Canadian College of Construction Lawyers

LEGAL UPDATE

CCCL | CCAC

L.U. #173

December 22, 2025

INSIDE THIS ISSUE:

Editors' Note

It is with pleasure that Catriona Otto-Johnston and Brendan Bowles, together with the entire Legal Update Committee, bring you the final issue of 2025. In reflecting on the past year, numerous decisions of interest to the construction industry were issued from jurisdictions across the country and changes to CCDC standard form contracts were released, providing updates to forms that most construction lawyers encounter regularly in practice. The Legal Update Committee is pleased to have included commentary on these decisions, as well as providing insight into updates to these standard form construction contracts and other various topics of interest to the Fellows.

We start Legal Update #173 with not one, but two, comments from the Saskatchewan Court of Appeal. Collin Hirshfeld, K.C., provides insight on both. The first is the decision in JV&M Civil Constructors Inc v Farnham, 2025 SKCA 72, involving the issue of agent liability for registering excessive liens. Lien legislation in jurisdictions across Canada typically contain some type of recourse against a lien claimant for registration of inflated liens. It is interesting to see how the Saskatchewan Court of Appeal dealt with this issue in light of the wording of the Saskatchewan Act. The second is the decision in Ace Burger Ltd v G and I Construction Group Inc., 2025 SKCA 82, which deals with interpretation of cost-plus contracts. It is always interesting to read how a Canadian court interprets these types of contracts, and Collin provides his insight as to key takeaways from the case.

In Legal Update #172, Catriona Otto-Johnston provided commentary on recent changes to the CCDC 30 form of IPD contract. In this issue, Jack Kent, a Partner at Reynolds Mirth Richards & Farmer, provides a summary of and insight into some of the key changes to the CCDC 5A, 5B and 17 forms.

Fellows should be aware of a major development coming in the ongoing process of reforming Ontario's Construction Act. As of January 1, 2026, legislative amendments, including updated regulations arising from Duncan Glaholt's 2024 independent review for the Ministry of the Attorney General will take effect. Jason Annibale and Natasha Rodrigues summarize the key changes that will be in place in the new year.

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Brendan D. Bowles

Catriona Otto-Johnston

Jason and Natasha have also helpfully summarized a significant legislative development at the federal level, Bill C-5 – Fast-Tracking National Interest Projects in Canada.

Earlier this year, changes were made to Alberta's Prompt Payment and Construction Lien Act, which were summarized in Legal Update #169 by Catriona Otto-Johnston and Marissa Dimmell of Rose LLP. These amendments included s.5(2), which permits a "prescribed class of professionals acting in a consultative capacity" to waive lien rights. The Prompt Payment and Adjudication Regulation has now been updated to specify the 'prescribed class of professionals': regulated professional engineers and regulated professional architects (s.35.1). While this specification comes as no surprise, until release of the updated Regulations, it was not clear who the lien waiver applied to, and so in particular for drafters of consulting agreements, there was some uncertainty as to whether this waiver was enforceable, absent updated Regulations. This amendment to the Regulations will provide much appreciated clarity going forward.

In closing, and on behalf of the Legal Update Committee, Catriona and Brendan wish you and your loved ones a safe and happy rest of the year. We look forward to bringing you more interesting content in 2026.

Agent Liability for Excessive Liens – The Saskatchewan View

LU #173 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Saskatchewan
Author:
Collin Hirschfeld, K.C., McKercher LLP

CanLii Reference:
2025 SKCA 72

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Collin K. Hirschfeld

Agent Liability for Excessive Liens – The Saskatchewan View

As we all know, a corporate entity has to generally act through agents in what it does. The same applies when filing lien claims and completing the necessary documents. In *JV&M Civil Constructors Inc v Farnham*, 2025 SKCA 72, the Saskatchewan Court of Appeal was faced with the question of the extent of liability for such an agent in the context of an alleged excessive lien claim.

JV&M Civil Constructors Inc. ("JV&M") was the general contractor on a water treatment plant project who subcontracted with Black & McDonald Limited ("B&M") to perform mechanical and electrical aspects of the project. A dispute arose between JV&M and B&M as to the quality and timeliness of the work completed under two subcontracts. JV&M signed certificates of substantial performance but did not pay B&M in full. As result, B&M filed a written notice of lien and a claim of lien for the alleged indebtedness owing by JV&M. Farnham, the division manager for B&M, caused the claim of lien to be served on JV&M. He also verified the amount of the claim of lien by swearing an affidavit—a statutory requirement under *The Builders Lien Act*, SS 1984-85-86, c B-7.1 ("*BLA*").

B&M issued a statement of claim against JV&M and its directors, the Ursels, for breach of contract, unjust enrichment and breach of trust. JV&M defended, denying the amount owing, and counterclaimed against B&M and Farnham, alleging, amongst other things, that they breached section 53 of the *BLA* because they knew or ought to have known that the lien was grossly exaggerated as they had failed to take into account an alleged set off. JV&M took the position it was entitled to recover against Farnham in his personal capacity and claimed solicitor-client costs against him.

