

15th Annual



CONSTRUCTION

superconference

Bidding and Tendering • Contracts • Liability Bonding • Insurance Claims • Disputes • Liens • Managing Electronic Documents • ADR • New Legislation

November 21 and 22, 2005

The Metropolitan Hotel, 108 Chesnut Street, Toronto, Ontario

HEAR FROM INDUSTRY EXPERTS INCLUDING:

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Get the most up-to-date and critical information on:

- How to protect your lien and trust rights in CCAA and BIA proceedings
- How to overcome the challenges of collecting and maintaining electronic data
- How to navigate through new labour, building code and environmental legislation
- How to make sense of the various request documents
- How to survive the bidding and tendering wars
- How to make alternate project delivery models work for you

PLUS! Add value to your attendance by attending this essential conference workshop:

November 23, 2005 – 9:00 a.m. to 12:00 p.m.

**The Anatomy of a Construction Action:
A Complete Guide to Best Practices in Preparing
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IF YOU ARE INVOLVED IN THE CONSTRUCTION INDUSTRY, THIS IS ONE EVENT YOU CAN'T AFFORD TO MISS

Now in its 15th successful year, *The Canadian Institute's Construction Superconference* is the one event that the construction industry relies on for the most comprehensive, up-to-date and practical advice on the most challenging and critical construction law issues.

In the past year alone there have been crucial developments in the judicial approach to bidding and tendering as evidenced by the recent cases of *Graham* and *Kinetic*. Lien and trust rights have seemingly been eroded by CCAA and BIA procedures and orders and the definition of a surety bond has forever been altered by the recent *Lac La Ronge* decision. New legislation such as Ontario's new Building Code Act and Ontario's *Labour Relations Statute Amendment Act 2005* are sure to change the way in which construction stakeholders carry on business as will recent developments in the treatment of electronic data as evidence. "Partnering" has become a viable approach to ADR and with government construction budgets increased, alternate project delivery systems need be assessed.

Whether you are a developer, land owner, project manager, sub-trade, design professional or construction lawyer you must stay abreast of the latest developments that affect the construction community. *The Canadian Institute's* annual event is your best opportunity to hear from top industry specialists and the most respected construction lawyers in the country and get the latest and critical information on:

- Bidding and tendering and the status of non-compliant bids in light of the *Graham* and *Kinetic* decisions
- Best practices in electronic data collection and management in the construction industry
- Lien and trust rights when there is a CCAA or BIA proceeding and the lessons learned from the *Stelco* fiasco
- What a surety bond is and what it is not as determined by the recent decision of *Western Surety v Lac La Ronge*
- Ontario's new *Building Code Act* and changes to Ontario's *Labour Relations Act* that will alter the certification procedure of construction labour unions
- The innovative ADR approach of "partnering"

This annual *Canadian Institute* event is also your best source for updates on construction contracts, allocation of liability, construction insurance, alternate project delivery models, change orders, delay and impact claims and so much more. **Spaces for this event will go quickly so register now.** Call *The Canadian Institute* toll-free at **1-877-927-7936**, fax the registration form to **1-877-927-1563** or register online at **www.CanadianInstitute.com** to secure your spot. We look forward to seeing you at the conference.

What 2004 Delegates had to say about this conference:

"Good overview of current law"

Robert Silberstein
(President/Modern Niagara Toronto Inc.)

"Excellent presentations"

Pierre Solda
(Senior Project Manager/City of Hamilton)

"Informative, very well organized and professional"

Charlene Christie
(Project Manager/The Belko Group)



This program has been accredited by the Construction Law Specialty Committee and the Civil Litigation Specialty Committee of the **Law Society of Upper Canada** for 13 hours towards the professional development requirement for certification.

