Evolving Construction Law: Ontario and Canada

Rocco Ruso
Principal & Founder
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Modernizing Ontario's *Construction Act*

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

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.

Requirements for a Proper Invoice

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.

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.

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 "*abandoned*" or has been "*terminated*"

Set-off is now explicitly tied to the abandonment or termination of a contract or subcontract, and a party cannot use holdback funds to remedy general defaults or deficiencies in the work

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 are Effective	Now that Amendments are Effective
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

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Uniformity of Construction Legislation

	Ontario	Alberta	British Columbia
Legislation	*Construction Act*	*Prompt Payment and Construction Lien Act*	*Builder Lien Act*
Payment	28 days → 7 days → 7 days	28 days → 7 days → 7 days	**Currently**: Payment in accordance with contract ***Post-Amendments* (Not in Effect)*:*** • *28 days → 7 days → 7 days*
Holdback	• 10% holdback • Released annually at contract anniversary date; • Paid no later than 74 days after notice • Contractors to release holdback 14 days after receipt	• 10% holdback • Released 45 days after substantial completion; • Annual release mandatory for contracts over $10M or 12 months in duration • Partial release of holdback also permitted	**Currently:** • 10% holdback • Released 55 days after completion ***Post-Amendments* (Not in Effect)*:*** • *Released 46 days after completion* • *Shimco liens abolished;* • *Early release of holdback permitted*
Adjudication	• Right to adjudicate expires 90 days after contract completion • Private adjudicators available; • Any matter subject to adjudication	• Available for payment disputes during contract performance	**Currently:** No adjudication ***Post-Amendments* (Not in Effect)*:*** • *Adjudication Authority will be established;* • *Adjudication will be available until 90 days from contract completion;* • *Scope of adjudication is broad but mainly relates to payment disputes*

Updates to the CCDC Contracts, and Collaborative Contract Models

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 IP except for willful default, gross negligence, breach of contract, statutory breach, non-payment, latent defects, etc.

Painshare/Gainshare Mechanisms:
Key Performance Indicators, Monetary Incentives, and Shared Allocation of Risk

Canadian Construction Industry Market Trends

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Notice Periods

Statutory Notice Requirements

- The Act provides specific scenarios where a party is to provide the other with notice of an event. These include, but are not limited to,
  - Notice of Non-Payment
  - Notice of Adjudication
  - Notice of Annual Release of Holdback
  - Notice of Termination

Contractual Notice Requirements

- Courts in Ontario treat the notice requirements under a contract as being a **condition precedent** to a party commencing a claim.
  - *Technicore Underground Inc. v. Toronto* (City), 2012 ONCA 597
  - *Urban Mechanical v. University of Western Ontario*, 2018 ONSC 1888

Responsibility for Latent Defects

Latent Defect claims in tort extend beyond warranty obligations

In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 SCR 85:

> "I conclude that the law in Canada has now progressed to the point where it can be said that **contractors (as well as subcontractors, architects and engineers)** who take part in the design and construction of a building will **owe a duty in tort to subsequent purchasers of the building** if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. **Where negligence is established** and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, **be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.**"

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Responsibility for Latent Defects

***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* is still frequently cited today**

- *White v. The Corporation of the Town of Bracebridge*, 2020 ONSC 3060
  - The court found a builder liable for negligent construction where the property's foundation walls were not constructed in accordance with the 1986 Ontario Building Code
- *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering Ltd.*, 2024 BCCA 25
  - The Court of Appeal held hat contractual linkage should not eliminate a duty of care in tort where dangerously defective workmanship was present

Contractual responsibility for latent defects

- Not acceptable risk to a general contractor
- Extends a general contractor’s exposure for future costs to the ultimate limitation period

“Buy Canadian”

Tariffs and Force Majeure

- Contractual Force Majeure relief may not protect against increase in tariffs
    - “The authorities are clear that the fact that a contractual obligation has become more expensive to perform, even dramatically more expensive, is not a ground to relieve the party of its obligation on the ground of *force majeure*.” - *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922.
- *Recommendation*: Reference increases in tariffs to be expressly included within the definition of Force Majeure

The changing tide:

- *Learning Resources, Inc., at al. v. Trump President of the United States, et. al.*, 784 F. Supp. 3d. 209 (D. D.C. 2025)

Subcontractor Insolvency

Risks attributable to Subcontractor Insolvency:

- Fixed-Price Bidding; Tight profit margins; Material unavailability & Labour shortages; Late or no payment; Geo-Political Market Impacts; Issues obtaining bonding

What happens next?

- Fixed price contract: Contractor assumes the cost (typically)
- Cost-Reimbursable: Owner reimburses Contractor for subcontractor defaults (typically)

Can I use the amounts owed to the insolvent subcontractor to hire a new trade?

- No, in *Ontario,* all funds received by a contractor that are owed to a subcontractor constitute a trust (section 8(1))

But, the contract says the Contractor can set-off for insolvency

- Monies owing to a subcontractor become the property of the trustee in bankruptcy, and contractual terms cannot override the *Bankruptcy and Insolvency Act* to prefer the bankrupt's creditors over others
- This is called the "*Anti-Deprivation Rule*": *Chandos Construction Ltd. v. Deloitte,* 2020 SCC 25

Contact

To discuss how to ensure your business benefits from these updates, please contact:

Rocco Ruso
E: rocco@rarlitigation.com
T: 416-931-6010

Spyros Bekiaris
E: spyros@rarlitigation.com
T: 416-882-6805

Alex Fotinos
E: afotinos@rarlitigation.com
T: 289-274-3689

rarlitigation.com

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