TABLE OF CONTENTS

PREF	NCE v	
TABL	E OF CASES xx	xiii
1.	INTRODUCTION AND GENERAL CONTEXT 1	
1.1	The Purpose of Insurance	
1.2	The Structure of a Construction Project 2	
1.3	Types of Insurable Loss 4	
1.4	Standard Form Policies 5	
1.5	Distinguishing Construction Insurance from Surety	
	Bonds	
1.6	Distinguishing Warranty Obligations from	
	Insurance	
1.7	Legislative and Regulatory Regime of Insurance	
	in Canada 8	
1.8	Conclusion	
2.	CONSTRUCTION RISK	1
2.0	Overview of Construction Risk	1
2.1	Risk Allocation through Contractual	
	Mechanisms	3
2.	1.1 Cost Overruns 14	4
2.	1.2 Late Completion	5
2.	1.3 Claims for Changes in the Work 10	6
2.	1.4 Consequential Damages	7
2.	1.5 Latent Defects	7
2.	1.6 "Long Tail" Claims	7
2.	1.7 Delay Events	8
2.	1.8 Third Party Claims	9
2.	1.9 Liens	9
2.	1.10 Insolvency and Cash Flow	9
2.	1.11 Accuracy and Completeness of Information Provided	
	by the Owner 20	0

	2.1.12 2.1.13	Site Investigation/Unanticipated Conditions	20 20
		Collateral Representations	
	2.1.14	Changes in Law	21
	2.1.15	Availability of Permits	21
	2.1.16	Performance Guarantees	21
	2.1.17	Damage to the Work and Injury to Persons	21
	2.2	Insurable Versus Uninsurable Risk	21
	2.3	Conclusion	23
3.		STRUCTION CONTRACTS AND PROFESSION-	
		ERVICES AGREEMENTS: THE CONCEPTUAL MEWORK	25
	3.1	Standard Form Construction Contracts and	23
	5.1	Professional Services Agreements	26
	3.2	Project Delivery Methods	27
	3.2.1	Design-Bid-Build	27
	3.2.1	e	28
	3.2.2	Design-Build Engineer Procure and Construct ("EPC")	29
	3.2.3		29 29
	3.2.4	Design-Build-Operate-Maintain	30
	3.2.5 3.2.6	Construction Manager At Risk	31
		Construction Manager Not At Risk	31
	3.3 3.4	Project Financing Methods	34
	3.4.1	Description of the Parties and the Work	34
	3.4.2	Definition of Contract Documents	34
	3.4.3	Contract Price	35
	3.4.4	Insurance	35
	3.4.5	Administration of the Contract	39
	3.4.6	Execution of the Work	40
	3.4.7	Payment Procedures	42
	3.4.8	Holdbacks	44
	3.4.9	Changes in the Work	45
	3.4.10	Liquidated Damages	47
	3.4.11	Default	47
	3.4.12	Dispute Resolution	47
	3.4.13	Indemnification, Limitation of Liability, Waiver of Claims, and Warranty	48

	3.5	General Structure of a Professional Services	
		Agreement	48
	3.6	Conclusion	50
4.	UNDI	ERSTANDING A POLICY OF INSURANCE	51
	4.1	Use of American Case Law	51
	4.2	The Structure of a Policy of Insurance	52
	4.2.1	The Declarations	53
	4.2.2	Insuring Agreement	54
	4.2.3	Definitions	54
	4.2.4	Exclusions	55
	4.2.5	Conditions and Warranties	56
	4.2.6	Endorsements	59
	4.2.7	Schedules	60
	4.3	Foundational Principles	60
	4.3.1	The Principle of Indemnity	60
	4.3.2	Utmost Good Faith	61
	4.3.3	Fortuity	62
	4.4	The Distinction between First Party and Third Party	
		Insurance Coverage	71
	4.4.1	First Party Coverage	71
	4.4.2	Third Party Coverage	71
	4.5	The Insured: Named, Unnamed, Additional, and Joint	
		and Several Insureds	72
	4.6	The Distinction between "Occurrence" and "Claims-	
		Made" Policies	76
	4.6.1	Occurrence-Based Policies	76
	4.6.2	Claims-Made Policies	77
	4.7	Coverage Triggers	81
	4.8	The Burden(s) of Proof	83
	4.9	The Principle of Subrogation	83
	4.9.1	What is Subrogation?	84
	4.9.2	When does Subrogation Arise?	84
	4.9.3	The Obligations of the Insured	85
	4.9.4	The Rights of the Insurer	85
	4.9.5	Subrogation Against Insured(s)	86

