July 7th, 2026

Ministry of Infrastructure, Government of British Columbia
via email: Engage.INF@gov.bc.ca

RE: Response to the Construction Prompt Payment Act Discussion Paper

Dear Minister Ma, Minister Beare and Ministry Staff:

Thank you for the opportunity to provide feedback on the Construction Prompt Payment Act ("the Act") Discussion Paper issued by the Ministry of Infrastructure.

Collectively, the undersigned associations represent approximately 5,500 construction companies across British Columbia. This submission is further supported by over 60 individual construction companies, ranging from businesses with only a few employees to some of the province's largest contractors. Together, the undersigned represent firms and associations working across the single-family and multi-family residential, commercial, institutional, industrial, and civil construction sectors, delivering projects of every size throughout the province. It is long overdue that BC join other Canadian jurisdictions in implementing prompt payment and adjudication legislation. Doing so will promote greater national consistency and harmonization across Canada's construction industry.

The positions and recommendations contained in this submission reflect extensive collaboration among industry associations and stakeholders across the construction sector. They are grounded in practical industry experience, informed by research into other Canadian jurisdictions, and refined through legal review to support a practical, effective, and nationally consistent prompt payment and adjudication framework for British Columbia.

Enacting the Act is one of the most achievable initiatives available to the Province this fiscal year, delivering tangible benefits across the construction sector with comparatively minimal implementation costs.

The urgency to implement the Construction Prompt Payment Act is greater than at any time in recent years. Ongoing financial pressures across the construction industry have highlighted the significant consequences of delayed payment. Had prompt payment and adjudication legislation been in place several years ago, some businesses may have remained operational, preserving jobs, livelihoods, and industry capacity.

As noted in the Deputy Minister's letter, we welcome the opportunity to learn the results of this consultation. Given the significance of the regulations to the successful implementation of the Act, we anticipate continued engagement with the Province throughout the regulatory development process and remain available to participate in future meetings and consultations.

Please include the following contacts in future correspondence regarding this submission:

Chris Atchison
President,
BC Construction Association
Cell: 250-818-9671
Email: chris.atchison@bccassn.com

Katy Fairley
Industry Practices Consultant,
BC Construction Association
Cell: 778-350-3444
Email: katy.fairley@bccassn.com

This submission is intended not only to communicate our positions, but also to identify the practical implementation issues and recommendations that we believe should be carefully considered as the regulations are developed. In our view, the regulations will ultimately determine the success of the Act and therefore should provide clear, comprehensive, and practical direction to support consistent application across the industry. We welcome the opportunity to discuss these recommendations further with the Province and legislative drafters as that work progresses.

Industry is ready. While change can bring challenges, our organizations remain committed to supporting the Act's successful implementation and providing practical feedback throughout the summer as key policy decisions are made and the regulations are developed.

Respectfully submitted,
The Undersigned Organizations

Chris Atchison President British Columbia Construction Association bccassn.com British Columbia Construction Association	**Matt MacInnis** President Electrical Contractors Association of BC eca.bc.ca ECABC Electrical Contractors Association of British Columbia	**Kim Barbero** Chief Executive Officer Mechanical Contractors Association of BC mcabc.org MCABC Mechanical Contractors Association of British Columbia
Nicole Bryant CEO Northern Regional Construction Association nrca.ca NORTHERN REGIONAL CONSTRUCTION ASSOCIATION	**Clifford Kshyk** Chief Executive Officer Southern Interior Construction Association sicabc.ca SICA SOUTHERN INTERIOR CONSTRUCTION ASSOCIATION	**Jeannine Martin** President Vancouver Regional Construction Association vrca.ca VRCA Vancouver Regional Construction Association
Rory Kulmala Chief Executive Officer Vancouver Island Construction Association vicabc.ca VICA Vancouver Island Construction Association	**Robert Greenough** Board of Directors President Roofing Contractors Association of BC rcabc.org RCABC ROOFING CONTRACTORS ASSOCIATION OF BRITISH COLUMBIA	**Caroline Andrewes** President & CEO Association of Consulting Engineering Companies - British Columbia acec-bc.ca ACEC BRITISH COLUMBIA

Rodrigue Gilbert
President
Canadian Construction Association
cca-acc.com

Matt Ainley
Chair
General Contractors Alliance of Canada

Robert (Bob) Sloat
Regional Director – Western Canada
Surety Association of Canada
suretycanada.com

Warren Singh
Executive Director
Alberta Construction Association
albertaconstruction.org

Shannon Friesen
President and CEO
Construction Association of Saskatchewan
constructionsk.ca

Darryl Harrison
President & CEO
Winnipeg Construction Association
winnipegconstruction.ca

Ken McCormack
President & CEO
Construction Labour Relations Association of BC
clra-bc.com

Jason Saunderson
Executive Director
Concrete BC
concretebc.ca

Donna Grant
President
BC1 CALL
bc1c.ca

Bradley Budden Executive Director BC Insulation Contractors Association	**Jeremy Hallman** Executive Director BC Sheet Metal Association smacna-bc.org	**Gary Schwaiger** Executive Director BCWCA – BC Wall & Ceiling Association bcwca.org
Amy Roberts Canadian Codes & Advocacy Director Fenestration & Glazing Industry Alliance (FGIA) fgiaonline.org	**Arthur Chung** Chief Executive Officer BCCA Employee Benefit Trust bccabenefits.ca	**Katy Fairley** Principal Fairley Strategies
Anthony Minniti President CGI Constructors cgigc.com	**Donald Wightman** President PML Professional Mechanical Ltd pmlbc.com	**Cameron Betts** President Betts Electric ltd bettselectric.com