Farnham and B&M applied to have the claim against Farnham struck out on the basis it disclosed no reasonable cause of action and was an abuse of process. The Chambers Judge agreed and struck out the relevant portions of the statement of claim.

Section 53 of the *BLA* provides:

> 53 In addition to any other ground on which he may be liable, any person who registers a claim of lien or who gives written notice of lien:
>
> (a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or
>
> (b) where he knows or ought to know that he does not have a lien;

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is liable to any person who suffers loss or damage as a result.

The question largely revolved around who was a "person." Employing the modern approach to statutory interpretation, the Court of Appeal found s. 53 of the *BLA* intended that only the lien claimant be liable for a grossly exaggerated lien claim.

The Court noted the section starts by referring to "any person who registers a claim of lien or gives a written notice of lien." It then uses the singular pronoun "he" to signify that person, making reference to each of "he [who] maybe liable", "he [who] knows or ought to know [the amount claimed] is grossly in excess" and "he [who] is owed" an amount. The Court pointed out that under s. 2-23 of *The Legislation Act*, SS 2019, c L-10.2 the use of gender-specific words refers to any gender and includes corporations. All the persons under s. 53 were one in the same, i.e., "*he* who may be liable is the same person as *he* who is owed an amount pursuant to a claim of lien—namely, *he* who is the lien claimant."

In other words, the Legislature intended that "any person who registers a claim of lien" is the same person as "*he* [who] knows or ought to know [the lien claimed] is grossly in excess of the amount which *he* is owed." He who is owed an amount is the lien claimant.

The Court felt this was consistent with the objects and purpose of the *BLA*. The primary purpose is to provide financial protection for those who provide services and materials on credit, with the secondary purpose being the protection of the owner/financier of the improvement. The overall focus was to ensure people are paid for the work and material they contribute to improvements of real property.

The Court stated, "It is difficult to see how conferring personal liability on an agent who stands to gain nothing through a claim of lien engages with this purpose." A corporation requires an agent to act for them, and when the agent files a claim of lien on a corporation's behalf, it is the corporation—not the agent—that is the lien claimant. The corporation is the one that enjoys the benefits of the claim of lien, not its agents. If JV&M's interpretation were to hold sway, the agent would bear all possible liability personally, while sharing in none of the benefits; meanwhile the principal would receive all potential benefits but bear none of the potential liability. That would discourage agents from filing claims of lien, thereby effectively preventing corporations from being able to avail themselves of the *BLA*'s protections.

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Alternative claim in negligence

JV&M also alleged it had a claim in negligence against Farnham as a result of a statutory duty of care Farnham owed to it due to Farnham's participation in the preparation, filing, registration, and provision of an affidavit verifying the claim of lien. It was argued the *BLA* established and defined a standard of care for a lien claimant's agent by setting out specific responsibilities and obligations of the agent in ss. 22, 28, 50(3), and 83, which includes a duty to inform oneself of the actual value of the lien.

The Court held the *BLA* contained no such duty of care and, given it was a comprehensive statute, if the Legislature intended to impose such a duty of care on an agent it would have explicitly done so. None of the sections referenced by JV&M spoke directly to any obligation that could give rise to a duty of care. Although s. 50(3) requires the affiant who verifies a lien claim to inform themselves of the facts set out in the claim and state them to be true, that does not give rise to a legal obligation to adhere to a standard of care that protects an owner or contractor from foreseeable risk of loss or damage.

Costs as a cause of action

JV&M also argued Farnham was liable to it for costs under the *BLA* and that its claim for solicitor-client costs was a reasonable cause of action. The Court noted that the Legislature had turned its mind to what liability an agent who participates in the registration of a lien can face and referred to s. 97 of the *BLA*. The provision specifically says an order for costs may be made against "the solicitor or agent of any party to the action or application, where the solicitor or agent has…knowingly participated in the registration of a claim of lien…where it is clear the claim of lien is without foundation or is for a grossly excessive amount." However, while the Court could order costs against the agent, that did not amount to potential liability for damages to ground a cause of action.

Key takeaways

Under the BLA, the only party with potential liability for an excessive or non-existent lien is the lien claimant, whether they are an individual or other legal entity. Special attention will have to be paid to the wording of legislation in other jurisdictions to see if this case could be argued to support a similar interpretation. The Court also confirms there is no claim in negligence against an agent for a corporate or other lien claimant for involvement in

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filing a claim of lien. However, the agent can be liable for an order for costs for an excessive lien, though that liability does not support an independent cause of action. Rather, the claim for costs against the agent would be included in the other pleadings in the matter.

Guiding Principles in Interpreting Cost-Plus Contracts – A View from the Saskatchewan Court of Appeal

Guiding Principles in Interpreting Cost-Plus Contracts – A View from the Saskatchewan Court of Appeal

LU #173 [2025]

Primary Topic:
III. Building Contract
Jurisdiction:
Saskatchewan
Author:
Collin Hirschfeld, K.C., McKercher LLP

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2025 SKCA 82

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Collin K. Hirschfeld

There is a paucity of case law in Saskatchewan on cost-plus contracts, despite it being a relatively common method of contract delivery. It was therefore a rarity when the Court of Appeal in *Ace Burger Ltd v G and I Construction Group Inc.*, 2025 SKCA 82 opined to give some guidelines to assist in the interpretation of these types of contracts.

