PROMPT PAYMENT MOVEMENT SWEEPS ACROSS CANADA: IS THE ENERGY INDUSTRY READY TO COMPLY?

PAULA OLEXIUK, MELANIE GASTON,
JAGRITI SINGH,* AND LESLEY LEE**

Jurisdictions throughout Canada are debating, drafting, and enacting legislation for prompt payment and mandatory adjudication in the construction industry. The purpose of such legislation is to avoid the pitfalls of delayed payments and improve the dispute settlement system. Although this legislative push is inspired by reforms undertaken in the UK decades ago, Canadian jurisdictions are now following Ontario's lead in legislating swift payment deadlines and adjudication requirements. This article surveys these legislative changes as they first occurred in the UK context and as they are now occurring throughout Canada. Special attention is given to implications for the Canadian energy sector. The article concludes by offering some risk allocation strategies for drafting contracts under the new statutory requirements.

TABLE OF CONTENTS

I. INTRODUCTION 314
II. STRIKING THE BALANCE 315
A. BORROWING FROM THE UNITED KINGDOM 315
B. BUILDING THE *CONSTRUCTION ACT* OF ONTARIO 316
C. FEDERAL FRAMEWORK 318
D. DEBATES IN ALBERTA 321
III. PROMPT PAYMENT 323
A. PROMPT PAYMENT IN THE UNITED KINGDOM 323
B. *CONSTRUCTION ACT* OF ONTARIO 325
C. *BUILDERS' LIEN (PROMPT PAYMENT) AMENDMENT ACT, 2020* OF ALBERTA 328
D. FEDERAL *PROMPT PAYMENT FOR CONSTRUCTION WORK ACT* 330
E. WHAT IS HAPPENING ELSEWHERE IN CANADA? 331
IV. ADJUDICATION 337
A. ADJUDICATION IN THE UNITED KINGDOM 337
B. ADJUDICATING IN ONTARIO 342
C. ADJUDICATION FRAMEWORK IN ALBERTA 347
D. FEDERAL *PROMPT PAYMENT FOR CONSTRUCTION WORK ACT* 349
E. WHAT IS HAPPENING ELSEWHERE IN CANADA? 350
V. HOW CAN THE ENERGY INDUSTRY PREPARE? 352
A. CONTRACT DRAFTING STRATEGIES 352

* Paula Olexiuk and Melanie Gaston are partners in the Calgary office of Osler, Hoskin & Harcourt LLP. Jagriti Singh is an associate in the Toronto office of Osler, Hoskin & Harcourt LLP. The authors would like to thank Storme Mckop, Cristina Cosneanu, Cole Tavener, Andrew Rintoul, Pamela Lee, and Gabriel Paquette Allard at Osler, Hoskin & Harcourt LLP for their assistance in the preparation of this article.

** Lesley Lee is the Manager, Litigation at TC Energy.

B. CAPL OPERATING PROCEDURE AND THE *ALBERTA BUILDERS' LIEN AMENDMENT ACT* 352
C. UPDATE PRACTICES AND PROCESSES 353
VI. CONCLUSION 354

I. INTRODUCTION

Prompt payment and mandatory adjudication legislation is being enacted across Canada in an effort to alleviate perceived delays in payment and the settlement of disputes down the construction pyramid. The prompt payment regime introduces swift payment deadlines that were inspired by similar reforms introduced over 20 years ago in the United Kingdom.

A watershed moment came in 2019 when such legislation came into force in Ontario through amendments to the *Construction Act* (formerly the *Construction Lien Act*).[1] Ontario was the first Canadian jurisdiction with a prompt payment and adjudication regime layered over an existing construction lien regime. To a large degree, the intersection between payment requirements and the lien process has been considered. Today, much of the development industry in Ontario has revised its internal processes and redrafted contracts to address the new rules.

While stakeholders in Ontario are grappling with the inevitable growing pains caused by the new legislation, a number of other jurisdictions in Canada, such as Nova Scotia, Saskatchewan, and Alberta, as well as the federal government, have followed Ontario's lead and passed similar legislation, which is yet to come into force. In Quebec, the Chair of the Conseil du trésor authorized the implementation of a pilot project in 2018 which prescribes the use of payment calendars and introduces dispute settlement by adjudicators to facilitate payment to enterprises that are parties to public construction work contracts and related public subcontracts. Still, other provinces, namely New Brunswick, Manitoba, and British Columbia, are either implementing other initiatives in relation to prompt payment or considering what form prompt payment and adjudication should take in their provinces. These provinces are having some interesting discussions regarding whether the Ontario model is right for them.