		Covenants to Insure and Tort Immunity	95
	4.9.5.2	2Waiver of Subrogation Against Other Insured(s) or Parties Involved in the Project	97
	4.10	The Principles of Policy Interpretation	99
	4.10	Coverage Provisions Construed Broadly and Exclu-	99
	4.10.1	sions Construed Narrowly	103
	4.10.2	Reasonable Expectations of the Parties	103
	4.10.3	Contra Proferentem	106
	4.11	Priority of Concurrent Insurance Policies: Primary vs.	100
	7.11	Excess Coverage	109
	4.12	Conclusion	110
5.	ТҮРБ	S OF CONSTRUCTION INSURANCE	111
	5.1	Builder's Risk Policies and Other Property	
	0.12	Policies	111
	5.2	Commercial General Liability Policies and Other	
		Liability Policies	112
	5.3	Professional Liability Policies	113
	5.4	Boiler and Machinery and Contractor's Equipment	
		Policies	115
	5.5	Pollution Insurance	115
	5.6	Default Insurance	116
	5.7	Marine Transit and Other Transit Policies	116
	5.8	Rigger's Liability Insurance	116
	5.9	Automobile, Watercraft, and Aircraft	117
	5.10	Delayed Completion, Force Majeure, and Liquidated	
		Damages Insurance	117
	5.11	Insurance for Leased, Rented or Borrowed Equipment	
			118
	5.12	Political Risk Insurance	118
	5.13	Controlled Insurance Programs ("CIPs")	118
	5.14	Conclusion	120
6.	BUIL	DERS' RISK POLICIES	121
	6.0	Overview of a Builders' Risk Policy	121
	6.1	Who is Responsible for Obtaining Builders' Risk	
		Coverage?	125
	6.2	Who is Insured under a Builders' Risk Policy?	128

6.3	What Coverage is Provided under a Builders' Risk	
	Policy?	129
6.3.1	Covered Property	130
6.3.1.	1 Existing Property Adjacent to or Adjoining Con-	
	struction Work in a Single Interconnected Structure	
	Under Renovation or Expansion	133
6.3.2	"All risks" Builders' Risk Policies	137
6.3.3	Named Perils Builders' Risk Policies	138
6.3.4	Cessation of Coverage	140
6.4	Cause of Loss	141
6.5	Physical Loss or Damage	143
6.6	Exclusions	147
6.6.1	Faulty or Improper Design, Workmanship, and	
	Materials	147
6.6.1.	1 Faulty or Improper Design	147
	6.1.1.1 The Negligence Standard	148
	6.1.1.2 The " <i>Prima Facie</i> " Standard	151
	6.1.1.3 The Foreseeability Standard	154
	6.1.1.4 The State-of-the-Art Standard	155
	2Faulty or Improper Design Exclusion in the United	
	States	158
6.6.1.	3Faulty or Improper Workmanship	162
	4Faulty or Improper Materials	168
6.6.2	Inherent Vice Exclusion	172
6.6.3	Latent Defect Exclusion	177
6.6.4	Mechanical Breakdown	181
6.6.5	Continuous Seepage or Leakage of Water	181
6.6.6	Earth Movement	181
6.6.7	Terrorism and Other Governmental Action	
	Exclusion	181
6.6.8	Excluded Damages	182
6.6.9	Pre-existing Buildings and Fixed Structures	182
6.6.10	Other Common Exclusions	182
6.7	Resultant Damage Exception	183
6.7.1	Historical Canadian Cases Interpreting the Resultant	100
0.7.1	Damage Exception	184
6.7.2	Consideration of the Resultant Damage Exception in	
2.,	the United Kingdom and the United States	194

