

Key provisions of the retentions regime under the CCA

18A	<p>“Retention money” is defined as “an amount withheld by a party to a construction contract (party A) from an amount payable to another party to the contract (party B) as security for the performance of party B’s obligations under the contract”;</p>	<p><i>This usually takes the form of a head contractor withholding a portion of payment from a subcontractor, or a principal withholding a portion of payment from a contractor. The amount of retentions vary from contract to contract but are usually a small percentage (often 5%) of each payment certified as due to the contractor / subcontractor. The purpose of withholding these amounts is to protect the head contractor / principal in the event of issues with the contractor / subcontractor’s performance of the contract (See 18E).</i></p>
18C	<p>(1) All retention money “must be held on trust by party A, as trustee, for the benefit of party B”;</p>	<p><i>By being held “on trust by party A, as trustee, for the benefit of party B” means the retention money is not the property of Party A so cannot be acquired by creditors if Party A becomes insolvent. It will instead be returned to Party B (subject to party B’s entitlement under law).</i></p>
	<p>(2) Retention money held on trust may be held in the form of cash or other liquid assets that are readily converted into cash.</p>	<p><i>This means the principal / head contractor does not have to set aside large amounts of cash – there are other ways in which it can meet its obligations under the Regime.</i></p>
	<p>(3) A trust over retention money ends when:</p>	
	<p>(a) the money is paid to party B; or</p>	
	<p>(b) party B agrees in writing to give up claim to the money; or</p>	
	<p>(c) the money ceases to be payable to party B under the contract or otherwise by law;</p>	<p><i>For example, if Party B is not entitled to receive the retention money because those monies have been legitimately applied by the head contractor to remedy defects in the performance of Party B’s obligations under the contract.</i></p>
18B	<p>(1) The provisions will apply to commercial construction contracts where the amount of retention money is “more than the de minimus amount”;</p>	<p><i>There is no threshold for the de minimus amount prescribed by regulations, meaning even smaller retention amounts held for smaller subcontractors are covered by the regime.</i></p>
18E	<p>(2) The retention money “does not need to be paid into a separate trust account” and “may be commingled with other moneys”;</p>	<p><i>On the plain face of the wording of this provision, provided that Party A complies with its accounting obligations under 18FC it does not need to set up a separate account for every retention fund it holds for every contractor or subcontractor. Provided that the retention monies can be identified by amount and by contractor / subcontractor, Party A will be compliant by mixing retention amounts with other monies.</i></p>
18FA	<p>(a) The retention money is “not available for the payment of</p>	<p><i>This provision explicitly spells out the key feature of the trust status of retentions under the retention</i></p>

	debts of any creditor of party A (other than party B)”;	<i>regime: retentions belong to Party B – no one else.</i>
18FC	<p>(1) Party A must keep proper accounting records of all retention money that—</p> <p>(a) correctly record—</p> <p>(i) all retention money held on trust; and</p> <p>(ii) all amounts of retention money protected by instruments issued for the purpose of this subpart; and</p> <p>(iii) all dealings and transactions in relation to retention money or instruments; and</p> <p>(b) comply with generally accepted accounting practice; and</p> <p>(c) are readily and properly auditable.</p> <p>(4) Party A must make accounting records of retention money available for inspection by party B at all reasonable times and without charge.</p>	<i>This allows Party B to have visibility over the retentions it is entitled to as well as incentivizing Party A to keep accurate accounting records as it is a breach of the Act to not do so, and such breaches can be readily discovered by Party B by exercising its rights under this section.</i>
18F	<p>(1) The retention money can be invested by party A in accordance with the Trustee Act 1956 and may retain the benefit of any interest earned on retention money on or before the date on which it is payable under the contract;</p>	<i>This provision allows Party A to profit by the investment of the retention money and keeping the interest earned. Prior to the retention regime coming into effect, principals / head contractors were able to withhold retention amounts from contractors / subcontractors but did not have to set aside this money. Rather, the ‘retention money’ could be used as working capital. The retention regime is designed to protect against this practice which resulted in the contractor / subcontractor often having no realistic chance of getting these retentions if the principal or head contractor went insolvent. This provision preserves a small amount of ability to profit on the part of Party A, but with this ability comes the obligations of a trustee as well as the obligation to repay any shortfall from an investment that leads to a loss (section 18F(2)).</i>
18E	<p>(1) The retention money must not be appropriated “to use other than to remedy defects in the performance of party B’s obligations under the contract”;</p>	<i>While Party A has the ability to apply retentions for specified purposes, it cannot simply apply the retention funds to use elsewhere. This means if a principal / head contractor considers it has a monetary claim against a contractor / subcontractor – it ought to pursue this through the dispute resolution forums available (be those under the contract or otherwise).</i>

18G	(1) Interest on retention money is payable to party B from the date on which it is payable under the contract until the date on which it is paid;	<i>When a retention is due to Party B, it is effectively a debt owed by Party A to Party B and is accordingly accruing interest for the benefit of Party B.</i>
18I	Any provision in a construction contract is void if the purpose, or one of the purposes, of the provision is to avoid the application of any of the provisions of this subpart.	<i>While the provisions cannot be contracted out of if retentions are being used by parties to a contract, there are other options aside from adopting the retention regime. For example, a bond (A mechanism of guaranteeing performance under the contract which is arranged by the contractor) or an alternative arrangement (Essentially the retention regime but the principal pays a premium for the retention amount instead of having to hold the amount of money on trust. This is governed by section 18D of the Construction Contracts Act).</i>