

NO LONGER THE WILD WEST: ALBERTA'S NEW PROMPT PAYMENT AND CONSTRUCTION LIEN ACT AND WHAT YOU NEED TO KNOW

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There are major changes to Alberta's *Builders' Lien Act*^[1] on the horizon that will impact all stakeholders in the construction pyramid. [Bill 37, the Builders' Lien \(Prompt Payment\) Amendment Act, 2020](#) ("Bill 37"),^[2] aims to modernize Alberta's construction legislation by implementing changes that have recently been made in other Canadian jurisdictions.^{[3][4][5][6][7]} This bulletin summarizes the key changes introduced by Bill 37, which are: (1) prompt payment, (2) adjudication, (3) mandatory progressive release of holdback in certain cases, and (4) extended registration deadlines for builders' liens. Bill 37 will also rename the Alberta *Builders' Lien Act* as the *Prompt Payment and Construction Lien Act* (the "**New Act**").

Bill 37 will apply to contracts entered into after it is proclaimed into force. We expect this to occur in July 2021. Bill 37 may go through changes before it is proclaimed into force. Bill 37 was most recently amended in the Alberta Legislature on November 4, 2020.

Need for Prompt Payment and Adjudication Legislation

The biggest changes in Bill 37 are the introduction of a prompt payment and adjudication regime to facilitate timely payment down the construction pyramid. Mr. Nate Glubish, the Minister of Service Alberta, recently identified the concerns around timely payment in the construction industry as follows:

This is a significant problem. You can imagine that if you're not getting paid for the work that you're doing, then you can't pay others for the work they're doing for you. In construction, where you have general contractors and subcontractors and suppliers of many kinds working on often very large-scale projects over long periods of time, you can imagine that when one group does not pay in a timely manner, that has a cascading effect all the way through the system.^[8]

Bill 37 is intended, at least in part, to address these concerns.

Prompt Payment Framework

What is Prompt Payment?

The New Act mandates timelines for payments down the construction pyramid that are triggered by the issuance of a “proper invoice” by a contractor to an owner. Once the proper invoice is issued to the owner, there are different timelines for payments as follows (subject to exceptions described herein):

- by an owner to a contractor (within 28 days after issuance of proper invoice),
- by a contractor to a subcontractor (within 7 days after contractor receives payment from the owner), and
- by a subcontractor to its subcontractor (within 7 days after subcontractor receives payment from the contractor).

The prompt payment regime does not affect obligations of a contractor or subcontractor to pay employees.

What is a “proper invoice”?

Bill 37 defines a “proper invoice”,^[9] as a request for payment that is in writing and includes, among other things, a description of the work done or materials furnished, the amount requested for payment, the payment terms broken down for the work done or materials furnished, a reference to the agreement under which the work or materials were provided, and a statement that the invoice is intended to be a proper invoice.

Initiating the Process

A proper invoice can only be issued by a contractor to an owner. A contractor is defined in the legislation as a person contracting with or employed directly by an owner or owner’s agent.

To keep the flow of funds moving on a project, the New Act provides that the contractor must submit a proper invoice to the owner at least every 31 days.^[10] There is an exception: if a contract includes a provision for the testing and commissioning of the work completed or materials furnished, and the conditions of such testing and commissioning are not met, then the contractor is not required to submit a proper invoice every 31 days.

Prompt Payment: Owner to Contractor

Once a contractor submits its proper invoice to the owner, the owner must pay the proper invoice within 28 days of receipt, unless the owner disputes payment, in part or in full.^[11] An owner who disputes a proper invoice may deliver a notice of dispute within 14 days after receipt of a proper invoice (“Owner Dispute Notice”). The notice of dispute must outline the amount not being paid and reasons for non-payment. This must be done in a prescribed form, which will likely be set out in forthcoming regulations under the New Act.^[12]

Once a notice of dispute is issued, the dispute may be referred to an adjudication process introduced under the New Act, as described in the “Adjudication Framework” section below.

A contractor is required to advise its subcontractors of an Owner Dispute Notice upon receipt and without delay. In turn, subcontractors who are advised of an Owner Dispute Notice are required to advise their subcontractors without delay.^[13] A contractor is also required, upon request of a subcontractor, to provide the subcontractor confirmation on the date which a proper invoice was issued to the owner.

Prompt Payment: Contractor to Subcontractor

A contractor who receives full payment of a proper invoice from an owner must, no later than 7 days after receiving payment, pay each subcontractor for work completed or materials furnished that formed part of the proper invoice. If more than one subcontractor is entitled to payment arising out of the same proper invoice, then all subcontractors will be paid on a proportionate basis. Where an owner delivers an Owner Dispute Notice, the subcontractors responsible for the work or material relating to the dispute will be paid after other subcontractors who provided work or materials that were not disputed by the owner.