	6.7.3	A More Expansive Interpretation of the Resultant Damage Exception in Canada	197
	6.7.4	The "DE" Clauses and London Engineering Group	1)/
	0.7.4	Defect Clauses	202
	674	1 Judicial Consideration of LEG 2/96 in Canada	208
	6.7.5	Divisibility Approach vs. Connectedness Approach	210
	6.8	Sue and Labour Clauses	211
	6.9	Conclusion	215
	0.7	Conclusion	213
7.		MERCIAL GENERAL LIABILITY	
	POLI	CIES	217
	7.0	Overview of a CGL Policy	217
	7.1	A Brief History of Liability Insurance and CGL Stan-	
		dard Forms	218
	7.2	Who is Responsible for Obtaining a CGL	
		Policy?	221
	7.3	Who is Insured under a CGL Policy?	221
	7.3.1	Additional Insured(s)	222
	7.4	What Coverage is Provided under a CGL Policy?	223
	7.4.1	Is there a Legal Obligation to Pay?	227
	7.4.2	Is there Bodily Injury and/or Property Damage?	232
	7.4.2.	Bodily Injury	232
	7.4	4.2.1.1 Mental Injury	233
		2Property Damage	235
	7.4	4.2.2.1 Is Coverage for "Property Damage" Limited to	
		Third-Party Property?	236
	7.4	4.2.2.2 Do Construction Defects Constitute "Property	
		Damage"?	241
	7.4.3	Was the Bodily Injury and/or Property Damage	
		Caused by an "Occurrence"?	248
	7.4.3.	Does Defective Workmanship Constitute an "Occur-	
		rence"?	249
	7.4.4	Did the Bodily Injury and/or Property Damage Occur	
		During the Policy Period?	253
	7.5	The Law Regarding Coverage Issues Under CGL	
		Policies Following <i>Progressive Homes</i>	254
	7.6	Exclusions	255
	7.6.1	Expected or Intended Injury	256

	7.6.2	Contractual Liability	256
	7.6.3	Worker's Compensation and Employer's	
		Liability	259
	7.6.4	Aircraft, Watercraft, and Automobiles	261
	7.6.5	Damage to Property	261
	7.6.5.1	Property You Own, Rent or Occupy	263
	7.6.5.2	Personal Property in Your Care, Custody, or	
		Control	263
	7.6.5.3	3"That Particular Part of Real Property on Which You	
		or Any Contractor or Subcontractor Working Directly	
		or Indirectly on Your Behalf is Performing Opera-	
		tions"	265
	7.6.5.4	4"That Particular Part of Any Property That Must be	
		Restored, Repaired or Replaced Because 'Your Work?' Was Incorrectly Performed on It'	265
	7.6.6	Work' Was Incorrectly Performed on It' Damage to "Your Product"	268
	7.6.7	Damage to "Your Work"	269
		Distinguishing Between Subcontractor and Supplier	209
	7.0.7.1	for the Purposes of the Exception to the Own Work	
		Exclusion	275
	7.6.8	Damage to "Impaired Property"	278
	7.6.9	Professional Services	280
	7.6.10	Other Relevant Exclusions	282
	7.7	Duty to Defend	286
	7.8	The Relationship Between CGL Coverage and Build-	
		ers' Risk Coverage	292
	7.8.1	When Coverage from a Builders' Risk Policy and a	
		CGL Policy Does Not Overlap	293
	7.8.2	When Coverage from a Builders' Risk Policy and a	
		CGL Policy May Overlap	296
	7.9	Wrap-Up Liability Policies	297
	7.10	Conclusion	299
8.	DDOI	FESSIONAL LIABILITY POLICIES	301
ο.	8.0	Overview of a Professional Liability Policy	301
	8.1	Who is Responsible for Obtaining a Professional	501
	0.1	Liability Policy?	302
		Liability Folicy:	302

8.2		Limitation of Liability Clauses in Professionals Services Agreements	30.
8.3		Who is Insured Under a Professional Liability Poli-	
0.4		cy?	31
8.4		Insuring Agreement	31.
8.5		Professional Services	31
	8.5.1	Amounts Recoverable Under a Professional Liability Policy	32
	8.5.2	Policy Limits of a Professional Liability Policy	32
8.6		Errors and Omissions, Wrongful Acts, and Profes-	
		sional Negligence	32
8.7		Standard of Care	32
	8.7.1	Negligent Performance of Field Services	32
	8.7.2	Negligent Misrepresentation	33
8.8		Notice	33
8.9		Legal Obligation to Pay	33
8.10)	Exclusions	33
	.10.1	Intentional, Dishonest, Fraudulent, Criminal or Mali-	
Ü		cious Conduct	33
8	.10.2	Express Warranties, Guarantees, and Cost	
		Estimates	33
8	.10.3	Exemplary, Punitive, Liquidated and Aggravated	
		Damages	33
8	.10.4	Insured v. Insured	34
8	.10.5	Liability Assumed under Contract	34
	.10.6	Pollution	34
	.10.7	Faulty Workmanship	34
	.10.8	Performance of Services that are Outside the Profes-	
	.10.0	sional's Area of Knowledge	34
8	.10.9	Failure to Provide Services Promptly	
	.10.10	Advice as to Suretyship, Bonds, and Insurance	
	.10.11	Infringement of Trademarks, Patents, or	
J		Copyrights	34
8	.10.12	Insolvency	
	.10.12	Fines and Penalties Imposed by Government	51
O	.10.10	Agencies	34
8.11		Conclusion	
$\sim \cdot \cdot \cdot \cdot \cdot$		~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~	J 1

