice case law in its 2018 decision of *Maglio Installations Ltd. v. Rossland (City of)*,[86] granting the contractor Maglio a partial award in spite of clear non-compliance with a contractual requirement to provide written notice of a claim within seven days of its commencement. Maglio was the low bidder by far on a municipal dam and reservoir project and had its contract price reduced even further due to its initial bid amount being over the city's internal budget for the project. It quickly became clear that the city's budgeted figure was grossly insufficient for the full performance of the work, particularly due to severe groundwater issues where the city severely delayed agreeing to implement Maglio's proposed solutions, leading to schedule loss and added expense. Maglio completed the work more than a year behind schedule, through no fault of its own, and advanced a claim for additional costs arising out of the delay, which the city defended in part relying on the notice provision.

The court reviewed the findings in *Dilcon* and *Doyle* in detail and assessed all of the back-and-forth correspondence between Maglio and the city to determine if any could be found to evince a present intention to advance a claim within seven days from the start of any period of delay on the project. None of them met this requirement; the first indication that Maglio would be seeking additional compensation came at the very end of the project. The court appears to conclude that Maglio did not provide sufficient notice, but it then notes that "[t]here is much that is unsatisfactory in the behaviour of both parties",[87] states that the project was effectively doomed to fail at the city's initial budget figure and notes that Maglio had minimal opportunity to negotiate the contract's strict terms. Without distinguishing any of the notice cases, but also without giving them effect in the case under consideration, the court ultimately awarded Maglio a portion of its claim. Like *Bianchi*, while the precedential value of *Maglio* may be limited, the case reinforces that courts can be sufficiently motivated by facts and a desire to arrive at

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85 See *Turano's Home Improvement Inc. v. Stern,* 2018 ONSC 201 (S.C.J.) at para. 62, leave to appeal refused 2018 CarswellOnt 15100 (S.C.J.), additional reasons 2018 CarswellOnt 17814 (S.C.J.).

86 2018 BCSC 1313, additional reasons 2018 CarswellBC 3167 (S.C.).

87 *Ibid.*, at para. 79.

a fair and just result to avoid harsh application of notice jurisprudence where they consider it appropriate.

All of the decisions above illustrate the fact-sensitivity of notice cases, the influence of the parties' awareness and conduct, the potential importance of the precise notice wording and the potential unpredictability of any final ruling, even in light of the fairly well-established general principles surrounding this area of the law.

2.4 Waiver

The legal doctrine of waiver has potential application to both sides of a notice precondition allegation. On one hand, a party's failure to comply with a condition precedent to provide notice of a claim can potentially be considered to be (or at least argued to be) a waiver of such a claim, a willing relinquishment of the right to proceed with that particular cause of action. The notice cases above, even where they have the effect of precluding a party from advancing a claim, do not tend to construe a mere failure to provide notice as an active waiver (as will be seen below, this would likely have to be paired with a more conscious demonstration of intention to give up the right to claim), although they can have the same effect of barring the ultimate claim. However, on the other hand, as many notice cases indicate, the party ostensibly relying on the notice defence can itself be held by its conduct to have waived its right to insist on formal compliance with such provisions. As Derek A. Brindle, Q.C., notes in his 2008 article on owner claims against contractors and contractual notice requirements:

> The "modern" trend in the authorities is to avoid the draconian effects of requiring strict compliance with contractual notice requirements, on the basis that the conduct of the parties to the contract may evidence a waiver or estoppel preventing the party asserting non-compliance with mandatory notice requirements as a defence. The conduct of the parties in declining to require adherence to a formal claims notice requirement throughout the project may constitute a waiver, estoppel or acquiescence, as a result of which the absence of formal written notice of claims will not defeat claims for delays and additional compensation under the contract.[88]

Waiver arises where "one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect

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[88] Derek A. Brindle, Q.C., "Owners' Claims Against Contractors — A Primer" (2008) 70 C.L.R. (3d) 7 at Part B(3).

in performance of the other party".[89] The leading Canadian authority on applicability of waiver remains the 1994 Supreme Court of Canada decision of *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*,[90] which sets out the test to establish waiver of a party's right to claim in the face of a defect or deficiency in the performance of another party:

> Waiver will only be found where the evidence demonstrates that the party waiving had (1) full knowledge of its rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.[91]

The required intention to waive may be expressed formally or informally or may be inferred by conduct, but "[i]n whatever fashion the intention to relinquish the right is communicated. . .the conscious intention to do so is what must be ascertained".[92] Note that while communication of the intent to waive need not be express and can be inferred from conduct, the intention itself must be overt, unambiguous and unequivocal and must be based on full and complete knowledge of what is being waived. The result of a proven waiver is that the rights in question will be unenforceable.

Waiver often arises in construction cases when a party's words or actions on a project indicate an evident intention not to enforce strict contractual rights. For example, as noted in *Halsbury's Laws of Canada*,[93] provisions requiring prior written authorization from the owner as a condition precedent to payment for extra work "may be waived or modified by acquiescence in an alternative course of conduct. Such provisions were waived where the work is performed at the express or implied request of the owners. . .or where a delay resulting in additional costs is caused by the owner".[94]

One example of such a case is the well-known 1984 Ontario Court of Appeal decision of *Colautti Construction Ltd. v. Ottawa (City)*,[95] which stands for the proposition that strict enforcement of rigid contract terms

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89 [1994] 2 S.C.R. 490 at para. 19.
90 *Ibid.*
91 *Ibid.*, at para. 20.
92 *Ibid.*, at para. 19.
93 "Construction", *Halsbury's Laws of Canada*, 1st ed., 2013 Reissue, Vol. (Markham: LexisNexis Canada Inc., 2013).
94 *Ibid.*, at HCU-48.
95 (1984), 46 O.R. (2d) 236 (C.A.).

in the construction context will often be ignored where the parties in practice proceed in a different fashion than that dictated in the agreement. The case related to the construction of sanitary sewers for a municipality, and the contract was heavily worded in the city's favour and imposed significant procedural and substantive burdens on the contractor, including language requiring any changes to be authorized in writing, on which the city sought to rely to bar the contractor's extras claim. However, the parties had not followed any such formal written change process during the course of performance of the work. The court held:

> There is no doubt that this contract, drawn as it was to protect taxpayers, attempted to limit the liability of the City to such an extent that one would expect that not even the ordered rotation of the seasons could be reasonably anticipated by the contractor. The problem with contracts such as these is that they are so rigid and so restricting that the parties tend to amend them by their actions during the course of the contract. That was the situation in this case. There were several significant changes and additions to the work ordered by the City during the contract. None of these were in writing. All but the items in dispute in this case were paid for by the City.
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> In these circumstances the parties, by their conduct, have varied the terms of the contract which require extra costs to be authorized in writing. As a result, the City cannot rely on its strict provisions to escape liability to pay for the additional costs authorized by it and incurred as a result of its errors.[96]

Colautti has been followed and applied numerous times in support of the principle that parties can vary the strict terms of their construction agreements by conduct and thus prevent themselves from later relying on these terms. In a similar vein, cases such as the 1992 Alberta Court of Queen's Bench decision of *Homes By Wallace Ltd. v. Werklund*[97] and the 1987 Saskatchewan Court of Queen's Bench decision of *DIC Enterprises Ltd. v. Kosloski*[98] confirm that parties can be considered to have waived any contractual obligation to notify and agree on changes in writing when they proceed to handle changes without any such formalities over the course of the work. "One usual form of waiver is by the owner himself [verbally] ordering the extra work. Another is to consistently ignore the requirement in practice".[99]

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[96] *Ibid.*, at paras. 29 and 30.
[97] (1992), 1 C.L.R. (2d) 53 (Alta. Q.B.).
[98] (1987), 26 C.L.R. 85 (Sask. Q.B.).
[99] *Ibid.*, at para. 34.

