



Council
of Ontario
Construction
Associations

FAQ for Bill 216 and the Construction Act

MARCH 2025

Council of Ontario Construction Associations

926 – 123 Edward Street, Toronto ON M5G1E2

(416) 968-7200

www.coca.on.ca

Table of Contents

<i>What is Bill 216.....</i>	<i>2</i>
<i>When does Bill 216 come into effect?.....</i>	<i>2</i>
<i>What are the major changes to the Construction Act made by Bill 216?.....</i>	<i>2</i>
<i>Why is mandatory annual release of holdback important?</i>	<i>3</i>
<i>How does mandatory annual release of holdback work?</i>	<i>3</i>
<i>How will mandatory annual release of holdback impact lien rights?</i>	<i>4</i>
<i>What was phased release of holdback and why was it deleted?</i>	<i>4</i>
<i>What does the elimination of notices of non-payment of holdback refer to?.....</i>	<i>5</i>
<i>How does Bill 216 affect the lien rights of design professionals?</i>	<i>5</i>
<i>When does a notice of termination need to be published and how does publication affect the lien rights of the contractor and subcontractor?</i>	<i>5</i>
<i>How does Bill 216 modify the information required in a “proper invoice”?.....</i>	<i>5</i>
<i>What does an owner need to do if it believes that a contractor’s invoice is “improper”?</i> <i>What are the consequences if it fails to act?</i>	<i>6</i>
<i>The deadline to bring a claim for adjudication has been extended by 90 days after the completion of the contract or subcontract. Why is that important and how will that work?</i>	<i>7</i>
<i>When does a respondent to a claim for adjudication need to raise jurisdictional objections and what are the consequences if it fails to raise its objection in a timely way or at all?</i>	<i>7</i>
<i>How will the scope of disputes that may be referred to adjudication be expanded?.....</i>	<i>8</i>
<i>Does a claim for adjudication still extend the deadline preserve a claim for lien?</i>	<i>8</i>
<i>What is a “private adjudicator” and how does it change the system?.....</i>	<i>8</i>
<i>The Transition Rules: When does Bill 216 come into effect?</i>	<i>9</i>

What is Bill 216

In February 2024 the Ministry of the Attorney General retained Mr. Duncan Glaholt to undertake an expert review of the *Construction Act*.

Bill 216, Building Ontario For You Act (Budget Measures), 2024 (“**Bill 216**”) was legislation passed on the Ontario Legislative Assembly in November 2024 that amended the *Construction Act* in accordance with recommendations made by Mr. Glaholt.

When does Bill 216 come into effect?

Bill 216 will come into effect on a date to be proclaimed by the Ontario Provincial government. Our best guess is that it will come into effect in the early summer of 2025. See below the FAQ regarding the transition rules to see how the various parts of Bill 216 will apply to new and existing contracts once Bill 216 comes into force.

What are the major changes to the Construction Act made by Bill 216?

The major changes to the *Construction Act* made by Bill 216 include the following:

- The introduction of mandatory annual release of holdback
- The elimination of phased release of holdback
- The elimination of notices of non-payment for holdback
- The addition of a rebuttable presumption that design professionals have lien rights in respect of projects that are abandoned before breaking ground
- Requiring the publication of a notice of termination of the contract within 7 days
- The modification of the information required for “proper invoices”
- An invoice delivered by a contractor to an owner is deemed to be a proper invoice unless the owner delivers a written notice objecting to the form of the invoice within 7 days
- The extension of the deadline to bring a claim for adjudication by 90 days from the completion of the contract or subcontract
- Any objections to an adjudicator’s jurisdiction to determine a dispute must be made as soon as practicable
- An adjudication no longer extends the deadline to preserve a claim for lien
- The scope of disputes that can be referred to adjudication will be expanded
- Parties may select a “private adjudicator” to decide their dispute

Why is mandatory annual release of holdback important?

Mandatory annual release of holdback fixes the longstanding problem that early trades, such as demolition and excavation, have often had to wait for years after they have left the site to be paid their 10% holdback.

Under the *Construction Lien Act*, which remain in force for contracts entered into before June 30, 2018, the 10% holdback retained by an owner was released 45 days after the completion, or substantial completion, of the contract between the owner and the contractor. The contractor would typically flow that 10% holdback down to their subcontractors. The treatment of holdback under the *Construction Lien Act* often meant that early trades, like demolition and excavation, had to wait years after they were completed their work to be paid the last 10% of their subcontract price.

