

# **The New Canadian Standard Construction Contract**

**CCDC 2 -2008**

## **Default Notice (Part 7)**

**Brendan D. Bowles  
Glaholt LLP**

## 1. Introduction

CCDC 2, like most standard form construction contracts, prescribes when the parties may terminate the contract. An owner may only terminate the contract if the contractor fails to comply with the requirements of the contract to a substantial degree, if the contractor fails to correct a substantial default after having been given notice in writing of the default and if the consultant has given a written statement to both the owner and the contractor that such action is justified. A contractor is entitled to terminate the contract if the owner violates the terms of the contract to a substantial degree and if the consultant confirms that such is the case.<sup>1</sup>

In the case of contractual termination, it is not necessary to establish that the breach underlying the termination is in any sense a “fundamental breach” entitling the innocent party to terminate the contract. It is sufficient that the breach meets the criteria set out in the contract.

Contractual termination may provide no remedies to the terminating party beyond those conferred by the termination clause itself.<sup>2</sup> In the United Kingdom, a contracting party that terminates future performance of the contract pursuant to a term of the contract may only be entitled to recover damages in respect of the loss which it has suffered at the date of termination and not for loss of bargain damages.<sup>3</sup> The separation of the right to terminate and the right to

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<sup>1</sup> CCDC 2 – 1994, GC 7.1, GC 7.2.

<sup>2</sup> *Hudson’s Building and Engineering Contracts*, Vol. 2, 11<sup>th</sup> ed (London: Butterworths, 1995) at 12-004.

<sup>3</sup> *Chitty on Contracts*, 29<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at 22-048.

claim loss of bargain damages has been rejected in Canada.<sup>4</sup> Thus, in Canada, a party terminating a contract under an express term of the contract would generally appear to retain its right to recover loss of bargain damages.

Common law and contractual terminations can overlap since contractual termination clauses are often conditioned on breaches which will be sufficiently serious to justify a common law termination as well.<sup>5</sup> In the absence of express provisions to the contrary, contractual terminations by either party do not exclude the parties' common law rights.<sup>6</sup>

The enforceability of a contract provision after a breach of contract is a question of contractual interpretation.<sup>7</sup> Terms with continuing effect, particularly those that have meaning only after a breach or termination, such as arbitration clauses, exclusionary clauses, choice of forum clauses, limitation periods and restrictive covenants, all usually survive termination.<sup>8</sup>

## **2. GC 7 – Notice of Termination**

GC 7.1 provides a balance between the rights and interests of the contractor and those of the owner. What makes the provision workable is the interposing of a consultant between the

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<sup>4</sup> *Keneric Tractor Sales Ltd. v. Langille* (1987), 43 D.L.R. (4<sup>th</sup>) 171. For an academic criticism of the United Kingdom position, see Opeskin, "Damages for Breach of Contract Terminated Under Express Terms" (1990), 106 L.Q.R. 293.

<sup>5</sup> *Hudson's Building and Engineering Contracts*, Vol. 2, 11<sup>th</sup> ed (London: Butterworths, 1995) at 12-005.

<sup>6</sup> *Ibid* at 12-006; *Chitty on Contracts*, 29<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at 22-048.

<sup>7</sup> *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423.

<sup>8</sup> See *Hackett Drugs Ltd. v. Ponoka Foods Ltd.*, [2006] A.J. No. 1232 (Q.B.).

conflicting positions of the contractor and the owner.<sup>9</sup> A consultant acting under a CCDC 2 contract acts in a quasi-judicial role and must be independent, impartial, objective and fair-minded in resolving conflicts between the contractor and the owner. In GC 7.1.2, the consultant has to give a "written statement" to the owner and the contractor that sufficient cause exists to justify a notice of default because of the neglect of the contractor in prosecuting the work properly, or because of the failure of the contractor to comply with the requirements of the contract to a substantial degree. If the consultant gives such written statement, the owner may notify the contractor that it is in default, must specify what the default is and can demand that the default be corrected following receipt of such notice. The contractor must then either correct the default or take appropriate steps to begin to correct the default, as set out in GC 7.1.3. If the contractor fails to correct the default or fails to take the appropriate steps to begin to correct the default, the owner has two options as set forth in GC 7.1.4, i.e. it may correct the default and deduct the cost thereof from any payment then or thereafter due, or terminate the contractor's right to continue with the work in whole or in part or terminate the contract. GC 7.2 sets out the corresponding rights of the contractor in the face of an owner's default.

