# Construction Act Amendments *Page 1*

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## Ontario Passes Amendments to *Construction Act* Following Independent Review

The Ontario Government has passed omnibus legislation containing several key amendments to the Construction Act (the "**Act**"). Only a week after it was introduced in the legislature (October 30, 2024), the Building Ontario For You Act ("**Bill 216**") received Royal Assent on November 6, 2024.

The amendments originate from a "Final Report" prepared following an independent review of the Act initiated by the Attorney General. This Final Report proposed various amendments under three "major themes": 1) holdback, 2) adjudication, and 3) administration.

Pursuant to the notice on the Province's Regulatory Registry, the Bill 216 amendments are intended to "alleviate administrative burdens experienced within the construction industry associated with payment matters by encouraging timely payment and more efficient dispute resolution," and "implement the priority recommendations" from the Final Report. This bulletin highlights the following key recommendations from the Final Report and related Bill 216 amendments:

1. Mandatory annual release of holdback;
2. Broadened access to adjudication;
3. Proper (vs. "improper") invoices, and definition of "price" (vs. "contract price").

Notably, most Bill 216 amendments are not yet in force and effect, but will apply upon a date to be proclaimed to all improvements in Ontario (including improvements that are the subject of contracts entered into prior to the effective date of the amendments). Further, several of the amendments either have specific transition rules attached to them or are subject to regulations that are yet to be put in place.

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## Mandatory Annual Release of Holdback

In response to concern that the Act's lack of certainty drives owners away from incorporating annual or phased holdback release, and to address the reality that most projects run for more than a year, the Final Report recommended enacting a simple scheme of mandatory annual release of basic holdback applicable at all levels of the industry.

The key amendments relating to holdback thus provide for mandatory annual release of basic holdback by an "owner" (note – not a "payer") for all contracts, with requisite flow-down to contractors and subcontractors. This moves away from the Act's current regime in which annual release of holdback is only available for contracts with a contract price in excess of $10,000,000; there is no longer a dollar threshold. There will also no longer be an option for phased release of holdback, as the amendments repeal s.26.2.

Specifically, the amendments under new s.26 require owners to publish notice, within 14 days of the anniversary of the date the contract "was entered into", of their intention to release holdback and, unless a lien has been preserved or perfected, to release all holdback accrued to the anniversary date within 14 days after the expiry of the lien period (note – this release is now disconnected from substantial performance, and involves a new lien expiry as set out below). Any holdback not payable per the above must be paid after all liens that may be claimed against that holdback have expired or been satisfied, discharged, or otherwise provided for. Payment of such holdback amounts reduces the amount to be retained by a payer under the Act to the extent of the amount paid.

The amendments correspondingly provide for a new lien expiry: liens arising from the supply of services or materials covered by an annual holdback notice will expire within 60 days after notice is published (s.31). As such, there will now be a distinction between lien rights applicable to services and/or materials supplied before or after an annual notice.

The amendments make annual holdback release mandatory and without a right of set-off by repealing s.27.1, which previously permitted non-payment of holdback by an owner, and potential for corresponding non-payment by contractors and subcontractors. Payment by an owner of any holdback amounts, whether pursuant to an invoice or following an adjudication, will be practically very difficult to recover.

Note that there will be a one-year transition period before annual release of holdback rules apply to contracts entered into prior to the provision's effective date (ss.87.4(4)). This means, for example, that where a contract was entered into on November 1, 2024, the requirement to release holdback on an annual basis would first arise on November 1, 2026 (assuming the provision is then in force) and such release of holdback would include all holdback accrued before that date (e.g., from November 1, 2024, through November 1, 2026).

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## Broadened Access to Adjudication

Several of the Bill 216 amendments are intended to broaden the availability of adjudication, including by permitting adjudication after completion of a contract or subcontract, and permitting consolidated adjudication of disputes under different contracts on the same improvement as more particularly described below.

