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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Canadian Building Contracts, 4<sup>th</sup> Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Canadian Building Contracts has been cited in 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

*M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619 and

*Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

## **The Duty To Defend: What are the Indemnity Obligations In Construction Contracts?**

### **Construction Law - Insurance - Duty to Defend**

A recent Ontario decision regarding the duty to defend against claims may have wide reaching implications for construction law even though the action did not involve a building contract.

In *Cadillac Fairview v. Jamesway Construction, 2011*, the Ontario Superior Court recently held that an indemnity obligation in a maintenance contract gave rise to a duty to defend the landlord. This conclusion may apply to indemnity obligations in a building contract.

Jamesway entered into a contract with Cadillac Fairview to shovel the sidewalks and parking lot of a shopping centre owned by Cadillac Fairview, and to keep those premises free of ice and snow. The contract contained an indemnity by Jamesway in favour of Cadillac Fairview, and an agreement by Jamesway to maintain CGL insurance in which Cadillac Fairview would be an

unnamed insured. Jamesway did take out such a policy. So far as the reasons of the court disclose, the contract did not contain an agreement by Jamesway to defend Cadillac Fairview from any claim.

When Cadillac Fairview was sued arising from a slip and fall on the ice on the shopping centre, it brought an application against Jamesway and the CGL insurer to require those parties to defend Cadillac Fairview in the slip and fall action. The Superior Court granted the application against Jamesway.

In arriving at its conclusion, the court referred to a number of cases involving insurers and an insurer's duty to defend. Relying on the reasoning in those cases, the court held that Jamesway had a duty to defend Cadillac Fairview. The court held that the indemnity and the obligation to insure combined to create an obligation to defend.

The court referred to no cases in which an obligation to defend had been ordered against a non-insurer, nor any case in which such an order had been made against a non-insurer when the contract contained no express obligation to defend. Rather, the court reasoned from the cases against insurers, and then concluded that the indemnity plus the duty to obtain insurance amounted to an agreement to defend.

The court dismissed the application against the CGL insurer, holding that there was no privity of contract between Cadillac Fairview and that insurer.

The implications of this decision for the construction industry are obvious. Many construction contracts contain indemnities. For example, Article 12.1 of the standard CCDC 2 Stipulated Price Contract contains indemnities between the owner and the contractor. However, construction contracts do not usually contain an express obligation on either party to defend the other party in the event of litigation by a third party. Even in an insurance setting, an obligation to defend will not necessarily be inferred if it is not expressly contained in the insurance contract. Implying such a duty to defend into a maintenance or construction contract may well exceed the intentions of the parties.

**Construction Law- Insurance- Duty to Defend:**

*Cadillac Fairview v. Jamesway Construction*, 2011 ONSC 2633 (CanLII)