The construction legislation discussed in this article will apply to the energy sector in each respective province. Since the energy industry is such a significant part of the Canadian economy, it is important to evaluate the potential impacts of the legislation on the energy sector. For example, the Alberta *Builders' Lien Act*,[2] and similar legislation in other provinces, applies to any work on or furnishing materials for improvement of the land, including, in some instances, mines and minerals leases. As such, the *ABLA*, like many other provincial statutory regimes, has always applied to construction, and any other "improvements" to the land, related to the energy industry. Contracts and operations in the construction industry, including the energy sector, will be invariably impacted by the implementation of prompt payment legislation, and this article will discuss some of the contract drafting strategies for risk allocation under the new regime. Also, since many oil and

---

1 *Construction Act*, RSO 1990, c C.30; *Construction Lien Act, 1983*, SO 1983, c 6 [*CLA*].
2 RSA 2000, c B-7 [*ABLA*].

gas operations incorporate the Canadian Association of Petroleum Landmen (CAPL) standard forms, this article will also highlight some concerns that might arise under the CAPL standard forms.

II. STRIKING THE BALANCE

A. BORROWING FROM THE UNITED KINGDOM

In May 1998, the *Housing Grants, Construction and Regeneration Act 1996*[3] came into force. Its purpose was to provide greater payment security to the construction industry while ensuring cash flow throughout the duration of construction projects by establishing payment rules.[4] While parties could retain a degree of flexibility in negotiating payment terms in their construction contracts, it was intended that the *UK Construction Act* and associated regulations would set out certain minimum standards that would be incorporated by law into their contracts.[5]

Since the *UK Construction Act* came into force in 1998, various consultations between the UK government and the construction industry resulted in new directions for the *UK Construction Act*. For instance, in 2007, although it was determined that the *UK Construction Act* had successfully improved cashflow, there was room for improvement in terms of: (1) increasing transparency and clarity in the exchange of information relating to payment to enable the better management of cash flow; (2) encouraging the parties to resolve disputes by adjudication where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and (3) improving the right to suspend performance under the contract.[6]

In 2009, the *Local Democracy, Economic Development and Construction Act 2009* amended the prompt payment provisions of the *UK Construction Act* to, among other things, extend the *UK Construction Act*'s application to all qualifying construction contracts, extend the prohibition on pay-when-paid provisions to pay-when-certified provisions, and add various requirements to payment notices.[7] This amendment also added section 112(3A), providing the defaulting payer would be "liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred."[8]

---

3 (UK), 1996, c 53 [*UK Construction Act*].

4 Jessica Tierney, "Construction Law Guide to: *The Construction Act*" (2019) 30:5 Construction L 14 at 15.

5 Richard NM Anderson & John T Aycock, "The Introduction of Payment and Adjudication Provisions into the Construction Laws of the Isle of Man" (2007) 73:3 Arbitration: Intl J Arbitration Mediation & Dispute Management 320 at 322, cited in Bruce Reynolds & Sharon Vogel, "Striking the Balance: Expert Review of Ontario's *Construction Lien Act*" (30 April 2016), c 8, s 2.4.2, online: <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/> [*Report*].

6 Jeremy Glover, "The New Draft Construction Contracts Bill: Changes to the HGCRA Finally Announced" (July 2008), online: <www.fenwickelliott.com/sites/default/files/New%20Draft%20Construction%20Contracts%20Bill%20changes%20to%20HGCRA.pdf>, cited in *Report*, *supra* note 5, c 8, s 2.4.2.

7 *Local Democracy, Economic Development and Construction Act 2009* (UK), 2009 c 20, ss 139(1), 142(2), 143–45 [*Local Democracy*], amending the *UK Construction Act*, *supra* note 3, ss 107(1), 110–12, 190, cited in *Report*, *ibid*, c 8, s 2.4.2.

