

May 21, 2026

### **Holdback is Always Holdback**

In the days of the *Construction Lien Act*<sup>1</sup> (the “CLA”), it used to be said that holdback lost its character as holdback and became trust funds once liens expired. But that has not been the case since the 2018 amendments to the *Construction Act*. On an improvement to which the *Construction Act* applies, owners cannot avoid holdback payment obligations simply by waiting (with one recent caveat).

This article provides a brief overview of how holdback has been treated when it comes time for payment by the owner.

#### **Holdback – What it is, what it’s for**

When an owner pays a contractor, the owner is required to retain a basic holdback equal to 10% of the contract price. The purpose of the holdback is to create a fund in the hands of the owner for the benefit of any potential subcontractor lien claimants who are unpaid by a contractor or subcontractor.<sup>2</sup> The owner can be personally liable in a lien action for these holdback obligations pursuant to s. 23.<sup>3</sup>

What happens when lien rights expire, no liens have been preserved, and the owner is still holding the 10% basic holdback while asserting substantial back charges against the contractor? That question has been answered differently under three regimes: (i) the pre-2018 *CLA*, (ii) the 2018-2025 *Construction Act* framework, and (iii) the amendments which took effect as of January 1, 2026.

#### **The Pre-2018 Framework**

[Under section 22 of the CLA](#), holdback needed to be retained until all potential lien claims expired and any actual liens were satisfied, discharged, or vacated. Section 26 of the CLA then provided that a payer “may, without jeopardy, make payment of the holdback”.

But because holdback was a fund for the benefit of subcontractor lien claimants, it was often said that once liens expired, the holdback funds lost their character as “holdback,” and became trust funds.<sup>4</sup>

The distinction is critical precisely because the language of section 26 permitted, but did not require, the payment of holdback following lien expiry. Under the *CLA*, [section 30 prohibited set-off](#) against holdback so long as liens could be claimed against that holdback. But [set-off was permitted by section 12](#) in respect of trust funds.

For instance, in *Man-Shield v Rainy River District School Board*, the court stated, “once those amounts lose their quality of being considered statutory holdback, the right, or possibility of, set off exists despite the fact that these monies are still trust funds under the Act.”<sup>5</sup>

The practical effect of these provisions was that if subcontractors did not lien at the end of a project, the owner could simply wait for the lien period to expire and then assert a set-off claim against the contractor and refuse to pay what had been holdback and was now trust funds.

This resulted in a persistent problem for subcontractors. They could either protect their rights to be paid their holdback by registering liens on every project – which would be expensive and a poor commercial strategy for good relationships with contractors – or they could hold their breath and hope that the owner was not going to assert a set-off claim against the contractor after liens expired.

Neither option was particularly good, or particularly fair.

### What changed in 2018

The 2018 amendments to the Act brought important changes regarding holdback. A key change was that sections 26 and 27 were amended so that the payment of basic holdback became mandatory rather than permissive. As noted above, the old *CLA* wording stated that a payer “may without jeopardy” make payment of the holdbacks.<sup>6</sup> But the new Act replaced “may, without jeopardy” with “shall”.<sup>7</sup>

The amendments also introduced a strict notice provision in respect of any non-payment of holdback. An owner could only set off against the holdback if (a) the owner published a notice of non-payment of holdback in accordance with the provisions of section 27.1 and (b) liens that could be claimed against the holdback subsequently expired. The requirement for publication (which was required no later than 20 days before lien expiry) gave subcontractors notice that there would be a dispute over the holdback, and a reasonable opportunity to register liens to preserve their claim against the holdback. It was a fair and reasonable compromise to address an unfortunate industry practice.

When these changes came into effect in July, 2018, it no longer made sense to say that holdback lost its character as holdback, or became trust funds, upon lien expiry. Unless an owner provided a notice of non-payment of holdback under section 27.1, holdback release was mandatory upon lien expiry. If holdback was no longer holdback following lien expiry, then what was the *Construction Act* requiring the owner to pay to the contractor?