This precise rationale was employed to grant an excavation subcontractor compensation for extra work it performed pursuant to verbal instructions in spite of a contractual requirement that all scope changes be agreed and documented in writing in the 1993 British Columbia Supreme Court decision of *Keen Industries Ltd. v. Hegge Construction Ltd.*[100] The subcontractor Keen had agreed to perform excavation and backfill work for a lump sum price on a site for which the general contractor Hegge had the responsibility for all supervision and all survey work. Hegge declined to carry out an initial survey of the site, and additional backfill material was ultimately required to be provided over and above the amounts on which Keen had based its price because the site elevations ended up being materially lower than anticipated. In a discussion with Keen's principal, Hegge's owner requested that Keen bring in extra material based on a verbal cost estimate from Keen, which Keen proceeded to do and on which Hegge relied in a subsequent written request to the project owner for additional compensation, which was denied due to the lack of initial survey work performed. Hegge then sought to rely on the contractual obligation to have written agreement on all changes to deprive Keen of compensation for this additional work performed, but the court found that Hegge had waived its right to insist on strict adherence to this formal changes process due to its prior lax conduct on the project in relation to similar changes:

> The performance of the contract was somewhat casual on both sides in the sense that strict formality was not observed by either side. This is demonstrated by the fact that although the strict wording of the contract requires written agreement as to changes, directions were given by the defendant [Hegge] to the plaintiff [Keen] and documented later. This was clearly demonstrated by the $1,300 extra [separately] authorized for the supply of extra gravel on the south side of the building. The memorandum in writing authorizing the extra is dated. . . well after the plaintiff had completed its work.
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> In so far as the contract documents required written approval of changes I conclude that the course of dealings between the parties was such that any such requirement was waived.[101]

A similar finding arose in the 2001 Alberta Court of Queen's Bench case of *Triple R Contracting Ltd. v. 384848 Alberta Ltd.*,[102] where the parties signed a written standard-form contract for the construction of a

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[100] 1993 CarswellBC 2458 (S.C.).
[101] *Ibid.*, at paras. 28-29.
[102] (2001), 6 C.L.R. (3d) 198 (Alta. Q.B.).

restaurant but then immediately and completely disregarded it; none of their dealings throughout the course of the project bore any resemblance to the contract's terms. The court found that the parties could no longer rely on the terms of the written agreement in light of the considerable evidence by conduct indicating their mutual intent not to be bound by it.

The 1997 Ontario Court of Justice (General Division) case of *Alden Contracting Ltd. v. Newman Bros. Ltd.*[103] suggests that, in the right circumstances, the use of the doctrine of waiver to excuse formal contractual non-compliance can be extended beyond the common applications described above. *Alden* involved a rock excavation contract where delays and additional work arose due to the character of the rock being different from what was stated in the agreement. However, the contract required the contractor to give notice of any claim within a set time period identifying the precise grounds upon which the claim is made, which the contractor failed to do. The change in the character of the rock was well known to both parties early on in the performance of the contract, and the court found that the owner had received "more than ample verbal notice of claims given through conversations at site meetings, notations of which were recorded in minutes of those meetings"[104] and was expecting a claim throughout. The owner also had sent a representative to review the site early in the excavation process, whose attendance was found to verify that the owner "was well aware of the pending claim"[105] and had the opportunity to confirm the rock conditions for itself. The court concluded that "no prejudice arises from the fact that formal written notice was not given"[106] as the owner knew about the claim, took steps to investigate it and demonstrated an intention to negotiate the issue with the contractor "within the confines of the contract document. I find that the [owner] by the conduct of its servants and agents in investigating the claim and in discussing the claim at site meetings waived any requirement as to formal notice".[107]

This line of judicial thinking was applied by the British Columbia Supreme Court in its voluminous 2002 decision of *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*,[108] where the court, citing *Colautti*, made a series of pointed comments relating to the enforcement of technical notice defences in light of differing facts on the ground:

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[103] (1997), 38 C.L.R. (2d) 1 (Ont. Gen. Div.).
[104] *Ibid.*, at para. 43.
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] 2002 BCSC 1460.

> Courts have repeatedly recognized that the parties to construction contracts often modify and/or waive contractual provisions during construction, particularly where the contractual provisions are inconsistent with the practical circumstances of a construction project. . .. Canadian Courts commonly reject "notice" defences raised in construction cases based on a failure of the claiming party to comply with the technical requirements of the formal procedures in the contract recognizing that, on most construction projects, the parties adopt less formal procedures more consistent with the realities of the construction project. I find that this was the case here.
>
> I am satisfied that I should not give effect to a "notice defence" where the notices given were sufficient to meet the purpose of the notice provisions or where the parties modify and/or waive the strict notice procedures during construction. For instance, oral notices are typically found to be sufficient so long as the owner is made aware of the potential claim.[109]

The court also noted that changing written project schedules over the course of construction work can act to indicate to all parties the impact of delays on the completion of the project. It must be noted that *Golden Hill Ventures* is clearly distinguishable from cases like *Dilcon* above in that the applicable contractual notice provisions were far less stringent: the contract in *Golden Hill Ventures* did not have any notice requirements relating to claims generally and, while notice was required of delays, no particular form of notice was specified. *Dilcon* and other similar cases are expressly distinguished in the case on the basis that "all of the contracts in those decisions required the contractor to provide written notice of a claim or change in soil conditions and/or extra work. There is no requirement for written notice of claims by Golden Hill in this case".[110] While this is a clear differentiation that limits the precedential impact of *Golden Hill Ventures*, the general attitude of the court towards strict adherence to notice provisions when the owner has actual knowledge of a pending claim remains of interest.

The above decisions regarding waiver, modification by conduct and rejection of rigid notice defences appear to paint a much more flexible picture than the strict compliance model evidenced by *Corpex* and *Dilcon*, but a relatively recent Ontario Court of Appeal decision, which has become a leading authority on the doctrine of waiver and is cited for its handling of notice provisions in *Ross-Clair* and *Urban Mechanical*

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[109] *Ibid.*, at paras. 735 and 741-42.
[110] *Ibid.*, at para. 747.

above, serves as a reminder that there are limits to this flexibility and that the more lenient approaches taken in those decisions cannot be applied in every case. The 2012 case of *Technicore Underground Inc. v. Toronto (City)*[111] unfolds in accordance with a familiar fact pattern: a construction agreement contained a claims notice provision requiring the contractor to submit detailed claims identifying the grounds and support for a claim as soon as reasonably possible and in no event later than 30 days after completion of the work. After a flood on a water main project in August 2006 gave rise to additional costs on the part of the contractor and its major subcontractor, the contractor gave no immediate notice. The work was completed in December 2006, but a written claim submission was not made to the owner municipality until more than 30 days afterward, in March 2007. The contractor then sought to add further claims worth in excess of $3 million three and a half years later, in August 2010, and the city brought a summary judgment motion to have these additional claims dismissed, with the question of whether the initial 2007 claim notice was compliant left to trial. The contractor argued that the notice provision was not in fact a condition precedent to a claim because it did not contain language expressly excluding any claims brought outside of the notice period; it also argued that the notice provision should not be enforced in this case because the owner had not suffered prejudice and that the owner had waived or varied the requirement to comply with the notice clause by not immediately taking issue with the timing of its March 2007 claim submission (which was similarly out of time). The court dismissed all of these arguments and barred the additional claim.

On the first issue, the Court of Appeal in *Technicore* followed *Corpex* and held that express claim waiver language was not necessary to render a notice requirement a condition precedent to a claim. It noted that the provisions in *Corpex* and in *Doyle* did not contain explicit statements confirming that a failure to provide notice would result in the exclusion of any claim, but they were interpreted to have this effect in any event, as they constituted a mandatory procedure that had to be followed for the filing of any claim under the contract. On the issue of prejudice, the court clarified that "there was no onus on the [owner] City to lead evidence of prejudice":[112] there was an assumption of prejudice by virtue of "a multimillion dollar claim being made year after the Contract permitted and long after the City could consider its position and take steps to protect its financial interests",[113] but more importantly,

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[111] (2012), 14 C.L.R. (4th) 169 (Ont. C.A.).
[112] *Ibid.*, at para. 51.
[113] *Ibid.*

prejudice was not a necessary requirement for the enforcement of notice provision. Cases like *Doyle* do make note of the prejudice that an owner might suffer by virtue of late notice, but they do "not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim".[114]

With respect to the contractor's arguments on waiver and modification by conduct, the Ontario Court of Appeal expressly distinguished *Colautti*, noting that in that case there were multiple instances where the contractor billed the owner for significant extra charges and the owner paid in the absence of a written change order, thus establishing the necessary variation of the contractual requirement that all changes be in writing.

> In the present case, there is no pattern of conduct by the parties over the course of the Contract demonstrating that they did not intend to be bound by the Notice Provision. Far from ignoring the relevant provisions in the Contract, the parties acted in compliance with its terms. . .. [T]he Notice Provision required [the contractor] to give a detailed claim after completion of the work affected by the situation. [The contractor] did that, by delivering its March 2007 Claim. As for the City, GC 3.14.03.05 required that it advise [the contractor], in writing, within 90 days of receiving the detailed claim, of its opinion of the validity of the claim. This the City did by means of its letter dated April 4, 2007, which denied the March 2007 Claim. There is no pattern of conduct by the parties that had the effect of varying the terms of the Contract.[115]

Similarly, there was no evidence suggesting that the city had waived compliance with the notice provision. The Court of Appeal cited the requirements from *Saskatchewan River Bungalows* that waiver be based on full knowledge of a right and an unequivocal and conscious intention to abandon it that is communicated to the other party. While the city did not immediately reject the contractor's March 2007 claim letter as out of time and non-compliant with the notice provision, this was not sufficient to communicate an "unequivocal and conscious intention to abandon" its right to rely on the contract's notice requirements and thus did not constitute a waiver of the city's right to complain about the much later 2010 claim. This suggests that mere delay in enforcing a right, without

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[114] *Ibid.*, at para. 50.
[115] *Ibid.*, at para. 67.

more and where that delay is not egregious in the circumstances, will generally not be sufficient by itself to establish waiver.

