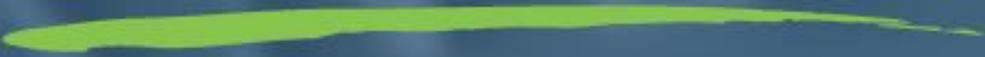


# LEARNERS



## CONSTRUCTION LAW: Drafting of Contracts

Lianne J. Armstrong  
January 29, 2016

# Code of Hammurabi (circa 1700 BCE)

- **Article 229.** If a builder builds a house for someone, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.
- **Article 230.** If it kills the son of the owner the son of that builder shall be put to death.
- **Article 232.** If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.
- **Article 233.** If a builder build a house for someone, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.

- **The foundation of all construction projects and the litigation that flows from them are the contracts (or lack thereof) entered into by the parties.**
- **The contract:**
  - Defines the project delivery and pricing models
  - Allocates responsibilities, risks, and rewards amongst the project participants
  - Defines the scope of work and services to be performed
  - Is also a tool for administering and managing the project

- **Construction Contracts are Unique:**
  - They govern a long-term relationship as compared to a single transaction (eg. 7-year renovation project for Union Station in Toronto, 30-year P3 Infrastructure Contracts)
  - They involve the coordination and interaction of many project participants including those who are not parties to the contract:
    - Owner
    - Contractor / Construction Manager
    - Designer / Consultant
    - Subcontractors/Suppliers
    - Lenders / Insurers
    - Sureties

# CONSIDERATIONS

- Triggers for Payment
- Costing Arrangements
- Assumptions of Risk
- Scope of Work
- Dispute Resolution
- Interest on Over-due Accounts
- Change Orders
- Delay Provisions
- Governing Law and Jurisdiction
- Repair of Deficiencies
- Notice Provisions
- Etc.

# Standard Costing Arrangements

- Fixed Price – Owner pays contractor a fixed amount for all services and materials supplied to the project
- Reimbursable/Cost-Plus – Contractor invoices time at a hourly rate is reimbursed for out-of-pocket expenses; Contractor receives a fixed or percentage fee
- Unit Price – different elements are identified as priced per unit

# Alternatives Costing Methods

- Time and Material – Contactor works on an hourly basis and is reimbursed for supplies etc.
- Guaranteed Maximum Price – Cost-plus pricing but with a maximum guarantee
- Target Price – a baseline budget is established with consequences for exceeding or beating it

# Construction Contracts

- **As a result of the uniqueness of construction contracts, the industry has developed sophisticated standard forms:**
  - **National:**
    - *Canadian Construction Documents Committee*, Canadian Construction Association, Royal Architectural Institute of Canada
  - **Provincial:**
    - Ontario General Contractor's Association, Ontario Association of Architects, Professional Engineers Ontario
  - **Industry Forms:**
    - Construction Owners Association, Defence Construction Canada, etc.
  - **International:**
    - Federation Internationale Des Ingenieurs-Conseils ("FIDIC"), American Institute of Architects

