

# CONSTRUCTION REMEDIES ON PUBLIC PROJECTS: ALBERTA'S PUBLIC WORKS ACT AND COMPARABLE LEGISLATION IN OTHER PROVINCES

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In [Graham Construction and Engineering Inc v Alberta \(Infrastructure\)](#),<sup>[1]</sup> the Alberta Court of Queen's Bench clarified that claimants must meet the prescribed notice requirements in order to have a valid claim under the *Public Works Act* ("**AB PWA**").<sup>[2]</sup>

The AB PWA is designed to protect persons that provided labour, equipment, material or services to a "public work". A public work is a construction project commenced pursuant to a contract entered into with the Provincial Crown (i.e. the Provincial government) or an agent of the Crown.

On private projects, the Alberta *Builders' Lien Act* protects unpaid subcontractors and workers by granting a builders' lien on the land being improved. The *Builders' Lien Act* does not bind the Provincial Crown. The Legislature determined that it would be against public policy to allow unpaid subcontractors to enforce builders' liens against a public work. As an example, permitting enforcement of builders' liens against public works could result in a hospital being sold to repay the unpaid subcontractors. Because of this, the AB PWA replaces use of the *Builders' Lien Act* on public projects.

The AB PWA is a short statute that has infrequently been subject to judicial determination. In *Graham Construction*, the Court held that a claimant must comply with the notice of claim provisions<sup>[3]</sup> described further below, to gain a priority right under the AB PWA.<sup>[4]</sup> Merely filing an invoice is not sufficient to grant an unpaid subcontractor a valid AB PWA claim.<sup>[5]</sup> The Court held that a claimant cannot earn a second-ranking priority by "substantially" complying with the AB PWA.<sup>[6]</sup>

This bulletin provides a brief overview of the AB PWA and similar legislation in other Provinces that create statutory remedies for work performed on public projects.

## **Public Works Act (Alberta)**

When a person or public project is legally obliged to but fails to pay any person that has provided work or materials "used or reasonably required for use" on the public work, then the unpaid person may file a notice of

claim with the relevant Minister or government agent.<sup>[7]</sup> This notice of claim must be mailed within 45 days after the last day the work or materials were provided.<sup>[8]</sup> For work on a highway or road, the claim must be submitted after 30 days but before 90 days after the last day the work or materials were provided.<sup>[9]</sup>

After receipt of a claim, the Crown is required to give notice to the general contractor and its surety within 30 days. Then the Crown has broad discretion in how it responds to the claim:

- The Crown may either directly pay the claimant an amount that it considers proper and deduct such amount from amounts the Crown owes to the contractor with whom it has a contractual relationship;<sup>[10]</sup> or
- The Crown may pay any amount it considers proper into Court.<sup>[11]</sup> The Court then determines which claims will get paid out, in part or in full, from the amounts paid into Court.<sup>[12]</sup>

If there are insufficient funds payable to the contractor to cover the PWA claims, then the Crown may seek recovery from the contractor's surety. As confirmed in *Graham Construction*, a valid AB PWA claim grants a claimant priority to any monies payable under the same public works contract.<sup>[13]</sup> This priority acts as a substitute for the builders' lien interest in an improvement on a private project.

## ***Graham Construction***

### **Background**

The case arose through a new hospital being constructed in Grande Prairie, Alberta, for which Graham Construction was the initial general contractor. After Graham Construction terminated its contract in 2018, a multitude of contractors had claims for money owed. In turn, some of the contractors filed AB PWA notices of claims<sup>[14]</sup> seeking payment by the Government of Alberta. The Crown paid more than \$30 million into Court pursuant to the AB PWA as a result of these claims.

