

Should you be retaining lien holdback under your repair or maintenance contract?

DEC 16, 2019 2 MIN READ

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- Changes to the definition of “improvement” after July 1, 2018
- Differentiate between contracts for capital repair and maintenance

Among various remedies provided for by the *Construction Act of Ontario* (Act), a lien remains the most sought after. A person who supplies services or materials to an improvement has a lien upon the interest of the owner in the premises improved for the price of those services or materials. Owners (and any other payors in the construction pyramid) must retain a legislative holdback, if their contract or subcontract relates to services or materials under which a lien may arise. Given this, the understanding of what constitutes an improvement is an important one.

The prior version of the Act defines improvement to include any alteration, addition or repair to the land. Starting July 1, 2018, the definition of improvement was amended to include “capital repair” instead of “repair” to the land. The distinction between capital repairs, repairs and maintenance is not straightforward.

As many know, the amendments in the Act are based on the recommendations of an in-depth [report](#) prepared for the Ontario government in 2016. Based on stakeholder concerns, the report addressed the distinction between repairs and maintenance by reference to the *Income Tax Act*. According to the report, “capital” repairs are intended to improve the land (and should be captured by the Act), while “maintenance” is intended to maintain the original condition of the lands and is not intended to form part of an “improvement” (and should not be captured by the Act).

As a result, from July 1, 2018, the Act defined capital repair to land as any repair intended to extend the normal economic life, or improve the value or productivity, of the land or the building, structures or works on the land. The definition expressly excludes maintenance work done in order to: (i) prevent normal deterioration; or (ii) maintain in a normal, functional state.

Despite the legislative changes, there is no bright line test to distinguish between capital repair and maintenance. While the laws and accounting practices may provide guidance, the answer will depend on the circumstances.

Stakeholders should pay close attention to the type of work under their maintenance or repair contracts, in order to determine if materials or services are being supplied to an

improvement. As mentioned above, this will impact a contractor's or supplier's right to a lien or an owner's obligation to retain legislative holdback.