

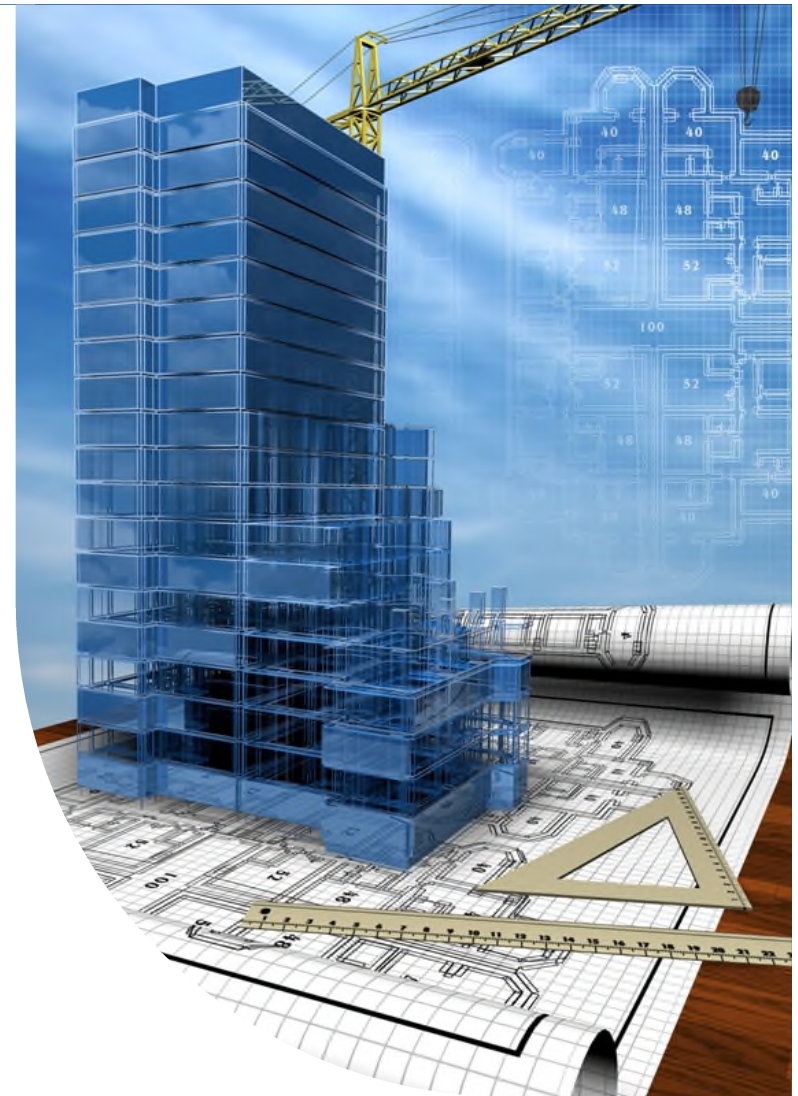
The Construction Act of Ontario

What Does it Mean for Industry Stakeholders?

Presented By

BLG

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Borden Ladner Gervais

Overview - Defined Terms

- Existing Terms – New Definitions
- New Terms – Defined
- New Terms – Undefined

- **Trigger:** Receipt of “proper invoice” from contractor triggers the prompt payment regime
- **Minimum Requirements:** “proper invoice” must include:
 - *Written request from Contractor to Owner for payment of services or materials;*
 - *Date of proper invoice;*
 - *Contractor’s name and address;*
 - *Description of services and materials supplied;*

- **Additional requirements:** Contract may specify additional requirements for “proper invoice”
 - **Exception:** Prior certification of a payment certifier or owner’s prior approval cannot be a pre-condition for “proper invoice”
- **Default timing:** “proper invoice” must be given to Owner monthly, unless contract provides otherwise

- **New Rules:**
 - Mandatory adjudication for prompt payment disputes
 - Focus is speedy dispute resolution
 - Adjudication determinations are interim binding during the project

- **Mandatory adjudication:** Under prompt payment, unpaid contractor/ subcontractor must commit to adjudication in notice of non-payment
- **Permitted adjudication (Mandatory once initiated):**
 - Any party may unilaterally refer the following disputes to adjudication:
 - Valuation of services or materials provided under the contract;
 - Payment under the contract (including in respect of a change order);
 - Notices of non-payment;
 - Amounts retained as set-off by trustee or as lien set-off; and
 - Any other matters as may be prescribed
 - If any party refers the dispute to adjudication, all parties must participate

