

LEGAL UPDATE

October 16, 2025

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Editors' Note

Brendan, Catriona and the Legal Update Committee welcome you all back after what we hope was an enjoyable summer. With that, we give you Legal Update #172. In this issue, Paul Ivanoff and Rebecca Orsini discuss a recent case from the Ontario Court of Appeal dealing with an appeal of an application judge's decision disallowing a request for mediation, and a subsequent request for arbitration, on the basis that the contract set deadlines for both, which deadlines were missed. The Court of Appeal allowed the appeal, relying on the language of the dispute resolution provision, the contract as a whole and the commercial relationship between the parties. This case reminds us that to require action within a specified timeframe, the contract must be explicit and clear.

Sandra Astolfo, Phillip Cho and Fabiola Bassong summarize a recent decision from the Commercial List in Toronto where the scope of a Companies Creditors Arrangement Act stay was extended to the surety of the insolvent company such that any claims upon performance bonds were stayed. The authors note that this appears to be unprecedented and raise concerns for how this decision may affect future cases considering that bonding is mandatory on Ontario public projects. The authors note that the case may be confined to its unique facts, especially the lack of opposition to the broad stay which extended to the surety.

The Ontario Court of Appeal's decision in *Ontario (Transportation) v. J & P Leveque Bros. Haulage Ltd.* serves as a reminder to construction lawyers that careful and precise language is required when drafting construction contracts, particularly when dealing with contractual limitation periods. Brendan Bowles and Saif Hashmi discuss this decision, which deals with an attempted shortening of the limitation period, and also includes a helpful reminder of how the courts will interpret standard form contracts. Overall, the decision in *J & P Leveque* serves as a cautionary tale when it comes to complicated, multi-stepped dispute resolution provisions, perhaps raising the question of whether simpler is better?

Paul Ivanoff and Emilie Dillon summarize a decision of the Ontario Superior Court where a supplier sought a stay of an insurer's subrogated action against them on the basis that they were a named insured under the builder's risk policy at issue. The court agreed with the supplier, finding that the

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Brendan D. Bowles



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language of the policy was broad enough to cover “subcontractors” and that the supplier was a “subcontractor” for the purposes of the policy. The court emphasized that one of the purposes of a builder’s risk policy was to provide protection to the project owner without having coverage turn on the complexity of determining liability as between subcontractors on projects that can involve numerous parties and significant complexity.

The Canadian Construction Documents Committee recently updated four of its standard-form contracts: CCDC 30 (Integrated Project Delivery), CCDC 5A (Construction Management Contract for Services), CCDC 5B (Construction Management for Services and Construction) and CCDC 17 (Stipulated Price Contract for Trade Contractors on Construction Management Projects). The CCDC first issued its IPD form of contract in 2018, and the changes issued in the 2025 form were highly anticipated by construction counsel and industry players alike. Catriona provides an overview of noteworthy changes appearing in the CCDC 30 – 2025 contract.

Readers will recall that Legal Updates #170 and #171 included case comments on two notable decisions from the Ontario Court of Appeal dealing with the issue of arbitrator bias; [Aroma Franchise Company, Inc. v Aroma Espresso Bar Canada Inc.](#), 2024 ONCA 839 ([Legal Update #170](#)) and [Vento Motorcycles, Inc. v Mexico](#), 2025 ONCA 82 ([Legal Update #171](#)). As noted in those case comments, leave to appeal to the Supreme Court of Canada was sought in both cases. Both leave applications were dismissed by the Supreme Court of Canada. While it would have been interesting to have these issues settled on a national level, the Supreme Court of Canada clearly felt that Ontario’s Court of Appeal adequately disposed of the matters. These dismissals highlight how difficult it is to obtain leave to appeal to Canada’s highest court for commercial matters.

We conclude with an update from fellow Committee member Dirk Lauden on the introduction of prompt payment legislation in British Columbia:

Prompt payment in, *Shimco* lien out!

On October 7, 2025, the British Columbia government tabled legislation to enact prompt payment and adjudication for construction projects, and to make certain changes to the province’s construction lien scheme. Bill 20 of 2025, First Session, 43rd Parliament, to be called, if enacted, the *Construction Prompt Payment Act*, would create a stand-alone statute for prompt payment and adjudication. The proposed legislation would introduce a prompt payment model generally along the same lines as that in the Ontario *Construction Act*, and in statutes elsewhere in Canada. As with other Canadian jurisdictions, the statutory scheme centres on the general contractor’s issuance of a proper invoice, as defined, the owner’s obligation to pay within 28 days or issue a notice of non-payment, and interim adjudication of

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payment and certain other disputes. Contractors are to issue proper invoices monthly unless the contract requires otherwise. A limited form of pay-when-paid is applied. Adjudicators must be registered with an adjudication authority that will be designated by regulation. Indeed, much is left to regulation. There is a statutory interest rate applicable to late payments, and the unpaid contractor can charge the higher of that and the contractual rate.

Unlike the Ontario *Construction Act*, Bill 20, if enacted as introduced, would not mandate the bonding of public procurement projects. It seems that such a requirement could, in theory, be made by regulation under existing legislation, however.

Bill 20 contains several important amendments to British Columbia construction lien legislation as well. Most notably, British Columbia's anomalous stand-alone lien against the holdback, known as the *Shimco* lien for the case that first recognized it, is to be eliminated. The amendments do not clearly provide how this extinguishment will apply to existing claimants who hold such rights as of the date the amendment comes into effect. The holdback period is to be reduced from 55 to 46 days (the lien period remains 45 days) to speed up the flow of money on construction projects. The existing 10-day gap between the lien period and the holdback period was intended to accommodate physical searches of paper records at land title offices, some of which were in remote locations. That gap is no longer necessary. The legislation would also now provide expressly that demolition work is the proper subject of a claim of lien. The stand-alone lien against the holdback retained on sales of condominium units under the *Strata Property Act*, a cousin to the *Shimco* lien, will also be abolished.

