



# ICLG

The International Comparative Legal Guide to:

## **Construction & Engineering Law 2018**

### **5th Edition**

A practical cross-border insight into construction and engineering law

Published by Global Legal Group, with contributions from:

Abuka & Partners, Legal Practitioners

Advokatfirmaet Thommessen AS

Aleksey Pukha and Partners

Allen & Gledhill

Ashurst

Clyde & Co

COMAD, S.C.

Deacons

ECHEVARRÍA LEUNDA & ECHEVARRÍA

PETIT Abogados

FALM – Sociedade de Advogados, RL

Greenberg Traurig Grzesiak sp.k.

Hamdan AlShamsi Lawyers & Legal Consultants

Herbert Smith Freehills LLP

Kachwaha and Partners

Kanagawa International Law Office

Kapellmann und Partner Rechtsanwälte mbB

Makarim & Taira S.

Mäkitalo Rantanen & Co Ltd, Attorneys-at-Law

Matheson

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

Miller Thomson LLP

Moravčević Vojnović i Partneri in cooperation with Schoenherr

Norton Rose Fulbright South Africa Inc.

Oles, Morrison, Rinker & Baker LLP

Oseko & Ouma Advocates, LLP

SBH Law Office

Simmons & Simmons LLP

Trofin & Asociații SCA

Wintertons Legal Practitioners

Wong & Partners



**Contributing Editor**  
Tim Reid, Ashurst

**Sales Director**  
Florjan Osmani

**Account Director**  
Oliver Smith

**Sales Support Manager**  
Toni Hayward

**Editor**  
Sam Friend

**Senior Editors**  
Suzie Levy  
Caroline Collingwood

**Chief Executive Officer**  
Dror Levy

**Group Consulting Editor**  
Alan Falach

**Publisher**  
Rory Smith

**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Ashford Colour Press Ltd.  
July 2018

Copyright © 2018  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-912509-19-5  
ISSN 2054-7560

**Strategic Partners**



## General Chapters:

1	<b>More Thoughts on Contractual Interpretation</b> – Tim Reid, Ashurst	1
2	<b>Saudi PPP: Lessons Learned from the International Market</b> – Richard Dyton & Simon Moore, Simmons & Simmons LLP	3
3	<b>Interim Methods of Dispute Resolution</b> – David Nitek & Nicholas Downing, Herbert Smith Freehills LLP	7

## Country Question and Answer Chapters:

4	<b>Australia</b>	Clyde & Co: Kon Nakousis & Teodor Lomaca	12
5	<b>Belarus</b>	SBH Law Office: Ivan Martynov & Vitaly Tvardovskiy	22
6	<b>Brazil</b>	Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados: Thiago Moreira & Eduardo Damião Gonçalves	30
7	<b>Canada</b>	Miller Thomson LLP: William J. Kenny & Leanna Olson	39
8	<b>England</b>	Ashurst: Tim Reid & Michael J. Smith	48
9	<b>Finland</b>	Mäkitalo Rantanen & Co Ltd, Attorneys-at-Law: Aimo Halonen & Juho Lönnblad	60
10	<b>Germany</b>	Kapellmann und Partner Rechtsanwälte mbB: Dr. Christian Bönker & Prof. Dr. Martin Jung	65
11	<b>Hong Kong</b>	Deacons: Kwok Kit Cheung	72
12	<b>India</b>	Kachwaha and Partners: Sumeet Kachwaha & Dharmendra Rautray	78
13	<b>Indonesia</b>	Makarim & Taira S.: Heru Mardijarto & Alexandra Gerungan	85
14	<b>Ireland</b>	Matheson: Rhona Henry	93
15	<b>Japan</b>	Kanagawa International Law Office: Hiroyuki Sakazaki & Hajime Kanagawa	103
16	<b>Kenya</b>	Oseko & Ouma Advocates, LLP: Christine A. O. Oseko & Anaciata Mbula	111
17	<b>Malaysia</b>	Wong & Partners: Janice Tay & Siaw Wan Lim	118
18	<b>Mexico</b>	COMAD, S.C.: Roberto Hernández García	126
19	<b>Nigeria</b>	Abuka & Partners, Legal Practitioners: Patrick Abuka	132
20	<b>Norway</b>	Advokatfirmaet Thommessen AS: Jacob F. Bull & Henrik Moinichen	138
21	<b>Poland</b>	Greenberg Traurig Grzesiak sp.k.: Agnieszka Stankiewicz & Barbara Pancer	146
22	<b>Portugal</b>	FALM – Sociedade de Advogados, RL: António André Martins & Joana Maltez	152
23	<b>Romania</b>	Trofin & Asociații SCA: Valentin Trofin & Oana Cuciureanu	157
24	<b>Serbia</b>	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Slaven Moravčević & Ivana Panić	167
25	<b>Singapore</b>	Allen & Gledhill: Ho Chien Mien	175
26	<b>South Africa</b>	Norton Rose Fulbright South Africa Inc.: Daniel McConnell & Emmanuel Tivana	182
27	<b>Ukraine</b>	Aleksey Pukha and Partners: Aleksey Pukha & Anna Gadiatska	188
28	<b>United Arab Emirates</b>	Hamdan AlShamsi Lawyers & Legal Consultants: Hamdan Al Shamsi & Omar Kamel	197
29	<b>USA</b>	Oles, Morrison, Rinker & Baker LLP: Douglas Stuart Oles & Alix K. Town	203
30	<b>Uruguay</b>	ECHEVARRÍA LEUNDA & ECHEVARRÍA PETIT Abogados: José Luis Echevarría Petit	213
31	<b>Zimbabwe</b>	Wintertons Legal Practitioners: Nikita Madya & Farai Chigavazira	219

