



**CONSTRUCTION LEADERS**

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**SENT VIA EMAIL**

February 14, 2017

**The Standing Senate Committee on Banking, Trade and Commerce |**

**Le Comité sénatorial permanent des banques et du commerce**

Committees Directorate | Direction des comités

Senate of Canada | Sénat du Canada

Room 1053, 40 Elgin Street, Chambers Bldg. | pièce 1053, 40 rue Elgin, édifice Chambers

Attention: Ms. Lynn Gordon, Committee Clerk | Greffière des comités

**RE: Bill S-224, An Act respecting payments made under construction contracts**

Honourable Members of the Standing Senate Committee on Banking, Trade and Commerce,

Thank you for the opportunity to provide written submissions on Bill S-224, An Act respecting payments made under construction contracts. We understand that the Standing Senate Committee on Banking, Trade and Commerce has heard from many industry participants and we regret being unable to attend last Thursday's (February 9, 2017) session.

PCL is a group of independent construction companies that carries out work across Canada, the United States, the Caribbean and Australia. In Canada, PCL is one of the largest general contracting organizations and focuses on large and small commercial, institutional, industrial and civil construction projects across a broad variety of markets.

PCL supports the spirit and intent of prompt payment legislation as being paid in a timely manner for work properly performed is integral in running a successful construction business at any tier. But there needs to be a balance between the competing interests of the parties as well as a balance between parties' freedom to contract and government intervention.

In PCL's view, prompt payment for contract work performed is generally not an issue. To require prompt payment of a certified payment is an easy expectation, and though trade contractors may disagree, it is PCL's general practice to do just that – pay amounts owing promptly. As the committee has heard, the issue is likely centered more around disputed payments, that is, claims and unapproved change order work. Change orders and claims are often complicated and time consuming to address – but the uncertainty of approval, and uncertainty of any payment, is often a distraction from construction.

As you have heard many times, much work has been done in Ontario on reviewing the current legislative regime, albeit the provincial regime, with the Reynolds and Vogel report, "Striking the Balance: Expert Review of Ontario's Construction Lien Act" (the "Reynolds and Vogel Report"). It would be a shame not to benefit from that extensive collection, review and analysis of various construction legislation around

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the world. The recommendations on prompt payment in that report are well summarized in this sentiment:

“... in our view, a customized solution that works in concert with an effective dispute resolution systems would certainly be an improvement over the current situation.

In examining the constituent elements of an appropriate, balanced prompt payment regime, it is also important to bear in mind that such a regime should impair only to the extent necessary the parties' freedom to contract, and it should be flexible enough to accommodate the different types of actors in the construction industry and their differing reasonable needs.”

With that, we provide below 6 specific issues of note on a review of the First Reading draft of Bill S-224, with suggestions on how to address them.

### 1) **Application (Section 4)**

**ISSUE:** Public private partnerships have become commonplace in the construction industry in Canada. But, at the contractual level, as between the government entity and the special purpose vehicle, Project Co, it is sometimes not characterized as a construction contract. Therefore, this particular legislation would not apply to those contracts, leaving out a potentially large section of the industry. And even if it was characterized as a construction contract, there is generally one payment made by the government at the completion of construction leaving the applicability of this draft legislation in question.

**SUGGESTION:** This draft legislation should be broad enough to capture various contracting arrangements and at least contemplate the public private partnership model.

### 2) **No Contracting Out (Section 6)**

**ISSUE:** There are many different types of construction projects and to simplify payment terms to either monthly or by milestone is to oversimplify the potentially complex relationships. To legislate how payments are to be made on construction projects and to restrict freedom of contract in how those payment structures are set up goes too far in interfering in the affairs of private parties. Some onus needs to remain on the contracting parties to manage and risk-assess their own affairs rather than the government restricting this freedom.

**SUGGESTION:** Parties should be allowed to choose their own payment terms, and if those are unclear, have a legislated default mechanism.

### 3) **Obligation to Pay Contractor (Section 7(3)) and Obligation to Pay Subcontractor (Section 9(3))**

**ISSUE:** The trigger for payment is currently the last day of the payment period or the receipt of the payment application. How Section 7 and Section 8 align is unclear. A subcontractor's payment application could be deemed approved before the contractor's payment application is disputed. The timing becomes even more tenuous the further down the construction pyramid one goes. It is important to keep any payment to a subcontractor tied to the payment to a



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contractor; otherwise, it puts the contractor in the potential position of paying amounts that end up being disputed in order to avoid a subcontractor exercising its suspension or termination rights.