Although the governing party in British Columbia has only a minority of seats in the Legislative Assembly, this bill seems unlikely to be controversial among the political parties and its timely passage is expected. Delay may be expected in the creation or selection of the adjudication authority and required regulations, however. A lot of work may have to go into that. Although the proposed amendments to the *Builders Lien Act* in Bill 20 include only a handful of the most easily implemented reforms to the *Builders Lien Act* that were recommended to the government by the British Columbia Law Institute in its comparatively recent *Report of the Builders Lien Act*, BCLI Report no. 89, July 2020, there is no indication that the government has given up on other reforms, such as mechanisms for earlier release of holdback. We will have to wait and see about those.

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College Fellow Marc MacEwing was so moved by the prospective extinguishment of the Shimco lien that he wrote the following words:

There once was a lien, Shimco by name,
That confounded the practice until it was tamed.
Although it generated fees,
It'll be brought to its knees
By the Construction Prompt Payment Act when it's proclaimed.

On behalf of Catriona Otto-Johnston and Brendan Bowles, we hope you enjoy Legal Update #172. We look forward to bringing you one more issue in 2025, and to that end, we are always happy to receive content from across the country for inclusion in upcoming issues. If you or your colleagues have something of interest to the College, please send it to Catriona and Brendan.

J.P. Thomson
Architects Ltd.
v. Greater Essex County
District School Board,
[2025 ONCA 378](#)

LU #172 [2025]

Primary Topic:

III. Building Contract

Secondary Topic:

XIV. Arbitration and
Mediation

Jurisdiction:

Ontario

Authors:

Paul Ivanoff, Partner,
Osler, and Rebecca Orsini,
Associate, Osler

CanLii Reference:
[2025 ONCA 378](#)

ONTARIO



Paul Ivanoff



Rebecca Orsini

Interpreting Time Requirements in Dispute Resolution Clauses

In a recent decision, *J.P. Thomson Architects Ltd. v. Greater Essex County District School Board*, [2025 ONCA 378](#), the Court of Appeal for Ontario clarified the interpretation of a dispute resolution clause that stipulated when parties must request mediation and/or arbitration. The ruling serves as a useful reminder that timelines in dispute clauses are occasionally subject to challenge and should be closely monitored by parties so that they can best take advantage of contractually agreed to dispute resolution mechanisms.

Relevant facts

In 2016, J.P. Thomson Architects Ltd. (Thomson) won two contracts with the Greater Essex County District School Board (the Board). The first made Thomson an approved vendor of record, and the second hired them to perform architectural services for two new schools. Both contracts included a dispute resolution clause that, among other things, provided for

1. mediation of any disputes arising out of the contracts “which cannot be resolved by the parties within thirty (30) days of the dispute arising”;
2. arbitration “[i]n the event that any dispute between the parties has not been resolved by such mediation within thirty (30) days following selection of the mediator”.

On October 12, 2021, Thomson sent a letter to the Board requesting mediation of two disputes:

1. The first dispute related to an August 2020 letter from the Board raising concerns about Thomson’s performance. Thomson addressed these concerns, but in March 2021, the Board sent a second letter advising that Thomson’s response was inadequate and barring Thomson from bidding on future work for two years.
2. The second dispute related to a June 2021 request from Thomson about the calculation of its fees. The Board refused the request in part on July 28, 2021. Thomson requested a reconsideration, but the Board refused on September 23, 2021.

The Board refused to appoint a mediator, arguing that the dispute resolution clause required mediation to be sought within 30 days of the dispute arising and that the disputes raised by Thomson were out of time. The Board took the same position when Thomson later served a notice to arbitrate. As a result, Thomson applied to the Court for an order appointing an arbitrator.

J.P. Thomson
Architects Ltd.
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Interpreting Time Requirements in Dispute Resolution Clauses

The Superior Court decision: mediation is out of time

The application judge agreed with the Board, holding that the dispute resolution clause clearly required Thomson to request mediation within 30 days of a dispute arising. In coming to this conclusion, the judge relied on her interpretation of the purpose of the clause: to provide an alternative mechanism to deal with disputes between the parties promptly when they arise.

The application judge went on to make several findings about the scope of the disputes raised by Thomson, finding that they had already been resolved by the parties. In particular, the judge found

- The first dispute was resolved when Thomson agreed to undertake remedial action. Even if the March 2021 letter gave rise to a new dispute, Thomson did not request mediation within 30 days.
- The July 2021 letter resolved the dispute. Thomson's request for a reconsideration did not extend the deadline to request mediation.

As a result, Thomson's application to the Court to appoint an arbitrator was dismissed.

The Court of Appeal decision: no deadline imposed

The Court of Appeal overturned the application judge's decision, finding that she erred in her interpretation of the dispute resolution clause and in making findings about the scope of the parties' dispute. The Court of Appeal granted the application, ordered that mediation proceed within 60 days and held that Thomson retained the right to seek arbitration should the parties fail to resolve their dispute.

The proper interpretation of the dispute resolution clause

The Court found that, properly construed, the dispute resolution clause did not require the parties to seek mediation within 30 days of a dispute arising. It instead set a minimum 30-day period for the parties to attempt to resolve the dispute before they sought mediation. This interpretation aligned with the language of the dispute resolution provision, the terms of the contract as a whole and the commercial relationship between the parties.

