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Update

Construction Law / Spring 2006

Scope of Performance Bonds as Contract Security

by Howard M. Wise

Introduction

In Canada, owners often utilize performance bonds in the construction industry as a form of security to ensure that the general contractor performs its obligations under the construction contract. Provided the general contractor performs all of its obligations, the bond is returned to the surety for cancellation. If the general contractor ("Principal") defaults, then the owner ("Obligee") can exercise its rights under the performance bond.

The terms of the bond usually provide that, once the Principal is declared to be in default, the surety is entitled to proceed with the options available to it as provided by the performance bond.

However, two competing appeal court cases in different provinces call into question the scope of the bond and the obligations of the bonding company once the general contractor is declared to be in default.

Lac La Ronge

In *Lac La Ronge Indian Band* v. *Dallas Contracting Ltd.*, [2004] S.J. No. 531 (Sask. C.A.) ("*Lac La Ronge*") the Saskatchewan Court of Appeal considered the obligations and responsibilities of the surety once the contractor is declared in default.

The contractor had failed to complete its contract on time and the owner terminated the contractor's contract. Upon declaring the contractor in default, the owner invited tenders for the completion of the work and a claim was made under the terms of the general contractor's performance bond.

The construction contract contained a clause which, in the event that the general contractor did not complete its work by the completion date, would oblige the contractor to pay certain liquidated damages to the owner. The owner wanted to offset this amount against the balance of the contract funds, thereby decreasing the available balance of contract funds and ultimately increasing the amount for which the surety would be responsible. The surety objected to this on the basis that a claim for liquidated damages was not within the scope of the performance bond.

The specific terms of the performance bond in *Lac La Ronge* gave the surety the following options in the event of default by the general contractor:

- Remedy the default;
- Complete the contract in accordance with its terms and conditions; or
- Obtain bids for submission to the owner for completion of the contract and ensure

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How contractors can protect themselves in the event of bankruptcy

Case commentary on *Southside Construction (London) Limited v. 734133 Ontario Limited and Schaible Electric v. Melloul-Blamey Construction*

Implications for the construction industry of the new *Consumer Protection Act*

The construction industry is one of Canada's largest. It is one of the industries by which our economy is measured. From heavy equipment manufacturers to suppliers from subcontractors and general contractors to owners and developers, changes in the industry can have a dramatic effect on day-to-day business. This Goodmans Update was created to keep you abreast of recent legal developments as well as industry trends. We hope you find it informative and we will continue to keep you informed of future developments and trends in the construction industry.

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> sufficient funds were available to pay the cost of completion, less the balance of the contract price.

The third option provided by the performance bond defined the 'balance of contract price' as being the total amount payable by the Obligee to the Principal under the contract, less the amount properly paid by the Obligee to the Principal.

The court examined the language of these options in order better to understand the scope of the surety's obligations and liabilities to the owner. After analyzing the various provisions of the bond, including the surety's obligations under each option, the court concluded that the surety's exposure under the bond was not to be any greater regardless of the option chosen by the bonding company. Therefore, the court held that each option must be read and interpreted in the context of the other options, ensuring that, in choosing one option over another, the surety was not subject to a greater liability.

In determining the extent of the surety's obligation with regard to completing the work, the court stated:

> "The words 'complete the contract' can be more easily interpreted as 'complete the work' than as 'perform all obligations under the contract'. Earlier in the bond, when it refers to the owner's obligations, it uses the word 'perform' rather than 'complete', which would lead one to conclude the parties intended a difference when they used 'complete' to describe the surety's obligations."

Furthermore, the Saskatchewan Court of Appeal, in reviewing the language contained in the performance bond, determined that a standard form agreement, such as the performance bond, must be read in the ordinary manner and not strictly construed against either party. The court acknowledged that the surety's responsibility under the performance bond was to guarantee the completion of the construction contract, rather than assume all of the contractor's responsibilities and obligations under the terms of the contract.

In reviewing the owner's ability to deduct liquidated damages, the court determined that the owner was only permitted to deduct liquidated damages only from any payment "which becomes due and payable" to the general contractor. However, the court held that, subsequent to the general contractor's default, no further monies were due and payable to the general contractor, and the owner was not entitled to payment of the liquidated damages. Therefore, such a claim for liquidated damages could not be included in the calculation to determine the balance owing under the contract when establishing the amount for which the surety could be liable under option three of the bond.

