

Review of Prompt Payment and Adjudication

Stakeholder Information Package

Prompt Payment in the Construction Industry

The *Builders' Lien Act* (BLA) protects contractors, sub-contractors, labourers, and suppliers who have provided labour or materials for a construction project on a parcel of land. The Act is enforced – through registration of liens on the land – when any of these parties are not paid for their work or supplies. The lien registration period for construction projects is 45 days after completion of work or supply of materials.

Recently, the timeliness of payment of invoices in the construction industry has become a serious problem, with the time between which sub-contractors issue their invoices for completed work and receive payments increasing to more than 71 days. This has placed substantial financial pressure on sub-trades, affecting cash flow and business solvency. The BLA does not address the process of obtaining timely payments. Furthermore, even when liens are registered on time, the Act's remedies are through the courts, which are time consuming and prohibitively expensive.

Representative organizations within the construction industry have been seeking amendments to the BLA to provide for 'prompt payment' legislation. 'Prompt payment' is a term that encompasses a suite of legislative amendments to streamline payment processes and introduces a system of adjudication through faster and more cost effective mandatory arbitration, thus reducing the red tape associated with collecting accounts.

The purpose of stakeholder engagement is to gather information to support effective implementation of a prompt payment system in Alberta. The specific goal is to shorten the time it takes for those who work in the construction industry to get paid and in cases where there are payment disputes, to set up a faster, more cost efficient system to resolve disputes.

This information package is designed as a guide for discussion and to gather your feedback on key topics related to payment processes in Alberta's construction sector.

1. Prompt Payment

Currently, the only Canadian jurisdiction to have enacted and operationalized prompt payment legislation is Ontario. Ontario's *Construction Act* contains the following prompt payment provisions:

- freedom of contract in respect of invoicing terms (so as to permit a variety of mechanisms such as milestone payments, phase payments, etc.);
- a 28-day payment period which runs from the delivery of a proper invoice and a 7-day payment period for payment to sub-contractors;
- certification processes are to take place within the 28-day payment period;
- evaluation of payment applications and delivery of a notice of non-payment; and
- interest charges arising from a failure to pay and a right to suspend arising after the failure to make payment following an adjudicator's decision.

Stakeholders in Alberta have expressed a desire to see similar provisions introduced in Alberta.

Addressing prompt payment within the BLA:

1. Prompt payment rules have been adopted in other jurisdictions. Please explain what kind of rules are necessary to address payment issues in Alberta's construction sector. Are there specific prompt payment provisions used elsewhere that would not be appropriate in Alberta? If so, what alternatives would be appropriate?
2. To what types of contracts should these rules apply? If not all, what contract types should be excluded?
3. Would it be appropriate for there to be exclusions based upon project type?
 - For example, should P3 projects be treated differently than other types of procurements? Should there be different rules for public and private sector projects?
 - Should prompt payment provisions exclude any sectors or industry professionals (e.g., architects are excluded in other jurisdictions)?
4. Should any new rules apply to all levels of contracts in the construction pyramid?
5. What is the appropriate event (such as the issuance of a 'proper invoice' as defined in the legislation) to start the clock running on a payment period?
6. What payment period is reasonable? Just as the oil and gas industry currently has a longer lien period, should payment and lien periods differ depending on the type of industry? Should rules be different for parties at different levels of the construction pyramid?
7. What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?
8. Withholding payment for reasons of deficiency is not specifically addressed in the BLA. Is there a specific rationale for withholding payment for deficiencies and when?
9. Should rights of set-off be allowed in relation to other projects?
10. Should all payment information be posted and be readily available and to what degree? If so, how should such information be posted and to whom should it be available?
11. What should the consequences be of a failure to pay? An interest penalty?

12. What rules should apply for distribution of partial payments?
13. Should there be specific rules addressing so-called 'pay when paid' contractual clauses?

2. Adjudication

On October 1, 2019, Ontario established the Ontario Dispute Adjudication for Construction Contracts (ODACC) as the authorized nominating authority for the adjudication of construction disputes as established by the *Construction Act*.

In Ontario, the key elements of the legislation include:

- targeted interim binding adjudication in relation to a defined set of issues focused on payment disputes available to all participants in the construction pyramid on projects in both the public and private sectors;
- consolidated adjudications are permitted;
- adjudicators have significant experience in the construction industry;
- there will be a single Authorized Nominating Authority (ODACC);
- parties cannot agree in advance to the adjudicator;
- adjudicators will have considerable discretion in setting procedures; and
- the total timeframe of an adjudication will be 46 days, unless extensions are agreed.