William Pauga President Southwest Contracting Ltd southwestcontracting.ca	**Regina Marklund** Director of Business Development Canadian Turner Construction Company Ltd turnerconstruction.com	**Chris Lyons** Director, Construction Omicron Construction Ltd. omicronaec.com
Roger Yager President Knappett Projects Inc. knappett.com	**Mike Fawcett** Regional Manager White Cap Supply Canada whitecapsupply.com	**Derek Fettback** Vice President Western Pacific Enterprises Ltd wpe.ca
Ronan Deane Strategic Development Manager NAC Constructors nacworld.com	**Barclay Ellis** President Blue Anvil Labour Leasing Services Ltd. blueanvil.ca	**Debra Dotschkat** Co-Owner Glass Canada Inc glasscanada.com

Aaron Henry Vice President Kalmar Construction Ltd kalmarconstruction.com	**Taylor Holmes** VP Operations Durwest Construction Management durwest.com	**Shawn Parkes** General Manager Trotter & Morton Group trotterandmorton.com
Christy Kerr Kerr Controls Inc. Director, Finance & Administration kerrcontrolsinc.com	**Nikki Keith** Principal Wilson M. Beck Insurance Services Inc. wmbeck.com	**Ellisha Mott** EVP Mott Electric mottelectric.com
Rick Wagner President Maxwell Floors Ltd maxwellfloors.com	**Byron Tarby** President Makon Projects Ltd. makon.ca	**Mike Walz** CEO Kinetic Construction Ltd. kineticconstruction.com

Rob Kline COO / Partner Plan B Contractors Inc. planbcontractors.com	**Dave Manson** Vice President Fettback and Heesterman poweringresults.ca	**Jason Glue** Owner JG Strategies Ltd
Don Sheepwash Director IDR Commercial Construction Management INC. idrccm.com	**Robert Greenough** Vice President TRS Building Envelope Corp. [TOMTAR Roofing & Sheet Metal Ltd.] tomtar.ca	**Thomas Schmitz** Partner & CEO FCS Finance Construction Support Canada Ltd.
Brad Greenbank Director Alpha Roofing & Cladding Inc alpharoofing.ca	**Dinos HadJiloizou** President & General Manager Division 15 Mechanical Ltd. div15mechanical.com	**Craig Cookman** General Manager Milner Group milnergroup.ca

Carter Hawke & Emma Miller Partner & Partner MNP LLP mnp.ca	**Jen Hilgersom** Office Manager Van-Berg Interiors Painting Ltd. vanbergpainting.com	**Lydia West** Director of Administration Medix Holdings Ltd. medixbc.ca
John Connors CEO AspenRidge Garden Design aspenridgegardendesign.com	**Mark Hartwick** Owner Kimco Controls Ltd kimcocontrols.ca	**Trent Novakowski** General Manager Genesis Building Controls genesiscontrols.ca
Robert Lutgendorf President SpanMaster Structures Ltd spanmaster.ca	**Kevin Penner** Operations Manager Chandos Construction chandos.com	**Anthony Price** Regional Manager Westwood Electric westwoodelectric.com

Cassie Savage Business Development Manager Corestock Industrial Supply Ltd Corestock.ca	**Vanessa Vizi** Legal Contract Analyst Metro Testing & Engineering Ltd. metrotesting.ca	**Stefano Rosales** COO & Partner Prevail Painting prevailpainting.com
Dean DeRosier GM – Vancouver Branch Edwards Electric edwardselectric.net	**Tim McCloskey** Owner BTR Fire Protection Ltd.	**Leryn Bullock** Owner Yellowstone Traffic and Safety Ltd yellowstonetrafficandsafety.com
Mitch Kelm Principal Spitfire Mechanical Services Ltd. spitfiremech.ca	**Dale Mercuri** Managing Partner Ramco's Carpet Warehouse Ltd. ramcofloors.com	**Kevin Moss** Director Marine Roofing marineroofing.com

Laurie Kirlik
President
Harvard Industries Ltd
harvard-roofing.com

HARVARD
ROOFING & SHEET METAL

Taylor Carcasole
Owner/Director
Raven Roofing Ltd
ravenroofing.com

Felix Menu
Owner/General Manager
R&L Construction Ltd.
rl.construction

R&L
CONSTRUCTION

Dallas Dekoff
Director
Ridgeline Exteriors Inc.
ridgelineext.com

RIDGELINE
EXTERIORS INC.

John Wilson
Owner
Top Line Roofing
toplineroofingvictoria.ca

TLR TOP LINE
ROOFING LTD.

Morgan Spencer
Office Manager
Mainline Roofing Co. Ltd.
mainlineroofing.ca

MAINLINE ROOFING

Terry Parsons
Owner
Hunter Glass & Aluminum Ltd
hunterglassandaluminum.com

HUNTER
GLASS & ALUMINUM LTD.

David Volk
Lawyer
Jenkins Marzban Logan LLP
jml.ca

JML

Brent Galbraith
Owner
Brega Contracting Ltd.

Terry Brown
President/Owner
STBR Consulting Ltd.

Response Overview *(hyperlinked)*

1 Application and Coming into Force

1.1 Do you agree that for the Act to be as effective as possible, it should apply as broadly as possible?

Yes, we agree that the Act must apply to the entirety of the construction industry.

The Act will be most effective if it applies across the entire construction industry without exception for class including sector, owner type, building or project type, size-based or types of material or services provided. The application of the Act to off-site construction, such as prefabricated and modular construction, intended to become part of an improvement, should be expressly confirmed in the regulations or Ministry implementation guidance to avoid uncertainty.

Industry has repeatedly demonstrated its ability to adapt to significant change. **Education and implementation resources, not exemptions or delayed implementation, are the appropriate response to supporting industry through this transition.**

Exemptions remove access to prompt payment and adjudication, removing statutory protections from parties throughout the construction supply chain, particularly small and medium-sized businesses that are most vulnerable to payment delays.

1.2 Are there any unusual or limited instances where it would be impossible to meet the requirements of Act and an exemption would be required? If so, please provide a detailed rationale.

No. There are no circumstances that would justify an exemption from the Act.

a. Please also explain how, in the case of an exemption, any downstream effects (i.e., payment delays to parties down the construction chain) could be prevented or mitigated.