Whitby Landmark

The Ontario Court of Appeal adopted a broader approach to the surety's obligations when assessing the obligations under a performance bond. In *Whitby Landmark Development Inc* v. *Mollenhauer Construction Limited* (2003), 67 O.R. (3rd) 628 (C.A.) ("*Whitby*") the owner and the general contractor agreed to a cost-savings arrangement whereby the owner would receive 75% and the general contractor 25% of any cost savings on the project. The general contractor failed to complete its work under the contract and ultimately ceased to carry on business. The owner completed the work on its own and subsequently made a claim under the general contractor's performance bond for an amount that included the balance of its share of the cost savings under the construction contract. The surety objected to the cost-savings claim on the basis that the performance bond did not extend to costs beyond those of completing the physical work.

In interpreting the provisions of the performance bond, the Court of Appeal concluded that where there is ambiguity in the wording of

the bond, the principle of *contra proferentum* applies so that the ambiguity is construed against the bonding company which chose the form of the performance bond (an approach that contrasts with *Lac La Ronge*).

As in *Lac La Ronge*, the Court of Appeal also examined the scope of the three options available to the surety under the performance bond once the contractor is declared in default. In particular, the court attempted to discern the intended scope of the surety's obligations under the performance bond and whether these extended beyond the costs of physically completing the work.

The court concluded that it was necessary to look at the underlying construction contract and that, without specific wording in the bond limiting the surety's obligations, the surety was obligated to "complete the contract or act under the default under the Contract."

The Court of Appeal stated:

> "The first option available to the surety is to remedy the Principal's default. There is no qualification on the type of default referred to. Furthermore, the surety's third option does not limit the surety's obligations to funding the completion of the physical construction; instead, the bond makes the surety's obligations inclusive of 'other costs and damages for which the surety may be liable hereunder'."

The court further concluded that there was no language in the performance bond that "limits in any way the references to the construction contract or the obligations to complete the contract or act on a default under the contract", thereby potentially expanding the scope of the surety's responsibilities and liabilities to the owner once the general contractor is declared to be in default.

In addition, in examining the language of the third option the court determined that, where the contract contains a cost-savings arrangement, the balance of the 'contract price' (as that term is used in the wording of option three of the performance bond) could be reduced by the amount that may be owing by the contractor at the time of the default. Therefore, the amount the surety may ultimately be obliged to pay to complete the work would be greater than it would have paid had there not been such a cost-savings provision in the contract. In making such a determination, the court was prepared to acknowledge that the surety might be responsible for costs other than those associated with the completion of the physical work.

Comment

Examining *Lac La Ronge* alongside *Whitby*, it is clear that the courts, faced with a similar issue, took different approaches, resulting in different outcomes.

The Saskatchewan Court of Appeal accepted the surety's argument that its obligations were limited to completing the work rather than performing all of the obligations under the contract. However, the Ontario Court of Appeal concluded that the surety's obligations may extend beyond simply completing the work and may result in the surety being responsible for damages beyond the completion of the physical work.

The analyses of the performance bonds' terms were affected in both cases by the manner in which the balance of contract price was calculated. In *Whitby*, the Ontario Court of Appeal opened the door to a more expansive interpretation of the surety's obligation based on an acceptance that the balance of contract price calculation could include a deduction for amounts owing and payable to the owner by the general contractor at the time of the default. In *Lac La Ronge*, the Saskatchewan Court of Appeal determined that, once the general contractor had defaulted, it was owed no further amounts by the owner and as such, the owner was not entitled to deduct any further amounts from the contract price.

Examining *Lac La Ronge* alongside *Whitby*, it is clear that the courts faced with a similar issue, took different approaches resulting in different outcomes.

Ken Crofoot is a partner with expertise in commercial, construction, banking and insolvency litigation. He has been involved as counsel in a number of arbitrations and mediations, including commercial disputes, joint venture disputes, partnership disputes, insurance loss determinations, bankruptcy claim valuations and construction project disputes. He is the author of a number of articles on aspects of construction claims for Insight Press and the Canadian Bar Association. He has acted as both chair and participant in a number of continuing legal education seminars on construction law. Ken is the Canadian case note editor of "Construct!", the American Bar Association's construction litigation section quarterly publication as well as the editor of the Construction Lien Section of Canadian Forms and Precedents.

