



## ACEC British Columbia Position Paper

# Limitations of Liability

## Purpose

Limitation of liability clauses are included in a Client-Consultant Agreement in order to limit a consulting engineer's exposure to liability for certain types of claims that may be brought by the client in the event of a dispute. It is important that consulting engineers be aware of limitation of liability clauses and seek to include them as a standard part of every Client-Consultant Agreement. In general terms, limitation of liability clauses can accomplish three things:

1. limit a consultant's liability to a monetary amount;
2. limit a consultant's liability in time  
(i.e. prevent claims from being brought after expiry of a certain period of time); or
3. limit a consultant's liability to certain types of claims  
(i.e. claims for breach of contract or for certain kinds of damages only).

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## An Illustrative Example

There are many examples of standard-form limitation of liability clauses. Clauses GC 14.5 and GC 14.8 of the ACEC 31 are useful to review as they address all three areas of limitations of liability (time, amount, and type). Clause GC 14.5 and GC 14.8 read in relevant part:

**GC 14.5** *The Engineer's liability for claims which the Client has or may have against the Engineer or the Engineer's employees, agents, representatives and Sub-Consultants under this Agreement, whether these claims arise in contract, tort, negligence or under any other theory of liability, will be limited, notwithstanding any other provision of this Engineering Agreement:*

**(a)** *to claims brought within the limitation period prescribed by law in the jurisdiction in which the Project is located or, where permitted by law, within 2 years of completion or termination of the Services, whichever occurs first; and*

**(b)** *to re-performance of defective Services by the Engineer, plus:*

**(i)** *where claims are covered by insurance under section GC 14.1, and, if applicable, by any additional insurance under section GC 14.2 – to the amount of such insurance; or*

**(ii)** *where claims are not covered by insurance under section GC 14.1, and, if applicable, by any additional insurance under section GC 14.2 – to the amount of \$250,000.*

**GC 14.8** *The liability of each party with respect to a claim against each other is limited to direct damages only and neither party will have any liability whatsoever for consequential or indirect loss or damage (such as, but not limited to, claims for loss of profit, revenue, production, business, contracts or opportunity and increased cost of capital, financing or overhead) incurred by the other party.*

Each key aspect of Clause GC 14.5 in the ACEC 31 is discussed in detail below.

## Time-Based Limitation of Liability

The ACEC 31 limits a consulting engineers liability “in time” through Clause GC 14.5(a) which provides that no claims may be brought by the client two years after either “completion or termination of the engineer’s services” (whichever occurs first).

The importance of incorporating a contractual time limit on claims is highlighted by the liberal interpretation the courts in this jurisdiction have given to the Limitation Act. Generally speaking, unless a contractual time limit exists, construction-related claims for defects in engineering work can be brought, in some circumstances, as late as 30 years after substantial completion of a project. As has been stated by our courts, engineers are particularly vulnerable to stale claims:

*“A professional advisor drafts a document or designs a structure and finds himself attacked when, generations later, damage flows from his act. The attack may come at a time when mind and memory have faded or even failed altogether. He may not be able to recall or may have an imperfect memory of instructions or discussions which excluded liability or which redefined in some limiting fashion the duty he undertook.”<sup>1</sup>*

Potential prejudice to engineers as a result of the passage of time highlights the importance of including a clause in every client agreement that provides a date-certain within which claims against the consultant must be brought. A limitation clause such as the one found in Clause GC 14.5 of the ACEC 31 accomplishes this objective.

A client may not want to limit the time within which a claim must be brought. In fact, consultants are sometimes required to contract out of a limitation period. A consultant should do its best to avoid this long-tail exposure unless it has specifically considered the risk, obtained the appropriate insurance, and charged an appropriate premium. From the client’s perspective, there should be reasons why the consultant is being asked to assume greater liability than would otherwise be imposed by law, and should be made to appreciate the increased cost associated with increased assumption of risk.

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## Monetary Limits

ACEC 31 limits the amount of a consulting engineer’s liability to its client to “the amount of such insurance, or ... to the amount of \$250,000” through Clause GC 14.5(b).

The purpose behind limiting the consultant’s liability in monetary terms is simple: if the consultant obtains a small economic benefit (profit) while helping the client achieve a much larger one, the risk the consultant must bear should be commensurate with the financial return. The ACEC 31 limits the quantum of any claim by the client against the consultant to the limits of available insurance. This can be a reasonable way to allocate the risk of loss on a project between the parties and, it can also be beneficial by causing both sides to turn their minds to insurance coverage issues at the front end of the project. Another example of an industry accepted clause that limits liability to insurance available is found in the MMCD Agreement.