We do not believe the downstream effects of exemptions can be mitigated. Exemptions create uncertainty regarding applicability and remove statutory payment and adjudication protections from the entire construction supply chain below position 0 and 1, including for owners.

1.3 Do you agree with bringing the Act into force in full at one time versus a phased approach? If not, please provide reasons.

Yes, we agree with the Act coming into force at one time.

A phased approach would create unnecessary complexity and confusion regarding applicability. A single implementation date will provide greater certainty for all participants.

Importantly, any potential future consideration of additional parties must not delay the implementation for contractors, subcontractors, and suppliers.

2 When a Record is Given or Issued, or a Payment is Made

Broadly, we are supportive of a recipient-based approach for both invoices and payments: an invoice or payment should be considered to have been given or delivered when it is received by the intended recipient.

Our response focuses on two foundational concepts for an effective statutory prompt payment regime: (1) the requirements for formal delivery of a proper invoice, and (2) when payment is recognized to have occurred under the Act. The Act also refers to "records" in the context of adjudication (s. 25 and ss. 49(2)), which raises separate considerations that we address in response to Question 6.

We support regulations which would bring clarity to these concepts and reduce opportunities for differences in interpretation. Experience from other jurisdictions suggests that prompt payment legislation has accelerated the use of electronic invoicing and payment and we welcome this transition.

Further and in our opinion, the Act is not clear whether a proper invoice is considered a "record" for the purposes of s. 25 and ss. 49(2)(f). "Record" is not a defined term, and section 25 appears to contemplate only records relating to the adjudication itself. However, the discussion paper itself seems to contemplate that a proper invoice is a record. The regulations should clarify whether a proper invoice is a record, if that is the intended policy outcome. In our view, this is an example of an issue that may not have been fully contemplated during the drafting of the Act.

Preserving the Statutory Payment Framework

The success of prompt payment legislation lies in creating a resilient statutory framework which preserves freedom of contract as much as possible but eliminates opportunities for payment obligations to be deferred or undermined. A balance must be struck to ensure that the minimum statutory framework cannot be contracted out of or be open to broad interpretation.

Standard contracts and "Payment Legislation"

The Canadian Construction Documents Committee (CCDC) is Canada's leading publisher of standard construction contracts, reflecting broad industry consensus among owners, contractors, consultants, specification writers, and trade associations. It is important to recognize that standard form contracts have already been updated to include for prompt payment legislation (e.g.

CCDC 2 – 2020, CCA 1 – 2021, CCDC 5B – 2025). Every CCDC and Canadian Construction Association (CCA) standard contract issued since 2020 includes the defined term "*Payment Legislation*" and is intended to operate alongside applicable prompt payment legislation. No further updates are required to these standard contracts to incorporate BC's Construction Prompt Payment Act.

2.1 How does the construction industry generally determine when an invoice has been "given" or "delivered" to an owner?

We support a recipient-based approach for determining when an invoice is given or delivered under the Act: an invoice should be considered to have been given or delivered when it is received by the intended recipient. As delivery of the proper invoice triggers the prompt payment timelines, clarity and certainty are essential.

Through our engagement with industry, we heard loudly that when an invoice is sent electronically, it is delivered. This engagement included contractors, subcontractors, suppliers and owners, who raised a number of practical questions have consistently arisen regarding the delivery and receipt of invoices. These include invoices delivered outside normal business hours, by text message, immediately before a statutory holiday or the Christmas period, the effect of staff absences or out-of-office notices, changes to designated recipients or electronic invoicing systems, and evidencing receipt. While we are ***not*** suggesting the regulations prescribe an answer to every scenario, they should provide sufficient clarity to minimize uncertainty and unnecessary disputes.

1. <u>Use of contracts</u>

The vast majority of construction in BC occurs under highly detailed written contracts such as standard form contracts (i.e. CCDC, CCA, MMCD) with supplementary conditions, standard public entity contracts (i.e. MOTT, BC Hydro, Fortis), or comparable industry contracts (i.e. general contractor standardized subcontracts or CHBA-BC contracts).

These contracts already outline how invoices are to be delivered, including the acceptable methods of delivery and the intended recipient. We believe that it is important that the regulations recognize these existing contractual processes while preserving the statutory rules governing when an invoice is considered given or delivered.

We note that CCDC standard contracts already require applications for payment to be delivered directly to both the owner and the consultant (i.e. CCDC 2 – 2020, GC 5.2.1 and 5.3.1), aligning with the Act's requirement for delivery of a proper invoice to the owner (i.e. s. 5(1)).

2. <u>Electronic Delivery</u>

For invoices delivered by email or through an electronic invoicing system, provided delivery is made to the agreed recipient (e.g. the email address or electronic invoicing system specified in the contract), delivery should be considered instantaneous (subject to the *Interpretation Act*).

3. Use of deeming provisions for mailed invoices

Although physical delivery of invoices is expected to become increasingly uncommon, the regulations should provide clarity where invoices are delivered by regular mail or by hand. For invoices delivered by regular mail or other methods that involve a delay before actual receipt, the regulations should avoid deeming an invoice received before it has actually been received by the intended recipient. The following are two examples of deeming provisions applicable to delivery of formal notices by mail:

a. Under the CCDC 2 – 2020, Article A-6.3 contains the following deeming provision for Notices in Writing sent by mail: "…it will be deemed to have been received five calendar days after the date on which it was mailed, provided that if either such day is not a Working Day, then the Notice in Writing will be deemed to have been received on the Working Day next following such day."
b. Under the *Builders Lien Act*, s. 33(3) says that a 21-day notice will be validly served if the notice is mailed or delivered to the address for service given in the claim of lien. S. 33(4) further provides that for service by mail, the notice is "conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada".
    i. These deeming provisions in the *Builders Lien Act* have been criticized for allowing extinguishment of a lien claim where there was proof that the notice in question was not actually delivered: *Triad Mechanical Inc. v Maple Leaf Green World Inc.*, 2021 BCSC 1865.