Ace Burger wished to open a new restaurant in a former restaurant space that required renovations. G&I had worked with the parties behind Ace Burger on two past restaurant renovations and so was retained to work on the new site. Because of the familiarity and past relationships, the parties entered into a verbal agreement that G&I would complete the renovations on a cost-plus basis with a 10% mark up. There were no estimates or quotations sought or provided before the renovations began or during performance of the work.

Perhaps not surprisingly, Ace Burger described the renovations as "some minor repairs and cosmetic updates," while G&I felt it was much more extensive. Eighteen different subcontractors and suppliers had been engaged to complete the renovations, which were started May 1 and completed by June 27. Starting in July, G&I provided several different final invoices, none of which were entirely consistent, causing Ace Burger to raise concerns. Ace Burger only partially paid, so G&I commenced a legal action seeking $83,113.66. G&I then sought summary judgment for its claim.

The lower Court found that the parties entered a verbal contract on a cost-plus basis, with no estimates or quotations and no maximum price. It also found the renovations had been completed and the work was not deficient. The Court adopted a decision of the Ontario Superior Court in *Infinity Construction v Skyline Executive Acquisitions Inc*, 2020 ONSC 77 ("*Infinity Construction*") for the principles governing the interpretation of cost-plus contracts. In particular, the lower Court relied on the 14 principles outlined by Healy, J. in *Infinity Construction* at paragraph 114 of that decision. The lower Court noted, though, that not all of the principles from *Infinity Construction* applied to the situation before it.

The lower Court also relied on *GT Parmenter Construction Ltd v Sanders*, [1947] OWN 539 (Ont H Ct J) for support for the proposition that a contractor in a cost-plus contract is obliged to keep proper accounts but not in a particular manner. The lower Court held that obligation principally related to the contractor's internal costs, which needed to be strictly proved, and not the internal costs of the subcontractors and suppliers. The contractor still had a duty to question subcontractor and supplier charges where they ap-

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peared questionable, but that duty would be met by exercising reasonable diligence.

In applying the principles to the case, the lower Court found for G&I. Ace Burger filed an appeal.

Court of Appeal

The Court of Appeal noted that *Infinity Construction* was largely distinguishable to the appeal before it because there was no estimate provided for the work to be performed by G&I. It was of the view that, for the most part, the principles in *Infinity Construction* related to comparing a quotation or estimate to the final invoice rendered. As such, those principles were of limited use. The Court also pointed out that the Court in *Infinity Construction* seemed to talk about a differing burden of proof while it had since been established that the burden of proof is always on balance of probabilities.

That being said, the Court accepted the three-part process in *Infinity Construction* for proving a claim under a cost-plus contact. Those steps are:

1. the contractor is required to prove that the charges claimed were for the purpose of completing the work contracted for and that those charges were accurate;
2. if that is demonstrated, then the onus shifts to the opposing party to provide evidence to suggest that the amounts the contractor claims are incorrect or unreliable;

if that is done, the onus then shifts back to the contractor to satisfy the Court that its accounts are accurate and reliable.

The Court noted the lower Court properly implied terms that prevented payment for wasteful or uneconomical use of labour or materials. It also found the lower Court specifically considered this term and found that the costs were not wasteful or uneconomical because it determined that the evidence did not show the costs claimed were incorrect or unreliable. Rather, G&I's expenses fell within the expected scope of work, it had done its best to negotiate reasonable terms with its subcontractors and suppliers, there was no admissible evidence challenging the reasonableness of the costs claimed, and the principals of Ace Burger conceded they did not have concerns about the quality of the work.

Because there was no initial estimate, it was not possible to identify any "degree of variance between the estimate and the final price." It is the reasonableness of the degree of variance between an estimate and the final

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price that is contemplated in *Infinity Construction*. The bounds of reasonableness do not apply to a situation where there is no estimate provided. In those circumstances, the contractor is not required to prove the reasonableness of the amounts it charged; it only has to show that its costs were accurate. So the first step involved validating G&I's accounts.

Ace Burger also argued the lower Court failed to consider whether G&I had shown it kept proper accounts. The Court of Appeal found the lower Court had indeed scrutinized G&I's invoices in detail and that it had exercised reasonable diligence with the charges of the subcontractors and suppliers.

Ace Burger also argued the lower Court erred in rejecting evidence from the principals of Ace Burger related to their experience with restaurant renovations and other projects of a similar nature as opinion evidence. The lower Court accepted those portions of the affidavits as statements of position only, and not fact or expert evidence. In addition, evidence from other contractors was also rejected as none of that evidence came from properly qualified expert evidence. The Court of Appeal therefore found no error had been committed.

The final issue on appeal was whether the lower Court erred in not requiring G&I to provide expert evidence on the reasonableness of its accounts. Ace Burger further argued the Court in effect reversed the burden of proof by accepting G&I's sworn assertion that it incurred the invoiced expenses in completing the renovations and then suggesting that Ace Burger should have called expert witness instead of simply providing estimates from other contractors.

