

# Here's the Drill: "Pay When Paid" Clauses in Subcontracts

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Many subcontracts include payment terms that try to shield the contractor from having to pay a subcontractor in the absence of the contractor receiving payment from the owner. These clauses can take different forms and are sometimes referred to as "pay when paid", "pay no later than", or "pay if paid" clauses.

A recent court decision in *Canadian Pressure Testing Technologies Ltd v EllisDon Industrial Inc*, 2022 ABKB 649 provides some useful guidance for how these clauses will be interpreted and enforced.

The court in *Canadian Pressure* was asked to review the following payment term in a subcontract:

[P]ayments shall become due and payable no later than five (5) business days after the [Contractor] receives payment pursuant to the terms and conditions of the Prime Contract from the Owner...

The contractor asserted this was a "pay-when-paid" clause and that it was not required to pay the subcontractor until it received payment from the owner. The subcontractor conversely argued that the clause did not alter the contractor's basic payment obligation in the contract but instead simply fixed an outside date by which the contractor had to pay (in other words, the clause was merely a "pay no later than" clause).

The court ruled in favour of the subcontractor and found that the language was too ambiguous to rise to the level of a true "pay when paid" clause. The court explained that any clause limiting a subcontractor's right to payment must be clear, specific, and unambiguous. The court also examined the surrounding circumstances and found the contractor's failure to obtain the owner's prior approval for the work completed by the subcontractor contributed to the owner's non-payment.

The case highlights that "pay when paid" clauses should leave no room for interpretation and that contractors should avoid contributing to the reasons for the owner's non-payment.

For those working in provinces with prompt payment legislation, it is also important to be mindful of the applicable statutory payment obligations and to ensure your contract's payment terms comply and align with the prompt payment rules.

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