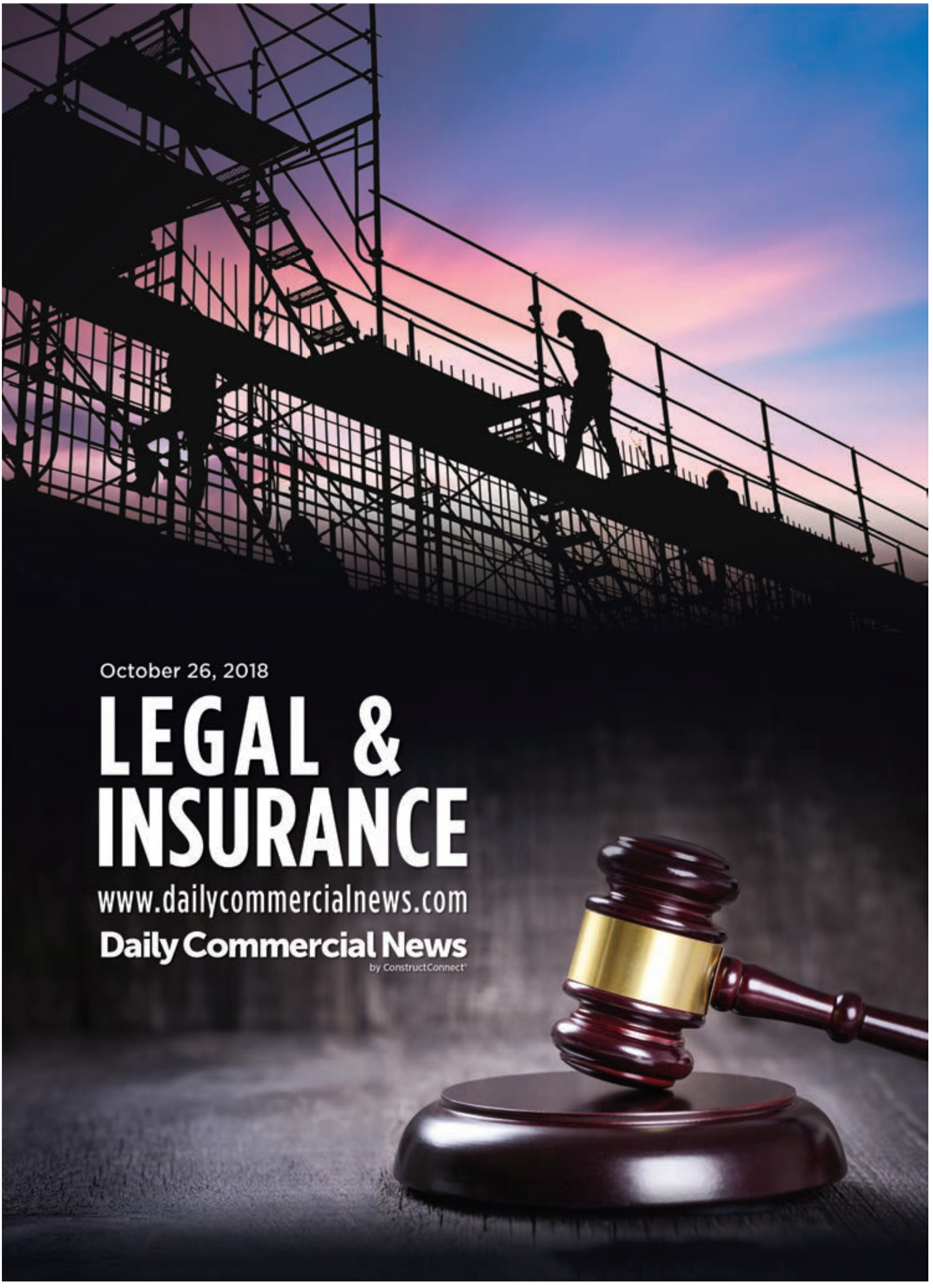
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LEGAL &
INSURANCE
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by ConstructConnect

Limitations Act

Know your limits…especially when it comes filing initial claims

DAN O'REILLY
CORRESPONDENT

An important legal milestone comes into full force on Jan. 1, 2019 and it will have major implications for almost all parties involved in construction.

Passed on Jan. 1, 2004, Ontario's Limitations Act, 2002, limits the period a person or party may initiate court proceedings in Ontario in respect of a claim to 15 years.

What that means for the design, construction, and related professionals is that they won't be subject to liability claims from an owner after 15 years "from when the work was done," says Glenn Ackerley, a partner with WeirFoulds LLP who practices exclusively in the area of construction law.

"As of January 1 the door will have closed on claims pertaining to buildings or projects older than the 15 years."

Before the Act came into in effect in 2004 an owner could launch legal action if they detected problems or defects even if the building or project was constructed and completed decades previously.