8 *Local Democracy*, *ibid*, s 145, amending the *UK Construction Act*, *ibid*, s 112, cited in *Report*, *ibid*, c 8, s 2.4.2.

As the *UK Construction Act* sets out only minimum requirements for addressing adjudication, one critical element to its effective operation has always been *The Scheme for Construction Contracts (England and Wales) Regulations 1998*.[9] Indeed, the *UK Construction Act* was not enacted until the UK Parliament approved the *Scheme*. Although the *UK Construction Act* applies to construction contracts for carrying out construction operations in England, Wales, or Scotland, there are separate schemes for England, Wales, and Scotland.[10] This article discusses the *Scheme* applicable to England and Wales only.

The adjudication provisions of the *Scheme*, amended in 2011, apply where a construction contract does not comply with the requirements of the *UK Construction Act*. The *Scheme* articulates the procedures and timelines for both adjudication and prompt payment.[11] Further, the *Scheme* aims to provide feasible arrangements for parties to construction contracts applicable in a variety of circumstances.[12]

B. BUILDING THE *CONSTRUCTION ACT* OF ONTARIO

The *Construction Lien Act* of Ontario was enacted in 1983 and had not undergone a holistic review since its enactment until recently.[13] Significant lobbying efforts by the construction industry, together with developments in the industry, that include the increasing popularity of public-private partnerships, necessitated a critical appraisal of the effectiveness of the *CLA* in achieving its policy objectives within the modern context.

The significant length of time that contractors, subcontractors, and suppliers typically waited to receive payment following the submission of an invoice was a long-standing issue in the construction industry. To address these concerns, the Ontario Legislature considered the implementation of prompt payment legislation in 2011 through Bill 211 titled *Protecting Contractors Through Prompt Payment Act, 2011*[14] and, again, in 2013 through Bill 69 titled *Prompt Payment Act, 2014*,[15] but both of these Bills failed to materialize as legislation. While Bill 69 was not passed, the province decided that a broader review of the *CLA* was warranted.

In April 2016, the report titled *Striking the Balance: Expert Review of Ontario's Construction Lien Act*,[16] resulting from legal research significantly informed by the UK experience and resulting legislation and extensive industry stakeholder consultations, was delivered to the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure of Ontario. As the name suggests, the *Report*

---

9 *The Scheme for Construction Contracts (England and Wales) Regulations 1998* (UK), SI 1998/649, as amended by *The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011* (UK), SI 2011/2333 [*Scheme*].

10 *UK Construction Act*, *supra* note 3, s 104.

11 *Ibid*, s 114.

12 *Ibid*.

13 *CLA*, *supra* note 1.

14 Bill 211, *An Act to protect contractors by requiring prompt payment of construction contracts*, 2nd Sess, 39th Leg, Ontario, 2011.

15 Bill 69, *An Act respecting payments made under contracts and subcontracts in the construction industry*, 2nd Sess, 40th Leg, Ontario, 2013.

16 *Report*, *supra* note 5.

aimed to strike a balance between competing interests and particularly between regulation and freedom to contract.[17]

The *Report*'s intent to perform a thorough and comprehensive assessment of the *CLA* was reflected in the breadth and scope of the substantive issues examined. The *Report* divided these issues into distinct chapters addressing: (1) lienability; (2) preservation, perfection, and expiry of liens; (3) holdback and substantial performance; (4) summary procedure; (5) construction trusts; (6) promptness of payment; (7) adjudication; (8) surety bonds; (9) technical amendments; and (10) industry education and periodic review. The *Report* generated 100 individual recommendations.

The *Report* proposed three key changes, namely modernizing the lien and holdback provisions, adopting a prompt payment regime requiring payment within 28 days of submission of a proper invoice, and introducing mandatory adjudication of construction disputes with decisions rendered within 30 days.[18] Other topics of the *Report* are also significant in their own right, including recommendations such as mandatory surety bonding for all public projects regardless of size.

On 12 December 2017, the *Construction Lien Amendment Act, 2017*, which incorporated almost all of the 100 recommendations of the *Report*, received royal assent.[19] These reforms modified and expanded upon the *CLA*, reflected by its name change from the *Construction Lien Act* to the *Construction Act*,[20] which was appropriate given that its scope was significantly broader than traditional liens.