Accordingly, care should be taken in developing any deeming provisions respecting the delivery of invoices by regular mail or other physical means.

4. Other considerations

Following is a non-exhaustive list of some specific areas to consider when addressing regulations for when a proper invoice is given:

a. Avoid creating additional procedural requirements for an invoice to be given. The Act already gives owners *ample* authority to dispute or challenge invoices (ss. 7(2) and 11).

b. The regulations should expressly recognize and permit common methods of delivery, including electronic invoicing systems, email, facsimile, regular mail, and physical delivery. Any special accommodations for regular mail should be minimized to discourage its use and the uncertainty it creates.

c. The regulations should address circumstances where an owner's designated email address or electronic invoicing system is unavailable or inoperable.

d. The regulations should clearly allocate the risk of failed delivery to the party responsible for the method of delivery chosen.

e. Legal counsel raised whether the *Interpretation Act*, RSBC 1996, C. 238 will apply to the CPPA. If so, the *Interpretation Act* may address various timing issues (i.e. s. 25).

2.2 How does the construction industry generally determine when a payment has been "made"?

In the construction industry, payment is recognized as having been made when it is received by the intended recipient. We strongly support this same recipient-based approach under the Act.

Through our engagement with industry, a number of practical questions have consistently arisen regarding when payment is considered to have been made. A recurring theme throughout our consultation was that there can be no "the cheque is in the mail" approach under prompt payment legislation: you either have your money, or you do not.

Questions also arose regarding the distinction between payment by cheque and electronic funds transfer, delays caused by financial institutions or payment platforms, the allocation of responsibility where payment is delayed, and when payment should be considered received between all positions under the Act. While we are *not* suggesting the regulations prescribe an answer to every scenario, they should provide sufficient clarity to minimize uncertainty and unnecessary disputes.

1. <u>Electronic payments</u>

The responsibility for ensuring payment is received within the statutory timelines must remain with the payor. For electronic payments, this means payment should be considered made when the funds are deposited into and available in the recipient's account.

2. <u>Payment by cheque</u>

Broadly, we support payment by cheque being considered made when the cheque has been delivered to the recipient and is available for deposit.

Payment by cheque creates a number of potential timing issues associated with the physical delivery of cheques, as well as the time required for cheques to clear following deposit.

While cheques may remain in use by some organizations, the regulations should not create special accommodations for payment by cheque, especially by mail, that undermine the statutory timelines or encourage continued reliance on this slower payment method.

> ***Recommended Regulatory Clarifications***
>
> Consideration should be given to prescribing that payment by cheque occurs only when (1) the cheque is physically received by the recipient, (2) the cheque is capable of immediate deposit, and (3) there are sufficient funds in the payor's account for the cheque to clear once deposited. This would provide parties and adjudicators with a clear regulatory framework should the timing of payment by cheque become the subject of an adjudication.

3. <u>Role of Payment Certifiers and Consultants</u>

While payment certifiers and consultants have no statutory role under the Act, their contractual role has been a recurring topic during industry engagement.

Section 6(1) appropriately provides that a contract cannot make the giving of a proper invoice conditional on certification by a payment certifier or approval by the owner. This principle must be maintained.

We have heard consistently, particularly from public sector owners, that completing payment certification and internal approval processes within the statutory timelines will be challenging. We have heard the same from contractors and subcontractors. However, the fact that these processes currently contribute to payment delays reinforces exactly why prompt payment legislation is needed.

We expect that this current practice will change greatly once the Act comes into force as a result of the combined effect of ss. 6(1), 9(1), and 11(2) of the Act.

It is also important to recognize that the contractual requirement for consultants to assess payment applications within 10 calendar days has existed in CCDC contracts since 2008. Owners and their consultants have been contractually required to do this for nearly 20 years.

4. We support the following principles and seek regulatory clarity:

a. Clarity regarding payments between all positions under the Act, not only payments made in response to a proper invoice.
b. The payor bearing responsibility for ensuring payment is received within the timelines established by the Act.
c. Certainty regarding when payment is considered received by avoiding deeming provisions that allow payment to be treated as having been made before it has actually been received (i.e. no "the cheque is in the mail" approach).
d. No exceptions for delays caused by the payor's banking institution, payment platform, or mail system.

2.3 If regulations are introduced to clarify these terms, should parties still be allowed to define these matters in their contracts?

No, parties must not be able to define or redefine these terms of given, delivered and received in their contracts.

Parties should still be free to decide *how* invoices are submitted and payments are made, such as by an electronic invoicing platform or payment by cheque, electronic funds transfer. However, contracts must not be permitted to change *when* an invoice or payment is considered given, delivered, received or made under the Act.

3 Calculation of Days

3.1 Do you agree that the calculation of days should be based on the rules in the Interpretation Act?

Yes, we agree that the calculation of days should be based on the rules in the *Interpretation Act*. We support the offered rationale of alignment with other Canadian prompt payment jurisdictions and for consistency with the *Builders Lien Act*.

It is worth noting that construction contracts may contemplate time measured in both "working days" and "calendar days". The CCDC 2 – 2020 contains the following definition for working day but no definition for a calendar day: "*Working Day* means a day other than a Saturday, Sunday, statutory holiday, or statutory vacation day that is observed by the construction industry in the area of the *Place of the Work*". Applications for payment under the CCDC 2 – 2020, as one example, measure time with reference to calendar days (i.e. GC 5.3.1 and GC 5.4.1).

Through our consultation, we also note that construction projects occur at various locations, within the same organization, with different operating hours, including owners' offices, project offices, and construction sites that may operate on the weekend or 24 hours a day, especially when co-located. This may cause unintended and unknown confusion with the Interpretation Act. The Province may wish to consider whether regulations may be needed, if not specified in the contract, to prescribe which location and business hours govern the giving and receipt of invoices, payments, notices, and responses to eliminate uncertainty and differing interpretations.

3.2 If not, how should they be calculated?

Not applicable.