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# Canada

Miller Thomson LLP

William J. Kenny



Leanna Olson



## 1 Making Construction Projects

**1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)**

There are a variety of project delivery methods and construction contracts in Canada. In Design Bid Build contracts, the owner contracts with an architect/engineer for design work before contracting with a general contractor for construction. Design Build contracts involve the owner contracting with one party to design and build the project. In Construction Management contracts, the owner retains a construction manager to work with a design team and either helps the owner retain subcontractors or retains them directly. Engineering Procurement and Construction contracts are used for large projects and involve the owner contracting with a single party to deliver the entire project. In Engineering Procurement and Construction Management contracts, the owner retains a contractor to perform engineering, procurement and construction management services. The contractor is usually retained before construction starts through project close-out, and sometimes through the warranty period. Public Private Partnerships involve a partnership between a public owner and a private contractor to construct a project. This may involve various delivery methods and services including designing, building, financing, transferring, operating and maintaining the project.

Parties often use standard form contracts which have been developed by industry associations and include the Canadian Construction Document Committee (CCDC), the Canadian Construction Association, and other local organisations such as the Construction Owners Association of Alberta.

CCDC has recently released a form of Integrated Product Delivery (IPD) contract. IPD contracts are single, multiparty contracts that often involve multiple trades in addition to the contractor and consultant. IPD contracts are relatively new to Canada, but are becoming increasingly popular.

The Royal Architectural Institute of Canada and the Association of Consulting Engineers of Canada have developed standard form contracts for situations where an owner retains an architect or engineer for design only.

**1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?**

Most provinces in Canada require the elements of offer, acceptance and consideration as well as capacity of the parties to enter into contractual arrangements. Contracts need not be in writing, though most construction contracts are and should be.

Agreements that involve a sale of land must be in writing to comply with the *Statute of Frauds*. In addition, a contract may be found invalid or void for uncertainty if it lacks one of the following three basic components: parties; price; and product.

The province of Québec is governed by civil law. The Civil Code of Québec provides that “[a] contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form”. There is no particular form required for construction contracts. However, there are laws governing public bodies that require them to follow certain formalities; for example, requiring the public body to launch a tendering process.

**1.3 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.**

Letters of intent are used and may be enforceable if they meet the requirements of a contract detailed above. However, if the letter of intent is in substance an “agreement to agree”, it is not enforceable. In the construction context, letters of intent are often used to allow contractors to commence performance of a limited scope of work prior to the completed negotiation and execution of a more fulsome construction contract.

**1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?**

The three most common types of insurance policies include:

1. Builder's Risk/Course of Construction policies for physical loss or damage to property in the course of construction, installation or repair. These are typically obtained by the owner or contractor.
2. Wrap-up Liability policies, naming all or most of the participants in the project. These are typically obtained by the owner or contractor.
3. Errors and Omissions Professional Liability policies for design professionals' negligence. These are typically obtained by the engineers and architects.

Other types of insurance common in construction contracts include: General Liability Insurance; Automobile Liability Insurance; Tools and Equipment Insurance; and Subcontractor Default Insurance. If the construction project has environmental risks, supplemental policies may be required to cover them.

Some provinces in Canada have legislation requiring new home warranty insurance. Also, each province has a statute regarding workers' compensation, in which the employer pays a premium and employees are insured for the replacement of wages in the event of injury. The statute abrogates a worker's right to sue the employer, other employees, and other employers and their employees in industries to which the legislation applies. Employers' Liability insurance is necessary to cover anyone coming to site not covered by workers' compensation.

**1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?**

Construction projects, and those working on them, must comply with applicable local legislation. Provincial employment legislation generally sets various minimum standards that employers must meet (e.g. hours of work, minimum wages, vacation, etc.).

Each province also has occupational health and safety legislation which imposes a duty on employers to ensure the health and safety of workers engaged in the work and those at the worksite. Workers are obligated to take reasonable care to protect their own health and safety and that of other workers on site, and to cooperate with the employer to ensure the same.

In many provinces, occupational health and safety legislation requires that a prime contractor or principal contract be designated (otherwise it will be the owner). The designated party is responsible for ensuring that health and safety requirements are complied with.

The *Criminal Code of Canada* also imposes criminal liability on organisations and individuals that do not take reasonable steps to prevent workers from being injured or killed on the job.

The federal government has jurisdiction over criminal matters. It also has exclusive jurisdiction over certain specific industries such as aviation and interprovincial transportation. Federal labour and employment legislation applies to construction projects undertaken in these industries, such as airports, inter-provincial pipelines, railways and highways.