Part 7 is generally strictly enforced by the courts, and failure to give proper notice under Part 7 may lead to a finding of wrongful termination and damages for lost profit. In *Dirm Inc. v. Dalton Ltd.*,<sup>10</sup> for example, the subcontractor breached the contract by refusing to complete it according to its terms. The court held that because of this breach, the general contractor was entitled to terminate the contract. The general contractor gave the following notice:

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<sup>9</sup> *Kaplun v. Mihhailenko* (2005), 43 C.L.R. (3d) 223 (Ont. Master).

<sup>10</sup> [2006] O.J. No. 3355 (S.C.J.).

This shall confirm that Dirm has been given formal notice effective June 4, 2003, by our project superintendent under the direction of the undersigned. Under the terms of our agreement you have five working days to comply with all outstanding issues, including completing the forming and finishing of the final portion of the floor slab.

The court found the notice to be lacking for the following reasons:

I find that the June 10, 2003, notice is deficient because it is not in compliance with the CCDC-2 default and termination provisions specified in Part 7.

The problem with Dalton's June 10, 2003, notice is that it counts the five working days from June 5, 2003, when in fact the June 4 fax was not a proper notice. The CCDC-2, Part 7, article 7.1.2, requires Dalton to give written notice of default to Dirm, including an instruction to Dirm to correct the default within five working days immediately following the giving of the notice. The June 10, 2003, notice of termination ought to have allowed until June 17, 2003, for Dirm to rectify the default.

To exacerbate the matter Dalton made arrangements to replace Dirm before the expiry of the five day notice period and on June 12, 2003, another contractor was already on site.

Dirm was removed from the site on June 12, 2003, when its work was 93% complete. On that date both Tony and Benny DiSotto returned to the Project site at 8:00am for a scheduled meeting with Dalton. They were surprised to see that another concrete subcontractor, Bravo, had been retained by Dalton to complete Dirm's contract work and to carry out the final pour using the Peri forms rented and placed by Dirm.

[...]

I find that Dirm's letter of June 5, 2006, constitutes a refusal to perform the contract work, justifying Dalton terminating the contract. However, I also find that Dalton failed to terminate the contract according to its terms.

For all of these reasons I find that Dalton was justified in terminating Dirm for breach of contract, but that Dalton breached the contract by removing Dirm from the job without proper notice of default under Article 7.1.2. Not having been properly terminated, Dirm ought to have been given an opportunity to rectify the default and complete the work.

So in the result there were two breaches of contract from which damages flow: the first is the breach by Dirm for failing to attend at the site and carry out the final pour. The second is the breach by Dalton for failing to properly terminate Dirm but nevertheless removing Dirm from the job and hiring another contractor to complete the work. Damages flow from each of these breaches of contract.

In the result, the damages awarded to the general contractor were its reasonable costs to complete the contract work. The damages awarded to the subcontractor were the money it would have earned had it completed the contract.

The provisions of GC 7 are inconsistent with a party having a unilateral right to refuse payment to the other party for breach without having given the required notice.<sup>11</sup> In *Poemen Enterprises Ltd. v. Chen*, the consultant issued a certificate of payment. When the owners refused to pay the amount certified, the contractor gave notice under GC 7.2.3.3 that the owner was in default of payment and that the contractor would terminate the contract if the default was not corrected within 5 working days as provided for in GC 7.2.4. When the owners delivered a cheque that was dishonoured, the contractor terminated the contract. The owner argued that it had withheld payment because of the contractor's failure to provide bonding required under the contract. The court held that in light of the contractual termination provisions, and the fact that the owner had at no time given notice of default, the owner had no right to terminate the contract. The contractor, on the other hand, having complied with the provisions of the contract, had the right to terminate the contract and demand payment as certified by the consultant.

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<sup>11</sup> *Poemen Enterprises Ltd. v. Chen* (1997), 34 C.L.R. (2d) 222 (B.C. S.C.).