4 Interest on Late Payments

This is a critical issue for our organizations and one of the most important regulatory decisions remaining before implementation.

While the Act provides that the higher of the contractual or prescribed interest rate will apply, the reality is that many contractors, subcontractors, and suppliers have little ability to negotiate contract terms due to the power imbalance between the parties and must accept the interest provisions presented to them or have their bid rejected. As a result, the prescribed interest rate will play a critical role in determining whether the Act achieves its intended purpose.

We recognize the federal payment legislation prescribes interest at 3%[1], illustrating there are different jurisdictional approaches. However, we believe the prescribed interest rate for BC should reflect established industry practice and support the Act's objective of deterring late payment.

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[1] Federal Prompt Payment for Construction Work Act, s. 14(2); Prompt Payment for Construction Work Regulations, SOR/2023-269, s. 4(1).

4.1 Are there impacts that we should be aware of with the interest rate on late payments being tied to the Supreme Court Registrar's guidelines?

Yes, there would be significant, negative impact and it would undermine the effectiveness of the Act.

The Supreme Court Registrar's rate is materially below the *actual* cost of financing borne by construction businesses. Construction businesses borrow at rates above prime and, in some cases, may rely on significantly more expensive forms of credit, such as credit cards, as a result of late and non-payment.

A prescribed interest rate set too low undermines the purpose of prompt payment legislation by reducing the consequences of late payment and shifting financing costs back onto contractors, subcontractors, and suppliers, and weakens incentives for timely payment.

4.2 If not tied to the Supreme Court Registrar, how should the rate be established?

The prescribed interest rate should be based on the long-established provisions found in the standard construction contracts published by the Canadian Construction Documents Committee (CCDC) and the Canadian Construction Association (CCA). These contracts are widely used and understood across BC's construction industry and provide for interest at 2% above prime for the first 60 days and 4% above prime thereafter[2]. We consider the CCDC and CCA interest provisions to be representative of the market.

This is to be compared with the Supreme Court Registrar's rate which is typically set at 2% below prime, representing a 4-6% discount against the CCDC and CCA standard.

In our view, these rates are fair and well-understood and would provide for an appropriate prescribed interest rate under the Act that helps deter late payment.

Recommended Regulation Language:

> *For the purposes of section 15(a) of the Act, the prescribed interest rate on unpaid amounts shall be:*
>
> *(a) 2% per annum above the Prime Rate for the first 60 days following the date payment became due; and*
>
> *(b) 4% per annum above the Prime Rate commencing on the 61st day following the date payment became due.*
>
> *Interest shall be compounded monthly.*
>
> *For the purposes of this section, "Prime Rate" means the annual rate of interest announced by the Bank of Canada from time to time.*

[2] See the Canadian Construction Documents Committee (CCDC) standard form contracts CCDC 2, 2 MA, 3, 4, 5A, 5B, 14, 15, 17, 30, 31, 33 and 34, and the Canadian Construction Association (CCA) standard form contracts CCA 1 and CCA 19. Each contract contains broadly identical provisions respecting interest on overdue payments within the Articles of Agreement under the heading "Payment."

5 Adjudicators' Qualifications and Fees

5.1 What minimum qualifications should adjudicators in B.C. be required to have?

We support a made-in-BC approach that aligns closely with other Canadian jurisdictions while adopting the strongest elements from each. This includes at least 10 years of relevant industry experience, comprehensive training through the Adjudication Authority, no undischarged bankruptcy, no indictable offence, payment of required fees, and agreement to a code of conduct.

Experience alone will not make an effective adjudicator. Robust training, assessment, and ongoing oversight by the Adjudication Authority are equally important and must be a priority in the regulations. Feedback from other jurisdictions has indicated that adjudicator training needs to be stronger.

5.2 Should B.C.'s qualification requirements be similar to those used in other Canadian jurisdictions?

Yes, B.C.'s qualification requirements should align closely with those used in other Canadian jurisdictions to support a national pool of qualified adjudicators. In our view, Ontario's qualification requirements provide the clearest language and model for BC's regulations.

We support:

1. The Adjudication Authority determining whether an applicant has at least 10 years of relevant construction industry experience. In particular, we are supportive of the Ontario and Alberta language which gives the authority some latitude to assess whether an applicant "...*has, in the Authority's view, at least 10 years of relevant working experience in the construction industry*".
2. Requiring the Adjudication Authority to establish strong processes for the selection, training, and continuing education of adjudicators. Yearly training cannot simply be a "refresh."[3]
3. Including examples of relevant experience similar to Ontario and Saskatchewan, including accountants, architects, engineers, quantity surveyors, project managers, arbitrators, lawyers, but also adding superintendents and estimators.
   - Superintendents and estimators have extensive experience with change orders and valuation, which are among the most common subjects of adjudication.[4]

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[3] See ODACC website, *Fees Payable by Adjudicators to ODACC*, noting "the refresher program must be completed every year by certified Adjudicators."
[4] Ontario Dispute Adjudication for Construction Contracts (ODACC), *Annual Report 2025* (2025) at 26, Table 6.

We support including this list of examples, as other jurisdictions, including ODACC and CanDACC, report on these categories in their annual reports. This provides useful data on the operation of the adjudication system.

We do not support Alberta's prescribed knowledge categories (PPCLA Regulation, s.7(2)). They are unnecessarily restrictive and do not reflect the breadth of expertise required to adjudicate construction disputes, including construction scheduling, building systems, design documents, specifications, and construction industry practices.

5.3 Are there any qualifications or continuing education that should be required that are specific to B.C., such as cultural competency or other specialized training?

1. Cultural Competency

We are strongly opposed to requiring cultural competency or other similar training for adjudicators. Adjudicators must determine disputes impartially based on the Act and its regulations, any requirements set forth by the Adjudication Authority, the information presented by the parties, and specifically section 17 Adjudication procedures and section 27 Powers of adjudicator of the Act.