> "As of January 1 the door will have closed on claims pertaining to buildings or projects older than the 15 years,"
>
> Glenn Ackerley
> WeirFoulds LLP

That placed an onerous burden and strain on design and construction firms in terms of record keeping and simply keeping track of a project, says Ackerley.

"Some of the people involved in a project may no longer be with the company and copies of the drawings may no longer be available."

In part, the Limitations Act was enacted through the efforts of the design and construction industries, as well as the legal profession. A member of an Ontario Bar Association committee which provided input into the statue changes, Ackerley recalls thinking at the time 15 years was a long time for the Act to come into full effect.

"But now it is here."

Although the ultimate limitation period is set at 15 years, it's critically important to emphasize that plaintiffs in a construction dispute only have two years to launch a lawsuit after a problem, defect or issue has been "discovered," he says. It's known as the general limitation period.

And what constitutes discovery is determined by four criteria:

That the injury, loss, or damage was caused by or contributed to by an act or omission; that the act or omission was that of the person against whom the claim is made; that the act or omission was that of the person against whom the claim is made; and that a proceeding with a lawsuit, would be an appropriate means to seek to remedy the injury, loss, or damage.

But that discovery criteria, especially the fourth, are subject to nuance and legal interpretation, he says.

"A contractor isn't going to file a legal claim for a $90 defect or even two or three $90 defects, and the courts don't look favourably on trivial claims. But what happens if there are 100 $90 defects? At what point is the line crossed?"

Resorting to legal action might not be appropriate when the plaintiff relied on the knowledge and expertise of the defendant, especially if the defendant took efforts to rectify loss or when an adequate alternative process is in place and that process, "hasn't fully run its course."

The two-year limitation period can also be extended, shortened, or suspended if there is an agreement by the disputing parties, if none is a consumer — in other words an individual — as defined under the Consumer Protection Act.

It's also possible to enter into a "tolling agreement" in order to allow for negotiations to take place before litigation commences, he says.

Open to interpretation is when a party knows "or should have known" and this has been the subject of several Ontario Court of Appeal hearings this year.

One particular claim involved a dispute dating back to 2009 when two cottage owners first realized that one of their deck piers was sinking. A structural engineering firm recommended several expensive investigative and remedial steps. But the builder said the issue wasn't serious but was due to the cottage settling and to simply monitor the situation.

As the problem continued, the owners investigated further and called an engineering firm in 2012 which concluded the retaining wall was falling and that it should be removed and reconstructed. The owners then filed a lawsuit against the builder in October 2013.

But the burden to prove discoverability rests with the plaintiff who must prove that their claim was not discovered and "was not capable of being discovered through the exercise of due diligence until some later date."

It's imperative that industry players contemplating a legal claim remain vigilant and "don't let the clock run out" before the two-year period expires, says Ackerley.

"Two years goes by very quickly and if you haven't filed a claim (within that period) you might be out of luck."

Economic Snapshot

Strong U.S. exports should continue to drive New Brunswick through 2019

John Clinkard

Although the recent explosion at the Irving Oil refinery caused a significant amount of damage and may temporarily disrupt the plant's operations, it is unlikely to have a permanent impact on New Brunswick's medium-term economic prospects.

Further, the recently negotiated USMCA trade agreement has lifted a major cloud of uncertainty which was overshadowing the province's future trade relations with the United States, the market for 93% of its total exports. Indeed, driven by sustained strong growth in the U.S., New Brunswick's exports have increased by 12.4% year to date, just slightly slower than the 13.5% year-to-date increase they posted during the first eight months of 2017.

Despite the strong export growth over the past year-and-a-half, job creation in "the Picture Province" can best be described as anemic. Over the past twelve months, the province has added just 1,500 jobs, almost all of which (1,400) are part-time.

Moreover, all of the jobs added were in the public sector, more than offsetting a retreat in private-sector hiring. From an industry perspective, employment in services posted the largest gain while the goods-producing sector saw hiring shrink by 1,400 due to losses in manufacturing and construction. Looking ahead, the most recent CFIB *Business Barometer* suggests that firms in New Brunswick are maintaining their very cautious approach about adding staff. However, with the province's job vacancy rate at a 14-year high, this hesitancy may be due to a shortage of qualified job applicants.

While the external side of the New Brunswick economy is doing quite well, the domestic side is in the doldrums. In line with the weak pattern of job creation over the past 24 months, the value of retail sales year to date, adjusted for inflation, is down by -0.3%, well below the 3.3% gain they posted during the first seven months of 2017.

Weak sales of both new and used motor vehicles more than offset gains in sales of building materials, auto parts and food and beverage stores.

Weak job growth and the more restrictive mortgage approval regulations introduced by the Office of the Superintendent of Financial Institutions at the beginning of the year appear to have exerted a drag on housing demand in New Brunswick over the past nine months.

