

**AN ACT RESPECTING THE PROTECTION AND  
VIABILITY OF CONSTRUCTION CONTRACTORS**

**[Consultation Draft 1]**

## **PREAMBLE**

People of Ontario and their Government:

Recognize the importance of the construction industry to the financial health of the Province of Ontario;

Recognize the contribution to that industry made by contractors and subcontractors;

Believe that contractors and subcontractors are particularly vulnerable as they must carry substantial upfront costs, including equipment, materials and employee salaries;

Recognize that carrying these costs have an obvious impact on all areas of a contractor's and subcontractor's business when payment is not forthcoming within a reasonable timeframe;

Recognize that payment for goods or services delivered in a prompt and efficient manner is necessary to ensure the success of contractors and subcontractors who operate important small businesses in the Province of Ontario; and

Believe it is important to facilitate regular and timely payments between the parties to a construction contract.

## **DEFINITIONS**

1. In this Act,

**"change"** or **"changes"** means any variation to a construction contract which varies the price or the method of calculation of the price, adds to or deletes from the amount of construction work supplied or to be supplied, varies the method of performance, or varies the schedule for performance of construction work.

**"construction contract"** means a contract or agreement, in writing or oral, or partly in writing and partly oral, made between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor, under which one party undertakes with the other party to provide construction work in connection with an improvement;

**"construction work"** means the supply of labour, services and materials, or any combination thereof, in connection with an improvement;

**"contractor"** means any person performing construction work under a construction contract with the owner, and may include a material supplier;

**"Crown"** includes a Crown agency to which the *Crown Agency Act* applies;

**"day"** or **"days"** means calendar day or calendar days, as the context requires;

**“final payment”** means the payment to which a person is entitled under sections 5 or 6 of this Act, and includes payment or credit for any change. Any single or one-time payment for carrying out construction work under a construction contract shall be deemed to be a final payment;

**“improvement”** means, in respect of any land,

- (a) any alteration, addition or repair to the land;
- (b) any construction, alteration, repair, restoration, maintenance, erection or installation on the land, including any temporary work, and also including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works; or
- (c) the complete or partial demolition or removal of any building, structure or works on the land;

**“material supplier”** means a contractor or subcontractor who supplies every kind of movable property,

- (a) that becomes, or is intended to become, part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement; or
- (b) that is equipment rented without an operator for use in the making of the improvement;

**“owner”** means an entity that holds an ownership interest in real property, including a legal interest in fee simple, an equitable interest under an agreement of purchase and sale or a leasehold interest as a tenant;

**“payment application”** means any invoice, bill or other request for periodic payment, payment upon any change, final payment or release of holdback in relation to and in accordance with the terms of the applicable construction contract;

**“payment certifier”** means the person or entity identified in a construction contract responsible for the issuance of certificates for payment;

**“progress payment”** means a payment to which a person is entitled under sections 5 or 6 of this Act, and includes payment or credit for any change;

**“regulations”** means regulations made under this Act;

**“subcontractor”** means any person performing construction work under a construction contract with a contractor or with another subcontractor, but not with the owner, and may include a material supplier;

“temporary work” means temporary supports, structures, facilities, services and other temporary items required for the execution of an improvement but not incorporated into the improvement.

#### APPLICATION

2. This Act applies to every construction contract entered into for construction work undertaken in Ontario after the effective date of this Act irrespective of whether or not the governing law of the contract is expressed as being the law of Ontario.

#### EXCLUSIONS

3. This Act does not apply to:

- (a) a construction contract under which a party undertakes to carry out construction work as an employee of the party for whom the work is to be carried out; and
- (b) any construction contract or class of construction contracts prescribed by the regulations for the purposes of this section.

#### NO CONTRACTING OUT

4. Any agreement by any person that this Act, or any portion thereof, does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void. .

#### OBLIGATION TO PAY CONTRACTOR

5. (a) The owner shall pay to a contractor progress payments and final payment for construction work in accordance with the terms of the construction contract between them on the dates provided for such payments in the construction contract, but no less frequently than monthly.

(b) Should no date for progress payments be provided in the construction contract, progress payments shall be made monthly. The contractor shall submit a payment application dated the last day of the first and each subsequent month, and each payment application shall claim for the value of construction work performed as at the date of the application. Payment upon each such payment application shall be made on or before 20 days following the receipt by the owner, or the payment certifier on behalf of the owner, of the payment application, or 30 days following the last day of the monthly payment period for which the payment application is made, whichever is later.