Technicore is a strong reminder that the legal exceptions allowing circumvention of the strict enforcement of notice clause have limits and are constrained by the facts of a given situation. Subsequent Ontario authorities have further confirmed that, while it might be of use in certain circumstances, the doctrine of waiver is not a panacea that can gloss over any instance of contractual notice non-compliance in the absence of compelling facts. In the 2016 Ontario Superior Court of Justice case of *Jessco Structural Ltd. v. Gottardo Construction Ltd.*,[116] concrete subcontractor Jessco sought to rely on *Colautti* to argue that a provision requiring any extra work to be performed pursuant to a written change order issued by contractor Gottardo was inapplicable, or was waived by Gottardo, in circumstances where Gottardo's site supervisor verbally asked Jessco to perform work beyond its initial scope on three different occasions and Jessco did so. In addition to specifically requesting the additional work to be performed, Gottardo's site supervisor had also signed off on tickets confirming that the work had been completed and the hours associated with its performance. The court found that these acts in and of themselves were insufficient to constitute a "pattern of prior conduct"[117] as required by *Colautti* to establish waiver, as they did not amount to an unequivocal intention to give up the right to rely on the contract's terms: "Gottardo's site superintendent requested Jessco to perform the extra work. There was no evidence that the parties negotiated the extra work. It was simply a request. In the three examples, Jessco performed the extra work upon request. After the work was done Jessco invoiced the extra work. The [tickets] confirmed that the work was done, but did not state the price of the extra work".[118] There was a further contractual provision requiring all extras to be negotiated with Gottardo before the work was completed, and the court held that the bare request for performance did not indicate a waiver of this subsequent process.

It should be noted that a strong dissent in the *Jessco* case argued that there was a compelling body of case law suggesting that a verbal request for extra work outside the initial scope of the contract does in fact establish waiver of the strict terms of the contract, at least as they relate to conditions for payment of that additional scope. The dissenting judge relied on an older Alberta authority, *Chittick v. Taylor*,[119] which was

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[116] (2016), 65 C.L.R. (4th) 247 (Ont. Div. Ct.).
[117] *Ibid.*, at para. 16.
[118] *Ibid.*, at para. 24.
[119] 1954 CarswellAlta 43 (S.C.).

also cited and relied on in the *Keen Industries* case discussed above for the proposition that an owner instructing a contractor to proceed with extra work, or allowing such work to proceed with full knowledge and tacit encouragement of its performance, thereby makes an implied promise to pay for it. The majority in *Jessco* did not engage in any assessment of these authorities. A fulsome discussion of the law surrounding the payment of extra work claims is beyond the scope of this article, but for the present purposes, the critical point is that courts may be hesitant to find a pattern of prior conduct sufficient to establish waiver where the bare facts do not make such a pattern apparent. A sufficient pattern of conduct was found to be present in *Keen Industries* in part because the parties had, on multiple occasions, verbally negotiated and agreed on a price for a discrete piece of extra work prior to its performance, and had delayed reducing such agreement to writing until after it was completed; in *Jessco* the requests for extra work were not accompanied by any contemporaneous negotiation or agreement on the price for such work.

A more recent Ontario decision reconsidered the identical notice provision that was at play in *Technicore* and at least left the door open to the possibility that the doctrine of waiver could have application depending on the facts that were ultimately established in the case. The 2018 Superior Court of Justice ruling in *Clearway Construction Inc. v. The City of Toronto*[120] dismissed the city's application for summary judgment to dismiss its contractor Clearway's claim for additional contract compensation due to differing subsurface conditions on the basis of (in part) non-compliance with the notice provision. It was clear that Clearway had not complied with the notice provision's requirements by failing to provide contemporaneous written notice of the issue and by submitting its formal claim document well after the required deadline for doing so. However, relying on *Colautti*, Clearway argued that the city had waived its right to rely on the notice provision because it had taken a number of steps during the course of the project to deal with differing soil conditions that were contrary to contractual requirements, including issuing Change Orders or Change Directives for additional or changed work relating to such conditions after such work had already been completed (when the contract mandated that no such work could begin without the issuance of such a change document), advising in meeting minutes that any actions taken with respect to changed soil conditions would be handled as "extra work", and paying for at least some of this extra work performed by Clearway. The evidentiary record before the court was deficient and incomplete, but there was sufficient evidence for

[120] 2018 ONSC 1736.

the court to hold that the city's handling of these additional cost items deviated from the strict terms of the contract.

> As a result, there is a genuine issue for trial regarding whether the City is disentitled from strict compliance with the Notice Provision on the basis of a pattern of conduct of deviation from strict adherence with the Contract, on the authority of *Colautti*. The determination of this genuine issue could cause the decision in *Technicore* [based on the same contractual terms] to be distinguishable should a pattern of conduct of deviation from strict compliance with contract terms, absent in *Technicore* but present in *Colautti*, be established.[121]

The above cases illustrate that the common law offers parties some leeway in the right circumstances to deviate from precise compliance with notice requirements but that courts are not fully free to ignore these contractual obligations unless it can be shown that the parties themselves have done so.

Similar to the finding on waiver in *Technicore*, two B.C. cases establish further restrictions on the applicability of the doctrine. The 1993 case of *Strachan v. Barton*[122] clarifies that mere payment of the contract price by an owner to a contractor for work performed, even in cases where the owner is aware of defects in the work at the time of payment, does not constitute an acceptance of the work or a waiver of any performance warranties associated with it: "such payment does not preclude the [owner] from contending that they sustained damage by reason of poor workmanship".[123] Further, the 1995 British Columbia Supreme Court decision of *Zurich Insurance Co. v. 356226 British Columbia Ltd.*[124] clarifies that the lack of insistence on a contractual condition in one instance does not necessarily result in a waiver of that condition in all subsequent instances. There the plaintiff owner had made progress payments for some completed floors of a building without an inspection and certificate from the project architect, despite this being a contractual condition for payment. The court held that in the circumstances the owner had not waived its right to rely on the payment condition with respect to a subsequent payment that had not been certified by the architect, as the prior payments had been advanced prior to the owner's

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[121] *Ibid.*, at para. 44.
[122] (1993), 10 C.L.R. (2d) 142 (B.C. S.C.).
[123] *Ibid.*, at para. 104. See also *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2014) at 7-33 and 7-34 and *Halsbury's Laws of Canada*, 1st ed., 2013 Reissue, Vol. (Markham: LexisNexis Canada Inc., 2013) at HCU-54.
[124] 1995 CarswellBC 2438 (S.C. [In Chambers]).

awareness of issues with the building to reduce administrative burden and not as a conscious abandonment of rights.

Due to the potential impact of waiver on the enforcement of contractual rights, "the building contract may include exclusion clauses which attempt to restrict the circumstances in which. . .waiver may be implied".[125] These clauses may have less effect than intended, particularly where the factual circumstances for waiver exist, but they can be an indication that a party did not possess the necessary unequivocal intention to waive its rights. According to *Heintzman*:

> Another clause commonly found in building contracts states that no conduct of a party shall be construed as a waiver of any right, duty or responsibility. This clause may also state that the acceptance of the building by the owner shall not constitute a waiver of any default of the contractor. These sorts of clauses will require a determination of whether the conduct in question is truly a waiver of a right of duty. If it is not, then the clause will not apply.[126]

As noted above, one case where an owner was found by conduct to have waived its rights to require formal compliance with notice requirements despite an express no waiver provision requiring any such waiver to be in writing was *W.A. Stephenson*, where the court held that the totality of the owner's conduct, including various discussions and negotiations with the contractor and the fact that it never raised formal notice as an issue once until proceedings were commenced, resulted in an abandonment of its right to insist on proper notice. In addition, in *HREIT Holdings 36 Corp. v. R.A.S. Food Services (Kenora) Inc.*,[127] the Ontario Superior Court of Justice held in 2009 that, notwithstanding the presence of a no waiver clause in a lease, "a course of conduct can be viewed to determine whether there is any intention by the landlord not to rely on the strict terms of the lease".[128] While each case will depend on its own facts, a no waiver clause will not be a full and final answer to any waiver allegation.