- Authorized Nominating Authority (the “**Authority**”) – an entity to be designated by the Ministry of Attorney General for the purposes of the adjudication regime
- Types of responsibilities:
 - Qualifying adjudicators
 - Establishing an online registry of adjudicators
 - Setting fees for adjudicators
 - Appointing adjudicators

Overview - Adjudication

- Adjudicator must give written determination, with reasons
- Adjudicator's determination and reasons are admissible as evidence in court
- Adjudicator's determination is binding until:
 - Determination by court;
 - Determination by arbitration; or
 - Written agreement between the parties

- Increased values for calculation of substantial performance under *Act*
 - Known deficiency of not more than 3% of the first \$1,000,000 of the contract price (increase from \$500,000)
 - Known deficiency of not more than 2% of the next \$1,000,000 of the contract price (increase from \$500,000)
 - Known deficiency of not more than 1% of the remainder of the contract price

Overview - Trust Funds

- **General rule:** Trustee may set off against “all outstanding debts, claims or damages related to the improvement”
- **Exception:** Trustee may set off against “all outstanding debts, claims or damages whether or not related to the improvement” if the contractor/ subcontractor becomes “insolvent”

- **New obligations imposed on trustee:**
 - Trust funds must be deposited in bank account in trustee's name (or all trustees' names, as applicable)
 - Trustee must maintain written records detailing:
 - amounts that are received into and paid out of the funds;
 - any transfers made for the purposes of the trust; and
 - any other prescribed information
 - Trustee's written records must be maintained separately in respect of each trust

- Trust funds from separate trusts may be deposited together into single bank account
- Trust funds deemed traceable if trustee complies with its obligations respecting trust funds

Overview – Holdback

- **Permissible Forms:** Alternative forms of holdback are now permitted:
 - cash funds;
 - letter of credit; or
 - Demand-Worded Holdback Repayment Bond
- **General Rule:** Holdback “shall” be paid “where all liens that may be claimed against that holdback have expired [60 days after substantial performance] or been satisfied, discharged or otherwise provided for under this *Act*”
 - **Exception:** Owner may publish notice of non-payment of holdback within 40 days after publication of substantial performance

Overview - Other Lien Issues

- When vacating lien by payment into court, security for costs is the lesser of \$250,000 or 25% of amount claimed (change from \$50,000)
- Referral to Small Claims Court for liens under \$25,000
- Holdback can be released on an annual basis if:
 - i. Multi-year prime contract (\$10M + value); and
 - ii. Contract provides for phased release of holdback (s.26.1)
- If contract terminated, Owner or Contractor shall publish Notice of Termination
- S. 39 information shall include:
 - i. Price of services;
 - ii. Amount paid;
 - iii. Amount of holdback;
 - iv. Any amount retained by set-off; and
 - v. Balance owing under contract.

- 1. General Regulation**
- 2. Adjudication Regulation**
- 3. Court Procedure Regulation**
- 4. Forms Regulation**

Forms Regulation

- 39 prescribed forms

Form No.	Form Name
1	Written Notice of Lien under s. 1 (1) of the Act
1.1	Notice of Non-Payment under s. 6.4 (2) of the Act
1.2	Notice of Non-Payment under s. 6.5 (5) of the Act
1.3	Notice of Non-Payment under s. 6.5 (6) of the Act
1.4	Notice of Non-Payment under s. 6.6 (6) of the Act
1.5	Notice of Non-Payment under s. 6.6 (7) of the Act
2	Notice to Contractor under s. 18 of the Act
3	Notice to Lien Claimant under s. 19 (3) of the Act
4	Letter of Credit under s. 22 of the Act
5	Demand-Worded Holdback Repayment Bond under s. 22 of the Act
6	Notice of Non-Payment of Holdback under s. 27.1 of the Act
7	Declaration of Last Supply under s. 31 of the Act