2. Other specialized training

We are supportive of training on the *Builders Lien Act* given its close relationship to construction payment matters, including the circumstances when an adjudicator may adjudicate a dispute which involves concepts under the *Builders Lien Act*. This would equip adjudicators from BC and across Canada with the knowledge needed to confidently adjudicate disputes in BC.

Fees

5.4 What factors should be considered in establishing appropriate fee amounts for adjudications?

Appropriate fee structures should encourage, not discourage, the use of adjudication, particularly for lower-value disputes where the cost of the process can quickly outweigh the amount in dispute. Accessibility, predictability, and consistency with other Canadian jurisdictions should be primary considerations.

At the same time, we recognize the fee structure must provide sufficient funding for the Adjudication Authority to operate effectively, educate and train adjudicators and maintain an effective adjudication program.

Our organizations considered two categories of fees: filing/referral fees and adjudication fees.

1. Filing / Referral Fees

a. We support a $0 filing fee for claims under $50,000 and support a $0 filing fee for claims under $100,000, provided the Adjudication Authority confirms this would not impact its ability to operate.

b. We support a single fixed filing fee for claims above the chosen threshold, either $500 or $600 as seen in Alberta and Ontario.
c. We do not support the filing fee structures used in Manitoba and Saskatchewan, as they create barriers for lower-value claims.

2. Adjudication Fees

a. Adjudicator fees and hourly rates must be sufficient to attract and retain experienced, qualified adjudicators, which will especially be important for higher-value and complex claims.
b. For smaller claims, we support simple, predictable fee structures, without unnecessary multiple fee tiers.
c. For higher-value and complex claims, we support hourly rates to ensure that, where appropriate, adjudication fees are scalable for disputes that require additional time and effort by an adjudicator, reflecting the complexity of the matter and the expertise required to resolve it.
d. Maximum fee caps may also warrant consideration to help ensure costs remain proportional to the value of the claim[5].

3. Additional Fees

The determination certification fee should be kept low, as in other jurisdictions.

Adjudicators training and qualification fees should also be accessible while providing sufficient funding to support robust training and continuing education programs for adjudicators.

5.5 What considerations should be made to ensure adjudication is accessible?

Accessible adjudication is fundamental to the success of the Act. During our consultation, accessibility was consistently discussed alongside practicality, efficiency, and confidence in the adjudication process. While an appropriate fee structure is an important component of accessibility, it is only one of many factors.

Our detailed recommendations respecting adjudication procedures and the Adjudication Authority are set out in response to Question 6.3. Together, those recommendations are intended to ensure that adjudication is not only accessible, but also practical, efficient, and capable of maintaining the flow of payment.

Accessibility requires:

- A sufficient number of qualified adjudicators to meet demand.
- Simple and efficient filing processes, forms, and procedures.
- Clear timelines and requirements (refer to response 6.3.)
- Education, training, and practical resources for all participants.
- Timely determinations that maintain the flow of payment.

[5] ARCANA(AB) Fee Schedule demonstrating the use of maximum fee caps based on claim value.

6 Readiness and Industry Support: Additional forms and industry support

6.1 What standardized forms should be developed under the Act at the outset?

1. No Prescribed Proper Invoice form

We do not support the creation of a prescribed Proper Invoice form. The Act already establishes the required contents of a Proper Invoice, and a prescribed form would create unnecessary administrative burden. A sample template would be more appropriate and will be included in the implementation guides developed by our organizations.

2. Standardized forms

We support the development of standardized forms for:

a. Notice of Non-Payment (including versions for owners, contractors, and subcontractors to reflect their differing statutory obligations)
b. Notice of Adjudication
c. Response to Notice of Adjudication
d. Notice of Improper Invoice
    - We support a standardized Notice of Improper Invoice that outlines the minimum prescribed information and seek to have further discussions on the topic. The concept was identified in the cross-jurisdictional analysis commissioned by BCCA and presented to the Province as part of the Prompt Payment Working Group process.[6] It would provide owners and contractors with a clear, consistent, and transparent process for identifying the basis on which an invoice is considered improper, reducing uncertainty and disputes at the outset of the prompt payment process.

3. Risk of form over substance

We strongly urge the Province to avoid creating any gaps in the statutory framework which would allow “form over substance” processes to take hold comparable to what has plagued the *Builders Lien Act* (i.e. innocent mistakes on the claim of lien form being fatal: *Yongfeng Holdings Inc. v Zheng,* 2019 BCSC 1534, para. 179).

Recommended Regulatory Clarifications

The Province may wish to consider adopting a provision similar to section 6(1)-(2) of Ontario's *Construction Act*, which preserves the validity of documents despite minor errors or irregularities that do not prejudice the other party.[7]

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[6] BC Construction Association, *Cross-Jurisdictional Legislative Comparison of Prompt Payment and Adjudication Regimes Across Canada* (Prepared by Glenn Ackerley & Kathleen Gregus, WeirFoulds LLP, November 2023) at 9.
[7] Construction Act, R.S.O. 1990, c. C.30, s. 6(1) and (2).

6.2 What information should be part of the proper invoice?

The information required under section 7(1)(a)(i through vii) of the Act is sufficient and should remain unchanged. Further prescribed requirements contemplated under section 7(1)(a)(xiii) is not required.

We support maintaining the ability of parties to require additional information through their contracts as allowed under section 7(1)(b).

Recommended Regulatory Language

While the Act establishes the required contents of a proper invoice, experience in other Canadian jurisdictions has demonstrated that two issues have repeatedly resulted in unnecessary uncertainty and disputes: (1) Additional requirements arising from invoicing or payment systems and (2) clarity regarding section 7(1)(a)(v) "Description."

We recommend that the regulations address these matters by providing additional clarity. Suggested drafting language is provided below.

1. **<u>Additional requirements arising from invoicing or payment systems</u>**

   Where contracts require the use of electronic invoicing or payment systems, any additional submission requirements must be expressly set out in the contract.

