

Pay When Paid Clauses

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In British Columbia, a general contractor and subcontractor may validly agree to a “pay when paid clause” in a subcontract.² A “pay when paid” clause expressly and unambiguously makes payment by the owner to the general contractor a precondition to payment by the general contractor to the subcontractor. In such circumstances, the subcontractor takes on the contractual risk of non-payment by the owner to the general contractor.

The law generally provides that a general contractor can only rely on the condition that a subcontractor is not entitled to payment until the owner pays the general contractor if the terms of the contract between the general contractor and subcontractor clearly state such a condition. Put another way, the clause must clearly specify the condition governing the subcontractor’s legal entitlement to payment and not merely the time of payment as, absent a clear expression to the contrary, a clause that payment is not due to the subcontractor until the owner has paid the general contractor does not establish a condition precedent for payment but merely fixes a time for payment.³ The courts have held that an intention so important cannot be buried in obscure language that would not alert the subcontractor that payment for the subcontract work was conditional on the owner paying the general contractor.⁴

Generally, a “pay when paid” clause will not form part of a subcontract based on mere reference to a general contractor’s standard form subcontract (even if the parties are both aware of that subcontract’s terms) and will not be implied into a subcontract based on past dealings between the general contractor and subcontractor or in order to give business efficacy to the subcontract.⁵ Further, a general contractor may not be able to rely on a “pay when paid” clause in circumstances where an owner’s refusal to pay is due to the general contractor’s act or default under the general contract.⁶

That being said, where a subcontractor has had an opportunity to review the subcontract before signing it, the general contractor is generally under no obligation to draw the attention of the subcontractor to the “pay when paid” clause (even where the “pay when paid” clause is located in supplementary conditions). The courts have held that a person receiving a formal document requiring execution should, in the ordinary course of business, approach the document with the sense that it was sent for a purpose and has some function. Accordingly, it is incumbent on the subcontractor to review the subcontract before signing or otherwise bear the risk of a “pay when paid” clause as part of the subcontract.⁷

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² *Brookwood Ironworks Ltd. v. DGS Construction Co.*, [1993 CanLII 2374](#) (BC SC)

³ *Timbro Developments Limited v. Grimsby Diesel Motors Inc. et al* (1988), 32 C.L.R. 32 (Ont. C.A.)

⁴ *Arnoldin Construction & Forms Ltd. v. Alta Surety Company*, [1995 CanLII 4295](#) (NS CA)

⁵ *Pro Star Mechanical Contractors Ltd. v. Farmer Construction Ltd.*, [1994 CanLII 602](#) (BC SC)

⁶ *Metal-Air Mechanical Systems Ltd. v. Ledcor Construction Limited*, [2008 CanLII 54961](#) (ON SC)

⁷ *Brookwood Ironworks Ltd. v. DGS Construction Co.*, [1993 CanLII 2374](#) (BC SC)