In particular, the Court found that in light of the longstanding and complex relationship between the parties and the context of the contract as a whole, it would not make sense to require the parties to serve a notice of mediation every time they were unable to resolve a dispute within 30 days.

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Interpreting Time Requirements in Dispute Resolution Clauses

The arbitrator determines the scope of the parties' dispute

The Court also held that the application judge should not have determined the scope of the parties' dispute. This should have been left to the arbitrator, as

1. The dispute resolution clause gave the arbitrator jurisdiction over any dispute between the parties "arising out of or relevant to" the contracts.
2. The general principle is that the arbitrator is best positioned to determine the scope of the dispute and their jurisdiction.

Key Takeaways

As this case highlights, dispute resolution clauses are critical in outlining parties' rights with respect to resolving contractual disputes. Parties should approach drafting and administration of these clauses with care. In this case, the Court of Appeal was not prepared to read in deadlines for dispute resolution that were not there. If a contract requires action within a specific timeframe, the language must clearly say so.

Re Earth Boring Co. Ltd.,
[2025 ONSC 2422](#)

LU #172 [2025]

Primary Topic:

I. General

Secondary Topic:

VIII. Bonds and Sureties

Jurisdiction:

Ontario

Authors:

Sandra Astolfo, Philip Cho
 and Fabiola Bassong,
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CanLii Reference:
[2025 ONSC 2422](#)

ONTARIO



Sandra Astolfo



Philip Cho



Fabiola Bassong

Carillion 2.0? Ontario Judge orders stay of claims against performance bonds

On May 28, 2025, a precedent-setting order was issued in a *Companies' Creditors Arrangement Act* ("CCAA") proceeding preventing calls on performance bonds by obligees unless the written consent of the insolvent companies and monitor is obtained, or leave is granted by a commercial court judge.¹

This order and the underlying endorsement² are significant because performance bonds are mandatory under the *Construction Act* for some public owner contracts³ and are often supplied to general contractors by major subcontractors and equipment suppliers. Project owners and contractors, as parties named as obligees in performance bonds, often pay the premium charged by the surety for the bond as part of the contract price and have come to rely upon this security especially when the principal becomes insolvent. The stay on performance bond calls provided for in the order made on May 28 is novel in that the authors are not aware of any other CCAA order issued in Ontario which places an obstacle in the way of making an immediate call upon a performance bond following an insolvency.

As most senior construction lawyers will recall, lien regularization orders (commonly known as LROs) and the process of giving liens to the monitor instead of complying with the registration or service requirements of the *Construction Act* did not exist prior to the 2013 Comstock insolvency. In that insolvency, members of the construction and insolvency bars worked together to create the LRO process which is now a familiar and accepted lien claims process appearing in subsequent CCAA orders. Given the importance of performance bonds in the construction industry, especially for public owners who have no choice but to obtain performance bonds from their contractors, hopefully the stay of calls on performance bonds in the Earth Boring CCAA proceeding will not form part of future CCAA orders or become part of the CCAA model order.

The Insolvency:

The Applicants, Earth Boring Co. Limited, Yarbridge Holdings Inc., Trolan Investments Ltd., and Yarfield Services Limited, are related entities providing

¹ In the matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended and in the matter of a plan of compromise or arrangement of EARTH BORING CO. LIMITED, YARBIDGE HOLDINGS INC., TROLAN INVESTMENTS LTD., AND YARFIELD SERVICES LIMITED, 2025 ONSC 2422 ("Re Earth Boring Co. Ltd., 2025 ONSC 2422"); <https://www.bdo.ca/getmedia/55c8a101-8f77-4019-96b5-ac8cf956ffdc/1-285Third-Amended-and-Restated-Initial-Order-Earth-Boring-Co-Limited-et-al-Dated-May-28th-2025.pdf>

² <https://www.bdo.ca/getmedia/a4878af7-da55-4e4c-b917-25bd10114aa2/2404-2-Further-Reasons-of-Justice-Steele-re-Initial-Order.pdf>. The relevant paragraphs are found in paragraphs 40 to 45 of the endorsement issued by Justice Steele on April 17, 2025 and appear in paragraph 26 of the Third Amended and Restated Initial Order of Justice Cavanagh, issued May 28, 2025.

³ Section 12, Ont. Reg. 304/18 and Section 85.1 of the *Construction Act*, R.S.O. 1990, c.C.30, as amended, require public owners obtain performance bonds from their contractors on all public contracts with a contract value of \$500,000 or more.

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trenchless construction services in Ontario. According to the Application Record, “the Applicants are the oldest and largest trenchless construction service provider in Ontario”⁴ and are industry leaders in underground construction for complex infrastructure projects.

The Applicants had a Master Surety Agreement with Aviva Insurance Company of Canada (“**Aviva**”) pursuant to which Aviva provided the Applicants with bonding for ongoing construction projects. There were 8 performance bonds issued by Aviva, four of which were for continuing projects. The bonds issued by Aviva totalled \$150,000,000. The obligees named in the performance bonds were both public owners and general contractors.

On April 17, 2025, the Applicants brought an application seeking an initial order under the CCAA which included an LRO and a broad stay against anyone with recourse to a performance bond (the “**Bond Stay**”). The initial order was issued together with the LRO; however, the Bond Stay issue was not decided until May 28.