Bill 142, which came into effect on July 1, 2018, introduced two alternative approaches to the release of holdback: phased and annual release of holdback. For contracts having a value of more than \$10,000,000, the owner and contractor could agree to have holdback released either annually or upon the completion of phases. Since very few owners and contractors opted to release holdback annually or in phases, delays in the payment of holdback persisted.

The advent of mandatory annual release of holdback means that no trade will need to wait more than a year for the release of the last 10% of their subcontract price.

How does mandatory annual release of holdback work?

Here is a timeline for mandatory annual release of holdback:

- Within 14 days of the anniversary date of the contract between the owner and the contractor, the owner shall publish a Notice of Annual Release of Holdback in one of three construction trade newspapers (i.e. the Daily Commercial News, Link2Build, or the Ontario Construction Report).
- Any lien rights that contractors and subcontractors have with respect to materials and services supplied within the last year will expire 60 days after the publication of the Notice of Annual Release of Holdback.
- The owner must pay the accumulated holdback to the contractor within 14 days after the expiration of any liens that attach to the holdback that accumulated over the first year of the contract (i.e within 75 days after publication of the Notice of Annual Release of Holdback),

- The contractor shall pay its subcontractors the holdback accumulated over last year of the subcontract within 14 days of the date that the contractor receives payment of the holdback from the owner.
- The process will repeat itself upon the second and subsequent anniversaries of the contract.
- In the ordinary course, any holdback accumulated between the last annual release of holdback by the owner and the completion of the contract shall be paid by the owner to the contractor 61 days after the completion of the contract, or the publication of a certificate of substantial performance, whichever is earlier.

How will mandatory annual release of holdback impact lien rights?

In general, the lien rights of contractors and subcontractors will now expire on an annual basis. The lien rights of a contractor or subcontractor with respect to the price of materials or services supplied to a project up until the date of publication of the Notice of Annual Release Of Holdback will expire 60 days after the date of publication.

The lien rights of a contractor or subcontractor that attach to that part of the holdback that accumulated between the last annual release of holdback and the completion of the contract or subcontract will expire as they have done in the past. In other words, the lien rights of the contractor will expire 60 days after the earlier of a) the completion, termination, or abandonment of the contract or b) the publication of a certificate of substantial performance of the contract.

The lien rights of a subcontractor will expire 60 days after the earlier of a) the subcontractor's date of last supply, b) the publication of a certificate of substantial performance of the contractor, or c) the date the subcontract is certified to be completed under section 33.

What was phased release of holdback and why was it deleted?

The *Construction Act* permitted the owner and the contractor to agree to have the 10% holdback released in phases on contracts with a contract price of \$10,000,000 or more. Phased release of holdback was another method of expediting the release of the 10% release of the basic holdback. However, the process for phased release of holdback was confusing. Few contracts provided for phased release of holdback. Now that we have mandatory annual release of holdback for all contracts over a one-year period, there was no longer a compelling reason to have phased release of holdback. It was better to delete phased release of holdback altogether, rather than try to fix a rarely used option.

What does the elimination of notices of non-payment of holdback refer to?

For most contracts entered into on or after July 1, 2018, if an owner intended not to release holdback to the contractor, presumably because of some dispute with the contractor, then the owner had to publish a notice of non-payment of holdback in a construction trade newspaper within 40 days of the publication of certificate of substantial performance of the contract or the completion of the contract, whichever was earlier.

Bill 216 simply eliminates the owner's ability to dispute the contractor's entitlement to payment of the basic 10% holdback.

How does Bill 216 affect the lien rights of design professionals?

Both the *Construction Lien Act* and the *Construction Act* were unclear as to whether design professionals had lien rights for design services supplied to a project that was abandoned by the owner before breaking ground.

New subsection 14(4) provides that, if an owner retains a holdback in respect of the supply of a design, plan, drawing or specification for the making of a planned improvement that is not commenced, then the design professional is deemed to have lien rights, unless the owner proves that the value of the owner's interest in land was not enhanced by the design, plan, etc.

When does a notice of termination need to be published and how does publication affect the lien rights of the contractor and subcontractor?

