Legal Risk Update for Owners & Developers:

Construction Act Changes and Commercial Landlord Remedies

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Agenda

1. **Updates to Construction Act & CCDC**

   Key Construction Act changes impacting owners and developers

2. **Commercial Landlord Rights & Remedies**

   Practical framework for managing tenant default risk

3. **Q&A**

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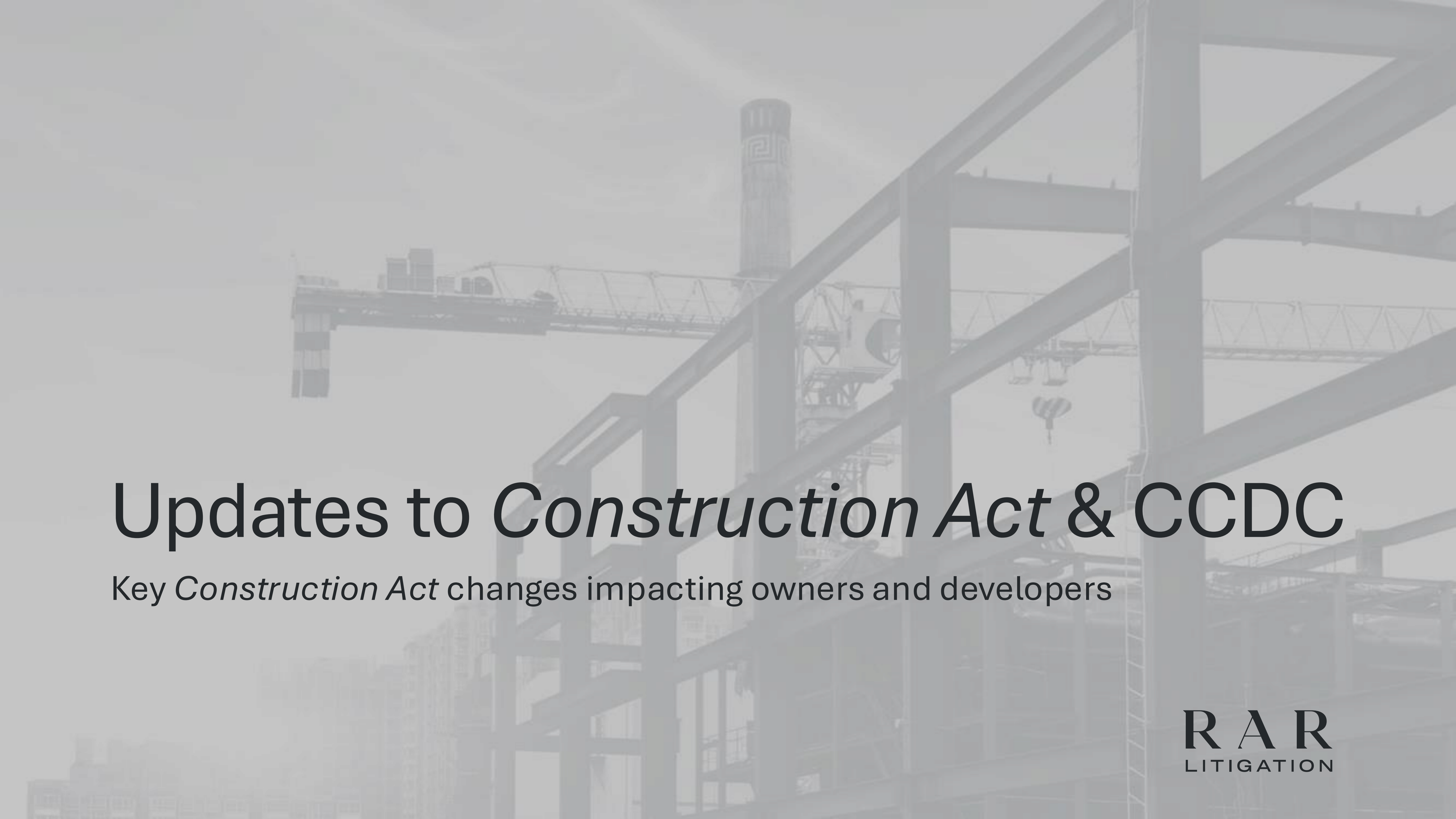

Updates to *Construction Act* & CCDC

Key *Construction Act* changes impacting owners and developers

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Five Key Amendments to Ontario's *Construction Act*

1. Proper Invoicing Requirements
2. Annual Release of Holdback
3. Adjudication
4. Use of Holdback for Set-Off
5. Notice of Termination

These changes affect project cashflow, risk allocation, and dispute resolution timing.