The May 28 Decision:

In paragraphs 40 to 45 of her endorsement, Justice Steele addresses whether the Court should grant a stay of calls on performance bonds. Justice Steele notes that section 11 of the CCAA gives the Court broad discretion to make any order appropriate in the circumstances. This discretion includes temporary stays of third-party rights. In exercising this discretion, the Court must consider whether the requested relief will “*further the efforts to achieve the remedial purpose of the CCAA*” and “*avoid the economic and social losses resulting from liquidation of an insolvent company.*”⁵

The Applicants were concerned that without an initial stay of calls on the performance bonds, the obligees would likely make claims under the performance bonds, triggering an obligation on Aviva to step in and respond to the calls. According to the Applicants, calling on the performance bonds and in essence enforcing rights and remedies bargained for would interfere with the Applicants’ ability to continue to provide services under the bonded project contracts and interfere with the flow of project funds to the Applicants. Under the standard form of performance bond, it is a condition precedent to the surety’s liability that the obligee agrees to pay the balance of the contract price to the surety. In other words, the obligee must pay the surety the total amount otherwise payable to the principal, thereby diverting money away from the principal’s bank account and into the hands of the surety.

⁴ Paragraph 6 of the affidavit of Eugene Woodbridge filed in support of the Application

⁵ Re Earth Boring Co. Ltd., 2025 ONSC 2422

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Carillion 2.0? Ontario Judge orders stay of claims against performance bonds

Justice Steele accepted the Applicants' position with the following stay terms appearing in paragraph 26 of the third amended and restated initial order (emphasis added):

"This court orders and declares that during the Stay Period, no Person, holding a Performance Bond (as defined in the First Woodbridge Affidavit), including any Person named as an owner or obligee under such bond, shall be permitted to enforce and/or call on the Performance Bond ("Performance Bond Claim"), **except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Performance Bond Claims currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.**"⁶

In her endorsement, Justice Steele relied on the recent decision by Justice Osborne in the CCAA proceedings of Hudson's Bay Company, 2025 ONSC 1530, where the court extended the stay of proceedings to co-tenants. In that case, the issue being addressed related to a specific type of clause in certain commercial retail leases that permit a tenant to certain rights (or remedies) based on another tenant (in this case Hudson's Bay Company) being unable to perform. Often, these clauses relate to so-called "anchor tenants" that can support the landlord charging premium rental rates in a retail centre. The stay of proceedings protecting Hudson's Bay Company would not normally prevent other tenants from enforcing co-tenancy clauses in their leases, creating a cascading impact on the landlords whose rights were already impacted by the stay of proceedings and other rights provided to a debtor in an insolvency proceeding. In the words of Justice Osborne, the "rationale is that extending the stay of proceedings in such a manner prevents a so-called "run on the bank" in the sense that many other co-tenants might seek... to terminate their own leases with landlord locations where Hudson's Bay currently operates."⁷

Justice Steele accepted the Applicants' submission that an initial stay of calls on the performance bonds are necessary for the "same reasons as in a co-tenancy stay."⁸ In accepting this position, the court appeared to accept the Applicants' evidence that if Aviva were called on to respond on the bonds, this "likely would interfere with the Applicants' ability to operate under the contract in question. Further, the Applicants state that any additional costs that Aviva might incur in exercising the range of options open to

⁶ Re Earth Boring at para 26

⁷ In Re Hudson's Bay Company, 2025 ONSC 1530 (CanLII), at para 65; <https://www.alvarezandmarsal.com/sites/default/files/canada/CV-25-00738613-00CL%20HBC%20Reasons%20Mar%2010%2025%20%281%29.pdf>

⁸ Re Earth Boring at para 43

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them in that scenario could and likely would interfere with the further flow of project funds to the Applicants.”⁹

However, reviewing the Application Record and affidavit filed in support of the relief sought, the evidence appears to simply be the statement by the affiant without any specific detail as to the nature of interference to the Applicants’ ability to operate or to the flow of project funds. In a co-tenancy scenario, the protection is extended to landlords as a way of mitigating against cascading and ripple effects of an insolvency. This is consistent with the Supreme Court’s comments in *Century Services Inc. v. Canada*, 2010 SCC 60, that in exercising its jurisdiction and discretion, the court should consider “whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.”¹⁰ Protecting landlords from a “run on the bank” protects landlords, and even tenants without a co-tenancy clause, from multiplying the economic losses that will cascade from the insolvency of an anchor tenant.

By contrast, it is not clear how the call on bonds by obligees (in this case, owners and contractors) against a surety, whose sole purpose is to provide a source of recovery for obligees, would create further economic losses that should be remediated by a broad stay of proceedings. Any rights of the surety to pursue its subrogation rights against the debtor are stayed. The court could, and often will, extend the stay to directors of the debtor, to permit the directors and the company the necessary breathing room and court protection to permit restructuring efforts and the continuation of operations. Court protection in favour of the surety, who received valuable consideration to back-stop the performance of the debtor, appears to cast the net wider than necessary to “achieve the remedial purpose of the CCAA.”

While not determinative, it is worth noting that under the provisions of the *Bankruptcy and Insolvency Act*, where proceedings are commenced in respect of a Division I Proposal (functionally similar to a CCAA), there is an automatic stay of proceedings in favour of directors of the debtor company. This is not the same in the case of a bankruptcy or receivership. However, that automatic stay in favour of directors does not automatically stay claims against the directors on a guarantee.¹¹ Generally, creditors are permitted to pursue guarantors even where the guarantor is a director of the debtor company. A performance bond, much like a guarantee, is a separate contract that stands for the benefit of the obligee and does not involve a claim against the estate of the debtor. The surety would have had the opportunity

⁹ *Re Earth Boring* at para 44

¹⁰ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, at para 70, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7904/index.do>

¹¹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, Section 69.31, <https://laws-lois.justice.gc.ca/eng/acts/b-3/>

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to protect against claims through security interests and other forms of collateral and as such, arguably, is not prejudiced by having to perform the contract of surety that it bargained for.

