

## Don't Hold Back (For More Than a Year): Mandatory Annual Holdback Release and Other Updates to the Construction Act

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### Key Takeaway

Changes to the *Construction Act* appear imminent following Royal Assent of Bill 216.

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### Application To Your Organization

On November 6, 2024, amendments to the *Construction Act* (the Act) moved closer to law when the *Building Ontario For You Act (Budget Measures), 2024* (Bill 216) received Royal Assent. The legislation passed quickly, coming just days after the Attorney General released his final report based on the independent review of the Act that was commissioned earlier this year.<sup>1</sup>

While the amendments are not yet in force, because they remain subject to one or more proclamations by the Lieutenant Governor<sup>2</sup>, construction industry participants should become familiar with the impending changes.

In this special edition of Cassels Construction Notes, we highlight how the following key changes will impact construction projects in Ontario:

- Mandatory Annual Release of Holdback
- Annual Expiry of Liens
- Mandatory Release of Holdback / Elimination of the "Notice of Non-Payment of Holdback"
- Augmenting Adjudication Availability
- Private Adjudicators
- No Extension of Lien Rights Through Adjudication
- Expanded Definition of "Written Notice of a

## **Mandatory Annual Release of Holdback**

One of the most directly impactful changes to the Act for most construction participants is that the annual release of holdback for contracts lasting longer than one year will be mandatory. Owners will now be required to:

1. publish a “notice of annual release of holdback”, within 14 days of each anniversary of the contract, setting out the amount of holdback to be released and the intended date of the release; and
2. pay the accrued holdback within 14 days following the expiry of what will become an annual lien registration period.

A 60-day lien registration period will follow publication of the “notice of annual release of holdback,” meaning that prospective lien claimants need to be more attuned than ever to construction industry publications where notices appear.

The form of “notice of annual release of holdback” has not yet been released, but we anticipate that it will be addressed in the forthcoming regulations.

## **Annual Expiry of Liens**

For contractors, subcontractors and suppliers: the trade-off for the mandatory annual release of holdback is that liens are now at risk of expiring on an annual basis. If the owner’s “notice of annual release of holdback” includes all (or a portion of) a lien claimant’s work, then the corresponding lien rights will expire on the 60th day following publication of the owner’s annual notice unless it is preserved (e.g., registered). However, and as set out above, the owner is now obligated to release the holdback within 14 days of all lien periods expiring.

## **Mandatory Release of Holdback / Elimination of the “Notice of Non-Payment of Holdback”**

Unless resuscitated by the forthcoming regulations, it appears that the concept of owners publishing notices of non-payment of holdback is dead. Underscoring the notion that holdback funds are sacrosanct, the amendments to the Act provide that any holdback that is not released as part of an annual distribution is payable by the owner within 14 calendar days of the expiry of the lien registration period following conclusion of the work. There is no longer a clear opportunity for the owner to reduce the holdback payable to a contractor.

## **Deemed “Proper Invoices”**

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Owners will now have an onus to promptly evaluate proper invoice submissions and to identify any deficiencies in the submission within seven (7) calendar days of receipt of a proper invoice. If the owner does not deliver written notice of defects in the proper invoice to the contractor within those seven (7) days, then the invoice will be deemed to be a “proper invoice” for the purposes of prompt payment.

For owners that typically delegate evaluation of the invoice submissions to a third-party consultant or payment certifier, it is critical that the obligation to promptly evaluate those invoices is built into the owner’s agreement(s) with those third parties.

## **Augmenting Adjudication Availability**

Clearing up confusion around the availability of adjudication at the end of a project: the Bill 216 amendments will allow for an adjudication to be commenced up to 90 days after the applicable contract has been “completed, abandoned, or terminated.”

Notably, the list of permitted matters available to be adjudicated has been removed from the Act and replaced with a reference to the regulations – which we presume means that a new list is coming. Parties will still be able to refer any matter by mutual agreement.

## **Private Adjudicators**

The Bill 216 amendments will give parties to an adjudication the option of selecting a private adjudicator rather than using somebody from the ODACC registry. Private adjudicators must still be trained by ODACC to be available for appointment, but the expansion of the pool of available adjudicators will presumably assist parties in finding more common ground in adjudicator selection and also allow for more specialized adjudicators to market their availability.

## **No Extension of Lien Rights Through Adjudication**

Currently, where a matter is the subject of an adjudication, section 34(10) of the Act extends the time period for registration of a lien in respect of the adjudicated issue to 45-days following the start of the adjudication. This extension of lien rights will be eliminated for all adjudications commenced after the Bill 216 amendments come into force, meaning that contractors and subcontractors will need to be mindful of the timing of the expiry of their lien rights even if they have commenced an adjudication.

## **Expanded Definition of “Written Notice of a Lien”**

In addition to the formal “Written Notice of a Lien” form (Form 1) that was introduced with the 2018 *Construction Act* amendments, a lien claimant will also now be able to provide notice of its lien, and trigger the owner’s obligation to retain additional funds by simply delivering a copy of its *registered* claim for

lien or its *given* claim for lien to the targeted owner. This amendment merely reflects the practice that prudent owners have been taking for decades, which is to retain the full value of the lien upon becoming aware of a lien claimant's intent to enforce.

## Timing the Changes: Transition Provisions

The Bill 216 amendments will become law immediately upon proclamation by the Lieutenant Governor, with the transition provisions carving out certain exceptions. In particular:

- the Bill 216 amendments will not apply to any projects for which the contract was entered into or the procurement process was commenced before July 1, 2018;
- for contracts entered into before the Bill 216 amendments come into force, the mandatory annual release of holdback will only start on the second anniversary of the contract following the date when the Bill 216 amendments become law – meaning that parties will have at least one year (and up to two) from the date that the legislation passes to adapt to this change; and
- where a notice of adjudication is delivered *in advance* of the Bill 216 amendments coming into force, the claimant's lien rights will continue to be extended to 45-days following the start of the adjudication.

Generally speaking, however, the amendments described above will apply to an improvement “on and after the day” Bill 216 comes into force.

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## Here to Help

For more information on the changes set out above as well as other changes to the *Construction Act*, or to discuss the impacts of Bill 216 on your organization, do not hesitate to reach out to anyone on the [Cassels Construction Law Team](#). We are here to help.

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<sup>1</sup> [2024 INDEPENDENT REVIEW: UPDATING THE CONSTRUCTION ACT: Final Report](#), prepared for the Ministry of the Attorney General by Duncan Glaholt, released on October 30, 2024.

<sup>2</sup> We anticipate that once the amendments to the Construction Act Regulations are complete, the Lieutenant Governor Proclamations will follow.