The Saskatchewan Court of Appeal did not apply the principle of *contra proferentum* and, in fact, determined that the performance bond should not be strictly construed against either party, as it was a standard form document used throughout the construction industry and should be given its ordinary meaning. However, the Ontario Court of Appeal applied this principle.

Finally, while the Ontario Court of Appeal did not find any ambiguity on the face of the performance bond and further determined that the bond's language did not limit the surety's obligations to complete the contract beyond completion of the physical work, the Saskatchewan Court of Appeal adopted a much narrower interpretation of the scope of the surety's obligations.

Until this issue is reviewed by the Canadian Supreme Court, it is clear that those relying on surety bonds as security will look to the decision that most favours their position in either responding to or making a claim under a performance bond.

Case Commentary

by Ken Crofoot

Owner Cannot Rely Upon Undisclosed Criteria in the Bidding Process

Southside Construction (London) Limited v. 734133 Ontario Limited (2005), 45 C.L.R. (3d) 237 (Ont. Sup. Ct.)

The Ontario Superior Court has again confirmed that an owner invoking a competitive tender process cannot rely upon undisclosed criteria in the awarding of a contract. In this case, the plaintiff and other general contractors had been invited to bid on the construction of a drug store. The owner had accepted a higher bid than that of the plaintiff and negotiated with the higher bidder to reach a price which was still marginally more than the plaintiff's bid. The plaintiff sued, claiming a breach of the bidding process. At trial, the representative of the owner admitted that they wanted a local contractor which was unionized and which who had done work for them in the past. These criteria had influenced their decision. Counsel for the plaintiff was able to convince the Court that the entire bidding process was essentially used by the owner to test and negotiate the price ultimately submitted by the contractor who was awarded the project (who met these criteria). The Court did not allow the owner to rely upon the usual clause giving the owner discretion not to accept the lowest bid because criteria had been utilized which were not disclosed in the bidding documents. The rejection of the plaintiff's bid in favour of another bid on the basis of undisclosed stipulations or preferences was a breach of the owner's obligation to treat all bidders fairly. This was not excused by the operation of a clause stating that the lowest bid need not be accepted.

The owner also argued that the plaintiff was not entitled to its entire projected profit as representing its damages because it would have not have made that sum on the job due to a strike by drywallers and due to the discovery of abandoned gasoline tanks. While the Court accepted that it was entitled to look to the circumstances that arose during construction and the impact of those circumstances on profitability, the Court did not accept that the plaintiff would have been affected by the drywall strike since it used a different subcontractor and found that the abandoned gasoline tank would have resulted in extras that would not have affected the overall profitability of the project.

Construction Liens and Bankruptcy: How Contractors Can Protect Themselves

By Joseph Cosentino

It is an unfortunate reality in the construction industry that bankruptcies can, and do, occur. An owner, general contractor or subcontractor may become insolvent and be unable to meet its financial obligations. In those circumstances, contractors need to know how you can best protect your rights and minimize potential losses. This article explains some of the rights and remedies available to contractors under insolvency legislation and under the *Construction Lien Act* of Ontario when you are confronted with the troublesome situation of a bankruptcy of someone in the construction pyramid.

Don't Abandon Your Lien Rights

Lien rights as set out in the *Construction Lien Act* are strictly interpreted and enforced by the courts. Even in the face of an insolvency, you should be aware that the time periods for preserving and perfecting a claim for lien are not suspended, nor are they extended. A contractor should preserve its lien within 45 days of its last supply to the project. Failing to do so will mean that your lien rights will expire and they cannot be revived. Failing to preserve its lien may also mean losing your right to receive a portion of the holdback funds being held for your benefit. These may be the only funds available to you in a bankruptcy-type of situation.

Typically in a bankruptcy or insolvency proceeding, the court will grant the insolvent company a form of protection by putting in place a "stay of proceedings." This means that creditors of the bankrupt company are forbidden by court order from commencing or continuing with a lawsuit against the insolvent party. Provisions of these orders may also indicate that construction liens are not to be registered. However, the courts have, on more than one occasion, amended their initial orders and lifted the stay on a limited basis. In these cases, they will permit lien rights to be preserved or perfected through the bringing of a motion or by getting the consent of the Trustee in Bankruptcy. However, the courts cannot bring back to life lien rights that have been lost by inaction or by the failure to enforce them.

