

## **Changes to the Construction Act**

Significant changes to the *Construction Act* (the “**Act**”) come into force on January 1, 2026. These include the introduction of mandatory annual holdback release, and numerous changes to the adjudication regime including the introduction of private adjudication.

### **Annual Holdback Release**

The most significant change to the Act is the introduction of the mandatory annual release of holdback and the elimination of the right of an owner to give a notice of non-payment in respect of holdback. All holdback accrued on a contract will need to be released following each anniversary of the contract (the agreement between the owner and the contractor).<sup>1</sup>

A fundamental aspect of the Act has been the interrelationship between holdback and liens: holdback is maintained for the benefit of lien claimants and therefore could only be released following the expiration of liens. Now, for the first time, holdback will be released while lien rights of contractors and subcontractors continue without expiration.

Owners are now required to publish a notice of release of holdback within 14 days of the anniversary of the date the contract was entered into, specifying the amount of holdback that is to be paid.

Owners can no longer give a notice of non-payment of holdback – this section has been repealed.<sup>2</sup>

At least 60 days but not later than 74 days after the date on which the notice of annual release of holdback is published, the owner must release all accrued holdback, unless there is a subsisting lien that has not been vacated.

The contractor and each subcontractor must pay the holdback down the contractual chain within 14 days of receiving payment – and, again, no set-off can take place at any level.

A question arises as to how the amount of holdback is to be calculated. The Act does not provide this answer. However, based on Duncan Glaholt’s 2024 report recommending these changes, there is an argument that the legislative intent is that the accrued holdback will be calculated based on the proper invoices given by the contractor to the owner in the relevant year, subject to any adjudication determinations.<sup>3</sup>

As a consequence, the importance of statutory adjudication will increase, because if a contractor gives a proper invoice that the owner believes is excessive, the owner must adjudicate or the holdback in respect of the disputed portion of invoice will arguably be required to be released following the anniversary date.

As noted above, holdback is to be released even though liens have not expired. This will mean that at the end of a multi-year project, there will be less holdback in the hands of an owner to answer

---

<sup>1</sup> Section 26 of the Act.

<sup>2</sup> Section 27.1 of the Act.

<sup>3</sup> [Duncan W. Glaholt, 2024 Independent Review: Updating the Construction Act](#), at page 18, Item 18.

the lien claims of any subcontractors. This has both benefits and drawbacks. On the one hand, subcontractors should benefit from significantly improved cash flow over the course of the project. On the other hand, if a contractor defaults on payment to subcontractors, the owner has less cash remaining to pay subcontractor liens. Subcontractors must be vigilant about ensuring they received their share of the annual holdback release, or pursue adjudications before it is too late, as their lien security is effectively diminished by the owner's holdback release.

The annual holdback release provisions do not change the existing procedures for holdback release following certification of substantial performance, contract completion, or certification of completion of a subcontract. However, subcontractors may be less likely to request certification of completion of their subcontracts given that holdback will be released annually.

One thing that the amendments do not do is provide for a detailed scheme to explain what happens if the owner pays none or only some of the required holdback. Section 26(5) of the Act provides that the contractor must pay "all of the accrued holdback" to subcontractors after receiving "payment of the holdback as required" from the owner. The prompt payment provisions of the Act have a detailed scheme setting out a contractor's rights and obligations if an owner does not pay a proper invoice in full; that scheme has not been carried over to the annual holdback payment provisions.

### **Commencement of the Annual Holdback Release**

When will annual holdback release begin?

For all improvements that are subject to the old *Construction Lien Act*,<sup>4</sup> and for P3 projects where the project agreement was entered into before January 1, 2026,<sup>5</sup> annual holdback release will never apply. For all other improvements, the following transition provisions apply.

If the contract is entered into on or after January 1, 2026, holdback must be released annually following the first anniversary date of that contract.<sup>6</sup> For example, for a contract entered into on May 1, 2026, annual holdback release would begin following May 1, 2027.

If the contract was entered into before January 1, 2026, annual holdback release begins as of the second anniversary date of the contract which follows January 1, 2026.<sup>7</sup> For example, for a contract that was entered into on June 1, 2023, annual holdback release would begin following June 1, 2027. In that first annual holdback release, all holdback accrued under the contract in the foregoing years must be released.

