Goodmans LLP Update

Construction Law / Spring 2005

Changes Relating to the Production of Documents in Construction Disputes

by Howard M. Wise

Changes

In any construction claim, the gathering of documents to support the claim can be a monumental task, often taking weeks or months. However, recent changes to the Ontario *Rules of Civil Procedure* ("*Rules*") may affect the timing of the gathering of this documentation where a case proceeds by way of court process rather than some other form of dispute resolution. While the amendments to the rules apply to all claims issued in the Province of Ontario, nowhere may the impact be greater than in a construction dispute.

As of January 1, 2005, Rule 25.03(4) has been enacted in Ontario. This rule provides that:

> any party who serves a pleading shall at the same time serve, at the party's own expense, a copy of every document referred to in the pleading.

Rule 30 of the *Rules* defines "document" to include:

> a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.

The meaning of the word "document" is extremely broad and can lead to the necessity of delivering a significant volume of material at the time that a statement of claim or any other pleading is actually delivered.

Prior to this amendment, a party that had been served with a statement of claim was allowed to inspect any document referred to in that statement of claim or any other pleading once it had been delivered. The change to the rules requires the party issuing the claim to deliver all documents referred to in the pleading.

Implications

In large construction claims there are often significant and complex issues set out in the pleadings. It is not uncommon for a large construction dispute to encompass breach of contract and/or negligence issues. Underlying these issues is the construction contract and voluminous documentation arising from or in relation to the contract. Where allegations of improper contract administration are raised in the pleading, specific examples may be set out, including reference to various contract or project documentation.

Therefore, where a detailed pleading is delivered referencing hundreds of change orders, site instructions and subcontracts, all that documentation must be served when the statement of claim is issued.

The amended rule essentially forces plaintiffs to incur costs for document gathering prior to the formal preparation of the affidavit of documents — a full listing of all relevant docu-

In This Issue:

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.

Howard Wise is a partner specializing in the areas of construction law and commercial litigation. Howard is the author of the *Manual of Construction Law*, co-author of *Construction, Builders and Mechanics Liens in Canada* (7th edition). He is also a contributing author to *Construction Disputes: Representing the Contractor* and *Canadian Forms and Precedents: Construction Liens*. Howard is a Fellow of the Canadian College of Construction Lawyers and has been certified by the Law Society of Upper Canada as a Specialist in construction law. He is regularly retained to act in large multi-partied disputes, including acting for owners, general contractors, subcontractors, financiers and design professionals.

ments that must be provided to the opposing party prior to oral examinations for discovery. The document-gathering process can be extremely disruptive, especially where the project is ongoing. In addition, document gathering at such an early stage of the proceedings may result in additional costs being incurred prior to the issuance of the statement of claim.

When one considers the fact that construction disputes often involve multiple parties and multiple events, the document-gathering process for the purposes of complying with Rule 25.03(4) can be quite daunting.

Rule 25.03(4) relates to claims that are commenced through the issuance of an originating process such as a statement of claim. The *Rules* do not apply to other forms of alternate dispute resolution such as arbitration. As such, situations may arise when drafting construction contracts where it is preferable to avoid the court process in order to avoid the obligations imposed by the *Rules*. Again, this may affect the forum in which a construction dispute is ultimately resolved.

Producing Documentation

In large construction projects it is not uncommon to have some form of document management in place during the course of construction. Where this takes place, the task of collecting the documentation and arranging for it to be served may not be quite as onerous. Where, for example, a party has kept a detailed contract document control system in place during the project, the requirements of Rule 25.03(4) may be more easily complied with. However, where this is not the case, a litigant may be put to great time, expense and inconvenience in readying itself to issue a statement of claim through the court process.

As this amendment to the *Rules* has only recently come into force, the courts have not yet ruled on what will constitute compliance in a construction case. For example, where reference is made to a construction contract, does that mean the entire contract must be provided or simply portions thereof? In addition, it is not known whether the courts will relax the obligations in construction cases in light of the type of documentation arising from a construction project. These are all areas that will have to be considered by the courts in due course. However, it is clear the rule amendments will affect not only the practice of construction litigation, but also the provisions of the construction contract. Those involved in the construction process must assess the business cost of entering into a contract that permits the parties to embark on the litigation process should a dispute arise.