2.5 Estoppel

Unlike waiver, estoppel is an equitable doctrine, but it can equally prevent or preclude the enforcement of a party's strict legal rights as a result of its conduct. According to *Heintzman*, "[a]n estoppel may arise if one party to the contract has changed its position as a result of the

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[125] *Heintzman*, *supra*, note 123 at 1-85.
[126] *Ibid.*, at 4-26.
[127] 2009 CarswellOnt 636 (S.C.J.).
[128] *Ibid.*, at para. 55.

representation, promise or assurance made by the other party, and the other party later seeks to enforce the contract without recognizing that representation, promise or assurance".[129] *Hudson's Building and Engineering Contracts*[130] similarly notes: "Estoppel is a complex doctrine with ancient origins which may prevent a party from denying facts previously asserted by it, or even from denying the effect of promises previously made by it which for one reason or another are not enforceable as contracts at common law".[131] The general principles behind estoppel were famously set out by Lord Denning in the 1981 English Court of Appeal decision of *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*[132] as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. . .. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.[133]

The basic elements of any estoppel are a statement or representation made by one party (whether expressly or by conduct), an act or omission in reliance on that statement by the other party and a resulting detriment to the relying party if the representation is not upheld. The Supreme Court of Canada noted in 2005 in *Ryan v. Moore*[134] that "the requirement of detrimental reliance [lies] at the heart of true estoppel"[135]

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[129] *Heintzman*, *supra*, note 123 at 1-83.
[130] *Hudson's Building and Engineering Contracts*, 13th ed. (London: Sweet & Maxwell, 2015).
[131] *Ibid.*, at para. 1-088.
[132] (1980), [1982] Q.B. 84 (Eng. Q.B.), affirmed [1981] 3 All E.R. 577 (C.A.).
[133] *Ibid.*, at para.122. Emphasis added.
[134] [2005] 2 S.C.R. 53.
[135] *Ibid.*, at para. 68.

and "encompasses two distinct, but interrelated, concepts: reliance and detriment".[136] Reliance requires the court to find that the party seeking to rely on estoppel "changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption [or promise, or representation], thereby altering his or her legal position".[137] Detriment then requires the court to find that, if the other party is allowed to resile from the assumption, promise or representation, "detriment will be suffered by the estoppel raiser because of the change from his or her assumed position".[138]

As noted in *Amalgamated Investment* above, there are numerous subsets of estoppel recognized by courts, although all of them are generally rooted in the same core principles. Two particularly relevant branches of estoppel in the construction notice context are estoppel by representation and promissory estoppel. *Hudson's* describes estoppel by representation as "a rule of law which prevents a plaintiff from alleging a fact necessary to its claim if it has previously, by word or conduct, represented the contrary to the defendant. . .. Where A. has by his words or conduct justified B. in believing that a certain state of facts exists, and B. has acted on such belief to his prejudice, A. is not permitted to affirm against B. that a different state of facts existed at the same time".[139] There must be a representation made and detrimental reliance on that representation. "In addition it must be unconscionable [or inequitable, or unjust] for the representor A to resile from its representation. What makes it unconscionable is the nature of the detriment which the representee B has suffered by acting on the representation".[140] The detriment must arise directly out of the reliance on the representation and must be "real and substantial, and not merely nominal, but any substantial change of position, resulting in expenditure, loss of valuable rights, etc. can in principle amount to detriment".[141] When the party allegedly relying on the representation is aware of the truth of the matter, there can be no estoppel.[142]

Ryan v. Moore clarifies the requirement of intention in the test for estoppel by representation: "Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable

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136 *Ibid.*
137 *Ibid.*
138 *Ibid.*
139 *Hudson's*, *supra*, note 130 at para. 1-088.
140 *Ibid.*
141 *Ibid.*
142 "Estoppel", *Canadian Encyclopedic Digest* (WestlawNext Canada) at part II.1, para. 4.

that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it".[143] It further confirms that "an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel".[144] In such case, delay may give rise to estoppel, but only where the party delaying in exercising a right acts so as to induce the other party to detrimentally alter its position in the reasonable belief that it had abandoned such right.[145]

A recent case where estoppel by representation was successfully invoked is the 2012 Alberta Court of Queen's Bench case of *Alberta Oil Sands Pipeline Ltd. v. Canadian Oil Sands Ltd.*[146] The key issue in the case was whether certain audit claims between the parties which were the subject of ongoing litigation were in fact properly arbitrable under the terms of the agreement between them. As part of its argument that the claims were arbitrable, the defendants argued that the plaintiff was estopped from arguing that the audit claims were not subject to arbitration; not only had the plaintiff never raised the arbitrability issue until after a Notice to Arbitrate was issued, but in prior discussions between the parties seeking to resolve the audit matters, it expressly noted in meeting minutes that the issues were likely to proceed to arbitration. Subsequent notes and correspondence reflect a similar understanding by the plaintiff about the likelihood of arbitration. The defendants argued that these now prevented the plaintiff from denying that the claims were arbitrable. The plaintiff argued that estoppel by representation was inapplicable because it had made no positive representations with the intention that they be acted upon. The court held that estoppel by representation did apply, citing a further formulation of the test from prior Supreme Court of Canada authority:

> With respect to whether AOSPL [the plaintiff] is prevented by this conduct from denying that the claims are arbitrable, the Syncrude Participants [the defendants] rely on estoppel by representation as described by the Supreme Court of Canada in *Meduk v. Soja*, [1958] S.C.R. 167 (S.C.C.) at 175 as follows:
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> > Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be

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143 *Ryan, supra*, note 134 at para. 5. Emphasis added.
144 *Ibid.*, at para. 76.
145 *Supra*, note 132.
146 2012 ABQB 524.

> relied upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.
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> . . .
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> The test set out by the Supreme Court of Canada is not limited to positive representations. . .. Estoppel by representation includes representation by conduct; a party conducting itself in a manner that another would reasonably understand that such representation was intended to be acted on. . .. The conduct and words of AOSPL led the Syncrude Participants to conclude that the audit procedure that they had commenced [culminating in arbitration] was not disputed. . ..
>
> AOSPL submits that the estoppel argument fails because an estoppel by representation cannot arise from silence unless a party is under a duty to speak. . .. The short answer is that AOSPL's conduct amounted to more than silence. The parties had a contractual relationship that set out a process to be followed with respect to audit claims, and AOSPL by its conduct followed the timelines and requirements of that process to the point of referral to arbitration. . .. Here, there was a contractual duty to respond and AOSPL complied with that duty.[147]

With respect to the remaining question of whether the defendants had acted on such representations by conduct to their detriment and "altered their position to their prejudice",[148] they noted that if the plaintiff had advised them earlier of its position that the audit claims were not arbitrable they could have immediately filed a Statement of Claim and commenced litigation proceedings earlier, which would have eliminated a limitations defence that the plaintiff was now asserting against it with respect to the litigation proceedings. The court agreed and held that estoppel by representation applied and prevented the plaintiff from contesting the arbitrability of the claims.

Promissory estoppel is very similar to estoppel by representation and relies on nearly the same elements being established. The Supreme Court

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[147] *Ibid.*, at paras. 70 and 72-74.
[148] *Ibid.*, at para. 72.

of Canada in its 1970 decision of *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*[149] states that "[t]he essential factors giving rise to [promissory] estoppel are, I think: (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (3) Detriment to such person as a consequence of the act or omission".[150] In particular, if one party leads another party to believe that its legal rights under a contract would not be enforced, or would be held in abeyance, that party is precluded from enforcing such rights where it would be inequitable to do so given the course of dealings between them. This is reflected in the modern restatement of the test for promissory estoppel in the subsequent 1991 Supreme Court of Canada case of *Maracle v. Travelers Indemnity Co. of Canada:*[151]

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354, Ritchie J. stated [at p. 615, S.C.R]:
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> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.[152]

As with estoppel by representation, the promise made for the purposes of promissory estoppel need not be expressly or formally stated: "a promise, whether express or inferred from a course of conduct, is intended to be legally binding if it reasonably leads the promisee to

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[149] [1970] S.C.R. 932.
[150] *Ibid.*, at para. 19.
[151] [1991] 2 S.C.R. 50.
[152] *Ibid.*, at para. 13.

believe that a legal stipulation, such as strict time of performance, will not be insisted upon".[153] The intent to affect legal relations must always be proven but can be implied from a party's actions. As stated by the Ontario Court of Appeal in its 1979 decision of *Owen Sound Public Library Board v. Mial Developments Ltd.*:

> "[I]ntent and knowledge on the part of the promisor are necessary ingredients of promissory estoppel. However. . . intent to create legal relations does not require a direct statement to that effect. . .. Knowledge by the promisor that the promisee is likely to regard the promise as affecting their legal relations constitutes an appropriate basis from which the inference of the existence of a sufficient intent can be drawn".[154]

One way that promissory estoppel differs from estoppel by representation is that silence can, in the right circumstances, result in a promissory estoppel even absent a legal duty to speak, but only where the party being estopped intentionally "lulled the other party to sleep" by failing to assert legal rights, much like the owner was found to have done in the trial decision of *Foundation Co*. This can be a difficult intention to prove. In *Adesa Auctions of Canada Corp. v. Southern Railway of British Columbia Ltd.*,[155] the plaintiff applied for a declaration that the defendant was estopped from exercising a right of first refusal on a lot. The plaintiff had received an offer to purchase the lot in question as part of a larger land package deal and sought to trigger the right of first refusal. After a series of correspondence back and forth between the parties regarding the plaintiff's compliance with notification obligations surrounding the right, the plaintiff took the position that the notice period associated with the right had expired and that the plaintiff was now free to sell the lands. The defendant wrote to the plaintiff in response explaining the integral importance of its rights of first refusal and its instructions to ensure that their terms were fully adhered to, but noting that, notwithstanding such rights, the defendant was not presently in the position to exercise its right of first refusal and was thus instead expecting the plaintiff to use its best efforts to have its purchaser take title subject to such rights. The plaintiff treated this correspondence as a waiver of the right of first refusal and issued an immediate response letter to that effect, to which the defendant did not respond. The plaintiff argued that both the defendant's letter and its lack

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[153] (1979), 26 O.R. (2d) 459 (C.A.) at para. 16, leave to appeal refused (1980), 31 N.R. 449n (S.C.C.).
[154] *Ibid.*, at para. 20.
[155] 2001 BCSC 1421.

of response constituted an estoppel preventing the defendant from now triggering the right of first refusal.