Why the Stay of Performance Bonds Term is Important to Obligees:

This Bond Stay removes an important protection bargained for by public owners and contractors who obtain performance bonds, while shielding sureties from their performance bond obligations. More specifically, it stays the obligees' right to make a written demand on the surety, a pre-notice meeting, a post-notice conference, reimbursement on account of mitigation work and necessary interim work, while staying a surety's obligation to work with the obligee to complete the project.

The Bond Stay may be a term that is unique to the Earth Boring CCAA proceeding and may be a "one-off" temporary stay of third-party rights under section 11 of the CCAA as it does not appear that the Applicants' request for relief was opposed by any party, both at the initial hearing and on the comeback hearing. However, it remains to be seen whether this type of third-party rights stay will appear in future CCAA orders in the same way LROs have come to be expected by construction lawyers in a construction project insolvency.

Ontario (Transportation) v.
J & P Leveque Bros.
Haulage Ltd
[2025 ONCA 573](#)

LU #172 [2025]

Primary Topic:

III. Building Contract

Jurisdiction:

Ontario

Authors:

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CanLii Reference:
[2025 ONCA 573](#)

ONTARIO



Brendan D. Bowles



Saif Hashmi

Saved by Absurdity: Contractual vs Statutory Limitation Periods in Standard Form Contracts

Introduction

The Ontario Court of Appeal's (the "**Court**") decision in *Ontario (Transportation) v. J & P Leveque Bros. Haulage Ltd.*¹, provides critical guidance on the interpretation of dispute resolution provisions in standard form government construction contracts and the limitation periods pertaining to same. The case centers on whether a contractual limitation period can bar litigation when the prerequisite steps, namely, a referee decision, are not completed within that period. The decision clarifies the interplay between contractual limitation clauses and Ontario's *Limitations Act, 2002*, and reinforces the principle that commercial contracts must be interpreted in a manner that avoids commercial absurdity.

Background and Procedural History

The dispute arose from a contract between the Ministry of Transportation of Ontario ("**MTO**") and J&P Leveque Bros. Haulage Ltd. ("**Leveque**") for the rehabilitation of Highway 60. The contract included a multi-tiered dispute resolution process culminating in a referee decision. If either party disagreed with the referee's decision, they were required to file a notice of protest and engage in alternative dispute resolution (ADR) **before** commencing litigation. Interestingly, the contractual requirements of notice of protest and engaging ADR were to be invoked after contract completion, but within two years of the contract's completion date. In other words, after a referee's decision, the final steps before the parties could resort to litigation were contractually restricted to a defined 2-year period.

In this case, the referee decision itself was released more than two years after the contract's completion. After the referee's decision was released, MTO promptly filed a notice of protest, initiated ADR, and subsequently commenced litigation. Leveque brought a motion for summary judgment, arguing that the contractual two-year limitation period barred MTO's claim. The motion judge agreed, holding that the contract, as a business agreement under the *Limitations Act*, ousted the statutory limitation period. MTO appealed to the Ontario Court of Appeal.

Issues on Appeal

The Court identified two central issues:

1. What is the appropriate standard of review for interpreting the contract?

¹ 2025 ONCA 573 [Leveque].

Ontario (Transportation) v.
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Saved by Absurdity: Contractual vs Statutory Limitation Periods in Standard Form Contracts

2. Did the motion judge err in interpreting the contractual claims review process?

Standard of Review

Although appellate courts typically review a lower court's interpretation of a contract deferentially,² the Court cited *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*³ (*Ledcor*) in applying the correctness standard. *Ledcor* identified three criteria for when an appellate court should use the correctness standard when interpreting a contract:

1. the contract at issue is a standard form contract;
2. interpretation has precedential value; and
3. no factual matrix specific to the parties exists to guide the interpretive process.⁴

In this case, the Court found that all three criteria were met. The contract at issue was a standard form contract, used repeatedly in government construction projects, and its interpretation had precedential value. There was no unique factual matrix to guide the contract's interpretation. As such, the appellate court was not bound by the motion judge's interpretation and could substitute its own interpretation of contract.

Contractual Interpretation and Commercial Absurdity

The Court emphasized and relied on three principles of contractual interpretation:

1. the contractual interpretation must be grounded in the textual language and read in light of the entire contract;
2. surrounding circumstances, although a necessary component of contractual interpretation, are of limited value in interpreting standard form contracts and must relate to the overarching commercial objective; and
3. contracts must be interpreted to make commercial sense and avoid absurdity.

The motion judge had focused on whether the claims review process could have been completed within the two-year window, attributing delays to MTO.

² *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras 50-52 [Sattva].

³ 2016 SCC 37 [*Ledcor*].

⁴ *Ledcor* at para 4.

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Haulage Ltd
[2025 ONCA 573](#)

LU #172 [2025]

Primary Topic:

III. Building Contract

Jurisdiction:

Ontario

Authors:

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[2025 ONCA 573](#)

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However, the Court found this analysis misguided and unnecessary. The key question was not whether the process could have been completed within the two-year window, but what the contract required when the referee decision was released outside of the two-year window.

The Court held that the plain language of the contract contemplated that the referee decision would be issued within two years. However, the contract was silent with respect to the process for when a referee's decision was released after two years of contract completion. Accordingly, the Court found that the requirement to file a notice of protest and engage in ADR within the contractually defined two-year window only applied if a decision had been rendered on or before the end of the two-year window. The interpretation advanced by Leveque would result in a commercial absurdity whereby a party would be required to deliver a notice of protest when no decision was made.