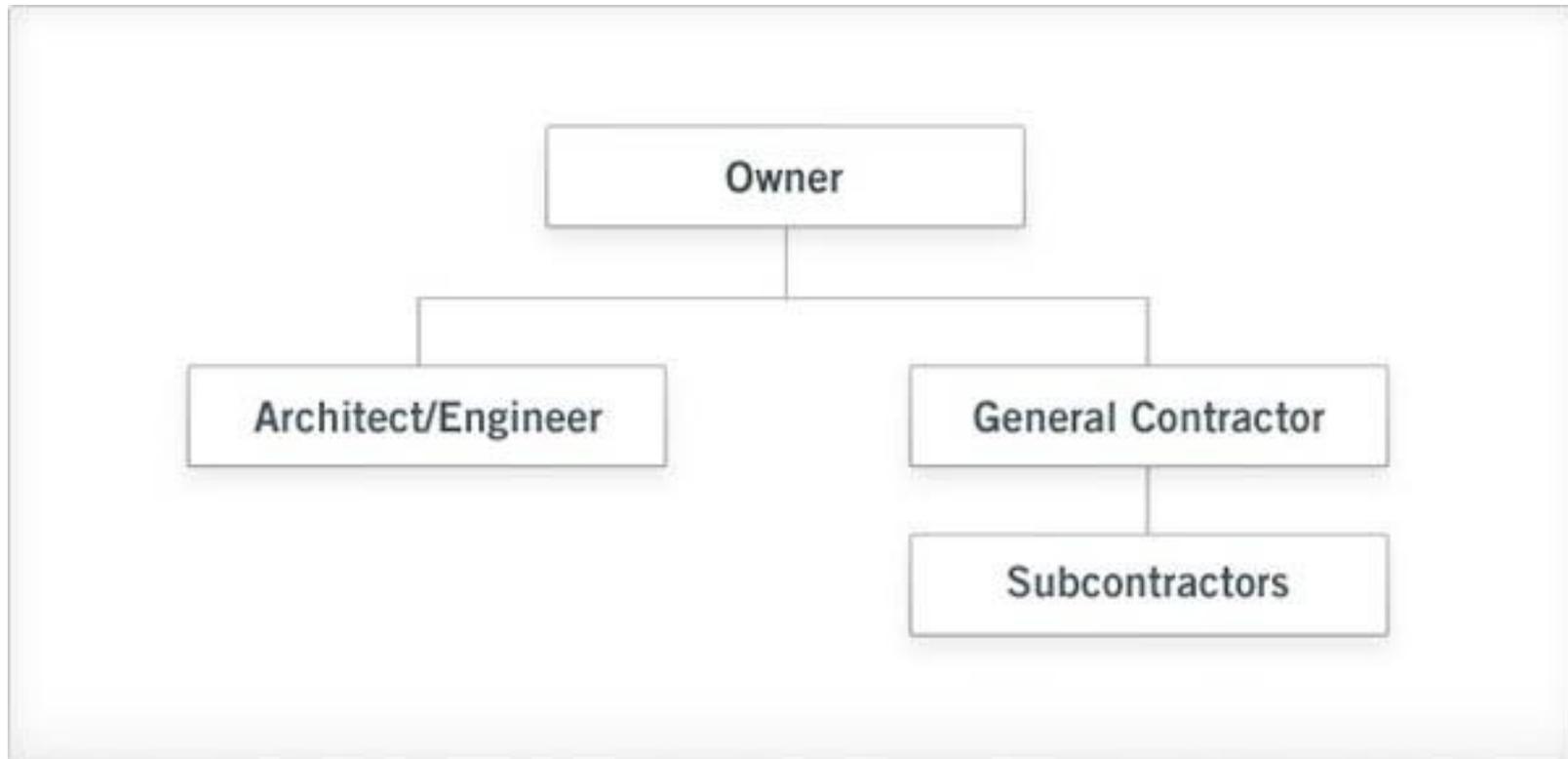
# Canadian Construction Documents Committee (“CCDC”)

LERNERS

- Most common Standard Form Construction Contracts in Ontario
- National joint committee for the development, production, and review of standard Canadian construction contracts, forms, and guides
- Aims to create balanced contracts that fairly allocate risks and responsibilities between the different members of the construction pyramid
- **Committee includes representatives from:**
  - Two owners from each of the public and private sectors
  - Association of Consulting Engineering Companies Canada
  - Canadian Construction Association
  - Construction Specifications Canada
  - Royal Architectural Institute of Canada
  - Canadian Bar Association, Construction Law Section

- **Select CCDC Standard Form Contracts:**
  - **Traditional Project Structure:**
    - CCDC 2 - 2008 Stipulated Price Contract
    - CCDC 3 - 1998 Cost Plus Contract
    - CCDC 4 - 2011 Unit Price Contract
    - CCDC 18 - 2001 Civil Works Contract
  - **Design-Build Project Structure:**
    - CCDC 14 – 2013: Design-Build Stipulated Price Contract
    - CCDC 15 – 2013: Design Services Contract Between Design-Builder and Consultant
  - **Construction Management Project Structure:**
    - CCDC 5A - Construction Management Contract – For Services
    - CCDC 5B – Construction Management Contract – For Services and Construction