Employers are required to withhold and remit to the government income tax, employment insurance premiums and Canada Pension Plan contributions on behalf of employees.

**1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?**

Most provinces have lien legislation which requires a certain percentage of the value of the work to be held back (typically 10%, but this differs between provinces). Outside of lien legislation, any right to holdback funds is a matter of contract. The parties may agree to different amounts of holdback for different purposes. For example, owners may contract to hold back certain amounts in relation to deficiencies. Typically, a statutory holdback cannot be applied to deficiencies.

In some provinces, such as Alberta, only the owner is statutorily required to hold back 10% of the total value of the work rendered. However, parties lower down the contractual chain may agree that one party may hold back a certain amount of money from each payment. However, legislation in other jurisdictions, such as Ontario and British Columbia, requires the owner, the contractor and each subcontractor to hold back 10%.

Typically, the owner is required to hold back the applicable percentage of funds for a specific period of time after the work on the project is complete/substantially complete or, if a certificate of substantial performance is issued. Assuming no liens are filed, the holdback can be released. In some provinces, the amount that must be retained is reduced to an amount for finishing the work. Some lien legislation provides for earlier and progressive release of holdbacks.

In Québec, the Civil Code provides that a subcontractor or supplier may register a lien (construction hypothec) for improvements to land, even though they have no contract with the owner. However, the lien is limited to the work done after the subcontractor or supplier provides written notice of their contract to the owner. Consequently, the owner may deduct from the price of the contract an amount sufficient to pay their claims. The deduction is valid until such time as the contractor gives the owner a release from such claims.

On large projects, financial security may replace the lien holdback such that funds can be advanced without deduction. Some provinces, such as Saskatchewan, provide for the early release of the holdback on large projects of long duration.

Ontario recently passed legislation creating new rules governing holdback. It allows for payment of holdbacks on an annual, phased or segmented basis. Parties may retain holdbacks in the form of a letter of credit or repayment bond rather than in cash. Release of holdbacks is now mandatory once all conditions are satisfied. However, holdbacks may be withheld if the payer publishes the requisite notice in accordance with the regulations. If the payer fails to do so, there is no right of set-off against the holdbacks. Contractors and subcontractors who are not paid holdbacks may refuse to pay related holdbacks to its subcontractors, provided that notice is given and the matter is referred to the adjudicative process set out in the legislation.

**1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?**

Sureties issue performance bonds on some projects. The bonds are

typically a standard form involving three parties: the surety; the contractor; and the owner. The surety and contractor guarantee to the owner that the loss event will not occur.

Typically, the owner will not be able to draw on the bond unless the contractor is in default, and the owner is not in default. The surety can then recover from the contractor after making payment on the bond for the benefit of the owner.

The Supreme Court of Canada recently held that the trustee of a labour and materials payment bond had a duty to disclose the existence of the bond to potential beneficiaries, marking a shift in the law. Trustees should now be aware that they may have a duty to inform potential beneficiaries of the existence of a bond.

Alternatively, owners may request letters of credit to be issued by a lender on behalf of the contractor. Letters of credit are flexible security that owners may call upon at any time. Unlike performance bonds, where the surety issuing the bond will review and assess any alleged default before responding, letters of credit are payable immediately on demand and without further substantiation, making them useful security for owners.

Parent companies may give a guarantee to ensure the performance of a subsidiary. Each bond and guarantee is limited to the wording of the particular instrument. Provincial legislation often provides that a person providing a guarantee must do so in the presence of a notary public or a lawyer.

---

**1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?**

---

Some construction contracts include retention of title rights in relation to goods and supplies used in the work. Some contracts will explicitly provide for the precise time when title passes (e.g. upon delivery of goods, or once the supplier is paid).

Under provincial Personal Property Security legislation, if a party to a contract has an attached/perfected a security interest, it may retain title rights in relation to that good. If the contractor holds a security interest in the goods/materials supplied, it may be entitled to seize and sell the property to discharge the debt owed.

In Québec, a supplier of materials could benefit from a reservation of ownership in respect of the materials if it is stipulated in a contract and if it has been published in the register of personal and movable real rights. Then, the supplier of materials may take the property back or force the buyer or the owner to pay the sale price. If the materials have been integrated into the work, the seller can force the owner to pay, but may not take them back.

Unpaid contractors and suppliers may also make use of provincial builders' lien legislation, which entitles them to register a lien against the project lands (within a prescribed time) in relation to unpaid goods which have been furnished to the project site, and then call upon those lands as security for unpaid amounts. Provincial lien legislation also includes trust provisions as an additional remedy to unpaid contractors. However, the extensiveness of the trust created varies from province to province. In certain circumstances, unpaid contractors who have not yet delivered goods or materials can also assert a possessory lien over such materials.

---

## 2 Supervising Construction Contracts

---

**2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.**

---

An owner may retain an engineer, architect or engineering firm to act as a consultant. The contract will set out the role of the consultant.