Some contractors did not use the form<sup>[15]</sup> required by the AB PWA, including Graham Construction. Graham had merely provided regular invoices to Alberta Infrastructure, albeit within the AB PWA's time frame for a notice of claim.<sup>[16]</sup> When Graham applied to distribute the funds being held in Court in 2019, including \$3.5 million to Graham itself, other parties opposed the application based on non-compliance with the AB PWA. This argument was split off from the other settled claims that had already been paid out by consent,<sup>[17]</sup> with roughly \$8 million in claims outstanding. On appeal from Master Schlosser's decision, the central issue was "whether or not the Master erred in holding that there are two different classes of claimants as defined by the [AB PWA] – those who 'complied' and those who 'substantially complied' with the notice requirements under s 14."<sup>[18]</sup>

### **Takeaways**

In short, and as with builders' liens, partial compliance is non-compliance. Only those who comply with the AB PWA obtain a priority and can access funds paid into Court.<sup>[19]</sup> The key takeaways from *Graham Construction* are:

- Sections 14 and 15 must be followed by a party claiming recourse under the AB PWA<sup>[20]</sup>
- Section 14(3)(b)'s notice in a "form satisfactory to the Crown" means the procedure under the AB PWA, including the Government's standard form notice of claim,<sup>[21]</sup> and not a mere invoice<sup>[22]</sup>
- A party which fails to comply with the AB PWA still has its contractual rights as against the party that failed to pay, albeit without the AB PWA claim priority,<sup>[23]</sup> however, pursuing these remedies may not be practical if the non-paying person is insolvent
- The Court retains no "overarching discretion under section 15(4)" to determine proper claimants<sup>[24]</sup>

### Comparable Legislation

Province/Territory	Legislation	Binds Crown?	Options for Recourse by an Owed Subcontractor
British Columbia	<i>Builders Lien Act</i> , SBC 1997, c 45	Partially <sup>[25]</sup>	<ul style="list-style-type: none"> <li>• Payment into Court by government; Court to decide claim<sup>[26]</sup></li> <li>• Lien action against the provincial government as "owner"<sup>[27]</sup></li> </ul>
Saskatchewan	<i>The Builders' Lien Act</i> , SS 1984-85-86, c B-7.1, as amended by <i>The Builders' Lien (Prompt Payment) Amendment Act, 2019, SS 2019, c 2</i> <sup>[28]</sup>	Yes <sup>[29]</sup>	<ul style="list-style-type: none"> <li>• Subcontractor submission of payment under contract to adjudication before adjudicator<sup>[30]</sup></li> </ul>
Manitoba	<i>The Public Works Act</i> , RSM 1987, c P300	No <sup>[31]</sup>	<ul style="list-style-type: none"> <li>• Repayment by provincial government on behalf of defaulting contractor<sup>[32]</sup></li> <li>• Provincial government submission of repayment amount to adjudication before two arbitrators<sup>[33]</sup></li> </ul>
Ontario	<i>Construction Act</i> , RSO 1990, c C.30	Yes <sup>[34]</sup>	<ul style="list-style-type: none"> <li>• Subcontractor has a lien against the holdback as well as any balance (subject to setoff) above the holdback, but lien does not attach to land<sup>[35]</sup></li> <li>• Subcontractor submission of payment under contract to adjudication before adjudicator<sup>[36]</sup></li> </ul>

Québec	<i>Pilot project to facilitate payment to enterprises that are parties to public construction work contracts and related public subcontracts</i> , CQLR C-65.1, r 8.01 (pursuant to <i>Act respecting contracting by public bodies</i> , CQLR c C-65.1, s 24.3)	Yes <sup>[37]</sup>	<ul style="list-style-type: none"> <li>Amount withheld by provincial government pending decision on claim<sup>[38]</sup></li> <li>Subcontractor submission of payment under contract to adjudication before adjudicator<sup>[39]</sup></li> </ul>
Nova Scotia	<i>Builders' Lien Act</i> , RSNS 1989, c 277, as amended by <i>An Act to Amend Chapter 277 of the Revised Statutes, 1989, the Builders' Lien Act</i> , SNS 2019, c 12 <sup>[40]</sup>	Yes <sup>[41]</sup>	<ul style="list-style-type: none"> <li>Subcontractor submission of payment under contract to adjudication before adjudicator<sup>[42]</sup></li> </ul>
New Brunswick	<i>Crown Construction Contracts Act</i> , RSNB 2014, c 105	Yes <sup>[43]</sup>	<ul style="list-style-type: none"> <li>Repayment by provincial government on behalf of defaulting contractor<sup>[44]</sup></li> <li>Amount withheld by provincial government pending decision on claim<sup>[45]</sup></li> </ul>
Prince Edward Island	<i>Mechanics' Lien Act</i> , RSPEI 1988, c M-4	Yes <sup>[46]</sup>	<ul style="list-style-type: none"> <li>Amount withheld by provincial government pending decision on claim<sup>[47]</sup></li> <li>Payment into Court by government; Court to decide claim<sup>[48]</sup></li> <li>Lien action against the provincial government as "owner"<sup>[49]</sup></li> </ul>
Newfoundland and Labrador	<i>Mechanics' Lien Act</i> , RSNL 1990, c M-3	No <sup>[50]</sup>	Other common law remedies
Yukon	<i>Builders Lien Act</i> , RSY 2002, c 18	No <sup>[51]</sup>	Other common law remedies
Northwest Territories	<i>Mechanics Lien Act</i> , RSNWT 1988, c M-7	No <sup>[52]</sup>	Other common law remedies
Nunavut	<i>Mechanics Lien Act</i> , RSNu 1988, c M-7	No <sup>[53]</sup>	Other common law remedies