Proper Invoicing Requirements

Deemed Proper Invoice

All invoices will be deemed to be “proper invoices” unless the owner notifies the contractor of the specific deficiencies within 7 days.

Key implications for owners:

- Improved flow of funds
- Reduced flexibility to delay payment
- Importance of internal review processes
- Alignment with accounts payable systems

Proper Invoicing Requirements

Subsection	Pre-Amendment	Post-Amendment
1	The contractor's name and address.	No change.
2	The date of the proper invoice and the period during which the services or materials were supplied.	The date of the invoice and the period, **milestone or other contractual payment entitlement** to which the invoice **relates**.
3	Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.	Information identifying the contract or other authorization under which the services or materials were supplied, **such as a contract number, contract line-item number or purchase order number**.
4	A description, including quantity where appropriate, of the services or materials that were supplied.	No change.
5	The amount payable for the services or materials that were supplied, and the payment terms.	No change.
6	The name, title, telephone number and mailing address of the person to whom payment is to be sent.	The name, title, mailing address and telephone number of the person to whom payment is to be sent or, **if payment is to be sent to an office or department, its name, mailing address and telephone number.**
6.1	-	Any other information that is necessary for the proper functioning of the owner's accounts payable system that the owner reasonably requests.
7	Any other information prescribed.	No change.

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Annual Release of Holdback

Timeline (section 26)

- The Owner is to give notice of the annual release of holdback **within 14 days of each contract anniversary date**.
- The Owner is to pay the accrued holdback **within 60 days and no later than 74 days** from the date that the notice was published.
- Contractors are required to pay their subcontractors **within 14 days** of receipt of payment from Owner.

Effect of Liens on the Annual Release of Holdback

- Owner will not release holdback until all preserved and perfected liens have been discharged.

Transition Period

- For contracts with procurement that started on/after July 1, 2018, and entered into before the amendments take effect, the mandatory annual release of holdback kicks in on **the second Contract Anniversary Date after January 1, 2026**.

Adjudication

1. “Any matter” is subject to adjudication;
2. The right to adjudicate expires 90 days following the completion of the contract;
3. It is not mandatory that a party obtains the consent of the opposing party to consolidate multiple disputes of related subject matters into a single adjudication;
4. The use of a private adjudicator is now available upon the agreement of the parties;
5. The parties have the right to object to the jurisdiction of the adjudicator;
6. A party has 15 days from the date of the adjudication determination to pay the amount awarded.

Adjudication provides rapid interim dispute resolution during project delivery.

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Use of Holdback for Set-Off

Pre-Amendments:

- The *Act* limited a payer's ability to set-off holdback funds for the purposes of remedying a "*default*"

Post-Amendments:

- The term "*default*" has been replaced with a contractor/subcontractor that has "*<u>abandoned</u>*" or has been "*<u>terminated</u>*"

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Terminating Contracts

Mandatory Publication:

- Notice of termination *must* be published in the prescribed form no later than 7 days after the termination of a contract.

Date of Termination:

- If multiple notices of termination are issued, the date of the first publication of the notice will determine the effective date of termination.

Preservation of Right to Contest:

- The published date of termination affects the lien period, parties retain the right to challenge the legitimacy itself.

Before Amendments	After Amendments
No deadline to reject an invoice as improper.	Invoice deemed proper if not rejected as improper within 7 days.
Progressive holdback release optional, not mandatory.	Annual holdback release mandatory.*
Holdback set-off available in the event of contractor/subcontractor default.	Holdback set-off limited to contract/subcontract abandonment or termination.
Right to adjudicate expired at contract completion, termination, or abandonment.	Right to adjudication expires 90 days after contract completion, termination, abandonment.
Notice of Termination was required to be published on a construction trade news site	Publication of termination is mandatory, in accordance with a prescribed form, with a defined date

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Other Notable Amendments

- **Joinder of trust and lien claims:** A lien claim may now be joined with a breach of trust claim as one singular action
- **Multiple improvements under one contract:** Multiple "improvements" under one contract will be considered separate of those improvements are not contiguous
- **"Price":** Price is not merely the default market value, but may now be prescribed under valuation methods provided by the Regulations
- **"Written Notice of Lien":** Now includes a copy of any claim for lien
- **Minor Errors to a Lien**: A valid lien will not be invalidated due to minor technical errors