After posting a 6.5% year-to-date gain in the first nine months of 2017, sales of existing homes are little changed during the comparable period this year. Cooling demand and evidence of excess supply have contributed to a significant slowdown in new residential construction.

So far this year, housing starts are down 6.7%, largely on account of a 17% drop in apartment starts and a slight 1.2% decline in single-family starts.

Looking forward, despite sustained, relatively strong net migration in the first half of this year, we expect that higher interest rates and an ample supply of existing homes for sale will cause starts to be in the range of 1,900 to 2,200 units this year and next compared to 2,300 in 2017.

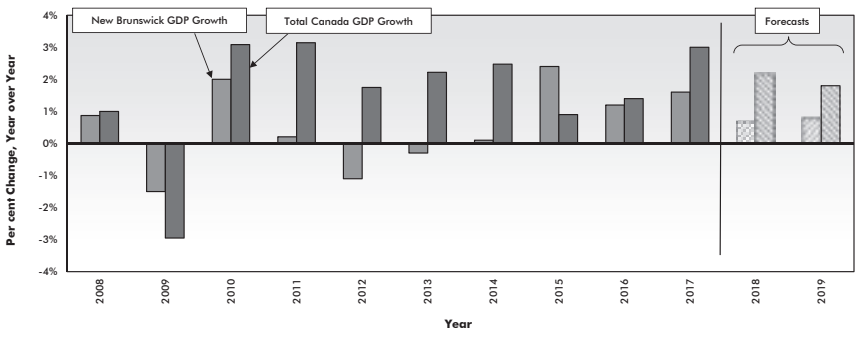
Initial expectations about the outlook for capital spending in New Brunswick were very subdued after Statistics Canada released its *Survey of Non-residential Capital and Repair Expenditures* (CAPEX) report in February. After posting a gain of 7.4% in 2017, the CAPEX survey projected a 2.1% increase in spending in 2018, a five-year low.

More recent data suggests that public organizations and private sector firms are investing more than they initially projected. In the first six months of this year, the total value of non-residential building construction in the province is up by 22%, largely on account of a 70% increase in institutional construction together with a 9% rise in commercial building.

While non-res capital spending will be underpinned by ongoing spending on the TransAqua Wastewater project and on upgrades to the Irving Oil Refinery, the 24% year-to-date decline in the value of the province's non-res building permits suggests that non-res capital spending will moderate during the remainder of this year and into 2019.

John Clinkard has over 35 years' experience as an economist in international, national and regional research and analysis with leading financial institutions and media outlets in Canada.

Real* Gross Domestic Product (GDP) Growth — New Brunswick vs Canada



* "Real" is after adjustment for inflation.

Data Sources: Actuals — Statistics Canada; Forecasts — CanaData.
Chart: ConstructConnect — CanaData.

Hear Me Out

Reference hearings can be effective construction dispute resolution tools

DAN O'REILLY
CORRESPONDENT


Harvey Kirsh

At a construction dispute hearing in Toronto earlier this year there were no witnesses, no experts, no court reporter, no transcript, and the parties weren't bound by the final decision.

The proceeding was a reference hearing and it was conducted by construction lawyer and arbitration specialist Harvey Kirsh who served in the capacity as referee.

A 2015 recipient of the Ontario Bar Association's Award of Excellence in Alternative Dispute Resolution, as well as the Association's Award of Excellence in Construction and Infrastructure Law in 2018, Kirsh believes references can be a forum for resolving construction disputes in a timely and less confrontational manner.

Although there is limited legal literature about them, references are becoming more popular in Canada because they are brief, less adversarial, and less expensive than full-blown arbitration or litigation, he says.

"The proceedings are private and usually confidential, so it is impossible to know how long they have been in use in Canada." Based on his own experience, he estimates that period is probably between five to 10 years.

A private form of an alternative dispute resolution, reference proceedings are mandated strictly by the contract between the parties and it those parties which direct it and who determine the governing rules, and the authority and jurisdiction of the referee, he explains.

In that respect they are different from a "judicial reference" which is contemplated by the court's rules of procedure of a particular province and where a judge may direct a reference, either to a master (a court official) or to a lawyer upon whom the parties agree, of all or part of a litigation proceeding in order to determine an issue.

There is no reason they can't be used in wide array of projects, but they tend to be used for resolving disputes on large infrastructure projects where governments either own or are partners in the projects, he says.

Certainly that was the case in the Toronto hearing which involved three distinct claims between the Government of Nunavut and a P3 (public-private partnership) consortium. That city was selected for convenience and minimizing costs, says Kirsh, who asked to act as referee based on his 40 plus years as a construction lawyer and several years' experience as a construction arbitrator.

Due to the confidential nature of the hearing, Kirsh can't reveal details of the dispute, the parties involved, his decision, and the final outcome. But he was able to shed some light on the process and how reference hearings should be conducted.

One of his first steps in the procedure was consulting with the parties to determine their own wishes and requirements: "within the guidelines of the contract."