## Conclusion

McMillan's National Construction Group has significant experience with public construction projects and would be pleased to assist you with navigating the provincial regimes.

[1] [ps2id id='1' target='']*Graham Construction and Engineering Inc v Alberta (Infrastructure)*, 2021 ABQB 184 [*Graham Construction* 2021].

[2] [ps2id id='2' target='']*Public Works Act*, RSA 2000, c P-46 [AB PWA].

[3] [ps2id id='3' target='']AB PWA, *supra* note 2, s 14(3).

[4] [ps2id id='4' target='']*Graham Construction* 2021, *supra* note 1 at para 66.

[5] [ps2id id='5' target='']*Graham Construction* 2021, *supra* note 1 at paras 45, 66.

[6] [ps2id id='6' target='']*Graham Construction* 2021, *supra* note 1 at paras 44, 66 (reversing Master Schlosser's holding on this point).

[7] [ps2id id='7' target='']/AB PWA, *supra* note 2, s 14(1).

[8] [ps2id id='8' target='']/AB PWA, *supra* note 2, s 14(3).

[9] [ps2id id='9' target='']/AB PWA, *supra* note 2, s 14(2).

[10] [ps2id id='10' target='']/AB PWA, *supra* note 2, s 15(1) (deducted from the money deposited by the contractor with the provincial government).

[11] [ps2id id='11' target='']/AB PWA, *supra* note 2, s 15(4).

[12] [ps2id id='12' target='']/*Ibid.* See e.g. [Graham Construction and Engineering Inc v Alberta \(Minister of Infrastructure\)](#), 2019 ABQB 543 [*Graham Construction Settled Claims*].

[13] [ps2id id='13' target='']/*Graham Construction* 2021, *supra* note 1 at paras 50, 66.

[14] [ps2id id='14' target='']/AB PWA, *supra* note 2, s 14.

[15] [ps2id id='15' target='']/See [page 3 for the Ministry form for a Notice of Claim](#).

[16] [ps2id id='16' target='']/*Graham Construction* 2021, *supra* note 1 at para 39.

[17] [ps2id id='17' target='']/*Graham Construction Settled Claims*, *supra* note 12.

[18] [ps2id id='18' target='']/*Graham Construction* 2021, *supra* note 1 at para 19.

[19] [ps2id id='19' target='']/*Graham Construction* 2021, *supra* note 1 at paras 45, 48.

[20] [ps2id id='20' target='']/*Graham Construction* 2021, *supra* note 1 at paras 49-52, citing [Alberta v Gall \(First Steel Fabricating Ltd.\)](#), 1983 CanLII 1032 (AB QB), 45 AR 384; [Moonview Builders Ltd v Alberta Housing Corporation](#), 1983 CanLII 1009 (AB QB), 24 Alta LR (2d) 66.

[21] [ps2id id='21' target='']/See [page 3 for the Ministry form for a Notice of Claim](#).