The Court of Appeal held that at the first stage of inquiry of the three-part process a contractor does not need expert evidence to prove the accuracy of its costs. It just has to establish that its costs were incurred for the work being performed under the contract and that the costs claimed are accurate. If that is shown, the second stage is engaged and the onus shifts to the opposing party to show that the costs incurred are incorrect, unreliable or otherwise wasteful. It is at this stage that expert evidence might assist the Court, especially if the opposing party is trying to show a cost claimed was wasteful or unreasonable. In those circumstances, a comparable could be useful to the Court; but a comparable often involves an expression of

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[1] For a summary of the Report, see I. Merrow, "Ontario Dispute Adjudication for Construction Contracts ("ODACC") Annual Report in Review", in *Building Insight, Adjudication: One Year in Review*, www.glaholt.com.

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opinion, which needs to be introduced through a qualified expert.

Key Takeaways

In cases where no estimates are provided, a contractor involved in a cost-plus contract has to show that the charges they incurred were to complete the work and that they were accurate. While detailed information on the contractor costs would generally be required, when it comes to the costs of subcontractors and suppliers, the contractor need only show it exercised reasonable diligence in relation to those expenses. No expert evidence is needed at this stage and, if the contractor passes that hurdle, the owner then has to provide evidence to show the amounts put forward by the contractor are incorrect, unreliable or otherwise wasteful. If the latter is being attempted, it is likely a good idea to have expert evidence reviewing the costs being claimed for wastefulness or for being uneconomical. If the owner can do that, then the onus shifts back to the contractor to show the accounts are accurate and reliable.

Because the Court was not required to review the remaining principles in *Infinity Construction*, it arguably remains to be seen whether it is good law in Saskatchewan. That being said, it could be argued that the *obiter* comments of the Court when discussing the principles in *Infinity Construction* give a good indication of the way the Court could go in future decisions, so those principles should be kept in mind when dealing with a cost-plus contract situation.

Construction Management Contracts: Updated, Refined, and Reflective of Modern Practice

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Reynolds Mirth
Richards & Farmer

CANADA

Jack Kent

The Canadian Construction Documents Committee (CCDC) recently issued updates to four of its standard form contracts. This article focuses on changes to the following three contracts:

- CCDC 5A – Construction Management Contract – For Services;
- CCDC 5B – Construction Management Contract for Services and Construction; and
- CCDC 17 – Stipulated Price Contract Between Owner and Trade Contractor for Construction Management Projects (collectively, the "**2025 CM Contracts**").

These updates (the first since 2010) reflect efforts to align the construction management suite with CCDC 2 – 2020, to integrate modern risk allocation principles, and to address prompt payment legislation (now adopted in many Canadian jurisdictions).
While most of the changes focus on structure or style, there are a number of substantive revisions.

Alignment with CCDC 2 – 2020 and other CCDC contracts

The 2025 CM Contracts have been modernized to ensure consistency with CCDC 2 – 2020. Three key areas of alignment include:

1. Ready for Takeover: The 2025 CM Contracts introduce the concept of "Ready-for-Takeover" and shift away from "Substantial Performance of the Work" for project handover, occupancy, warranty and insurance.[1] This change expands the Construction Manager's obligations by requiring additional steps before the project can be considered complete. These include obtaining occupancy permits, performing final cleaning, delivering operations and maintenance manuals, providing as-built documentation, and conducting demonstrations and training for the owner's personnel. This change formalizes expectations that were often imposed through supplementary conditions. Although it heightens procedural requirements, it may ultimately improve project closeout transparency and mitigate disputes over readiness milestones. The concept of Substantial Performance continues to dictate the commencement of lien periods and the release of holdbacks in accordance with applicable lien legislation.
2. Early Occupancy: The Owner's ability to occupy part or all of the Work before "Ready-for-Takeover" is now codified, requiring the Construction Manager's consent (not to be unreasonably withheld) and approval by authorities having jurisdiction.[2] If the Owner seeks to occupy a portion of

[1] Ready-for-Takeover at GC 9.1 in CCDC 5A and GC 12.1 in CCDC 5B and CCDC-17.
[2] Early Occupancy by Owner at GC 9.2 in CCDC 5A and GC 12.2 in CCDC 5B and CCDC-17.

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Reynolds Mirth
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the Work, the Construction Manager is no longer liable for the care of that portion and the warranty period for those areas will commence. If the entirety of the Work is occupied early, the Work is deemed to have achieved "Ready-for-Takeover". This codification provides clarity to an area that previously relied heavily on *ad hoc* agreement. It balances Owner flexibility with Construction Manager protection.

3. Payment Obligations: The concept of "Payment Legislation" is introduced to better reflect the prompt payment legislation that has been implemented across multiple Canadian jurisdictions. Contracts now require construction managers and trade contractors to submit monthly applications for payment, resulting in owners being required to pay within 28 calendar days of receipt.[3] Incorporating statutory payment timelines directly into these standard forms promotes national consistency and reduces the need for supplementary terms. However, practitioners should ensure compliance workflows align with provincial variations.