Register at 1-877-927-7936 or in Toronto 416-927-7936 or www.CanadianInstitute.com

Monday, November 21, 2005

8:00 Registration Opens – Coffee Served ☕

8:45 Opening Remarks from the Co-Chair

Geza Banfai

Partner, Blaney McMurtry LLP

9:00 The Bidding and Tendering War: How to Survive it and How to Keep the Project From Falling Off the Rails Before it Starts

Glenn Ackerley

Partner, Weir Foulds LLP

Clive Thurston

President, Ontario General Contractors Association

- Determining the appropriate procurement strategy for your project
- Assessing the legal obligations of owners who call for tenders and contractors who submit them?
- Mastering successful bidding techniques and strategies:
 - ensuring technical specifications you received are detailed enough to make a complete and proper bid
 - what clauses are essential to protect your interests?
 - drafting to limit Contract "A" liability
- What constitutes fairness and good faith in the tendering process?
- When can you renegotiate or re-tender and what are the possible legal consequences?
- Dealing with escalating material costs post tender: What you can and can't do?
- Identifying the advantages and disadvantages of prequalification
- What are the legal implications of a mistaken bid?
- Examining the latest cases that distinguish a "minor irregularity" from a "material defect"
- Reconciling the *Graham* and *Kinetic* decisions: Where are we now when there is a non-compliant bid?
- Determining the difference between clarification and bid modification
- Has the bidding and tendering process become a battlefield for owners and contractors?
- The bid depository: Is it a working and viable option for owners and bidders alike?
- Are subcontractor and supplier quotes irrevocable in light of the recent case of *Harvey Holdings v Hercules Food Processing*?
- Tips and traps in electronic bidding and tendering
- What is bid shopping and how does it undermine the spirit of the bidding and tendering process?
- What are the risks of bid shopping and what are the legal consequences of getting caught?
- Alternate Bidding Models: Is it time to revamp the system?
- What are the advantages and disadvantages of the various bidding models?

10:00 The ABCs of RFPs: How to Make Sense of the Various "Request" Documents

L. Brian Swartz

Senior Vice President, Legal and Commercial
Aecon Group Inc.

Matthew R. Alter

Partner, Borden Ladner Gervais LLP

- Examining the legal distinctions between an RFP and RFQ and an RFI

- How does an RFP differ from bidding and tendering document?
- Assessing the advantages and disadvantages of the RFP process
- What is required to satisfy the "duty of fairness" in an RFP?
- Best practices when drafting an RFP document
- How to avoid unintentionally creating a binding obligation
- What to do when material costs skyrocket after the RFP process
- How to deal with disputes between competing bidders
- Examining the latest strategies and techniques in bidding for public sector construction projects

10:45 Networking Refreshment Break ☕

11:00 Good Contracts, Bad Contracts and No Contracts: Examining the Latest Trends and Cases Dealing with Construction's Most Fundamental Agreement

Geza Banfai

Partner

Blaney McMurtry LLP

- What makes a good construction contract?
- One size does not fit all: Choosing the appropriate type of contract for your project
- Ensuring that pre-contractual goals are reflected in the drafting of the construction agreement
- What are the advantages and disadvantages of using CCDC and CCA standard contracts?
- Amending the CCDC and CCA standard forms: How to do it properly and avoid the common pitfalls
- Dealing with troublesome contractual provisions including:
 - site inspection and assumption of risk clauses
 - flow-through provisions
 - the "constructor" clause
 - pay when paid and liquidated damages clauses
 - indemnity provisions
- The failed contract: How to recover payment where work is done without an effective contract in place

11:45 Working in a Paperless World: Overcoming the Challenges Faced by the Construction Industry When Dealing with Electronic Data Collection and Management

Jennifer Dolman

Partner

Osler, Hoskin & Harcourt LLP

Jim Ilkay

President

EdgeBuilder Inc.

