

PUBLICATION

Significant changes coming for Alberta's construction industry

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For the first time in decades, Alberta is making major updates to its builders' lien legislation. Builders' liens exist to protect a contractor or subcontractor who provides labour or materials and does not get paid. A lien allows the contractor or subcontractor who was not paid to register a claim, in the form of a lien, on the property they worked on.

Bill 37 was created in response to concerns raised by the construction industry and addresses both the delay in payment and delay in dispute resolution for the industry. The new act will apply to contracts entered into after Bill 37 is proclaimed, subject to exceptions the government hasn't announced. Contracts entered into prior to the proclamation of Bill 37 will continue to be governed by the *Builders' Lien Act*. The Bill is expected to be proclaimed in Fall 2021 and will create significant changes in the construction industry in Alberta.

A summary of the significant changes includes:

- owners will have 28 days after receiving a "proper invoice" to pay contractors;
- contractors and subcontractors have to pay subcontractors within 7 days of payment;
- a new system of adjudicating disputes which will allow parties to resolve disputes without having to go to court;
- increased minimum amount for a lien (from \$300 to \$700);
- longer deadlines to register liens (from 45 to 60 days for most projects, the oil and gas industry will stay the same at 90 days, and works relating to concrete now have 90 days);
- introduction of new rules for the payment of holdbacks on large, multi-year projects;
- expanding who can inspect a contract and statement of accounts; and
- renaming of the Alberta *Builders' Lien Act* to the *Prompt Payment and Construction Lien Act*.

Prompt Payment and a New Adjudication Process

Bill 37 introduces "prompt payment" provisions which create mandatory payment timelines. The payment timelines are based on the issuance of a "proper invoice". The Bill sets out certain requirements for an invoice to be a "proper invoice", which are summarized below.

The general timelines, which have exceptions for specific scenarios, are as follows:

(a) Owners will have 28 days after receiving a proper invoice to pay contractors, unless they dispute the amount within 14 days.

(b) Once paid, contractors have to pay subcontractors within 7 days, unless it disputes the amount within 35 days. If the contractor is not paid, it still has to pay a subcontractor within 35 days unless it gives the subcontractor notice of non-payment and undertakes to refer the matter to adjudication within 21 days of that notice.

(c) Once paid, subcontractors have to pay any subcontractors within 7 days, unless it disputes the amount within 42 days. If the subcontractor is not paid, it still has to pay the subcontractor within 42 days unless it gives the subcontractor notice of non-payment and undertakes to refer the matter to adjudication within 21 days of that notice.

The payment timelines tie into the introduction of a new system of adjudicating disputes. Under the new act, the government will introduce a Nominating Authority which nominates adjudicators. This adjudication system will allow parties to resolve disputes without having to go to court, which is usually expensive and takes a long time to reach a resolution.

Many of the specific details of the process for adjudication will be determined by regulations which have not yet been announced by the government.

Increased minimum for liens

Bill 37 increases the minimum amount of money that can be subject to a lien. Under the old act, a contractor or subcontractor who had not been paid for \$300 of work or materials could register a lien. Now a contractor or subcontractor will have to have \$700 of unpaid work or materials before they can register a lien.

Increased time to register a lien

Another change introduced by Bill 37 is an increase of the time to register a lien. For the construction industry, the timeline to register a lien will be increased from 45 days to 60 days. The timeline for the oil and gas industry will stay the same at 90 days. Bill 37 creates a new category for work done in relation to concrete. The timeline for registering a lien in this category will be 90 days, to account for the longer time it takes to allow concrete to cure.

Payment of holdbacks on large projects

Another key change in Bill 37 is the introduction of new rules for the payment of holdbacks on large, multi-year projects. Under the Builders' Lien Act, the owner is required to retain 10% of the total value of work done or materials furnished as a lien fund for the payment of liens. Under the new act, payments can be made: when the contract provides for annual or phased payments of the lien fund, there are no liens at the time of the payment, and the contract price is above a certain value, to be determined by the regulations.

Inspect contract

Bill 37 expands who may inspect a contract and statement of accounts from just lienholders to include a beneficiary of a trust and a contractor or subcontractor currently working on the project. A copy of the contract and/or statements of account must be provided within 6 days of a written request.

Issuing a "proper invoice"

The prompt payment process under the new act begins from issuing a "proper invoice". A "proper invoice" is a defined term under Bill 37. It is a written request for payment which must include the following information: (i)

contractor's name and business address, (ii) the date of the proper invoice and the period during which work was done or materials were provided, (iii) information identifying the authority (such as the contract) under which the work was done or materials provided, (iv) a description of the work done or materials provided, (v) the amount requested for payment and the payment terms, (vi) the name, title and contact information of the person to whom payment is to be sent, (vii) a statement indicating that the invoice is intended to be a "proper invoice" and (viii) any other information prescribed by the regulations.

Moving forward

Bill 37 is going to have a dramatic impact on the construction industry. The changes to the administration of payments, liens and holdbacks and dispute resolution is going to impact day to day operations and management of all construction projects in Alberta, big and small. There will also be a trickle-down effect from the new act that will impact how projects are financed and funded. This new act is going to create major changes for businesses and other stakeholders.

No matter how your business is connected to the construction industry in Alberta, we can help you understand how to take advantage of the new opportunities (and handle the new challenges) that arise from this change to the landscape of the construction industry.

Our **construction lawyers** are here for you. We know how to put complex issues into simpler terms, so you can move quickly to present or respond to disputes under the new regulations efficiently and effectively.

We will continue to monitor the progress of Bill 37 and will provide further updates as they become available. You can stay updated on the progress of Bill 37 at

<https://www.alberta.ca/introducing-prompt-payment-for-construction-industry.aspx>