Get the Information You're Entitled To

Under Section 39 of the *Construction Lien Act*, a contractor is entitled to make a request for information and to receive it from the owner, general contractor or mortgagee. This information will set out the state of accounts, indicate the amount of the holdback fund, help to determine if a lien has priority over a building mortgage and will identify the existence of any labour and material payment bond. This information can prove very valuable in determining what course of action should be pursued. Knowing that a bond is in place can mean that recovery can be sought against the surety.

Contractors are also urged to contact the receiver or Trustee In Bankruptcy. Very often, this will provide you with some information on the insolvency of the debtor company and will get you on the list of people who are entitled to be notified of further proceedings that may affect your rights.

Consider Bringing an Action for Breach of Trust

Sections 7 and 8 of the *Construction Lien Act* impose a trust on funds received by owners and contractors for the benefit of those who have supplied labour, services and materials on the project. If an owner or contractor uses the funds in a manner inconsistent with the trust (i.e., they have paid money to themselves and not to contractors, they have made a preferential payment to a creditor unrelated to the pro-

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ject, etc.), they may be guilty of a breach of trust. Section 13 of the *Construction Lien Act* empowers a claimant to personally sue the officers and directors of the insolvent company and can make them personally liable for the misused funds. The spectre of personal liability is a powerful tool in the contractor's arsenal and should not be forgotten in situations involving an insolvent payor.

Request the Appointment of a Construction Lien Trustee

If an owner or general contractor has gone bankrupt, there is a danger that the value of the project could deteriorate if the work stops or is abandoned. Consider, for example, an unfinished subdivision project where only a portion of the underground services have been installed and several of the houses remain unfinished. Exposure to the elements, the risk of vandalism and general deterioration of the work are likely if the project comes to a standstill for a prolonged period.

The CRA asserts a "superpriority" over the assets of the debtor company that is arguably ahead of the interest of lien claimants and other secured creditors.

Section 68 of the *Construction Lien Act* allows a lien claimant or person with an interest in the premises to apply to the court and request that a construction lien trustee be appointed to:

- Manage, mortgage or sell the property;
- Complete the improvement;
- Reserve the premises and do other things such as realize on the project assets, administer the trust funds and distribute the monies to entitled contractors and suppliers.

A lien trustee is a court officer who must act in a fair and equitable manner for the benefit of all affected parties.

Investigate Possible Remedies Against the Mortgagee

If a mortgage was taken with the intention of financing the construction project, the mortgagee (i.e., the lender) may be liable for any deficiency in the holdback. If an owner has failed to maintain the 10% holdback fund, the mortgagee may be responsible to the contractors for any shortfall in the fund.

Negotiate with the Canada Revenue Agency (CRA)

Under the *Income Tax Act*, the CRA asserts a "super priority" over the assets of the debtor company. The CRA's claim arguably trumps the interest of lien claimants and other secured creditors. CRA even maintains its priority over the holdback fund.

Notwithstanding this priority, CRA will, in many instances, negotiate a sharing of the holdback monies with the valid lien claimants. This is especially true if it can be demonstrated that hardship would result to the lien claimants if CRA kept all of the money for itself in order to satisfy its claim for unpaid source deductions and GST.

Take Action to Maximize Recovery

A bankruptcy situation is often one where a contractor will not entirely recoup all you are owed. Knowing what remedies are available and initiating actions to preserve and protect your rights will ensure that you are putting yourself in the best position possible to maximize your potential recovery.

Ontario Decision Analyzes General Contractor's Duty to Act Fairly and in Good Faith in the Bid, Tender and Contract Award Stages of Construction Projects

by Jennifer Leitch

Case Comment on *Schaible Electric Ltd.* v. *Melloul-Blamey Construction Inc.*

In the recent decision of *Schaible Electric Ltd.* v. *Melloul-Blamey Construction Inc.*, [2004] O.J. No. 3088, Justice Cavarzan of the Ontario Superior Court of Justice examined the "reasonableness" of a general contractor's objection to and ultimate dismissal of the electrical subcontractor initially carried in the general contractor's tender to the owner.