Case Commentaries

by Ken Crofoot

When Are Construction Lien Rights Available for Industrial Equipment Installation?

Kennedy Electric Ltd. v. Rumble Automation Inc. [2004] O.J. No. 5091, (Ont. Sup. Ct.)

In Ontario, section 14(1) of the *Construction Lien Act* R.S.O. 1990 c. C. 30, (the "Act") as amended, provides that a "person who supplies services or materials to an improvement for an owner, contractor or subcontractor has a lien upon the interest of the owner in the premises improved for the price of those services or materials." Section 1(1) of the Act defines an improvement as:

> "(a) any alteration, addition or repair to, or
>
> (b) any construction, erection or installation on, any land, and includes the demolition or removal of any building, structure or works or any parts thereof, and "improve" has a corresponding meaning."

With this background, one might expect that the installation of a vehicle assembly line at a Ford Motor Company plant might give rise to lien rights. As installed, the assembly line covered over 100,000 square feet of space, stood about 20 feet tall and weighed approximately one-half million tons. It was shipped to the site in 165 separate transport trucks; it was contemplated to be in place for at least 8 years; it was attached to the floor by a complex system of up to 3000 mechanical and chemical bolts ranging from ⁄ inch in width to up to 8 inches in length; it was hard wired to the building's own services which had been prepared to receive them; and changes had been made to the building to accommodate the assembly line. Nevertheless, the Ontario Superior Court ruled after six days of trial that this installation did not give rise to lien rights and the Court ordered the Plaintiff's registered claim for lien to be discharged.

The case contains a thorough review of the law with respect to when an installation can be considered to become part of the realty and when it remains personal property. There were a number of factors which persuaded the Court that the assembly line was not part of an improvement to the premises but only part of the business operation of the company operating within the premises. Significantly, the contract had required the assembly line to be assembled and tested at another location and then moved to the plant. The Court therefore found that it was designed as a portable line, fully capable of being disassembled and reassembled elsewhere. The Court considered that the operation of the assembly line was different than the operation of a cooling tower in connection with a heating, ventilation and air conditioning system which was a necessary part of the operations of the building itself (See *Baltimore Aircoil of Canada v. Process Cooling Systems Inc.* (1993), 16 O.R. (3d) 324 (Ont. Gen. Div.). Notwithstanding the apparent affixation of the assembly line to the floor of the premises, the Court nevertheless considered it independent of the building and capable of removal with appropriate engineering expertise. The Court considered that the Act was never intended to apply to the installation of manufacturing equipment. The assembly line was not part of an improvement to the building and the materials and services in connection with its installation could not be classified as having been supplied in the construction, altering, improving or repairing of the building in question. Therefore the Court considered that while the equipment was physically attached to the real estate, it was intended to enhance the manufacturing process within the building and did not relate to the function of the building, as a building itself. However massive, the assembly line was still personal property.

The Court also looked at the contract between the parties and determined that while the contract referenced an obligation to discharge any liens filed by subcontractors of the installers, the contracts otherwise did not contemplate lien rights and did not appear to contemplate the specific holdback requirements of the Act.

The Court therefore attempted a purposeful analysis of the problem of characterizing the installation of manufacturing processes for construction lien purposes. The analysis seems relatively straight forward on the facts of the case due to the ability to disassemble the manufacturing line and move it elsewhere. There are many installations that are more difficult to analyze using the Court's approach. In a steel mill for instance, the manufacturing processes would typically be integrated into the very structure of the building in that the civil works, (i.e., concrete foundations and structural steel) are designed to fully support and anchor the equipment installed within the building. The entire structure of the building is dependent upon the equipment and it is artificial to talk about the building as having an existence apart from the processes carried on within it. Similarly, many large equipment industrial installations require huge electrical distribution systems and one wonders how one should characterize the bus ducts, transformers and various junction stations attached to and inside

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 and is the Canadian case note editor of "Construct!", the American Bar Association's construction litigation section quarterly publication.

the structure of the building when the electrical subcontractor claims lien rights.

