

## Construction Law

January 2011

### Construction Law Updates

The latter part of 2010 brought two important developments to the construction legal community. Amendments to the *Construction Lien Act* were enacted on October 25, 2010 and, in late November 2010, the long awaited new construction management contracts were published by the Canadian Construction Documents Committee. This bulletin highlights both.

#### **Construction Lien Act Amendments**

The *Open for Business Act, 2010* received royal assent on October 25, 2010. The stated aim of the Act was to create a more competitive business climate in the province of Ontario by amending or repealing more than 40 pieces of legislation, including the *Construction Lien Act* ("CLA"). Some of the CLA amendments came into force on October 25, 2010. Others will come into force on a day to be named by proclamation of the Lieutenant Governor. Some of the key amendments are highlighted in this bulletin. As of the date of publication only the amendment to the definition of 'improvement' was already in force.

#### **Definition of "Improvement"**

In September, 2007, the Ontario Court of Appeal released its decision in *Kennedy Electric Ltd. v. Dana Canada Corporation*. The case involved the question of whether the supply and installation of 500,000 tons of assembly line equipment in an expanded truck manufacturing plant gave rise to construction lien rights. The Court of Appeal, upholding two lower court decisions, found that the installation of the equipment was not an "improvement" within the meaning of the CLA because the equipment was "portable". The Supreme Court of Canada refused to hear a further appeal. This decision caused consternation among electrical and mechanical contractors and much ink was spilled on legal commentaries. It was the subject matter of our December 2008 Year in Review Construction Bulletin.

The definition of "improvement" in the CLA has now been broadened to, in effect, statutorily reverse the *Kennedy Electric* decision. An "improvement" now means, in respect of any land,

- (a) any alteration, addition or repair to the land,
- (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
- (c) the complete or partial demolition or removal of any building, structure or works on the land

The operative words added to the original definition are 'including the installation of industrial, mechanical, electrical or other equipment...that is essential to the normal or intended use'. It remains to be seen what lienable interests will now be permitted by the amended definition which were not caught by the original definition.

#### **Condominiums \***

A brand new section was added to the CLA that applies to land that is intended to be registered as a condominium corporation in accordance with the *Condominium Act, 1998*. An owner must now publish notice of his or her intention to register the condominium, in a construction trade newspaper, at least five and not more than 15 days before the condominium is submitted for approval under the *Condominium Act*. This is a new obligation imposed upon owners of condominium projects.

The publication is intended to give notice to all suppliers of services or materials to the project that the land will soon be registered as a condominium. This gives an unpaid trade the opportunity to decide whether to register a lien before the lands and premises are legally divided into separate

condominium units and title is transferred to various homebuyers. Under the CLA, a person has a lien upon the interest of the owner in the premises improved. However, the definition of owner specifically excludes a 'home buyer', which includes a typical purchaser of a condominium unit.

This new notice must be in a prescribed form and must include,

- (a) the owner's name and address for service;
- (b) a concise overview of the land described in the description, including reference to the lot and plan number and the parcel number or numbers of the land; and
- (c) if, to the best of the owner's knowledge, information and belief, a contractor supplied services or materials to an improvement in respect of the land during the 90-day period preceding the day on which the description is to be submitted for approval under subsection 9 (3) of the *Condominium Act, 1998*, the contractor's name, address and, if known, address for service.

Failure to comply with this obligation may have serious consequences. An owner who fails to publish this new notice will be liable to any person entitled to a lien who suffers damages as a result.

## **Affidavit of Verification\***

With the advent of electronic registration in Ontario came confusion over the continued need for an Affidavit of Verification, as required by the CLA. Recent lower court decisions held that the electronic "affirmations of facts" are equivalent to formal affidavits, and as such, satisfy the CLA's requirement for an affidavit of verification. However, the CLA specifically mandates that a claim for lien "shall be verified by an affidavit of the person claiming the lien". Not surprisingly, there has been much inconsistency regarding the proper preservation of a lien with regard to the Affidavit of Verification. The new

changes, when they come into force, will formally dispense with the need for an affidavit of verification in all cases. This will bring a welcome end to the confusion.

Now, instead of cross-examining the deponent of the affidavit of verification, the lien claimant, the agent or assignee of the lien claimant, or a trustee of the workers' trust fund, as the case may be, is liable to be cross-examined.

## **Amendments to Sheltering Rules\***

The amendments to the CLA aim to protect the rights of claimants with sheltered liens, regardless of whether the lien under which they are sheltering is dealt with or resolved. A lien claimant whose lien has been sheltered under a certificate of action that has been vacated by court order will now be permitted to proceed with an action to enforce its sheltered lien as if the order to vacate had not been made.