The defendant, Melloul-Blamey Construction Inc. ("Melloul"), is a general contractor that bid on the construction of a school in Hamilton, Ontario. The tender was completed pursuant to the Ontario Bid Depository Standard Rules and Procedures. In submitting its tender to the owner, Melloul carried the plaintiff, Schaible Electric Ltd. ("Schaible") as its electrical subcontractor. Schaible had pre-qualified with the Hamilton-Wentworth District School Board (the "Board") and was the low electrical tender. Melloul submitted its bid to the Board on September 28, 1999 and was awarded the contract on September 30, 1999.

Subsequent to being awarded the contract and despite having included Schaible's bid in its tender to the Board, Melloul ultimately contracted with C. Wallingham Electric Ltd., which was the second lowest electrical bidder. Schaible subsequently commenced an action against Melloul and the Board based on Melloul's breach of Contract A, a breach of a duty of good faith on the part of Melloul and the Board, and a breach of the fiduciary duty owed to Schaible by both Melloul and the Board.

In his decision, Justice Cavarzan examined the general contactor's responsibilities and obligations to a subcontractor once Contract A has been formed (i.e. the subcontractor has submitted a bid to the general contractor). Justice Cavarzan found that a general contractor is entitled to object to a subcontractor it originally carried in its tender to the owner and terminate Contract A when the general contractor's objection is "reasonable". In determining what constitutes a "reasonable" objection, Justice Cavarzan adopted the reasoning used in an earlier decision, which suggested that the question of "reasonableness" would be determined on a case by case basis.

In determining whether Melloul had acted "reasonably" and thereby justifying its termination of Schaible's contract, the Court examined Melloul's actions subsequent to it being awarded the contract and prior to it terminating Schaible's subcontract. After having been awarded the contract with the owner, Melloul took no immediate steps to formalize Contract B with Schaible. Melloul alleged that, subsequent to award of the tender and based on conversations with certain site personnel and a School Board representative, it became nervous about Schaible's ability to complete the project in a timely and cost-efficient manner.

Upon hearing about Schaible's poor performance on a previous school renovation project as well as its alleged precarious financial position, Melloul wrote to Schaible and requested that it provide Melloul with a 100% performance bond and a 100% labour and material bond within seven days (two days of which were a Saturday and Sunday).

Melloul also claimed that it made several additional calls to electrical suppliers and other gen-

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Jennifer acts for owners, general contractors, subcontractors, materials suppliers and lenders in construction disputes. She is regularly consulted on contract issues, lien matters and claims involving design professionals. She is a frequent contributor to Goodmans' Construction Update newsletter.

eral contractors in order to obtain further information on Schaible's reputation. Based on its alleged conversations with these individuals (of which there were no notes or diary entries), together with Schaible's inability to produce the requested bonds, Melloul decided to terminate Schaible's contract.

Schaible argued that Melloul had failed to demonstrate proper due diligence prior to terminating its contract. The Court determined that Melloul had failed to act reasonably. Specifically, the Court determined that:

- At no point during its background checks on Schaible did Melloul ever contact Schaible to provide it with an opportunity to respond to the statements made about it, nor did Melloul request a list of references from Schaible regarding previous projects or from suppliers with which it had an ongoing relationship;
- Melloul gave no serious consideration to the possibility of alternative forms of guarantee when Schaible had difficulty raising the 100% performance bond and 100% labour and material bond nor was Melloul prepared to revise its demand for the bonds when Schaible could not obtain them within the given time limit;
- Melloul did not record any of its attempts to verify Schaible's reputation in the industry. (It was confirmed at trial that none of the suppliers contacted by Melloul had an ongoing relationship with Schaible);
- Melloul failed to take Schaible's long-standing reputation in the construction business into consideration; and
- The Board had pre-qualified Schaible for the tender.

Ultimately, the Court held that Melloul's "purported due diligence amounted to perfunctory window-dressing" and demonstrated an intention on Melloul's behalf to avoid contracting with Schaible from the moment it heard the faintest rumours regarding Schaible's reputation in the industry. Justice Cavarzan found that Melloul had failed in its contractual duty to Schaible to ensure that its objection was reasonable, and that it [had failed to] act fairly and in good faith in the bid, tender and contract award stages of the process.

Although the court indicated that the determination of whether a general contractor has acted "reasonably" during the tender stages will be based on a case-by-case analysis of the particular facts, this case does provide some insight into how a general contractor's actions could be perceived during the tender and contract award stages.