"When I learned they did not require examinations for discovery or expert witnesses, we were able to tailor the reference proceeding to suit their (the parties) needs, and to streamline it."

Referees usually have sufficient independence, experience and expertise in construction and construction law to be able to discharge their responsibility of servicing the requirements of the disputing parties, while guiding them towards a successful resolution. And, while they are bound by the law, there is a certain amount of flexibility and informality in reference hearings not allowed in court cases or even complex arbitration, he says.

Asked why a court reporter and a transcript weren't used, Kirsh says that would only be the case if parties wanted to preserve their right to appeal the decision to a court, in which case they might want to refer to the written record of the hearing.

However, some references such as this one stipulate that the referee's decision is not final and binding, so an appeal would never be contemplated, he says.

At the same time he took "copious notes" and the parties involved also submitted documents which he was able to review and refer to when writing his decision—"which couldn't be a one liner. I had to give a reasoned decision as required by the contract."

The lawyer's decision with respect to one claim was 36 pages long, 19 pages long on a second one, and 13 pages on the third. The hearing only took a few days to complete with Kirsh writing his decision within about a month.

Although underscoring the confidential nature of the hearing, Kirsh point outs: "That at the end of the day the parties were satisfied with the outcome."

In response to a question on whether the construction industry should embrace references, Kirsh says that one type of proceeding does not fit all disputes.

"References have a role to play in the alternative resolution of disputes in the construction industry, but they are only one form of proceeding. Other forms, such as arbitration, mediation, or adjudication, may be more appropriate for other parties and other projects."

Simple due diligence can cut down litigation risks: construction lawyer

DAN O'REILLY
CORRESPONDENT

A construction lawyer with more than 20 years in the profession has created a one-day workshop to help contractors reduce the risk of litigation.

"It personally pains me to see some of the things I've seen over the years. That is people becoming embroiled in litigation, costing thousands and hundreds of dollars and years of their lives when it might have been avoided," says Janice Quigg, principal of Janice Quigg International Inc.

"Sometimes a simple follow up email or other documentation could have resulted in the avoidance of a multimillion dollar dispute."

To be held in various venues across the Greater Toronto Area, the one day workshops will examine common errors, best practices and will highlight some case studies.

In explaining the rationale for the workshop, Quigg notes that construction sites are hectic pressure-filled places. But in the rush to meet scheduled deadlines little details can and do get overlooked and often it's those small points rather than major events which can send owners and contractors on the road to litigation.

"Details such as not getting written confirmation of a change order, even if it's only email confirmation for extra work the parties have agreed to. Then later, the owner denies that it authorized the work and there is no paperwork to confirm that it was indeed authorized," says Quigg, who is also a speaker, trainer, and author who specializes in teaching conflict resolution and how to use it as a competitive advantage.

Besides not obtaining signed change orders, some of the common mistakes contractors keep making over and over again include not complying with the terms of the contract such as Notice of Default requirements or requests for schedule extensions on the change order.

Other mistakes are even more glaring such as relying on verbal rather written agreements — a trap which she labels as "dangerous" — or simply not bothering to read or understand the terms of the contract.

That oversight doesn't just apply to contractors. In litigation she was involved with, the project owner admitted in discovery (pre-trial procedure) that "he got bored and didn't bother finishing reading the contract."

Another major error some contractors fall into is not signing the company's proper legal name on the contract. Or one corporate entity signs it and then another division of the same company sends out invoices. In the event of litigation that misstep can cause problems because it will be unclear who the contracting party is and where liability may rise, she says.

Other mistakes include failures either to start on time or not consistently maintaining schedules, says Quigg, using the example of contractors: "who promise to start on a Monday, but don't show up until Tuesday or even the Wednesday."

While that habit may be limited to smaller contractors, even larger companies sometimes fail to uphold schedules, she says.

Project omissions aren't limited to contractors. On the design side failures to respond to ail to reply for RFIs (requests for information) in a timely can result in delay claims which can be significant in terms of dollars, she says.

Asked to provide a list of safeguards to avoid these common errors, Quigg cited the need for a good contract, reading it thoroughly and then adhering to its provisions; and documenting discussions.

"There is also needs to be a need for communication and respect between the parties."

When asked if that recommendation was something of a cliché, Quigg pointed out that "sometimes it's best to pick up the telephone" to deal with an issue rather than relying on a string of emails.

Touching on her workshops, Quigg says anyone can attend, but they will be limited to 10 participants per session.

Profile

The Canadian College of Construction Lawyers an all-star roster of expertise

CCCL founding fellow Harvey Kirsh honoured after 45 years practicing construction and infrastructure law

PETER CAULFIELD
CORRESPONDENT

Toronto construction lawyer Harvey Kirsh has won the 2018 Ontario Bar Association's (OBA) Award of Excellence in Construction and Infrastructure Law.