The *Construction Lien Amendment Act, 2017* came into force in three phases: minor edits to the *CLA* on 12 December 2017, the lien modernization provisions on 1 July 2018, and the prompt payment and adjudication regimes on 1 October 2019. On 6 December 2018, the *Restoring Trust, Transparency and Accountability Act, 2018*[21] also introduced a number of amendments to the *Construction Act*, including changes to the adjudication procedures and transition provisions.

As the flagship amendments to Ontario's *Construction Act* came into effect on 1 October 2019, Ontario had three versions of the legislation in play simultaneously: first, the *CLA* and regulations as of 29 June 2018; second, the *Construction Act* with the first phase of amendments on lien modernization effective 1 July 2018; and third, the *Construction Act* with the first phase of amendments mentioned above as well as the second phase of amendments on prompt payment and adjudication effective 1 October 2019. Transition provisions like this are not uncommon in new legislation, and in the case of construction, they provide industry participants who have spent considerable lead time structuring their projects and contracts some ability to continue under the old rules.

---

17 *Ibid*, c 1.
18 *Ibid*.
19 SO 2018, c 24 - Bill 142.
20 *Construction Act*, *supra* note 1.
21 SO 2018, c 17 - Bill 57.

The transition provisions in section 87.3 of the *Construction Act* determine which one of these three versions of the legislation govern an improvement or contract in Ontario. Section 87.3(1) grandfathers certain improvements under the 29 June 2018 version of the *CLA*, depending on when a contract for the improvement was executed or a procurement process for the improvement was commenced. The *Construction Act* considers a procurement process as commenced on the earliest of the making of a request for qualifications, a request for quotation, a request for proposals, or a call for tenders.[22]

However, section 87.3(3) of the *Construction Act* is an exception to the grandfathering provision under section 87.3(1).[23] Starting 1 October 2019, certain provisions of the *Construction Act* relating to municipal liens apply with respect to an improvement to premises in which a municipality has an interest, even if a contract for the improvement was entered into or a procurement process for the improvement was commenced before 1 July 2018.

Further, under section 87.3(4) of the *Construction Act*, prompt payment and adjudication regimes under Parts I.1 and II.1 of the *Construction Act* do not apply with respect to contracts and subcontracts, if: (a) the contract was entered into before 1 October 2019, and any subcontracts, made thereunder; or (b) the contract was entered into on or after 1 October 2019, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises, and any subcontracts made thereunder.[24]

The transition provisions are not straightforward or free from interpretation, and some of the subtle nuances to the analysis include two transition rules that are worded differently from each other and focus on two elements, namely contracts and improvements. Given the varying rights and remedies of industry participants under the *Construction Act*, the choice of applicable version is an important one. We anticipate that any differences in interpretation of the transition provisions will be resolved by the courts as cases arise.

C. FEDERAL FRAMEWORK

At the federal level, Public Services and Procurement Canada (PSPC) has taken a leadership role to advocate that construction related payments follow three prompt payment principles: promptness, transparency, and shared responsibility. In 2016, PSPC formed a working group with the Canadian Construction Association (CCA) and Defence Construction Canada (DCC). The working group's goal is to enhance the adoption of prompt payment principles. The working group first prepared an engagement strategy;[25] then the working group developed and implemented the first phase of its action plan.[26]

---

22 *Construction Act*, *supra* note 1, s 1(4).

23 *Ibid*, s 87.3.

24 *Ibid*, s 87.3(4).

25 Government of Canada, "Prompt Payment Initiative Engagement Strategy" (November 2016), online: *Public Services and Procurement Canada* <www.dcc-cdc.gc.ca/documents/corporate/Prompt_ Payment _Engagement_Strategy.pdf> ["Engagement Strategy"].

26 Government of Canada, "Action Plan on Prompt Payment in the Construction Industry" (16 December 2020), online: *Public Services and Procurement Canada* <www.tpsgc-pwgsc.gc.ca/biens-property/ divulgation-disclosure/papsdic-apppci-eng.html>.