## Design-Bid-Build



## Design-Bid-Build

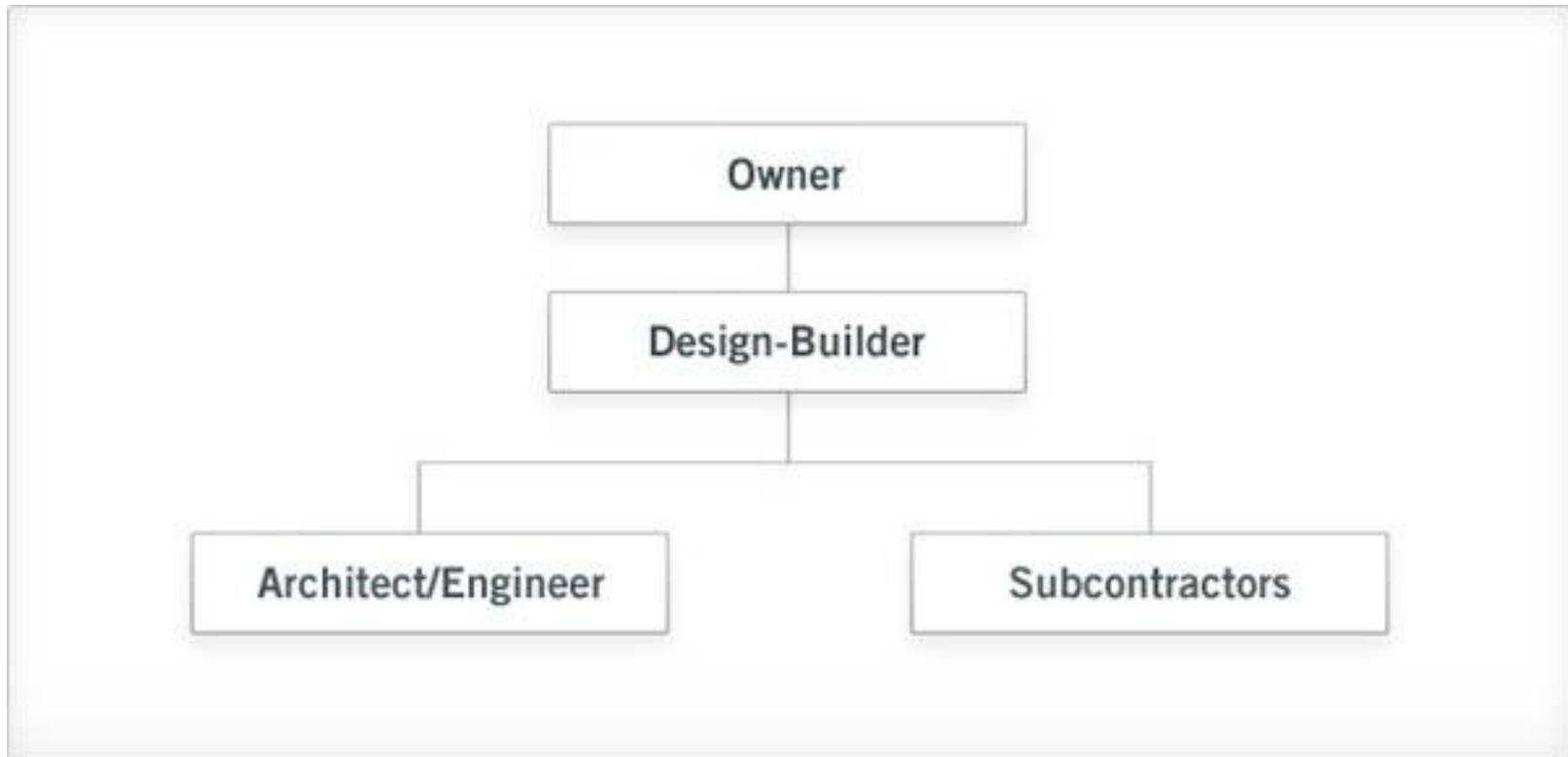
- A Major Disadvantage of the traditional Design-Bid-Build project delivery model is that the Contractor has no input during the design phase
- **Who then is responsible for the constructability of the design?**
  - *Temar Construction Ltd. v West Hill Redevelopment Co.* (1986), 21 CLR 156 (Ont HC) at paras 29 and 36:
    - “Although the owner generally provides the specification and the contractor is obliged to do its work in accordance therewith, there is no implied warranty by the owner that the work can in fact be carried out in accordance with the specifications.”

