

Article

# HERE WE GO AGAIN? SENATE INTRODUCES BILL S-224, THE CANADA PROMPT PAYMENT ACT



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Is the construction industry about to have another round of prompt payment?

In 2013, the *Prompt Payment Act* was quietly introduced in the Ontario Legislature as a private member's bill by an MPP who had grown up in the construction industry. Before anyone could blink, it seems, the bill passed second reading and was on the verge of becoming law in Ontario. Will the same thing happen at the federal level?

On April 13, 2016, the Canadian Senate passed the first reading of Bill S-224, An Act respecting payments made under construction contracts, to be known as the *Canada Prompt Payment Act*. On April 19, Bill S-224 was put on the Order Paper for second reading.

The *Canada Prompt Payment Act* follows on the heels of Ontario's Bill 69, *Prompt Payment Act, 2013* which received a second reading in the Ontario legislature in 2015, but died on the order table with the provincial election, and after it was shelved by the provincial government with a promise to undertake a robust review of the *Construction Lien Act* (Ontario), including a review of prompt payment issues. The first report resulting from that review will be released any day now.

As we reported in [our previous article](#), Bill 69 had numerous technical problems. It is clear that the drafters of the *Canada Prompt Payment Act* have learned many of the lessons of Ontario's Bill 69. It is much more scaled back in scope than Bill 69, and focuses almost exclusively on imposing mandatory payment terms on construction parties, both in terms of timing and consequences of non-payment. It does not address some of the more controversial issues that were addressed in Bill 69 such as a prohibition on all holdbacks (other than statutory holdbacks), explicit prohibitions on "pay when paid" clauses, and on onerous financial disclosure obligations. However, it does permit milestone payments whereas Bill 69 did not, an omission that was heavily criticized.

The *Canada Prompt Payment Act* was introduced by the Honourable Senator Don Plett, founding president of the National Council of the Conservative Party of Canada and, before politics, the owner of a heating and ventilation company. It is not a government bill or a bill that has been commented on by the federal government, which holds a majority in the House of Commons, so it is not clear that Bill S~~I~~224 would ever become federal law. However, the issue of prompt payment in the construction industry is one of the biggest hot button issues today and the *Canada Prompt Payment Act* has garnered a lot of early attention.

### **Purpose**

The stated purpose of the *Canada Prompt Payment Act* is to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving the federal government. It attempts to accomplish this purpose by prescribing the timelines for making payments on federal construction projects and the consequences of failing to pay on time.

### **Application**

As a proposed federal law, the *Canada Prompt Payment Act* would only apply to construction contracts made with the federal government, or "government institution", and related subcontracts. The Act defines the scope of a government institution to include a department or ministry of state of the Government of Canada, and any body or office listed in Schedule I to the *Access to Information Act*, and any parent crown corporation, and any wholly-owned subsidiary of a crown corporation, within the meaning of section 83 of the *Financial Administration Act*.

The Act would apply in respect of a construction contract whether or not the contract states that it is to be governed by the laws of Canada. It will apply to all contracts without any ability of the parties to contract out of or waive any of the rights, obligations or remedies provided for under the *Canada Prompt Payment Act*.

### **Prescribed Times for Progress Payments**

The Act will codify into law a requirement for progress payments and the timing of those progress payments. Section 7 stipulates that a government institution must make progress payments to a contractor on a monthly basis or at shorter intervals provided for in the construction contract. Where no date for progress payments is provided for in the contract, the government must pay the contractor on or before the 20<sup>th</sup> day following the later of (a) the last day of the payment period, or (b) the receipt of the payment application from the contractor.

Similarly, contractors, on federal government projects, would have to pay their subcontractors (and subcontractors their sub-subcontractors) progress payments on a monthly basis or at shorter intervals provided for in the contract. Where the contract does not specify progress payments, according to section 8, the contractor must pay the subcontractor (and each subcontractor must pay its sub~~s~~ubcontractors) on or before the 30<sup>th</sup> day following the later of (a) the last day of the

payment period, or (b) the receipt of the payment application by the contractor (or subcontractor, as the case may be).

### **Milestone Payments**

One of the major criticisms of Ontario's Bill 69 was that it did not contemplate contracts for which milestone payment structures were established, wherein a contractor needed to complete or attain certain milestones before becoming entitled to any payment for the work related to that milestone.

Section 12 contemplates that the federal government may enter into a construction contract that does provide for milestone payments. However, with milestone payments, the government must make the payment on or before the later to occur of (a) the 20<sup>th</sup> day after the achievement of the milestone, or (b) the 10<sup>th</sup> day after the issuance of the certificate for payment for the milestone by the payment certifier.

The *Canada Prompt Payment Act* permits milestone payments in subcontracts in section 11, but only if: (a) the construction contract between the government institution and the contractor is structured on a milestone payment basis, and (b) before entering into a construction contract with a subcontractor, the contractor (or a subcontractor with its sub-subcontractors) provides written notice to the subcontractor (or sub-subcontractor, as the case may be) of any milestone payments relating to the construction work that is to be the subject of the subcontract.