The engagement strategy highlighted problems caused by delays in the chain of payments down the construction pyramid and initiatives in other jurisdictions designed to address the issues. Citing a CCA estimate, the engagement strategy noted that, in 2015, $46 billion in payments remained unpaid after the conventional 30-day payment period, which represented about 16 percent of all construction payments nationally.[27] In contrast, the engagement strategy also noted that PSPC is required by the Treasury Board Policy to pay interest after 30 days, unless the contract specifies otherwise, and late payment interest represented approximately 0.013 percent of PSPC's $1.9 billion of business in 2015–16.[28] However, the engagement strategy recognized the importance of the Government of Canada being seen to take an active leadership role to advance the adoption of prompt payment principles.

On 23 January 2018, PSPC commissioned an industry engagement initiative to develop a recommendation package for the Government of Canada on the potential application of prompt payment and adjudication to federal construction projects. Industry consultation commenced in March 2018 and resulted in a report titled *Building a Federal Framework for Prompt Payment and Adjudication* on 8 June 2018.[29] Although the consultation process represented a significant acceleration compared with the similar 13-month consultation process in Ontario, one of the key recommendations in the Federal Report was to apply selected elements of the widely consulted new Ontario model, described below, at the federal level.

A number of important questions were raised on the application and scope of the statute. For instance, the Federal Report recommended that the legislation operate only in relation to matters integral to federal powers. It recommended limiting the legislation to federal construction projects on lands owned by the federal government and defence projects and that the legislation should not apply merely on the basis that the federal government had funded a project in whole or in part or because the federal government had specific regulatory authority in relation to a particular industry. An excerpt of the discussion reflecting the examples of projects envisaged is provided below:

> [I]n our view the mere fact that the federal government may fund a project, in whole or in part, including P3 projects, is not sufficient to render such legislation constitutionally valid. Nor is the mere fact that an industry such as the banking industry, the nuclear industry or the aeronautics industry is federally regulated for other purposes sufficient to establish a basis for the application of federal prompt payment legislation for construction projects relating to these industries.[30]

For construction projects located on Indigenous lands, the Federal Report recommended further appropriate consultations before introducing a prompt payment or adjudication regime.[31]

---

27 "Engagement Strategy," *supra* note 25 at 8.

28 *Ibid*.

29 R Bruce Reynolds & Sharon C Vogel, "Building a Federal Framework for Prompt Payment and Adjudication" (8 June 2018), online: *Canadian Construction Association* <www.cca-acc.com/wp-content/uploads/ 2018/08/Building-a-Federal-Framework-Report.pdf> [Reynolds & Vogel, Federal Report].

30 *Ibid* at 105.

31 *Ibid*.

On 21 June 2019, the *Federal Prompt Payment for Construction Work Act*[32] received royal assent as part of the larger federal budget legislation the *Budget Implementation Act, 2019, No. 1*.[33] The *Federal Prompt Payment Act* will be effective on the date determined by the order of the Cabinet. This effective date has not yet been determined.

Once in effect, the *Federal Prompt Payment Act* will not grandfather existing contracts; instead, it provides for a one-year deferral period before it applies to existing contracts.[34] Therefore, construction contracts executed prior to the enactment of the new legislation will be subject to the new legislation starting a year from its enactment. We anticipate disruption as existing contracts may be amended somewhere mid-performance to provide for contractual clarity and alignment on prompt payment and adjudication or risk the potential application of the legislation, which will override the contract to the extent of conflicting terms. However, the scope of the *Federal Prompt Payment Act* is narrower than the Ontario *Construction Act* as it only deals with prompt payment and adjudication, so the federal transition may be more targeted with specific changes.

Given that most provinces are either discussing or undertaking steps to introduce prompt payment and adjudication regimes, it is important to have consistency and clarity in relation to legislative alignment. The Federal Report recommended the federal government address the issues of legislative alignment by exploring the following three options: (1) exempt application of certain parts of the federal legislation if the Governor in Council is satisfied that provincial legislation is "substantially similar"; (2) develop a model law to address the topic of prompt payment and adjudication; and (3) initiate an alignment initiative with a view to attempt to negotiate an intergovernmental agreement on prompt payment and adjudication legislation.[35]

The *Federal Prompt Payment Act* follows the first option provided by the Federal Report, where the Governor in Council may designate any province if, in accordance with the criteria set out in the regulations, in its opinion a province has enacted a prompt payment regime for the payment of contractors and subcontractors and an adjudication regime in case of nonpayment of contractors or subcontractors that is "reasonably similar" to the one set out in the *Federal Prompt Payment Act*.[36] As of the writing of this article, no guidance regarding which provinces will be so designated has been provided, although, as various jurisdictions develop and enact legislation drawn in large part with consideration of other provincial enactments, it is expected helpful similarities aligning various prompt payment requirements will permit multiple provincial designations and a more user-friendly scheme.

