

The New N.B. Construction Remedies Act

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Construction Association

MCINNES
COOPER

CRA | Key Changes in Law

- ✓ Date of Proclamation - November 1 , 2021
- ✓ Application of Lien Legislation
- ✓ Capital Repair
- ✓ Holdback
- ✓ Trust Rules
- ✓ Trust Accounts (not yet - but coming)
- ✓ Completion

CRA | Key Changes in Law

- ✓ Application to Provincial and Municipal Work
- ✓ Bonds

Statute, Forms and Regulations

- The Act can be found here
 - [Construction Remedies Act](#)
- The Regulations
 - [Regulations and Forms](#)
- Bill 68 – Industrial Site and Owner’s Website
 - [Bill 68 - Construction Remedies Act - Amendment](#)

What is a “Lien”

20(1) A person who supplies services or materials for an **improvement** for an owner, contractor or subcontractor has a lien for the amount of wages owed to the person or for the contract price or subcontract price of those services or materials, as the case may be, or for as much of those amounts that remain owing to the person, that, subject to sections 22 and 23, attaches to the owner’s estate or interest in

- (a) the land in respect of which the improvement is made, and
- (b) the improvement.

Application – Improvement

- “improvement” means, in respect of any land,
 - (a) any alteration, addition or **capital repair** to the land,
 - (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
 - (c) the complete or partial demolition or removal of any building, structure or works on the land.

Interpretation of “capital repair”

- ... a capital repair to land ... is any repair intended to extend the normal economic life of the land ... or of any building, structure or works on the land ..., or to improve the value or productivity of the land, ..., building, structure or works, but does not include maintenance work performed in order to prevent the normal deterioration of the land, ... , building, structure or works or to maintain the land, ... , building, structure or works in a normal, functional state.

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Application – Improvement

- “improvement” means, in respect of any land,
 - (a) any alteration, addition or capital repair to the land,
 - (b) any construction, erection or installation on the land, including the installation of **industrial, mechanical, electrical or other equipment on the land** or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
 - (c) the complete or partial demolition or removal of any building, structure or works on the land.

Application – Improvement

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 - (a) any alteration, addition or capital repair to the land,
 - (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
 - (c) the complete or partial **demolition** or removal of any building, structure or works on the land.

New Application



- Applies to the Crown
- Applies to Local Government

Application – Highway Improvement

“highway improvement” means, in respect of a **highway**,

- (a) any alteration, addition or capital repair to the **highway**,
- (b) any construction, erection or installation on the highway, including the installation of industrial, mechanical, electrical or other equipment on the highway or on any building, structure or works on the highway that is essential to the normal or intended use of the **highway**, building, structure or works, or
- (c) the complete or partial demolition or removal of any building, structure or works on the highway.

Contracting Out | Change

Old MLA



New CRA

- Every contract is amended in so far as is necessary to be in conformity with this **section**. (holdback section)

- The provisions of **this Act** apply despite any agreement to the contrary, and any waiver or release of the rights, benefits or protections provided under this Act is void. (Whole Act and Broader)

Trust Provision | New Owner's Trust

- Owner's trust fund includes:
 - (a) all amounts received in the financing of the improvement,
 - (b) proceeds of a sale
 - (c) funds in the owner's hands
 - (d) unpaid contract price
 - (e) insurance proceeds

Trust Provision | Liability for a Breach

- If a corporation is a trustee of a trust fund ... any of the following persons who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to a breach of trust by the corporation is liable for the breach of trust:
 - (a) a **director or officer** of the corporation; and
 - (b) any person who has effective control of the corporation or its relevant activities, including an **employee or agent** of the corporation.