Given the relationship of adjudication to prompt payment, stakeholders have expressed a desire to see similar provisions explored for Alberta.

Addressing adjudication for payment disputes:

1. Under what circumstances can a party initiate an adjudication process and when should they be allowed to do so?
2. What party should be able to adjudicate a dispute?
3. What should be the process to select an adjudicator?
4. In Ontario, there is an accredited nominating authority that keeps a roster of adjudicators. What should be the role of such an authority in Alberta?
5. Should all disputes be subject to adjudication under the statute? Should there be limits to the amount of money in dispute or the type of dispute or project?
6. Should there be limits to the awards an adjudicator can make? Only monetary damages?
7. What should an adjudication process look like?
8. What qualifications should an adjudicator possess?
9. Adjudication processes will entail costs. Who should bear such costs in an adjudication process?
10. How should adjudication decisions be enforced and what should be the mechanisms for enforcement in the event of non-compliance?

3. Holdbacks

Some stakeholders in the construction industry have expressed concerns with respect to the current 'holdback' provisions of the BLA, suggesting that potential changes to legislation would encourage release of holdbacks on a timelier basis.

The 'holdback' rules in Alberta are somewhat unique and relate to the establishment of minor and major lien funds under the BLA. Minor lien funds occur prior to the issuance of the Certificate of Substantial Performance whereas the major lien fund is established after the Certificate is issued.

Addressing 'holdback' provisions in the BLA:

1. The BLA contains provisions for holdbacks under the minor and major lien funds of 10%. Does this still make sense? What would be a better approach for maintaining holdbacks, if any?
2. Is the amount of the holdback sufficient? Should the current amount of 10% be increased? Decreased?
3. What rules should apply to any interest payable on monies retained as holdbacks?
4. What rules should be applied to annual or phased release of holdback monies? If release of holdbacks is appropriate, for what projects? For what amounts?
5. What should be the relationship to the issuance of the Certificate of Substantial Performance to holdback release?
6. What holdback rules would make sense for Alberta's construction sector? In the context of 'prompt payment' changes contemplated above, what is the appropriate role of lien holdbacks?

4. Modernizing Lien Provisions

The BLA was enacted in 1983, and was last amended in 2002, when the lien period for oil and gas projects was extended from 45 to 90 days. Modernizing some provisions of the Act would ensure the legislation is responsive to current business practices in the construction industry.

Addressing 'lien' provisions in the BLA:

1. Should the Act be amended to incorporate an express statement of purpose for the lien remedy to guide the Courts on lien actions?
2. Are there defined terms under the BLA that require clarification or alteration?
3. The current minimum value for claiming a lien is \$300. Should this be updated and to what amount?
4. The period for filing liens at the Land Titles Office is 45 days. In light of the lien period for oil and gas projects being 90 days, does the current lien period for construction projects make sense? What would be an appropriate period of filing liens at Land Titles?
5. A "Notice to Take Proceedings" may be used to remove a lien prior to 90 days. Does the rule function adequately? Should it be amended and if so, how?

6. The processes for enforcement of liens through the Courts are laid out under the Act. Are they still relevant and what, if any, changes would improve them?
7. All liens are registered at the Land Titles Office. Are there any improvements to the registration processes and fees that may be made?
8. If a limited set of BLA amendments were pursued, such as only pertaining to certain sectors of the construction industry, which would they be?
9. What sort of linkages should be established with other remedies under the Act?
10. What should the relationship of lien claims under the BLA be with respect to work done on Crown lands?
11. Currently, the Act stipulates 180 days from the filing of a lien to commence an action at the Court of Queens Bench? Should this period be amended?
12. Should any amendments be made that deal with the definition of what constitutes a lienable interest?
13. In what ways could the remedies for liens under the BLA be better harmonized with the provisions of the *Public Works Act*, which regulates claims on public projects?

5. Interprovincial Rule Harmonization

The rules that govern prompt payment and adjudication have gone through significant evolution across international jurisdictions in recent years. Harmonization of rules within Canadian jurisdictions would simplify processes for those in the construction industry who operate across provincial borders.