Where a fire marshal issued a stop work order, GC 7.2.2 was held to have been triggered and the contractor entitled to terminate under GC 7.2.5 in *Del Ridge Construction Inc. v. General Accident Assurance Co. of Canada*.<sup>12</sup> The motions judge held that in such circumstances, the contractor was entitled to exactly those damages provided for in GC 7.2.5, i.e. the cost of all work performed prior to the fire, including a percentage for overhead and profit, as well as penalties incurred as a result of the non-performance of the contract. The Court of Appeal, while holding that the motions judge might be proved correct on all or some of the issues, set the judgment aside based on the fact that the motions judge had treated the summary judgment motion as a trial on the record and determined all issues of fact and law other than the issue of quantum. There were genuine issues for trial and the motion judge was required to send them on for trial.<sup>13</sup>

Where because of the provisions of the contract as a whole, the application of GC 7 becomes impossible, the common law termination regime will apply. In *Kaplun v. Mihhailenko*,<sup>14</sup> the owner and the consultant were the same person. The court held as follows:

In my view, it is impossible for an owner to also be a "consultant" because of the inability of the "owner" to be independent, impartial, objective and fair-minded in carrying out his duties as the consultant under the contract and in resolving conflicts between the contractor and the owner.

I therefore find that Part 7, GC 7.1 (and any other part of this contract that provides for activity on the part of a "consultant") is inapplicable and inoperative because of the legal impossibility of these provisions being applied and being workable. This does not abrogate the entire contract but only makes these provisions inapplicable.

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<sup>12</sup> (2003), 24 C.L.R. (3d) 101 (Ont. S.C.J.).

<sup>13</sup> (2005), 46 C.L.R. (3d) 154 (Ont. C.A.).

<sup>14</sup> (2005), 43 C.L.R. (3d) 223 (Ont. Master).

The question then remains as to what legal principle or provision governs the rights of the owner and the contractor here to perform or stop the work and/or terminate the contract? My answer is the common law[...]

At common law, there is no specific manner required for an owner to terminate a contract. If, at common law, the owner is entitled to terminate because of the repudiation by the contractor, then any method that shows that the owner has accepted the repudiation and has terminated the contract, i.e., has brought the contract to an end, will suffice. Here, I find that the owners' registered letter of August 26, 2003, Ex. 14, was a proper method of termination. Specifically, the owners did not have to give the contractor a specification of what the default or defaults were and a particular number of days' opportunity for the contractor to remedy such defaults, as was argued by counsel for the plaintiff.

### **3. CCDC 2 – 1994**

The 1994 version of Part 7 provided as follows:

#### Part 7 DEFAULT NOTICE

##### GC 7.1 OWNER'S RIGHT TO PERFORM THE WORK, STOP THE WORK, OR TERMINATE THE CONTRACT

- 7.1.1 If the Contractor should be adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the Contractor's insolvency, or if a receiver is appointed because of the Contractor's insolvency, the Owner may, without prejudice to any other right or remedy the Owner may have, by giving the Contractor or receiver or trustee in bankruptcy notice in writing, terminate the Contract.
- 7.1.2 If the Contractor should neglect to prosecute the Work properly or otherwise fails to comply with the requirements of the Contract to a substantial degree and if the Consultant has given a written statement to the Owner and Contractor that sufficient cause exists to justify such action, the Owner may, without prejudice to any other right or remedy the Owner may have, notify the Contractor in writing that the Contractor is in default of the Contractor's contractual obligations and instruct the Contractor to correct the default in the S Working Days immediately following the receipt of such notice.
- 7.1.3 If the default cannot be corrected in the 5 Working Days specified, the Contractor shall be in compliance with the Owner's instructions if the Contractor:
  - .1 commences the correction of the default within the specified time, and
  - .2 provides the Owner with an acceptable schedule for such correction, and
  - .3 corrects the default in accordance with such schedule.

- 7.1.4 If the Contractor fails to correct the default in the time specified or subsequently agreed upon, without prejudice to any other right or remedy the Owner may have, the Owner may:
- .1 correct such default and deduct the cost thereof from any payment then or thereafter due the Contractor provided the Consultant has certified such cost to the Owner and the Contractor, or
  - .2 terminate the Contractor's right to continue with the Work in whole or in part or terminate the Contract.
- 7.1.5 If the Owner terminates the Contractor's right to continue with the Work as provided in paragraphs 7.1.1 and 7.1.4, the Owner shall be entitled to:
- .1 take possession of the Work and Products; utilize the construction machinery and equipment; subject to the rights of third parties, finish the Work by whatever method the Owner may consider expedient, but without undue delay or expense, and
  - .2 withhold further payment to the Contractor until a final certificate for payment is issued, and
  - .3 charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 - WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference, and
  - .4 on expiry of the warranty period, charge the Contractor the amount by which the cost of corrections to the Contractor's work under GC 12.3 - WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the Contractor the difference.
- 7.1.6 The Contractor's obligation under the Contract as to quality, correction, and warranty of the work performed by the Contractor up to the time of termination shall continue in force after such termination.