Trust Provision |

- Offence
 - Fine \$240 - \$10,200
 - Impose further fine if for financial gain
 - Second conviction up to 90 days in prison (see also Criminal Code)
- Trust for the benefit of contractors, subcontractors, suppliers of services or materials

Owner Holdback Trust Account | Change

Old MLA → New CRA

- N/A
- Trust Account
 - Section 37(3) An owner is required to establish a trust account with a financial institution
 - Section 37(4) An owner that establishes a holdback trust account shall deposit all amounts required under subsection 34(3) to be deducted from payments made under a contract into the account, or, if the holdback is partly retained in accordance with section 39, deposit the portion of those amounts that corresponds to the portion of the holdback to be retained in the account, and the owner shall administer the account jointly with the contractor as trustees

NOT YET FINALIZED
NOT EXPLORED

Owner Holdback Trust Account | Change

Old MLA 

- N/A

New CRA

- Trust Account
 - Section 37(3) An owner is required to establish a holdback trust account with a **financial institution**
 - Section 37(4) An owner that establishes a holdback trust account shall deposit all amounts required under subsection 34(3) to be deducted from payments made under a contract into the account,

NOT YET IN FORCE

Owner Holdback Trust Account | Change

Old MLA New CRA

- N/A
- Trust Account
 - if the holdback is partly retained in accordance with section 39 (Letter of credit or Release Bond) deposit the portion of those amounts that corresponds to the portion of the holdback to be retained in the account, and the owner shall administer the account jointly with the contractor as trustees
 - **NOT YET IN FORCE**

Owner Trust Account | Multiple Contracts

Despite subsection (4), **if there is more than one contract with respect to the same improvement**, if the owner establishes a holdback trust account, it shall be a single holdback trust account to be administered jointly by the owner and one other trustee from among the following persons:

- (a) one of the contractors, other than a contractor who is an agent of the owner;
- (b) a lawyer;
- (c) an architect or engineer, other than a payment certifier for any of the contracts;
- (d) a chartered professional accountant; or
- (e) a trust company licensed under the *Loan and Trust Companies Act*.

• **NOT YET IN FORCE**

Owner Holdback Trust Account | Change

- Trust Account
 - Applies for contracts over \$100,000
 - Need to open 1 (or more) trust accounts
 - Requires two “signatures” to release funds
 - 1) Owner Signature
 - 2) Contractor or other Trustee

Unless otherwise ordered by the court, all payments from a holdback trust account require the signatures of both trustees.

- **NOT YET IN FORCE**

Owner Holdback Trust Account | Change

If a mortgagee is a financial institution and is authorized by an owner to disburse the money secured by a mortgage, the mortgagee may retain as a holdback the amount required to be retained by the owner under subsection (1) or (2) and the retention by the mortgagee of that amount is deemed to be compliance with this section by the owner.

○ **NOT YET IN FORCE**

Holdbacks | Section 34



- ✓ 10% owner holdback
- ✓ 10% completion holdback
- ✓ 5% on Provincial Government Bonded Work

Holdback

- The *Owner* must deduct 10% holdback as the value of services or materials are supplied by the *Contractor* (s. 34(1)).

Contract Value 500K	Owed	Holdback	Payment to Contractor	HST	Payment to Contractor
Progress Draw 1	\$100,000.00	\$10,000.00	\$ 90,000.00	\$ 13,500.00	\$ 103,500.00
Progress Draw 2	\$200,000.00	\$20,000.00	\$ 180,000.00	\$ 27,000.00	\$ 207,000.00
Final Draw 3	\$200,000.00	\$20,000.00	\$ 180,000.00	\$ 27,000.00	\$ 207,000.00
Holdback Payment			\$ 50,000.00	\$ 7,500.00	\$ 57,500.00
Total Payment			\$ 500,000.00	\$ 75,000.00	\$ 575,000.00

Holdbacks | Annual release (projects > \$10M)



- Completion date longer than one year
- Contract provides for the annual basis
- Exceeds amount in regulation
- No liens

Holdbacks | Phased release (projects > \$10M)

- Contract
 - ✓ Provides for a phased release
 - ✓ Identifies each release
- Exceeds amount in the regulation
- No liens

Payment Certifier

- A payment certifier is required to be
 - (a) an architect,
 - (b) an engineer, or
 - (c) if not an architect or engineer, identified in the relevant contract as being the payment certifier.