## Design-Bid-Build

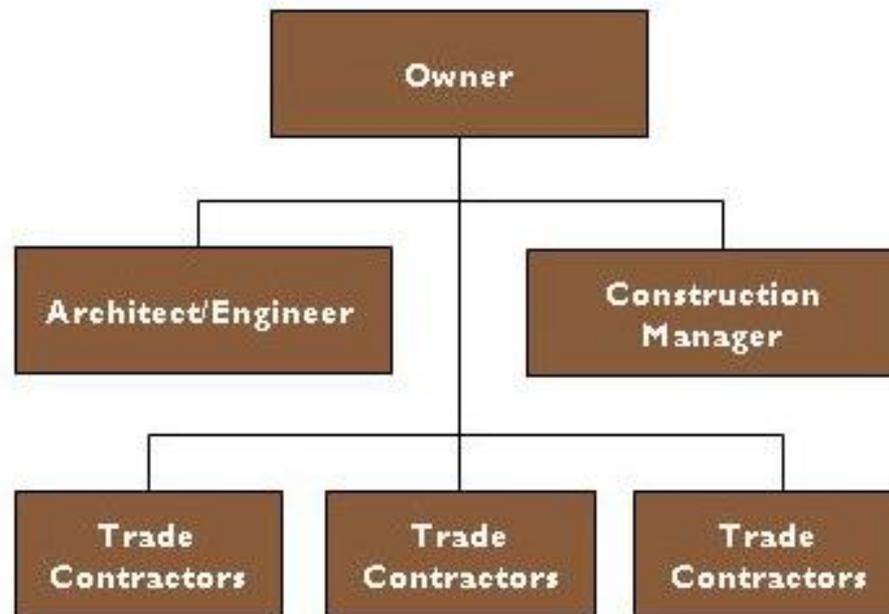
- **Who then is responsible for the constructability of the design?**
  - *Asco Consturction Ltd. v Epoxy Solutions Inc.* (2014), 32 CLR (4<sup>th</sup>) 1, 2014 CarswellOnt 9200 (Ont CA) at para 9:
    - “We agree with the appellant that tender documents represent an implied representation to compliant bidders that the work described in the tender documents could be built as described. Those bidders are entitled to rely upon the accuracy of design information prepared by the owner or its engineers. A bidder does not have to duplicate design and analysis prior to submitting a bid.”