If an owner fails to pay the contractor for all or part of a proper invoice, the contractor is still required to pay its subcontractor for the work or materials that formed part of the proper invoice within 35 days after the date the proper invoice was issued, regardless of whether the contractor was itself paid. However, there are two types of notices that a contractor may issue to its subcontractor to either defer or dispute such mandatory payment within 35 days after issuance of the proper invoice:

1. A notice to defer payment must be in a prescribed form stating that some or all of the amount payable to the subcontractor is not being paid due to non-payment by the owner to the contractor. The notice must specify the amount not being paid and the contractor must provide an undertaking to refer the dispute with the owner to adjudication no later than 21 days after the notice to the subcontractor. If an Owner Dispute Notice is issued, a copy must also be provided to the subcontractor.
2. A notice of dispute must be in a prescribed form and specify the amount not being paid to the subcontractor and the reasons for non-payment. A notice of dispute contests the subcontractor's entitlement to be paid for reasons other than non-payment by the owner.

Each of the above notices must be issued within 7 days after the contractor receives an Owner Dispute Notice, or if no Owner Dispute Notice is received, then within 35 days after the proper invoice is issued.

Prompt Payment: Subcontractor to Subcontractor

The payment process for a subcontractor to its subcontractor is very similar to the payment process as between a contractor and its subcontractor. The subcontractor must make payment to its subcontractor within 7 days of receiving payment from the contractor, or if it is not paid by the contractor, 42 days after the proper invoice is issued by the contractor to the owner.

A subcontractor can also defer or dispute payment by issuing one of the two forms of notices available to a contractor described above, with the exception that a subcontractor is not required to refer the dispute with the owner to adjudication as part of its notice to defer. This is because the subcontractor has no contractual relationship with the owner and thus no ability to refer the dispute to adjudication. Each of the notices must be issued within 7 days after the subcontractor receives notice of non-payment from the contractor, or if no notice of non-payment is provided to the subcontractor, then within 42 days after the proper invoice is issued to the owner.

Interest

Interest at a prescribed rate under the New Act will accrue on any amounts in a proper invoice that are not paid when due.

Prohibition on Conditional Payments

The New Act prohibits an owner from making payment of a proper invoice conditional on the prior certification of a person (e.g., the project consultant), or the prior approval of the owner.^[14] However, parties may agree that testing and commissioning of the improvement or work done or materials furnished is a condition to payment.^[15] Once a proper invoice is issued and testing and commissioning has been successfully completed, the proper invoice is due and payable.

The effect of the prohibition on conditional payments is that payment can no longer be delayed due to issues unrelated to work completed or materials furnished.

Adjudication Framework

Current Framework

Under the current framework, a builders' lien dispute is resolved by (1) registering a builders' lien against the project lands, and (2) commencing an action in the Court of Queen's Bench to enforce that builders' lien.

Adjudication

Bill 37 provides an optional adjudication process. The Bill 37 drafters intended adjudication to be a faster and less costly process than a court proceeding. Adjudication is only available to parties to the same contract. Accordingly, a subcontractor cannot adjudicate a dispute with an owner through the new adjudication process.

To commence adjudication, one of the parties to the contract must refer the dispute to adjudication. The other party may oppose adjudication as the appropriate forum for the dispute and seek to transfer the dispute to court. The adjudicator will then either hear the dispute and make a binding determination, or refer the dispute

to court. Where a binding determination is made, the decision is subject to judicial review on limited grounds, such as a mistake of law.

The existing *Builders' Lien Act* prevents parties from contracting out of remedies available under the lien legislation. This same restriction will be carried forward to the New Act to prevent parties from contracting out of the adjudication process altogether.

Bill 37 does not outline the grounds for adjudication, and we await regulations that will no doubt clarify this aspect of the new procedure. As a point of reference, grounds under the Ontario Act include valuation of services or materials under the contract, payment under the contract including change orders, disputed payments of proper invoices, or other matters that the parties agree to submit for adjudication.^[16] We anticipate similar grounds in Alberta.

Who are the Adjudicators?

Bill 37 provides that the Minister responsible for the New Act may designate one or more Nominating Authorities to qualify and appoint adjudicators to hear disputes under the New Act.^[17] The Nominating Authorities would then appoint third-party adjudicators to resolve disputes in the construction industry. Fees for adjudicator services are expected to be established by regulation.

Governing Rules for Disputes

We expect adjudication procedures to either be established in forthcoming regulations or by a Nominating Authority. Parties to a contract can also agree to their own adjudication procedures, however, procedures established in regulations or by a Nominating Authority, as the case may be, will take precedence over the parties' own adjudication procedures in the event of a conflict.^[18]

Timeline for Resolving Disputes

The Alberta regulations establishing the timelines for adjudication are not yet available. It is expected that Alberta will introduce relatively short timelines for adjudication given the objectives of the New Act. In Ontario, for example, an adjudication notice and the parties' contract must be given to the adjudicator within five days of the adjudicator's appointment,^[19] and the adjudicator must also deliver his or her decision by written reasons within 30 days (unless extended by agreement).^[20] Alberta is likely to follow suit with similar timelines.

