

CERTIFIED SPECIALIST PROGRAM Standards for Certification **Construction Law**

Definition of Construction Law Specialty

1. The practice of construction law encompasses the representation of participants in the construction industry and includes the negotiation and formation of contracts, provision of legal advice on construction and infrastructure matters, representation with regards to tenders or proposals, preparation of documents, representation in proceedings and the resolution of disputes including, alternative dispute resolution and litigation.

Designation

2. An applicant who is certified as a specialist in construction law for their specialization in solicitor related legal work may be identified as a *Certified Specialist (Construction Law: Solicitor)*.
3. An applicant who is certified as a specialist in construction law for their specialization in litigation related legal work may be identified as a *Certified Specialist (Construction Law: Litigation)*.

Achieving Specialist Certification in Construction Law

4. Applicants must comply with the requirements for certification set out in the Policies Governing the Law Society's Certified Specialist Program ("Policies"), particularly those relating to:
 - Minimum Years of Practice and Recent Experience;
 - Substantial Involvement in the Specialty Area;
 - Professional Development;
 - References;
 - Professional Standards; and
 - Application Fee.
5. Applicants must satisfy the following requirements in order to demonstrate their substantial involvement in construction law:
 - (a) averaged over the 5 years of their recent experience applicants will have devoted a minimum of 30% of their practice concentration to construction law; and
 - (b) during the 5 years of their recent experience applicants will have attained broad and varied experience and a mastery of substantive law and procedures in the area, and comply with the Construction Law Experience requirements set out below.
6. In the event that applicants do not entirely meet the experience requirements, they may apply to the Society for consideration of their individual circumstances or their related (non-practice) skills. Consideration will be given in circumstances where applicants have:
 - (a) limited their practice in recent years to a particular area of construction law or have been involved in matters of extraordinary length and complexity; or
 - (b) engaged in advanced course work or performed related activities such as teaching, authoring books or articles for publication, completing post-graduate or other studies, participating in the development and/or presentation of professional development programs, research, participating in the policy development process, drafting legislation and/or instruments, participating as active members on boards or tribunals, or on the executive of any organization related to construction law or any other experience that applicants consider relevant to their application.

Applicants applying for consideration under this paragraph must, in addition to the brief description of their practice required pursuant to paragraph 6, include with their application:

- (c) a detailed description of their individual circumstances or related (non practice) skills; and
 - (d) references from the institutions or organizations from which their experience is drawn, references from peers, samples of writing and/or research, and a complete list of publications.
7. All applicants must include a brief description (no more than 100 words) of the nature of their practice in relation to the specialty area.

Construction Law Experience

8. Applicants have 2 routes to meet the experience requirements:

Route 1: During the 5 years of their recent experience applicants must have performed at least 15 tasks in categories 1-3 enumerated below to be considered for certification as a *Certified Specialist (Construction Law: Solicitor)*.

Route 2: During the 5 years of their recent experience applicants must have performed at least 50 tasks in at least 6 of *any* of the 12 categories enumerated below to be considered for certification as a *Certified Specialist (Construction Law: Litigation)*.

9. Applicants are asked to place a check mark (✓) next to the tasks they are selecting from the categories below to demonstrate their construction law experience and include the Standards with the application package, along with any supplementary information required in the Standards.

Category 1: Development

- Represent either party in negotiating/drafting a property development contract
- Represent either party in negotiating/drafting an access easement agreement
- Represent either party in negotiating/drafting an access license agreement
- Represent either party in negotiating/drafting a servicing agreement
- Represent either party in negotiating/drafting an alternate finance procurements agreement
- Represent either party in negotiating/drafting design services agreements
- Represent either party in negotiating/drafting design build agreements
- Advise on permitting issues
- Advise on project structure
- Represent either party in negotiating/drafting a demolition contract
- Represent either party in negotiating/drafting a joint venture agreement
- Represent either party in negotiating/drafting a concession agreement
- Represent either party in negotiating/drafting a consortium agreement
- Represent either party in negotiating/drafting a confidentiality agreement
- Advise any Canadian participant on international projects

Category 2: Financing

- Represent owner/developer in obtaining financing for development
- Represent either party in negotiating/drafting a loan agreement and security documents to provide financing for development
- Represent either party in negotiating/drafting a construction loan agreement and security documents and registering a construction-financing mortgage
- Represent either party on construction financing throughout the construction of a project
- Represent a lender's engineer in negotiating/drafting a monitoring agreement

- Represent a consultant in negotiating/drafting the consultant's certificate to be delivered to the lenders
- Provide an enforceability opinion with respect to construction documents
- Represent any party in negotiating/drafting an assignment agreement
- Advise clients with issues that arise under the prompt payment rules under the *Construction Act*