	LER AND MACHINERY AND CONTRACTORS' JIPMENT POLICIES	345
9.0	Overview	345
9.1	Boiler and Machinery Insurance	345
9.1.1	Who is Responsible for Obtaining a Boiler and	
	Machinery Policy?	347
9.1.2	Who is Insured Under a Boiler and Machinery	
	Policy?	347
9.1.3	What Coverage is Afforded Under a Boiler and Machinery Policy?	347
9.1.4	Exclusions Under a Boiler and Machinery Policy	357
9.1.5	Potential Overlapping Coverage between Boiler and	
	Machinery Coverage and Property Coverage	358
9.2	Contractors' Equipment Insurance	362
9.2.1	Who is Responsible for Obtaining Contractors'	
	Equipment Coverage?	362
9.2.2	Who is Insured Under Contractors' Equipment Insur-	
	ance?	362
9.2.3	What Coverage is Afforded Under Contractors'	262
0.2.4	Equipment Insurance?	362
9.2.4	Exclusions under Contractors' Equipment Insurance	368
9.3	Conclusion	370
10. POI	LUTION INSURANCE	371
10.0	Overview of Pollution Insurance	371
10.1	Pollution Exclusions in Commercial General Liability	
	Policies	372
10.2	Liability for Pollution in Respect of the Construction	
	Industry	387
10.3	Express Pollution Coverage	391
10.4	Types of Pollution Policies Available	391
10.4.1	Pollution Legal Liability	393
10.4.2	Contractors' Pollution Liability	393
10.4.3	Clean-Up Cost Cap Policy / Remediation Stop Loss Policies	394
10.4.4	Environmental Consultant's Liability	394
10.4.5	"Sudden and Accidental" Pollution and Hostile Fire Endorsement to CGL Policy	395

10.5	Conclusion	396
	VERVIEW OF BONDS AS A NON-INSURANCE FRANSFER MECHANISM	397
	Introduction	397
	What is a Surety Bond?	399
	Bond Wordings	399
	Subrogation	401
11.1.3 H	Electronic Commerce Legislation	402
	Bid Bonds	402
11.2.1 V	What is a Bid Bond?	402
	Potential Grounds of Denial in Respect of a Bid	
	Bond Claim	403
	Error on the Face of Bid	405
	2 Non-Conforming Tender	405
	Performance Bonds	406
	What is a Performance Bond?	406
	Potential Grounds of Denial in Respect of a Perform-	409
11.3.2.1	ance Bond Claim	409
11.3.2.1	· · · · · · · · · · · · · · · · · · ·	409
11.3.2.3	,	409
11.3.2.4		410
11.3.2.5		412
11.3.2.6	1	413
	Bond Forms	414
11.3.3.1		414
11.3.3.2		414
11.3.3.3		
	tor Contracts	415
11.4 I	Labour and Material Payment Bonds	416
11.4.1 V	What is a Labour and Material Payment Bond?	416
	Bond Forms	418
11.4.2.1	Federal Government Form 506	418
11.4.2.2	· · · · · · · · · · · · · · · · · ·	440
11 100	ment Bond	418
11.4.2.3	3 Ontario Construction Act Form 31 For Public Sector Contracts	410

	11.4.3	Potential Grounds of Denial in Respect of a Labour	420
	11.4.3	and Material Payment Bond Claim	420 420
		3.2 Timing of Notice	421
	11.4.3		421
	11.4.3	Underlying Subcontract	424
	11 4 3	3.4 Other Defences	428
	11.4.4	Subrogation in the Context of a Labour and Material	120
	11.7.7	Payment Bond	428
	11.5	Conclusion	429
12		AULT INSURANCE	431
	12.0	Overview of Default Insurance	431
	12.1	What Coverage Does Default Insurance Provide?	431
	12.2	Who is Responsible for Obtaining Default Insurance?	
			433
	12.3	Who is Insured Under Default Insurance?	434
	12.3.1	Contractor Default Insurance	434
	12.3.2	Subcontractor Default Insurance	434
	12.4	If There is a Default, How Does Default Insurance	
		Respond?	435
	12.4.1	Contractor Default Insurance	435
	12.4.2	Subcontractor Default Insurance	435
	12.5	What Exclusions are Typically Found in a Policy	
		of Default Insurance?	436
	12.6	What is the Difference Between Default Insurance	
		and Surety Bonds?	436
	12.6.1	Two-Party vs. Three-Party Relationship	437
	12.6.2	Indemnity Obligations and Subrogation Rights	437
	12.6.3	Protection of Contractor vs. Protection of	
		Owner	437
	12.6.4	Timing of Payment	437
	12.6.5	Completing the Work	438
	12.6.6	Underwriting Process	438
	12.6.7	Enrollment, Renewal and Cancellation	439
	12.6.8	Lack of Case Law	440
	12.6.9	Premiums and Deductibles	441
	12.6.10	Policy Limits	441

