

RETURN OF PROMPT PAYMENT LEGISLATION TO BRITISH COLUMBIA: A SUMMARY OF THE PROPOSED *CONSTRUCTION PROMPT PAYMENT ACT*

Introduction

In 2019, we wrote about Bill M-223, which would have enacted the *Builders Lien (Prompt Payment) Amendment Act, 2019* for the purpose of amending the *Builders Lien Act*.¹ These amendments would have introduced prompt payment reforms to British Columbia (i.e., to statutorily require payment for construction services and material in a timely manner).² The bill, however, did not pass first reading. More than half-a-decade later, following recommendations by the British Columbia Law Institute,³ the inclusion of prompt payment legislation in provincial budget consultations,⁴ and consultation with various stakeholders,⁵ the Province recently introduced Bill 20.⁶ Bill 20 would enact the *Construction Prompt Payment Act* (the “**Proposed Act**”), which as of October 27, passed second reading. This article briefly summarizes the Proposed *Act*, which if enacted, could provide certainty as to when contractors and subcontractors can expect to be paid.

The Proposed *Act* has three major parts: (1) regular invoicing, (2) prompt payment, and (3) adjudication.⁷

Regular Invoicing

Part 2 [*Regular Invoicing*]⁸ sets out how a contractor must deliver a “proper invoice” to the owner: (1) the contractor must give a proper invoice to the owner monthly (unless the contract between the parties specifies otherwise), in the manner set out in

regulation,⁹ (2) each proper invoice must include certain information such as the contractor’s name and address, the services and material supplied, and the amount payable,¹⁰ and (3) an invoice given to the owner is deemed a “proper invoice” unless the owner then gives the contractor written notice in accordance with the Proposed *Act* stating otherwise.¹¹ Further, a contractor may, in certain circumstances, revise their invoice.¹²

Prompt Payment

Once the contractor provides the proper invoice to the owner, the prompt payment requirements in the Proposed *Act* are automatically triggered: Part 3 [*Prompt Payment*]¹³ sets out the manner in which payments must be made by the owner to a contractor, the contractor to a subcontractor, and a subcontractor to its subcontractors once the proper invoice is provided. Generally, the owner must pay the contractor within 28 days after the invoice date (being the date the contractor gives the invoice to the owner),¹⁴ the contractor must pay its subcontractor the earlier of 7 days after it receives payment and 35 days after the invoice date, and any subcontractor required to pay its subcontractor must make that payment the earlier of:

- a) 7 days after the paying subcontractor receives its payment; and

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- b) The date that is the number of days after the invoice date calculated as follows: $28 + (7 \times \text{the paying subcontractor's position})$.¹⁵

Under Section 2 of the Proposed *Act*, the initial subcontractor is in second position, that initial subcontractor's subcontractor is in third position, the next subcontractor is in fourth position, and so on and so forth.

This means that the initial subcontractor (being in second position) must pay its subcontractor the earlier of 7 days of the initial subcontractor receiving payment from the contractor and 42 days (i.e., 28 plus the product of 7 and 2) after the invoice date.

Part 3 also sets out how partial payment to a party is distributed to subcontractors, and how a contractor or earlier subcontractor that does not receive payment must provide notice to the subcontractor entitled to be paid by that contractor or earlier subcontractor.¹⁶

Additionally, Part 3: (1) sets out the information a contractor or subcontractor must provide to another subcontractor upon request, (2) confirms that a holdback is required on the amount to be paid under Part 3, (3) confirms that the Proposed *Act* has no effect on the obligation to pay wages (as defined in the *Builders Lien Act*), and (4) requires interest to accrue on amounts not paid when due.¹⁷

Adjudication

One notable omission from Bill M-223 (which would have enacted the *Builders Lien (Prompt Payment) Amendment Act, 2019*) was the lack of an adjudication process.¹⁸ The Proposed *Act* rectifies this deficiency in Part 4¹⁹ and Part 5.²⁰ Part 5 creates an "adjudication authority" that trains, regulates and supports adjudicators. An adjudicator under the Proposed *Act* must be registered as an adjudicator by the adjudication authority. Part 4 sets out the framework for adjudications for disputes relating to prompt payment and other matters as may be

agreed to by the parties or set out by regulation. Disputes that may be adjudicated include the failure to give a proper invoice and the valuation of services or materials supplied.²¹ To refer a dispute to adjudication, a party to a contract must give written notice to the other party with the information required under the Proposed *Act* unless regulations require otherwise.²² However, there are limitations in respect of giving notice—there is a 90 day time period within which notice must be provided, the start for which period depends on the type of dispute (such as whether it is between an owner and a contractor or it relates to a subcontract). Also, an adjudication generally may only address a single dispute.