Substantial Performance | Section 7(1)

7(1) For the purposes of this Act, a contract is substantially performed

(a) when the improvement under the **contract is ready for use or is being used for the purposes intended**, and

(b) when the improvement is capable of completion or, if there is a known defect, of correction, at a cost of not more than

(i) 3% of the first \$250,000 of the contract price,

(ii) 2% of the next \$250,000 of the contract price, and

(iii) 1% of the balance of the contract price.

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(b) when the improvement is capable of completion or, if there is a known defect, of correction, at a cost of not more than

(i) 3% of the first \$250,000 of the contract price,

(ii) 2% of the next \$250,000 of the contract price, and

(iii) 1% of the balance of the contract price.

- Say \$1M Contract
 - 3% of 250K = \$7,500
 - 2% of 250K = \$5,000
 - 1% of Balance = ...
 - 1% of 500k = \$5,000
- $7500 + 5000 + 5000 =$
- Defect Value of \$17,500 on \$1,000,000

Completion Cost | Section 7(2)

7(2) For the purposes of this Act, when the improvement is ready for use or is being used for the purposes intended and the owner and the contractor agree not to complete the improvement expeditiously or, due to reasons beyond the control of the contractor, the improvement cannot be completed expeditiously, the value of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Completion Cost | Section 7(2)

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Completion Cost | Section 7(2)

7(2) For the purposes of this Act, when the improvement is ready for use or is being used for the purposes intended and the owner and the contractor agree not to complete the improvement expeditiously or, due to reasons beyond the control of the contractor, the improvement cannot be completed expeditiously, **the value of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.**

Completion Cost Holdback

- If the Contract is substantially performed, the *Owner* must deduct 10% holdback as the value of services or materials for the completion are supplied by the *Contractor* (s. 34(2)).

Contract Value 500K	Owed	Holdback	Payment to Contractor	HST	Payment to Contractor
Final Draw 3	\$450,000	\$45,000	\$405,000	\$60,750	\$465,750
Holdback Payment			\$45,000	\$6,750	\$51,750
Completion Costs	\$50,000	\$5,000	\$45,000	\$6,750	\$51,750
Completion Holdback			\$5,000	\$750	\$5,750

Certificate of Substantial Performance

- If there **is a payment certifier** in respect of a contract, at the request of the contractor, **the payment certifier shall determine whether the contract has been substantially performed**, and if so determined the payment certifier shall certify the substantial performance of the contract by signing a certificate of substantial performance.
- If there is **no payment certifier** in respect of a contract, at the request of the contractor, **the owner and contractor shall jointly determine whether the contract has been substantially performed**, and if so determined they shall certify the substantial performance of the contract by signing a certificate of substantial performance.

Certificate of Substantial Performance

- 7 days to determine whether contract has been substantially performed

S. 2020/18-11/001

FORM 7

**CERTIFICATE OF SUBSTANTIAL
PERFORMANCE OF THE CONTRACT**
(Construction Remedies Act, S.N.B. 2020, c.29, s.42)

*(County and Rural Community/Regional Municipality/Town/City/
Village in which land is located)*

(civic address or, if there is no civic address, the location of the land)

Name of owner: _____

Address for service: _____

Name of contractor: _____

Address for service: _____

Certificate of Substantial Performance |

- Within 7 days, after receiving a copy, the contractor shall post the certificate
 - ✓ at the office of the improvement or
 - ✓ in a prominent place
 - ✓ And, if provided, publish

Name of payment certifier (if applicable): _____

Address: _____

I/We certify that the contract for the improvement described below to the identified land was substantially performed on: _____
(date the contract was substantially performed)

(short description of the improvement)

Date certificate signed: _____

(payment certifier if there is one)

(owner and contractor, if there is no payment certifier)

Details – Substantial Performance

- **41(1)** If there is a payment certifier in respect of a contract, **at the request of the contractor**, the payment certifier shall determine whether the contract has been substantially performed, and if so determined the payment certifier shall certify the substantial performance of the contract **by signing a certificate of substantial performance**.
- **41(2)** A payment certifier shall sign a certificate of substantial performance **within seven days** after a request is made under subsection (1) or after the payment certifier determines that the contract has been substantially performed, whichever is later.