The court disagreed that promissory estoppel had any application. Although a representation had been made by the defendant about its ability to exercise its right of first refusal, in the context of the parties' correspondence "the letter does not indicate an intention to alter legal relations, or to release [the plaintiff] from its obligations under the Right of First Refusal to Purchase".[156] Rather, it simply advised as a practical matter that the defendant was not in a position to exercise its rights. The defendant's silence in failing to respond to the plaintiff's assertion of waiver was equally not an estoppel, as silence only qualifies as estoppel where it is in a context of lulling another party to sleep by failing to assert rights, which, "[i]n all of the circumstances of the case, and in particular, given the numerous exchanges of positions between the parties".[157] the defendant had not done. Finally, the court noted that the plaintiff had not proven it had changed its legal position or acted in detriment upon the representation. The plaintiff, after purporting to accept the waiver of the right of first refusal, had continued to take steps to finalize the larger land purchase deal, which involved considerable time, effort and expense, but since the plaintiff had been taking such steps even before the alleged waiver and had previously asserted that the right was no longer active, it could not be said to have acted in reliance on the waiver. The court therefore concluded that estoppel was not established.

One recent case where promissory estoppel was found following the statements of principle in both *Maracle* and *Ryan v. Moore* was the 2018 Alberta Court of Queen's Bench decision of *Omnus Investments Ltd. v. Rethink and Diversify Securities Inc.*,[158] which applied both parallel lines of authority to conclude that the defendant Rethink and Diversify was estopped from relying upon a termination clause in an asset purchase agreement that would have seen Rethink and Diversify acquire all of the seller Omnus' assets. Both buyer and seller were dealers in a unique class of "exempt" securities, and as part of the purchase and sale arrangement, and in reliance on a signed Letter of Intent, the seller Omnus had deregistered as a market dealer, notified its clients that it would no longer be their dealer and referred them to Rethink and Diversify, and made its proprietary client files available to Rethink and Diversify. The transaction was subject to a deadline for completion after which either party could terminate at will and was conditional on

[156] *Ibid.*, at para. 36.
[157] *Ibid.*, at para. 40.
[158] 2018 ABQB 868.

regulatory approval. A week before the deadline, Omnus and Rethink and Diversify jointly submitted the arrangement to the regulator for approval, each knowing that such approval or rejection would not be received by the deadline. Rethink and Diversify continued to work on closing the transaction until the deadline passed, after which it purported to exercise its termination right. The court held that the parties' conduct in submitting the transaction to the regulator had created a mutual assumption that the deal was going ahead and that Omnus had acted in reliance on this assumption by significantly altering its legal position to its detriment, effectively ceasing to carry on business and transferring all of its clients to Rethink and Diversify. As such, "[i]t is unjust and unfair to allow R&D to resile from the common assumption that the transaction would close on receiving regulatory approval and that they would pay for the assets acquired".[159] The court held that Rethink and Diversify was estopped from relying on its contractual termination right and ordered that it pay Omnus the entirety of the agreed purchase price for the aborted transaction.

Hudson's notes that estoppel tends to appear to be more applicable to construction matters than it often actually is and that it can be highly difficult to establish, particularly with respect to defective work:

> Contractors have persistently sought to contend that an Employer is estopped from claiming damages for defective work on the ground that the work was previously seen, or that defects could have been detected. . .or on the ground that earlier rights under the contract (for example, to condemn work while under construction, or when certifying practical completion, or when carrying out satisfactory reinstatement of defects at the end of the defects liability period) have not been exercised. There is no substance to any of these contentions, unless perhaps in a very special case the Architect's attention is specifically drawn to a suspected defect for a ruling and then acts or gives instructions in such a way that the Contractor suffers a real detriment. The only way in which the Employer will usually lose the right to complain is if there is some certificate which, by the terms of the contract, is conclusive as to the quality or sufficiency of the work.[160]

This logic also appears to extend to amounts paid pursuant to a construction contract, as the following case summary in *Hudson's* suggests:

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[159] *Ibid.*, at para. 80.
[160] *Hudson's, supra*, note 130 at para. 1-089.

> A Contractor alleged that during negotiations it had been agreed that increases in the cost of all materials, and not merely those in the basic price list, should be payable under the [price] fluctuations clause. The Employers relied on the contract as signed, which said that only increases in listed materials were payable. The Contractor relied on the fact that during the currency of the contract the Employers had paid the sums claimed by the Contractor on interim certificates for increases in unlisted materials. Held, by Ashworth J, that the Employers were not estopped by reason of their making the payments from later contending that the sums had not been due: *Royston UDC v. Royston Builders Ltd. (1961)*.[161]

Thus it is not every delay by an owner in asserting rights or issuing notices that gives rise to an estoppel preventing a later claim, and not every payment made that raises an estoppel preventing a later argument that the sums paid were not owing; the elements and requirements of estoppel, particularly detrimental reliance, need to be proven by the contractor on the facts of each particular case before estoppel will arise.

That said, and while there is not yet a wide body of case law applying the principles of estoppel to defeat a party's attempt to rely on a formal contractual notice provision, we anticipate that further judicial consideration of estoppel in the context of notice obligations will likely be forthcoming in the future as another way for courts to deflect the otherwise determinative impact that notice requirements can have on the right to advance a claim. Factual scenarios similar to those set out in the above discussion of waiver, involving a course of conduct demonstrating an apparent intention not to strictly comply with contractual requirements, in conjunction with some evidence of detrimental reliance on such conduct by the counterparty, could well be sufficient to ground a notice defence in estoppel, and the harshness of the contrary outcome suggests that parties will continue to seek recourse to the doctrine. Estoppel has recently been employed to prevent the application of other strict-compliance construction law preconditions, such as in the 2015 Alberta Court of Queen's Bench decision of *Boulevard Real Estate Equities Ltd. v. 1851514 Alberta Ltd.*,[162] where the court ordered builders' liens that had been discharged and were beyond the statutory time limit for registration to be reinstated because the discharge had occurred in reliance on a representation by the landowner that the lienholder would be paid amounts owing to it. No such payment was

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[161] *Ibid.*, citing *Royston UDC v. Royston Builders Ltd.* (1961), 177 EG 589 (Q.B.D.).
[162] 2015 ABQB 619.

made, and the court found that promissory estoppel barred the landowner from asserting that the liens were re-registered out of time.

Similarly, in the 2015 case of *TRG Developments Corp. v. Kee Installations Ltd.*,[163] the Alberta Court of Appeal held that a landowner could not argue that liens had ceased to exist due to a failure to register a certificate of lis pendens within the statutorily mandated time frame in circumstances where the landowner had filed an application to determine the validity of the liens, to be heard prior to the certificate of lis pendens registration deadline, and had then requested an adjournment of that application (to deal with interlocutory matters) until a date after the registration deadline. The court ultimately relied on the doctrine of waiver in making its decision, but both waiver and estoppel were discussed as potentially applicable defences by the Court of Appeal and courts below. The path seems open for future courts to apply the doctrine of estoppel with respect to the strict application of a notice provision where an act or promise of the party relying on the notice precondition led the other party to the contract not to provide notice in accordance with contract requirements.