The Proposed *Act* also sets out:

- a) preliminary matters for adjudication such as how an adjudicator is selected, the fees for the adjudication (which fees are split among the parties of the adjudication equally unless the adjudicator determines that costs should be mostly or entirely borne by a single party), records that must be delivered to the adjudicator, and whether the person receiving a notice for adjudication may respond;²³
- b) the conduct of the adjudication, including the powers the adjudicator may exercise (including issuing directions, conducting on-site inspections, and making determinations), objections that a party to an adjudication may make, how the parties can terminate an adjudication prior to the adjudicator making a determination, how the determination must be made, the period within which the adjudicator must make their determination, and the sharing of costs between the parties for the adjudication—a party typically bears its own costs unless the adjudicator determines otherwise; and²⁴

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- c) how a determination can be enforced by the party entitled to receive payment—while the party required to pay under a determination must do so within 15 days after the determination is issued, if that party fails to do so, the party entitled to receive payment may suspend work and is entitled to interest on late payments and reasonable costs incurred due to suspending and resuming work.²⁵

A party may seek judicial review of a determination (within 35 days after the determination is issued) for the purpose of setting aside the determination,²⁶ and a party may also file the determination in the Supreme Court of British Columbia,²⁷ in which case it has the same force and effect as a judgment, meaning that it may be registered on title to the property or properties relating to the dispute. Lastly, the amount paid under a determination is subject to a holdback under the *Builders Lien Act*.²⁸

Conclusion

In a letter to the Attorney General dated October 16, 2023, signed by over 30 industry associations, the writers called prompt payment legislation “an economic necessity”.²⁹ Similarly, in 2023, the BC Chamber of Commerce said that such legislation would “alleviate risks throughout the entire construction ecosystem”.³⁰ Currently, the Proposed *Act* has only passed second reading and could, similar to Bill M-223, fail to be enacted; however, with the Proposed *Act* having been drafted following consultation with industry and fleshing out the adjudication process, the Proposed *Act* may avoid the pushback that faced the previously proposed *Builders Lien (Prompt Payment) Amendment Act, 2019*,³¹ be more readily accepted by construction industry stakeholders, and accomplish its stated purpose: to establish a scheme for prompt payment and timely, accessible adjudication in the construction industry.

November, 2025

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- 1 SBC 1997, c 45.
- 2 Bill M-223, *Builders Lien (Prompt Payment) Amendment Act, 2019*, 4th Sess, 41st Parl, 2019.
- 3 Members of the Builders Lien Act Reform Project Committee, *Report on the Builders Lien Act* (Vancouver: British Columbia Law Institute, 2020).
- 4 See e.g., British Columbia, Select Standing Committee on Finance and Government Services, *Report on the Budget 2023 Consultation*, 42nd Parl, 3rd Sess (August 2022) (Chair: Janet Routledge).
- 5 See e.g., “Prompt Payment in the Construction Industry” online (pdf): *Province of British Columbia* <gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/active-reviews/prompt-payment-in-the-construction-industry>.
- 6 Bill 20, *Construction Prompt Payment Act*, 1st Sess, 43rd Parl, 2025.
- 7 The Proposed Act also abolishes the “Shimco lien,” being a lien on the holdback required to be retained under Section 4 of the *Builders Lien Act* and first established in *Shimco Metal Erectors Ltd v North Vancouver (District)*, 2003 BCCA 193.
- 8 See Proposed *Act* *supra* note 6, ss 5-8.
- 9 See *ibid*, s 5-6.
- 10 See *ibid*, s 7.
- 11 See *ibid*, s 7(2).
- 12 See *ibid*, s 8.
- 13 See *ibid*, ss 11-15.
- 14 Note that the Proposed Act in its current form does not appear to provide a method for extending the 28-day pay period, which is likely to provide certainty to all contractors and subcontractors, but could cause a headache for contractors that typically require payment within 30, 60 or 90 days as they adjust to the 28-day pay period.
- 15 See Proposed *Act* *supra* note 6, s 9.
- 16 See *ibid*, ss 10-11.
- 17 See *ibid*, ss 12-14.
- 18 See “Construction Law Reform Across Canada: Prompt Payment and Adjudication” (22 October 2019), online: *Canadian Bar Association* <cba.org>.
- 19 See Proposed *Act* *supra* note 6, ss 16-40.
- 20 See *ibid*, ss 41-46.
- 21 See *ibid*, s 16.
- 22 See *ibid*, s 18.
- 23 See *ibid*, ss 23-26.
- 24 See *ibid*, ss 27-33.
- 25 See *ibid*, ss 34-38.
- 26 See *ibid*, ss 39-40.
- 27 See *ibid*, s 36.
- 28 See *ibid*, s 37.
- 29 “The Economics of BC’s Construction Industry” (16 October 2023), online: *BC Construction Association* <bccassn.com>.
- 30 “ENABLING ECONOMIC POTENTIAL THROUGH PROMPT PAYMENT LEGISLATION (2023)” (2023), online: *BC Chambers of Commerce* <bcchamber.org>.
- 31 See “Prompt payment: more red tape for residential construction in B.C.” (30 May 2019), online: *Canadian Home Builders’ Association British Columbia* <chbabcc.org>.



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Kai is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development. In particular, he regularly drafts section 219 covenants, statutory rights of ways and other legal agreements for real estate projects, and he has provided assistance during various stages of the development process, from rezoning and development permit issuance to air space parcel subdivision and occupancy permit issuance. He has also assisted with other local government matters, ranging from procurement to regulatory issues.

Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia, articulated with a provincial organization, and was called to the Bar of British Columbia in May 2022. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from UBC. Upon graduating, he was employed as a Process Improvement Specialist at an architectural glass fabrication company for several years, where he designed and implemented a new laminated glass line as well as numerous mechanical and organizational process improvements.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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