Form No.	Form Name
8	Notice of Termination under s. 31 of the Act
9	Certificate of Substantial Performance of the Contract under s. 32 of the Act
10	Certificate of Completion of Subcontract under s. 33 of the Act
11	Notice of Intention to Register a Condominium in accordance with the Condominium Act, 1998 under s. 33.1 of the Act
12	Claim for Lien under s. 34 of the Act
13	Notice of Preservation of Lien under s. 34 of the Act
14	Certificate of Action under s. 36 of the Act
15	Notice Given by Defendant under s. 36 of the Act
16	Notice of Cross-Examination under s. 40 (3) (a) of the Act
17	Notice of Cross-Examination under s. 40 (3) (b), (c) or (d) of the Act

Regulations

Form No.	Form Name
18	Withdrawal of Written Notice of Lien under s. 41 of the Act
19	Discharge of Lien under s. 41 or 42 of the Act
20	Notice of Postponement of Lien under s. 43 of the Act
21	Financial Guarantee Bond under s. 44 of the Act
22	Judgment Directing a Reference for Trial under s. 58 of the Act (Master)
23	Judgment Directing a Reference for Trial under s. 58 of the Act (Small Claims Court)
24	Judgment at Trial under s. 62 of the Act if Lien Attaches to Premises
25	Judgment at Trial under s. 62 of the Act if Lien Does Not Attach to Premises
26	Report under s. 62 of the Act if Lien Attaches to Premises

Form No.	Form Name
27	Report under s. 62 of the Act if Lien Does Not Attach to Premises
28	Report under s. 62 of the Act if Lien Attaches to Premises (Small Claims Court)
29	Report under s. 62 of the Act if Lien Does Not Attach to Premises (Small Claims Court)
30	Financial Guarantee Bond under s. 78 of the Act
31	Labour and Material Payment Bond under s. 85.1 of the Act
32	Performance Bond under s. 85.1 of the Act
33	Notice of Trial
34	Notice of Settlement Meeting

Construction Act – Surety Bonds

- Surety bond forms in Regulations for:
 - Performance Bond
 - Labour and Material Payment Bond
 - Holdback Repayment Bond

Construction Act – Performance Bond

- Pre-Notice Meeting
 - Pre-Notice Meeting to occur at mutually convenient time and take place within **7 business days** (or such longer time as agreed to by all parties) after Surety's receipt of Owner's request
- Notice of Claim
 - Prescribed form (Schedule A)
- Conditions Precedent
 - Contractor is and declared to be in default
 - Notice of default to Contractor
 - Owner performed obligations
 - Owner has agreed to pay balance of Contract price to Surety



Construction Act – Performance Bond con't



- Surety to acknowledge receipt of notice no later than **4 business days** of receipt with request for additional documentation or information (prescribed form)
- No later than **20 business days** after receipt of Notice (unless longer period agreed to with Owner) Surety shall provide its Position (prescribed form)
 - Accept liability
 - Does not accept liability (with reasons)
 - Unable to determine if Conditions Precedent satisfied (Surety may propose process for collaboration to mitigate)
- If requested, Surety to meet with Owner to discuss status of investigation within **5 days** by face-to-face, teleconference or electronic meeting agreed to by Owner and Surety

Construction Act – Performance Bond con't

- Necessary Interim Work
 - Owner required to provide notice of Necessary Interim Work within **3 business days** of commencement
 - No limitation on Owner steps reasonably necessary in public interest



Construction Act – Performance Bond con't

- Post-Notice Conference
 - Upon receipt of notice, Surety to propose face-to-face meeting, teleconference or other form of electronic media with Owner within **5 business days** (or such longer period as may be agreed).
- Mitigation Work may proceed provided Owner:
 - Pays reasonable costs,
 - Keeps records of amounts to be claimed under Bond, and
 - Allows Surety reasonable access to monitor progress



Construction Act – Performance Bond con't

- Owner's Direct Expenses

- Additional Key Points:
 - Balance of Contract Price to be used by Owner to mitigate potential loss to Surety under Performance Bond and then under Payment Bond

 - Owner to assert all rights and remedies available to the Balance of Contract Price and make payment thereof as directed by Surety

Construction Act – Payment Bond

- Not trustee form
- Two-tier Payment Bond
- Notice of Claim (prescribed form)
 - Timing is condition precedent – Claimant to submit Notice :
 - In respect of any holdback, **within 120 calendar days** after Claimant should have been paid in full under its Contract
 - In respect of any amount other than holdback, **within 120 calendar days** after the date on which the Claimant last performed labour or provided materials