"I extend my sincere thanks to the OBA in general, and the Construction Law section in particular, for honouring me this evening with this Award of Excellence," Kirsh said in his acceptance speech.

"As I think back over my 45 years as a construction lawyer, I have to admit that construction law has been a huge and rewarding part of my professional life," he said.

"It has been a life of privilege, experience, enjoyment and learning. And it has also been punctuated with incidents of pride and honour. Like this evening."

The Construction and Infrastructure Law Section of the OBA established the Award of Excellence to recognize exceptional contributions by individuals both to the law and the construction bar.

In addition to his recent OBA honour, Kirsh is a Founding Fellow of The Canadian College of Construction Lawyers (CCCL), an "all-star team" of senior construction lawyers.

The CCCL was founded as a non-profit association in 1998, "to facilitate and encourage the association of outstanding lawyers who are distinguished for their skill, experience and high standards of professional and ethical conduct in the practice or teaching of construction law and who are dedicated to excellence in the specialized practice of construction law.

"Through the association of such members in an environment of collegiality and good fellowship, the College shall strive to nurture, improve and enhance the practice and understanding of construction law."

The CCCL has approximately 100 Fellows and Emeritus Fellows, and a 20 Honourary Fellows, says CCCL president Matthew Alter.

"That number includes several current and retired members of the judiciary, including The Right Honorable Justice Beverley McLachlin, former Chief Justice of the Supreme Court of Canada," said Alter.

"Fellows are admitted by invitation only."

> "Construction law cuts across many types of law — contract, negligence, liens, insurance, bonds and regulatory,"
>
> Marc MacEwing
> Canadian College of Construction Lawyers

Alter says Canadian construction law did not used to be as distinctively identifiable as a legal practice area as it is today.

"The Fellows of the college contribute to the development and growth of construction law in Canada by providing a forum for members to exchange views and ideas on construction law, including legislative changes," he said.

For example, since 2007 the CCCL has published the Journal of the Canadian College of Construction Lawyers every year. This collection of scholarly articles is available to the public.

Alter says that, in many respects, construction lawyers are similar to commercial lawyers and civil litigators.

"A main difference is the degree of specialization," he said.

"Many construction disputes involve contracts and commercial agreements that involve statutory provisions unique to the industry, such as construction and builders lien legislation."

Another difference between construction lawyers and generalists and lawyers in some other practice areas is that many construction lawyers provide solicitor services, such as contract drafting and negotiation, in addition to barrister work as counsel for litigation and disputes.

"Also, what makes construction law different from many other branches of law is the large number of documents involved in a construction dispute, especially in a project that is large and complex," Alter said.

Another CCCL Fellow, Marc MacEwing, says he is one of about 30 lawyers in Greater Vancouver who practice primarily construction law.

"Unlike other forms of law in Canada, construction law cuts across many types of law — contract, negligence, liens, insurance, bonds and regulatory," said MacEwing.

"Every case is different, covering many different legal issues."

One of the unfolding trends that MacEwing has been seeing is an increasing number of disputes involving residential construction.

"In large, growing centres like Vancouver, there is an increasing number of residences being built, some of which are very expensive — in the millions of dollars," he said.

MacEwing says disputes concerning the construction of such houses can involve many dollars, and therefore some of them are bitterly fought.

"Such disputes can become legally complex and expensive to resolve, especially if the owner is inexperienced with contracts or if the contractor draws up an unclear legal document," MacEwing said.

MacEwing's colleague Seema Lal also says litigation is becoming more common in construction.

"There's more construction taking place, and therefore there are more opportunities for disagreements," said Lal.

"In addition, individuals and small businesses are becoming more aware of their rights and are prepared to fight for what they believe to be their due."

Another trend — a regrettable one, in Lal's opinion — is that some people are

going online and copying and pasting parts of contracts they like and trying to write a do-it-yourself legal document.

"The results are often sub-standard," Lal said.

Analysis

Renewed optimism under new Construction Act and here's why

JAMIE COLLUM & WARREN GRIFFITHS, FCA SURETY
SPECIAL TO THE DCN

FCA Surety is a surety bond broker that has been providing surety expertise to the construction industry for over 99 years. The following is an analysis they've generated which looks at Ontario's new Construction Act and some of its implications.

Bill 142: What's in it for subcontractors?

On July 1, 2018, the first part of Ontario's new Construction Act came into effect. The Construction Act is the most wide-ranging change of rules in the construction industry in Ontario since 1983. These broad changes are going to have a major impact on our industry.

Under the new prompt payment rules, the industry can expect to see a much faster flow funds from project owners all the way down to sub-trades and suppliers. This will lead to fewer hung receivables and better cash flow across the industry as a whole. When future disputes do arise between parties, the new adjudication rules should also provide a faster and clearer path towards resolution. Sureties are also required to be much more responsive when dealing with performance and labour and material payment bond claims. The overall intention is to keep projects and the flow of funds moving forward and to provide a fairer marketplace for all parties. While we cannot focus on all of the changes, there are a few key ones that are important to understand for all subcontractors.