The Court noted: "Without a decision, there is no way of knowing who should protest and on what basis. There is similarly no ability to engage in meaningful ADR before litigation."⁵

Thus, enforcing the contractual two-year limitation in these circumstances would deprive MTO of any meaningful opportunity to challenge the referee's decision, leading to an unjust and commercially unreasonable outcome.

Interaction with the Limitations Act

The motion judge had found that the contract, as a business agreement under s. 22(6) of the *Limitations Act*, validly substituted its own limitation period. While the Court agreed that the contract could extend the statutory limitation period, it disagreed that it could shorten it in the absence of clear language.

The Court cited *Boyce v. The Co-Operators General Insurance Company*,⁶ which held that a contractual term purporting to shorten a statutory limitation period must clearly describe the limitation period, its scope, and exclude other limitation periods. The contract in this case did not meet that threshold. It did not explicitly state that a referee decision rendered outside the two-year window would be immune from review or litigation.

Accordingly, the Court held that the statutory limitation period under s. 4 of the *Limitations Act* applied. Since the MTO commenced its action within two years of receiving the referee decision, its claim was not statute-barred.

⁵ Leveque at para 27.

⁶ 2013 ONCA 298.

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Conclusion

The Ontario Court of Appeal has reaffirmed the importance of interpreting construction contracts in a manner that aligns with commercial reality and fairness. In doing so, in a standard form contract where there is precedential value and the factual matrix is unimportant, the appellate court will apply a correctness standard on appeal and can substitute its own interpretation for the lower court's. The decision also provides valuable guidance on the limits of contractual limitation periods and the need for careful drafting of contractual limitation periods. For construction law practitioners, the case serves as a reminder to scrutinize dispute resolution clauses and ensure that the process is commercially sensible, and if the parties truly intend to shorten a limitation period, to do so clearly.

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LU #172 [2025]

Primary Topic:

XIII. Insurance

Jurisdiction:

Ontario

Authors:

Paul Ivanoff,
Emilie Dillon, Osler

CanLii Reference:

[2025 ONSC 2517](#)

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Paul Ivanoff



Emilie Dillon

Builders' Risk Insurance: recent Ontario court decision confirms broad interpretation of coverage provisions

Authors:

Builders' risk insurance is a keystone of every large construction project: it serves to protect those involved in the project and the value of the project itself, subject to the specific wording of the policy. Courts have recognized that broad builders' risk policies provide certainty and stability in construction projects by among other things, reducing the need for litigation.

In a recent Ontario Superior Court of Justice decision (*Fluid Hose & Coupling Inc. v. Allianz Global Risks US Insurance Company et al.*)¹, while acknowledging that every case will turn on its facts and the specific wording of the policy in issue, Justice Schabas confirmed Canadian courts' approach of broadly interpreting coverage under builders' risk policies, consistent with the recognized public policy objectives behind them. This coverage determination is especially crucial when an insurer attempts to bring a subrogated claim against parties involved in the construction, which is typically prohibited where the party is itself insured under the policy.

Summary of the facts

Fluid Hose & Coupling Inc. (Fluid Hose) was a supplier in a project for the construction of a residential high-rise building in Toronto (the Project).

Fluid Hose was several levels down the construction pyramid: RioCan were the owners and developers of the Project and contracted with PCL Constructors Canada (PCL) to provide general contractor and construction management services for the Project. PCL in turn contracted with Malfar Mechanical Inc. (Malfar) to supply and install mechanical, plumbing and fire protection for the building, including HVAC cabinets and heat pumps. Malfar in turn subcontracted with HTS Engineering Ltd. (HTS) to purchase HVAC cabinets and heat pumps required for the building. HTS then contracted with Omega Heat Pumps Inc. (Omega) for custom heat pumps, which fulfilled its contract by working with its sister company, Sigma Convector Enclosure Corp. (Sigma), to manufacture and supply the HVAC cabinets and heat pumps. These custom HVAC cabinets and pumps were manufactured using ball valves supplied by Fluid Hose to Sigma.

The Builders' Risk Insurance Policy for the Project (the Policy) was issued by Allianz Global Risks US Insurance Company (Allianz) and specifically named RioCan and PCL as insured parties, along with the following parties: "all contractors, sub-contractors, consultants, sub-consultants, architectural consultants, engineering consultants, construction and project managers and/

⁹ *Fluid Hose & Coupling Inc. v. Allianz Global Risks US Insurance Company et al.*, [2025 ONSC 2517](#).

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or any other entities with an insurable interest in the project and as per individual Project Certificate(s) attached.”

Further, “subcontractor” was defined broadly under the Policy to mean “(i) any person, firm, or corporation entering into a contract with any Contractor, and (ii) any person, firm or corporation entering into a contract derived through any such contract with a Contractor to provide, supply or lease work, services, materials or equipment, or any combination thereof, in connection with the project shown in the Declarations. ‘Contractor’ and ‘Subcontractor’ shall not include consulting engineers or consulting architect.”

On June 8, 2020, a water leak occurred from an HVAC cabinet on the 32nd floor of the Project building, resulting in damage costing approximately \$420,000 to repair. The cause of the water leak was determined to be a 1/2 inch ball valve in the water supply line for the heat pump in a particular unit. Allianz paid for the repairs. Allianz subsequently commenced a subrogated action (naming RioCan and other named insured as plaintiffs) in the Ontario Superior Court of Justice for damages against, among others, Fluid Hose, pursuant to the Policy (the Subrogated Action). Fluid Hose disputes liability for the leak, alleging the valve’s failure resulted from improper installation by either Sigma or Malfar.

