

## **Upcoming Changes to Bill 37: The Builder's Lien (Prompt Payment) Amendment Act**

June 10, 2021

On June 3, 2021, McCarthy Tétrault's Calgary Construction Group hosted a virtual presentation titled "Upcoming Changes to Bill 37: *The Builder's Lien (Prompt Payment) Amendment Act*". The presentation discussed fundamental changes to construction industry law and practice in Alberta as introduced by the *Prompt Payment and Construction Lien Act* (the "**PPCLA**"). As discussed during the presentation, the **PPCLA** will have major consequences, not just for the construction industry, but for any industry that is involved directly or indirectly in the buying, selling, drilling, mining, developing, maintaining or financing of land in Alberta, and will apply to all lienable construction contracts entered into after the amendments comes into force, which is expected occur on July 1, 2021. A recording of the virtual event is available to view **online**.

Here are four key takeaways discussed at the event

### **1. The **PPCLA** introduces statutory payment deadlines ("Prompt Payment") once a Proper Invoice is issued**

As indicated by its top-billing position in **PPCLA**'s title, "prompt payment" constitutes a significant addition to Alberta's construction and lien regime. The **PPCLA** sets out a strict timeline for when payments are due after the issuance of a Proper Invoice, as well as restricts the timeframe that a party can dispute a payment. The purpose of the strict timeline is to keep cash flowing down the Construction Pyramid to contractors and subcontractors, and keep the construction project moving forward.

The timeline starts running once a Proper Invoice is issued. A Proper Invoice is an invoice issued that complies with the requirements of the **PPCLA** by containing the following information:

- The contractor's or subcontractor's name and business address;
- The date of the proper invoice and the period for which the work was done or the materials were furnished;
- Information identifying the authority under which the work was done or materials were furnished;
- A description of the work done or materials furnished;
- The amount requested for payment and corresponding payment terms broken down for the work done or materials furnished;
- The name, title and contact information of the person to whom the payment is to be sent;

- A statement indicated that the invoice is intended to constitute a Proper Invoice for the purposes of the **PPCLA**; and
- Any other information that may be prescribed by the parties.

Once issued, the party receiving the invoice has 14 **calendar days** – not business days – to file a Notice of Dispute to dispute any of the charges contained within the Invoice. If no Notice of Dispute is made, payment of all amounts not disputed is due 28 calendar days from when the Proper Invoice was issued. This also means that if a party files a Notice of Dispute for only a certain portion of a payment in an Invoice, the non-disputed portion still must be paid within 28 calendar days. Following payment, a contractor has 7 calendar days to pay additional subcontractors who are owed payment.

## **2. The PPCLA creates a new “Adjudication” dispute resolution process for construction projects**

The **PPCLA** creates a non-judicial dispute resolution system to enforce the prompt payment timelines, as well as hear other types of disputes to be prescribed by regulation that arise between contracting parties.

The **PPCLA**'s adjudication system will be administered by “Nominating Authorities”. The Nominating Authorities will then qualify, appoint, and train the Adjudicators who will actually hear a dispute. The Nominating Authorities will also arrange for hearings and establish a registry of Adjudicators.

The proposed legislation currently states that only disputes between contracting parties may be heard by the **PPCLA**'s dispute resolution system. Disputes can pertain to “any prescribed matter” in the regulations, which have not yet been released. However, based on Ontario’s prompt payment and adjudication regime, it is anticipated that the types of disputes that may be heard include simple debt claims, workmanship issues, change orders and impact claims.

Adjudication procedures are to be set by regulations and the Nominating Authorities. Additionally, parties themselves can agree to add further procedural rules to their dispute resolution process, but cannot subtract from or conflict with the procedures that will be prescribed by the regulations and Nominating Authorities. Overall, the adjudication process is designed to provide a quick resolution while a construction project is ongoing.

Finally, due to industry reaction, the Alberta government under Bill 62 has replaced the originally contemplated “final and binding” (subject **only** to judicial review) Adjudication system, with an “interim binding” (also subject to judicial review) Adjudication system. This means that a Adjudicator’s decisions will be binding until and unless the parties take further action, such as, for example, entering into a written agreement to appoint an arbitrator under the (Alberta) *Arbitration Act*; agreeing to settle the matter; or seeking and receiving a court order over the subject dispute. If, for example, the parties have a valid arbitration agreement, then an Adjudicator’s decision is not binding, and the parties may proceed through arbitration and the arbiter can decide on the dispute’s merits. Additionally, Bill 62 also gives the Court or an arbitrator the authority to hear the merits of a dispute despite that dispute being previously heard before an Adjudicator. What this means in practice is that traditional litigation and arbitration routes are still available to parties engaged in a construction dispute, however, parties will be subject “in the interim period” to binding Adjudication decisions.

### 3. Progressive release of holdbacks is now permitted

Under the existing *Builders Lien Act* regime, owners are required to set aside 10 per cent of the contract price as a holdback to help satisfy any lien that may be claimed. This holdback would traditionally be released 45 days after work is completed, but in practice were often held onto for longer, imposing a fiscal burden on contractors.

Now, under the new rules in the ***PPCLA***, construction contracts can now contemplate having a progressive release system of the holdback. Holdback money on large, multi-year projects is now allowed to be released without risk at pre-set construction milestones. Progressive release of the holdback will give increased certainty to the parties and keep cash flowing throughout a construction project.

### 4. Increased access to information rights for construction projects

The ***PPCLA*** also improves access to information rights for construction projects. The definition of an “applicable person” who has a right to access information related to a lien has been generally expanded. It includes a lienholder, a beneficiary of a trust, and a contractor or subcontractor who is currently under a contract with the relevant owner. Additionally, the Court is now permitted to make an order, on application, to allow an applicable person to inspect contracts and other relevant documents. Finally, the ***PPCLA*** now permits electronic copies of Certificates of Substantial Performance.

For further information about the impact of the ***PPCLA*** on your business, please contact your McCarthy Tétrault trusted advisor.

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## Authors

### Bryan G. West

Partner

Calgary

**t. (Contact by phone) +1 403-260-3743**

**[bwest@mccarthy.ca](mailto:bwest@mccarthy.ca)**

## **Scott Chalmers**

Partner

Toronto

**t. (Contact by phone) +1 416-601-8303**

**schalmers@mccarthy.ca**

## **Jocelyn Turnbull Wallace**

Associate

Calgary

**t. (Contact by phone) +1 403-260-3706**

**jturnbullwallace@mccarthy.ca**

## **David Meier**

Associate

Calgary

**t. (Contact by phone) +1 403-260-3741**

**dmeier@mccarthy.ca**

## **Andrew West**

Associate

Calgary

**t. (Contact by phone) +1 403-260-3581**

**awest@mccarthy.ca**

## **Jordan Bierkos**

Associate

Calgary

**t. (Contact by phone) +1 403-260-3744**

**jbierkos@mccarthy.ca**

## **Derek Baker**

Summer Student

Calgary

**t. (Contact by phone) 403-260-3568**

**dbaker@mccarthy.ca**