Details – Substantial Performance

- **41(3)** If there is no payment certifier in respect of a contract, at the request of the contractor, **the owner and contractor shall jointly determine** whether the contract has been substantially performed, and if so determined they shall certify the substantial performance of the contract by signing a certificate of substantial performance.
- **41(4)** A contractor and owner shall both sign a certificate of substantial performance within **seven days** after a request is made under subsection (3) or after they determine that the contract has been substantially performed, whichever is later.

Details – Substantial Performance

- **41(5)** A contractor shall request a determination under subsection (1) or (3), as the case may be, if requested by a **subcontractor**.
- **41(6)** A payment certifier or an owner and a contractor jointly, as the case may be, **shall set out in a certificate of substantial performance the date the contract was** substantially performed.
- **41(7)** Despite subsection (6), **the date a certificate of substantial performance is signed shall be deemed,** for the purposes of this Act, to be the date that the contract was substantially performed.

Details – Substantial Performance

- **41(8)** A payment certifier shall give a copy of a certificate of substantial performance to the owner and to the contractor within **three days** after the certificate is signed.

Details – Substantial Performance

- **41(9)** Within **seven days** after receiving a copy of a certificate of substantial performance, or after signing a certificate with an owner, as the case may be, a contractor shall
 - (a) **post a copy** of the certificate at the office at the site of the improvement, if there is one, otherwise, in a prominent place at the site of the improvement, and
 - (b) if the regulations provide for any additional manner of publication, publish the certificate in accordance with the regulations.

Time to Lien | Start time

Old MLA

- 60 days from Completion



New CRA

- 60 days from ...
- If a contract has been certified or declared to be substantially performed under section 41, the holdback required to be retained under subsection 34(1) with respect to the contract and any subcontract under the contract shall be retained for 60 days after the date the certificate of substantial performance is signed or the declaration of substantial performance is made, as the case may be.

Completion | Change

Old MLA



New CRA

- “completion of the contract” means substantial performance, not necessarily total performance of the contract;

- For the purposes of this Act, a contract is completed when the cost of completing it, correcting a known defect or supplying the services or materials remaining to be supplied **for the improvement is not more than 1% of the contract price.**

Certification of Subcontracts

- If there is a Payment Certifier, the Payment Certifier may agree to certify completion of a subcontract;
- If there is no Payment Certifier, the Owner and Contractor may agree to certify completion
- Holdback can be reduced by the holdback on the Subcontract
- Completion – Not more than 1% of contract price remaining
- Holdback period of 60 days from signing certificate of completion of Subcontract

Notice of Certificate of Completion of Subcontract

47(4) If a subcontract has been certified or declared to be completed under section 44, the holdback required to be retained under subsection 34(1) with respect to the subcontract and any subcontract under the subcontract shall be retained for 60 days after the date the certificate of completion of subcontract is signed or the declaration of completion of subcontract is made, as the case may be.

Notice of Certificate of Completion of Subcontract

- Certification of Subcontract
- Completion

FORM 8
**CERTIFICATE OF COMPLETION OF
SUBCONTRACT**
(Construction Remedies Act, S.N.B. 2020, c.29, s.45)

Name of subcontractor: _____
Address for service: _____

Name of owner: _____
Address for service: _____

Name of contractor: _____
Address for service: _____

Name of payment certifier (if applicable): _____

Certificate of Substantial Performance Posting

41(9) Within seven days after receiving a copy of a certificate of substantial performance, or after signing a certificate with an owner, as the case may be, a contractor shall

(a) **post a copy of the certificate at the office** at the site of the improvement, if there is one, otherwise, in a prominent place at the site of the improvement, and

(b) if the regulations provide for any additional manner of publication, publish the certificate in accordance with the regulations.