A consultant owes a duty of care to the owner in administering the contract or authorising any alterations or additions to the project. However, a consultant also has a duty to be an impartial adjudicator when disputes arise between the owner and contractor. For example, in a CCDC 2 contract, the consultant has the authority to resolve matters in regards to contract interpretation, performance of the work, or any other matters in which agreement is necessary but cannot be reached. The consultant's role as a first arbiter cannot be biased by its role as a representative of the owner. The consultant has a duty to adjudicate the dispute in a fair, unbiased, and professionally competent manner.

In all provinces, architects and engineers must also follow their respective codes of ethics.

Sometimes contracts include a supplementary condition for a waiver of claims against the consultant's interpretations and findings in a dispute resolution process.

In Québec, if an architect or engineer supervised the work and a loss associated with the work occurs within five years after the work was completed, the liability of the supervisor is presumed. The supervisor will have to prove that the defect is not due to its own acts to be relieved from liability.

---

**2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?**

---

A construction contract may include a "pay when paid" clause. The validity of a "pay when paid" clause, by which the contractor does not have to pay a subcontractor until the owner has paid the contractor, has been recognised in Québec by the Court of Appeal. However, the contractor may be found to have a duty to collect the amounts owing.

Some clauses have been interpreted to be condition precedents to the legal entitlement to payment, whereas others have been interpreted as an intention to address the timing of the payment in the clause, not the actual right to payment.

Further, a "pay when paid" clause does not forfeit lien rights of subcontractors, and lien legislation typically grants subcontractors the ability to obtain information about the status of payment on the project.

In Ontario, the new *Construction Act* creates a prompt payment regime with strict timelines for payment, in force as of 1 October 2019. The regime requires a contractor to pay a subcontractor within seven days of payment by the owner, and requires a contractor to provide notice of non-payment to subcontractors within seven days of receiving notice of the same from the owner. Otherwise, the contractor must pay a subcontractor within 35 days of receipt of

a subcontractor's invoice. A failure on the part of a contractor to give the required notice of non-payment to a subcontractor could, presumably, preclude that contractor from relying on a "pay when paid" clause in the subcontract as a basis for non-payment of that subcontractor within 35 days.

**2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?**

Construction contracts may provide for liquidated damages in the event of certain acts of default, such as delays in completion, by the contractor. Liquidated damages must be a genuine pre-estimate of loss arising from the delay (e.g. lost rent for an apartment complex). Unreasonable amounts for liquidated damages (typically assessed at the time the amount was negotiated) are interpreted as a penalty and are unenforceable. Sections 1622 to 1625 of the Québec Civil Code address penal clauses, and grant courts the power to reduce the amount of a penalty if the clause is abusive.

### 3 Common Issues on Construction Contracts

**3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?**

Construction contracts in Canada generally contain contract change provisions which allow the owner to vary the scope or time to complete the contract. If there are no such provisions and there is a change, a court will look to the conduct of the parties to determine whether they have agreed to a change to the contract. Generally, a change in scope must remain within the overall contemplated scope of the project and cannot extend to something wholly different.

Even where formal change provisions exist, if the change process has not been followed, the courts may look to the conduct of the parties to determine whether the contract change provisions have been waived, and whether there has been a change to the contract.

Contracts often have notice requirements for claims, such that contractors will be required to make a claim in a certain time period or risk losing their entitlement to recover amounts for it.

**3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?**

Work can be omitted from the contract if the change provisions in the contract allow for it. Most template forms allow for changes upon appropriate notice provisions being met. If the owner has the ability to remove work from a contractor, the owner may find another contractor to perform the work or do it himself.

Absent contractual provision that work may be removed, an owner could face a claim in contract for lost revenues or lost profits if it self-performs or awards the work to another contractor.

**3.3 Are there terms which will/can be implied into a construction contract?**

Courts may imply terms into a contract in order to establish the nature and scope of the contractual agreement. This is done in the following circumstances: when the contract is of a kind in which the implied term has historically been found; when the term is necessary given the surrounding circumstances (e.g. to give business efficacy to the transaction); when there is a term of art used or notorious business custom that can be said to govern the relationship between the parties (so long as it is not contrary to an express contractual provision); the implied term is consistent with the parties' presumed intentions (so long as it is not contrary to an express contractual provision); or when a statute implies a term (e.g. Sale of Goods legislation may include implied terms that the seller has the right to sell the goods, and that the goods are reasonably fit for their purpose if the buyer makes known the purpose).

There is a general duty of honesty in contractual performance which is implied into contracts and requires that parties not lie or mislead each other on matters linked to the performance of the contract. The principle of good faith is codified in the Québec Civil Code.

**3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?**

Where both the contractor and owner contribute to the delay, or where there are concurrent delay events, each caused by a different party, fault will generally be divided and apportioned based on the extent to which each delay caused any resulting losses.

Construction contracts generally contain delay provisions. Some limit the remedies available as a result of delay. Where acts or omissions of the owner are the cause of the delay, delay provisions may provide for a reasonable extension to the contract time, and the reimbursement of the contractor's reasonable costs incurred as a result. Notice in writing of the delay by the contractor is normally required.

In situations of concurrent delay, the contract between the parties should first be examined to determine whether it provides an answer as to how the allocation of liability for any concurrent delay should be considered.