Given their similar application and outcomes, it is suggested at times that the doctrines of waiver and estoppel can be considered to be roughly interchangeable and without practical distinction; the *HREIT Holdings* case is one example of a decision where courts have made general pronouncements to that effect. Despite the fact that these doctrines can at times be employed in overlapping circumstances, this type of sweeping statement does not appear to be strictly accurate. The primary difference between the two doctrines is that the test for waiver is a one-way consideration focused on the waiving party alone and that party's knowledge and intention of the rights being relinquished. As noted by *Heintzman*, ''[w]aiver does not depend upon a variation of the contract. Nor, unlike estoppel, does it depend upon reliance''[164] or any form of prejudice suffered by the counterparty. In contrast, detrimental reliance — in other words, the impact of one party's acts or omissions on its counterparty — is the cornerstone of estoppel, making it by necessity a two-way consideration. It is therefore possible to prove waiver without proving estoppel, and *vice versa*, even if they often arise in similar factual scenarios. This is supported by the recent Ontario Court of Appeal decision in *Technicore*, which expressly held that prejudice did not have to be established in order to prove waiver; it clearly must be established to prove estoppel.

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[163] 2015 ABCA 187.
[164] *Heintzman*, *supra*, note 123 at 1-84.

3. PRACTICAL APPLICATION AND CONSIDERATIONS

There are a number of common types of mandatory notice provisions in construction contracts that can give rise to the significant legal consequences discussed above in the event of non-compliance, requiring that notices be provided for changes, default, disputes, claims, delays, warranty defects or other items. It is worth noting at the outset that these notice provisions as a whole can vary widely in treatment and extent from contract to contract: their legal impact may turn on whether they require notice to be provided within specific time limits (as opposed to within "a reasonable time" or other non-concrete period of time), whether they require written notice to contain any particular supporting documentation or information, or whether they require notice to be in any recognized or predetermined form (or expressly exclude as notice any communications in certain forms, such as email). Given the fact-specific nature of the case law on notice and the general principles of contractual interpretation, the precise details of a notice provision will play a key role in determining how those obligations are interpreted, either militating towards a more lenient interpretation like that discussed in *Golden Mines* or a stricter interpretation like that set out in *Dilcon*. As seen above in *W.A. Stephenson*, the presence of a no waiver clause is not determinative of whether or not waiver can be found to exist, but it is another ingredient for a court to consider in determining whether an unequivocal intention exists in the circumstances of this case for a party to fully relinquish a potentially significant right to claim for no consideration. Certain practical suggestions for drafting fulsome and effective notice provisions are set out below.

The case law on notice requirements establishes that strict compliance may be required with respect to the time and substance of a notice but always not its form: as long as the party has sufficiently communicated its intentions within the stated time limit of the notice provision, it will usually not be prejudiced by the fact that it did so informally. The stringent protection of contractual time limits is what has led to many of the harsh results in the jurisprudence, but is also the component of a notice provision that is most consistently upheld by the courts. In cases where there is no set time limit for the provision of a notice of dispute, and the notifying party complies with both the formal and substantive requirements for the notice, this will be a clear distinguishing factor from the above examples in the case law and will likely make it difficult for the counterparty to succeed in its arguments on notice. As such, if a party wishes to craft a notice provision with more specific and certain impact, it should seek to employ clear timing deadlines (seven days from the occurrence of the given event, 10 days from the issuance of the final

completion certificate, 15 days from the receipt of final payment, etc.) as opposed to more general terminology that requires some level of interpretation (''within a reasonable period of time''). The issue of whether a ''within a reasonable time'' notice provision has been properly satisfied was held by the British Columbia Supreme Court in its 1993 decision of *State Group v. Cana Construction Co.*[165] to be ''to a large extent a question of fact which must be determined with reference to all of the surrounding circumstances''.[166] This case was specifically cited in the 2018 *Urban Mechanical* decision of the Ontario Superior Court of Justice as an example of the ''potentially nebulous'' nature of such notice periods.[167]

If a notice provision does not include a specific timing deadline, this immediately differentiates it from the clauses at issue in *Corpex*, *W.A. Stephenson*, *Dilcon*, *Northland Kaska*, *Graham*, *West Shore*, *Technicore*, *Nordic Construction* and *Bianchi*, all of which required notice to be provided within a set number of days from the occurrence of a certain event (usually the occurrence or awareness of the event that is the basis of the claim). If the provision does not include any timing deadline at all, this would distinguish it from even the less rigid clauses at issue in *Doyle*, *Campbell-Cox*, *Foundation Co.*, *Centura* and *State Group*, which required notice to be provided within a reasonable time. The court in *TNL Paving* refused to imply an obligation to give notice within a reasonable time and bar a claim due to the failure to provide such notice while the work was ongoing in a situation where the contract wording did not expressly set out any such obligation. The use of a set timing deadline offers certainty as to the timeliness of the notice obligation and requires any proof of notice compliance to come from within that limited period.

If a party further wishes to retain some degree of formality in its notice processes and seeks to avoid the potential satisfaction of notice requirements by constructive or other means that are not strictly compliant with the requirements of the provision, it should consider employing a notice clause akin to the ones used in *Dilcon* and *Ross-Clair*, which imposes not only timing but also specific and substantive content requirements on the notifying party. Instead of merely requiring notice of a claim, change or other event, these provisions go one step further and require a subsequent submission of a full detailed claim or cost/schedule impact statement, complete with specified supporting documentation (or substantiating documents) within a further specified

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165 (1993), 9 C.L.R. (2d) 239 (B.C. S.C.).
166 *Ibid.*, at para. 29.
167 *Urban Mechanical*, 2018 ONSC 1888 at para. 115.

time period. These documents are sometimes subject to their own content threshold, required to be sufficiently detailed and fulsome to allow the receiving party to properly determine the validity of the claim. While the receiving party's general knowledge or awareness of an issue, or even of an intention to claim, may well be able to be established constructively or pieced together from informal correspondence, meeting minutes and other sources, it is much more difficult to comply with a requirement for the submission of a full detailed claim or specified formal substantiation in any manner other than actually making the submission as and when required. *Ledore Investments* demonstrates emphatically that an intention to claim is not the same as the claim itself, so requiring something more than mere notice in the contract can assist in ensuring full formal compliance with notice requirements, or in safeguarding and enforcing the receiving party's rights in the absence of such full compliance.

The *Strachan* decision confirms that payment alone will not generally be considered a full acceptance of the work and waiver of possible future claims. In *Technicore*, the fact that the project owner did not take immediate issue with the late timing of a claim submission did not result in a waiver of its rights to rely on a notice clause. However, if parties establish a mechanism involving a notice provision in their contract for dealing with a certain type of claim (e.g. changes), or with claims as a whole, reference should be had to that mechanism any time such an occurrence arises on the project in order to avoid the creation of an inadvertent pattern of conduct in deviation from the pre-agreed process that might later become the foundation for a waiver claim, as in *Colautti* and *Clearway*. The establishment of a protective mechanism tied to notice is only of use if the parties actually act as if it governs their relationship. In other words, parties should not merely seek to draft and negotiate effective notice provisions: they should also have reference to contract requirements during project execution and take steps to comply with them wherever possible. For parties seeking to rely on the often-harsh legal impact of any failure to satisfy a notice provision, this can determine whether they have relinquished the right to such reliance; for parties who are bound by the notice provision, it can determine whether they retain any substantive rights at all.

4. CONCLUSION

Much like the law surrounding bidding and tendering, the law surrounding contractual notice provisions in construction contracts is subject to so much factual intricacy, language-specific determination and prior judicial pronouncement, and the legal impact that arises from

giving full effect to such provisions is often so severe, that it is virtually certain there will be no shortage of additional case law on the issue going forward. The stakes are often so high, and the jurisprudence sufficiently confusing, that parties will continue to litigate notice disputes and force courts to turn their eyes yet again to this developing body of law. However, although there are outlier decisions that prove difficult to reconcile, a careful reading of the state of the law in Canada as it currently exists finds more harmony than discord in the cases, with the differentiating factors in the decisions arising more out of specific facts or clear contractual distinctions than the use of inconsistent legal principles or reasoning. Once these common principles are defined and described, they can be a useful tool for navigating these turbulent judicial waters.

A deeper understanding of the foundational concepts behind notice case law does not alter the conclusion that, in many circumstances, formal notice provisions can wholly deprive contracting parties of substantive rights to which they are otherwise entitled, even if they have a valid underlying claim or cause of action. As such, parties and their counsel negotiating construction contracts should pay particular heed to any contractual clause requiring the provision of formal notice, whether or not it is accompanied by an express waiver for lack of compliance, and contractors and owners agreeing to abide by such provisions must remember during the performance of the contract that their rights might be preconditioned on the provision of sufficient notice and adjust their project management approaches and reporting processes accordingly. The fruits of their bargain might depend on it.

