

Preparing for Adjudication? How to Govern Yourself Accordingly

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By

The *Construction Act* is on its way to Ontario, and with it comes the advent of adjudication. As many will already know or soon find out, Ontario's adjudication process will be document intensive. Construction industry players will be well-advised to structure their business practices in such a way that participating in an adjudication process involves a quick transfer of well-organized files rather than a hurried rush to turn the office upside down.

The following tips are not only helpful for future litigants, but are also just good business practices that may help avoid any sort of dispute.

Contracts

Make them fit – Whether using a standard form CCDC or your own custom standard form, make sure you take the right approach. Every project is different, and every contract should address the project's inherent risks. Adding supplementary conditions may involve an extra investment of time up front, but will almost certainly save you a significant sum of money down the road.

Read them! – Spend some time at the outset of a project checking for key provisions and timeframes in the contract and supplementary conditions. Make a note of everything with a deadline: delay notice provisions, change requests, dispute provisions, etc. Make certain that everyone on your team is aware of the deadlines and remind them of the significance of always meeting those deadlines. Courts are increasingly strict about notice provisions and may deny an otherwise valid claim on the basis that a deadline was not met.

Statutory Provisions

Know Them – In the same way that your team should know the contract deadlines, the new *Construction Act* will impose strict deadlines with respect to the new prompt payment regime as well as the existing lien regime. Make certain that team members responsible for payment or contract management are aware of the new statutory provisions, and prepare invoice and notice templates ahead of time in case they become necessary.

Email

Document everything – Handshake deals and informal agreements are a recipe for disaster. In this day and age courts often take the approach that if it is not in writing, it did not happen. Most people carry miniature computers (smartphones) in their pockets that can send email in a matter of seconds. After having an undocumented conversation, recap that conversation in an email and send it to the person you were speaking to. That email could save you thousands of dollars later on. Also: don't text. Unless you back them up regularly, texts have a habit of disappearing.

Respond to Emails – If you get an email confirming a conversation or instructing you to do something, respond to it unless you agree with everything in it. Courts generally prefer notes that were written contemporaneously with an event happening, so make sure the written record is correct! Also: be short and to the point.

Use Identifiable Subject Lines – Using relevant subject lines will help when your team is later digging through a mountain of emails to find a key email. Replying to the latest email may be quick, but spending a few extra seconds writing a relevant subject line (i.e. “Subway Project – Change Order 33 Request”) will help you or your legal counsel find that helpful email later on.

Use Folders – File your emails! When adjudication rolls in to town, you’ll thank your former self for having spent the time organizing things when they happened. It takes much longer to dig around and find things than it does to simply practice good inbox management at the outset. When you need all your files from the Gerrard Street project, it’d be much easier to just quickly drag and drop the folder on to a USB, than sort through 10,000 emails.

Be Professional – Only send work emails from your work email address. It’s pretty embarrassing when a personal email is accidentally produced in a legal proceeding. Also, watch the tone of the email so you don’t find an unfortunate use of bad language quoted in a court decision.

Photos / Videos

Take Them – In fact, take them often. Photos and videos are one of the best ways to tell a story. Get a good camera for your project manager, or tell your whole team to (at safe opportunities) use their smartphones to document the work. Set up a central folder where photos can be uploaded and organized by date.

Reports

Prepare Them Often – Daily, weekly, monthly, yearly, or all of the above. Reports should be thorough and document everything that is germane to what is happening on-site including, but not limited to: weather, trades present on site, manpower per trade, site shutdowns, site access issues, visits from authorities, incident reports, discussions between trades, inspections, etc.

Meeting Minutes

Be diligent – Ensure that discussions at meetings are captured carefully and completely. They form an important record for many items that may later be disputed. If you are not responsible for preparing the meeting minutes, ensure that you review the minutes that are distributed to you. Meeting minutes often state something to the effect of “*if you find an error, you have 10 days to correct it by contacting the writer*”. Send that email! If you don’t report an error, courts will often make a finding that the minutes are the accurate record, and you could be stuck with that error standing as fact.

Schedules

Check, double-check, and repeat – Schedules are *critical* to delay claim analysis. Similar to the notes above about meeting minutes, schedules will tell a story to delay claim experts and the courts. Make sure you keep native file copies of your schedules so that the experts can deconstruct them.

If you disagree with an issued schedule, document your disagreement at the time that the schedule is released. Without that documentation, you may later find yourself trying to explain why you disagreed but never said anything.

Document Management

The underlying theme to all of these tips is that proper document management will save you time and money in the long run. Disputes can be entirely avoided by well-organized companies that can quickly find relevant documents that have been properly filed, titled, dated, and supported. Where disputes still persist, companies save on their litigation spend and employee time where they can quickly put their hands on the documents that need to be seen. Well-organized companies will flourish under the new *Construction Act*, so what better time to reshape business practices than now!

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Toronto

Email:

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035