

# Litigation-avoiding Behaviour

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Issues arise on every construction, so what separates the projects that complete successfully from those mired in litigation? Whether it is early intervention to nip catastrophe in the bud or proactive management before problems arise, there are some easy guidelines to minimize risk.

### **REACH AGREEMENT BEFORE YOU START**

The parties should agree. Ridiculous as it sounds, people regularly commit to projects without knowing what is expected of them or what they fully expect themselves. The traditional way to record the obligations that parties owe to each other is by contract. You may question whether a contract is necessary for your project, but ask yourself some specific questions: when it comes to scope of work, scheduling, interruptions, payment schedules, changes, or substantial and final completion, what does my contractor / supplier / owner expect and what am I expecting? The contract lays out expectations from what is supposed to be done, to what happens when things are not done. While no two projects are exactly alike, standard form documents have evolved that apply reasonably to most situations but you still have to read even standard form contracts. Many clauses seem tedious, but all are there for a reason. If you do not understand a provision, make sure that it is clarified to your satisfaction. Ask your lawyer to review and discuss the document with you and determine whether it accurately reflects what you believe you have agreed to, and avoid having to explain that you did not appreciate what you had contracted to do.

### **PROACTIVE PROBLEM SOLVING**

When it starts to go off the rails, communicate how to bring things back on track. Resolve problems sooner rather than later, before they fester and create adversarial relationships. If possible, a face-to-face meeting of individuals who can speak to specifics of the incident, the bigger picture, and the options to move forward should take place as soon as possible, but communications should not be stalled pending scheduling for a meeting. Impacts are most often minimized when the responsible party can correct the issue with a minimum of delay. Frequently a creative change can resolve the issue, but even when it cannot, try to stay objective and focus on what should be considered a business problem that usually only involves dollars. Unless your specific circumstances dictate, approaching the problem as a moral issue rarely leads to a practical resolution. Responses focused on options for remedy are generally more productive than those seeking to lay blame, and again expectations (including impacts on costs, timing and the end product) should be clearly communicated. Be open-minded to creative solutions and avoid unnecessary rigidity. Formalize contract changes with a view to signing off on all impacts of the change. Evaluate whether you are better served by reasonably contributing to an unforeseen expense or maintaining a firm position that can grind progress to a halt.

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## **PROTECT YOURSELF AHEAD OF TIME**

Expect the unexpected. Insist on insurance. Agree upfront to mediation. To the extent possible, try to have a contingency plan: What happens if delay takes us into winter? What happens if non-completion by another trade frustrates when work can proceed? Try to plan for the worst but, if flexibility is not an option, ensure that everyone recognizes the impact of the issue from the earliest possible moment. Again, open communication lines facilitate opportunities to work through an issue or to best minimize losses.

## **ASK FOR HELP**

Get help early. If you have a construction issue, get an engineer but if you have a legal issue, get a lawyer familiar with construction. Understanding competing rights and obligations is critical to determining whether options and strategies are reasonable and do not create more issues than they resolve. Beyond legal fees, the full costs of litigation include delay to the project or payment, reassignment of resources to tasks which do not generate income, injury to reputation, and diminished ability to secure bonding and other projects. Early retention of professional assistance can be an investment as much as a cost.

Litigation is frequently unavoidable, but should always remain your last alternative. Keep expectations clear and communications open, keep an open mind to reasonable solutions and engage help from an early stage. If legal action cannot be avoided, in many cases the fallout can be managed and overall impacts minimized. Contrary to what some may complain, at the end of the day, most people are simply trying to figure out how to get the job done.

Cox & Palmer has been an integral part of Atlantic Canada's business community for over a century. Our belief is that a strong relationship between law firm and client is the best way to get results. Richard is a partner at the St. John's office, practicing in commercial litigation with a focus in construction.

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