SCHEDULE "A"

Summary of Key Notice Cases

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
Corpex	1982 SCC	Changed Soil Conditions	"No payment shall be made by Her Majesty to the Contractor. . .on account of any extra expense, loss or damage. . .unless [it] is directly attributable to. . . a substantial difference between information relating to soil conditions at the work site. . .and the actual soil conditions encountered. . .in which case, if the Contractor has given the Engineer written notice of his claim before the expiry of **thirty days** after encountering the soil conditions giving rise to the claim. . .Her Majesty shall pay to the Contractor in respect of the additional expense. . .incurred"	Claim failed because notice requirements not complied with — nothing close to compliant notice given within notice time period.	The changed soil conditions clause had itself established the "compensation machinery" for the contractor to take advantage of, so the contractor had to observe its requirements.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
W.A. Stephenson	1987 BCSC	Delay and Additional Costs	1. "The Contractor shall give MCL written notice of any of the foregoing [uncontrollable] causes as soon as practicable and in any event no later than **five Days** following the occurrence thereof. . ." 2. "Notice of a Claim shall be submitted in writing by the Contractor to MCL within **seven Days** after the Contractor first becomes aware of the events or circumstances giving rise to such Claim. As soon as practicable thereafter the Contractor shall submit full details of such Claim in order to permit MCL to review and evaluate it".	Claim succeeded in spite of no formal notice — detailed comprehensive meeting minutes held to satisfy notice requirements in this case due to their widespread use as a formal method of communicating concerns and their inclusion of a specific intention to claim.	Owner additionally found to have waived the right to rely on formal notice defence by virtue of its conduct through the project, including keeping minutes, negotiating issues and never previously raising notice issue, in spite of express "no waiver" clause in contract.
Doyle	1988 BCCA	Cumulative Impact Change Costs	"Claims under this General Condition shall be made in writing to the party liable **within reasonable time** after the first observance of such damage. . ."	Claim failed because notice requirements not met. Notice needs to provide particulars of the claim and of the intention to claim —	Same notice provision as in *Campbell-Cox* and *Foundation Co.* Claim was for cumulative impacts of multiple Change Orders. 50+

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
				meeting minutes in this case did not do so and were mere ''grumblings''.	Change Orders previously issued and approved with no hint of any further claim with respect to their subject matter until just before substantial completion. No reservation of rights in Change Orders.
Nordic Construction	1991 NFSC	Delay and Change Costs	''If at any time Contractor believes that other acts or omissions of Owner. . . constitute a change to the work not covered by a change notice, Contractor must within **ten calendar days** submit in writing a change notice request explaining in detail the basis for the request. . .. If Contractor intends to assert a claim for an equitable adjustment under this article, it must, within **ten calendar days** after receipt of the written change notice, submit. . .a written	Claim with respect to scope changes failed because notice requirements not met — letters regarding changes not considered notice because multiple timing and content requirements for notice not satisfied. All other contractor claims (for delays and damages arising out of late site access and failure to provide drawings) succeeded because change notice requirements held not	The scope and extent of the types of claims caught by the notice provision were construed narrowly in a situation where the owner's actions had clearly resulted in delays and increased costs to the contractor and where the contractor had clearly not sufficiently complied with the notice requirements. As in *Dilcon*, it was impossible to conclude informal or constructive notice compliance for

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			statement setting forth the nature, schedule impact and monetary extent of such claim in sufficient detail to permit thorough analysis and negotiations . . .. No claim by the Contractor for an equitable adjustment hereunder shall be allowed unless the required notice has been given within ten calendar days as specified".	to apply to them.	claims squarely within the notice scope given the strict timing deadlines, multiplicity of notices required and claim waiver in place.
Campbell-Cox	1996 ONGD	Delay, Cost Overrun and Change Impact	1. "If the Contractor is delayed in the performance of the Work by an act or omission of the Owner. . . then the Contract Time shall be extended for such reasonable time [and the] Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay. No extension shall be made for delay unless written no-	Claim succeeded despite no delay notice and no formal damages notice due to the cumulative correspondence between the parties, and particularly because the contractor provided and sought to negotiate an omnibus Change Notice during the project that led to negotiations where parties discus-	Same notice provision as in *Doyle* and *Foundation Co.* The combined correspondence and discussions amounting to sufficient notice was held to be "barely adequate", but the court concluded that all of the main elements of the claim and the basis of its quantification were before the parties.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			tice of claim is given to the Consultant not later than **fourteen (14) days** after the commencement of delay. . . " 2. "If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom he is responsible in law, then he shall be reimbursed by the other party for such damage. Claims under this General Condition shall be made in writing to the party liable **within reasonable time** after the first observance of such damage. . ."	sed basis and calculation of claim and acknowledged the issue would be dealt with at the end of the job.	An agreement to defer the handling of a claim until the end of a contract will not lead to its defeat on notice grounds if sufficient details of the claim were communicated prior to such agreement.
Foundation Co.	1997 BCCA	Extra Work and Delay Costs	1. "If the Contractor is delayed in the performance of the Work by an act or omission of the Owner. . . then the Contract Time shall be extended for such	Contractor claim succeeded because compliant written notice of claim (clause 2) provided, despite no written notice of delay	Same notice provision as in *Doyle* and *Campbell-Cox*. Not immediately seeking an available contractual remedy in

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			reasonable time [and the] Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay. No extension shall be made for delay unless written notice of claim is given to the Consultant not later than **fourteen (14) days** after the commencement of delay. . . " 2. "If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom he is responsible in law, then he shall be reimbursed by the other party for such damage. Claims under this General Condition shall be made in writing to the party liable **within reasonable time** after the first observance of such	(clause 1) being provided within the 14 day time period — contractor's decision not to seek an extension of time did not bar a damages claim. Owner claim failed because notice requirements not met. Owner adopted deliberate policy of silence to keep contractor on site and did not issue cross-claim until Project complete.	respect of a claim, even one that overlaps with other contractual remedies, does not preclude later access to those other remedies. The delay remedy included an ability to claim for costs and not just schedule and was subject to a 14-day notice limit, but the court allowed the contractor to proceed under the broader "reasonable time" notice limit under the general damages remedy. The owner led the contractor to believe that its claim would be fairly considered up until work was completed and a cross-claim was advanced.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			damage. . ."		
TNL Paving	1999 BCSC	Changed Quantities and Conditions, Delay	1. Quantity adjustment provision: no stated notice or timing requirements 2. "The Province will not pay the Contractor for any Changed Conditions unless the Contractor gives written notice of the Claim to the Ministry Representative not later than **seven (7) days** after the Contractor detects the Changed Conditions". 3. "The Contractor may claim compensation for standby due to a Reimbursable Delay by. . .not later than **seven (7) days** following the start of a Reimbursable Delay, giving written notice to the Ministry Representative of the intention of the Contractor to make a Claim together with reasons. . .and not later than **thirty (30) days** after	Notice defence with respect to quantity adjustments was rejected because no notice or time requirements were included in that provision. Claim succeeded for Changed Conditions despite lack of formal notice compliance — Court declined to give effect to notice defence where owner was fully aware of issue, verbal notice given and no prejudice arose out of lack of written notice. Claim succeeded for delay despite lack of notice compliance because there were other provisions/remedies available to contractor for obtaining delay damages — it failed un-	Notice preconditions can be interpreted with some flexibility in the right circumstances, particularly where the party facing the claim had full knowledge of the issue at the time, so as not to entirely preclude access to remedies. A court will not impose a notice precondition where the contract does not contain one (subject to waiver/estoppel considerations). A provision providing for a mechanism to handle a specific issue and containing a notice precondition will not be considered an exclusive remedy and precludes access to other applicable and available contractual remedies.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			the resumption of Work, giving the Ministry Representative full written particulars of the nature and magnitude of the Claim including. . .Claim documentation. . .".	der Reimbursable Delay provision but succeeded elsewhere.	
West Shore	1999 BCSC	Delay Costs	"A party shall be conclusively deemed to have accepted a finding of the Consultant. . .and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within **15 Working Days** after receipt of that finding, the party sends a notice in writing of dispute to the other party and to the Consultant.."..	Owner barred from contesting consultant's finding granting contractor's delay claim due to failure to comply with notice requirements. Contractor granted summary judgment for its claim. Court dismissed separate notice defence from owner and held that contractor had given notification of its claim within a reasonable time.	Notice requirements apply equally to owners. It is unlikely that the contractor would have had to comply with the separate reasonable notice requirement for claims in any event in light of its prior compliance with the formal submission of the delay claim to the consultant for determination as contemplated by the contract.
Dilcon	2000 ABCA	Delays, Changes, Scope Growth	"The Contractor shall immediately notify the Engineer in writing of any	Claim failed because notice requirements not met. The contract	The combination of the number of different notice tiers, the detailed