Jerry Topolski focuses on corporate and commercial litigation. He has a broad-based practice, having assisted clients on a full range of matters including construction, employment and contractual disputes.

Ontario's New *Consumer Protection Act*: Implications for the Construction Industry

by Jerry P.K. Topolski

The Ontario government has recently put into law new consumer protection legislation which, in many cases, fundamentally affects the way in which consumers and businesses interact and conduct transactions.

The scope of the new statute is incredibly broad. For the purpose of this update, we have focused on those particular sections of the legislation that may effect the construction industry and individuals operating within it. The statute itself came into force on July 30, 2005 and is titled, somewhat confusingly, the *Consumer Protection Act, 2002* (CPA).

The CPA casts a wide net in that, subject to certain exceptions outlined below, every consumer transaction in Ontario is covered by its provisions. A consumer includes any individual

acting for a personal, familial or household purpose but does not include a person who is acting for a business purpose. Accordingly, when individuals enter into a transaction with a business for other than a business purpose, they are afforded the protections of the CPA. A concrete example of this would be individual home owners who contract with a construction company for an addition to their home.

The CPA does not apply in respect of certain consumer transactions regulated under securities legislation or financial products or services regulated under other statutes. Furthermore, prescribed professional services that are regulated under statute in Ontario, such as architectural or engineering services, would not be covered by the CPA. Finally, consumer transactions regulated under the *Tenant Protection Act* and consumer transactions related to the purchase, sale or lease of real property (except transactions with respect to timeshare agreements) are not covered.

Notably, the CPA has a built in "anti-avoidance mechanism" for those individuals who seek to structure certain business transactions in ways to get around the CPA. This mechanism allows a court to consider the substance and form of the transaction to determine whether the CPA should apply to it.

Of particular importance to the construction industry, consumers and suppliers of goods or materials are not allowed to contract out of the procedural and substantive rights provided for under the CPA. In this respect, the CPA grants additional rights to consumers in addition to those provided for at law, such as the right to obtain a refund or cancel a given agreement within particular periods of time. Moreover, where a supplier of goods or services acts in an egregious fashion, the CPA sets out penalties ranging from fines to imprisonment, and potentially the awarding of exemplary or punitive damages in addition to other remedies.

Below, sections of the new legislation are analyzed with particular relevance to construction.

Estimates

The delivery of a written estimate in situations where the CPA applies now has potentially serious consequences for a supplier of goods or services.

Where an estimate is provided to a consumer, the supplier cannot ultimately charge the consumer any amount that exceeds the estimate by more than 10%, except where the consumer and the supplier agree, preferably in writing, to amend the estimate. Furthermore, if a supplier charges an amount that exceeds the estimate by more than 10%, the consumer may insist that the supplier provides the goods or services at the estimated price. In addition, the supplier is not allowed to cancel or frustrate the contract, even in situations, for example, there has been a price fluctuation in a particular good the supplier had undertaken to provide. The estimate provisions of the CPA further benefit consumers by stating that any ambiguities in a consumer agreement (defined in the Act as an agreement between the supplier and a consumer in which a supplier agrees to supply goods or services for payment) will be interpreted to the benefit of the consumer.

The delivery of a written estimate in situations where the *Consumer Protection Act* applies has potentially serious consequences for suppliers of goods or services.

Types of Consumer Agreements

The CPA outlines six specific types of agreements covered by its provisions: future performance agreements, timeshare agreements, personal development services, Internet agreements, direct agreements and remote agreements.

For the purpose of this update, we focus only on direct agreements, which are most applicable to the construction industry. A direct agreement is one negotiated or concluded in person at a place other than the supplier's place of business or at a market place, auction, trade fair, agricultural fair or exhibition. Conceivably, where an agreement is entered into at a consumer's place of residence or intended place of construction, these provisions would apply to protect the consumer.

The CPA provides protection against unfair business practices, implied warranties of quality for goods and services for goods provided to consumers, and protection against "negative option" billing.

Where a direct agreement is entered into, there is a requirement under the CPA that the agreement be in writing and that a copy be provided to the consumer. A consumer may, without any reason, cancel a direct agreement at any time from the date of entering into the agreement until 10 days after receiving a written copy of it. Furthermore, a consumer may cancel a direct agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of it, and if that copy does not meet the requirements of the CPA.