Category 3: Tenders and Proposals

- Represent an owner in preparing a request for tenders including the invitation to tenders, instructions to tenders and a form of tender and/or advise an owner, consultant or sub-consultant in regard to the preparation of same
- Represent a tenderer in responding to a request for tenders
- Represent an owner in preparing a request for qualifications
- Represent a party in responding to the request for qualifications
- Represent an owner in preparing a request for proposals
- Represent a party in responding to a request for proposals
- Represent either party in interpreting tender or proposal requirements
- Represent either party in a dispute (negotiating, arbitration and/or litigation) about an unsuccessful tender

Category 4: Design/Professional Services

- Represent either party in negotiating/drafting an architects agreement
- Represent either party in negotiating/drafting an engineers agreement
- Represent either party in negotiating/drafting an interior design agreement
- Represent either party in negotiating/drafting a project management agreement
- Represent either party in negotiating/drafting a sub-consultant agreement
- Represent either party in negotiating/drafting a design-build agreement or engineering, procurement and construction contract
- Represent either party in negotiating/drafting a program management agreement
- Represent either party in interpreting any of the above-noted design/professional services agreement
- Advise a party with respect to the application of the *Professional Engineers Act*
- Advise a party with respect to the application of the *Architects Act*
- Represent an architect or the applicable architects' association in a discipline hearing
- Represent an engineer or the applicable engineers' association in a discipline hearing
- Advise either party with respect to intellectual property rights related to design drawings

Category 5: Procurement and Construction

- Represent either party in negotiating/drafting/advising as to the meaning of language in a stipulated price general contract
- Represent either party in negotiating/drafting/advising as to the meaning of language in a unit price general contract
- Represent either party in negotiating/drafting/advising as to the meaning of language in a cost-plus general contract
- Represent either party in negotiating/drafting/advising as to the meaning of language in a material supply agreement

- Represent either party in negotiating/drafting/advising as to the meaning of language in an equipment supply agreement
- Represent either party in negotiating/drafting/advising as to the meaning of language in an off-site storage agreement
- Represent either party in negotiating/drafting/advising as to the meaning of language in a construction management contract
- Represent either party in negotiating/preparing/advising as to the meaning of language in a construction subcontract
- Advise parties with respect to the application of NAFTA including importation of employees and service representatives

Category 6: Insurance

- Advise any party with respect to liability insurance
- Advise any party with respect to errors and omissions insurance
- Advise any party with respect to property insurance
- Advise any party with respect to wrap-up insurances
- Represent any party in an insurance claim

Category 7: Violations of Regulatory Requirements

- Represent a person/corporation charged with violation of the *Competition Act*
- Represent a builder charged in violation of municipal by-laws (e.g. constructing without building permit)
- Represent a person/corporation charged with a violation of the Construction Regs./OHSA
- Represent a builder/developer charged with a violation of the *Environmental Protection Act*
- Represent a builder/developer faced with responsibility for a site cleanup as a result of a negative environmental assessment

Category 8: Post-Construction

- Represent either party in negotiating/drafting an extended warranty agreement
- Represent either party in negotiating/drafting a maintenance of equipment agreement
- Advise any party on the termination of a contract or sub-contract

Category 9: Security for Payment and Performance

- Represent an indemnitor re a corporation obtaining bonding on a construction project
- Represent a construction company obtaining bonding for a project
- Represent an owner seeking bonding for a project
- Advise on performance bonds
- Advise on labour and material payment bonds
- Advise on indemnity agreement
- Advise on dual obligee riders
- Represent a party in negotiating/drafting a performance bond
- Represent a party in negotiating/drafting a Labour and Material Payment Bond
- Represent a party in negotiating/drafting an indemnity agreement
- Represent a party in negotiating/drafting a dual obligee rider

- Prepare and deliver a notice of claim under a Labour and Material Payment Bond
- Represent a claimant in an action to enforce a claim under a Labour and Material Payment Bond
- Represent a bonding company in an action to enforce a claim under a Labour and Material Payment Bond
- Participate in the trial of an action to enforce a claim under a Labour and Material Payment Bond
- Represent an obligee giving a notice of a default under a Performance Bond
- Represent the surety in circumstances where notice of the principals default under a Performance Bond has been given
- Represent the principal where notice of default under a Performance Bond has been given
- Represent the indemnitor in circumstances either of default under a Performance Bond or of claim(s) under a Labour and Material Payment Bond
- Advise on holdback obligations pursuant to the *Construction Lien Act* and/or the *Construction Act*
- Advise either party in negotiating/drafting a parent company guarantee
- Advise any party in negotiating/drafting a letter of credit
- Represent any party in negotiating/drafting international performance guarantees

Category 10: Trust Claims

- Represent a Plaintiff in a breach of trust action
- Represent an individual Defendant in a breach of trust action
- Represent a corporate or bank Defendant in a breach of trust action
- Participate in the trial of a breach of trust action
- Provide assistance to the Court in the determination of the validity and quantum of claims against trust funds under and pursuant to an appointment in that respect by Court Order
- Prepare materials and attend a Court motion for directions re trust funds under Section 66 of the *Construction Lien Act*, and/or the *Construction Act*
- Prepare materials and attend on a motion for the appointment of a lien trustee pursuant to Section 68 of the *Construction Lien Act*, and/or the *Construction Act*