Upon designation, certain provisions relating to prompt payment to the subcontractor will no longer apply to a contractor performing construction work for a project located in the designated province. Further, the *Federal Prompt Payment Act* will not apply to any subcontractor that is to perform construction work or any service provider that is to pay for

---

32 SC 2019, c 29, s 387 [*Federal Prompt Payment Act*].

33 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019 at div 26.

34 *Federal Prompt Payment Act*, *supra* note 32, s 25.

35 Reynolds & Vogel, Federal Report, *supra* note 29 at 11.

36 *Federal Prompt Payment Act*, *supra* note 32, s 6.

construction work, for the purposes of that construction project. The Governor in Council may, with respect to all construction projects located in that province, adapt any provisions of the *Federal Prompt Payment Act* that apply to Her Majesty or contractors for the purpose of addressing any inconsistency or conflict between those provisions and the provincial law. However, the exemptions accorded to a designated province will not apply to a construction project in such province if any part of that project straddles the border between two or more provinces.[37]

Any individual construction project may also be exempted from the application of the *Federal Prompt Payment Act* by the Governor in Council.[38]

D. DEBATES IN ALBERTA

The Government of Alberta introduced Bill 37, titled the *Builders' Lien (Prompt Payment) Amendment Act, 2020*,[39] on 21 October 2020. The Original Bill 37 amended the *ABLA* for the first time in nearly 20 years in an attempt to modernize the current *ALBA*. Following Ontario's lead, the Government of Alberta took the initiative to address the concerns of the construction industry voiced over the past two decades, including implementing prompt payment requirements.[40] The Government of Alberta consulted with industry participants and the Original Bill 37 had direct stakeholder input. As such, the Original Bill 37 received support from several major industry stakeholders, including not only large private corporations but also the Alberta Construction Association, the Building Trades of Alberta, the Calgary Construction Association, Calgary Women in Construction, the Alberta Trade Contractors Coalition, Concrete Alberta, the Alberta Roofing Contractors Association, and the Electrical Contractors Association of Alberta.[41]

The *ABLA* does not contain any rules relating to the timeline for payment in the construction industry. In recent years, the average payment time in Alberta's construction industry has increased from 45 days to 70 days.[42] These payment delays cause major problems for contractors and subcontractors who are often paid months after completing their work. To help resolve this issue, the Original Bill 37 had proposed a 28-day deadline for the payment of a "proper invoice" for work done or materials furnished, whether under a contract or a subcontract, and a 14-day deadline for the dispute of a "proper invoice" from any contractor or subcontractor.[43]

The Original Bill 37 payment structure deviated from the payment structure in Ontario's *Construction Act* noted above, which added an additional seven days for each level of

---

37 *Ibid*.
38 *Ibid*, s 7.
39 2nd Sess, 30th Leg, Alberta, 2020 (first reading 21 October 2020) [Original Bill 37].
40 Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," 1st reading, *Alberta Hansard*, 30-2, Day 55 (21 October 2020) at 2665 (Hon Nate Glubish) [21 October 2020 *Hansard*]; *Builders' Lien (Prompt Payment) Amendment Act, 2020*, SA 2020, c 30 (assented to 9 December 2020) [*ABLAA*], amending *ABLA*, *supra* note 2.
41 Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," 2nd reading, *Alberta Hansard*, 30-2, Day 59 (28 October 2020) at 2838 (Christina Gray) [28 October 2020 *Hansard*].
42 *Ibid* at 2830 (Jackie Armstrong-Homeniuk).
43 *ABLAA*, *supra* note 40, s 32.2(1).