Clarification of Services, Contract Price and Schedule

The 2025 CM Contracts provide clearer guidance regarding the scope of services to be performed by the Construction Manager and the determination of the Contract Price and the Schedule of Work.

In the previous versions of CCDC 5A and 5B, the pre-construction services were included within the overall services and compensation but lacked a distinct contractual definition or a mechanism to properly allocate payment.

The new CCDC 5B replaces the defined term "Services" with "Pre-Construction Services" (which is set out in a completely redrafted Schedule A1 – Pre-Construction Services) and "Construction Services" (which is set out in a completely redrafted Schedule B - Construction Services). Since these services are delineated, there is greater flexibility in specifying whether fees are fixed, time-based (for Pre-Construction Services), or percentage based (for Construction Services).[4]

Although the new CCDC 5A does not bifurcate the definition of "Services", there is a revised Schedule A1 to improve clarity on the services to be provided. The new document also provides greater flexibility in pricing by permitting the parties to specify a fixed fee for the Pre-Construction Phase, and either a fixed or percentage fee for both the "Construction Phase" and "Post-Construction Phase". [5]

[3] Payment at GC 4.2 in CCDC 5A, Payment for the Work at GC 5.5 in CCDC 5B, Payment at GC 5.3 of CCDC-17.
[4] CCDC 5B - Article A5 to A7.
[5] CCDC 5A - Article A5.

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In addition to clarifications in scope and price, both the new CCDC 5A and 5B contracts provide greater schedule certainty by introducing separate Construction Schedules (provided by Construction Manager and periodically updated) and Project Schedules (provided by Owner and may include Owner's activities).
These refinements enhance transparency and better reflect industry practice by delineating project phases and associated compensation models. The approach is intended to promote clearer budgeting, billing, and accountability.

Termination for convenience

In both the CCDC 5A and 5B, the Owner has a new right to terminate for convenience (i.e. if the owner is "unwilling or unable to proceed"). The compensation payable to the Construction Manager upon such termination is as follows:

- In CCDC 5A, the Owner is required to pay the Construction Manager for all services performed up to the effective termination date, as well as any direct damages, in the form of a "break fee" pre-agreed by the parties at the time of execution of the contract, which is calculated based on a predetermined percentage of the latest accepted Construction Cost Estimate.[6] For instance, the parties might agree to a break fee of 10% of the construction cost estimate if the termination occurs prior to the Class A Construction Cost.[7]

- In CCDC 5B, the Owner is similarly required to pay the Construction Manager for all services performed up to the effective termination date, but the Owner's additional obligations depend on whether the termination occurs during the Pre-Construction Phase or Construction Phase.[8] In the Pre-Construction Phase, the Construction Manager's entitlement mirrors the entitlement under CCDC 5A. In the Construction Phase, the Construction Manager is entitled to "such other direct damages as the Construction Manager may have sustained as a result of the termination including reasonable loss of profit".

For both contracts, the addition of a defined break-fee structure is intended to provide predictability for both parties and to mitigate potential disputes over lost opportunity or indirect damages.

[6] CCDC 5A – GC 6.1.7
[7] CCDC 5A – Article 5.5
[8] CCDC 5B – GC 7.1.9

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Limitation of Liability

The limitation of liability has undergone substantial modification and clarification, which can be categorized into the following three concepts.[9]

First, the application of the limitation of liability has been revised from "the obligation of either party to indemnify" to "the liability of either party … under any legal theory". This is a significant change which is intended to cap all potential liability (i.e. in contract, tort, etc.), and not only indemnity claims.

Second, the minimum and maximum liability for uninsured losses has been standardized across the construction management contracts by revisions to CCDC 5A. In CCDC 5A – 2025, the Construction Manager[10] is now responsible for uninsured losses under any legal theory for the greater of the amount paid to Construction Manager or $2 million, with an overall liability cap of $20 million. These minimums and maximums already existed for the Construction Manager in the prior CCDC 5B and the Trade Contractor in the prior CCDC-17 and remain in both of these updated contracts.

Third, the exclusions to the limitation of liability are more clearly identified and now specify that limitation of liability does not extend to particular types of conduct (e.g. willful or criminal acts).

These changes offer greater certainty to both Owners and Construction Managers and bring coherence across the CCDC suite of contracts. Nonetheless, parties should ensure that caps align with project scale and insurance coverage.

Waiver of Consequential Damages

The 2025 CM Contracts now include a waiver of consequential damages (subject to the same exclusions as the limitation of liability), which states that "…neither party shall have any liability to the other for indirect, consequential, punitive or exemplary damages."[11]

Conclusion and Takeaways

The CCDC updates codify established practices, improve contractual symmetry within the CCDC documents, and increase alignment with recent legislative developments.

[9] CCDC 5A – GC 10.2, CCDC 17 – GC 13.2, and CCDC 5B – GC 13.2.
[10] Fee for Service in CCDC 5A and Contract Price in CCDC 5B.
[11] CCDC5A – GC 10.2.1.3, CCDC 17 – GC 13.2.1.3, and CCDC 5B – GC 13.2.1.3.

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Practitioners should remind their clients to review their processes and ensure that their standard practices align with the new definitions (and the associated pricing) and the prompt payment workflows.