In response to the Subrogated Action, Fluid Hose brought an application for a declaration that the Subrogated Action is barred against it (on the basis that it is an insured under the Policy) and that Allianz is obligated to indemnify it for any amounts found to be owing in the Subrogated Action and for its costs of defending the action.

The Court’s ruling

Justice Schabas began his reasons by observing general legal principles regarding builders’ risk policies, which are a “unique species of insurance contract, providing broad coverage to complex construction projects, protecting those involved in the project and the value of project itself, subject to the specific wording of the policy.” Like insurance policies generally (which are typically standard form), coverage under these policies should be “interpreted broadly, and exclusions clauses narrowly”, and referenced should be made to the Supreme Court of Canada’s decisions in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*² and *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*³ for principles of contractual interpretation applicable to builders’ risk policies.

² *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016 SCC 37](#).

³ *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010 SCC 33](#),

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Justice Schabas also noted that coverage is not unlimited and must respect the contract—while some courts have limited coverage to parties who are an “integral and necessary part of the construction process itself” and excluded parties “collateral to that process”, each case turns on its facts and the specific wording of the policy in issue.

In this case, in determining whether Fluid Hose was a “subcontractor” (and therefore an insured) under the Policy, Justice Schabas emphasized the broad definition of “subcontractor” under the Policy, which extended “well beyond” subcontractors who contracted with the contractor to include contracts “derived” from contracts with the contractor that were in connection with the Project (like suppliers to subcontractors such as Fluid Hose). Notably, Justice Schabas observed that, unlike the other cases cited by counsel to Allianz, coverage under the Policy was not limited to subcontractors “engaged in the construction of the Project” and did not exclude “suppliers whose sole function is material delivery”. Interpreting coverage under the Policy to include Fluid Hose was also consistent with the Policy as a whole and with regard to its purpose:

- the description of “property insured” and associated provisions were drafted broadly to include property “owned by the Insured or in which the Insured had an insurable interest” (like the HVAC units RioCan purchased);
- the general construction contract between RioCan and PCL obligated RioCan to obtain a builders’ risk policy “covering all risks of physical loss or damage to the Project” with coverage representing “100% of the total contract price”; and
- the Policy clearly stated that Allianz was required to pay a loss regardless of how it happened and regardless of who caused it (in fact, Justice Schabas observed that one of the very purposes of comprehensive builders’ risk policies is to avoid disputes about potential liability amongst various subcontractors, having regard to the nature of complex construction sites).

Accordingly, Justice Schabas found that the Policy unambiguously and clearly included suppliers such as Fluid Hose within the definition of “subcontractor”, and that Fluid Hose was therefore insured under the Policy.

In response to arguments from counsel for Allianz, Justice Schabas disagreed that his interpretation would render the Policy unlimited in scope, rather finding that case law supported the purpose of such policies as providing “broad coverage” and that courts should give effect to that purpose and

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read them expansively as long as they do not “disregard or do violence to the policy’s language and ordinary meaning”.

Justice Schabas concluded with a caution to insurers: “if an insurer is prepared to provide a very broad policy, as it has done here, and which it presumably priced accordingly, it must live with the consequences.”

Takeaways

Courts have repeatedly recognized the benefits of builders’ risk policies in the construction industry, in simplifying insurance coverage, providing stability, and reducing litigation (especially in complex construction projects involving numerous parties). Accordingly, while ordinary rules of contractual interpretation still apply to builders’ risk policies, as standard form contracts which serve an important purpose, courts appear to be protective of maintaining their broadest interpretation in determining coverage. Insurers, owners, contractors, subcontractors, and suppliers alike should be keenly aware of these considerations, both in initiating and/or defending litigation (subrogated claims in particular) and in commercial negotiations before, during, and after construction.

**Collaborative Construction:
Navigating Changes to the
CCDC 30 – 2025**

LU #172 [2025]

Primary Topic:

III. Building Contract

Jurisdiction:

Canada

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Collaborative Construction: Navigating Changes to the CCDC 30 – 2025

Integrated Project Delivery (IPD) contract models continue to gain traction in the Canadian construction market, particularly when it comes to complex projects. In 2018, the Canadian Construction Documents Committee (CCDC) issued its first standard form Integrated Project Delivery contract. The CCDC recently issued updates to four of its standard form contracts, including the CCDC 30.¹ On the whole, many of the changes are “form over substance”, an attempt to fine-tune the 2018 version and improve the overall flow of the agreement. However, the following changes are noteworthy for those assisting with drafting and other front-end project work.

Segments A, B and C

In the 2018 form, the four project phases of the IPD contract: Validation, Design/Procurement, Construction and Warranty were found in GC 4. In the 2025 form, these phases are found immediately after the articles, organized into two Segments: Segment A – Validation (deals only with the Validation process) and Segment B – Project Execution (covers Design/Procurement, Construction and Warranty). Segment C contains the general articles of the agreement, which remain largely unchanged from the 2018 version, aside from the addition of Article C-3 (Added Value Incentive Items), previously found in Article A-4, though revised to include specific criteria for adding such items, as discussed below.

Segment A – Validation Phase

Acceptance (or not) of the Validation Report is important, because acceptance is the “green light” for the project. In the 2025 form, Article A3.1 is revised such that the Validation Report, which was previously prepared for acceptance by the Owner alone, is now prepared for acceptance by the SMT (Senior Management Team). Decisions of the SMT are to be unanimous, per GC 3.1.5.² The SMT is comprised of members from each party to the contract, which typically includes one senior management representative from each of the Owner, the Contractor and the Consultant. Therefore, on its face, the new form takes approval of the Validation Report, and green lighting of the project, out of the Owner’s sole control and puts it into that of the SMT, requiring a unanimous vote. However, the Owner still has an “off-ramp”, since it may vote not to accept the Validation Report, in which case the Owner has termination rights under GC 8.3.³ The Owner may also terminate the Contract any time prior to acceptance of the Validation Report, per GC 8.3.1.