# Project Delivery Models

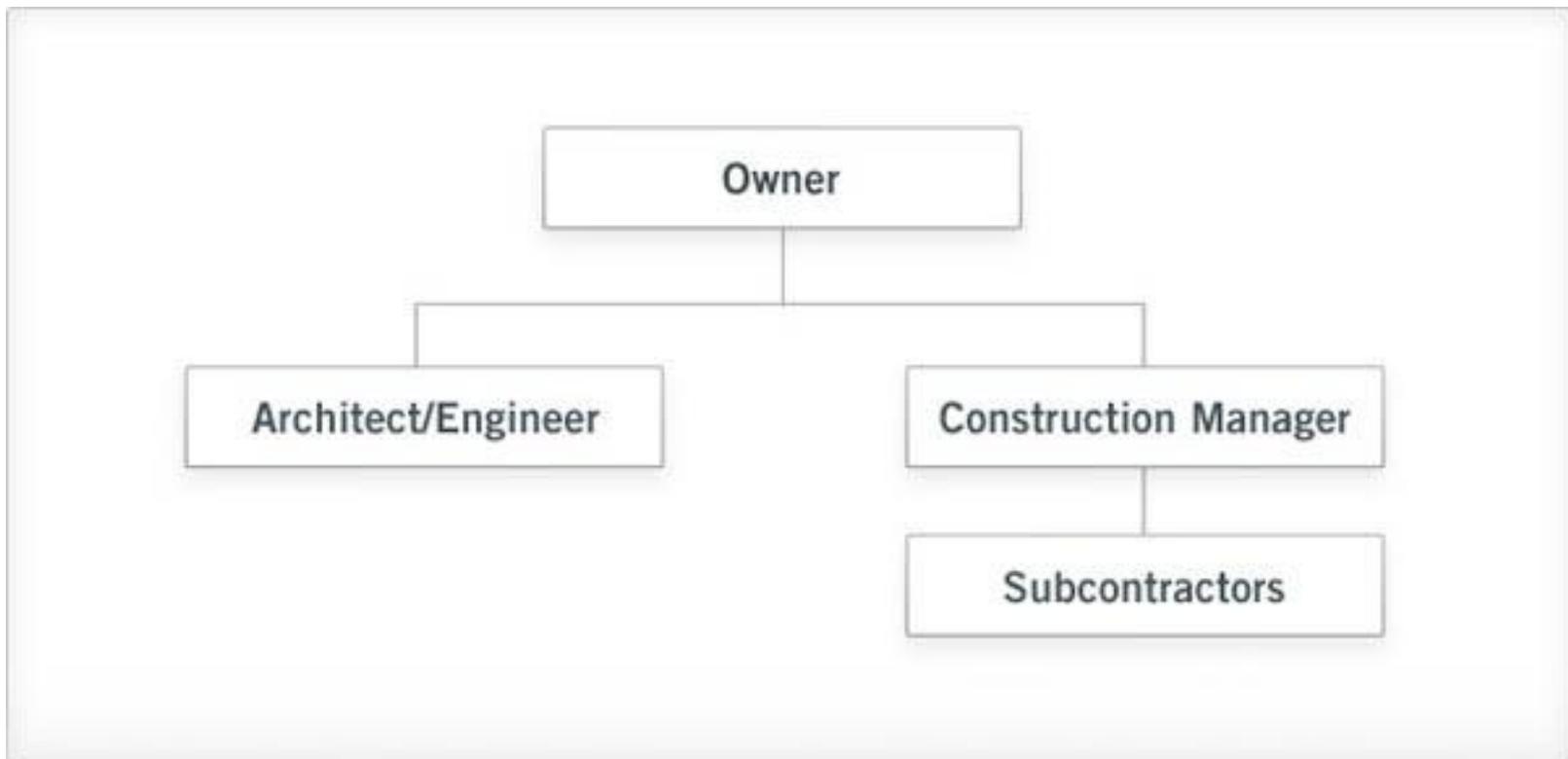
## Design-Build



## Construction Management (Not at Risk)

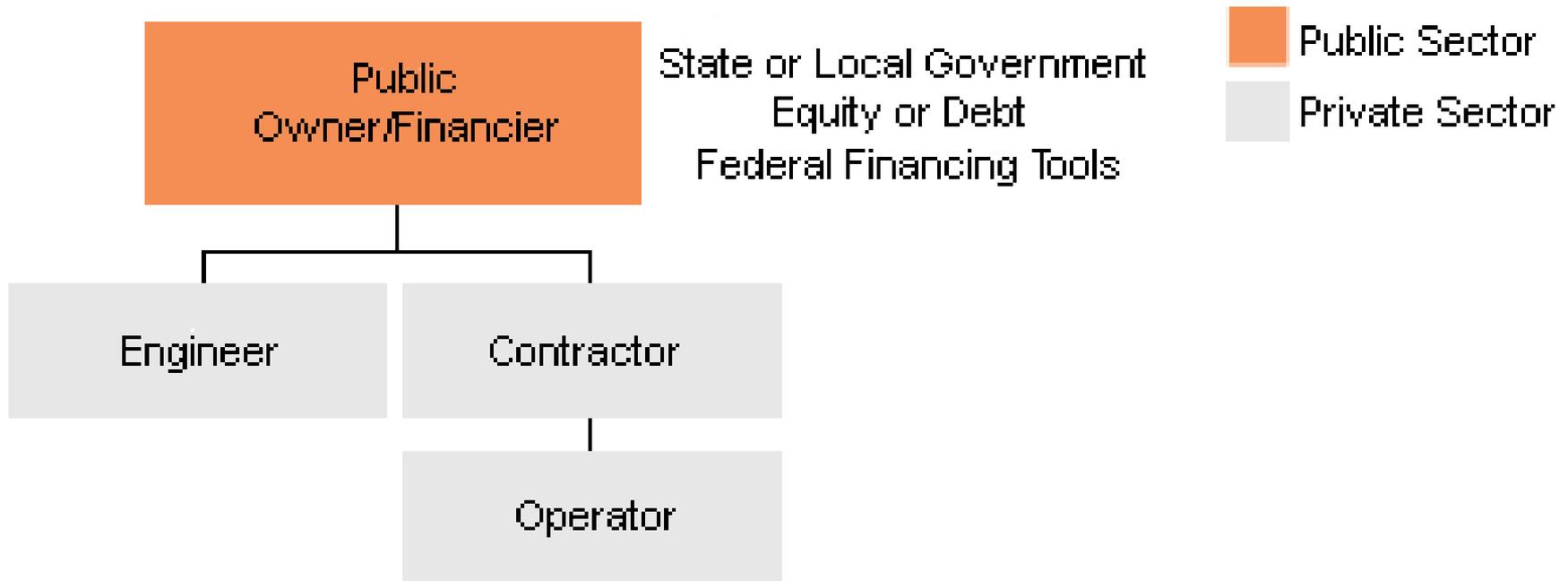


## Construction Management (At Risk)



# Project Delivery Models

## Design-Build-Maintain (P3 Projects)



# Why Standard Forms?

- **Standard terms and conditions are known to construction industry players (developers, contractors, and consultants)**
- **Treatment of risks and critical issues are understood:**
  - Payment protocol
  - Delay risks and force majeure events
  - Insurance requirements
  - Indemnities and limitations on claims
  - Warranty obligations
- **Case law may be able to assist in interpretation**