Despite the changes, supplemental conditions are likely still necessary for project-specific adjustments, however, the revised CCDC forms should hopefully reduce the need for extensive customization and improve baseline clarity.

Legislative Reforms to Ontario's Construction Act Coming into Force January 1, 2026

LU #173 [2025]

Primary Topic:
II. Statutory Regulation
Jurisdiction:
Canada
Author:
Jason J. Annibale and Natasha R. Rodrigues, McMillan LLP

ONTARIO

Jason Annibale

Natasha Rodrigues

Legislative Reforms to Ontario's Construction Act Coming into Force January 1, 2026

The legislative amendments to Ontario's *Construction Act* (the "***Act***") resulting from Duncan Glaholt's October 30, 2024, *independent review* for the Ministry of the Attorney General will take effect on January 1, 2026.

Less than a week after the release of Mr. Glaholt's report, the *Building Ontario For You Act* ("**Bill 216**") introduced key amendments to the ***Act*** and received Royal Assent on November 6, 2024. However, the amendments to the *Act* did not come into force at that time as, in part, key regulations applicable to the amendments were not ready.

On August 25, 2025, we came one step closer to the amendments coming into force as the Province released for comment a new set of regulations to the *Act*, together with a Consultation Paper on the Ontario Regulatory Registry. Comments were solicited and received by September 24, 2025. The draft amendments to the *Act* and regulations were finalized and came into force after this consultation process.

The new regulations entirely replace existing Ontario Regulation 306/18 – Adjudications under Part II.1 of the *Act* and amend certain other regulations existing under the *Act*.

Key changes to the body of the *Act* include technical amendments to the *Act*, and new rules regarding annual release of holdback.

This article highlights key changes to the *Act* and regulations which will come into force on the first day of the new year.

(1) Expanding the Scope of Adjudication

The 2024 Report included several recommendations centered on strengthening and expanding access to and the use of adjudication in Ontario. While many of these recommendations were implemented through Bill 216, key details and further required changes were left to the regulations as described below.

A. Expansion of Matters Eligible for Adjudication

The new regulations add contractual performance issues linked to payment disputes to matters that can be adjudicated under the Act. Specifically, the regulations expand the list of matters for adjudication to include the following matters, "if it is reasonably necessary to resolve a dispute" to make a determination on another matter that may be adjudicated:

i. the scope of work required to be performed under the contract.

ii. a request for a change in the contract price.

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iii. a request for an extension of time in the completion of work required to be performed under the contract.

According to the Consultation Paper, this change would: "clarify for adjudicators and the construction industry when it's permissible to address issues outside the 'four corners' of a proper invoice, while maintaining adjudication's core focus on payment disputes that could delay and derail construction projects."[1]

In furtherance of the mandatory annual holdback release introduced by the Bill 216 amendments, the regulations also modify paragraph 5 of the list of matters that can be adjudicated to include disputes relating to the annual release of holdback and holdback payments.

B. Private Adjudicators

Consistent with a recommendation in the 2024 Report,[2] the new regulations permit the use of private adjudicators in addition to the existing ODACC roster. Although private adjudicators would still be qualified and certified by ODACC and would be subject to the same code of conduct, the certification process would be shorter, a different fee structure would apply, and they would not appear on the ODACC adjudicator roster. Also, private adjudicators would be required to charge a **minimum** of $1,000 per hour for all adjudications they perform, and $350 of each hourly fee would be payable in administrative fees to ODACC, up to $30,000.[3]

C. Publication of Adjudication Determinations

Presently, adjudication determinations are kept confidential between the parties. However, the new regulations contemplate the public release of adjudication determinations in an effort to establish a body of precedents.[4]

Prior to being released, the determinations will be anonymized if the parties' request. The scope of redactions will be determined by the parties to the adjudication. We expect that, over time, this will provide a growing body of law, while keeping the identities of parties confidential.

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[1] Discussion Paper - Proposed Regulatory Amendments Following Independent 2024 Ontario Construction Act Review dated August 25, 2025 (the "**Consultation Paper**") at pgs. 11-12.

[2] With respect to Section 13.9 of the *Act*, the 2024 Report recommended that the Province: "[a]mend s. 13.9 to permit the parties to agree on the appointment of any natural person who has completed ODACC training as a private adjudicator for any referred dispute, provided that the appointment is made in writing, signed by the parties and the proposed adjudicator, and discloses all commercial terms between the parties including provision for the payment by the parties of ODACC's one-time administration charge for such private adjudications. The one-time administration fee should be recalibrated periodically as necessary to fairly compensate ODACC for the actual cost of administrative services to be provided together with reasonable recovery of overhead and profit."

[3] Consultation Paper at pg. 14.

[4] *Ibid.* at pg. 19.