The most instructive thing that can be taken from the *Kennedy Electric v. Rumble Automation* decision is that if a contractor wishes to claim lien rights, it should conduct itself from the very beginning on the basis that the installation is an improvement within the meaning of the Act. The contractual documentation should reflect the understanding of the parties that lien rights are contemplated. While not determinative, the mutual recognition of such rights during the administration of the contract will assist in supporting the characterization of the work as an improvement under the Act.

If a contractor wishes to claim lien rights, it should conduct itself from the outset on the basis that the installation is an improvement within the meaning of the *Construction Lien Act*.

Can An Expressed Term in the Conditions of Tender Entitle the Owner to Waive Non-Compliance with the Terms of Tender?

Graham Industrial Services Ltd. v. Greater Vancouver Water District **[2004] B.C.J. No. 5 (B.C.C.A.)**

Kinetic Construction Ltd. v. Regional District of Comox-Strathcona **(2004), 245 D.L.R. (4th) 262 (B.C.C.A.)**

It is common in invitations to bid to see language in which the owner reserves the right to accept a bid notwithstanding a non-compliance in some respects with the terms of the invitation. In inserting such clauses, the Owner is attempting to preserve a discretion to accept a low bid notwithstanding that the bid might not have strictly complied with precise requirements. In this case, Graham submitted a bid in connection with the construction of a water main pumping station which was $5 million lower than the other three bidders. Immediately after the bids were opened, Graham advised the owner that its bid contained a $2 million arithmetical error and sought to withdraw it. It took the position that its bid objectively did not conform to the tender requirements and therefore was incapable of acceptance by the owner. The owner objected to the withdrawal of the bid because bids were irrevocable once submitted and the owner took the position that it was entitled to waive the defect due to a term in the invitation stating that right. The Judge ruled that the bid was non-conforming in material respects, that the non-conformance was objectively apparent and that therefore the owner was not entitled to accept Graham's bid. The British Columbia Court of Appeal upheld this decision and added additional analysis which is instructive with respect to the use of discretionary clauses in invitations to bid.

The legal analysis of the parties' obligations in a tender situation is defined by the Supreme Court of Canada in Ron Engineering [1981] 1 S.C.R. 111. Simply put, the invitation to bid is an offer and the submitted bid is an acceptance of that offer forming a "contract A" between an owner and each bidder consistent with the terms of the invitation to bid. This contract A is a binding contract between each bidder and owner that the owner will conduct itself in accordance with the invitation to bid and the bidder will enter into a construction contract if its bid is accepted. Once contract A is notionally created, the individual bid becomes an offer to perform the work which is capable of acceptance by the owner and which, when accepted, will lead to a contract B. Contract B is the actual construction contract which is the subject matter of the invitation to bid. This contract A/contract B analysis permits the Court to consider tender disputes in the context of two separate contracts wherein the owner owes obligations to potential bidders under contract A even though it may not enter into a contract B with any particular bidder.

In the *Graham* case, the Court found that where a bid is materially non-compliant, no contract A can be formed because the bid is not objec-

tively capable of constituting an acceptance of the owner's invitation to bid terms. A discretion clause in the instruction to bidders cannot permit the owner to determine subjectively whether a defect is material to it. Such a discretion clause which looks at the contents of the bid itself would not operate until a valid contract A was formed. If, as in this case, a bid is objectively non-compliant, the owner, through an exercise of discretion, cannot make it compliant. The contract A would not come into existence where a bid failed to comply with the invitation to bid. The Court felt that the mandatory requirements of the instructions to bidders would be completely negated if the owner had the right to exercise its discretion to waive any defect or non-compliance by deeming material omissions to be non-material.

This somewhat convoluted analysis makes sense when looked at from the point of view of the Court policing the bidding process for construction projects. As the Court noted, no bidder would participate in a tendering process in which the owner had the unreviewable, subjective right to deem patently non-compliant bids to be compliant bids. The effect of such a provision would result in a construction industry where negotiation on undisclosed terms rather than competition on specified terms would govern the process. The Court was therefore imposing its will that if a public bidding process is going to be used by an owner, that process has to be fair to all parties and the Court will not permit uncertain discretionary terms to be used to dilute the fairness of that process.