Otherwise, courts may apportion the various causes of delay between the parties based on the applicable contributory negligence legislation or by analogy to such legalisation. If the court finds there is contributory negligence on the part of the contractor and the owner, which contributory negligence affected the critical path to project completion, the court will apportion the delay damages between the owner and contractor.

In the event that the contractor would not have been able to perform the contract due to its own act of delay, regardless of the existence of an owner-caused delay, the contractor will be held liable for delay damages.

**3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?**

Where a contract specifies a contract time, or time for substantial performance of the work, the contractor may, regardless of the

existence of a float, make use of the entire time period up to the specified contract time to perform the work. The owner may not interfere with the contractor's time for substantial performance of the work. Where the obligation to perform a contract is at large, the contractor is obligated to complete the work within a reasonable time and the owner is not entitled to prevent timely completion of the contract.

The jurisprudence in Canada does not establish who owns the float. However, courts have held that, in the event of an owner-caused delay which consumes the float but which does not delay the date of completion, the contractor will not be entitled to damages on that account. If, on the other hand, the owner-caused delay consumes the float, and thereafter there is a contractor-caused delay which delays the date of completion, the contractor may be entitled to an extension of time equal to the duration of the float. The contractor has a duty to mitigate any owner-caused delay.

---

### **3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?**

---

Every province has limitation legislation which governs the time limits for bringing an action. A two-year basic limitation period is typical and an action must be commenced within two years from when the party knew or ought to have known about the harm, which is an objective assessment.

Each province also has an ultimate limitation period which varies in length (e.g. 10 years in Alberta and 15 years in Ontario). The ultimate limitation period starts from the date when the act or omission occurred, not when the damage may have been discovered.

In Québec, an action must be brought within three years, and starts to run from the time when the cause of action is known (for instance, when the contractual amounts are owed). For an ongoing contract, the starting point is when the work is completed. Where the right of action arises from a material injury appearing progressively or tardily, the period runs from the day the injury appears for the first time.

Contracts often contain clauses providing that the contractor must give notice to the owner if it intends to bring a claim.

Limitation periods may be extended by contract, but may not be shorted unless the applicable provincial limitation legislation expressly permits it.

---

### **3.7 Who normally bears the risk of unforeseen ground conditions?**

---

Which party will bear the risk of concealed or unknown ground conditions depends on the contract. Absent contractual terms providing for compensation or extra time on account of materially different subsurface conditions, the contractor may be at risk. Many contracts provide for testing ahead of time, or contain a site inspection clause which requires the contractor to declare itself satisfied of the ground conditions based on the information available. However, where there is a hidden risk known to the owner but not the contractor, the owner may be liable to the contractor regardless of the existence of a site inspection clause or contractual provision.

---

### **3.8 Who usually bears the risk of a change in law affecting the completion of the works?**

---

Absent a contractual provision, a contractor will often bear the risk for a change of law. However, construction contracts often include

a provision which identifies which party will be responsible if there is a change in law. These changes may include: environmental law changes; zoning changes; or building code changes. Ideally, the risk is placed on the person who is responsible for the particular portion of the risk (e.g. contractors typically bear the risk of a change in building code).

---

### **3.9 Who usually owns the intellectual property in relation to the design and operation of the property?**

---

Unless changed by the contract, the designer retains the intellectual property in the design. The owner typically retains copies of drawings, blueprints, models or other work, but cannot use them for other projects without the consent of the designer of the work, or unless it obtains a licence from the designer to use the work. Owners often require the right to use the intellectual property for the purpose of operating or maintaining the project, and will also require an assignment of any intellectual property resulting from the use by the designer of any of the owner's confidential information in the design process.

Other intellectual property issues may arise in construction projects; for example with patented products, processes, devices or designs. If the owner does not obtain the intellectual property rights, the owner will need to obtain a licence to use the intellectual property, and potentially to have others maintain the equipment.

---

### **3.10 Is the contractor ever entitled to suspend works?**

---

Construction contracts often contain provisions allowing the contractor a right to suspend the work if, for example, the owner has not paid, or if the work is suspended for a certain number of days (not as a result of the contractor). If the contract does not have a clause regarding suspension, the courts will consider whether the owner is in default of its obligations under the contract to a substantial degree in order to determine whether the contractor had the right to suspend the work.

If the contract has a *force majeure* provision, a party may have additional rights to suspend the work if an event qualifies as an event of *force majeure* (see also question 3.12).

---

### **3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?**

---

Construction contracts often provide for termination where, for example, the other party is bankrupt or insolvent, the work is suspended or delayed for a period of time, or the other party fails to perform certain obligations under the contract. These termination for cause provisions typically contemplate notice and a period of time for the party in default to cure its breach.

The contract may also include a termination for convenience clause which may permit one or both parties to terminate the contract "at will", and set out the compensation to be paid upon termination.

Under the common law, certain terms of the contract which are essential or sufficiently important may be found to be conditions which, if breached, allow the innocent party to terminate the contract.

Absent termination provisions in the contract, the common law doctrine of repudiation will apply where one party unequivocally indicates its intention not to be bound by the terms of the contract.

In such a case, the innocent party may elect to accept the breach, and bring the contract to an end, or affirm the contract, in which case the contract continues. Whether it accepts the repudiation or affirms the contract, the innocent party may sue for breach of contract.