- Why is electronic data collection and management so important today in the construction industry?
- Examining the provisions of the *Ontario Rules of Civil Procedure* that relate to the definition of documents
- Mastering the art of discovering electronic data: What types of questions should be asked?
- How has the cost of the production of electronic data within a lawsuit been dealt with in Canada and in the United States?
- How long should data be maintained and what is a "litigation hold"?
- Examining the various devices used to preserve information

- Defining the tort of "spoilation"
- Determining why the creation of a record retention system is essential and establishing what a good one will entail
- Examining the minimum statutory retention periods in construction related legislation
- What constitutes a reasonable retention period?
- How to ensure that deleted documents are not recoverable
- Examining the latest cases dealing with electronic data as evidence
- Best practices in communicating and applying your data retention policy
- Maintaining the functionality and integrity of your computer and electronic storage equipment
- What role can forensic experts play in the preservation and archiving of electronic data?
- Mastering techniques and strategies to avoid the dangers of data alteration and tampering
- Outlining the challenges of maintaining digital photographs and PDFs
- E-mail etiquette: Be careful what you write as it may be held against you
- Implementing a comprehensive and consistent e-mail policy
- E-Risk management: Incorporating your mobile and private e-mail within your business communication model
- Gone but not forgotten: Understanding the probative value of deleted e-mails in construction disputes
- Software programs and metadata: Identifying and managing the risks
- How to integrate emerging technologies into your data management system

12:30 Luncheon for Delegates and Speakers

2:00 Its a Risky Business: Examining the Allocation of Liability in the Construction Process

Janine Kovach

Partner

Cassels Brock & Blackwell LLP

Walter Woloshyn

Senior Vice President

Ellis Don Corporation

- Identifying the key risks at the different stages of the construction project
- Determining acceptable risk levels on the part of the owner, contractor, design professional and lender
- Examining the most common contractual risks posed by standard building agreements
- What are the appropriate roles for the owner, contractor and architect on the construction project?
- Risk management for professional designers: The standards and most recent cases underlying their obligation and duties
- Best practices in dealing with the change-happy meddling owner
- Examining liability issues when the developer/contractor disappears
- Who's the boss: Untangling the difficulties when there are multiple contractors on the site
- Risk sharing amongst subcontractors: Is it a workable solution from both the contractors' and subcontractors' perspectives?
- How to effectively utilize bonds and insurance to limit and alter risk in the construction process

- Best practices in allocating risks in various project delivery systems
- How does the allocation of risk change in the case of a public/private partnership or international project?
- Liability floats to the top: Understanding the personal risks for the construction company's officers and directors in light of new legislation and obligations

2:45

Surety Bonds: Understanding What They Are and What They Are Not in Light of the *Western Surety v Lac La Ronge* Case

R. Bruce Reynolds

Partner

Borden Ladner Gervais LLP

Mark Knudsen

Assistant Vice President

St. Paul Guarantee Insurance Company

- Identifying the various types of bonds and how they can work for you:
 - surety bonds
 - bid bonds
 - performance bonds
 - labour and material payment bonds
- Best practices in the prequalification stage
- What are bonding companies looking for when deciding whether to underwrite a project?
- The issue of "notice" and what it means for you now
- Determining the best strategies to ensure a finding of sufficient capacity
- An overview of the indemnity agreement required by bonding companies
- Lessons learned: The surety bond is not a fund for the owner to dip into at will
- Practical strategies on how to minimize risk and manage the surety bond process
- How does a bond company investigate a claim and how can you ensure the process functions smoothly and to your benefit?
- Examining coverage options for liquidated damages and non-construction claims
- How effective are contractor default insurance and letters of credit as a bonding alternative?
- *Lac La Ronge*: How have the rules regarding performance bonds changed?
- Assessing the surety's obligation to respond promptly: When does it arise and what constitutes a "prompt" response?
- What is a "bid" to complete and what is a "responsible bidder"?
- What constitutes completion on the part of a defaulted contractor?
- What are the completing surety's obligations to perform when there are unrealistic timelines?
- Can an owner set-off against contract balances in its hands for liquidated damages?
- The limits of the performance bond:
 - Does it pay damages for delay?
 - Does it guarantee performance of the liquidated damages provision of the bonded contract?
 - Does it pay for additional engineering costs incurred by the owner in completing a defaulted contract?
- Deconstructing the performance bond: How should its provisions be legally interpreted?