Updates to the CCDC Documents

On June 30, 2025, the Canadian Construction Documents Committee released updated versions of the following contracts:

- *CCDC 5A* – Construction Management Contract – For Services;
- *CCDC 5B* – Construction Management Contract – For Services and Construction;
- *CCDC 17* – Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects; and
- *CCDC 30* – Integrated Project Delivery Contract

Updates to the CCDC Documents

1. ***Ready-for-Takeover*** shifts the focus of project completion from Substantial Performance to full operational readiness for the owner.
2. ***Progressive Holdback Release*** is now standard, and in alignment with prompt payment legislation.
3. ***Liability for Uninsured Losses*** is now clearly capped, more clearly allocating risk.
4. ***Termination for Convenience*** clauses provide owners with increased flexibility, while construction managers may now obtain a Break Fee for termination before construction commences.

Collaborative Contract Modelling

Form of Contract:
Integrated Project Delivery (IPD), Alliance Agreements, Collaborative Design-Build, etc.

Collaboration:
Immense stakeholder buy-in, a well-advanced design, confirmation of funding, and robust early works

Dispute Resolution:
Early resolution, pre-selected leadership teams, proper and timely notice

Waiver of Claims:
For IPD and Alliance models, all claims are waived except for typical exceptions such as willful default, gross negligence, breach of contract, statutory breach, non-payment, latent defects, etc.

Profit Incentives:
Key Performance Indicators, Monetary Incentives, and Shared Allocation of Risk

Most Common Risks on Construction Projects

- Condensed Construction Schedules
- Cost Uncertainty
- Fixed-Price Cost Structure
- Underdeveloped Design
- Using Contracts as a Weapon

Key Takeaways for Owners and Developers

- Annual holdback release will affect project cash flow
- Adjudication is effective at providing quick interim binding decision and a great tool for dispute resolution tool
- Statutory holdback is not to be used to correct defective work
- Market shift to collaborative contracting models

The market is changing. The law is adapting. We are here to help.

Commercial Landlord Rights & Remedies

Practical framework for managing tenant default risk

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Landlord Remedies
Decision Framework

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Has the Tenant Breached the Lease?

YES

Has the Tenant Breached the Covenant to Pay Rent?

YES

Does the Landlord Wish to Terminate the Lease?

NO

Available Remedies
- Sue for arrears only
- Exercise right of distress
- Sue for fraudulent removal of goods (s.50 CTA)

Exercise Right of Distress
Available where tenant is in arrears of rent. Subject to statutory requirements and procedural safeguards.

Distress – Defences & Limitations
Distress may be challenged where:
- Illegal, irregular or excessive
- Lease terminated or surrendered
- Receiver appointed
- Tenant bankrupt

Fraudulent Removal of Goods (s.50 CTA)
Applies where tenant removes goods to defeat the landlord's right of distress.
Liability: double value of goods removed.

YES

Does the Lease Specify the Method of Termination?

YES

Lease Provisions Govern
- Default notice requirements
- Service requirements

NO

Section 18(1) - Commercial Tenancies Act
If rent remains unpaid for 15 days after due date:
- The landlord may terminate without prior demand
- The landlord may claim damages for the unexpired term (with proper notice)

Termination – Required Steps
To terminate, the landlord must:
- Physically re-enter and post Notice of Termination; or
- Obtain court-ordered termination and a writ of possession

Tenant Challenges to Termination
Termination may be challenged on the basis that:
- It was improper; or
- Relief from forfeiture should be granted

Relief from Forfeiture (s. 20, CTA)
The court may grant relief, considering:
- Nature and seriousness of breach
- History of default
- Balance of harm
- Clean hands
- What is just and equitable

Waiver
If the landlord's conduct affirms continuation of the lease, the termination may be found to be waived.

NO

Does the Lease Deem This Breach to Be a Rent Default?

YES

Treat as a Rent Default

NO

Does the Lease Govern the Landlord's Remedies For This Breach?

YES

Lease Provisions Apply

NO

Does the Landlord Wish to Terminate the Lease?

YES

Section 19(2) - Commercial Tenancies Act
Where the tenant breaches a covenant other than payment of rent:
- The landlord must serve written notice
- Notice must specify breach
- Provide reasonable opportunity to remedy
- Require compensation

If not complied with the landlord may terminate.

NO

Other Remedies
- Declaration / injunction
- Perform obligation at tenant's cost (if lease permits)
- Sue for damages

Download Flowchart

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Has the Tenant Breached the Lease?