As amended, the Act will no longer limit the matters which can be referred to adjudication to items are generally only payment-related. Instead, the Act will now permit adjudication of "any prescribed matter or any matter agreed to by the parties to adjudication". The amended list of matters that may be adjudicated is yet to be specified by the regulations.

Under the amendments, any party may now require consolidation of adjudications respecting the same improvement. Previously, only a contractor could require such consolidation. Parties may also, if prescribed in the regulations, have the right to seek consolidation of adjudications between parties to different contracts or subcontracts where those agreements pertain to the same improvement. This amendment should help reduce the risk of contradictory findings of fact related to the same improvement or project and may offer cost and time savings opportunities.

The amendments should also remove much of the uncertainty as to when adjudication becomes unavailable. Previously, parties would have to refer a dispute to adjudication before the subject contract or subcontract was "complete" (unless the parties agreed otherwise). As "completion" is tied to the last supply of services or materials, or cost of correction, this effectively meant that a party could not adjudicate a dispute over an unpaid final invoice (unless the other party agreed to adjudicate).

The amendments permit commencement of adjudication within 90 days after the date on which the contract is completed, abandoned or terminated, unless the parties to the adjudication agree otherwise. In the case of a subcontract, this is 90 days following the date the subcontract is certified complete or the date of last supply. The adjudication period is notably 30 days longer than the deadline to preserve a lien (at 60 days). This means that parties have the ability to continue dispute resolution proceedings even after the right to security via lien has expired – now, if a lien right has expired, a party is not only limited to bring a claim to the courts; it can also (for a limited time after lien expiry) pursue adjudication.

Given this, Bill 216 repealed ss.34(10), which extended the date for expiry of a lien where a matter was subject to adjudication. This subsection will continue to apply with respect to a lien if a notice of adjudication was given under s.13.7 until the amendments come into force.

In addition, the Act will now permit parties to retain a private adjudicator rather than being obligated to solely select from ODACC's registry, much like parties do already when choosing an arbitrator.

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With respect to an adjudicator's jurisdiction, a new section provides for the making of objections to an adjudicator's jurisdiction to conduct an adjudication, or on the basis that an adjudicator has exceeded their jurisdiction in the conduct of an adjudication. While jurisdictional questions have been fairly common, the scope of an adjudicator's ability to address those questions was not clear. The amendments now expressly provide that adjudicators can determine their own jurisdiction.

The broadened availability of adjudication offers parties more latitude in resolving disputes. As a reminder, contracts and subcontracts are deemed to conform to the Act, meaning that adjudication is available regardless of a contract's dispute resolution provisions. Subcontractors should also remain mindful that the limit on adjudication availability to the earliest of completion, 90 days after certification of completion, or last supply means that subcontractors cannot adjudicate non-payment of holdback.

## Proper (vs. "Improper") Invoices, and definition of "Price" (vs. "Contract Price")

The Final Report notes the view of several stakeholders that the definition of "proper invoice" gives owners broad discretion to dictate what must be included and no corresponding obligation to notify the contractor when the payment application received is deficient of such requirements.

In response, the amendments update the definition of "proper invoice" by making changes to the criteria that must be met in order for an invoice to be considered a proper invoice. This includes stipulating that a proper invoice may include any other information reasonably needed by the owner.

The new subsection 6.1(2) will deem an invoice that does not meet the requirements of a "proper invoice" to be a proper invoice, unless the owner notifies the contractor, within 7 days of receipt of the invoice, in writing, of the alleged deficiency, and what is required to address it.

As a result, owners will need to be especially vigilant in reviewing submitted invoices from contractors to assess whether they are deficient and be prepared to provide written notice of any alleged deficiency within 7 days of receipt to avoid having to send a notice of non-payment.

Further, the amendments now clarify deeming of a "price". Prior to the amendments, where a contract or subcontract did not stipulate a price, the price was deemed to be the market value of the services or materials supplied. The amendments now permit regulations to be passed that would specify a "price" other than market value. This change is intended to recognize that "price" may not have the same meaning across delivery models.

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