Addressing harmonization of Alberta's rules with rules of other Canadian jurisdictions:

1. A desire to see rules on prompt payment processes similar to Ontario has been expressed by some stakeholders in the construction industry. Which rules from Ontario, or other Canadian jurisdictions, should Alberta consider adopting?
2. What specific rules in Alberta should be amended to harmonize better with national standards? What rules should remain undisturbed?

6. Transparency

Some stakeholders in the construction industry indicated that obtaining information as to the payments and financial status of what is occurring within the construction pyramid is a persistent problem. Without access to information as to whom has been paid and in what amounts, it is difficult to know what steps to take, if any. Given prompt payment works closely with remedies for disputes, the sharing of information on a timely basis is necessary to ensure such a system operates effectively.

Addressing transparency in payment processes for construction projects:

1. Current rules in Alberta limit the ability to obtain information to lienholders and litigants. What parties should be entitled to information with respect to payments made in the construction pyramid? Should this be expanded to any potential lien claimants?
2. To what information should other parties within the construction pyramid be entitled?
3. What should be the timing of disclosure for requested information?
4. How should the cost of providing information be handled?
5. What penalties should be imposed for non- or misleading disclosure?

7. Bonding

Ontario and Manitoba have implemented, or are considering new rules for surety bonding, on projects, which are mandated with a statutory regime. In Alberta, no such rules are currently mandated under the BLA.

Upon contractor default, surety bonds protect against non-performance and non-payment risks and provide a source of new funds. These can be used by the owner for completing the project and protect parties within the construction pyramid in the event of contractor insolvency.

Addressing ‘bonding’ rules within the BLA:

1. Should bonding be required in Alberta under the BLA?
2. In the event that bonding should be required under the BLA, what, if any, are the appropriate limits on bonding? Should it be limited to projects of a certain economic threshold values and what is the appropriate value?
3. Should types of bonds required be specified? For example, should there be both Performance Bonds as well as Labour and Materials bonds? What specific rules should apply to each?
4. What should be the relationship between bonding requirements and other remedies available under amendments made to enable prompt payment?
5. What rules should be imposed on bonding companies with respect to any claims processes?

8. Reform of Trust Remedies

Currently, the BLA imposes trusteeship obligations on the individual to whom money has been paid higher up in the constriction pyramid, but who must then use those funds to pay others to whom money is owed for work or materials. Some stakeholders have expressed a desire to have such obligations more clearly defined.

Addressing rules for ‘trust remedies’ in the BLA:

1. Do the current trust provisions function well for the construction industry? Please explain why or why not.
2. Would you support removing trust obligations from the BLA?
3. In the event that there is a desire to see more clarification of trusteeship obligations, the following questions require clarification:
 - 1) How should the trust fund be created?
 - 2) Who should act as trustees and who should be excluded from trusteeship obligations?
 - 3) What should be the payment certification process?
 - 4) Who should be designated as the beneficiaries under the trust?
 - 5) What should be the specific obligations of the trustee under the trust?
 - 6) What should be the permitted and non-permitted uses of trust funds?
 - 7) What enforcement remedies should be available?
 - 8) How should trust provisions operate in the case of bankruptcy?

How to Participate

Formal stakeholder consultations will start in January. In addition to an online survey, the following two stakeholder consultation meetings have been scheduled:

Dates	Locations
January 14 Session 1: 9:00 AM to 12:00 PM Session 2: 1:30 PM to 4:30 PM	Service Alberta Boardroom 106, 29th Floor, ATB Place South 10020 - 100 Street Edmonton, Alberta, T5J 0N3
January 24 Session 1: 9:00 AM to 12:00 PM Session 2: 1:30 PM to 4:30 PM	Land Titles and Surveys Branch Video Conference Room 2nd Floor, Service Alberta Building 710 – 4th Ave SW Calgary, T2P 0K3

Your organization may participate in one in-person session, as well as respond to the online survey. Please RSVP to promptpayment@gov.ab.ca to indicate which session your organization wishes to attend. Spaces will be limited in each and so we will forward session confirmation to you in advance.

Please use this information package as a guide as you prepare for the in-person sessions or for responding to the online survey. You are also welcome to email us any written submissions or reports.

Thank you for your participation and we look forward to working towards improving payment processes in the construction industry. If you have any questions, please feel free to contact us by email promptpayment@gov.ab.ca.