B.C. introduces new Construction Prompt Payment Act

October 10, 2025

This week, the British Columbia government tabled legislation to enact prompt payment and adjudication for construction projects. The proposed legislation also contains amendments to the British Columbia *Builders Lien Act* that are intended to abolish the stand-alone lien against the holdback that was recognized in the 2002 British Columbia case *Shimco Metal Erectors Ltd. v. North Vancouver (District)*. Bill #20 proposes a new *Construction Prompt Payment Act* and makes certain other limited changes.

What you need to know

When: The new Act, and the amendments to the *Builders Lien Act*, will come into force on a date to be prescribed by regulation. Regulations are expected to be extensive and detailed, so it is possible the enactment, if passed, will not come into force for some time. Subscribe to our mailing list for further updates. Once in force, the Act will not apply to pre-existing contracts.

Prompt payment

In many ways like Ontario's *Construction Act* adjudication regime, the new legislation requires an owner to either pay a "proper invoice" within 28 days of receipt, or issue a notice of objection, which will be subject to a summary adjudication process. Contractors must pay subcontractors by the earlier of 7 days of receipt of payment, or within the time calculated based on their position in the chain of contracts.

Disputes may be adjudicated. This is a summary process like arbitration requiring a decision within 30 days and payment within 15 days after that. Designed to keep payment flowing, an adjudicator's order is binding unless and until the underlying dispute is resolved in Court or by arbitration.

Features of the Act as currently proposed include:

- Material suppliers and service providers benefit from the prompt payment regime. (Section 4.)

- The Act incorporates the principle of "pay when paid" by permitting contractors to rely on non-payment by the owner as a ground to refuse payment to a subcontractor. However, the contractor must provide a copy of the owner's notice to the subcontractor, (section 11), and subcontractors are to be paid rateably from partial payments.
- By default, proper invoices must be issued monthly but parties are free to contract as to the timing of proper invoices including by milestone. (Section 5.)
- An adjudication authority is to be established to oversee the certification of adjudicators, who must be registered with the authority. This differs from recent amendments in Ontario to permit parties to privately select adjudicators. (Section 1; Part 5.)
- Consistent with the goal of issuing speedy interim decisions, judicial review of adjudicators' decisions is limited to jurisdiction and procedural fairness grounds. (Section 40.)
- An owner may agree that another person will serve as owner for the purposes of the Act. (Section 3.)
- Unlike prompt payment legislation in some jurisdictions, the Act does not make surety bonds mandatory on public sector projects.

Matters that may be established by regulation include adjudication procedures, designating whether certain persons are owners, contractors, or subcontractors, designating whether and when services or material are supplied under the Act, specifying the information to be contained within a proper invoice, and other items. The regulations may differ for different industry sectors or contract models. (Section 49(3)(c).)

Builders Lien Act

The new legislation includes several amendments to the *Builders Lien Act* (BLA) that were included in the British Columbia Law Institute's 2020 *Report on the Builders Lien Act*. Some of them are consistent with the statutory purpose of accelerating payment on construction projects.

Holdback period shortened. The holdback period would be shortened from 55 days to 46 days. This change would also apply to the holdback on condominium purchases under the *Strata Property Act*.

Partial holdback release. The BLA would now expressly permit release of that portion of the holdback in excess of the aggregate total of claims of lien filed on title.

"Shimco lien" to be abolished. The new legislation expressly provides that "A person does not have a lien under this Act against a required holdback", although the holdback remains charged with payment of claims of lien filed by persons engaged by or under the person from whom the holdback was retained. The intent of these amendments is plainly to abolish the stand-alone lien against the holdback under BC law.

Demolition work lienable. Demolition work is now expressly included in the definition of an "improvement" in section 1(1) of the BLA.

Dirk Laudan is a Fellow of the Canadian College of Construction Lawyers, the author of the *Guide to Builders' Liens in British Columbia*, and a member of the editorial board of the *Builders Lien Practice Manual of the British Columbia Continuing Legal Education Society*. He was a member of the *Builders Lien Act* Reform Project Committee of the British Columbia Law Institute of the BCLI. Krista Johanson is the chair of the Canadian Bar Association's national construction and infrastructure section and has successfully represented clients on highly technical lien matters in respect of major projects in the superior courts and courts of appeal in B.C. and Saskatchewan. Both are sought after by owners, contractors, consultants and sureties on complex construction and infrastructure claims.

BLG has been advising clients on prompt payment issues since new legislation was first contemplated in Ontario a decade ago.

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