(c) Should no date for final payment be provided in the construction contract, final payment shall be made 5 days following the issuance of any certificate for final payment issued by the payment certifier, or if there is no payment certifier or the payment certifier fails or refuses to issue a certificate for final payment within 10 days of a request to do so, within 15 days after submission of the payment application for final payment.

(d) Notwithstanding subsections (b) and (c) hereof, if any progress payment or final payment includes payment of any holdback prescribed by the *Construction Lien Act*, such payment of holdback shall only be made one day after the expiration of the holdback period prescribed by

the *Construction Lien Act*, provided that there are no preserved or perfected liens then registered on title to the lands and premises upon which the improvement was undertaken under which claims against the holdback may be made.

**OBLIGATION TO PAY SUBCONTRACTOR**

6. (a) A contractor shall pay to the subcontractor, and a subcontractor shall pay to another subcontractor, progress payments and final payment for construction work in accordance with the terms of the construction contract between them on the dates provided for such payments in the construction contract, but no less frequently than monthly.

(b) Should no date for progress payments be provided in the construction contract, progress payments shall be made monthly. The subcontractor shall submit a payment application dated the 20th day of the first and each subsequent month, and each payment application shall claim for the value of construction work performed as at the date of the application. Payment upon each such payment application shall be made on or before 30 days following the receipt of the payment application, or 10 days after the date of a certificate for such payment issued by the payment certifier, whichever is the later.

(c) Should no date for final payment be provided in the construction contract, final payment shall be made on or before 30 days following the receipt of the final payment application, or 10 days after the date of a certificate for payment issued by the payment certifier, whichever is the later.

(d) Notwithstanding subsections (b) and (c) hereof, if any progress payment or final payment includes payment of any holdback prescribed by the *Construction Lien Act*, such payment of holdback shall only be made one day after the expiration of the holdback period prescribed by the *Construction Lien Act*, provided that there are no preserved or perfected liens then registered on title to the lands and premises upon which the improvement was undertaken under which claims against the holdback may be made.

**AMOUNT OF PROGRESS PAYMENT**

7. The amount of the progress payment to which a person is entitled under a construction contract shall be:

(a) the amount provided for payment for construction work under the construction contract, including the payment or credit provided for any changes ; or

(b) if the construction contract does not provide for payment of a specified amount, the actual value of the construction work performed, or related goods or services supplied, immediately prior to the date of payment for the particular payment period, relative to the value of the entire construction contract including the actual value of all changes.

**DEEMED APPROVAL OF PAYMENT APPLICATION**

8. (a) A payment application shall be deemed approved unless the party liable for payment, or the payment certifier on its behalf, within 10 days after receipt, provides a written statement to

the party delivering such payment application describing the reasons for any disapproval or amendment of such payment application.

(b) Receipt of the payment application by the payment certifier or agent of the owner shall be deemed to be sufficient for the purposes of establishing the date of receipt under subsection (a) hereof.

(c) The written statement prescribed by subsection (a) hereof shall contain full particulars of the reasons for any disapproval or amendment of such payment application, including relevant provisions of the construction contract being relied upon, and shall further contain a statement of the amount of such payment application for which payment is disapproved or amended.

(d) The portion of any payment application for which payment is disapproved or amended,

(i) shall be limited to a reasonable estimate of the cost of completion or correction of construction work for which payment is being disapproved or amended; and

(ii) to the extent the disapproval of a payment application, or portion thereof, is limited to the valuation or method of valuation of any change, shall be further limited to the reasonable estimate of only such portion of the value of such change as is in dispute.

(e) Provided the party liable for payment provides the written statement as provided in subsection (a) hereof, that party may only withhold such amount from the progress payment as may represent the reasonable value of the disputed portion of the construction work.

(f) Payment shall be made upon any payment application:

(i) in respect of which the written statement prescribed by this section 8 is not given, or is not given in accordance with the provisions of this section 8; and

(ii) for the amount of any payment application for which payment is not disapproved or amended, as verified by the statement prescribed in subsection (c) hereof.