*\* Not in force as of the date of publication. To come into force on a day to be named by proclamation of the Lieutenant Governor*

## **New CCDC Construction Management Contracts**

The Canadian Construction Documents Committee ("CCDC") published three new construction management contracts in the latter part of November, 2010. CCDC is a national joint committee made up of volunteer representatives from various interest groups in the construction industry. In the past, construction managers and owners had available CCA 5-1988 and the corresponding Agreement between Owner and Trade contractor (CCA17-1996). These have been replaced by the following three new contracts:

- CCDC 5A-2010 Agreement Between Owner and Construction Manager – For Services
- CCDC 17-2010 Stipulated Price Contract Between

## Owner and Trade Contractor for Construction Management Projects

- CCDC 5B-2010 Agreement Between Owner and Construction Manager – For Services and Construction

There are fundamental differences between CCDC 5A and CCDC 5B. Under 5A, the owner retains only the construction management services of the Construction Manager. The Construction Manager is the agent of the owner to the extent of the services described in the schedules to the contract. However, the Construction Manager has no contractual obligation to the trade contractors. The owner, not the Construction Manager, hires the trade contractors. CCDC 17-2010 is the new trade contract (replacing CCA 17-1996).

CCDC 5B is a new creation. Some have referred to this as the Construction Manager “at risk” model. In this case, the owner hires the Construction Manager to provide services and to undertake the construction. The Construction Manager then hires all of the subcontractors. The Construction Manager is contractually bound to the subcontractors in the same way as a general contractor. The Construction Manager is not the agent of the owner. This contract provides several options for the method of payment including stipulated price, guaranteed maximum price or GMP plus percentage of cost savings options. The payment option can be agreed upon at the start of the contract or exercised thereafter and documented by change order. Some have questioned whether there is any difference between CCDC 5B and a general contract model (CCDC2-2008 for example).

These new contracts have adopted the use of several schedules, including schedules which describe the following, and the method of payment for each:

- the services to be provided in the pre-construction, construction and post-construction phases
- applicable reimbursable expenses
- additional services and temporary work

- reimbursable expenses applicable to the additional services and temporary work
- time based rates for Construction Manager’s personnel

The professed aim of the committee members was to force parties, by the use of these schedules, to reflect upon each item and, in each case, decide and denote whether the service is to be provided by the Construction Manager, and if so, by what method of payment it is to be compensated and whether reimbursable expenses are included in the Construction Manager fee or compensated otherwise. The new schedules require careful review and precision. In this case, the devil is certainly in the details.

New terms and definitions have been created, which deserve careful scrutiny. Presumably, from time to time, a Construction Manager will provide cost estimates. The new contracts have defined four classes of construction cost estimates (Class A, B, C or D). Under Class A, the estimate of the construction cost is based on the completed construction documents and is the final estimate before the bid call. In addition to labour and material costs, it includes “allowance for all costs resulting from the project schedule, all actual associated costs, including cash allowances, contingencies, allowances for design, escalation, market conditions and anticipated amendment amounts as applicable”. By contrast, a Class D cost estimate is based on the owner’s “functional requirements to the degree known at the time”. The level of precision of each cost estimate is to be commensurate with the level of detail available at the time. This is bound to be a ripe area for controversy.

CCDC 5A introduced a new term: Project-In-Use Date. This is not the same as the concept of substantial performance. The latter is prescribed by the lien legislation of each province or territory. The new Project-In-Use Date is defined as the date when the project (ie. the total construction) is ready for use or is being used for the purpose intended and is so confirmed in writing by the Construction Manager, in consultation with the consultant and the owner. This concept is mirrored in CCDC17 and is

the trigger for the warranty period. CCDC17 prescribes the warranty period under the trade contract as one year from Project-In-Use Date (except for extended warranties specified elsewhere).

Contract administration, as between the Construction Manager and the consultant, may have some areas of overlap under CCDC 17. Both the Construction Manager and the consultant have a role. The Construction Manager

is the principal administrator and, in the first instance, gives interpretations and makes findings, except with respect to architectural and engineering aspects of the work. The consultant gives interpretations and makes findings on matters relating to the requirements of the design. Both the Construction Manager and consultant have authority to reject non-conforming work.

## Pallett Valo LLP Construction Practice

Litigation risk management in the construction industry requires the advice and guidance of experienced construction and employment lawyers. The Pallett Valo LLP Construction Practice has particular expertise in the resolution of all types of construction disputes. Their practical and timely advice assists our construction clients in meeting their day to day challenges.

## In-House Training

A good understanding of the rights, remedies and obligations created by the Construction Lien Act is a valuable asset for anyone in the construction industry. Anna Esposito, and other members of the Construction Practice, are frequent speakers on topics of legal interest to the construction industry and conduct training seminars on liens, bonds, breach of trust and contracts. If you are interested in discussing options for in-house training seminars specifically tailored to your business needs, please contact Anna Esposito.

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