If YES: What type of breach?

- **Rent default** (breach of the covenant to pay rent or other monetary default); or
- **Non-monetary default**

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Has the Tenant Breached the Covenant to Pay Rent?

YES

NO

Rent Default Branch

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Does the Landlord Wish to Terminate the Lease?

Strategic considerations may include:

- Nature of the tenant relationship
- Market conditions and re-leasing prospects
- The tenant’s role within the property (e.g., anchor tenant)

YES

NO

If NO – Landlord Does Not Wish to Terminate

Available Remedies

The landlord may instead:

- **Sue for rental arrears only**
  - *(Note: The existence and scope of any duty to mitigate is currently under consideration by the Supreme Court of Canada.)*
- **Exercise the right of distress**
- **Sue for fraudulent removal of goods**

Exercise Right of Distress

Requirements and Process

Distress is available where the tenant is in arrears of rent.

Key requirements:

- Must be levied between sunrise and sunset, and not on Sunday
- Landlord (through a bailiff) must post a Notice of Distress
- A five-day waiting period must expire before any sale
- Two independent appraisals of the seized goods are required after the five-day waiting period
- Tenant must be granted access to the premises during levy period
- The lease cannot be terminated during the levy period

Sale of goods:

- Following appraisal and expiry of the waiting period, goods may be sold
- The landlord cannot purchase the distrained goods
- Net sale proceeds are applied to rental arrears

Distress

Defences and Limitations

Distress may be challenged where:

- The distress is illegal
- The distress is irregular or excessive
- The lease has been terminated
- The tenant has surrendered the lease and the landlord has accepted the surrender
- A receiver is appointed
- The tenant has become bankrupt

Fraudulent Removal of Goods

Section 50, *Commercial Tenancies Act*

This remedy applies where:

- A tenant abandons the premises and removes goods to defeat the landlord's right of distress

Liability:

- The tenant – and any person who assists – is liable for **double the value of the goods removed**, regardless of the amount of rental arrears

If YES – Termination Path

Does the Lease Specify the Method of Termination?

- **If NO:** Section 18(1) of the *Commercial Tenancies Act* applies
  - If rent remains unpaid for 15 days after it becomes due, the landlord may terminate the lease without prior demand
- **If YES:** The lease provisions govern
  - Default notice requirements
  - Service requirements

Termination: Required Steps

To terminate the lease, the landlord must:

1. **Physically re-enter the premises**
    - Change the locks and post a Notice of Termination*; **or**
2. **Obtain a court-ordered termination** under the *Commercial Tenancies Act*, together with a writ of possession.

*The Notice of Termination must expressly reserve the landlord's right to claim damages for lost rent for the balance of the lease term (i.e., the amount that would have been payable but for the termination).

Tenant Challenges to Termination

A tenant may challenge the termination on the basis that:

1. **The termination was improper**
   - Non-compliance with lease provisions or statutory requirements
2. **Relief from forfeiture**
   - A discretionary remedy available through the court

Waiver

- If the landlord's conduct implies or expressly acknowledges the continuation of the lease, the landlord may be found to have **waived the termination**
- In such circumstances, the landlord cannot rely on the prior termination

Relief from Forfeiture

- Under **section 20 of the *Commercial Tenancies Act***, a tenant may apply for relief from forfeiture
- The application must be brought within a **reasonable time**

In exercising its discretion, the Court will consider:

- The nature and seriousness of the breach
- The frequency or history of default
- The balance of harm between the parties
- Whether the tenant has “clean hands”
- What is just and equitable in the circumstances

Non-Rent Breach Branch

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Does the Lease Deem This Breach to Be a Rent Default?

- **If YES:**
    - Treat as a rent default
    - Proceed to the Rent Default Branch
- **If NO:**
    - Continue to non-rent remedies analysis

Does the Lease Govern the Landlord's Remedies for This Breach?

- **If YES:** The lease provisions apply
- **If NO:** Does the landlord intend to terminate the lease?

If YES – Landlord Intends to Terminate: Section 19(2), CTA

Where the tenant breaches a covenant **other than the covenant to pay rent**:

- The landlord must serve written notice on the tenant

The notice must:

- Specify the breach
- Provide the tenant with a reasonable opportunity to remedy the breach
- Require compensation for any resulting damages

If the tenant fails to comply with the notice, the landlord may then terminate the lease.