Nine months later in *Kinetic* the same appeal court, comprised of a different panel of judges, reached a different conclusion. In this case, the invitation to bid stated that the Owner may "in its sole discretion, reject or retain for its consideration Tenders which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers." The reasons for judgment are very short but the Court stated that the contract A contained the terms found in the invitation to bid which expressly permitted the owner to accept a non-conforming bid. Therefore the Court was not prepared to state that the owner was not entitled to accept the non-conforming bid. The *Graham* case and its line of reasoning was not distinguished or even referred to. The factual difference between the two cases that may be significant is that in the *Graham*, the Court felt that the Owner was attempting to take advantage of the non-conforming contractor in order to force it to perform the work, while in the *Kinetic* case, the contractor wanted the contract and the objection was raised by a rival bidder.

Does a One-Year Warranty Limit Claims after the One-Year Warranty Period has Expired?

Levy v. Elmer Lohnes Lumbering Ltd. [2004] N.S.J. No. 329 (Nova Scotia Supreme Court)

It is common to see construction contracts in which the contractor provides a warranty period for its work. In this case, the contractor provided a one-year warranty on vinyl siding installed on a building. Many years later, the building experienced moisture and cracking problems caused by what was determined to have been improper installation. When the owner sued, the contractor contended that it had provided a one-year building warranty and that the contract clearly stated that a notice of any defect must be given to the builder in writing within the one-year period. As a result, the defendant argued that it owed the Plaintiff no further obligation. The Nova Scotia Supreme Court ruled that the existence of a warranty in the contract did not bar the Plaintiff's normal rights of recovery for breach of contract at common law. In the absence of extremely clear language defining a contractual limitation

A defect liability clause in a typical construction contract would not impact the normal period of claims unless the language makes clear that the warranty period also acts as a contractual period.

Experts called to Ontario and other provinces may wish to consider paying the licence fee to avoid the risk of their evidence being disallowed.

period, the Court indicated that it was reluctant to hold that a guarantee period itself supplants the right to sue for a breach of contract in the normal fashion. A defect liability clause in a typical construction contract would not usually be considered to impact the normal period of limitation under which the owner could complain of defective work. The specified warranty was in addition to and not in substitution for the common law rights and merely provided the owner with an additional right to require the contractor to reattend to remedy the work within the one-year period (as opposed to the obligation of common law to mitigate damages by remedying and suing for the cost of the remediation).

Based on this decision, the normal contractual warranty period does not operate as a bar to common law claims, unless the language is extremely clear that the warranty period is also to act as a contractual limitation period.

Do You Have to be Licensed in Ontario to Give Evidence as an Expert in an Ontario Proceeding?

Mann-Tattersall v. City of Hamilton, Superior Court of Ontario, File No. 4401/78 unreported, decided November 25, 2003 [Festeryga, J]

It is very common for counsel in Ontario to call expert evidence from experts who practise in other jurisdictions, where they feel the expert can be qualified to give opinion evidence in Ontario Court. In the past, the issues for consideration by the Court were whether the witness was sufficiently skilled in the area for which his testimony was sought to be adduced and whether the witness could offer an independent opinion which would be useful to the Court to determine a question of fact. Whether the witness has acquired its expertise through prolonged practical experience or whether the expert is qualified as a result of a long list of university degrees and recognitions, it is up to the Judge to determine that the expert has been qualified and is capable of giving opinion evidence.

In *Mann-Tattersall v. City of Hamilton* (Superior Court of Ontario) File No. 4561/98 decided November 25, 2003, (unreported), the Court refused to allow an out-of-province expert engineer to testify in Ontario because the learned Judge considered that this would be contrary to a legislative provision forbidding the practice of engineering without a licence in the Province of Ontario. The Judge concluded that the giving of expert evidence constituted the practice of engineering in Ontario and therefore refused to qualify an expert who was not so licensed.

This decision most likely will prove to have been wrongly decided, but in the short run, will result in an argument being raised in any case where an out-of-province expert is called to give evidence in a construction case. The Judge's actions are totally consistent with the policy of Ontario's Association of Professional Engineers, who have made it known that they consider the offering of consulting services as an expert witness to constitute the practice of engineering in the Province of Ontario and that they intend to enforce the statute by preventing such practice. The fact that for a relatively nominal fee, one can become licensed in Ontario should not excuse the confused logic that has resulted in this decision.

