

Annual release of holdback under Ontario's Construction Act: When does it apply?

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In 2024, the Ontario Government conducted a review of the Ontario Construction Act. As a result, the Government introduced, the Building Ontario for You Act (Budget Measures) (Bill 216), which received Royal Assent on Nov. 6, 2024. Bill 216 introduces several amendments to Ontario's Construction Act (the Amended Construction Act) that will impact contract administration and dispute resolution in Ontario's construction industry.

The Amended Construction Act introduces, among other things, mandatory annual release of holdback on certain construction contracts (Mandatory Annual Release). However, there appears to be some confusion in the industry as to when these provisions take effect.

Importantly, the Ontario Government has not announced when the Amended Construction Act will come into force, nor has the Government released the draft regulations, which are to accompany the changes.

Transitioning Ontario 's construction legislation

The changes to Ontario's Construction Lien Act (CLA) that were introduced in the Construction Act, and the further changes to the Construction Act that are proposed in the Amended Construction Act, (the Construction Legislation) are accompanied by a set out transition rules. The transition rules, summarized below, provide for when the changes apply to any particular "improvement"¹ and related contracts and subcontracts.²

Therefore, participants in Ontario's construction industry should consider which version of the Construction Legislation applies to their particular improvement, contract or subcontract, as this will affect if or when the Mandatory Annual Release may apply.

Construction Act Ontario (formerly referred to as the CLA)

Pursuant to the transition provisions in the Construction Act, if a procurement process for an improvement was commenced, or a contract for the improvement was entered into, before July 1, 2018, the version of the Construction Act in place prior to July 1, 2018 shall continue to apply, referred to as the CLA.³

The CLA does not provide for the annual release of holdback for materials or services provided to an improvement governed by the CLA.

The changes proposed in the Construction Act apply to an improvement if a procurement process for the improvement was commenced, or a contract for the improvement was entered into, on or after July 1, 2018.⁴

The Construction Act introduced an option for the annual release of holdback; however, **the annual release was not mandatory. Rather, for this to apply, (1) the contract price must be \$10 million or more, (2) the contract must provide for a completion schedule that is longer than one year, and (3) the contract must expressly provide the payment of accrued holdback on an annual basis.⁵**

Amended Construction Act (not yet in force)

As discussed above, the Amended Construction Act is not yet in force. Once the Amended Construction Act comes into force (the In Force Date), the following transition provisions shall apply.

- **Contracts governed by the CLA:** If the CLA applies to the contract, the provisions of the CLA shall continue to apply and the Mandatory Annual Release shall not apply.⁶ **Contracts governed by the Construction Act, entered into before the In Force Date:** The Amended Construction Act provides for a transition for Mandatory Annual Release to contracts for an improvement entered into before the In Force Date.

If the contract for an improvement was entered into before the In Force Date, the release of annual holdback shall commence on the second anniversary of the day the contract was entered into that follows the In Force Date.⁷ **For example, if the contract was entered into Aug. 1, 2025, and the In Force Date is Dec. 1, 2025, the process for the Mandatory Annual Release shall commence Aug. 1, 2027 (not 2026).⁸ However, at the time that the Mandatory Annual Release commences (Aug. 1, 2027 in the above example), the payer shall release all holdback accrued up to that release date.**

- **Contracts entered into after In Force Date:** If the contract for an improvement is entered into after the In Force Date, the Mandatory Annual Release shall immediately apply to the contract, and all accrued holdback shall be released on the first anniversary of the day the contract was entered into.⁹ **For example, if the In Force Date is Dec. 1, 2025, and the contract was entered into Dec. 10, 2025, the process for first Mandatory Annual Release shall commence Dec. 10, 2026.¹⁰**

Conclusion

The Mandatory Annual Release included in the Amended Construction Act, once in force, will have significant implications on the administration of affected construction contracts in Ontario, including lien regimes.

Participants in Ontario's construction industry should consider attaining advice from a construction law advisor for any questions regarding how the amendments to the Construction Act may affect their contracts, the Mandatory Annual Release process and impact on any lien or other rights, and steps to prepare for the new rules under the Amended Construction Act.

BLG's Construction Group is continuing to monitor the progress of the Construction Act amendments. We are available to answer questions about the amendments and the proactive steps that should be taken to prepare for their coming into force.

This article provides an overview and is not intended to be exhaustive of the subject matter contained therein. Although care has been taken to ensure accuracy, this article should not be relied upon as legal advice.

Footnotes

¹ The Construction Act defines an "improvement" to mean "in respect of any land, (a) any alteration, addition or capital repair to the land, (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or (c) the complete or partial demolition or removal of any building, structure or works on the land." The Amended Construction Act does not propose a change to this definition.

² Section 5(1) of the Construction Act provides that every contract and subcontract is deemed to be amended in so far as is necessary to conform with the Construction Act. The Amended Construction Act does not propose a change to this provision.

³ Construction Act, s. 87.3(1).

⁴ Construction Act, s. 87.3(1).

⁵ Construction Act, s. 26.1. O. Reg. 304/18, s. 5.

⁶ Amended Construction Act, s. 87.4(1).

⁷ Amended Construction Act, s. 87.4(4).

⁸ The actual timing of the payment of the holdback will depend upon the process outlined in Section 26 of the Amended Construction Act.

⁹ Amended Construction Act, s. 87.4(2).

¹⁰ The actual timing of the payment of the holdback will depend on the process outlined in Section 26.

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