## **GC 7.2 CONTRACTOR'S RIGHT TO STOP THE WORK OR TERMINATE THE CONTRACT**

- 7.2.1 If the Owner should be adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the Owner's insolvency, or if a receiver is appointed because of the Owner's insolvency, the Contractor may, without prejudice to any other right or remedy the Contractor may have, by giving the Owner or receiver or trustee in bankruptcy notice in writing, terminate the Contract.
- 7.2.2 If the Work should be stopped or otherwise delayed for a period of 30 days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, the Contractor may, without prejudice to any other right or remedy the Contractor may have, by giving the Owner notice in writing, terminate the Contract.
- 7.2.3 The Contractor may notify the Owner in writing, with a copy to the Consultant, that the Owner is in default of the Owner's contractual obligations if:
- .1 the Owner fails to furnish, when so requested by the Contractor, reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract, or

- .2 the Consultant fails to issue a certificate as provided in GC 5.3 PROGRESS PAYMENT, or
  - .3 the Owner fails to pay the Contractor when due the amounts certified by the Consultant or awarded by arbitration or court, or
  - .4 the Owner violates the requirements of the Contract to a substantial degree and the Consultant, except for GC 5.1 - FINANCING INFORMATION REQUIRED OF THE OWNER, confirms by written statement to the Contractor that sufficient cause exists.
- 7.2.4 The Contractor's notice in writing to the Owner provided under paragraph 7.2.3 shall advise that if the default is not corrected within 5 Working Days following the receipt of the notice in writing, the Contractor may, without prejudice to any other right or remedy the Contractor may have, stop the Work or terminate the Contract.
- 7.2.5 If the Contractor terminates the Contract under the conditions set out above, the Contractor shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon Products and construction machinery and equipment, and such other damages as the Contractor may have sustained as a result of the termination of the Contract.

#### 4. CCDC 2 - 2008

Part 7 as amended in 2008 reads as follows:

##### PART 7 - DEFAULT NOTICE

##### GC 7.1. OWNER'S RIGHT TO PERFORM THE WORK, TERMINATE THE CONTRACTOR'S RIGHT TO CONTINUE WITH THE WORK OR TERMINATE THE CONTRACT

- 7.1.1 If the *Contractor* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Contractor's* insolvency, or if a receiver is appointed because of the *Contractor's* insolvency, the *Owner* may, without prejudice to any other right or remedy the *Owner* may have, terminate the *Contractor's* right to continue with the *Work*, by giving the *Contractor* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.
- 7.1.2 If the *Contractor* neglects to prosecute the *Work* properly or otherwise fails to comply with the requirements of the *Contract* to a substantial degree and if the *Consultant* has given a written statement to the *Owner* and *Contractor* that sufficient cause exists to justify such action, the *Owner* may, without prejudice to any other right or remedy the *Owner* may have, give the *Contractor Notice in Writing* that the *Contractor* is in default of the *Contractor's* contractual obligations and instruct the *Contractor* to correct the default in the 5 *Working Days* immediately following the receipt of such *Notice in Writing*.
- 7.1.3 If the default cannot be corrected in the 5 *Working Days* specified or in such other time period as may be subsequently agreed in writing by the parties, the *Contractor* shall be in compliance with the *Owner's* instructions if the *Contractor*:
- .1 commences the correction of the default within the specified time, and
  - .2 provides the *Owner* with an acceptable schedule for such correction, and
  - .3 corrects the default in accordance with the *Contract* terms and with such schedule.