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			occurrence which. . .has caused or which he anticipates may cause a substantial delay. . .and in any event shall notify the Owner in writing not later than **seven (7) days** after the occurrence of the delay. Claims made by the Contractor [for a schedule revision or additional costs arising out of the delay, with complete details]. . .in any event shall be submitted not later than the earlier of a) **6 months** after the commencement of the alleged delay or b) **seven (7) days** after the date on which the full extent of the alleged delay or the full amount of the additional. . .costs could reasonably be determined. . .otherwise such claims shall be rejected".	by its terms set out the exclusive method for claiming delay damages. Meeting minutes were not considered notice in this case given multiplicity of notice periods and detailed submissions required to satisfy them.	informational requirements arising out of them, and the express exclusion of claims if the requirements were not followed made this a very difficult case to try to prove constructive/informal notice. The contractor had also previously (properly) given formal notice of delay on the project, displaying its familiarity and ability to comply with the provision.
Northland Kaska	2001 BCSC	Changed Soil Conditions	"If the Contractor incurs or sustains any extra ex-	Claim failed because notice requirements	The court set out the framework for reconcil-

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			pense or any loss or damage that is directly attributable to. . .a substantial difference between the information relating to soil conditions. . .and the actual soil conditions encountered. . .he shall, within **ten days** of the date the actual soil conditions. . .were encountered. . .give the Engineer written notice. When the Contractor has given [such] notice. . .he shall give the Engineer a written claim for extra expense or loss or damage within **30 days** of the date that a Final Certificate of Completion. . .is issued. . .. If the Contractor fails to give a notice. . .and a claim . . .within the times stipulated, an extra payment shall not be made to him in respect of the occurrence".	not met. It is not necessary to comply precisely with the mandated form of notice, but must within stipulated time period notify both of the change of conditions and of the intention to bring a claim. In this case verbal notice was given within first time period of potential issue but not of intent to advance claim for costs as a result of it.	ing and assessing all prior notice case law: there can be flexibility on the form and formality of notice, but not on its timing or its content, and that content must at least suggest an intent to bring a future claim in relation to the issue.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
Graham	2006 ABQB	Delay and Change Order Impact Costs	"If the Contractor is delayed in the performance of the Work by an action or omission of the Owner. . . then the Contract Time shall be extended [and the] Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay. No extension shall be made for delay unless notice in writing of claim is given to the Consultant not later than **10 Working Days** after the commencement of delay. . ."	Claim succeeded in part despite lack of formal notice because of an express reservation of rights in all Change Orders after a certain date declaring intention to advance further claim for impact costs, which met the timing and content requirements for notice. Claim failed for lack of notice with respect to earlier Change Orders with no similar reservation of rights.	Same notice provision as in *Bianchi*. Over 250 Change Orders were issued and paid, and the issue, like in *Doyle*, was the ability of the contractor to claim again for further costs arising out of those same Change Orders. The reservation of rights was not held to be a prerequisite to advancing any such claim but was the method by which informal notice compliant with the time and content requirements of the notice provisions was found to have been given.
Bianchi	2007 ONSCJ	Additional Costs, Extras, Delay	"If the Trade Contractor is delayed in the performance of the Work by an action or omission of the Owner. . . then the Contract Time shall be extended [and the]	Claim succeeded in part despite no compliance with formal notice requirements — the court held without further explanation	Same notice provision as in *Graham*. This is an anomalous decision. *Graham* was not considered; other notice cases, including

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			Trade Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Trade Contractor as the result of such delay. No extension shall be made for delay unless notice in writing of claim is given to the Construction Manager not later than **10 Working Days** after the commencement of delay..".	that the owner was not blameless and that therefore the parties should split responsibility for delay.	*Doyle*, were considered but not distinguished; and the court's ruling does not attempt to differentiate cases coming to a contrary result but simply decides based on the owner's underlying partial fault. The case may have limited precedential value as a result.
Technicore	2012 ONCA	Flood Damages and Additional Costs	"The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than **30 Days** after completion of the work. . . The detailed claim shall: a) identify the item or items in respect of which the claim arises; b) state the grounds. . .upon which the claim is made; and c) include the Records maintained by the Contractor supporting such claim".	Claim failed because notice requirements not met. Express contractual claim waiver language in notice provisions not required to render them conditions precedent to bringing a claim. The mere fact that the owner did not raise the notice defence with respect to a prior (late) claim on the project	This is now a widely cited authority on waiver. It notes that there is no need to lead evidence of prejudice in order to prove waiver, which is a key distinguishing factor between waiver and estoppel. It also notes that not immediately taking issue with a failure to comply with a contractual requirement is insufficient by

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
				does not constitute a waiver of notice compliance for a subsequent claim.	itself to result in a waiver of that requirement.
Ross-Clair	2016 ONCA	Delay and Change Costs	"If the contractor incurs or sustains any extra expense or any loss or damage that is directly attributable to... any neglect or delay that occurs after the date of the contract on the part of Her Majesty in providing any information or in doing any act that the contract either expressly requires Her Majesty to do or that would ordinarily be done by an owner in accordance with the usage of the trade, the contractor shall, within **ten (10) days** of the neglect or delay. . .give the Engineer written notice of intention to claim for that extra expense or that loss or damage. When the contractor has	Claim failed because notice content requirements not met — insufficient claim information and description provided within 30 days of Final Completion to allow the project Engineer to determine whether or not the claim was justified. Some proof that delays attributable to project owner and that additional subcontractor costs claimed arose out of owner delay was necessary and was not provided despite numerous requests. Initial notice of intention to claim provided,	Similar notice provision structure as *Dilcon*. The added formal claim submission obligation is much more difficult to meet on an informal or constructive basis, particularly in this case where both the owner and its Engineer advised that the information supplied was insufficient and the contractor did not provide any more detailed information until over a year after final project completion.

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			given a notice referred to [above], the contractor shall give the Engineer a written claim for extra expense or loss or damage within **thirty (30) days** of the date that a Final Certificate of Completion. . .is issued and not afterwards. [The] written claim. . .shall contain a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified and the contractor shall supply such further and other information for that purpose as the Engineer requires from time to time. If the contractor fails to give a notice. . .and a claim referred to [above] within the times stipulated, an extra payment shall not be	but subsequent claim content obligations in notice provision not satisfied. The bare statement of subcontractor costs provided was not sufficient to allow for the Engineer to determine whether the claim was justified.	

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			made to the contractor in respect of the occurrence".		
Ledore	2017 ONCA	Delay and Acceleration Costs	"As of the date of the final certificate for payment of the prime contract, the contractor expressly waives and releases the subcontractor from all claims against the subcontractor, including without limitation those that might arise from the negligence or breach of this agreement by the subcontractor, except [for]. . .those made in writing **prior to the date of the final certificate for payment** of the prime contract and still unsettled".	Claim failed because notice requirements not met — a formal notice of intention to claim had been submitted prior to the trigger date of the global release of claims, but no formal claim had actually been advanced despite the contractor having opportunity to do so. An intention to make a claim is not an actual claim, and the provision in question required more than a mere statement of intention.	Like *Ross-Clair*, this was a case of submission content requirements not being met as opposed to notice not being provided. The Court of Appeal correctly overturned the lower court's reasoning that *Doyle* stood for the proposition that provisions requiring written claims should be construed as provisions requiring written notice of claims — the two types of provisions are different and impose different content obligations.
Urban Mechanical	2018 ONSCJ	Labour and Material Cost Overruns	"The Subcontractor shall be conclusively deemed to have accepted a decision of the Contractor. . .and to have expressly waived and	Claim failed because notice requirements not met — the contractor promptly rejected an invoice for addi-	Consistent with prior body of case law, in that the court focused on whether there was any type of notice provided

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			released the Contractor from any claims in respect of the particular matter dealt with in that decision unless, within **7 Working Days** after receipt of that decision, the Subcontractor sends a Notice in Writing of dispute. . .which contains the particulars of the matter in dispute and the relevant provisions of the Subcontract Documents. . .”	tional costs arising out of a disputed scope item and the subcontractor provided no notice disputing the decision within the required time period. Later protest of decision came too late.	within the mandated notice time period, which was held to be critical and inflexible. Demonstrates that judicial flexibility has limits where specified time periods not met.
Maglio	2018 BCSC	Delay and Site Conditions	“If the Contractor is delayed in the completion of the Work by any act or neglect of the Owner, Engineer or any Other Contractor, by changes ordered in the Work, then the Completion Date shall be extended for such reasonable time as the Engineer may decide. . . No such extension shall be made for delay unless writ-	Claim succeeded in part despite no compliance with formal notice requirements — the court confirmed that notice not sufficient but then separately held that internal owner project budget was unrealistic and that both parties’ behaviour was unsatisfactory and made par-	Similar notice provision as *Graham* and *Bianchi*. Similar outcome as *Bianchi* that was similarly inconsistent with the notice case law specifically cited by the court in the judgment, which the court did not question or distinguish. This case is likely highly fact-specific and will have limited preceden-

Name	Year/Court	Type of Claim	Notice Provision	Found	Comments
			ten notice of claim is given to the Engineer within **seven (7) days** of its commencement, provided, however, that in the case of a continuing cause of delay only one claim shall be necessary".	tial award to contractor. *Dilcon* and *Doyle* cited approvingly and not distinguished, but then not followed in the result.	tial value as a result.