In some circumstances (such as small fee retainers), it may be appropriate for a consulting engineer to contractually limit its liability to a set amount such as \$25,000, \$100,000, or some other amount, such as the value of the engineering fees for the project.

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<sup>1</sup> *Costigan v. Ruzicka* (1985), 13 D.L.R. (4th) 368 (Alta. C.A.) at 377

It is in the consultant's best interests to limit its exposure to liability to the extent possible. Where a client requires a consultant to assume greater liability than that which the consultant is insured for, it is important that both parties understand the implications of such an arrangement. The consultant essentially has three choices: (1) decline the project on the basis that the risk assumed is too great; (2) take on additional insurance over and above the minimum amount prescribed by the contract and reflect that cost in the bid; or (3) assume the risk and accept that in the event of a significant claim, the survival of the firm may be jeopardized.

Clients have to realize that it is not in their interests for there to be uninsured risk. In the event that something goes wrong on a project, it is in the client's interest for there to be access to a pool of insurance. Professional liability insurance is a risk allocation tool that should be discussed with the client at the outset of the project to ensure the client's interests are reasonably protected and the financial future of the engineering firm is not put at risk by a particular project. Discussing and resolving these allocation of risk issues at the front-end of the project (rather than after a dispute has arisen) avoids the conflict and damage to the ongoing working relationship between client and engineer that can occur when an engineering firm's financial future is unexpectedly put at risk by a client's claim.

On a larger project, a consultant may not be able to obtain sufficient insurance to completely cover its exposure, or at least not at a reasonable cost, particularly if the client-consultant agreement does not include a limitation of liability clause. In that situation, it may be in the interests of both the client and the consultant to take out a project specific professional liability policy. While that may increase the initial cost of the project to the client, the consultants and contractors will all be able to offer their services at lower cost because they are not burdened with accepting uninsured risk or obtaining their own insurance.

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## Types of Liability

Consultants can greatly reduce their exposure to liability by including in the client-consultant agreement a clause limiting their liability to claims arising directly out of their performance of the agreement. ACEC 31, Clause GC 14.8 (transcribed above) limits the types of claims that may be advanced against a consulting engineer to "direct damages" arising from the engineers services. A client's lost opportunities or reduction/loss of profit are not recoverable when this clause is implemented.

Consultants should always seek to limit their exposure to certain types of damage. The ACEC 31 accomplishes this objective. The MMCD Agreement also has a clause that restricts the types of claims that may be advanced against a consulting engineer. There are, however, other types of damages that consultants may want to exclude based on the specific nature of the project.

The Engineers Joint Contract Documents Committee ("EJCDC") E-500 contains a useful clause for this purpose:

*To the fullest extent permitted by law, and notwithstanding any other provision in the Agreement ... the Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, or any of them, shall not be liable to Owner or anyone claiming by, through, or under Owner for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability, breach of contract, or warranties, express or implied, of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, and including but not limited to: [list particular types of damages].*

These clauses are very broad in that they limit the consultant's liability to the client to direct damages. Special, incidental, indirect, or consequential damages of any kind in any way related to the project are excluded. These clauses would be particularly useful to a consultant engaged on a large project where there is potential for business interruption losses which may be significant and not capable of being defined at the front for which the consultant should not be responsible even in the event of the consultant's negligence.

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## Enforceability

A common question by many in the construction industry, including consulting engineers, is whether limitation of liability clauses have been found by the courts to be enforceable. The Supreme Court of Canada has held that these clauses are enforceable provided they are not unconscionable, unfair, unreasonable, or otherwise contrary to public policy<sup>2</sup>. This determination is highly fact driven and as such, a comprehensive review of the law is beyond the scope of this discussion. As a general rule though, where parties are of equal bargaining power, and they are aware of what they are agreeing to, the courts will permit them to make their own bargain and hold them to the terms of that bargain. Recent court decisions have upheld limitation of liability clauses in client-consultant agreements<sup>3</sup>.

There are steps a consultant can take to increase the likelihood that a limitation of liability clause will be upheld. First, it is important that a limitation of liability clause be incorporated into every contract, so it becomes a matter of standard practice. Second, the limitation must be brought to the client's attention. This can be done by way of a cover letter or obtaining the client's initials next to the clause or at the bottom of every page of the agreement. Third, if the client is unsophisticated, explain the clause and document that explanation by way of a letter.

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<sup>2</sup> *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at ¶64

<sup>3</sup> *Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd.* (1989) 21 C.L.R. (2d) 128 (B.C.S.C.) and *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc.* 2007 BCSC 28

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