



THE CANADIAN  
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November 9, 2017

Via email: minister@pwgsc.gc.ca

The Honourable Carla Qualtrough, MP  
Minister of Public Services and Procurement  
Place du Portage, Phase III  
11 Laurier Street, Room 18A1  
Gatineau, QC K1A 0S5

Dear Minister:

**Re: Bill S-224, *Canada Prompt Payment Act***

I am writing on behalf of the Canadian Bar Association's Construction and Infrastructure Law Section (CBA Section) about Bill S-224, *Canada Prompt Payment Act*. The Bill has passed in the Senate without broad consultation among affected stakeholders. We encourage the federal government to undertake more extensive consultations before passing any prompt payment legislation affecting the construction industry.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers across Canada with expertise in construction and infrastructure law, who act for a broad cross-section of stakeholders in the construction industry, including public and private owners, building code authorities, contractors and subcontractors, construction lenders and construction insurers, construction professionals and construction industry associations. In our CBA Section role, we do not speak for, nor represent, their individual interests.

The CBA Section applauds efforts to consider prompt payment in the construction industry. However, Bill S-224 raises a number of implications in its current form. Prompt payment legislation will have significant and direct impacts on commercial arrangements throughout the country and any proposed legislation should reflect broad stakeholder feedback and strike a balance between regulation and freedom of contract. Bill S-224 falls short in both of these regards.

**Extensive Consultation Process**

Extensive consultation across the construction industry is necessary to take into account differing viewpoints in a sector as large and diverse as construction. Bill S-224 will have significant effects, many unintended or unforeseen. For example, a statutory mandatory adjudication process not developed with input from stakeholders may have unintended and unforeseen negative

consequences for projects. Similarly, the right to suspend work for non-payment, although a powerful tool for contractors and subcontractors to motivate prompt payment, could discourage negotiation and other informal means of dispute resolution or lead to disruption on projects, causing delay and increasing costs. In this vein, section 17 of Bill S-224 would permit a payee to suspend work even where an adjudicator ultimately decided that payment was not due.

The time period and scope of the Senate Banking Committee hearings to study Bill S-224 were short and narrow given the complexity of the proposed legislation. A more inclusive, transparent and collaborative consultation process is imperative before passing any prompt payment legislation.

The Ontario government recently introduced Bill 142, *Construction Lien Amendment Act 2017*, which is currently at second reading. If passed, Bill 142 will amend the Ontario *Construction Lien Act* to create a prompt payment regime in Ontario. The government bill was preceded by a broad industry stakeholder consultation over 14 months, including over 30 stakeholder meetings and feedback from an advisory panel of experienced professionals representing a cross section of the construction industry. The result was an extensively researched report (the Reynolds and Vogel Report<sup>1</sup>), with numerous recommendations, that received broad support from most segments of the construction industry. Bill S-224, by contrast, was drafted prior to the release of the Reynolds and Vogel Report and without broad consultation from the construction industry. It was not significantly reviewed or modified following the release of the Reynolds and Vogel Report.

The federal government should follow Ontario's example and introduce an extensive consultation process before bringing forward similar legislation. It would be appropriate to review Bill S-224 in light of the considerable work undertaken in Ontario, the conclusions of which would be equally applicable in the federal context.

### **Oversights, inconsistencies and Lack of Clarity**

Further consultation is needed to address oversights, inconsistencies and lack of clarity in the Bill, which could lead to more disputes and litigation, slowing down rather than speeding up the payment cycle.

Bill S-224 lacks critical details about the adjudication process. If the federal government chooses to adopt adjudication as a parallel process to the courts to resolve disputes in the construction industry, that system must be structured carefully. Instead, the Bill fails to address four significant issues:

- qualifications and powers of the adjudicator;
- type(s) of evidence the adjudicator is allowed to hear;
- how fees are established; and
- whether adjudication can address multiple issues.

Perhaps most significantly, Mr. Reynolds and Ms. Vogel testified at the Senate Committee hearing on Bill S-224 on the importance of the government establishing (and funding) an "Authorized Nominating Authority" for the success of an adjudication system, but no authority is contemplated

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<sup>1</sup> Bruce Reynolds, Sharon Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act, Report Prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure* (April 30, 2016), available [online](#).

by Bill S-224. Setting up an adjudication system requires active engagement, commitment and funding from the Department charged with its administration.

Limited consideration has also been given to the intersection of this legislation and public private partnership (P3) projects. Confusion on how Bill S-224 applies to different project delivery models, such as P3 projects, may impair the federal government's plans for its infrastructure program. Relevant stakeholders, including PPP Canada, the Minister of Infrastructure and Communities, and the Canada Infrastructure Bank, should be consulted. It is worth learning from the Ontario experience, where stakeholders in the P3 sphere were not engaged until after Bill 142 was introduced, the result of which is expected to be and material amendments after second reading.

### **Balance between Regulation and Freedom of Contract**

An effective prompt payment regime must strike a balance between regulation and freedom of contract. The Vogel and Reynolds Report notes that striking a balance was a primary consideration in making their recommendations. Unlike Ontario's prompt payment legislation, Bill S-224 is very prescriptive and allows parties limited flexibility to make arrangements appropriate to the particular project.

Section 7 of Bill S-224, for example, prescribes monthly invoicing terms, regardless of the parties' intentions. In contrast, the Reynolds and Vogel Report recommends that parties be free to contract about payment terms but, failing to do so, a 28-day payment term will be implied. A one-size-fits-all invoicing regime is not in the best interests of payers or payees and may prevent parties from agreeing on invoicing terms that best suit their needs. Bill S-224's definition of milestone is another limit on freedom of contract. Section 6 of Bill S-224 prescribes a minimum time (one month) for a milestone. This is incongruent with the concept of milestone payments, which may be short or long. The Reynolds and Vogel Report recommends that parties be free to negotiate invoicing terms, including milestone payments.

In summary, the CBA Section supports efforts to effect prompt payment in the construction industry and urges the federal government to conduct broad stakeholder consultation on this important matter before taking the legislation further. We would be happy to discuss our recommendations with you in further detail.

Yours truly,

*(original signed by Gillian Carter for David Plunkett)*

David Plunkett  
Chair, CBA Construction and Infrastructure Law Section