New subsection 31(8) requires the owner or contractor to publish a notice of termination within 7 days of the date the contract is terminated. As before, the termination of the contract starts the running of the clock for the preservation of contractor and subcontractor liens. However, if such a notice of termination is published, then new subsection 31(9) provides that the counting of the 60 days to preserve a claim for lien shall run from the date of publication. Owners have an incentive to publish a notice of termination as soon as possible in order to start the running of the clock for the expiration of the lien rights of contractors and subcontractors.

How does Bill 216 modify the information required in a "proper invoice"?

The delivery of a "proper invoice" by the contractor to the owner triggers the timelines for payment of the invoice by the owner to the contractor and the subsequent flow of funds all the way to the bottom of the construction pyramid.

Bill 216 modifies the information required for a “proper invoice”. The changes are set out in bold text below:

“proper invoice” means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor’s name and address.
 2. The date of the invoice and the period, **milestone or other contractual payment entitlement** to which the invoice relates.
 3. Information identifying **the contract** or other authorization under which the services or materials were supplied, **such as a contract number, contract line item number or purchase order number.**
 4. A description, including quantity where appropriate, of the services or materials that were supplied.
 5. The amount payable for the services or materials that were supplied, and the payment terms.
 6. The name, title, mailing address and telephone number of the person to whom payment is to be sent **or, if payment is to be sent to an office or department, its name, mailing address and telephone number.**
- 6.1 Any other information that is necessary for the proper functioning of the owner’s accounts payable system that the owner reasonably requests.**

If you are a “contractor”, meaning someone who contracted directly with the owner, then it is important that your invoices include the information set out above.

What does an owner need to do if it believes that a contractor’s invoice is “improper”? What are the consequences if it fails to act?

“Prompt Payment” came into effect in Ontario for most contracts entered into on or after October 1, 2019. Prompt Payment was supposed to accelerate cash flow. Prompt Payment set specific deadlines for the payment of parties from the top of the construction pyramid down to the bottom. For example, the owner had to pay the contractor within 28 days of the date that it received a “proper invoice” from the contractor unless the owner delivered a notice of non-payment to the contractor within 14 days of the contractor’s proper invoice. The contractor had to pay its subcontractors within 7 days of the date that it received payment from the owner.

Prompt Payment never worked as intended. Everything hinged upon the delivery of a “proper invoice” by the contractor to the owner. Unfortunately, the content of a “proper invoice” required by the *Construction Act* was counterintuitive. Very few invoices rendered by contractors to owners met the statutory requirements of a “proper invoice”.

Once in effect, Bill 216 will *deem* an invoice rendered by a contractor to an owner to be a “proper invoice” unless the owner delivers a notice to the contractor within 7 days advising the contractor that its invoice is improper.

The deadline to bring a claim for adjudication has been extended by 90 days after the completion of the contract or subcontract. Why is that important and how will that work?

Since 2019, the right to refer a dispute to adjudication has expired when the contract or subcontract work was completed. That was unfortunate, because most payment disputes manifest after the contractor’s or subcontractor’s work is completed.

In general, Bill 216 extends the deadline for a contractor or subcontractor to bring a claim for adjudication by 90 days from the date that the contract or subcontract work is completed.

More specifically, Bill 216 extends the adjudication period for 90 days from the date that the contract is completed, abandoned or terminated. For subcontractors, Bill 216 extends the adjudication period to 90 days after the earliest of:

- (a) The date the contract is completed, terminated or abandoned;
- (b) The date that the subcontract is certified complete pursuant to section 33;
and
- (c) The subcontractor’s date of last supply.

When does a respondent to a claim for adjudication need to raise jurisdictional objections and what are the consequences if it fails to raise its objection in a timely way or at all?

New subsection 13.12.1 requires a respondent to a claim for adjudication to raise any objection to the jurisdiction of the adjudicator when first making its submissions or as soon as the adjudicator exceeds their jurisdiction. If a party fails to raise an objection, then new subsection 13.18(5.1) says that the Divisional Court may only set aside the adjudicator’s determination if it considers the applicant’s failure to raise the objection justified.

How will the scope of disputes that may be referred to adjudication be expanded?

Since adjudication first came into effect in Ontario on October 1, 2019, it has only been available for disputes falling within one of seven types of dispute listed in subsection 13.5(1) of the *Construction Act*.