   > *"For greater certainty, where a contract requires the use of a particular payment, project management, or electronic invoicing system, the requirement to use that system, together with any information, documentation, or other submission requirements arising from that system, must be expressly set out in the contract."*

2. **<u>Clarity regarding section 7(1)(a)(v) Description</u>**

   The regulations should clarify that the description requirement in section 7(1)(a)(v) is intended to identify the work, services, or materials being invoiced and should not be used to invalidate an otherwise proper invoice based on minor administrative disagreements.

   > *"For greater certainty, a description of the services or materials supplied is sufficient if a reasonable person can identify the work, services, or materials for which payment is being claimed. Minor deficiencies in the level of detail provided shall not, in and of themselves, render a proper invoice improper."*

6.3 What, if any, considerations are missing from this discussion paper that would ensure the success of prompt payment legislation being implemented in B.C.?

Regulations must be comprehensive, clear, and unambiguous, leaving as little room as possible for inconsistent interpretation or unnecessary disputes, regardless of BC's drafting conventions.

The regulation-making powers in section 49 are fundamental to the successful implementation of the Act. Given their significance, we anticipate continued engagement with industry throughout the regulatory development process and welcome the opportunity to review these matters with the Province as they are considered and developed.

In addition to the topics identified in the discussion paper, we have identified five additional areas that we believe warrant further consideration: (1) Adjudication Procedures, (2) Adjudication Authority, (3) Builders Lien Act and the Act, (4) Section 3, Substituted Owners, (5) Review of the *Cross-Jurisdictional Legislative Comparison Report* and (6) Other.

1. <u>Adjudication Procedures</u>

In our view, the adjudication regulations may ultimately determine the success or failure of the Act, to provide clarity and avoid differences in interpretation. They should recognize the significant variation in the value and complexity of disputes while preserving the expedited nature of adjudication and the flow of payment.

a. *Comprehensive Regulations:* The Province should make full use of the regulation-making powers under section 49 to provide clear and comprehensive procedural rules, including but not limited to:
   i. Adjudication procedures (s. 17) including what specifically can be modified by contract (ss. 17(1)(b) and 17(2));
   ii. Timing and other requirements for notices (ss. 18 and 26);
   iii. Consolidation of adjudications (s. 21);
   iv. Powers of adjudicator (ss. 27(2)(g), if any)
   v. Extensions (s. 30); and
   vi. Corrections that may or may not be made to a determination (s. 33(1)(b); discussed in further detail below).

b. *Timelines and Procedural Flexibility:* Clear and enforceable timelines are critical to maintaining the flow of payment; however, adjudicators and the parties should retain reasonable discretion under section 30(2) to extend procedural timelines where appropriate for more complex disputes. This flexibility is important for procedural fairness.

   During our consultation and discussions with other jurisdictions, the relationship between extensions of time and hourly adjudicator compensation was identified. While we are not suggesting this is a concern or that the regulations prescribe a specific solution, the Province may wish to consider whether reporting requirements, or other measures are appropriate to maintain confidence in the adjudication process.

c. *Notices and Responses*: We support regulations under section 49(2)(l), consistent with other Canadian jurisdictions, prescribing clear timelines for notices under section 18 and responses under section 26 and reasonable limits on the length of notices, responses, and supporting materials to ensure the process remains efficient and proportionate.

   During our consultation, concerns were raised regarding situations where a party may have significant time to prepare its claim before beginning adjudication, while the responding party has only the statutory timelines to prepare its response. While we are not suggesting a specific regulatory response, this is a topic we believe is worthy of awareness.

d. *Subsection 33(1)(b) Corrections:* We strongly recommend that the regulations, under s. 49(2)(p), prescribe *no* circumstances in which ss. 33(1)(b) may be exercised. Subsection 33(1)(a) already and rightfully captures "slips of the pen."
   i. The ability to amend a determination on the basis of an "injustice caused by an oversight on the adjudicator's part" undermines the finality of adjudication (see the concept of *functus officio* as discussed in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, paras. 33-35).
   ii. If the Province determines that s. 33(1)(b) must remain operative, the regulations must clearly and narrowly prescribe the only circumstances in which it may be exercised to preserve the finality of adjudication, maintain confidence in the process, and avoid the perception that parties may seek to influence an adjudicator after a determination has been issued.
   iii. Based on our review, section 33(1)(b) appears to have originated from Ontario's statutory arbitration framework and subsequently brought into its *Construction Act* framework. We have not identified an equivalent principle in BC's arbitration legislation.

e. *Monitoring Adjudication Timelines:* Detailed annual reporting will provide an important timeline accountability mechanism. While Ontario reports that 61% of adjudications were completed within the statutory timeline, little information is available regarding the value or complexity of those disputes.[8] The federal CanDACC reports the duration by days of each adjudication individually.[9] More comprehensive reporting would support future improvements to BC's adjudication regime.

2. <u>Adjudication Authority</u>

a. Robust education and continuing professional development for adjudicators. Feedback and experience from other Canadian jurisdictions indicate that substantive training is essential to maintaining consistency and quality in adjudication.

b. A single Adjudication Authority, similar to Ontario and federal models. While multiple Adjudication Authorities may become appropriate as BC's adjudication system matures, in our view, a single authority at the outset will promote consistency and reduce unnecessary complexity.

c. A requirement for the Adjudication Authority to publish anonymized adjudication determinations. This will assist adjudicators, industry participants, and prospective parties by promoting consistency and transparency in the application of the Act.

d. A requirement for the Adjudication Authority to publish detailed annual reports, including but not limited to:

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[8] Ontario Dispute Adjudication for Construction Contracts (ODACC), *Annual Report 2025* at 29, Table E.
[9] Canadian Dispute Adjudication for Construction Contracts (CanDACC), *Annual Report 2025* at 17, Table 4.

- Average days from the adjudicator receiving records under section 25 to the issuance of the determination.
- Average time to determination by dispute value (e.g., <$50k, $50k-$250k, $250k-$1M, >$1M).
- Percentage completed within statutory timelines.
- Number and average length of extensions and rationale.
- Number of adjudications exceeding 60, 90, and 120 days.