- 7.1.4 If the *Contractor* fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the *Owner* may have, the *Owner* may:
- .1 correct such default and deduct the cost thereof from any payment then or thereafter due the *Contractor* provided the *Consultant* has certified such cost to the *Owner* and the *Contractor*, or
  - .2 terminate the *Contractor's* right to continue with the *Work* in whole or in part or terminate the *Contract*.
- 7.1.5 If the *Owner* terminates the *Contractor's* right to continue with the *Work* as provided in paragraphs 7.1.1 and 7.1.4, the *Owner* shall be entitled to:
- .1 take possession of the *Work* and *Products* at the *Place of the Work*, subject to the rights of third parties, utilize the *Construction Equipment* at the *Place of the Work*, finish the *Work* by whatever method the *Owner* may consider expedient, but without undue delay or expense, and
  - .2 withhold further payment to the *Contractor* until a final certificate for payment is issued, and
  - .3 charge the *Contractor* the amount by which the full cost of finishing the *Work* as certified by the *Consultant*, including compensation to the *Consultant* for the *Consultant's* additional services and a reasonable allowance as determined by the *Consultant* to cover the cost of corrections to work performed by the *Contractor* that may be required under GC 12.3 -WARRANTY, exceeds the unpaid balance of the *Contract Price*; however, if such cost of finishing the *Work* is less than the unpaid balance of the *Contract Price*, the *Owner* shall pay the *Contractor* the difference, and
  - .4 on expiry of the warranty period, charge the *Contractor* the amount by which the cost of corrections to the *Contractor's* work under GC 12.3 - WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the *Contractor* the difference.
- 7.1.6 The *Contractor's* obligation under the *Contract* as to quality, correction and warranty of the work performed by the *Contractor* up to the time of termination shall continue after such termination of the *Contract*.

## **GC 7.2 CONTRACTOR'S RIGHT TO SUSPEND THE WORK OR TERMINATE THE CONTRACT**

- 7.2.1 If the *Owner* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Owner's* insolvency, or if a receiver is appointed because of the *Owner's* insolvency, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.
- 7.2.2 If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner* *Notice in Writing* to that effect.
- 7.2.3 The *Contractor* may give *Notice in Writing* to the *Owner*, with a copy to the *Consultant*, that the *Owner* is in default of the *Owner's* contractual obligations if:
- .1 the *Owner* fails to furnish, when so requested by the *Contractor*, reasonable evidence that financial arrangements have been made to fulfill the *Owner's* obligations under the *Contract*, or
  - .2 the *Consultant* fails to issue a certificate as provided in GC 5.3 - PROGRESS PAYMENT, or

- .3 the *Owner* fails to pay the *Contractor* when due the amounts certified by the *Consultant* or awarded by arbitration or court, or
  - .4 the *Owner* violates the requirements of the *Contract* to a-substantial degree and the *Consultant*, except for GC 5.1 - FINANCING INFORMATION REQUIRED OF THE OWNER, confirms by written statement to the *Contractor* that sufficient cause exists.
- 7.2.4 The *Contractor's Notice in Writing* to the *Owner* provided under paragraph 0 shall advise that if the default is not corrected within 5 *Working Days* following the receipt of the *Notice in Writing*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, suspend the *Work* or terminate the *Contract*.
- 7.2.5 If the *Contractor* terminates the *Contract* under the conditions set out above, the *Contractor* shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon *Products* and *Construction Equipment*, and such other damages as the *Contractor* may have sustained as a result of the termination of the *Contract*.

## 5. Comparison

The changes are most easily set out in a blacklined comparison between the 1994 and 2008 versions:

### PART 7 - DEFAULT NOTICE

#### GC 7.1 OWNER'S RIGHT TO PERFORM THE WORK, ~~STOP~~TERMINATE THE CONTRACTOR'S RIGHT TO CONTINUE WITH THE WORK, OR TERMINATE THE CONTRACT

~~7.1.1~~ 7.1.1 If the *Contractor* ~~should be~~is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Contractor's* insolvency, or if a receiver is appointed because of the *Contractor's* insolvency, the *Owner* may, without prejudice to any other right or remedy the *Owner* may have, terminate the *Contractor's* right to continue with the *Work*, by giving the *Contractor* or receiver or trustee in bankruptcy ~~notice in writing, terminate the *Contract*~~*Notice in Writing* to that effect.

~~7.1.2~~ 7.1.2 If the *Contractor* ~~should neglect~~neglects to prosecute the *Work* properly or otherwise fails to comply with the requirements of the *Contract* to a substantial degree and if the *Consultant* has given a written statement to the *Owner* and *Contractor* that sufficient cause exists to justify such action, the *Owner* may, without prejudice to any other right or remedy the *Owner* may have, ~~notify~~give the *Contractor* *Notice in writing**Writing* that the *Contractor* is in default of the *Contractor's* contractual obligations and instruct the *Contractor* to correct the default in the ~~5~~5 *Working Days* immediately following the receipt of such ~~notice~~*Notice in Writing*.

