Milestone Payments and Proper Invoices under the Prompt Payment and Construction Lien Act

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Background and Interpretation

Under section 32.1(6) of the *Prompt Payment and Construction Lien Act* (the PPCLA), "proper invoices" (as that term is defined in section 32.1(1)) are to be given to an owner at least every 31 days unless the contract includes a provision for the testing and commissioning of the improvement or of the work done or materials furnished under the contract and the conditions of testing and commissioning are not met.

This requirement does not appear to contemplate milestone payment schemes, which only require payment to be made by an owner (or a contractor, as the case may be) when agreed upon progress or objectives are met and which consequently, only require a contractor to submit its invoices to an owner upon meeting those objectives (as opposed to strictly following a monthly, bi-weekly or some other invoicing and payment system). Indeed, the 31 day requirement in the PPCLA does not contemplate any invoicing interval other than at a minimum, every 31 days.

In the lead up to the proclamation of the PPCLA, it seemed evident from the legislative debates that it was the intention of the Alberta legislature to create a scheme whereby at least every 31 days, contractors would be required to submit "proper invoices" to owners, which would cover 100 per cent of the work performed and materials provided by subcontractors, suppliers and their labourers within that invoice period.[1]

The PPCLA itself, however, does not appear to contain any such express requirement. While the PPCLA and its *Prompt Payment and Adjudication Regulation* (the Regulation) seemingly require that a "proper invoice" must be submitted by a contractor to an owner at least every 31 days[2] (unless the contract includes a provision for the testing and commissioning of the improvement), there is nothing in the PPCLA (including in the definition of a "proper invoice") that expressly prohibits a contractor from excluding any of the work performed or materials supplied in any given invoice period from the "proper invoices" that are ultimately submitted to the owner.

In fact, this concern was raised in one of the legislative debates addressing the PPCLA, where a member of the legislative assembly expressed some consternation that:

> while an invoice may be submitted every 31 days, is it possible…that an invoice may be submitted that insufficiently covers the amount of the work that is done? So an invoice does indeed go in but does not cover a hundred per cent of the materials and labour that should be covered in that 31-day period. Can a deal be made between an owner and a contractor to only submit part of the bill so that it can be paid out but not all of the bill, which would indeed result in the same outcome that we're trying to avoid in this legislation for the front-line worker, for the labourer, who maybe, while they do get a payment on a regular basis, do not get payment in full on a regular basis?...[3]

Indeed, it may be arguable that a contractor is statutorily entitled to submit a $0 invoice or an invoice with some other nominal amount to the owner at least every 31 days, even when subcontractors have performed work or furnished materials and have submitted invoices for payment to the contractor within that period. This, of course, could leave these subcontractors whose invoices were not passed onto the owner in the "proper invoice" without recourse to recover amounts owed using the remedial processes provided for in the PPCLA or to be paid in accordance with the prompt payment timelines.

On the other hand, given that the legislation was seemingly intended to provide contractors and subcontractors with increased certainty in terms of the timing of payment, it is arguably nonsensical to interpret the legislation in a way that creates unpredictability in the "prompt" payment scheme. Indeed, the definition of a "proper invoice" in 32.1(1) states that a "proper invoice" must be a "written bill" or "request for payment for the work done or materials furnished in respect of an improvement under the contract". Given what appears to be the remedial intention of the legislation, it is possible that "the work done or materials furnished" may be interpreted by the adjudicators and the Courts as "all work done or materials furnished". If that is the case, then pursuant to section 32.1(6), it would be all work done and materials furnished in any given 31 day period, which would need to be included in the "proper invoice" and passed onto the owner at least every 31 days.

Ultimately, there is nothing stopping subcontractors from commencing adjudication over non-payment for amounts, which are actually or perceived to be due, as they are entitled to do so under section 19(e) of the *Regulation* "regardless of whether or not a proper invoice was issued". How the adjudicators and Courts will interpret these provisions is yet to be seen.