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(2) Technical Amendments to the Act

In addition to the proposed amendments to the adjudication regime, the new regulations include amendments to implement technical changes which are "intended to improve the effectiveness of the Act and to provide greater clarity and certainty to the construction industry."[5]

A. Joinder

Although prior amendments to the *Act* repealed the prohibition against joinder of lien and trust claims, the Consultation Paper noted that the lack of enabling language in either the Act or its regulations led to uncertainty and confusion. On this basis, the regulations amend Section 3 of the current Ontario Regulation 302/18 to allow a party to "join a lien claim and a claim for breach of trust under Part II of the Act."[6]

B. Publication in Construction Trade Newspapers

The definition of "construction trade newspaper" under existing Ontario Regulation 304/18 is currently broadly defined to include any newspaper: (a) that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario, (b) that is published at least daily on all days other than Saturdays and holidays, (c) in which calls for tender on construction contracts are customarily published, and (d) that is primarily devoted to the publication of matters of concern to the construction industry.

Consistent with a recommendation in the 2024 Report, the regulations modify the definition of "construction trade newspaper" to the following websites:

- The Daily Commercial News.
- Link2Build.
- Ontario Construction News.

These amendments are intended to address the uncertainty described in the 2024 Report as to where to search for and publish statutory notices under the *Act*.[7]

(3) Holdback

a. Annual Release of Holdback, the Expiry of Liens, and Notice of Termination

Basic holdback will be required to be released annually for all contracts. Pres-

[5] *Ibid.* at pg. 21.
[6] *Ibid.* at pg. 21.
[7] *Ibid.* at pg. 27.

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ently, annual release of holdback is optional and only available for contracts with a contract price of more than $10,000,000.

The new holdback regime[8] will require owners to,

1. publish a notice of annual release of holdback (the new Form 6) in a construction trade news website, within 14 days of the anniversary of the date the contract was entered into; and

2. release holdback accrued during the contract year at least 60 days but not later than 74 days after the date on which the notice of annual release of holdback is published.

In turn, contractors will be required to release holdback to subcontractors within 14 days of receiving payment from the owner, and so on down through the construction pyramid with subcontractors. Consistent with current holdback release practices, the annual release of holdback will remain subject to the requirement that no liens have been preserved or written notices of lien issued.

The present sections of the *Act* relating to optional annual holdback release (s. 26.1), optional phased holdback release (s. 26.2), and withholding of holdback by notice (s. 27.1) will all be repealed. This means that (i) terms in existing contracts that currently provide for annual or phased holdback pursuant to ss. 26.1 and 26.2 will no longer be enforceable, and (ii) owners will no longer be able to use a notice of non-payment of holdback to assert set-off rights against the holdback for deficient work or similar claims (given the repeal of s. 27.1).

The timing for the preservation, perfection and expiry of liens will remain the same.

Owners and contractors will be required to publish a notice of termination within 7 days of the termination of a contract.[9] The date of publication of the notice of termination will be considered the date of termination triggering the start date for calculating the applicable lien(s).

B. Transition Provisions for Annual Release of Holdback

Contracts entered into on or after January 1, 2026 will have the process for their first notice and annual holdback release starting on January 1, 2027 or later, depending on the date the contract was entered into.[10]

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[8] *Construction Act*, RSO 1990, c C.30, s. 26
[9] *Construction Act*, RSO 1990, c C.30, s. 31(8).
[10] *Construction Act*, RSO 1990, c C.30, s. 87.4(2).

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For contracts entered into before January 1, 2026, the trigger for the first annual holdback release is the second anniversary of the contract date after the amendments come into force. For example, a contract dated March 19, 2025, will have its first annual release of holdback on March 19, 2027. At such time, the annual basic holdback release will include all accrued basic holdback up to that first annual holdback payment.[11]

Contracts for special purpose entities within P3 arrangements will be exempted from annual holdback release if they are (i) entered into before January 1, 2026 and (ii) fall within the type(s) of P3 project agreement prescribed by regulation.[12] The present holdback regime will continue to apply to those contracts. At the time of writing, no such regulation has been issued.

Contracts currently governed by the Construction Lien Act will also remain unaffected by the amendments, including the new annual release of holdback regime. For those contracts, the provisions of the Construction Lien Act will continue to apply.[13]

C. Further Restriction on Use of Holdback

Presently, where a contractor or a subcontractor defaults in its performance, a payer may apply holdback funds towards obtaining services or materials in substitution for those that were to have been supplied by the defaulting party and towards any other claims once all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provide for under the Act (s. 30 of the *Act*).

That may no longer be the case. The *Act* now only expressly permits payers to apply holdback funds in this manner where the contractor or subcontractor has abandoned or terminated their contract or subcontract.[14]

[11] *Construction Act*, RSO 1990, c C.30, s. 87.4.
[12] Bill 60, Schedule 2, s. 7(1).
[13] *Construction Act*, RSO 1990, c C.30, s. 87.4(1).
[14] Bill 60, Schedule 2, s. 5.

Bill C-5 – Fast-Tracking National Interest Projects in Canada

In early June 2025 the federal government tabled the *One Canadian Economy Act* (referred to as "**Bill C-5**") to expedite nation-building infrastructure projects and reduce interprovincial trade barriers. Bill C-5 received royal assent shortly thereafter on June 26, 2025.[1]

Bill C-5 enacts two new pieces of legislation:

1) the ***Building Canada Act***, which aims to "urgently advance" infrastructure projects which serve the national interest, including energy projects; and
2) the ***Free Trade and Labour Mobility in Canada Act***, which seeks to eliminate federal barriers to the interprovincial movement of goods, provision of services, and movement of labour.

