

# The Paper Trail: Successful Construction Claims Often Rely on Thorough Documentation

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Large construction projects generate thousands of pages of documents. Some of those documents create the legal relationships between the parties who were actively involved in the construction process. Others vividly demonstrate how the parties dealt with issues as they came up during the course of construction. Consider the spectrum of project documents:

- contract documents (including general conditions, supplementary general conditions, specifications, drawings, soils reports and bonds);
- drawings (including tender set, issued-for-construction set, as-built set, shop drawings, erection drawings and coordination drawings);
- bar chart and electronic schedules;
- contemplated change notices, site instructions, price quotations and change orders;
- applications for payment and payment certificates;
- inspection reports and testing reports;
- minutes of site meetings;
- deficiency lists;
- correspondence, inter-office memos and e-mails;

- handwritten notes of meetings and telephone conversations;
- site superintendent reports (for example, daily reports, diaries and logs).

For a lawyer, this is a treasure trove of evidence that will assist in the prosecution or defence of a construction claim.

These documents, for better or worse, complete or deficient, accurate or self-serving, comprise the complete written history of the project. They tell us who did what on the project; they tell us about design issues and how they were handled; they tell us about construction problems and how they were addressed (or not addressed). They tell us about delays and often state outright, or hint or allege, who was responsible; they tell us about disputes and how they were resolved (or not resolved); they tell us about delivery problems, labour problems, the number of people on the site every day, whether it was sunny on a particular day and whether propane heaters were used to heat the site during winter work.

One thing is very clear — the importance of these documents should never be underrated.

The archive boxes filled with project documents, which are typically delivered by clients to their lawyers for use in an arbitration, mediation or litigation proceeding, are not always organized. But by arranging them in chronological order, they tell a story in a comprehensible and revealing manner. That story, which tends to unfold during and after construction, often traces the history of construction problems, which may ultimately mature into one or more construction claims. The way that story is told may very well determine whether the construction claim will be successful or defeated.

The case of the leaking office building is a good example of the value of following the paper trail. During construction, it was not apparent that there was a problem. It was not until after the building became occupied that one of the tenants noted a number of puddles on the floor of his office after a heavy rainfall.

More tenants in other offices had the same experience, and within a short period of time, the problem became widespread and serious. The point of entry of the water could not be discerned. It was not clear whether the water was penetrating the masonry, or coming through the window gaskets, from the roof, or from some other point of entry. It was not clear whether it was a design, construction or materials problem.

The owner asserted a claim against a number of parties involved in the project (the “shotgun” approach) and hoped that the dispute resolution process would

sort things out. The targeted parties were the general contractor, the general contractor's bonding company (under the performance bond), the masonry subcontractor, the window supplier, the roofing subcontractor, the structural steel subcontractor, the architect, the structural engineer and others.

As you might expect, each of these parties said they did nothing wrong and blamed the others. All parties hired lawyers. Some were represented by their insurers and some retained expert witnesses (with varying degrees of expertise).

In the dispute resolution process, each of these parties had an obligation to produce all documents in his or her possession that were relevant to the issues in dispute. In turn, each party had the right to review the documents produced by the opposing parties. In doing so, each party was looking for a "smoking gun" in the opposing parties' documents. A "smoking gun" consists of one or more documents that may serve to implicate another party or to shift the blame or focus away from themselves.

In the case of the leaky building, during the discovery process the owner's lawyer was able to uncover numerous letters between the contractor and the masonry subcontractor that the owner had never seen before. In these letters, the contractor had warned about the masonry work.

There were allegations of poor grouting, which might have allowed water penetration through the building envelope. The comprehensive daily site reports indicated that the masonry subcontractor employed crews of mostly apprentice masons. There were letters, notes and other documents indicating that there were disputes between the architect and the structural engineer, in which the architect warned that certain alleged design deficiencies could lead to a "twisting" of the structure, a separation of the masonry and the consequent water penetration. The detailed minutes of site meetings also made reference to problems with the steel erection which, in retrospect, were caused by a deficiency in the structural design.

Uncovering these documents helped the parties to identify the causes of the leakage problem and suggested certain remedial strategies. The documents also helped to establish which parties were responsible for, or may have contributed to, the problem.

The owner's claim was resolved shortly thereafter. But for the detailed and thorough paper trail leading to the masonry subcontractor and the structural engineer, and leading away from the roofing subcontractor and the steel supplier, the dispute resolution process might have been protracted and considerably more

expensive.

In baseball, the rule is that a tie goes to the runner. In a construction claim scenario, a tie goes to the person with the best paper trail.

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