In Québec, two kinds of *resiliation*/termination may occur: 1) the owner may unilaterally terminate the contract even though the work or provision of service is already in progress, as long as he pays to the contractor in proportion of the agreed price, the actual costs and expenses, the value of the work performed before the notice of termination and, as the case may be, the value of the property furnished; or 2) any party may terminate the contract if the contractor fails to properly perform the work or comply to a substantial degree with the contract. In such case, the owner may finish the work itself or with another contractor, so long as termination was in accordance with the terms of the contract.

---

**3.12 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?**

---

Both *force majeure* and frustration are known. Contracts may contain *force majeure* clauses that define *force majeure* events; for example tornadoes, fires, labour strikes, acts of war, etc. In the clause, the parties may agree to notice provisions, and that, if such an event occurs, neither party is at fault nor entitled to damages. The *force majeure* event may suspend obligations under the contract, and may lead to contract termination. Typically, the parties will not be permitted to rely on an uneconomical contract as a ground for *force majeure*. In the absence of a contractual term, there is no right to claim *force majeure*.

In Québec, if a contract stipulates which party will assume the risk of *force majeure*, the clause supersedes what is provided by the Civil Code. The Civil Code provides that a debtor is released where he cannot perform an obligation by reason of a *force majeure* event which occurred before he was in default. If the debtor was in default, a debtor is nonetheless released if the creditor could not in any case benefit from the performance of the obligation by reason of that *force majeure* event.

Frustration may occur if circumstances change such that it becomes impossible for one party to fulfil its obligations under the contract. If such a change occurs, performance will no longer be required, though it is not necessarily the case that all obligations under the contract will come to an end. The parties may address events of frustration, and allocate responsibility to the party in the best position to manage the risk of the event. Frustration only serves to end a contract in whole; it cannot be used to suspend performance or to partially terminate a contract.

---

**3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?**

---

In Québec, the subsequent owner can benefit from legal warranty obligations resulting from a contract to which they were not the contracting party.

A third party is not normally entitled to claim a right or benefit under a contract to which it is not a party at common law. However, Courts have recognised exceptions to this doctrine, including agency, trust, and assignment. If these recognised exceptions do not apply, a third

party may benefit from contractual provisions to which they were not a contracting party under a common law principled exception to the third party beneficiary rule. Courts require clear language to find that parties intended to assume liability to a third party.

A third party may bring a claim of negligence against contractors, designers, and engineers involved in the construction of a building. These people owe a duty to use reasonable care to prevent damage to parties who they should reasonably expect to be affected by their work. This duty is owed to subsequent building purchasers if it is foreseeable that a failure to meet the reasonable care standard would result in defects that create real and substantial danger to health and safety.

Most provinces have legislation regulating warranties on newly built homes, under which subsequent owners may have a claim. Warranty coverage varies across provinces.

---

**3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?**

---

Canadian law recognises legal and equitable set off, and construction contracts may provide for contractual set-off in specific situations. In the absence of a contractual right of set-off, parties to a contract may, in certain circumstances, be entitled to legal or equitable set-off.

Legal set-off requires two conditions be fulfilled: first, that both obligations be debts which are for liquidated sums or money demands that can be ascertained with certainty; and, second, that both debts be mutual cross-obligations. The right to legal set-off is subject to statutory limitation periods in Canada.

Equitable set-off can be distinguished from legal set-off on the basis that it applies in the absence of mutuality, and where the cross-obligations are not for liquidated sums or money demands. While equitable set-off is not subject to statutory limitation periods, and the claim and cross-claim need not arise out of the same contract, the party relying on the set-off must show an equitable ground which goes to the very root of the other party's claim.

---

**3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?**

---

Each party to a construction contract owes a duty of care to one another. A contract may be constructed to limit or exclude a party's contractual or tortious liability. If the contract specifies a limitation clause for liability for a specific matter or type of conduct, a party cannot sue in tort to circumvent the contractual clause. A party may bring an action under either contract or tort, but may not recover damages under both.

If a contract does not specify a standard of care, the parties are held to a reasonable standard of care of an ordinary person with similar expertise. For example, an engineer, contractor or subcontractor will be held to the standard of care of a person with similar knowledge and expertise.

---

**3.16 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?**

---

If the language of the written contract is clear and unambiguous, then no extrinsic evidence may be admitted to alter, vary, or interpret in any way, the words used in the contract. Construction



contracts usually contain interpretation provisions, such as priority provisions, which clarify which document has priority in the event of a conflict between terms.

Courts prefer a common-sense approach to determine the intentions of the parties over the application of technical rules of construction. Courts will thus consider the ordinary and grammatical meaning of the words, in light of the surrounding circumstances at the time the contract was entered into.

Where a term of a contract is found to be ambiguous, extrinsic evidence regarding the parties' objective intentions, and objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties, may be admitted to interpret the contract and resolve the ambiguity.

As an interpretive tool of last resort, the court may apply the doctrine of *contra proferentem*, and interpret ambiguous contractual terms against the drafter.