# Why Standard Forms?

- **But Standard Forms must be used with caution:**
  - **Whose form is it?**
    - eg. RAIC, AIA forms – very pro-architect, major limitation of liability clauses
  - **Is it really standard?**
    - eg. Industry forms frequently amended by supplementary conditions
    - Implications of *Sattva v Creston Corp?*
  - **Standard Forms do not set out the main scope of work elements**

- There is often a disconnect between the players negotiating and drafting construction contracts and the project managers, site supervisors, etc. who administer and perform them
- **Example: Extras and Changes**
  - Industry Standard Forms typically provide that contractors need to have prior written owner/consultant approval or at least give notice of claim for payment for extra work in order to be paid for unanticipated extra work or changes to the scope of work (Depending on terms of the Contract)
- ***Corpex (1977) Inc. v Canada, [1982] 2 SCR 643 (SCC):***
  - Contractor is not entitled to a claim for additional costs where Contractor failed to give written notice of claim within time required by Contract

# Extras and Changes in Scope

- Despite well-established written change order and/or notice of claims formalities in standard form contracts, there is substantial case law regarding the parties waiving the strict terms of the contract
- ***Colautti v City of Ottawa (1984), 46 OR (2d) 236 (Ont CA):***
  - City tried to rely on the strict terms of the contract, which required all additional cost to be duly authorized in writing prior to the work being done
  - An error by the city resulted in contractor incurring additional costs in excavation of a proposed sewer line
  - City refused to pay additional costs since Change Order was issued
  - Court held parties waived strict terms of contract by their conduct

# Extras and Changes in Scope

- ***Toscani Homes Ltd. v Horvath (1984), 7 CLR 289 (Ont SC), aff'd [1986] OJ No 430 (Ont CA):***
  - Owners of a donut shop requested a large amount of additional work to be done, which deviated materially from the original plans and specifications
  - Court found for the contractor
  - Court could not believe “that a man with the experience in business that Horvath had, although not building business, would believe that such extensive changes could be made without having to pay for them.”
- ***See also Homes by Wallace Ltd. v Werklund, [1992] 1 CLR (2d) 53 (Alta QB):***
  - Owner tried to rely on strict terms of contract despite numerous changes without written authorization, Court held that waiver applied

- ***R v Stelco Inc., (1989) 1 COHSC 76 (Ont Prov Ct):***
  - "[T]he constructor in relation to a construction project [is] the person who enjoys and can exercise the greatest degree of control over the entire project and all working upon it."
- ***Ontario (Ministry of Labour) v Reid & Deleye Contractors Ltd., 2011 ONCJ 472 (CanLII):***
  - Construction Management (not at risk) contract
  - Construction Manager charged with OHSA violation as "Constructor"
  - Defended on basis that Owner was "Constructor"
  - Court still concluded that Construction Manager was "Constructor"

# Construction Lien Act

- Can not contract out of obligations pursuant to the *Construction Lien Act*
- Even if contract does not set out holdback obligations in payment scheme, must still maintain required holdbacks
- Must ensure that holdbacks are not released except in accordance with the *Construction Lien Act*
- If improperly release holdback, remain liable to the entitled parties for their share of the holdback amount

# CLA: More than Just Liens!

- In addition to construction lien/holdback scheme, the *Construction Lien Act*, RSO 1990, c C.30, creates an additional scheme of rights and obligations
- Part II of the CLA creates a scheme of deemed statutory trusts with respect to financing, sale monies, etc. to the benefit of those who supplied services or materials to the improvement:
  - Owner's Trust (section 7)
  - Contractor's and Subcontractor's Trust (section 8)
  - Vendor's Trust (section 9)

# CLA: More than Just Liens!

- Breach of trust occurs where there is a failure to distribute trust funds in accordance with *CLA* scheme
  - Eg. Using funds from one project to pay a debt from another project
- Personal Liability for Corporate Representatives (section 13)
  - Joint and several liability (section 13(3))
  - See ***Commonwealth Brick Ltd. v Parron***, (1998) ONCA 3026 (CanLII)