¹ Also updated are the standard form CCDC 5A (Construction Management Contract for Services), CCDC 5B (Construction Management for Services and Construction) and CCDC 17 (Stipulated Price Contract for Trade Contractors on Construction Management Projects).

² Subject to the exception found in GC 8.1.10.

³ Article A4.1.

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Articles A4.1 and A4.2 are both new additions to the concept of termination for failure to achieve Validation. These are in addition to the termination rights set out in GC 8.3. Both deal with termination if the SMT does not accept the Validation Report. In that instance, A4.1 allows the Owner to terminate, and A4.2 permits any member of the Design/Construction Team (comprised of the Consultant, the Contractor and any Other IPD Parties) to terminate.

Segment B – Project Execution

The 2025 form makes establishing of the Final Target Cost a condition precedent to commencing the Construction Phase, which should provide greater cost certainty to the Owner, and visibility as to the amount of the Profit Pool⁴ for the Design/Construction Team.

Articles B3.3 to B3.8 are new. These provisions relate to “Ready-for-Takeover”, a newly added concept in the CCDC 30.⁵ Ready-for-Takeover replaces Substantial Performance of the Work in many places in the new form, though the latter remains a defined term and is still used in the contract. The PMT (Project Management Team) is responsible for verifying Ready-for-Takeover, and the criteria for attaining it is determined by the IPD Team during the Validation Phase. The definition of Ready-for-Takeover includes some criteria which may be required to achieve verification, including achieving Substantial Performance of the Work.

Changes to Articles B4.2 and B4.3 in the Warranty Phase include removal of the words “in the Work” in reference to defects and deficiencies. Since the definition of “Work” excludes Design Services, this change broadens the scope of the warranty obligations to include deficiencies in both work and design.

Segment C – General Articles

As mentioned above, Article C3.3 is new to the 2025 form. It specifically permits the addition of Added Value Incentive Items during the Construction Phase, but only where the conditions set out in .1 to .3 are met, which includes a cost formula, the intention of which is to put a governor on the value of scope of work added during the Construction Phase in an effort to reduce project execution and schedule risk.

⁴ Note that the Profit Pool, as it is called in the 2025 form, was called the Risk Pool in the 2018 form.

⁵ Note that the concept of Ready-for-Takeover is found in the CCDC 2 – 2020.

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Concepts Added and Eliminated

While the “Big Room”, a shared, co-located space where project-specific activities take place, was a concept in practice, it is now a defined term in the 2025 form. “Payment Legislation” is also now defined, and changes have been made to address prompt payment regimes, where they exist.⁶

Notably, the concept of an “Owner Directive”, which permitted the Owner to require the Design/Construction Team to proceed with a change prior to agreeing to the corresponding price adjustment, is removed. As such, in the new CCDC 30, the Owner is no longer able to issue a change directive.

The provision in the 2018 form stating that PMT decisions are final and not subject to review or modification, except by PMT or SMT action, has been removed.⁷ The concept of Key Personnel has been added in the new form, together with Schedule G where such personnel are to be listed. Replacement of Key Personnel is dealt with in newly added GC 3.4.2 and 3.4.3.

Changes to GC 5.1.2 provide that pay applications can now include materials that are not yet delivered to site (previously, materials had to be delivered to site in order to be included).

Changes to GC 8.2 (Owner’s Right to Terminate) include the addition of wording to GC 8.2.4 which limits the Owner’s right to set off losses and damages caused by default from amounts otherwise owing under the Profit Pool, to the list of exceptions found at GC 10.1.1 (the waiver of liability clause).

A new clause has been added as GC 8.3.8, which provides that the rights and remedies found in GC 8.3 are the parties’ sole rights and remedies arising in consequence of any termination prior to acceptance of the Validation Report.

New clause 8.5 is added to specify a curing period for default under the contract, something which was missing in the prior version (and consistently added with the use of Supplementary Conditions).

Changes to the carve outs for claims found at GC 10.1.1 include the addition of claims arising from a party’s willful misconduct, fraudulent or criminal acts, or abandonment of the Design Services or the Work.⁸ GC 10.1.1.2 is added to include claims arising from breach of applicable laws and any

⁶ See GC 5.1

⁷ GC 3.2.5 in CCDC 30 – 2018.

⁸ GC 10.1.1.1.

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violation of “applicable environmental, labour or occupational health and safety legislation”. Changes to GC 10.1.1.3 clarify that this carve out includes claims arising from any “failure to perform” express warranty obligations or “failure to provide” third-party warranties. GC 10.1.1.6 is revised to include claims that would have been covered by insurance, had it been obtained as required by the contract. GC 10.1.1.8, which provides for claims resulting from “substantial defects or deficiencies”, now includes claims for defects or deficiencies in the Design Services, as well as the Work.

GC 10.1.2 has been revised slightly to relocate reference to the word “consequential”, although the author queries whether the wording is clear enough to exclude these types of claims with certainty.

Conclusion

While still in its infancy, industry feedback on the CCDC 30 – 2025 is that, overall, the changes are a step in the right direction for IPD. Many of the changes incorporate concepts that had been at play already and regularly seen in Supplementary Conditions. In many respects, the changes are aimed at making the contract even more “team focused”, though it does also expand the carve outs to the waiver of claims.

Even with the new form, Owners will still want (and need) Supplementary Conditions to tailor the contract to their needs.

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