Prompt Payment — Improving the Flow of Contract Funds

Under the new prompt payment rules, which will come into effect on Oct. 1, 2019, an owner must pay a contractor within 28 days of receiving a 'proper invoice', unless the owner delivers a notice of non-payment in the prescribed form within 14 days. This is a significant improvement from the past, when sub-trades were often forced to wait up to 90 days or even longer for payments.

A 'proper invoice' must:

- describe the services or materials supplied;
- the period during which they were supplied; and
- the authority under which they were supplied.

A contractor who receives full payment from an owner must then pay any subcontractor within 7 days of the date they receive payment. If for any reason the contractor fails to make this payment, they must provide a written notice of non-payment to the subcontractor to explain the reasons for non-payment.

There of course will still be cases where an owner refuses to pay a contractor due to a dispute; however, the New Construction Act responds to this as well. In these cases, the contractor must either:

- pay the subcontractor within the prescribed 35 day period with their own funds; or
- if the contractor is unable to make this payment, they must deliver a notice of nonpayment to the subcontractor explaining the reason for the delay

In the latter situation, the matter must then be referred to adjudication within 14 days.

Mandatory Surety Bonding on Ontario Public Contracts

Bill 142 includes a provision to require a minimum of 50 per cent performance and 50 per cent labour and material payment bonds from contractors performing work under public contracts signed after July 1, 2018 and valued at $500,000 or more. This includes all contracts with the Ontario Crown, local municipalities or any other broader public sector entity including the MTO.

A More Responsive Surety

Under the new act, sureties must now follow mandatory response times to claims:

- Performance bond claims: The surety will have four business days to acknowledge a claim and request documents in the prescribed form. The surety must then provide its position within 20 business days from date of claim.
- Labour & Material Payment bond claims: The surety is required to acknowledge and request information within three business days after receiving the initial notice of claim. The surety must then provide its written notice the earlier of 10 business days after receiving information from the claimant, or 25 business days after the initial notice of the claim.
- Payment of Labour & Material Payment bond claims: The surety will have 10 days after providing its written position to pay any undisputed amounts.

Given these improved requirements, many sureties have already taken the step to strengthen their internal claims departments by hiring additional staff members and building out more efficient processes in order to meet these timelines.

Changes to Holdback Provisions

Given that most large construction projects take more than 12 months to complete, the new legislation provides for holdback payment on an annual, phased or segmented basis. This new release of holdback is the new standard once the conditions have been satisfied, which is essentially as soon as the deadline to register or deliver a lien has passed. However, it is important to note that the Act still provides a contractor with the ability to withhold some or the entire amount of the holdback, conditional upon the contractor publishing a notice of non-payment in the manner as described by the Regulations.

A New Process to Resolve Disputes

The introduction of adjudication as a means for dispute resolution is a significant change for the industry. The new process is intended to provide a path to the faster settlement of disputes related to these specific matters.

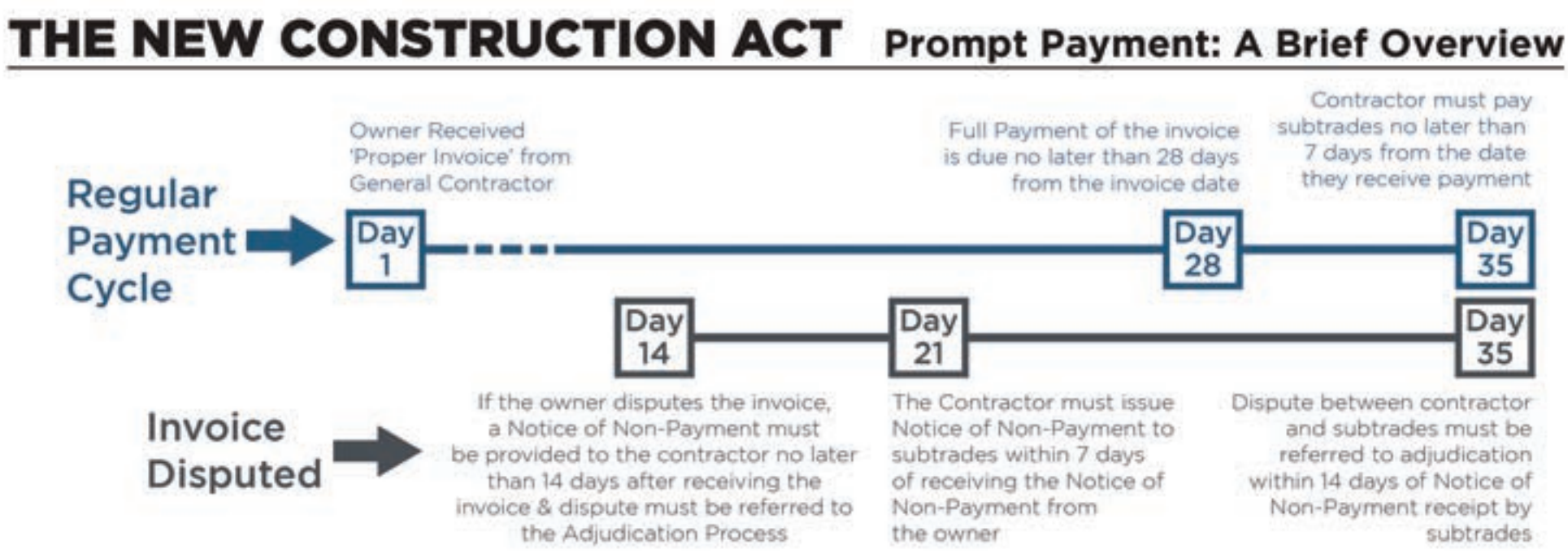
- The valuation of services or materials provided under the contract;
- Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- Non-payment of a holdback; or
- Any other matter that the parties to the adjudication agree to, or that may be prescribed by regulation.