This article considers the key elements of the new *Building Canada Act*, including the designation of national interest projects.

1. *Building Canada Act* – An Overview

The *Building Canada Act* accelerates the regulatory process for infrastructure projects which are designated as being in the national interest. The purpose of the *Building Canada Act* is to "enhance Canada's prosperity, national security, economic security, national defence and national autonomy by ensuring that projects that are in the national interest are advanced through an accelerated process that enhances regulatory certainty and investor confidence, while protecting the environment and respecting the rights of Indigenous peoples."[2]

The *Building Canada Act* contemplates the following two-step streamlined process: (1) the designation of a project as being in the national interest; and (2) issuance of a single federal authorization for the designated project.

a. Designating National Interest Projects

The *Building Canada Act* empowers the Governor in Council (i.e., effectively the federal cabinet) to designate infrastructure projects as being in the national interest. In deciding whether to designate a project, the Governor in Council may consider "any factor" that it considers relevant, including the extent to which the project can,

[1] C-5 (45-1) - LEGISinfo - Parliament of Canada

[2] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 4.

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CANADA

Jason Annibale

Natasha Rodrigues

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- strengthen Canada's autonomy, resilience and security;
- provide economic or other benefits to Canada;
- have a high likelihood of successful execution;
- advance the interests of Indigenous peoples; and
- contribute to clean growth and to meeting Canada's objectives with respect to climate change.[3]

Once a project is designated as a national interest project, every determination and finding made and every opinion formed in order for an authorization to be granted in respect of the project is deemed to be made or formed in favour of approving the project.[4] However, this does not exempt a proponent from the requirement to comply with the relevant legislation,[5] but merely frames the regulatory question as how to approve and not whether to approve.

b. Accelerated One Approval

Once a project is designated as being in the national interest, the Minister (i.e., an appointee of the Governor in Council who is a member of the King's Privy Council for Canada) must provide the project proponent with a single authorization and conditions document. The authorization is defined to include an approval or decision, permit, licence, regulation, or other document that is required by all legislation listed in Schedule 2 to the *Building Canada Act*.[6]

Before issuing this authorization document, the Minister must,

- be satisfied that the proponent has taken all measures that the proponent is required to take in respect of each authorization that is specified in the document;
- consult with the minister who is responsible for the enactment under which each authorization is required with respect to the conditions that should be set out in the document;
- undertake a national security review for all state-owned or foreign investments from hostile countries in any national interest project;
- ensure that Indigenous peoples whose rights recognized and affirmed by section 35 of the *Constitution Act, 1982* may be adversely affected by the carrying out of the project are consulted; and
- be satisfied that, with regard to any foreign investments in the project, all necessary measures have been taken to protect national security interests.[7]

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[3] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 6.
[4] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 6(1).
[5] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 6(2).
[6] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 2.
[7] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 7(2).

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A national interest project that is also subject to the *Impact Assessment Act* is further exempted from certain requirements of that legislation (namely the 180-day planning phase).[8]

Once issued, the authorization document is deemed to be the authorization that project proponents would otherwise have been required to obtain under various individual statutes.

2. Implementing the *Building Canada Act*

With respect to next steps, the federal government will proceed to consult with provinces, territories, and Indigenous rights-holders to develop an initial list of national interest projects as defined in the *Building Canada Act*.[9]

After consultations, if the Governor in Council is of the opinion that a project may be in the national interest, an Order in Council will add it to the *Building Canada Act* Schedule of projects.[10] Before a project is added to the Schedule of projects, a notice that includes the name and description of the Project will be published in the *Canada Gazette* for 30 days as an opportunity to enlist feedback.

The federal government has committed to respecting the rights of Indigenous Peoples and ensuring consultation throughout the process of selecting projects of national interest.[11] In particular, the *Canada Building Act* requires that the Minister ensure that the process of consultation with Indigenous peoples whose rights may be negatively affected "allows for the active and meaningful participation of the affected Indigenous peoples" and requires that a report of the consultation process and results be made available within 60 days after issuing the authorization document.[12]

While the federal government has noted that the intent of the new legislation is to ensure that nation-building projects complete federal review within 2 years,[13] only time will tell whether practically, this is achievable.

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[8] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 19.
[9] Implementation of Bill C-5: One Canadian Economy - Canada.ca
[10] Implementation of Bill C-5: One Canadian Economy - Canada.ca
[11] Implementation of Bill C-5: One Canadian Economy - Canada.ca
[12] *Building Canada Act*, S.C. 2025, c. 2, s. 4 at Section 7(2.1).
[13] Implementation of Bill C-5: One Canadian Economy - Canada.ca

Contact the Legal Update Committee:
c/o Brendan D. Bowles
&
Catriona Otto-Johnston
E-mail: brendanbowles@glaholt.com
E-mail: catriona.otto@rosellp.com

Legal Update Newsletter Design and Desktop Publishing:
Nicholas J. Dasios

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