

Key changes made to Ontario's *Construction Act*

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On November 6, 2024, the [Building Ontario for You Act](#) (Bill 216) received royal assent. This omnibus legislation makes several key changes to the *Construction Act* (the Act), including implementing a mandatory annual release of holdback regime, broadening the availability of adjudication relating to contractual disputes and updating core definitions, including to clarify what constitutes a “proper invoice”. While many of the changes have yet to come into effect, industry participants should understand their new rights and obligations in relation to construction contracts.

What you need to know

- **Mandatory annual release of holdback:** The amendments require mandatory annual payment of accrued holdback. Owners must give notice of an annual release of holdback within 14 days after each anniversary of the day on which the contract was entered into, specifying the amount and intended payment date. Owners must release accrued holdback amounts annually. The released holdback must be passed down the construction pyramid (i.e. contractors to subcontractors). These changes should increase working capital at all levels.
- **Enhanced and broadened adjudication:** The amendments increase the availability of statutory interim adjudication. This includes making adjudication available for end-of-contract disputes by allowing for adjudication over contracts that have been “completed, abandoned or terminated”, allowing parties to request consolidation for multiple adjudications relating to the same improvement, expanding the types of disputes that may be submitted to adjudication (to be specified in future regulations) and continuing to allow the parties to agree upon additional matters that may be submitted to adjudication. This will likely increase use of interim dispute resolution on construction projects and reduce the negotiating leverage that parties with weaker legal positions might otherwise have (since the strength of their position can now be quickly tested in adjudication proceedings).
- **Deeming of “proper invoice”:** The amendments create a rule deeming an invoice to be a “proper invoice”, even if the invoice does not satisfy the applicable requirements, unless the owner notifies the contractor of a deficiency within seven days. Owners will need to be more diligent and expedient in reviewing invoices.
- **Transition period:** For contracts entered into prior to the effective date of the amendments to the Act, the requirement to release holdback annually begins on the second anniversary of the day the contract was entered into which follows the date on which the amendments take effect. The requirement to release the holdback at that time will include all holdback accrued before that date. Industry participants should consider whether any of their existing contracts will need to be amended to reflect the new mandatory annual release of holdback.

Three key changes to the *Construction Act*

Mandatory annual release of holdback

Bill 216 amends section 26 of the Act, requiring annual release of the holdback. Under the new provision, owners are required to publish notice of an annual release of holdback within 14 days after each anniversary of the day on which the contract was entered into, specifying the amount and intended payment date. The owner must pay the accrued holdback to the anniversary date within 14 days after the expiry of the lien period (which is the 60th day following the publication of the annual notice) unless a lien has been preserved or perfected and has not expired or been discharged or vacated. The requirement of annual holdback release is strengthened by the fact that former section 27.1 (which permitted non-payment in specific circumstances) has been repealed and not replaced. This regime will apply to all levels of the construction pyramid (i.e. owners to contractors, contractors to subcontractors, etc.).

Enhanced and broadened adjudication

On October 1, 2019, the Act brought into effect interim adjudication of construction disputes.

The amendments expand access to statutory adjudication in a number of ways:

- They expand the temporal scope of interim adjudication. Section 13.5(3) permits commencing adjudication within 90 days after a contract has been “completed, abandoned or terminated unless parties to the adjudication agree otherwise”. Previously, adjudication was not available for completed contracts. This means that end-of-contract disputes can now be addressed by way of interim adjudication rather than (or in addition to) having to proceed to court or arbitration.
- For subcontracts, the expiry period for commencing adjudication is 90 days following either the date on which the subcontract is certified complete, or the date of the last supply of services or materials (whichever is earliest).
- They repeal the categories of disputes that can be referred to as adjudication by default. Instead, categories will be outlined by regulation to be enacted. The parties will continue to be able to agree upon additional matters that may be submitted to adjudication.
- They allow for adjudication to be conducted by private adjudicator. Before, adjudicators were limited to those in the “Authorized Nominating Authority’s adjudicator registry” (i.e. the Ontario Dispute Adjudication for Construction Contracts registry).
- They amend subsection 13(8) to allow any party to request that an adjudicator consolidate multiple disputes relating to the same improvement. Previously, only a contractor could require consolidation. This includes the right to seek consolidation of adjudication between parties to different contracts, but the same improvement.

The outcome of these changes will likely be greater use of interim adjudication. Industry participants ought to consider their risk exposure under construction contracts in relation to this broadened scope.

Deeming of “proper invoice”

Bill 216 introduces a deeming provision where an invoice that fails to meet the criteria of a “proper invoice” will still be deemed a “proper invoice”. This will occur if an owner does not notify the contractor in writing of the invoice’s deficiencies and what is needed to resolve the deficiencies within seven days after receiving the invoice. Thus, owners must be more diligent and expedient in reviewing their invoices.

Transition and next steps

Most of the amendments will take effect after proclamation by the Lieutenant Governor. However, like previous amendments, some of the larger changes will be transitioned into the Act to allow industry to adapt accordingly. Section 87.4 of the Act outlines transition measures that prescribe how some of the changes will proceed.

For contracts entered into before the provision's effect, the requirement to release holdback annually begins on the second anniversary of the date the contract was entered into which follows the date on which the amendments take effect. At this anniversary, the requirement to make holdback payment will include all holdback accrued before that date.

By way of example, assume (hypothetically) that the holdback amendments come into force on July 1, 2025. For a contract entered into on November 5, 2024 (prior to the amendments), the first mandatory release of holdback would happen two contract anniversaries later, on November 5, 2026. At this time, the accrued holdback released would date back to November 5, 2024.

The amendments aim to improve the holdback regime and timely payment, enhance statutory adjudication, and add greater certainty to the construction sector. Industry participants should prepare for this new regime in their existing and future contracts. The requirement to release holdback annually will alter owners' financing requirements. The expanded scope for adjudication will increase the importance of dispute readiness, and will change contract dynamics by permitting end-of-contract change order disputes to be addressed through the rough justice of interim adjudication.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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