

PROMPT PAYMENT SWEEPING ACROSS CANADA

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In the last few years the momentum for change has grabbed hold of the construction industry in Canada, and pulled tight on the reins. Several provinces, as well as the federal government, have been grappling with the issue of prompt payment on construction projects, and trying to determine how best to incorporate the rights and concerns of the most vulnerable parties who are lower down the pyramid: the construction trades. Instituting a prompt payment scheme to force the flow of construction funds from the top down appears to be the panacea. Canada, in fact, is a bit of an outlier when it comes to prompt payment, as most states in the United States and most common law countries have already adopted some form of prompt payment legislation for the purposes of regulation of the construction industry.

However, in order for prompt payment legislation to work, and funds to flow as is intended, there must be an avenue to enforce a new payment structure and to resolve disputes in a more expeditious manner. Over two decades ago, the United Kingdom introduced an adjudication model which is now considered quite successful in resolving disputes quickly. Rough justice, as some have termed it, or alternative dispute resolution on an interim basis, to the lawyers in the room, seems best suited for the job.

Across this country, it has also become apparent that now is the time for updating and modernizing the various builders/mechanics/construction lien acts in force.^[1] With the

momentum finally picking up, the industry has taken notice and is working feverishly to assist legislators across the country develop more modern and practical construction legislation, to codify a library-full of case law and to recognize many modern-day construction project structures. The keystones to such an approach appear to be prompt payment and effective dispute resolution, both with the ultimate goal of moving money more quickly through the construction pyramid.

The first province to embark on the monumental task of reform was Ontario^[2], which first considered prompt payment in Bill 69, Prompt Payment Act. When this private member's bill failed to become law, the province commissioned a report from industry experts who broadly consulted the industry, studied internationally relevant systems, and produced a report entitled *Striking the Balance: Expert Review of Ontario's Construction Lien Act*.^[3] This was adopted by the Ontario legislature in December 2017 in the form of Bill 142, the Construction Lien Act Amendment Act, 2017, which will come into effect in phases: modernization in July 2018, with prompt payment and adjudication to follow in October 2019.

Following the same path, the Federal Senate introduced a private senator's bill, Bill S-224, the Canada Prompt Payment Act, which has many similarities to Ontario's Bill 69. After passing in the Senate, Bill S-224 has not moved forward as the Federal Government engaged the same expert consultants on January 23, 2018, to "develop a recommendation package for the Government of Canada in relation to promptness of payment and adjudication in relation to federal construction projects."^[4] The ambitious timeline set out for the review contemplates a report, or at least recommendations being presented to the federal government, by May 1, 2018, with consultations occurring in March across Canada. Based on the federal government's public announcements, though, the review process will result in some form of prompt payment and adjudication legislation.

Other provinces that have formally set a similar process in motion include Manitoba, New Brunswick and Quebec.

- The Manitoba Law Reform Commission has published [The Builders' Liens Act: A Modernized Approach](#), which provided for comments to be submitted by April 2, 2018. Overlapping with that initiative by the government, on April 11, Manitoba MPP Reg Helwer introduced a private member's bill, Bill 218, The Prompt Payments in the Construction Industry Act in the provincial legislature which passed Second Reading on April 24, 2018, and will now go to committee.
- In New Brunswick, the Legislative Services Branch of the Office of the Attorney General is publishing two sets of Law Reform Notes, and welcoming comments after publication.

Law Reform Notes #40 was released in December 2017, and deals with modernization. The deadline for submitting comment has passed, but they appear to be accepting late submissions. Law Reform Notes #41 is expected shortly, and will deal with prompt payment and adjudication, with a comment period to follow.

- Lastly, Quebec has a pilot project underway stemming from provisions in Bill 108[5] - An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics, to adapt some prompt payment language into public contracts, prior to full adaptation of a regulation which will apply to all public contracts.

Other provinces have engaged stakeholders to consider reform on a less formal level, including British Columbia, Saskatchewan and Alberta.

- In B.C., the British Columbia Law Institute has embarked on a Builders Lien Act Reform Project, but has not yet published a report with recommendations.[6]
- In Saskatchewan, the government has informally engaged local stakeholders to conduct a preliminary review of the Ontario amendments, with the prospect of adopting prompt payment and adjudication provisions into their act at a later date.
- Finally, in Alberta the government has added prompt payment provisions into Alberta Infrastructure contracts[7], however broad based lien act reform is not currently on the table.

While not every province has adopted or engaged in consultations to update their lien acts just yet, it appears that prompt payment reform is sweeping the country.

[1] Builders Lien Act (BC), The Builders Lien Act (AB), Builders Lien Act (Sask) Builders Liens Act (Man), Construction Act (ON), Mechanics Lien Act (NB), Builders' Lien Act (NS), Mechanics' Lien Act (PEI), Mechanics' Lien Act (NFLD), Builders Lien Act (YT), Mechanics Lien Act (NWT), Mechanics Lien Act (NU)

[2] Bill 69 is arguably the starting point of reform in Ontario for prompt payment.

[3] https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/

[4] Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts, February 2018. Singleton Reynolds

[5] <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-108-41-1.html>

[6] <https://www.bcli.org/project/builders-lien-reform-project>

[7] <http://albertaconstruction.net/?p=1184>

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