**SUGGESTION:** The Reynolds and Vogel Report triggered requirements to pay off of a “proper invoice” concept. This is predicated on the parties being able to specify what a proper invoice is. For example, PCL requires certain documentation (WSIB, insurance, safety records etc.) with each invoice and if these requirements are not met, payment does not flow. The legislation should support parties making certain reasonable requirements in what makes up a proper invoice and, more importantly, triggering payment off of a proper invoice approved and paid by the owner.

### 4) **Right to Suspend Performance and Payment (Section 17) and Right to Terminate a Construction Contract for Non-Payment (Section 19)**

**ISSUE:** Including a right to suspend performance and a right to terminate a contract are welcome remedies for parties that are unpaid, but the current drafting does not require one to happen before the other leading to the potential of a party choosing between one or the other at their whim and, in addition, there is no requirement to make use of a dispute resolution mechanism before suspending. This would likely lead towards many suspended or terminated construction contracts in short order especially as there is no requirement to dispute a non-payment before triggering suspension or termination.

**SUGGESTION:** The referral of disputes to adjudication is not required in this draft legislation; the legislation uses permissive language. We suggest that suspension and termination rights are revisited with a view to making some form of dispute resolution a requirement while work continues and that termination can only occur after some length of suspension and/or lack of response to the dispute resolution process.

### 5) **Dispute Resolution (Section 20)**

**ISSUE:** As has been stated by many stakeholders, and in PCL’s experience, prompt payment by the federal government for original contract amounts is not usually an issue. The issue of prompt payment comes into focus when there are disputes or changes to the work. A major complaint on most construction projects is the time it takes to approve a change order or deal with a claim. At times, the amount of change order work or quantum of claims becomes a serious cash flow issue for contractors and subcontractors.

The addition of adjudication into this legislation has been done with a very light touch, i.e., there is not much detail on the timing of the process. The main purpose of adjudication is swift resolution to disputes. We note that timing and process may be covered in upcoming regulations, but without any indication of timelines, it is difficult to contemplate adding another layer of dispute resolution from those already embedded in construction contracts.

**SUGGESTION:** We understand that the Senate Committee has heard similar views on adjudication and is looking closely at the Reynolds and Vogel Report for guidance. We strongly



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note that adjudication will be a major change to the speed of construction disputes – both starting them, and resolving them – and it is with a word of caution that adjudication is adopted with its potentially aggressive timelines for resolution of disputes and limited recourse to appeal. All parties in the construction pyramid, including the government, may be sideswiped by the additional resources to deal with adjudication of disputes. As it has been described in other jurisdictions in the Reynolds and Vogel Report, adjudication is a very swift process with significant consequences. As stated above, a balance needs to be struck between swiftness of dispute resolution and prompt payment.

**6) Right to Information (Section 21)**

**ISSUE:** The proposed Section 21(2) requiring payers to provide, immediately upon receiving a payment, notice to each of its payees of the amount of the payment that relates to their construction work is potentially an administrative burden or of no necessity. If the legislation is followed, all undisputed amounts are paid and the payee has been notified of any payment disputes (it is noted, though, that there does appear to be a gap as a downstream subcontractor may not be aware that an owner/payment certifier or someone else upstream is disputing part of a payment application) leaving no reason to immediately notify the parties of the amounts received since payments are flowing as expected.

**SUGGESTION:** The Ontario *Construction Lien Act* has a well-known and often used provision, section 39. Section 39 allows any party in the construction pyramid to ask specific questions about certain of contract provisions and current state of accounts. This type of information is likely of better use to those in the construction pyramid rather than a notice of an amount one is going to be paid in short order.

We sincerely hope that you consider our suggestions. Should you have any questions or would like to receive further submissions, please do not hesitate to contact the undersigned.

Regards,

**PCL CONSTRUCTORS INC.**

A handwritten signature in black ink, appearing to read "A. Fajnt", written over a horizontal line.

Audrey Fajnt

Legal Counsel, Eastern Canadian Operations

cc: Hon. Judy M. Foote, Minister of Public Services and Procurement  
Steven MacKinnon, Parliamentary Secretary to the Minister of Public Services and Procurement