Construction Act – Payment Bond con't

- Acknowledgment and Response / Position
 - For each Notice of Claim by 1st tier Claimant:
 - No later than **three (3) business days** after receipt by Surety of a Notice of Claim, Surety shall acknowledge receipt of Notice of Claim and request from Claimant any information and documentation Surety requires to determine the Claimant's entitlement under this Bond (called the "Information")
 - Response:
 - No later than earlier of: (a) **ten (10) business days** after receipt of the Information, (b) **twenty-five (25) business days** after receipt of Notice of Claim, or (c) such longer time as agreed by Surety and Claimant, Surety shall provide position in response to the Notice of Claim
 - Surety's Position to set out what Surety disputes is owing (with reasons) and what Surety concludes are undisputed amounts owing (with reasons)

Construction Act – Payment Bond

- For each Notice of Claim by 2nd tier Claimant:
 - No later than **three (3) business days** after receipt by Surety of a Notice of Claim, Surety shall acknowledge receipt of Notice of Claim and request from Claimant any information and documentation Surety requires to determine the Claimant's entitlement under this Bond (called the "Information")
- Response:
 - No later than earlier of: (a) **fifteen (15) business days** after receipt by Surety of the Information, (b) **thirty-five (35) business days** after receipt of Notice of Claim, or (c) such longer time as agreed by Surety and Claimant, Surety shall provide position in response to the Notice of Claim

Construction Act – Payment Bond



- Payment of undisputed amounts:
 - No later than **ten (10) business days** after Surety's Position provided to Claimant, Surety shall pay such amounts included in Notice of Claim that are undisputed by Surety

- Adjudication – Stay of Surety's investigation / obligations

Construction Act – Payment Bond

- Subrogation rights to Surety
- Recall: balance of Contract Price to be used by Owner to mitigate potential loss to Surety under Performance Bond and then under Payment Bond.
- Suit limitation period:
 - **one (1) year after the date on which the Contractor last performed work** on the Contract, including work performed under any warranty or guarantee



Construction Act – Holdback Repayment Bond

- Where Contract allows Owner to make payments to Contractor without retaining holdback, Owner may satisfy statutory holdback obligation with Holdback Bond
- Holdback Bond is irrevocable
- Owner's demand
- Demand must be received by Surety within **120 calendar days** from the last date on which a lien could have been preserved



Construction Act – Holdback Bond

- Surety is required to pay demand amount **within 10 business days**
- Surety required to pay notwithstanding objection by Contractor (Surety cannot assert that no default has occurred, that lien is invalid, etc.)



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The Construction Act of Ontario

What Does it Mean for Public Owners?

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Your bonding resource

How We Got Here

- Reynolds/Vogel Report: Striking the Balance
 - 100 Recommendations
- Four Recommendations Regarding Bonds:
 - Mandatory ***Broad Form*** Bonds on Public Contracts – in conjunction with SAC
 - Sureties required to pay undisputed amounts of payment bond claims promptly
 - Claims Protocol included in the regulations
 - No change to 3rd Party Beneficiary Rule

The Act

- New Section on Surety Bonds Part XI.1 (Section 85)
- 50% Performance and Payment Bonds Mandatory on all “Public Contracts” > \$500K
- Public Contracts – Broadly defined; Owner is Crown, Municipality or Broader Public Sector
- Doesn't apply to architects or engineers
- Bonds to be issued on prescribed forms
- L&M Claimants have right of action against the Surety as per 85.2 (1)

Prescribed Bonds

- Bond Language and Schedules 11 to 15 pages
- More Clarity and Responsiveness
- Built-in Claims Protocol
 - Schedules bring consistency and reduce delay
 - Timelines for Acknowledgement and Response
 - Undisputed amounts paid promptly

So...What Does This All Mean?



For Public Owners

- Mandatory performance and payment bonds
- More Clarity and Certainty around claiming under a payment bond
 - Prompt Acknowledgement and Response from Surety
 - Prompt Payment of Undisputed Amounts
 - Opportunity for problem solving and communication; e.g. pre- and post-Notice
 - Clarity around coverage (e.g. direct expenses)

A Few Tips...

Communication

- Bond Form itself requires more interaction between Owner and Surety
- Pre-Notice and Post-Notice Conferences
- Necessary Interim Work; Mitigation Work
- Inform Surety when issues arise

A Few Tips...