---

### 3.17 Are there any terms in a construction contract which are unenforceable?

---

Courts will generally uphold the right of freedom of contract – only in rare circumstances will they relieve a party from its bargain. As a general rule, a term of a contract will be unenforceable where it is unconscionable, or where it is contrary to public policy or statute (e.g. annual rates of interest over 60% will not be enforceable, and terms of contracts that purport to contract out of provincial lien legislation may be void).

Exclusion of liability clauses may be found to be unconscionable in certain circumstances, such as where there is a power imbalance between the parties. While exclusion of liability clauses are generally enforceable, they are strictly interpreted (see also question 2.3).

In Québec, some warranties are created by statute, and, therefore, cannot be voided by contractual provisions (for instance, the warranty in the Civil Code for the loss of the work that occurs within five years after the work is completed). Also, an abusive clause, which is excessively and unreasonably detrimental to the adhering party, in a contract of adhesion may be reduced.

---

### 3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

---

A professional designer may have specific obligations to the client expressed in the contract. However, the contract may also include exclusion clauses which limit the liability of the designer. In the absence of the parties providing for the obligations in their contract, under tort law, a designer has a duty to act with the reasonable skill, care and diligence expected of a designer of ordinary competence.

Unless the contract provides otherwise, a designer is typically liable if the design was defective due to negligence. The standard of care for a design professional is not a guarantee that the work will be to the owner's complete satisfaction nor that the work be successful, so long as the work was done competently and non-negligently.

The designer may have a duty to ensure the project is constructed in accordance with its plans, and satisfies the necessary specifications, building codes, and bylaws. These obligations are typically known as field review services. Although the designer is responsible for

ensuring that plans and specifications are generally complied with, it is usually not responsible for carrying out the work. Therefore, the designer's obligations do not provide an absolute guarantee of perfect compliance with the design, nor supervision of every single thing that is done on the project; however, designers are expected to supervise critical stages of the work.

---

## 4 Dispute Resolution

---



---

### 4.1 How are disputes generally resolved?

---

Dispute resolution provisions in construction contracts vary. Often there is a tiered process where disputes are resolved first by the consultant, then negotiation, then mediation and/or arbitration. These stages could be mandatory and have timelines in which they must be met before moving to the next stage. Where there is a mandatory arbitration clause, the court will refrain from taking jurisdiction over the dispute. In some provinces, one party may apply to the court for summary judgment of a matter which may otherwise be arbitrable, if the issues can be determined by way of summary judgment.

If the parties do not contract into the alternative dispute resolution methods described above, they can have their dispute resolved by the court.

---

### 4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

---

The adjudication of construction litigation varies from province to province and generally there are no specific adjudicative processes in Canada focused on construction. In Ontario, a specialised construction lien court has been created which is administered by case management masters, but this court only has jurisdiction for projects within the City of Toronto.

---

### 4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

---

Many construction contracts have arbitration clauses but not all. They may be mandatory or permissive. If the clause is merely permissive, in order to proceed with arbitration, the parties must subsequently agree to arbitrate.

Arbitration clauses vary in complexity and may range from a simple agreement to arbitrate, or set out details such as the number of arbitrators, the selection process, the seat and any rules that apply to the arbitration.

If the parties set out arbitration rules, those rules typically provide the framework for the arbitration. Otherwise, the parties may agree to the procedure at the start of the arbitration or the arbitrator will determine the process (e.g. document exchange, witnesses, timing, etc.). The arbitration hearings also depend on the type of dispute being heard. In Québec, if there is no specific procedure to follow stipulated in the contract, the rules codified in the Code of Civil Procedure (CCP) will apply.

Each province has arbitration legislation, but the legislation does not set out the detail of the arbitration procedure. That detail is instead set out in the rules of arbitration the parties may choose, as mentioned above.

Parties thus, at times, choose to adopt third-party rules (or a variation of them), such as the CCDC Rules for Arbitration of Construction Disputes or the UNCITRAL Arbitration Rules. Canadian courts will assist in the enforcement of arbitral awards.

---

**4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.**

---

Yes, in 1986, Canada ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and each province has enabling legislation for the New York Convention as well as the Model Law on International Commercial Arbitration.

Other than the provisions of Article V of the New York Convention, one recent obstacle to enforcement is that the arbitral award must be brought for enforcement within the applicable provincial limitation period (see question 3.6).

---

**4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?**

---

A judgment of a foreign court may be upheld in Canada. A prerequisite to enforcement is that the foreign court had a real and substantial connection with the parties or subject of the dispute, or another basis of jurisdiction was satisfied. There need not be a real and substantial connection between the dispute or the defendant and the province in which recognition and enforcement is being sought. The judgment must also be final and conclusive.

Canadian courts will only enforce a foreign judgment that is fair and does not offend Canadian public policy.

Several provinces have statutes that govern the reciprocal enforcement of judgments that may allow a party to apply to the courts for an order registering the foreign judgment. However, recognised reciprocal jurisdictions may vary across provinces.

---

**4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.**

---

The process is governed by the Rules of Court of each province which set out the requirements to, *inter alia*, start a proceeding, respond, bring third-party claims and cross claims, exchange

documents, conduct discovery/questioning, and retain experts. Some Rules of Court have mechanisms to encourage settlement, like mediation, and rules relating to settlement offers which impose enhanced cost consequences if a rejected offer to settle is better than the final award by a court.