The Ontario Rules of Civil Procedure, require that an expert's report be served on the opposing party prior to the commencement of a trial. It is extremely debatable that the rendering of such a report to an Ontario situated party and the giving of oral evidence in Court constitutes the practice of engineering in Ontario. However, even if it does, it is even more debatable whether a judge has a role to prevent such unauthorized practice using the rules respecting qualifying expert witnesses.

The case in question was an automobile accident in which engineering evidence was sought

to be called relating to accident reconstruction and highway design and maintenance. Part of the evidence related to the standard of care for snow clearing in Ontario which might very well be a basis to disqualify an out-of-province expert as being unqualified to give such evidence. However, the Court did not limit its decision on that basis and extended it to issues that were not particular to local engineering issues. In the past, the admissibility of expert evidence is based upon the evidence being relevant, beyond the capacity of a lay person, not offending any exclusionary rule and being admitted through a properly qualified witness with special knowledge. None of these requirements for the giving of expert evidence necessarily have anything to do with the place of licensing of the expert in question to practice engineering. It would be strange, to say the least, if the foremost expert from abroad in an engineering field in a construction case or in a medical field in a personal injury case could not be called to give evidence in Ontario because he or she was not licensed as a practitioner in the jurisdiction. Because the decision lacks a detailed analysis of the nature and purpose of expert evidence and such a detailed analysis should lead to the opposite conclusion, one would expect that it would not be followed by other judges when further considered.

In the meantime, experts called to Ontario (and probably other Canadian provinces) may want to consider paying the nominal licence fee in order to avoid the risk and consequent cost of their evidence being disallowed due to this case.

Indemnity Clauses in Construction Contracts – The Need for Clarity

by Joseph Cosentino

In the case of *TransCanada Pipelines v. Potter Station Power Limited Partnership*, a decision of the Ontario Court of Appeal released in mid-2003 and subsequently noted in several other cases, the Court was asked to determine whether the motions judge erred in failing to apply the principle of *contra proferentum*, (i.e. the doctrine used in the interpretation of documents where ambiguities are construed unfavourably against the drafter of the document) and in failing to find ambiguity in the indemnity clause regarding TransCanada Pipeline's claim for damages. The case is of interest to participants in the construction industry who may routinely agree to indemnify the party with whom they have contracted with on a construction project. In circumstances where indemnity clauses are not ambiguous, they will potentially be upheld and can be enforced. Where clear wording has been used, the indemnity clause may withstand scrutiny by the court and be given effect. Ensuring clarity at the outset is an important consideration to keep in mind when indemnity clauses are being considered.

The facts in the *Potter Power* case are as follows:

On May 3, 1990, Potter Station Power Limited's ("Potter Power") predecessor entered into an agreement with TransCanada Pipeline ("TCPL") granting Potter Power the exclusive right to purchase the waste heat produced by a compressor station. On May 12, 1993, the parties entered into a further agreement which included an indemnity clause ("Indemnity") requiring TCPL and Potter Power to indemnify each other in certain circumstances.

On October 23, 1995, a natural gas compressor station owned by TCPL was damaged when the land upon which it was situated partially collapsed.

Relying on the Indemnity, TCPL sued Potter Power on May 26, 1998 for the damages suffered. Potter Power added Commonwealth Insurance ("Commonwealth") to the proceeding as a third party. Commonwealth, one of Potter Power's insurers, brought a summary judgment motion to dismiss TCPL's action,

Joseph Cosentino focuses on litigation with an emphasis on construction law and energy disputes. His construction law practice involves negotiating major contracts, lien litigation and resolving disputes for owners, general contractors, subcontractors, material suppliers and lenders. His practice also involves a broad range of commercial litigation matters, including bankruptcy/insolvency litigation and disputes involving the electricity industry. Joe has handled a variety of claims and disputes in connection with municipal utilities. Joe is a frequent seminar speaker and contributor to a number of industry trade publications. He is also the editor of the firm's Construction Law Update Newsletter.