The determinations of the adjudicators are binding on the parties once the determination is made. Following this decision, any amount determined to be owed must then be paid within 10 days.

A Brighter Future for All

When there is a major failure in the construction industry, it has the ability to cause widespread financial pain and duress across our industry. The common consensus has been that the industry fails to recognize potential failures in time before they reach the level of catastrophe. With these changes, there is renewed optimism that the improvements under the New Construction Act will lead to the quicker identification of concerns, which should help to minimize the effects of the next major failure. At the very least, subtrades should be alerted to the probability of serious issues earlier on, helping to minimize the wider spread exposures across the industry. In addition, sureties will no longer be able to delay claims in support of their clients. With these new regulations in place, the industry is now going to be supported by much more responsive sureties in times of crisis.

For more information about FCA Surety and to stay up to date on the changes to the new Construction Act, visit www.whatissurety.com. To contribute a column idea to the Daily Commercial News or to comment on this piece, please email editor@dailycommecialnews.com.



Impairment Risks

Construction contractors unfairly liable for impaired employees: Expert

IAN HARVEY
CORRESPONDENT

The legalization of cannabis again highlights how construction employers face higher risks from employees who are impaired by drugs or alcohol on the job, says Toronto lawyer Norm Keith.

> "Employers must provide training to supervisors and employees on the impact of impairment,"
>
> Workplace Strategies: Risk of Impairment from Cannabis — 3rd Edition
> CCOHS

"There are three industries where it is expressly forbidden by law for employees to be impaired from drugs or alcohol on the job," he says. "And they are all fairly obvious. Ontario Health and Safety Act (OHSA) regulations expressly prohibit impairment or the presence of alcohol or drugs in workplaces for mines and mine plants, offshore oil and gas and commercial diving."

However, he says, the same rules don't require construction workers to be drug or alcohol free and that puts an unfair risk on employers especially because cannabis is now decriminalized as of Oct. 17.