For milestone payments in subcontracts, the payer must make the payment on or before the later of (a) the 30<sup>th</sup> day after the achievement of the milestone, or (b) the 20<sup>th</sup> day after the issuance of the certificate for payment for the milestone by the payment certifier (section 13).

### **Deemed Approval and Disputes**

As with Bill 69, all invoices submitted by payees are deemed to be approved by the payer 10 days after the receipt of the invoice unless, before that time, the payer or the payment certifier, in a written notice to the payee, disputes the amount in the invoice.

Section 16 goes further to specify what portion of the invoice can be subject to a dispute. The payer must pay the full amount of the invoice, and may not hold back any amount unless a notice of dispute is provided setting out the reasons for the dispute or amendment required and the amount being disputed.

The portion of an invoice capable of being disputed is limited in section 16(3). A payer's dispute is limited to: "(a) an estimate of the loss, damage or cost of completion or correction of the construction work where the loss, damage or cost is recoverable under the construction contract, and (b) an estimate of any portion of the value of a change that is the subject of the disagreement where the dispute of a payment application in whole or in part is limited to the value of the change or its method of evaluation".

### **Interest**

A payer (whether the government institution, the contractor or a subcontractor) must pay interest on any amount due at the rate provided for in the construction contract. If the construction contract does not provide for a rate of interest on late payments, then the interest is at the rate prescribed by regulation (section 18).

### **Right to Suspend or Terminate**

If the government fails to make a payment when due, in accordance with the Act, the contractor must immediately provide written notice of default to the government institution. Similarly, if a

subcontractor has not been paid when required under the Act, the subcontractor must provide notice of default to the contractor, with a copy of the notice of default sent to the government institution.

Unlike under Ontario's Bill 69, the default notice must also be delivered to all subcontractors.

If payment continues to be outstanding for seven days after receipt of the notice of default, whether from a contractor or a subcontractor, the payee may suspend performance of the work (section 17(3)). Section 19(3) also provides that, after that seven days' notice, the payee may also terminate, if the notice of non-payment includes a notice of termination. The suspension or right to terminate is lifted if, within the seven days notice period, payment is made.

### **Right to Information**

Under section 21, a subcontractor may, at any time and by written notice, require a payer with whom the subcontractor has entered into a construction contract to disclose the due dates for the progress payments and the final payment to the payer under a construction contract that relates to the construction work that is the subject of the construction contract between the subcontractor and the payer.

Section 21 also stipulates that, immediately upon receiving a payment, every payer other than a payer who is a government institution must provide notice to each of its payees of the date and amount of the payment received that relates to the construction work performed by the payee.

A payer is liable to its payees for damages if the payer does not provide the notice or the information required under section 21.

### **Process and Next Steps**

Usually, a bill becomes law by passage through the House of Commons and then passage through the Senate. Royal Assent is then given by the Governor General and a bill becomes a law. It is common for private member's bills, such as Bill S-224, to be initiated in the Senate rather than the House. After the bill finishes its third reading in the Senate, it will then pass through the House. The process for a bill to become a law in each Chamber is similar. Passing a bill in the Senate includes a first reading, second reading, committee stage, report stage and a third reading.

Bill S-224 passed first reading on April 13, 2016 and was introduced for second reading in the Senate on April 19. If it passes second reading, it would likely be sent for consideration at committee, then public hearings, and finally third reading. If it passed all reading stages in the Senate, Bill S-224 would then move to the House of Commons and, if passed, Royal Assent.

There is no set timeframe to be able to predict how long it might take for Bill S-224 to complete each legislative stage. After its last debate on April 19, 2016, Bill S-224 has slowly moved down the Order Paper, going from item number 4 to number 8. Any item on the Order Paper that has not been dealt with or revisited within 15 sitting days automatically gets dropped. This puts the deadline for debating Bill S-224 for June 7 or 8, 2016. If Bill S-224 is not debated again at Second Reading before then, it will be dropped and the sponsor will need to take steps to re-introduce it. With private bills, it is rare for a dropped bill to be able to revive.

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Gowling WLG has been at the forefront of legislative reforms in the construction industry. We will continue to monitor, and report back on, the progress of Bill S-244 through the Senate and House of Commons.

Please join us on June 7 for our **spring Construction Law Program** which is focused on the Province of Ontario's expert review report on recommended reforms to the *Construction Lien Act*. We will also update attendees on the status of Bill S-224.

*Ted Betts is a partner at Gowling WLG. He is a Certified Specialist in Construction Law, Co-Head of Gowling WLG's Construction Group and a member of the OBA Construction and Infrastructure Law Section Executive. He is the co-chaired the OBA's Construction Lien Act Reform Committee.*

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