As noted above, a review of the annual reports published by ODACC and CanDACC demonstrates that *significantly* more performance data can be reported than is provided.

3. <u>Builders Lien Act and the Act</u>

a. We will continue to advocate for the modernization of the *Builders Lien Act* to address widely known issues: it is out-of-date, reflects a patchwork of case law overlaid on the legislative framework and represents an impediment to improving the productivity of BC's construction sector.

b. We urge continued coordination between the Act and the *Builders Lien Act* to ensure both Acts operate seamlessly together.

c. Written government guidance is required to clearly explain the interaction between the two Acts to minimize confusion.

4. <u>Section 3 Substituted Owners</u>

Extensive clarity for the application of s. 3 (Substituted Owners) under ss. 49(2)(b) and (c) is required.

a. In our strong opinion, regulations must provide clarity to ensure that s. 3 is not interpreted to allow owners to effectively contract out of their obligations under the Act by delegating payment obligations under the Act to an owner's representative, construction manager, consultant, or other representative as all of those parties are paid by owners.

b. Section 3 of the Act should only apply where an owner is replaced such as through a purchase, receivership, or trustee. In our discussions with various stakeholders, there is already uncertainty.

c. The regulations should clarify who is considered the owner for the purposes of the Act as contemplated under ss. 49(2)(b). At a minimum, they should expressly confirm that the owner is the person for whom the improvement is made and who receives the direct benefit of the improvement.

5. Review of the *Cross-jurisdictional Legislative Comparison of Prompt Payment and Adjudication Regimes Across Canada Report*

We encourage the Province to revisit the *Cross-jurisdictional Legislative Comparison of Prompt Payment and Adjudication Regimes Across Canada* during the development of the regulations. Prepared by leading construction lawyer Glenn Ackerley, the report identifies drafting considerations and lessons learned from jurisdictions across Canada that may improve legislative clarity and avoid future disputes. BC has the benefit of learning from those experiences before finalizing its regulatory framework.

6. Other Important Topics Requiring Consideration

a. *Mandatory review of the Act* and its regulations within five years, similar to Ontario's approach. This would provide an opportunity to incorporate lessons learned and make any necessary legislative or regulatory improvements.

b. *Protection against reprisals or "blackballing" for parties*, especially public sector owners, who exercise their statutory rights under the Act. Consider protections to limit or eliminate the use of clauses in tendering and contracts which permit owners and other parties to refuse to contract with any contractor or subcontractor that has engaged in a legal proceeding with the party: see for example *J. Cote & Son Excavating Ltd. v City of Burnaby*, 2018 BCSC 1491. Parties will have other means to make the commercial decision on who they do business with, but discrimination based on the use of statutory rights should not be one of them.

c. *Section 12 Right to Information*: We recommend that the Province review section 12, together with the interaction between the proper invoice provisions and downstream payment obligations, to ensure subcontractors have access to the information necessary for the prompt payment regime to function as intended, including the amount from their invoice included in the contractor's proper invoice to the owner and the concepts contemplated in ss. 49(2)(h) and (i). Further discussion with industry would be beneficial to confirm that these provisions fully achieve their intended purpose.

d. *Addressing project delivery methods*, including public-private-partnerships (P3s), so that it remains relevant regardless of changes in government policy or procurement practices.

e. *Potential Impact of Set-off:* Through our discussions with industry and legal experts, a potential issue has been identified where a party higher in the contractual chain may assert significant, untested claims of set-off and argue that its statutory payment obligations have been satisfied. Experience in other jurisdictions suggests this issue will arise in practice. The Province should consider whether any regulatory clarification is warranted to ensure the prompt payment framework is not undermined while recognizing that disputes regarding set-off remain subject to adjudication.

6.4 What tools, data, guidance materials, or engagement mechanisms would support effective implementation of the Act?

Effective implementation will require a coordinated effort involving the Province, the Adjudication Authority, industry associations, owners, contractors, subcontractors, suppliers, and consultants. No single organization can successfully implement the Act on its own. We support the solutions brought forward in the response from the Mechanical Contractors Association of BC (MCABC.)

We believe implementation responsibilities can be broadly divided as follows, with the Province as the leader:

1. <u>The Province</u>

a. Maintain a centralized information hub, provide email updates via a subscriber database to communicate updates, guidance, implementation materials and webinars hosted by industry associations.
b. Convene regular stakeholder meetings during implementation.
c. Publish guidance on the interaction and overlap between the Act and the *Builders Lien Act* to minimize confusion and rogue interpretation.
d. Develop plain-language guidance tailored to different audiences (owners, contractors, subcontractors, suppliers, consultants, and public sector organizations).
    i. Use practical scenarios and worked examples to explain how the Act and regulations apply in common industry specific situations.
e. Include consultants and payment certifiers in education and implementation efforts. While they have no statutory role under the Act, they continue to play an important contractual role in the payment process, especially for public sector projects.

2. <u>Adjudication Authority</u>

a. Publish detailed, data driven annual reports.
b. Publish anonymized adjudication determinations.
c. Develop adjudication-specific guidance for each type of party/position.
d. Provide information for and training for prospective adjudicators.
e. Deliver robust education for adjudicators and industry participants.
f. Consult with industry associations and stakeholders on emerging issues.

3. <u>Industry associations</u>

a. Develop and deliver practical implementation resources, including webinars, workshops, guides, checklists, templates, sample workflows, and practical examples illustrating payment and adjudication timelines.
b. Gather implementation industry feedback,
c. Work collaboratively with the Province and the Adjudication Authority to identify implementation issues and opportunities for improvement.

Our organizations have already begun this work and will continue collaborating on the development and delivery of educational resources.

Importantly, we strongly believe interpretation of the Act and development of clear regulations must remain the responsibility of the Province, with adjudication-specific guidance provided by the Adjudication Authority.