Duncan Glaholt has recommended that the scope of disputes that may be referred to adjudication be expanded to include any issue arising under a contract or subcontract.

Bill 216 sets the stage to expand the scope of disputes that may be referred to adjudication as recommended by Duncan Glaholt, but the actual scope of disputes that may be referred to adjudication will be defined in a new set of regulations, which are still being drafted. Stay tuned.

Does a claim for adjudication still extend the deadline preserve a claim for lien?

Subsection 34(10) of the *Construction Act* will be deleted. Subsection 34(10) had the effect of delaying the expiration of a lien rights when there was an ongoing adjudication. The possibility that lien may, unbeknownst to the owner, subsist beyond the usual expiration period left owners uncertain as to whether they were at liberty to release holdback. The deletion of subsection 34(10) is a welcome change.

What is a “private adjudicator” and how does it change the system?

ODACC is the Adjudicating Nominating Authority in Ontario. ODACC is tasked with training, qualifying, and appointing adjudicators in Ontario.

Currently, about 60 people have been appointed by ODACC to act as adjudicators in Ontario. Within the first 4 days after the notice of adjudication is issued, the parties can agree to select a specific adjudicator determine their dispute. If the parties have not selected a mutually agreeable adjudicator within 4 days, then ODACC will appoint one of the 60 adjudicators to determine the dispute. Whether the adjudicator is selected by the parties or appointed, ODACC collects a fee equal to a 40% to 50% share of the adjudication fee.

Some parties have found the range of choice of adjudicators limiting. Some people who would otherwise be good candidates to act as adjudicators have been unwilling to share a 40% to 50% share of their fees with ODACC.

Bill 216 creates a new class of “private adjudicators”, and reclassifies the existing 60 or so adjudicators as “registry adjudicators”. As was the case before, the parties have 4 days to select an adjudicator to determine their dispute. What is new is that the parties may select either a private adjudicator or a registry adjudicator to hear their dispute. If the parties are unable to agree on an adjudicator, then ODACC will appoint a registry adjudicator to hear the dispute.

Although the regulations defining who may act as a private adjudicator have not yet been drafted, Duncan Glaholt’s report suggests that anyone who has taken the ODACC training and has 10 years of construction experience will qualify as a private adjudicator. This change will come into effect upon the proclamation of Bill 216. Duncan Glaholt also recommended that private adjudicators will need to pay ODACC a fixed fee as opposed to a 40% to 50% share of the adjudication fee. If the concept of the private adjudicator works as intended, then parties to an adjudication will have a larger selection of potential adjudicators to choose from.

The Transition Rules: When does Bill 216 come into effect?

Bill 216 has yet to be proclaimed into force. However, even when Bill 216 is proclaimed into force, parties will need to consult the transition rules to see whether Bill 216 applies to the particular contract or subcontract in question.

The existing transition rules of the *Construction Act* (i.e. 87.3) will continue to apply. So, for example, a contract or subcontract that was entered into on or before June 30, 2018, will continue to be grandfathered under the *Construction Lien Act* and not be subject to either prompt payment or adjudication.

With the exception of annual release of holdback, and contracts grandfathered under the old *Construction Lien Act*, the changes made by Bill 216 will apply to all existing contracts and subcontracts as soon as Bill 216 is proclaimed into force. Our best guess is that will take place in the early summer of 2025.

For contracts signed before new section 26 is proclaimed into force, the first annual release of holdback should occur on the second anniversary of the contract after Bill 216 comes into force. So, for example, if the anniversary date of the contract is June 30, and Bill 216 is proclaimed into force on July 1, 2025, then the first annual release of holdback will be within 88 days of June 30, 2027. Conversely, if Bill 216 is proclaimed into force on June 30, 2025, and the anniversary date of the contract is July 1, 2025, then the first annual release of holdback will be within 88 days of July 1, 2026.

Annual release of holdback shall apply to all new contracts entered into after the date that new section 26 is proclaimed into force.

This FAQ was prepared by

Ted Dreyer

Lawyer, Q. Med, and ODACC Adjudicator

T: 519-744-4491 Ext. 225 M:226-339-3714

55 King Street West, 6th Floor, Kitchener Ontario N2G 4W1