Put another way, the whole point of the amendments was to prevent owners from playing the game of saying, as soon as they could pay the holdback, that they didn’t have to pay the holdback. The amendments would be rendered a nullity if holdback played the old disappearing trick of becoming “trust funds” as soon as the payment obligations under section 26 became effective.

### Holdback and set-off under the 2026 amendments

The amendments to the *Construction Act* that took effect on January 1, 2026 simultaneously strengthen the permanent character of “holdback” and undo some of the protections for subcontractors at the end of a project.

In the ordinary course, accrued holdback must be released annually following each contract anniversary, provided that no liens have been registered. Notably, liens do not expire annually; instead, for the first time, holdback release takes place before lien expiry. So there is no possible suggestion that holdback being released annually on longer projects is not “holdback.”

What’s more, the amendments clearly evince an intention to enforce release of any remaining holdback following lien expiry.

The amendments repeal s. 27.1 and consequently remove the ability of an owner to publish a notice of non-payment of holdback. Owners can no longer assert claims against statutory holdback for set-off by publishing a notice of non-payment.

The amendments also expand the availability of adjudication until at least 90 days after contract completion, termination or abandonment. This change, recommended by Duncan Glaholt in his report to the Attorney General, specifically responded to industry concerns that adjudication was previously unavailable to enforce holdback release after contract completion.

Again, it is incoherent to say that a party may adjudicate for holdback release following contract completion if holdback no longer exists following lien expiry.

Section 26(8) also explicitly requires the payment of any holdback which was not part of the annual releases, following lien expiry:

(8) A payer **shall** make payment of all holdback that is not paid or payable under subsections (4) to (7) after all liens that may be claimed against the holdback required to be retained under subsection 22 (1) have expired or been satisfied, discharged or otherwise provided for under this Act... [**Emphasis added.**]

Again, this mandatory requirement would be rendered meaningless if holdback ceased to be “holdback” upon lien expiry.

Having said all that, there is a change to section 30 which implies that set-off against holdback is permissible in limited circumstances once all liens have expired. [Section 30 now states:](#)

**If a contract or subcontract is abandoned or terminated**, a holdback shall not be applied by any payer toward obtaining services or materials in substitution for those that were to have been supplied under the contract or subcontract, nor in payment or satisfaction of any claim against the contractor or subcontractor, until all liens that may be claimed against that holdback have expired or been satisfied, discharged or otherwise provided for under this Act. [**Emphasis added.**]

This suggests that the legislature has intended to preserve a set-off right against holdback following contract termination or abandonment, though the wording could more clearly state that it is *only* in the case of abandonment or termination that such set-off is permitted.

It is also somewhat incongruous that this should be permitted without the requirement to publish a notice of non-payment of holdback. It is true that with the move to mandatory annual holdback release, there is likely to be much less holdback available. But the whole thrust of the amendments has been to ensure payment of holdback, and reduce possible non-payment to subcontractors, and this seems like a clear gap in that scheme which needs to be corrected.

Whatever happens with section 30, the industry should be in no doubt that holdback is holdback, whether before or after lien expiry. The expiry of lien rights does not convert holdback funds into non-holdback funds. Any owner taking such a position can, in the absence of a termination or abandonment, now expect to find itself on the wrong side of a statutory adjudication.



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<sup>1</sup> *Construction Lien Act*, RSO 1990, c. C30.

<sup>2</sup> Section 22(1) of the *Construction Act* sets out the basic requirement: “Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback in respect of the supplied services or materials have expired or been satisfied, discharged or otherwise provided for under this Act.”

<sup>3</sup> *Construction Act*, RSO 1990, c. C30, s. 23.

<sup>4</sup> Kirsh and Alter, *A guide to Construction Liens in Ontario*, p. 86.

<sup>5</sup> *Man-Shield v Rainy River District School Board*, 2012 ONSC 323 at para 16.

<sup>6</sup> Historical version of the *CLA* for the period December 14, 2017 to June 30, 2018.

<sup>7</sup> Historical version of the *CLA* for the period July 1, 2018 to December 5, 2018.