Final and Binding

Given the rather narrow grounds for judicial review of an adjudicator's decision, Bill 37's stipulation that an adjudicator's decision is otherwise final and binding^[21] is significant and contrasts with the Ontario Act, which

provides for adjudication on an “interim” basis.[\[22\]](#)

Lien Registration and Holdback Changes

Progressive Release of Holdback Permitted but Not Mandatory

The existing *Builders’ Lien Act* makes release of holdback contingent on the issuance of a certificate of substantial performance or completion of the project, and the absence of builders’ liens registered against the project lands. Proper invoices will remain subject to such existing holdback requirements of the *Builders’ Lien Act*. However, the New Act mandates progressive release of holdback, if the value of the contract exceeds a minimum amount (which is yet to be prescribed) or if the project lasts longer than one year. An owner may also contractually agree to the progressive release of holdback on a phased basis as set out in the contract between the parties. The existing requirement that there are no builders’ liens registered on title for release of holdback to be permitted will apply to progressive release of holdback.

New Lien Registration Deadlines

The deadline for registration of a builders’ lien under the New Act will now be 60 days from the last day the services or materials were supplied,[\[23\]](#) which is up from 45 days in the existing *Builders’ Lien Act*. The deadline for registration of a lien relating to the furnishing of concrete or work relating to concrete will now be increased to 90 days, up from 45 days.[\[24\]](#) The deadline to register a builders’ lien relating to improvements to an oil or gas well or to an oil or gas well site remains 90 days.

Takeaways

There are three key takeaways for construction industry stakeholders:

1. The introduction of a prompt payment and adjudication regime will change how payments are made on construction projects and how disputes will be resolved. Parties should consider how the new regime will not only impact their future construction contracts, but also their project financing. Liquidity during a project may be impacted by the requirement to pay parties within prescribed time periods. Parties should be prepared to issue the required notices to defer or dispute payment where necessary.
2. Existing standard form construction contracts should be examined and updated to comply with the new legislation. Among other things, parties should consider adding testing and commissioning clauses and adjudication procedures into their contracts.
3. All construction industry stakeholders should know about the changes to the lien registration periods and mandatory progressive release of holdback. Contractors and subcontractors may also wish to request progressive release of holdback from owners if mandatory progressive release of holdback is not applicable to their projects.

Bill 37 is expected to be proclaimed into force by the Alberta Government in July 2021. We will continue to monitor Bill 37 and any related regulations introduced in this regard.

McMillan's National Construction Group is well equipped to assist industry members with any impacts from Bill 37.

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[1][ps2id id='1' target=''] [Builders' Lien Act](#), RSA 2000, c B-7.

[2][ps2id id='2' target=''] [Bill 37, Builders' Lien \(Prompt Payment\) Amendment Act, 2020, 2nd Sess](#), 30th Leg, Alberta, 2020 (second reading 28 Oct 2020) as amended by Amendment A1 2nd Sess, 30th Leg, Alberta, 2020 (committee of the whole 4 Nov 2020) [together, *Bill 37*].

[3][ps2id id='3' target=''] [Construction Act](#), RSO 1990, c C.30 [Ontario Act].

[4][ps2id id='4' target=''] [The Builders' Lien \(Prompt Payment\) Amendment Act](#), 2019, SS 2019, c 2.

[5][ps2id id='5' target=''] [An Act to Amend Chapter 277 of the Revised Statutes, 1989, the Builders' Lien Act](#), SNS 2019, c 12.

[6][ps2id id='6' target=''] Bill 108, [An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics](#), 1st Sess, 41st Leg, Quebec, 2017 (assented to 1 December 2017).

[7][ps2id id='7' target=''] [Federal Prompt Payment for Construction Work Act](#), SC 2019, c 29, s 387.

[8][ps2id id='8' target=''] Alberta, Legislative Assembly, Hansard, 30th Leg, 2nd Sess, No. 64, at 2774.

[9][ps2id id='9' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.1(1)).

[10][ps2id id='10' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.1(6)).

[11][ps2id id='11' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.2(1)).

[12][ps2id id='12' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.2(2)).

[13][ps2id id='13' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.4).

[14][ps2id id='14' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.1(3)).

[15][ps2id id='15' target=''] *Bill 37*, *supra* note 2, cl 14 (new s 32.1(4)).

[16][ps2id id='16' target=''] Ontario Act, *supra* note 3, [s 13.5\(1\)](#).

[17][ps2id id='17' target=''] *Bill 37*, *supra* note 2, cl 17 (new s 33.2(1)).

[18][ps2id id='18' target=''] *Bill 37*, *supra* note 2, cl 17 (new s 33.4).

[19][ps2id id='19' target=''] Ontario Act, *supra* note 3, [s 13.11](#).

[20][ps2id id='20' target=''] Ontario Act, *supra* note 3, [s 13.13](#).

[21][ps2id id='21' target=''] *Bill 37*, *supra* note 2, cl 17 (new s 33.6(4)).

[22][ps2id id='22' target=''] Ontario Act, *supra* note 3, [s 13.1](#).

[23][ps2id id='23' target=''] *Bill 37*, *supra* note 2, cl 27.

[24][ps2id id='24' target=''] *BLA*, *supra* note 1, [s 41](#).

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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