12.7	What is the Difference between a CGL Policy and Default Insurance?	441
12.8	Conclusion	442
12 CED7	PHELOA TREC OF INCLIDANCE	115
	TIFICATES OF INSURANCE	445
13.0	Overview	445
13.1	"Information Only" Disclaimers	448
13.2	Scope of Coverage for Additional Insureds Under Liability Policies	451
13.2.1	Where an Endorsement Adds the Additional Insured and a Subordinate Certificate Purports to Narrow Coverage	451
13.2.2	Where No Endorsement Adds the Additional Insured and a Certificate Purports to Narrow Coverage	453
13.2.3	Where No Endorsement Adds the Additional Insured and the Certificate is Silent with Respect to Coverage	
13.3	The Authority and Liability of Brokers with Respect	455
10.4	to Certificates Issued for Additional Insureds	457
13.4	Conclusion	460
	ROLE OF INSURANCE AGENTS AND	
BROI	KERS	461
14.1	What is the Role of an Insurance Agent or Insurance	
	Broker?	461
14.2	Role of the Insurance Agent and Broker in Placing Coverage for a Construction Project	463
14.3	Role of the Insurance Agent and Broker in the Application Process, Renewal, and Cancellation of Insur-	
	ance Policies	466
14.4	Role of the Insurance Agent and Broker in Respect of Certificates of Insurance	467
14.5	Role of the Insurance Agent and Broker in the	
	Claims Process	467
14.5.1	Notification of Loss	467
14.5.2	Quantification of Loss	467
14.6	Standard of Care Imposed on an Insurance Agent and	
	Broker	468

14.6.1	Standard of Care Imposed in Placing Adequate	
	Coverage	468
14.6.2	Standard of Care Imposed in Transmitting	
	Information	474
14.6.3	Standard of Care in Advising an Insured in Respect	
	of Making a Claim Under a Policy of Insurance	479
14.7	Damages Payable by an Agent or Broker for Failing	
	to Obtain Coverage	480
14.8	Conclusion	482
	TERIAL MISREPRESENTATION AND	
	UD	483
15.0	An Overview of Misrepresentation and Fraud	483
15.1	What is a Material Misrepresentation?	483
15.2	Application for Insurance	485
15.3	Changes Material to the Risk	490
15.4	Claims	493
15.5	Fraud	495
16 11011	WEO MAKE A OLAIM LINDER A ROLLOW OF	
	V TO MAKE A CLAIM UNDER A POLICY OF URANCE	499
16.1	What to Do If a Claim Arises?	499
16.2	Identifying an Insurance Claim	499
16.3	Methodology for Making an Insurance Claim	500
16.4	Notice	501
16.4.1	Timing of Notice	501
16.4.2	Form of Notice	502
16.4.3	Proof of Loss	503
16.4.4	Limitation Periods	504

	16.5	Statutory Provisions in Respect of Relief from	
		Forfeiture	504
	16.5.1	Relief from Forfeiture Under the Applicable Insur-	
		ance Legislation	505
	16.5.2	Relief from Forfeiture Under the Applicable Justice	
		Statute	508
	16.5.2.1	Contractual Forfeiture and Classes of Insurance Not	
		Subject to Relief from Forfeiture Under Insurance	
		Legislation	508
	16.5.2.2	Statutory Forfeiture	510
	16.6	How Will an Insurer Handle a Claim?	515
	16.6.1	How Will an Insurer Respond to a Notice	
		Letter?	515
	16.6.2	Investigation	515
	16.7	Dispute Resolution	516
	16.7.1	Control of Insured's Defence Against Civil Actions	
		Under Liability Policies	516
	16.8	Alternative Dispute Resolution	517
	16.8.1	Mediation	518
	16.8.2	Arbitration	519
	16.8.2.1	Arbitration of Underlying Construction Claims	519
	16.9	Conclusion	521
17	7. CONC	LUSION	523
	NDEX		525