~~7.1.3~~ 7.1.3 If the default cannot be corrected in the 5 *Working Days* specified or in such other time period as may be subsequently agreed in writing by the parties, the *Contractor* shall be in compliance with the *Owner's* instructions if the *Contractor*:

- .1 commences the correction of the default within the specified time, and
- .2 provides the *Owner* with an acceptable schedule for such correction, and

.3 corrects the default in accordance with the Contract terms and with such schedule.

7.1.4 ~~7.1.4~~ If the Contractor fails to correct the default in the time specified or in such other time period as may be subsequently agreed upon in writing by the parties, without prejudice to any other right or remedy the Owner may have, the Owner may:

- .1 correct such default and deduct the cost thereof from any payment then or thereafter due the Contractor provided the Consultant has certified such cost to the Owner and the Contractor, or
- .2 terminate the Contractor's right to continue with the Work in whole or in part or terminate the Contract.

7.1.5 ~~7.1.5~~ If the Owner terminates the Contractor's right to continue with the Work as provided in paragraphs 7.1.1 and 7.1.4, the Owner shall be entitled to:

- .1 take possession of the Work and Products; ~~utilize the construction machinery and equipment; at the Place of the Work~~, subject to the rights of third parties, utilize the Construction Equipment at the Place of the Work, finish the Work by whatever method the Owner may consider expedient, but without undue delay or expense, and
- .2 withhold further payment to the Contractor until a final certificate for payment is issued, and
- .3 charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 - WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference, and
- .4 on expiry of the warranty period, charge the Contractor the amount by which the cost of corrections to the Contractor's work under GC 12.3 - WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the Contractor the difference.

7.1.6 ~~7.1.6~~ The Contractor's obligation under the Contract as to quality, correction, and warranty of the work performed by the Contractor up to the time of termination shall continue ~~in force~~ after such termination of the Contract.

## **GC 7.2 CONTRACTOR'S RIGHT TO STOP/SUSPEND THE WORK OR TERMINATE THE CONTRACT**

7.2.1 ~~7.2.1~~ If the Owner ~~should be~~ is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the Owner's insolvency, or if a receiver is appointed because of the Owner's insolvency, the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner or receiver or trustee in bankruptcy ~~notice in writing~~, terminate the Contract Notice in Writing to that effect.

7.2.2 ~~7.2.2~~ If the Work ~~should be stopped~~ is suspended or otherwise delayed for a period of ~~30 days~~ 20 Working Days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner ~~notice in writing~~, terminate the Contract Notice in Writing to that effect.

~~7.2.3~~ ~~7.2.3~~ The *Contractor* may ~~notify~~ give *Notice in Writing* to the *Owner* ~~in writing~~, with a copy to the *Consultant*, that the *Owner* is in default of the *Owner*'s contractual obligations if:

- .1 the *Owner* fails to furnish, when so requested by the *Contractor*, reasonable evidence that financial arrangements have been made to fulfill the *Owner*'s obligations under the *Contract*, or
- .2 the *Consultant* fails to issue a certificate as provided in GC 5.3 - PROGRESS PAYMENT, or
- .3 the *Owner* fails to pay the *Contractor* when due the amounts certified by the *Consultant* or awarded by arbitration or court, or
- .4 the *Owner* violates the requirements of the *Contract* to a substantial degree and the *Consultant*, except for GC 5.1 - FINANCING INFORMATION REQUIRED OF THE OWNER, confirms by written statement to the *Contractor* that sufficient cause exists.

~~7.2.4~~ ~~7.2.4~~ The *Contractor*'s ~~notice~~ *Notice in Writing* to the *Owner* provided under paragraph 7.2.3 shall advise that if the default is not corrected within 5 *Working Days* following the receipt of the ~~notice~~ *Notice in Writing*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, ~~stop~~ suspend the *Work* or terminate the *Contract*.

~~7.2.5~~ ~~7.2.5~~ If the *Contractor* terminates the *Contract* under the conditions set out above, the *Contractor* shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon *Products* and ~~construction machinery and equipment~~ *Construction Equipment*, and such other damages as the *Contractor* may have sustained as a result of the termination of the *Contract*.