When signing contracts with indemnity provisions, ensure that the wording is clear and will give effect to the intention of the parties. Legal counsel should review the indemnity provision before a contract is signed.

claiming that the Indemnity was restricted to claims against TCPL by third parties and that it did not cover first party losses suffered by TCPL directly.

In dismissing Commonwealth's summary judgment motion, the motions judge found that the relevant case law did not establish a general principle that wherever words of indemnity are found, the obligation created is confined to third party claims.

Commonwealth contended that the motions judge erred in two separate but related aspects in concluding that the indemnity extended to TCPL's claim for damages that it suffered directly. First, the motions judge failed to apply the principle of *contra proferentem*. Second, he failed to find, at a minimum, that the Indemnity was ambiguous concerning whether it covered TCPL's claim for damages.

The Indemnity read as follows:

> Potter Power shall indemnify and save harmless TransCanada from and against all liability, actions, claims, losses, costs and damages which may be brought against or suffered by TransCanada and which TransCanada may incur, sustain or pay arising out of or in connection with:
>
> (a) construction, operation and maintenance of the Facility (including Duct System);
>
> (b) the negligence or wilful misconduct of Potter Power, its directors, officers, employees, agents, servants, contractors and subcontractors arising out of or incidental to this Agreement; or
>
> (c) a breach by Potter Power or any of the terms and conditions set forth in this Agreement.
>
> Except to the extent that such losses or damages, result from the negligence or wilful misconduct of TransCanada.

In considering these issues, the Court of Appeal refused to give effect to the first ground of appeal. The judge determined that it was apparent from the motion judge's reasoning that he did not find the Indemnity ambiguous. As such, it was not necessary to apply the principle of *contra proferentem*. The appeal judge relied upon the 1980 decision of the Supreme Court of Canada in the *Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance* case for the proposition that *contra proferentem* applies only once a finding of ambiguity had been made.

Despite this conclusion, the Court of Appeal did consider whether the Indemnity was ambiguous. The Court found that the clause was not ambiguous based on four grounds:

1. The Court of Appeal agreed with the motions judge that the Indemnity should be read in the context of two sophisticated businesses, both commercially and geographically involved with each other;

2. The Court further agreed with the motions judge that when reading the Indemnity fairly and in context, the language of the Indemnity is "appropriately read more broadly than [covering] simply claims by third parties." In the Court of Appeal's view, the submission by Commonwealth was no more than an attempt to create an ambiguity by attaching an obscure meaning to unambiguous words;

3. The Court of Appeal rejected Commonwealth's submission that the motion judge had given too little weight to *Mobil Oil Canada Ltd. v. Beta Well Service Ltd.*, an earlier decision of the Canadian Supreme Court where it was found that the language of the two relevant indemnity provisions differed in a significant way. The key difference between the two provisions was the compelling alternative introduced by the words "which may be brought against or suffered by" in the TCPL Indemnity. In the *Mobil Oil* indemnity clause there was no clear alternative presented; and

4. Finally, the appeal judge rejected Commonwealth's submission that the motions judge relied improperly upon Potter Power's counterclaim in interpreting the Indemnity. The Court found that although the motions judge, when summarizing the positions of the parties, recited TCPL's argument that Potter Power's conduct indicated that it shared TCPL's interpretation of the Indemnity, there was no indication in the motion judge's analysis that he relied upon this argument in reaching his decision.

In summary, the Court of Appeal concluded that the motions judge did not err in his conclusion concerning the meaning of the Indemnity and would not give effect to this ground of appeal. There was no ambiguity and thus no reason to apply the principle of *contra proferentum* to the analysis of the Indemnity. The Court of Appeal stated that the plain and ordinary meaning of the contract should be assessed in its own context with a focus on the intention of the parties.

When signing contracts with indemnity provisions, industry participants should ensure that the wording used is clear and will give effect to the intention of the parties. In this regard, involving legal counsel to review an indemnity provision before a contract is signed is warranted.

