

## Indemnification - Industry Feedback

---

These info-sheets are produced by Saskatchewan's construction industry to provide information to all parts of the construction supply chain. Each info-sheet focuses on one particular contract clause that is often seen as problematic and challenging. This info-sheet is intended to encourage discussion between all parties to construction contracts and to support the implementation of best practices wherever possible.

### Example Clause:

#### *Industry Standard Clause (CCDC 2 GC 12.1)*

- The Contractor shall indemnify and hold harmless the Owner and the Consultant, their agents and employees from and against claims, demands, losses, costs, damages, actions, suits, or proceedings (hereinafter called "claims"), by third parties that arise out of, or are attributable to, the Contractor's performance of the Contract provided such claims are:
  1. attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, and
  2. caused by negligent acts or omissions of the Contractor or anyone for whose acts the Contractor may be liable, and
  3. made in writing within a period of 6 years from the date of Substantial Performance of the Work as set out in the certificate of Substantial Performance of the Work, or within such shorter period as may be prescribed by any limitation statute of the province or territory of the Place of the Work.

The Owner expressly waives the right to indemnity for claims other than those stated above.

#### Problematic Clause

- The contractor shall indemnify and hold harmless the owner, its officers, directors, personnel, agents and consultants, including the prime consultant from and against, all claims that arise out of, or result from the acts or omissions of the contractor, the subcontractors, and any person for whom the contractor is responsible at law, and without limiting the generality of the foregoing, arising by reason of any matter or thing done, permitted or omitted to be done by the contractor, the subcontractors, or any person for whom the contractor is responsible at law, whether occasioned or caused by negligence, breach of contract, or otherwise.

### What the clause is intended to do:

- Indemnification clauses are set out to protect a party's liability if a third-party is harmed in any way contractually obligates one party to compensate another party for losses or damages that have occurred or could occur in the future.
- Changes to the indemnification clause, like the problematic clause above, are intended to make the contractor responsible for all actions of all parties. It helps protect the project owner and their agents from any act by the contractor, without restriction. At a basic level, the goal of the clause is to shift as much risk as possible off the owner and on to the contractor.



### Why the clause is problematic for industry:

- Part of the challenge is that the contractor is expected to indemnify other parties they are not contractually linked to, like the consultant, against their own work, without reciprocal indemnity or an understanding of the indemnity provided by the consultant for the owner.
- It is not reasonable to ask the contractor to be responsible for things that are outside of their control. Being liable for claims outside your fault or negligence puts excessive risk on the contractor.
- The clause should include a limit of liability and a limitation period to ensure a reasonable insurance policy can manage the risk.

### Better option for the owner:

- Allocate project risk to the party that is most in control of that risk and best positioned to assume it.
- Discuss risk allocation with all parties and be clear about expectations.
- Consider limiting the contractor's indemnification to "to the extent of its fault or negligence" and provide the contractor with a cap on their risk exposure.
- Adopt the CCDC wording for indemnification which properly addresses the fault-based intent of indemnity and provides value and time limits on the liability. CCDC documents are developed by an industry committee including representation from owners, architects, consulting engineers, and contractors.

### What Industry can do:

As a contractor, when you face an indemnity clause, you should consider a few mitigation strategies, including:

- Understanding the implications of the clause;
- Negotiating changes to the clause;
- Purchasing additional insurance; and/or
- During the tender process, request an addendum to change the clause.

At a national level, this issue has been discussed and [CCDC Bulletin 25](#) addresses the risks associated with changes to the standard indemnification clause.

For more information about this issue, or any issue related to procurement and contracts within Saskatchewan's construction industry, please reach out to the Saskatchewan Construction Association at 306-525-0171 or [sca@scaonline.ca](mailto:sca@scaonline.ca).

*Prepared by the Saskatchewan Industry Advisory Council, a committee of the Saskatchewan Construction Association, representing 19 industry and trade associations in the province, as a guideline of recommended industry practice.*