

JCCL - 2007

SUMMARY TABLE OF CONTENTS

Preface	iii
Table of Cases	xiii
Expert Evidence: Legislation, Law & Practice in Canada	
– <i>Report of the Experts & Website Committee</i>	1
Construction Risk in Public-Private Partnerships in Canada	
– <i>Report of the Construction Documents Committee</i>	63
“Covered for What?”: Faulty Materials and Workmanship Coverage under Canadian Construction Insurance Policies	
– <i>Report of the Insurance & Surety Committee</i>	101
Construction Litigation Before Quebec Courts	
– <i>Thérèse Rousseau-Houle</i>	175
Les litiges de construction: que décideront les juges au Québec	
– <i>Thérèse Rousseau-Houle</i>	187
Concurrent Delay: A Modest Proposal	
– <i>R.B. Reynolds and S.G. Revay</i>	199
The Law of Tendering – The Canadian Advantage	
– <i>W. Donald Goodfellow, Q.C.</i>	227
Index	281

TABLE OF CONTENTS

<i>Preface</i>	iii
<i>Table of Cases</i>	xiii
Expert Evidence: Legislation, Law & Practice in Canada	
– <i>Report of the Experts Committee</i>	1
1. Expert Evidence in General	3
1.1 Historical Overview	3
1.2 Who is an Expert?	5
1.3 Admissibility of Expert Evidence	6
1.4 Relevance and Necessity	6
1.5 Exclusionary Rule	10
1.6 Properly Qualified Objective Expert	13
2. Computer Generated Expert Evidence	15
3. Legal Requirements for Admissibility of Expert Reports and Evidence	18
3.1 Quebec	18
3.2 Common Law Provinces	21
4. The Use of Common Law Decisions in the Interpretation of the Law on Evidence under the <i>Civil Code of Quebec</i>	22
4.1 The Law on Evidence	22
4.2 <i>Civil Code of Quebec</i>	24
4.3 Conclusion	28
5. Expert Evidence – Up to Trial: Draft Reports	28
5.1 Access to the Expert’s File, Including Draft Response	28
5.2 Destruction of Draft Reports	35
5.3 Preparation of the Report Itself	38
5.4 When are the Expert’s File and Drafts Producible?	40
6. Challenging Expert Evidence Prior to Trial	40
6.1 Common Law Provinces and Federal Court	40
6.1.1 Governing Legislation	40
6.1.2 Jurisprudence	41
6.2 Quebec	44
7. Undermining the Expert of the Opposite Party	45
7.1 Introduction	45
7.2 Partisan Advocacy	46
7.3 Evidence Beyond the Expert’s Field of Expertise	49
7.4 Failure to Prove Assumptions, Lack of Factual Familiarity and the Expert’s Distorted Presentation of the Facts	50
7.5 Lack of Scientific Rigour	50
Annex A Preparing an Expert’s Report	53
Annex B	56

Construction Risk in Public-Private Partnerships in Canada	
– <i>Report of the Construction Documents Committee</i>	63
1. Public-Private Partnership: An Overview	66
1.1. What is Public-Private Partnership?	66
1.2. Quebec Legislation	68
1.3. Underlying Rationale and Objectives of the Public Sector in Entering into P3 Arrangements	69
1.3.1. Public Demand	69
1.3.2. Financial Constraint	69
1.3.3. Improving Efficiency and Improving Quality Standards and Service Levels	70
1.3.4. Allow a Greater Possibility for Access to Expertise and Innovative Approaches and Cost Savings	70
1.4. Key criteria for a Successful P3	71
1.4.1. Governmental Support	71
1.4.2. Recognition of Differences	71
1.4.3. Commitment to Life-Cycle Costing	71
1.4.4. Realistic Allocation of Risk	72
1.5. Common structures of P3 arrangements	72
1.5.1. Build-Finance	72
1.5.2. Build-Lease or Own-Operate	72
1.5.3. Design-Build-Maintain	72
1.5.4. Design-Build-Operate-Maintain	73
1.5.5. Design-Build-Finance-Maintain	73
1.5.6. Design-Build-Finance-Operate	73
2. Risk Allocation Issues Involved in P3 Arrangements	73
2.1. Assumption of Increased Financial Risk by the Private Sector Team	74
2.2. Duration of the Relationship	74
2.3. Build-Finance Risk Allocation	74
2.4. Design-Build-Finance-Maintain Risk Allocation	76
3. Specific Construction Concerns in Drafting the Project Agree- ments	78
3.1. Prescribing Standards and Performance Guarantees Dur- ing Operating Period and at Transfer Back to the Public Sector	79
3.1.1. Formulating the Standards	79
3.1.2. Remedies	80
3.2. Warranties	80