### **Holdback Deemed to be Trust Funds**

The statutory trust provisions are amended to provide that holdback which is required to be retained by an owner, or which is owed to or received by a contractor or subcontractor, are trust funds for the benefit of persons who have supplied services and materials to the trustee.<sup>8</sup>

---

<sup>4</sup> Section 87.4(1)(a) of the Act.

<sup>5</sup> Section 87.4(5) of the Act.

<sup>6</sup> Section 87.4(2) of the Act.

<sup>7</sup> Section 87.4(4)1 of the Act.

<sup>8</sup> Sections 7 and 8 of the Act.

The amendments to the owner's trust provisions are particularly notable. For the first time, "any amount that is required to be retained by the owner as a holdback" will be impressed with a statutory trust, whether or not that amount has been received as financing by the owner, and whether or not it is certified as payable. As a result, the delivery of a proper invoice will give rise to trust obligations in respect of the holdback amount of that invoice.

### **Invoices Deemed Proper Unless Objected To**

One of the issues that has arisen in the course of implementing prompt payment and adjudication has been the question of whether a contractor's invoice is in fact a proper invoice. Prompt payment obligations are triggered by the giving of a proper invoice; so if the invoice does not meet the requirements for a proper invoice, the prompt payment obligations of an owner (including to give a notice of non-payment) are not triggered.

This has given rise to a practice in which owners receive an invoice which some technical defect, fail to deliver a notice of non-payment, and then object to a contractor's right to adjudicate on the basis that no proper invoice was given and so no prompt payment obligations arose.

In response to this practice, the Act now includes a provision that deems an invoice to be a proper invoice unless, within 7 days of receipt of the invoice, the owner provides notice in writing of the deficiency in the proper invoice and of what is required to address it.<sup>9</sup>

The Act's definition of a proper invoice has also been amended to include "Any other information that is necessary for the proper functioning of the owner's accounts payable system that the owner reasonably requests."<sup>10</sup>

These changes should improve the proper functioning of prompt payment and associated adjudications. However, the changes did not address the fact that contractors are under no obligation to carry subcontractor amounts in the contractor's proper invoice to the owner – and prompt payment to subcontractors from contractors applies only in respect of services and materials "that were included in the proper invoice". Subcontractors must still close this gap through contract negotiations.

### **Significant Changes to Adjudication**

The most significant change to the Act's adjudication provisions is the introduction of "private" adjudications, to be held outside of the ODACC process and before private adjudicators who are not registered with ODACC. These private adjudicators must still be licensed by ODACC, but ODACC will not set their fees.<sup>11</sup> This change was driven by a concern that many senior lawyers have opted not to participate as registry adjudicators because ODACC requires remittance of 40-50% of an adjudicator's fees to ODACC.

Adjudicators may either be ODACC registry adjudicators or private adjudicators, not both. Private adjudicators must be agreed to by both parties; they may not be appointed by ODACC.<sup>12</sup>

---

<sup>9</sup> Section 6.5(2) of the Act.

<sup>10</sup> Section 6.1.6.1 of the Act.

<sup>11</sup> Section 13.10(2.1) of the Act.

<sup>12</sup> Section 13.9(2.1) of the Act.

The regulations provide for a minimum fee of \$1000/hour for a private adjudicator, in an attempt to create a clear market distinction between registry adjudicators and private adjudicators and to avoid an exodus of registry adjudicators.<sup>13</sup>

There are numerous other changes to the adjudication regime which should make adjudications more relevant to dispute resolution on construction projects.