## 6. The Changes

### The "Notice in Writing"

Under GC 7.1.1, if the *Contractor* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Contractor*'s insolvency, or if a receiver is appointed because of the *Contractor*'s insolvency, the *Owner* may, without prejudice to any other right or remedy the *Owner* may have, terminate the *Contractor*'s right to continue with the *Work*, by giving the *Contractor* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.

"Notice in Writing" is now a defined term:

A *Notice in Writing*, where identified in the *Contract Documents*, is a written communication between the parties or between them and the *Consultant* that is transmitted in accordance with the provisions of Article A-6 of the Agreement — RECEIPT OF AND ADDRESSES FOR NOTICES IN WRITING.

Article A-6 now reads as follows and governs the delivery of a Notice in Writing:

*Notices in Writing* will be addressed to the recipient at the address set out below. The delivery of a *Notice in Writing* will be by hand, by courier, by prepaid first class mail, or by facsimile or other form of electronic communication during the transmission of which no indication of failure of receipt is communicated to the sender. A *Notice in Writing* delivered by one party in accordance with this *Contract* will be deemed to have been received by the other party on the date of delivery if delivered by hand or courier, or if sent by mail it shall be deemed to have been received five calendar days after the date on which it was mailed, provided that if either such day is not a *Working Day*, then the *Notice in Writing* shall be deemed to have been received on the *Working Day* next following such day. A *Notice in Writing* sent by facsimile or other form of electronic communication shall be deemed to have been received on the date of its transmission provided that if such day is not a *Working Day* or if it is received after the end of normal business hours on the date of its transmission at the place of receipt, then it shall be deemed to have been received at the opening of business at the place of receipt on the first *Working Day* next following the transmission thereof. An address for a party may be changed by *Notice in Writing* to the other party setting out the new address in accordance with this Article.

#### Termination of Contract v. Termination of Owner's Right to Continue

GC 7.1.1 and GC 7.1.4.2 are now consistent with each other in terms of stating the owner's option to terminate the contractor's right to continue with the work, as opposed to terminating the contract. GC 7.1.1 now provides that upon default, rather than terminating the contract, the owner may terminate the contractor's right to continue with the work. GC 7.1.4.2 still provides

that if the contractor fails to correct the default in the time specified or in such other time period as may be subsequently agreed, the owner may terminate the contractor's right to continue with the work in whole or in part or terminate the contract.

#### Correction of Default in 5 Working Days or Other Period Agreed Upon

GC 7.1.3 used to provide that if the default cannot be corrected in the 5 *Working Days* specified, the contractor was still in compliance with the owner's instructions if it commenced the correction of the default within the specified time, and provided the *Owner* with an acceptable schedule for such correction, and corrected the default in accordance with the *Contract* terms and with such schedule. The new clause preserves the essential scheme of allowing the contractor to correct the default by commencing remedial work and providing the owner with an acceptable schedule to complete such work, but allows the parties to agree on a time period other than 5 working days for commencing such remedial work.

#### Possession of Work and Products at the Place of the Work

The new GC 7.1.5 clarifies that if the owner terminates the contractor's right to continue with the work as provided in paragraphs 7.1.1 and 7.1.4, the owner may take possession of the work and products at the place of the work and utilize the construction equipment at the place of the work.

### Termination by Contractor after Delay of 20 Days

GC 7.2.2 allowed the contractor to terminate the *Contract* if the work was suspended or otherwise delayed for a period of 30 working days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*. That time period has now been reduced to 20 days.

### Suspension of Work v. Stoppage of Work

The new GC 7.2.4 stipulates that the contractor may suspend rather than stop the work or terminate the contract where the owner does not correct the default after having been put on notice by the contractor. The word “stop” has been replaced with the word suspend, which is not a defined term. This may be an area of possible controversy, if the parties cannot agree on what “suspension” of the work means, and for how long the suspension of work is permitted.

### Construction Equipment v. Construction Machinery and Equipment

References to “construction machinery and equipment” have been replaced by “construction equipment”.

## **7. Conclusion**

Part 7 of the document remains mainly unchanged. The most significant change was made outside of Part 7; the change to add “Notice in Writing” as a defined term of the contract. Other than that, and with the few exceptions outlined above, it will be business as usual with regard to notice of default under Part 7.