The interpretation of these sections will be important, as only amounts that are "included in a proper invoice" are protected by, and subject to the provisions of the PPCLA. For example, under section 32.2(1), an owner is only required to pay amounts payable if it "owes money under a proper invoice".[4] Similarly, under sections 32.3(1) and (4), the contractor is, subject to giving notices of non-payment, required to pay its subcontractors within 7 days of receiving payment from the owner, or within 35 days of submitting a "proper invoice", as the case may be, the amounts payable for the work done or materials furnished under a subcontract "that were included in the proper invoice".[5] Similarly, interest only begins to accrue on "any amounts included in a proper invoice that are unpaid and due."[6] If a subcontractor's invoice was delivered to the contractor, but not included in the "proper invoice", then it could be argued that this payment timeline and associated interest accrual for non-payment is not triggered.

Other jurisdictions which have implemented prompt payment legislation have allowed for more flexibility in payment schedules under a milestone payment scheme. The Ontario *Construction Act* allows parties to deviate from monthly progress payments if they establish payment milestones, which are clearly set out in their contract (*Construction Act*, s. 6.3(1)). While the *Construction Act* allows for flexibility in invoice submission, it defaults to a monthly proper invoice submission schedule if the contract does not state otherwise. In addition, the Saskatchewan *Builders' Lien* (*Prompt Payment*) *Amendment Act* states that a proper invoice must be submitted monthly to the owner, unless the contract provides otherwise (*Builders' Lien (Prompt Payment) Amendment Act* s. 5.3(1)). Again, the Saskatchewan legislation appears to provide more deference to owners and contractors to establish an invoicing schedule which best suits project requirements. Alberta's decision to leave out similar provisions, and the intention of the legislation that can be gleaned from the legislative debates in respect of Bill 37, may indicate a conscious choice aimed at preventing contractors from neglecting or refusing to submit subcontractor invoices for work performed in intervals longer than 31 days.

How the PPCLA will be interpreted in this regard remains uncertain. The weight to be given to the intention of the legislature versus the lack of express direction in the PPCLA and the long-standing industry practice of implementing milestone payment schemes in appropriate circumstances, are competing forces that the adjudicators and Courts may need to contend with in the future. If Alberta ultimately follows Ontario's *Construction Act* and Saskatchewan's *Builders' Lien (Prompt Payment) Amendment Act*, contractors may find themselves with increased freedom to build their invoicing schedules around a project's unique requirements. Ultimately, it is likely that additional clarification will be needed to firmly establish whether milestone payment schemes that contemplate the submission of invoicing for payment of all work performed and materials furnished at intervals longer than 31 days are permitted under this new legislation.

Takeaways

Given the uncertainty surrounding the application of the invoicing requirements and payment provisions of the PPCLA, contractors may want to negotiate contract terms, which expressly permit the submission of 100 per cent of the costs associated with the work performed and materials supplied to the owner at least every 31 days. Notwithstanding the payment terms that are agreed to between the contractor and the owner or the contractor and its subcontractors, it is possible that subcontractors are entitled to have their invoices for all work done and materials furnished submitted to the owner at least every 31 days. If that timeline is not adhered to, contractors might risk having to pay interest accrued in respect of any unpaid or late paid amounts and may face adjudications over non-payment for amounts due pursuant to the requirements of the legislation.

For more information on reconciling milestone payments and proper invoices under the *Prompt Payment* and *Construction Lien Act*, please reach out to any of the authors or Construction Lawyers listed below.

[1]Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," Committee of the Whole, Alberta Hansard, 30-2, Day 63 (4 November 2020) at 3026 (Nate Glubish); and at 3028 (Nathan Neudorf); and at 3041 (Richard Feehan);

and Day 71 (25 November 2020) at 3529 (Nathan Neudorf)
[2]*PPCLA*, section 31.1(6); Regulation, section
[3] Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," Committee of the Whole, *Alberta Hansard*, 30-2, Day 63 (4 November 2020) at 3041 to 3042 (Richard Feehan)
[4]*PPCLA*, section 32.2(1)
[5]*PPCLA*, section 32.3(1)
[6]*PPCLA*, section 32.6; *Regulation*, section 4

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