3:30

Networking Refreshment Break

3:45 Construction Insurance: Examining the Latest Trends and Issues

Simon J. Fenn

President, Fenn & Fenn Insurance Practice Inc.

- What are the latest trends and products in the construction insurance market?
- Allocating liability and assessing insurance needs from the owners', General Contractors', subcontractors and design professionals' perspectives
- What are the coverage options for each construction stakeholder?
- What new risks do design professionals face as a result of Ontario's new Building Code Act and how can they protect themselves?
- How can construction companies' adequately protect their officers and directors from liability in light of new legislation?
- Exclusion confusion: Making sense of the many clauses that could lead to a denial of coverage
- Best risk management practices prior to and when dealing with a denial of coverage

4:30 Alternate Project Delivery Models: What They Are and How To Make Them Work For You

Tony Miele

President and CEO, Ontario Realty Corporation

Donald G. Pierce, Q.C.

Partner, Goodmans LLP

- All projects were not created equal: Assessing when the traditional design-build model will be less than satisfactory
- What are the different types of project delivery models that are available and what criteria should you use to evaluate them?
- Examining the essential elements of a joint venture: Can it work for you?
- What are the advantages and disadvantages of entering into a joint venture agreement?
- What are the unique risks in a joint venture arrangement and what are the best methods for managing them?
- Tailoring your insurance needs to the joint venture and alternate finance models
- Examining public private partnerships: How do they differ from other delivery methods?
- Understanding the unique procurement process when dealing with the public sector
- Best practices in project management when involved in a public private partnership

5:15 Co-Chairs' Closing Remarks Cocktail Reception

Tuesday, November 22, 2005

8:00 Coffee Served ☕

8:30 Opening Remarks from the Co-Chair

Donald E. Short

Partner, Fasken Martineau DuMoulin LLP

9:00 The Latest Word on Change Orders, Delay, Acceleration and Impact Claims

Paul Sandori

Senior Consultant, Revay and Associates Ltd.

Matthew Nicholas

Senior Consultant, Revay and Associates Ltd.

- What are the major causes of claims in construction?
- How can you avoid conflict when there is a change order?
- Identifying the various types of change orders and their impact on construction
- In what circumstances is it advisable for a contractor to refuse to honour a change order?
- What are the risks in proceeding in the absence of a written change order or change directive?
- How to get prompt valuations and payment for changes
- What are the essential elements of a valid delay claim?
- Mastering the forgotten art of claiming time extensions
- When can a contractor obtain increased remuneration for a delay?
- How are delay claims affected when the delay is considered concurrent or parallel in nature?
- How can acceleration and impact claims affect the bottom line?
- Understanding the concept of "constructive acceleration"
- Best practices in defending and asserting delay, acceleration and impact claims
- Accurate and complete record keeping: A must for both owner and contractor success when asserting or defending a claim
- An overview of the latest cases and trends in damage awards for delay
- Examining the difficulties in claiming for damages for loss of labour productivity, head office overhead contribution and loss of profit
- Is the construction industry doomed to fight about these costs or is there a better way to resolve these conflicts?

10:00 Navigating the Choppy Waters of Construction Litigation: How to Keep from Drowning Once the Action is Commenced

Stephen J. Tatrallyay

Partner, Koskie Minsky LLP

Anna M. Esposito

Partner, Pallett Valo LLP

- Best practices in collecting and preserving evidence
- To lien or not to lien?
- Examining the changes in the *Ontario Rules of Civil Procedure* that will most significantly affect the management of a construction lawsuit
- Which documents are privileged and which are not?
- Delay, delay, delay: Answering the defendant's primary tactic
- Do you have the time, the money, and the stomach for litigation?
- How to preserve and marshal evidence once the action has started
- When and how to make an offer to settle
- Preparing for trial: The do's and don'ts

10:45 Networking Refreshment Break ☕

11:00 The Lowdown on Liens: Making Sense of the Construction Industry's Most Confusing Remedy

Howard M. Wise

Partner, Goodmans LLP

- Best practices in protecting your lien rights
- The CLA an unforgiving piece of legislation: Which mistakes can be cured?