Update on Proposed Changes to the *Labour Relations Act* in Bill 144

by Joseph Morrison

On November 3, 2004, the Ontario Ministry of Labour announced proposed new legislation that contains several significant changes to the *Labour Relations Act*. If passed, these amendments will reintroduce specific remedies of the Ontario Labour Relations Board and impact the certification process for unions in the construction industry sector. In particular, Bill 144 will:

- Re-establish a card based certification system for the construction sector. Currently, a vote must always be held before a union can be certified. A card based system will permit automatic union certification if more than 55% of the employees sign cards to join a union;
- Restore the power of the Ontario Labour Relations Board to certify unions ("automatic certification") even if they lose a representation vote in situations where the employer is found to have broken the law during a union organizing campaign; and
- Restore the Ontario Labour Relations Board's power to reinstate workers on an interim basis who were fired or disciplined during a union organizing campaign because they were exercising their statutory rights.

These new provisions are aimed at reversing certain previous provisions introduced by the previous government. The Minister of Labour, Chris Bentley, has stated that the automatic certification provisions will only by used as a last resort. However, it remains to be seen how the Ontario Labour Relations Board will interpret and apply such provisions. When these provisions existed in the past they were not necessarily used as a last resort but as a means of addressing unfair labour practice complaints that arguably could have been addressed with less stringent remedies.

The card based certification procedure will definitely make it easier for construction unions to obtain certification in Ontario. The Ontario Labour Relations Board will have the power to certify construction industry bargaining units without any secret ballot vote being held.

This legislation has passed first reading but it is not clear if and when the legislation will be enacted by the current government.

Joseph Morrison specializes in labour and employment law on behalf of management. He represents employers in arbitrations, labour board proceedings, human rights complaints, occupational health and safety prosecutions, workplace safety and insurance appeals, and actions for wrongful dismissal. He also provides advice to employers and corporate counsel regarding labour and employment issues that arise in closures, dispositions, insolvencies and restructurings. Joe joined Goodmans in 2003 after practicing with a leading management side labour and employment law firm in Toronto. He is currently a member of the Executive of the Ontario Bar Association Labour Relations Section and is a regular contributor to Canadian Employment Law Times.

In the next issue:

Claims Under Performance Bonds

Construction Liens and Bankruptcy

In Focus

Construction Law Group News and Upcoming Events

Joseph Cosentino and Jerry Topolski were the featured speakers at the February 1, 2005 meeting of The American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE), Hamilton, Ontario chapter. Joe and Jerry gave an overview of the Construction Lien Act — what is a construction lien?, who may lien?, initiating a lien action and trial of a construction lien action.

Don Pierce spoke at the Ontario Bar Association's 30th Annual Institute on Construction entitled "Construction Law for Commercial Lawyers or Murphy was an Optimist" held on February 4, 2005. Don presented an overview on alternative project delivery models.

Crossroads - Issue No. 3 - January 2005

Goodmans and KPMG, two leading firms that provide infrastructure renewal and procurement services in Canada, have joined forces to provide clients and contacts with Crossroads — a regular publication designed to provide practical articles on current trends and developments in these areas.

In the first two issues of Crossroads, the various infrastructure renewal delivery options and the key selection criteria to help determine the best delivery option for any project were discussed. In this third issue, select issues relating to deal structure were described. Ira Berg and Carla Salzman of Goodmans along with Paul Lan of KPMG are Crossroads' contributing editors. Members of Goodmans' Procurement and Infrastructure Renewal Group include: Ira Berg, Don Pierce, Carla Salzman, Howard Wise and Susan Zimmerman. Publications are available at www.goodmans.ca.

New Construction Group Members

The construction group recently welcomed two new members to the group — **Jerry Topolski** and **Derek McBean**.

Jerry Topolski received his law degree from the University of Windsor in 2000.

He clerked at the Court of Appeal of Alberta, completed his articling at Goodmans and joined the firm as an associate in 2002. Jerry assists clients on a full range of matters including construction, employment and contractual disputes.

Derek McBean received his law degree from the University of British Columbia in 2002.

Derek joined Goodmans as a summer student in 2001, articled in 2002-2003 and returned as an associate in 2003.

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❑ Municipal, Planning & Property Tax
❑ Privatization, Public/Private Projects & Project Finance
❑ REITs & Income Funds
❑ Real Estate

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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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