

**THE CONSULTANT AND
DISPUTES BETWEEN THE OWNER AND THE CONTRACTOR**

**J. MARC MacEWING
Shapiro Hankinson & Knutson
Barristers and Solicitors**

It is the hope of every prime consultant engineer or architect who acts in the capacity of the Consultant designated by a construction general contract that the project can be completed without major dispute between the owner and the contractor, aided in that goal by the mediating role and moderating influence of the design professional. Unfortunately, not all projects adhere to that idyllic blueprint. When legal claims arise between the owner and the contractor, the Consultant is always to a greater or lesser degree caught in the middle. If the Consultant is in luck, the discomfort of that position will be limited to the procedural requirements which arise from being the source of evidence pertaining to the design and construction issues between the parties. More often, the Consultant risks being dragged into the dispute as a party to litigation, being sued by either the client/owner or, with increasing success, by the contractor.

The following are some important professional practice concerns for engineers or architects who risk finding themselves in the position of "the ham in the sandwich" between a feuding owner and contractor:

1. Experience shows that there is no sure way to insulate oneself from possible involvement in such disputes. Assuming the absence of actual professional negligence on the part of the Consultant, the best loss prevention technique is to perform the professional services with scrupulous attention to the potentially conflicting duties of acting as the owner's representative and as the impartial arbiter in the first instance of the requirements of the construction contract. However, even the most painstaking professional may be the target of allegations by the contractor of bias in favour of the owner or by the owner of insufficient protection of the owner's interests, sometimes simultaneously.
2. Recent common law case authority has strengthened the potential liability of a Consultant to the general contractor for negligence in design, despite the absence of a contract

directly between them. Such liability may exceed any liability of the owner under the construction contract, since the Consultant will usually not be entitled to take advantage of any limitations or exclusions of liability contained in the contract.

3. Recent common law case authority has also decided that there is no legal principle which wholly protects employees, whether professional or non-professional, from potential personal liability for their negligence. However, case law has identified some restrictions to the scope of potential personal liability, such as requiring that some special circumstances exist by which it is clearly identified that specific reliance is being placed on the individual employee and confirming that the use of a professional seal does not necessarily constitute a personal guarantee of the content of the drawings or other documents sealed.
4. The supporting evidence of the Consultant will usually be critical to the claim or defence of the owner and the contractor. It is particularly difficult for an owner to rely on obtaining a successful result in a dispute with the contractor if the owner must attempt to contradict the findings and certifications of its own Consultant. In the more usual scenario in which the Consultant's evidence supports the owner's case, the contractor's typical tactic is to allege incompetence and partiality on the part of the Consultant.
5. Payment and completion, the identification of deficiencies and the assessment of delays are the subject matter of most owner/contractor disputes. Each of these potential flashpoints directly involves professional services performed by the Consultant. For that reason, the professional must make the utmost effort to perform those services properly and with full knowledge of their significance, in order to satisfy his or her duties to the client, to the contractor and to the professional himself or herself.