Practical
Problem

Certificate of completion of Subcontract | Posting

44(9) Within seven days after receiving a copy of a certificate of completion of subcontract, or after signing a certificate with an owner, as the case may be, a contractor shall

(a) **post a copy of the certificate at the office** at the site of the improvement, if there is one, otherwise, in a prominent place at the site of the improvement, and

(b) if the regulations provide for any additional manner of publication, publish the certificate in accordance with the regulations.

Practical
Problem

Other Holdback Methods



- Form 5 - Letter of Credit in place of Holdback Account
- Holdback Release Bond

Province and Local Government



- Applies to highways and all construction
- No Trust Accounts
- Bonds mandatory above threshold of \$500,000
- Virtual Liens

Province and Local Government

- New L&M Bond Form
- Mandatory on contracts over \$500k
- Minimum 50% of Contract Price
- Post the Bond in a prominent Place

Loi sur les recours dans le secteur de la construction

FORM 18
LABOUR AND MATERIAL PAYMENT BOND
(Construction Remedies Act, S.N.B. 2020, c.29, s.83(4)(a) and s.84(3)(a))

No. _____ (the "**Bond**") Bond Amount \$ _____

_____ *(name of the contractor*)*

as a principal, hereinafter [collectively] called the "**Contractor**", and

_____ *(name of the surety company**)*

a corporation created and existing under the laws of _____ *(place of incorporation)*

as a surety, and duly licensed under the *Insurance Act* to transact guarantee insurance or surety insurance and hereinafter called the "**Surety**" are held and firmly bound unto _____ *(name of the owner***)* as obligee, hereinafter called the "**Owner**", in the amount of \$ _____ *(Bond Amount in figures)* hereinafter called the "**Bond Amount**", for the payment of which sum the Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns, in accordance with the provisions of this Bond (the "**Obligation**").

WHEREAS the Contractor has entered into a written contract with the Owner dated the _____ day of _____ *(month)* in the year _____ for _____ *(title or description of the contract)*

Province and Local Government

- New Performance Bond Form
- Mandatory on Contracts over \$500k
- Minimum 50% of Contract Price

Loi sur les recours dans le secteur de la construction

FORM 19
PERFORMANCE BOND
(Construction Remedies Act, S.N.B. 2020, c. 29, ss. 83(4)(b) and 84(3)(b))

No. _____ (the "**Bond**") Bond Amount \$ _____

(name of the contractor)*

as a principal, hereinafter [collectively] called the "**Contractor**", and

*(name of the surety company**)*

a corporation created and existing under the laws of _____
(place of incorporation)

as a surety, and duly licensed under the *Insurance Act* to transact guarantee insurance or surety insurance and hereinafter called the "**Surety**", are held and firmly bound unto

_____ as obligee, hereinafter called the "**Owner**",
*(name of the owner***)*

in the amount of \$ _____ hereinafter called the "**Bond Amount**",
(Bond Amount in figures)

for the payment of which sum the Contractor and the Surety, jointly and severally, bind themselves, their heirs,

Claims – Bonds

- Two-Tier Bond
 - Every person who either has a direct contract with the Contractor (“**Subcontractor**”) or who has a direct contract with a Subcontractor under the Contractor (“**Sub-subcontractor**”) ... is a “Claimant” under the Bond.
- Sub-Subcontractors – Limited to holdbacks from the Owner
- New Process and Timelines

Residential Construction

- Notice required to Owner for Contractor to obtain Lien

FORM 9

NOTICE TO OWNER
(Construction Remedies Act, S.N.B. 2020, c.29, s.54(1))

Owner: _____

Contractor: _____

Description of the land sufficient for identification, including civic address, if any: _____

TAKE NOTICE that, in addition to the Contractor, the following subcontractors have supplied or will supply services or materials for the improvement of the land identified above:

Rights to Information

- Substantially enhanced rights to all lienholders
 - Trust Accounts (joint administration)
 - Posting of Certificates
 - Request to give notice of Substantial Performance (S. 43) and Completion of Subcontract (S. 46)
 - Posting of Notice of Bond (S. 85)
 - Right to Information (s. 87)

Questions?



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