The timing of court proceedings varies. Large, complex cases may take several years to get to trial. If an appeal is possible, one party may appeal the decision to the provincial Court of Appeal. The decision of a Court of Appeal may also be appealed to the Supreme Court of Canada; however, the party seeking to appeal will need to seek leave of the court before having their appeal heard.

Simpler cases may be resolved summarily which allows for a faster decision. If the claim is below a threshold amount, each province has a small claims court which has a simplified procedure and shorter time frame in which a trial of the matter is heard. Decisions from small claims and provincial courts can also be appealed.

The CCP of Québec codifies the obligation for the parties to consider private prevention and resolution processes before referring their dispute to the courts. The CCP also codifies that the courts are to facilitate conciliation when required, the parties request it, circumstances permit, or if a settlement conference is held. The parties may agree to settle their dispute through a private dispute resolution process or judicial conciliation and they may also otherwise terminate the proceeding at any time. The CCP provides rules for settlement conferences before a judge, mediation and arbitration.

### Acknowledgment

The authors would like to thank all lawyers and students from across the country at Miller Thomson who provided assistance in preparing this chapter, with special thanks to Fergus Schappert, Andréanne Sansoucy, Nick Willis and Haley Edmonds.

Fergus Schappert practises construction law and commercial litigation in Edmonton, Alberta (Tel: +1 780 429 9737 / Email: [fschappert@millერთhompson.com](mailto:fschappert@millერთhompson.com)).

Andréanne Sansoucy has expertise in Québec construction law and the Québec Civil Code (Tel: +1 514 871 5455 / Email: [asansoucy@millერთhompson.com](mailto:asansoucy@millერთhompson.com)).

Nick Willis practises construction law and commercial litigation in Edmonton, Alberta (Tel: +1 780 429 9459 / Email: [nwillis@millერთhompson.com](mailto:nwillis@millერთhompson.com)).

Haley Edmonds practises construction law and commercial litigation in Edmonton, Alberta (Tel: +1 780 429 9410 / Email: [hedmonds@millერთhompson.com](mailto:hedmonds@millერთhompson.com)).

**William J. Kenny**

Miller Thomson LLP  
3000, 700 – 9<sup>th</sup> Avenue SW  
Calgary, Alberta  
Canada

*Tel:* +1 403 298 2404 / +1 780 429 9784  
*Fax:* +1 403 262 0007  
*Email:* [wkenny@millerthomson.com](mailto:wkenny@millerthomson.com)  
*URL:* [www.millerthomson.com/en](http://www.millerthomson.com/en)

Bill Kenny is a Partner in the Edmonton and Calgary offices of Miller Thomson. As general counsel, Bill practices civil and regulatory litigation, construction law, transportation, insurance and corporate commercial law.

Bill has written many articles and participated in seminars dealing with litigation, construction law and directors' liability. He has appeared before all levels of court in Alberta, Saskatchewan and the Northwest Territories, as well as before numerous agencies, boards and tribunals. He has appeared as counsel before international commercial arbitration panels in London and Paris. Bill has acted for construction contractors, consulting engineers and owners, with experience in all forms of claim related events and forms of dispute resolution as well as the preparation of contract documents. He has also been appointed as arbitrator and mediator in many commercial disputes.

**Leanna Olson**

Miller Thomson LLP  
3000, 700 – 9<sup>th</sup> Avenue SW  
Calgary, Alberta  
Canada

*Tel:* +1 403 298 2417  
*Fax:* +1 403 262 0007  
*Email:* [lolson@millerthomson.com](mailto:lolson@millerthomson.com)  
*URL:* [www.millerthomson.com/en](http://www.millerthomson.com/en)

Leanna Olson advises clients on litigation and construction law matters. Her practice focuses on the construction industry, including residential, commercial, infrastructure and industrial projects.

Leanna helps clients at the initial stage of projects by reviewing contracts, contract negotiations, and drafting custom-built contracts. When disputes arise, Leanna assists with reviewing and advising on the issues and helps navigate through negotiation, mediation, arbitration or litigation, as necessary.

Leanna has worked on various lien claims, deficiency claims, negligence claims and contract disputes. She has experience in small claims trials, questionings, negotiations, mediations and large litigation matters.



Miller Thomson LLP, one of Canada's leading national law firms, is dedicated to the Canadian market. We have close to 550 lawyers in 12 offices nationally, and the broadest geographic reach of any Canadian law firm. Miller Thomson is uniquely positioned to provide 'on the ground' insight and knowledge from the country's key economic hubs, and under both the common law and civil law systems in Canada. We are able to consistently deliver the highest quality advice, advocacy and expertise required by Canadian or international clients doing business in Canada.

Our Construction and Infrastructure industry group includes lawyers who are available and experienced to assist with a variety of legal needs. We represent domestic and foreign owners, developers, engineers, architects, contractors, and subcontractors in the project development process and in dispute resolution. Our expertise extends from simple to complex projects involving a variety of delivery models.

## Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- Investor-State Arbitration
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)