Read the Bonds – Understand the Terms

- Surety Claim process is interactive and requires responses from owner; e.g. Necessary Interim Work
- Ensure key staff is familiar with the response requirements
- Consult with counsel, consultants, knowledgeable staff
- Make sure systems are in place to allow for quick release of information to surety

A Few Tips...

Work with the Surety in the Event of a Claim

- Cooperation is crucial; despite the circumstances
- Submit Notice of Claim as per Schedule A
- Ensure requested information/documentation submitted promptly and thoroughly
 - Reduce likelihood of “Option C” response
- Allow Surety access to site and key people
- Flexibility wherever possible

A Few Tips...

Keep Expectations Realistic

- While claim process is enhanced, a bond can't make problems disappear
- Delays are sometimes inevitable

Frequently Asked Questions

When calling for a bond, should we require the contractor and surety to provide the entire document including the schedules?

The attached schedules are an integral part of the instrument and the protection it provides. The schedules themselves are referenced in the text of the bond at several points and it was for this reason that they were made part of the instrument, rather than published as standalone documents.

Frequently Asked Questions

**One of the defining features of the new Act is the ability to refer disputes to adjudication.
Can surety bond claims be adjudicated?**

Only disputes surrounding labour & material payment bond claims may be referred to an adjudicator and then only after the adjudication provisions come into force in October of 2019. Adjudication of performance bond claims may be considered if and when the regulations are amended at a later date.

Frequently Asked Questions

Will Surety requirements change or will premiums increase as a result of these new changes?

Each individual surety will make its own determination as to whether or not underwriting / pricing / administrative requirements will change once the new act comes into force. Owners should discuss arrangements with their Contractor.

Frequently Asked Questions

What about long-term service contracts; e.g. waste management? Are we required to call for the prescribed bond forms?

The Act applies only to ***construction*** projects where an “improvement” is made to a property under the Act. Service contracts are not subject to the provisions of the Act. Owners wishing protection on these contracts can continue to call for the SAC Multi-year Renewable Bond.

Frequently Asked Questions

Will the new bond forms now be required on all construction work in Ontario?

No, These bonds are required only on contracts above \$500,000 between a Contractor and a Public Owner. Privately financed work, projects below the threshold amount or subcontracts between a general and trade do not fall under the umbrella of the Act.

Frequently Asked Questions

Will it be permissible under the Act for Generals to call for bonds from our subcontractors?

Yes. The Act allows for any additional security as required and parties are free to negotiate their own performance/payment security as needed.

Frequently Asked Questions

Will the surety requirements under the Act apply to Ontario government agencies such as Metrolinx or OPG?

Yes, “Public Contract is broadly defined under Section 85.1 of the Act and it applies “*...if the owner is the Crown, a municipality or a broader public sector organization.*” This would include any agency owned by the government as indicated.

Frequently Asked Questions

Is there a prescribed bid bond or consent of surety form?

No, there is no requirement to post tender security of any kind under the Act.

Frequently Asked Questions

Can we require bonds if the Contract amount is less than \$500,000?

Yes, \$500K is the threshold where bonds become mandatory on public work. Owners are free to call for bonds on smaller projects if they so require.

Frequently Asked Questions

What if there are extended warranties under the contract, can these warranties be bonded under the new bond forms?

Extended warranties create a problem for Owners but not an unsurmountable one. The 2-year suit limitation clause will mean that any owner looking for surety protection of longer term warranties should call for a SAC multi-year warranty bond in addition to the prescribed performance bond. The Act doesn't prohibit Owners from doing this.

Frequently Asked Questions

Do the new bond requirements also apply to P3/AFP contractual arrangements?

Yes. The bonding provisions for P3 projects are found in Section 1.1 (4). Under this section, the agreement between the contractor and the SPV is deemed to be the “public” contract. The regulations provide further modification by establishing a minimum coverage for P3 projects:

- a) *50 per cent of the contract price, if the contract price is \$100,000,000 or less; or*
- b) *\$50,000,000, if the contract price is more than \$100,000,000.*

And Remember...

This is unexplored territory; new to all participants. The list of suggestions here is not exhaustive or even necessarily authoritative. It's strongly recommended that you consult Brokers Sureties, knowledgeable consultants and counsel for advice on how to proceed.

For more information:

Visit:

www.suretycanada.com

or call the Surety Association of Canada at:

(905) 677-1353

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