- In which circumstances are liens not available as a viable remedy?
- How to prevent your lien from being discharged
- Examining the difference between lien and trust rights under the CLA
- Is there a difference between defective work and work not done?
- Can you lien for manufacturing installations and managements expenses?
- Holdback thresholds: Are they adequate to ensure job completion?

11:45 Are Your Lien Rights Getting Leaner: How to Protect Your Lien Rights When There is an Insolvency and When Registering Electronically

Roger Gillott
Osler, Hoskin & Harcourt LLP

- Best practices in preserving and protecting your lien rights when faced with stay and priority orders under the CCAA and other insolvency legislation
- The problem of the CLA's strict timelines: How to reconcile them with ongoing CCAA and BIA actions
- Establishing priorities amongst lien claimants, creditors, mortgages and the government
- Where do CLA trust claims rank in a CCAA or BIA proceeding?
- *Stelco* and other draconian CCAA Orders: What have we learned?
- Tips and traps in the electronic registration of liens
- Update of Lien Committee's latest proposals to the Ministry of Consumer and Business Affairs regarding electronic lien registration
- What is the status of affidavits and other registration issues since *Petroff*?

12:30 Luncheon for Delegates and Speakers

2:00 Innovative Dispute Avoidance and Dispute Resolution: Examining Emerging Trends in ADR

Duncan W. Glaholt
Partner, Glaholt LLP

Robert Pattison
Legal Counsel, SNC-Lavalin Inc.

- Best practices in avoiding conflicts before they start
- Identifying the key elements of the ADR process:
 - creating the right "status quo";
 - determining the standard of performance
 - allowance for project sponsor/senior executive negotiation
 - appointing the appropriate neutral party
 - inclusion of all necessary parties
 - representation of the parties' interest
 - setting out the rules for the exchange of information
 - the use of experts
 - the choice of law, venue and procedural protocol
 - is arbitration optional or mandatory
 - the interim preservation of rights
 - the right to appeal
- Techniques in utilizing early neutral evaluation to your advantage
- When can onsite ADR be effective in resolving conflict?
- The Dispute Review Board: How can it work for you?

- Determining the proper use of consultants in the ADR process
- Examining the different methods of ADR and assessing their respective strengths and weaknesses
- Can mandatory adjudication work?
- Do "partnering" and "alliancing" really minimize conflict?
- Tips and traps when entering a partnering agreement
- Investigating the merits of online ADR
- Examining the latest developments in the use of ADR for international construction contract disputes
- Is there ever a case when litigation is preferable to ADR?

Legislation Translation: Examining the Latest Laws and Regulations That Impact on the Construction Industry

2:45 Ontario's New Building Code Act

Donald E. Short
Partner
Fasken Martineau DuMoulin LLP

- How has the new Act impacted on the permit and inspection processes?
- Clarifying the Code's new qualification standards for design professionals
- Code Implementation: Is everyone holding up their end of the bargain?
- Limitation periods under the Building Code Act and other provincial legislation: Is it a level playing field for all stakeholders?
- Assessing the new risks faced by design professionals and municipalities
- How has the insurance industry responded to these new risks?
- Best practices in risk management as a consequence of the new Act
- How will objective-based codes alter building designs and the approval process?