[22] [ps2id id='22' target='']/*Graham Construction* 2021, *supra* note 1 at para 42.

[23] [ps2id id='23' target='']/*Graham Construction* 2021, *supra* note 1 at paras 46, 58.

[24] [ps2id id='24' target='']/*Graham Construction* 2021, *supra* note 1 at para 55.

[25] [ps2id id='25' target='']/The statutory exception to the Crown being bound has been assumed to include provisions of the Act “which deal in the stated senses with real estate”: [Engineering & Plumbing Supplies Ltd v Seaboard Excavating Ltd](#), 1988 CarswellBC 293 at para 11, 29 BCLR (2d) 309 (Co Ct); provincial government agencies are not bound by the Act: [Fidelity Insurance Co. of Canada v Cronkhite Supply Ltd](#), [1979] 2 SCR 27, 13 BCLR 33. Conversely, sections 5(8)(a) and 31(6) of the Act refer to the provincial government as an “owner”, which may bind the province to the Act. See also British Columbia Law Institute Report No. 89, “[Report on the Builders Lien Act](#)” (July 2020).

[26] [ps2id id='26' target='']/ss 13(5), 23.

[27] [ps2id id='27' target='']/ss 2(1), 10 (breach of trust action), 26.

[28] [ps2id id='28' target='']/Not yet in force. Comes into force on Proclamation.

[29] [ps2id id='29' target='']/Excluding public highways, streets or bridges: ss 2, 5.

[30] [ps2id id='30' target='']/s 21.21 (per s 7 of 2019 amending Act).

[31] [ps2id id='31' target='']*The Interpretation Act*, SM 2000, c 26, s 49.

[32] [ps2id id='32' target='']s [13\(1\)](#).

[33] [ps2id id='33' target='']ss [13\(2\)](#), [13\(5\)](#). See also [The Arbitration Act](#), SM 1997, c 4.

[34] [ps2id id='34' target='']s [3\(1\)](#).

[35] [ps2id id='35' target='']ss [16-17](#), [21-22](#).

[36] [ps2id id='36' target='']s [13.5\(1\)-\(2\)](#).

[37] [ps2id id='37' target='']An eligible “public body” includes a provincial government department, school board or health and social services institution: [s 4](#).

[38] [ps2id id='38' target=''][s 19](#).

[39] [ps2id id='39' target=''][s 20](#).

[40] [ps2id id='40' target='']Not yet in force. Comes into force on Proclamation.

[41] [ps2id id='41' target='']Excluding public highways or roadwork or improvements: ss [3\(1\)](#), [\(6\)](#).

[42] [ps2id id='42' target='']s [4J](#) (per s 2 of 2019 amending Act); forthcoming Regulations (per s [3\(b\)](#) of 2019 amending Act).

[43] [ps2id id='43' target='']s [2](#).

[44] [ps2id id='44' target='']s [7\(3\)](#); s [19\(2\)-\(3\)](#) (Regulations).

[45] [ps2id id='45' target='']s [19\(1\)](#) (Regulations).

[46] [ps2id id='46' target='']ss [1\(d\)](#), [\(j\)](#); *Interpretation Act*, RSPEI 1988, c I-8, s 20.

[47] [ps2id id='47' target='']s [15\(1\)](#).

[48] [ps2id id='48' target='']s 53.

[49] [ps2id id='49' target='']ss [2](#), [3\(3\)](#), [14\(9\)](#), [33](#).

[50] [ps2id id='50' target=''][Brook Construction \(2007\) Inc v Blackwood Contractors Limited](#), 2015 NLCA 18 at paras [31-37](#), citing, *inter alia*, *Interpretation Act*, RSNL 1990, c I-19, [s 12](#).

[51] [ps2id id='51' target=''][Interpretation Act](#), RSY 2002, c 125, [s 13](#).

[52] [ps2id id='52' target=''][Interpretation Act](#), SNWT 2017, c 19, s 8.

[53] [ps2id id='53' target=''][Interpretation Act](#), RSNu 1988, c I-8, s 8.

by [Andrew Stead](#), [Preet Saini](#), [Jacob Stucken](#)

## A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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