- a) More Time to Commence Adjudications: In an attempt to ensure that adjudication is available in the event that holdback is not released at the conclusion of a project, adjudication can now be commenced:<sup>14</sup>
  - i. by contractors, within 90 days after the date on which the contract is completed, abandoned or terminated, or later if the parties agree;
  - ii. by subcontractors, within 90 days of the earlier of (i) the deadline for a contractor's adjudication; (ii) date the subcontract is certified complete, or, (iii) the date of the subcontractor's last supply.
- b) Expanded Scope: The regulations now permit adjudication in respect of disputes regarding (i) the scope of work required under the contract or subcontract, (ii) a request for a change in the contract or subcontract price, and, (iii) a request for an extension of time for the completion of work under the contract or subcontract.<sup>15</sup>
- c) Consolidation by Subcontractors: Previously only a contractor could require consolidation of adjudications; the Act now permits any party to require consolidation of separate adjudications, with the agreement of the adjudicators.<sup>16</sup> The regulations impose procedural requirements for such a consolidation.<sup>17</sup>
- d) Notices of Adjudication: Notices of adjudication must now include the date, nature and substance of any previous adjudication in which the party was involved in respect of the contract or subcontract, including a copy of any determination made by the adjudicator.<sup>18</sup>
- e) Determinations To Be Made Public: For adjudications commenced on or after January 1, 2027, the adjudicator's determination will be published on ODACC's website; however, any party to an adjudication may require that the determination be anonymized.<sup>19</sup>
- f) Jurisdictional Objections: Parties are now explicitly permitted to raise issues of jurisdiction with an adjudicator. Objections must be made promptly.<sup>20</sup>
- g) Corrections: Adjudicators may, without a further hearing, correct their determinations within 5 days the determination being communicated to the parties. Corrections are permitted in the case of typographical, calculation or similar errors, or to correct an injustice caused by an oversight on the adjudicator's part.<sup>21</sup>

---

<sup>13</sup> Section 21 of [O. Reg. 264/25](#).

<sup>14</sup> Section 13.5(3) of the Act.

<sup>15</sup> Section 19(1) of [O. Reg. 264/25](#).

<sup>16</sup> Section 13.8(2) of the Act.

<sup>17</sup> Sections 26-27 of [O. Reg. 264/25](#).

<sup>18</sup> Section 13.7(1)(e) of the Act.

<sup>19</sup> Section 16 of [O. Reg. 264/25](#).

<sup>20</sup> Section 13.12.1 of the Act.

<sup>21</sup> Section 13.17.1 of the Act.

- h) More Time for a Motion for Leave: Timing for a motion for leave to bring an application for judicial review of a determination may be brought within 35 days after the determination is communicated, rather than 30 days, accounting for the 5 day correction period.<sup>22</sup>
- i) Delayed Enforcement: Similarly, determinations are now payable within 15 days after the determination is communicated, rather than 10 days.<sup>23</sup>

### **Joinder of Lien and Trust Claims Permitted**

The Act now explicitly allows for the joinder of breach of contract and breach of trust claims in the same court action. This will eliminate the need for duplicative actions. The court will retain jurisdiction under the Rules of Civil Procedure to sever claims where appropriate.<sup>24</sup>

### **Notice of Termination**

The Act now provides for a 7-day deadline for the publication of a notice of termination after a contract is terminated.<sup>25</sup> For the purpose of lien expiry, if more than one notice is published, the date of the first notice will act as the trigger for lien expiry.<sup>26</sup>

### **Deemed Lien Rights for Architects and Engineers When Holdback Retained**

If an owner retains holdback in respect of the supply of a design, plan, drawing or specification for a project which is not commenced, the Act now deems that the architect or engineer has lien rights, unless the owner can prove there has been no increase in value to the lands. This shifts the onus from an architect to the owner in cases where an owner has retained holdback.<sup>27</sup>



Jay Nathwani, Partner

T. 289-815-5013

[jnathwani@margiestrub.com](mailto:jnathwani@margiestrub.com)



Josh Strub, Partner

T. 647-924-2264

[jstrub@margiestrub.com](mailto:jstrub@margiestrub.com)



Simren Sihota, Associate

T. 647-794-1564

[ssihota@margiestrub.com](mailto:ssihota@margiestrub.com)

This article is for informational purposes only and is not intended to constitute legal advice or an opinion on any issues contained therein.

---

<sup>22</sup> Section 13.18(2) of the Act.

<sup>23</sup> Section 13.19(2) of the Act.

<sup>24</sup> Section 50(4) of the Act and Section 1 of [O. Reg. 265/25](#) amending Section 3 of [O. Reg. 302/18](#).

<sup>25</sup> Section 31(8) of the Act.

<sup>26</sup> Section 31(9) of the Act.

<sup>27</sup> Section 14(4) of the Act.