3:15 Union Certification in the Construction Industry: The New Regime

Mark Geiger
Partner
Blaney McMurtry LLP

Bernard S. Fishbein
Partner
Koskie Minsky LLP

- An overview of Ontario's proposed changes to the union certification process
- How will these changes impact on the construction industry?
- What is automatic certification and how will it affect the way in which management and unions carry on business?
- Is the construction industry headed toward costly and lengthy litigation to resolve certification disputes?
- Will employers be more discriminating when deciding to oppose unionization when certification is a remedy for unfair labour practices during union drives?
- Will first contract arbitration as a remedy to unfair labour practices become more common in light of the proposed changes to the certification process?
- What effect will these changes have on the "labour wars" between various construction unions?

3:45 Networking Refreshment Break

**4:00 Ontario's New Brownfields Legislation:
Examining the Opportunities and the
Obligations it Creates**

Donna S.K. Shier

Partner, Environmental Law Specialist
Willms & Shier Environmental Lawyers LLP

- Bill 133 and its Harsher penalties, extended Director / Officer liability, EP spill penalties: What are the implications for builders, contractors and developers?
- The new contaminated sites regulation: best practices to control costs and reduce delays.
- When do you face mandatory clean-up requirements?
- How to choose the clean-up approach that works for your project?
- What are the limits on protection that a Record of Site Condition provides?
- Registration on title: When can the government require it?
- How to cope with the environmental regulators' wide discretion?
- Update on the latest Brownfields' case law: What are the latest judicial trends and how will they impact on your business practices?

**4:30 Greenbelt Act 2005 and Places
to Grow Act (Bill 136) 2004**

Jonathan W. Kahn

Partner, Blake, Cassels & Graydon LLP

- Overview of the impact of the *Green and Grow* legislation on municipalities and landowners in and outside the Golden Horseshoe
- How can developers respond to the challenges of intensification?
- Will the enactment of these Acts add value to brownfields and make them more attractive to developers?
- How significantly will landowners' rights and land values be affected?
- What are the developers'/owners' rights to appeal a decision made under this legislation?
- How do the *Green and Grow* plans interact with the *Planning Act* and with water protection and other provincial initiatives?

**5:00 Co-Chairs' Closing Remarks
Conference Concludes**



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**Post-Conference Workshop
Wednesday, November 23, 2005**

**The Anatomy of a Construction Action:
A Complete Guide to Best Practices in
Preparing for and Participating in a
Construction Lawsuit**

9:00 am. to 12:00 p.m.

Registration Opens at 8:30 a.m.

Kenneth W. Movat

Partner, Movat Eccleston

Neil S. Abbott

Partner, Gowling Lafleur Henderson LLP

Construction litigation can be confusing, time consuming and expensive. In this hands-on workshop you will learn the do's and don't's of trial preparation, how to marshal evidence before and during the litigation process and best practices in submitting offers to settle.

Topics will include:

- Is a lawsuit the only way to resolve your conflict?
- Assessing your litigation options when the project goes sour
- How to collect and preserve evidence in preparation for litigation
- What do the changes in the *Ontario Rules of Civil Procedure* mean to you?
- Privileged documents: Distinguishing them from admissible evidence
- Examining the various litigation strategies for both owners and contractors
- Best practices in litigation preparation: How to save time and money by doing your homework
- When should an offer to settle be submitted and what are the various approaches in proposing settlement?
- Sorting out the priorities in a multiple claim lawsuit



This workshop has been accredited by the Construction Law Specialty Committee of the **Law Society of Upper Canada** for 3 hours towards the professional development requirement for certification.

WHO SHOULD ATTEND

- **Owners/Developers**
- **General Contractors, Subcontractors and Suppliers**
- **Construction and Project Managers/Coordinators**
- **Engineers, Architects and Interior Designers**
- **Federal, Provincial and Municipal Government Representatives**
- **Utilities and School Board Representatives**
- **Financial Institution Representatives**
- **Insurance/Surety Bond Company Representatives**
- **Construction, Municipal, Environmental and Real Estate Lawyers**
- **Construction Finance Professionals**
- **In-house Counsel**
- **Construction Consultants**

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