Category 11: Disputes

- Represent a Plaintiff in an action for damages for defective construction
- Represent a Defendant in an action for damages for defective construction
- Represent a Plaintiff or Defendant in an action for delay
- Represent a Plaintiff or Defendant in action for breach of contract
- Represent a party in a bankruptcy or insolvency
- Represent a Plaintiff or Defendant in a warranty claim
- Represent a Plaintiff or Defendant in a negligence claim
- Represent a claim in an arbitration of a construction dispute
- Represent any party in negotiating/drafting a settlement agreement
- Represent a party at the mediation or arbitration of a construction dispute
- Have acted as mediator or arbitrator of a construction dispute (e.g. participation in adjudication under the *Construction Act*)
- Advise on the creation of, or represent a party in an appearance before, a Dispute Resolution Board such as CDAB
- Advise on or assist in the preparation of a Teaming Agreement, Alliancing Agreement or Partnering Agreement

Category 12: Liens

- Provide Section 19 notice to a landlord of an improvement to be made for a tenant
- Respond to a Section 19 notice on behalf of an owner/landlord
- Prepare and deliver a request for information under Section 39
- Respond to a request for information under Section 39
- Prepare and register a Claim for Lien
- Prepare and serve a Claim for Lien in circumstances where Lien does not attach to land
- Bring a motion to vacate a Claim for Lien on posting security - uncontested (Section 44(1))
- Appear on a motion to vacate a claim by posting security - contested (Section 44(2))
- Appear on a motion to discharge a claim for lien without the posting of security
- Attend with client on a cross-examination on a claim for lien under section 40 of the *Construction Lien Act* or *Construction Act*
- Conduct cross examination on a claim for lien under section 40 of the *Construction Lien Act* or *Construction Act*
- Commence an action to enforce a Claim for Lien
- Prepare and register a Certificate of Action
- Attend on a motion for directions in a Lien action
- Attend at a settlement meeting in a Lien action
- Obtain a Judgment referring a Lien action to the Master for trial
- Represent an "Owner" Defendant in a Lien action
- Represent a general contractor Defendant in a Lien action
- Represent a subcontractor Defendant in a Lien action
- Attend at discoveries to a Lien action
- Appear on a motion for the reduction or return of security
- Appear on a motion to discharge a Lien for failure to comply with Section 37
- Appear as counsel at the trial of a Lien action
- Appear as counsel at a reference of a Lien action
- Bring a motion to oppose confirmation of a Master's Report to a Lien action
- Perfect an appeal from a Judgment in a construction-related action
- Appear on an appeal in a construction-related matter
- Bring proceedings to enforce a Lien Judgment by the sale of the land
- Bring proceedings to enforce a Lien Judgment from the proceeds of a Lien Bond
- Bring proceedings to enforce a personal Judgment in a construction-related action

Professional Development

10. Applicants must attest to the completion of not less than 50 hours of self-study.
11. The 50 hour self-study requirement may be met through methods such as, but not limited to:
 - (a) teaching or being guest lecturer on a course in the specialty area;
 - (b) writing and editing of published books or articles relating to the specialty area;

- (c) graduate or post-graduate studies in the specialty area;
- (d) involvement in the development and/or presentation of professional development; programs related to the specialty area;
- (e) involvement in the development of policy related to the specialty area.

References

- 12. Applicants must submit 4 references from legal practitioners eligible to practise law in Ontario who have direct knowledge of the applicant's work in the specialty area in the 5 years of the applicant's recent experience and can attest to the applicant's competent performance of the tasks outlined under Construction Law Experience. Applicants must provide to the referees a copy of the completed Standards to let them know which categories they have selected to demonstrate their experience.
- 13. Applicants should not include as reference: judges, partners, associates, co-workers, employers, counsel to their firm, employees, relatives, 3rd party neutrals (i.e. persons, such as adjudicators, arbitrators, mediators, or any statutory decision maker, whose knowledge of the applicant's practice is derived solely from the applicant's appearance before the person while acting as an impartial decision maker), members of the Certified Specialist Board, benchers or employees of the Law Society.
- 14. The Statements of Reference must be submitted directly to the Law Society Certified Specialist Program via email to: certspec@lso.ca (preferred method), or via mail to: 130 Queen St W., Toronto ON, M5H 2N6.

Application Assessment

- 15. The Society will consider the totality of an applicant's practice in the specialty area, the applicant's Professional Development Report and references.
- 16. Applicants should not assume that completion of all of the enumerated practice concentration and experience requirements will automatically entitle them to certification as a specialist.
- 17. Applicants may be required to provide additional information to the Society to facilitate the assessment process.
- 18. The Society may make discreet inquiries, as it deems appropriate, to determine the applicant's eligibility and suitability for certification as a specialist.

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