

Builder's Lien Act Review

Issue

Alberta Builder's Lien Act needs to be reviewed. There needs to be modern mechanisms where disputes in the construction industry are resolved in a timely and expeditious manner so as to better protect the most vulnerable parties, being subcontractors and contractors who do not have privity of contract or the ability to bring a claim against a project owner.

Background

Two issues which should be reviewed by the Alberta government are;

A. Prompt Payment

All too often delays in payment in construction contracts can cause cash flow problems which lead to financial strain on contractors or subcontractors who have not been paid for work completed. If a project owner is late or delays payment to a contractor, the payment due to a subcontractor can also be delayed, which can lead to the subcontractor being late in payment to employees and suppliers. This delay in the chain of cash flow can have a serious impact on the operations of small and medium sized businesses. Alberta's current legislation does not adequately address this issue.

As such, a comprehensive review of Alberta's builder lien legislation should be completed by the Alberta government to determine the feasibility of incorporating the principles of 'prompt payment' into legislation so that all of Alberta's subcontractors, contractors and suppliers can benefit.

The Government of Canada identifies the following as 'prompt payment' principles:

Prompt payment principles

Public Services and Procurement Canada advocates that construction-related payments should follow these 3 principles:

1. Promptness:

The department will review and process invoices promptly. If disputes arise, Public Services and Procurement Canada will pay for items not in dispute, while working to resolve the disputed amount quickly and fairly

2. Transparency:

The department will make construction payment information such as payment dates, company names, contract and project numbers, publicly available; likewise, contractors are expected to share this information with their lower tiers

3. Shared responsibility:

Payers and payees are responsible for fulfilling their contract terms including their obligations to make and receive payment, and to adhere to industry best practices³⁸

³⁸ <https://www.tpsgc-pwgsc.gc.ca/biens-property/divulgarion-disclosure/psdic-ppci-eng.html#a2> – Prompt Payment in the Construction Industry – May 5, 2018

The principles of 'prompt payment' have been endorsed by the Alberta Construction Association. As part of a dialogue between the Alberta government and the Alberta Construction Association, the Alberta government has changed their Alberta Infrastructure contracts to address the issue of ensuring 'prompt payment'. The changes include the following:

1. The contract specifies a maximum of 30 calendar days after the initial receipt of the application for payment, provided the contractor has properly completed their claim. Infrastructure will verify the invoice and adjust if necessary, advise the General Contractor within 14 days of the amount to be paid. Infrastructure has modified the Statutory Declaration so that the General Contractor must confirm that they paid their subcontractors within 10 days of receipt of payment from the Government.
2. Their contracts specify that amounts which are not in dispute will be paid. Disputed amounts will be resolved during the next invoice period.
3. Alberta Infrastructure has committed to publicizing the date of payment so that subcontractors and suppliers will be aware of when the prime contractor was paid (see contact info below).
4. Upon appropriate application, holdback funds will be released once the portion of the work is complete. The contractor will submit their certificate of substantial performance for their portion of the work performed, and follow normal procedures of posting the certificate at the job site. Infrastructure will verify substantial performance. After the 45 day period, the contractor then applies for release as part of the next progress claim. Warranty will still be from the date of Interim Acceptance.³⁹

In Ontario, the Construction Lien Amendment Act (the "Act") received Royal Assent on December 12, 2017. The Act overhauled Ontario's existing Construction Lien Act to incorporate the principles of 'prompt payment', including minimum timelines for payment and a procedure for adjudicating disputed payments.⁴⁰

Similarly, in British Columbia, with the encouragement of the Ministry of Justice and Attorney General⁴¹, the B.C. Law Institute is currently undertaking a review of British Columbia's Builder's Lien Act with the view to implementing 'prompt payment' principles into legislation.

The Alberta Government should follow suit. The principles of 'prompt payment' (i.e. proper invoicing, timely payment and a procedure for adjudicating disputed payments) should be incorporated into Alberta legislation so as to protect the most vulnerable parties, being those lower down on the chain of payment.

B. Eliminating Multiplicity of Actions

The Alberta Provincial Court is the court where civil claims which do not exceed \$50,000.00 can be heard. The Court of Queen's Bench has no financial limits on the matters that are heard. Provincial Court is generally more accessible and cost effective due to its simplified procedures than the rules based/procedure driven Court of Queen's Bench. However, some matters can only be heard before the Court of Queen's Bench including matters where title to land is at issue. As a result, a subcontractor or contractor who wants to register a builder's lien against land where work has been completed must take the following steps:

³⁹ <http://albertaconstruction.net/?p=1184> - Alberta Infrastructure Introduces Prompt Payment in Contracts – April 19, 2016

⁴⁰ *Construction Lien Amendment Act, 2017*, S.O. 2017, c. 24 - Bill 142

⁴¹ <https://www.bcli.org/project/builders-lien-reform-project> - Builder's Lien Reform Project

1. a contractor or subcontractor is required to file a builder's lien within 45 days of the last time improvements were made to a property; and
2. within 180 days after a lien is registered a Statement of Claim must be filed at the Court of Queen's Bench and a Certificate of Lis Pendens (a certificate of pending litigation) must be registered on title to the lands where the work was completed.

If a contractor or subcontractor wants to have the security of having a lien registered it must commence proceedings in the Court of Queen's Bench. A subcontractor or contractor cannot file a Civil Claim in Provincial Court and then subsequently file a Certificate of Lis Pendens (as required to be done within 180 days as referenced above). The claim must be made in the Court of Queen's Bench, thereby engaging a more complex and potentially expensive time-consuming process.

As such, contractors and subcontractors are often left in dilemma requiring them to decide whether to file a builder's lien and enforce it in the Court of Queen's Bench or suing for damages in Provincial Court, without protection. The decision to proceed at the Provincial Court level is appealing when considering costs and timelines. However, losing the ability to register a lien can impact a contractor's or subcontractor's ability to get paid. A subcontractor or contractor can file a builder's lien that would be enforceable in the Court of Queen's Bench and then subsequently file claim for debt or damages in Provincial Court. However, the cost associated with a multiplicity of actions is dissuading and constitutes an unnecessary burden on the Court system.

Accordingly, the Alberta government should conduct a comprehensive review of the Builder's Lien Act and the Provincial Court Act, to determine the feasibility of incorporating changes which would permit claimants at the Provincial Court level to obtain and register a Certificate of Lis Pendens at Land Titles. This would allow for a more cost effective and timely remedy for contractors and subcontractors.

The Alberta Chambers of Commerce recommends the Government of Alberta:

1. Commission a comprehensive review of the *Builder's Lien Act* with the view to:
 - a. incorporate the principles of 'prompt payment'; and
 - b. incorporate changes to legislation which would enable liens to be enforced in both the Provincial Court of Alberta, where the value is within its jurisdiction, or the Court of Queen's Bench, where the claims exceeds the jurisdiction of the Provincial Court.