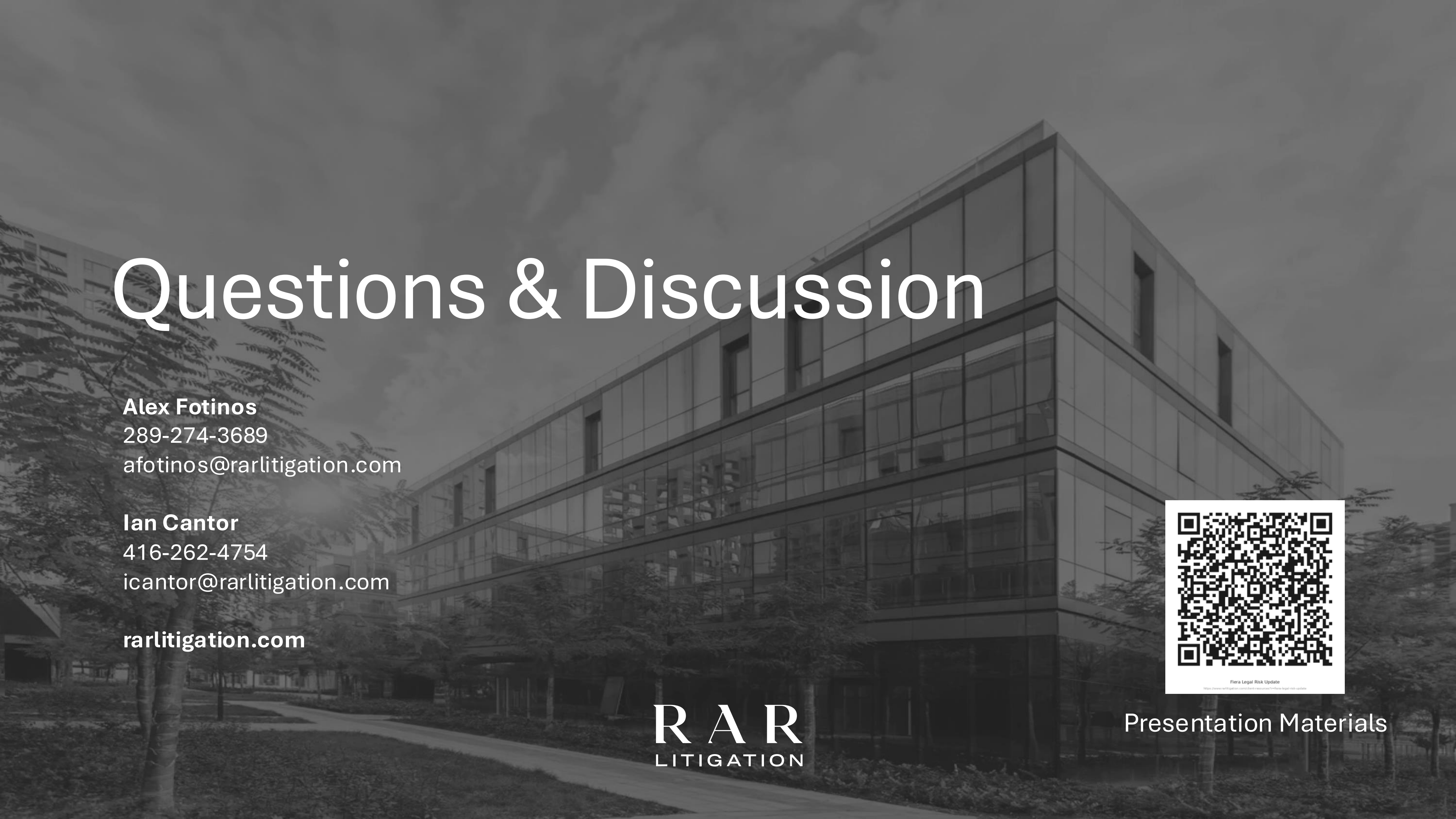
If NO – Landlord Does Not Intend to Terminate: Other Remedies

The landlord may instead pursue:

- A declaration and/or injunction
- The right to perform the obligation at the tenant’s cost (if the lease permits)
- An action for damages

Key Takeaways for Landlords and Property Managers

- The appropriate remedy will depend on the nature of the breach, your objectives, market conditions, and knowledge of your tenant
- Careful reference to the lease – particularly notice provisions – is critical when assessing available rights and remedies
- Limit litigation risk and exposure by saying what you mean, and meaning what you say



Questions & Discussion

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Presentation Materials

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