#### **CONTRACTOR'S RIGHT TO SUSPEND PAYMENT**

9. In the event the payment certifier fails to issue any certificate upon which payment shall become payable to the contractor or the owner fails to make payment to a contractor as prescribed by this Act:

(a) the contractor shall immediately provide written notice to the owner of the owner's default, and contemporaneously provide a copy of such written notice of default to all subcontractors with whom the contractor has entered into a construction contract for the improvement under which subcontracts payments are due or will become due;

(b) should the owner not remedy the default within the time prescribed in the contract between the owner and the contractor, or if such contract does not provide for a time to remedy the default, within 7 days of the date of delivery of the written notice of default, the contractor shall suspend performance of construction work and take such steps as are required to enforce

the lien rights of the contractor under the *Construction Lien Act*, and provide to the subcontractors written notice of all such steps taken to enforce payment;

(c) provided the contractor has complied with the provisions of subsections (a) and (b) hereof, the time for payment by the contractor to the subcontractors otherwise prescribed by this Act shall be extended for 90 days, and the amount of payment so suspended shall be then deemed payable as a progress payment or a final payment pursuant to this Act; and

(d) notwithstanding any suspension of the contractor's obligation to make payment under any subcontract, the contractor shall be obliged to pay interest on the amount of payment so suspended from the date the payment was due but for the suspension to the date the payment finally becomes due pursuant to subsection (c) hereof, at the rate of interest prescribed in section 10.

#### **INTEREST ON OVERDUE PAYMENTS**

10. Interest is payable on the unpaid amount of any progress payment or final payment that becomes due and payable in accordance with this Act, calculated at the rate prescribed by the *Courts of Justice Act* for prejudgment interest, or at the rate prescribed by the construction contract, whichever is the greater.

#### **RIGHT TO SUSPEND CONSTRUCTION WORK AND TERMINATE A CONSTRUCTION CONTRACT UPON NON-PAYMENT**

11. (a) If a contractor or subcontractor undertaking construction work does not receive payment to which such person is otherwise entitled pursuant to this Act, that contractor or subcontractor may suspend performance of construction work or terminate the construction contract, in accordance with the provisions of the construction contract.

(b) Should the construction contract contain no provisions for the suspension of performance of construction work or termination of the contract for failure to make payments, the contractor or subcontractor who does not receive payment to which such person is otherwise entitled pursuant to this Act may suspend performance or terminate the construction contract in accordance with the provisions of this section 11.

(c) No suspension of construction work or termination of the construction contract shall be effective unless the contractor or subcontractor intending to suspend or terminate,

(i) provides written notice to its payer of such intention to suspend construction work or terminate the construction contract, which written notice shall provide that if the default is not corrected within 7 days following receipt of such written notice, the contractor or subcontractor shall suspend construction work or terminate the construction contract; and

(ii) the party receiving such notice fails to correct the default within such 7 days following receipt of notice.

- (d) A construction contract upon which construction work has been suspended in accordance with the provisions of this section 11 may be terminated following 7 days written notice of termination provided by the contractor or subcontractor to its payer.
- (e) No suspension or termination in accordance with the provisions of this section 11 shall be deemed to be a breach of the construction contract.
- (f) Upon any resumption of construction work following a suspension thereof in accordance with this section 11, the party resuming construction work shall be entitled to the payment of reasonable remobilization costs, in addition to such other amounts to which such party is otherwise entitled under the construction contract or under this Act.

#### **RIGHTS TO INFORMATION**

- 12. (a) A contractor may, before entering into a construction contract and at any time thereafter, by written request, require an owner under the construction contract to provide reasonable evidence to the contractor that financial arrangements have been made to fulfill the owner's obligations under the construction contract.
- (b) Promptly upon receiving the written request stipulated in subsection (a) hereof, the owner shall provide such reasonable evidence to the contractor, and shall further provide to the contractor written notice of any material adverse change in the owner's financial arrangements to fulfill the owner's obligations under the construction contract during the performance thereof.
- (c) A subcontractor may, at any time, by written request, require its payer under a construction contract to disclose the due dates for payment of progress payments and final payment to such payer under a construction contract.
- (d) If a person receiving the written request stipulated in subsections (a), (b) or (c) hereof fails or refuses to provide the information requested, or knowingly or negligently mis-states the information provided, such person shall be liable to the person requesting such information for any damages sustained by reason thereof.
- (e) Upon application, the court may at any time order a person to comply with a request that has been made to the person under this section and, when making the order, the court may make any order as to costs as it considers appropriate, including an order for costs on a substantial indemnity basis.

#### **LIMITATION ON HOLDBACKS**

- 13. No construction contract shall provide any right to maintain any holdback or other withholding of funds other than such holdbacks as are prescribed by the *Construction Lien Act*.

#### **ACT BINDS CROWN**

- 14. This Act binds the Crown.

**REGULATIONS**

15. The Lieutenant Governor in Council may make regulations under this Act.

**COMMENCEMENT**

16. This Act comes into force on the day it receives Royal Assent.

**SHORT TITLE**

17. The short title of this Act is the Prompt Payment Act.