TABLE OF CONTENTS ix

3.2.1. Allocating Contractual Obligations within the Private Sector Team	81
3.3. Project Interference and Security	82
3.4. Delegation of Rights, Powers and Functions	82
3.5. Intellectual Property	83
3.6. Changes of Team Members	84
3.6.1. Considerations for the Private Sector Team	84
3.7. Insurance and Bonding	85
3.7.1. Considerations for the Private Sector Team	86
3.8. Termination Provisions	87
3.8.1. Termination for Cause – Default of Public Sector Team	87
3.8.2. Termination for Cause – Default of Private Sector Team	87
3.8.3. Materiality and Incurability of Default	88
3.8.4. Termination for Convenience	89
3.8.5. Other Termination Provisions	89
3.8.6. Termination for <i>Force Majeure</i>	90
3.8.7. Compensation upon Termination	90
3.8.8. Role of Lender and Step-in Rights	92
3.9. Changes in Law	92
3.9.1. Changes in General Law	93
3.9.2. Discriminatory Changes in Law	93
3.10. Confidentiality and Disclosure	94
3.10.1. Freedom of Information Legislation	94
3.10.2. The RFP Stage	95
3.10.3. Confidentiality Provisions	96
3.11. Dispute Resolution	97
4. Select Bibliography	99

“Covered for What?”: Faulty Materials and Workmanship Coverage under Canadian Construction Insurance Policies

– <i>Report of the Insurance & Surety Committee</i>	101
1. Introduction	104
2. Early Case Law in Canada	105
2.1 Introduction	105
2.2 Review of the Case Law	106
2.3 Conclusion	119
3. The Quebec Situation	120
3.1 Introduction	120

3.2 Decisions of the Quebec Court of Appeal	121
3.3 Decisions of the Superior Court of Quebec	126
3.4 Conclusions	130
4. Architects' & Engineers' Liability	130
4.1 Liability	130
4.2 Insurance Coverage	135
5. Case Studies	136
5.1 Case Study A: British Columbia Leaky Condos	136
5.2 Case Study B: Ontario Hydroelectric Dam	145
6. Conclusion	150
Appendix A	153
Appendix B	163

Construction Litigation Before Quebec Courts

– <i>Thérèse Rousseau-Houle</i>	175
1. Introduction	176
2. The Principle of Good Faith	178
3. Offer and Acceptance	182
4. Conclusion	185

Les litiges de construction: que décideront les juges au Québec

– <i>Thérèse Rousseau-Houle</i>	187
1. Introduction	187
2. Le principe de bonne foi	190
3. Le mécanisme de l'offre et de l'acceptation	194
4. Conclusion	197

Concurrent Delay: A Modest Proposal

– <i>R.B. Reynolds and S.G. Revay</i>	199
1. Introduction	199
2. Analytical Approaches to Solving the Concurrency Dilemma	202
2.1 The Snapshot Method	203
2.2 The Dominant Cause Approach	204
2.2.1 Collapsed As-Built Schedule Method	205
3. The General Canadian Rule of Assessing Damages	205
4. Apportionment of Liability	208
5. Concurrent Liability in Tort and Contract	217
6. Summary	220

The Law of Tendering – The Canadian Advantage

– <i>W. Donald Goodfellow, Q.C.</i>	227
1. The Canadian Advantage	228
2. Tender Principles Apply to all Areas of Commerce	229

TABLE OF CONTENTS xi

3.	Law Prior to <i>Ron Engineering</i>	230
4.	The <i>Ron Engineering</i> Case	231
5.	What is the Obligation of the Person Calling for Tenders	234
5.1	The <i>M.J.B.</i> Case	234
5.2	Issues Before the Supreme Court of Canada	235
5.3	Facts in <i>M.J.B.</i>	235
5.4	The Judgment of the Supreme Court of Canada in <i>M.J.B.</i>	237
6.	The Supreme Court of Canada Always had an Opportunity to Take a Second “Kick at the Cat”	238
7.	What if no Criteria for Tender Elevation Contained in the Invitation to Tender	240
8.	Obligation of the Subcontractor to the Contractor	241
9.	Obligation of the Contractor to the Subcontractor	243
10.	Liability to Non-privity Party	248
11.	What Damages are Available to a Wronged Tenderer?	252
12.	Can One Contract out of the Right to Claim Gross Profits as Damages for Breach of Contract A?	255
13.	The Privilege Clause Really Does Mean Something	258
14.	When is Compliance Compliance?	259
15.	Bid Shopping	262