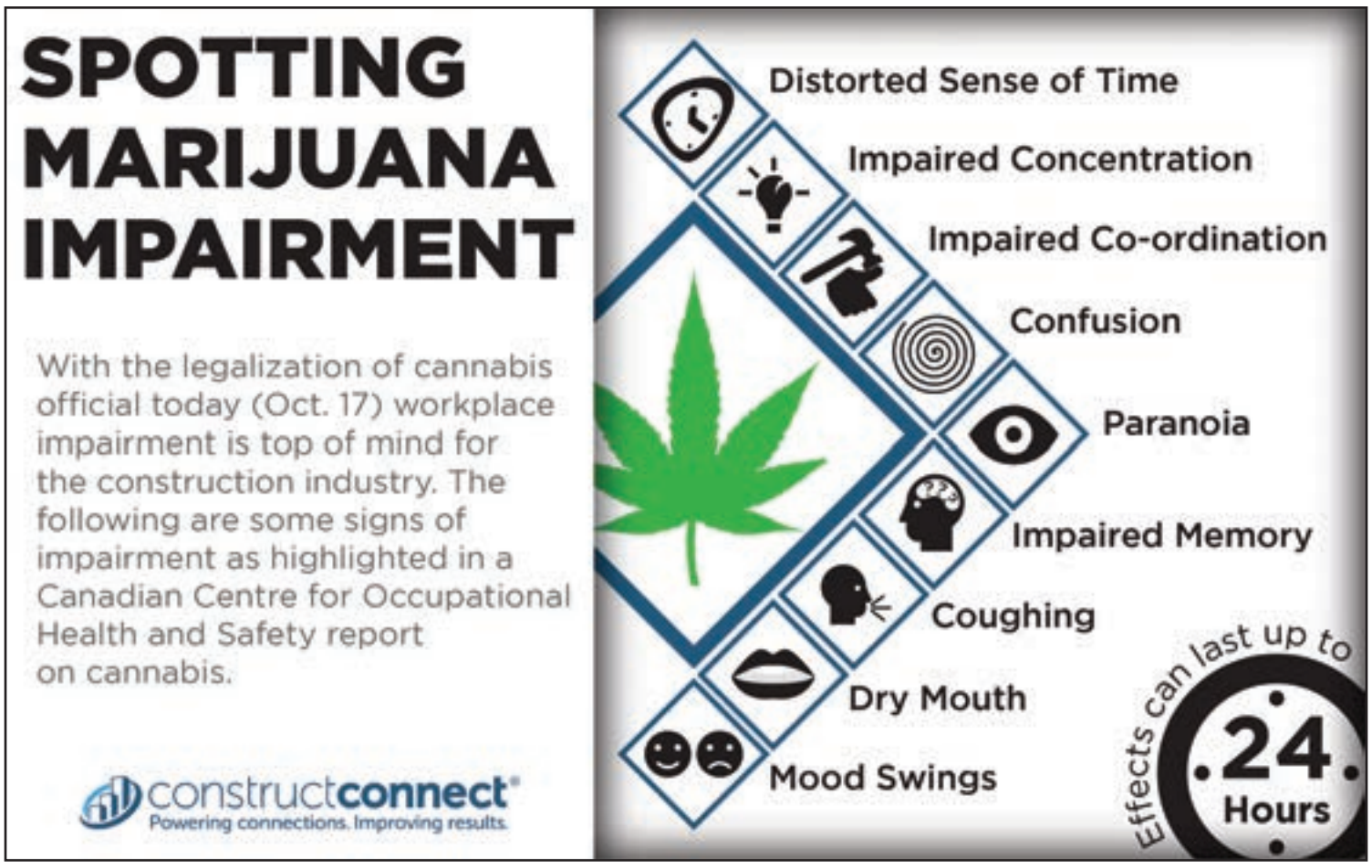
"Construction sites are dangerous places, we know that," he says. "It's dangerous not only for the person using drugs or alcohol, but those working around them and even bystanders if something goes wrong."

Even commercial drivers face a zero tolerance threshold of cannabis in their system, yet it is well known in the construction industry that workers consume marijuana, often during their lunch breaks and sometimes even before getting to the site, he argues.

Each of the three sectors named is covered under a specific section of the OHSA. For oil and gas it's Section 64: "No person under the influence of, or carrying, an intoxicating alcoholic beverage shall enter, or be on, or knowingly be permitted to enter, or be on, a rig" which was extended last year in preparation for decriminalization of cannabis to include "carrying, a drug or narcotic substance."

Regulations for mining are similar under Regulation 854.

Commercial diving operations are covered under Regulation 629 and require "the diving supervisor for a diving operation shall ensure that each diver participating in the diving operation is competent and fit to perform the work" and includes a new clause that a "diver or standby diver shall ensure that he or she is not impaired in his or her diving ability because of consumption of alcohol or drugs."



> "Employees who appear to be impaired in the workplace should always be assessed according to employer policies,"
>
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However, the regulations also allow for those with a prescription for a drug, which includes, cannabis may use it after "establishing medical proof thereof."

In reality, it is open season on construction, he says, because supervisors, project managers and others could be held liable if there's an incident which is ultimately traced back to cannabis usage and a court determines there wasn't enough due diligence to prevent the drug's consumption.

Canadian law also generally prevents drug tests on the job because they are considered "discriminatory on the basis of disability and perceived disability under human rights legislation," according to a white paper from the Canadian Centre for Occupational Health and Safety (CCOHS) titled Workplace Strategies: Risk of Impairment from Cannabis — 3rd edition.

It goes on to advise that testing should only be considered for safety sensitive positions and on a case-by-case basis.

"Employers must provide training to supervisors and employees on the impact of impairment, and how to recognize and respond to possible signs of impairment," it advises.

Furthermore, spotting an impaired employee is as tricky as testing is conclusive, according to the report.

"Employees who appear to be impaired in the workplace should always be assessed according to employer policies," the report notes. "Urine levels of THC do not correlate with impairment. Blood levels correlate more directly; however, all assessments should include an overall evaluation of impairment."

Asked about the gap in OHSA regulations, the Ministry of Labour referred to a speech by Attorney General Carolyn Mulroney at the Empire Club of Canada in October where she said only that "employers need to take a look at their guidelines, you don't want your employees working impaired and cannabis is impairing. I'm sure most employers have guidelines that say you cannot come to work impaired."

She also referred to the need for the federal government to approve more forms of cannabis testing equipment so it can be rolled out. However, the law is clear that employee can be only randomly tested for drugs or alcohol at work in exceptional circumstances, says Keith.

"I know the construction industry associations have made efforts to talk to the Ministry of Labour about this," says Keith. "But they're so overwhelmed, it just isn't getting on to anyone's agenda."