The regulations prescribed under the CPA set out specific requirements for direct agreements. The agreement must be signed by the consumer and include information such as the name and address of the consumer, the name of the supplier and other relevant details of the contract. (Note that not all of the many requirements are covered here.) Obtaining legal advice should be considered before entering into any significant agreement or before developing a "standard form" contract in respect of a particular business in order to comply with these requirements.

Other Protections Under the CPA

In addition to those areas outlined above, the CPA also provides:

- Protection against unfair business practices including false, misleading or deceptive representations;
- Implied warranties of quality for goods and services for goods provided to consumers; and
- Protection against what is commonly known as "negative option" billing.

The CPA at Work

At the time of writing, there have been no reported cases decided under the CPA. However, recently, a company was convicted in Brampton, Ontario under an older consumer protection statute, which was identical in certain respects to the CPA. In that case, a contractor failed to provide an adequate form of contract to a consumer who hired a construction company to complete a rear addition to the consumer's home. The contract ultimately provided by the contractor did not include:

- Notice of the consumer's right to cancel within 10 days;
- A break-down of which portion of the total cost was attributed to each service; or
- The delivery date for goods and services.

Each of the above details was required under the old legislation (and under the new CPA) for contracts negotiated at a consumer's house — that is, a direct agreement. The contractor was fined $2,000 as a result of these breaches. Accordingly, contractors and service providers will have to ensure that their consumer contracts meet the requirements of the legislation or they will face penalties and other possible court sanctions.

'Deans of Liens' Collaborate to Co-Author Construction Lien Textbook

Four of Canada's leading authorities have written a definitive legal guide on construction liens. In an unusually collaborative effort, four industry leaders in construction law from four different firms, David I. Bristow Q.C., Duncan W. Glaholt, R. Bruce Reynolds, and Goodmans partner, Howard Wise, collectively known as the 'Deans of Liens,' collaborated over a five-year period to complete the 7th edition of the classic work on Canadian lien law, *Construction, Builders' and Mechanics' Liens in Canada*, published by Thomson Carswell.

"We recognized the importance of this pivotal industry resource, and approached David Bristow to assist with updating the text for a new edition," said Bruce Reynolds, partner at Borden Ladner Gervais LLP. "Over the course of five years and countless meetings, the four of us were able to rewrite the entire text line by line."

The text, first written in 1951, is considered to be the most authoritative construction law reference in Canada by construction law practitioners and construction industry professionals. This guide is a user-friendly resource, and has long stood as the only national work on the field packed with commentary and practical analysis.

"The collaborative nature of the 7th edition is truly unique in today's legal marketplace," said Howard Wise. "By working together we drew on the knowledge and strengths of each of the authors in enhancing what is regarded as the leading construction law text in Canada."

Designed specifically for busy practitioners who need accurate information quickly, *Construction, Builders' and Mechanics' Liens in Canada*, 7th Edition provides expert commentary and analysis of legislation and case law, practical advice, forms, and precedents. The book also offers practical guidance on construction lien practice before, during, and after the trial. Portions of the final manuscript were peer-reviewed by lawyers across the country.

"This marks a significant achievement in all of our careers," said Duncan Glaholt, partner at Glaholt LLP. "This whole project grew out of a conversation between two people, that became a recreation for four people, then, in its final stages, a full-time occupation and obsession for about a dozen people across the country, all of whom we thank in our Preface."

L-R: Bruce Reynolds of Borden Ladner Gervais LLP, Duncan Glaholt of Glahot LLP, David Bristow, Q.C. of Team Resolution, and Howard Wise of Goodmans LLP

The authors enlisted David Kauffman of De Grandpré Chait in Montréal to provide the chapter on "The Law of Construction Hypothecs in Quebec." David Kauffman is widely recognized as one of the leading practitioners of construction law in Quebec and across Canada.

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If you have any comments about this Goodmans Update or wish to discuss industry-related issues or recent developments and trends, please contact a member of our Construction Law Group. The group handles all types of construction matters, including contractual disputes, construction liens, disputes between design professionals and contractors, and between subcontractors and general contractors. As well, we regularly advise clients on complex construction contracts including design build agreements and public/private partnerships. We advise a wide variety of clients including owners, contractors, subcontractors, material suppliers, receivers and lending institutions in construction litigation matters.

Good people are good for business.

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