payment down the construction chain. Despite the overall support for Original Bill 37 from the Alberta Legislature, the majority of the debate with respect to it arose from the inclusion of this singular payment structure rather than a cascading structure. Many argued that this singular structure did not provide additional time for contractors to pay subcontractors down the chain. Considerable debate resulted regarding the practical difficulties that contractors and subcontractors would face trying to meet these timelines and the problems they would cause in the construction industry. For example, if an owner made a payment to the general contractor on the 27th day, it would only leave one day for the rest of the payments to be made throughout the construction chain. Many were concerned that this proposed structure could cause extreme difficulties for contractors and subcontractors to comply with prompt payment requirements. Some argued that subcontractors are particularly vulnerable because they might not get future work from a contractor if they complain about late payments, but late payments also limit their financial ability to place bids for other work.[44] Additionally, the Original Bill 37 would also result in the issuance of multiple "proper invoices" triggering the 28-day payment deadline, each with different time periods calculated at each level of the construction pyramid.

Although the Original Bill 37 passed the second reading on 28 October 2020, on 4 November 2020, amendments were introduced by the Government of Alberta in response to the concerns noted above, creating Amended Bill 37 which was passed as the *ABLAA*.[45] The *ABLAA* made significant adjustments to the prompt payment requirements by revising the structure of the payment timelines and revising the definition of a proper invoice. The Amended Bill 37 was the Government of Alberta's response to concerns about the complexities that would have resulted from the Original Bill 37.

Under the *ABLAA*, a "proper invoice" is a written bill or other request for payment given by the contractor to an owner. This definition removed all references to subcontractors, with the resulting amendment that only contractors can submit proper invoices under the legislation. Additionally, subject to regulations, billings are mandatory at least every 31 days unless contractual requirements for testing and commissioning are not met. Since the regulations have not been published yet, it is unclear whether this requirement will permit the use of milestone payments. The *ABLAA* does not require a proper invoice to cover 100 percent of the materials and labour provided in each 31-day period unless it is required by the contract or by the upcoming regulations.[46]

For payment timing, the clock starts ticking once the owner receives a proper invoice from the contractor. Once the contractor receives payment from the owner, it has an additional seven days to pay any subcontractors for work that was included in the paid invoice. This significant change responded to concerns about having only 28 days for all payments to be made as proposed in the Original Bill 37. This payment timeline also aligns with the payment timeline under Ontario's *Construction Act*.

---

44 28 October 2020 *Hansard*, *supra* note 41 at 2830 (Jackie Armstrong-Homeniuk).

45 Bill 37, *Builders' Lien (Prompt Payment) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 9 December 2020), SA 2020, c 30 [Amended Bill 37], enacted as *ABLAA*, *supra* note 40.

46 Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," Committee of the Whole, *Alberta Hansard*, 30-2, Day 63 (4 November 2020) at 3042 (Lorne Dach).

The schematic below reflects a scenario where none of the parties dispute entitlement to invoice payment and each receiving party pays the submitting party in full.

Diagram 1: Payment Timelines

Although this issue was less debated, certain concerns regarding the transparency of the adjudication process were also raised during the second reading of Original Bill 37. The *ABLAA* also made changes to the adjudication process, including providing clear timelines for this process. The *ABLAA* requires the owner to give a notice of any dispute articulating the reasons for nonpayment within 14 days of receiving a proper invoice, failing which the owner will be required to pay the contractor within the 28-day timeline. A contractor who receives a notice of dispute from an owner or a subcontractor who receives a notice of nonpayment from the contractor will either pay the subcontractor within 35 days or 42 days, as applicable, of giving proper notice to the owner, or they will issue a notice of nonpayment within seven days of receiving the notice of dispute or notice of nonpayment. As a result of the cascading payment mechanism and the changes to the adjudication process, *ABLAA* removes the pay-when-paid clause prohibition that was introduced in the Original Bill 37.

Lastly, additional concerns were also raised about the interest rate associated with late payments, which is to be prescribed by the regulations. Since regulations are decided behind closed doors by the Premier and the Cabinet, it remains unclear whether the interest rate will be a sufficient deterrent to prevent late payments.[47] These concerns were not addressed in the *ABLAA*.

III. PROMPT PAYMENT

A. PROMPT PAYMENT IN THE UNITED KINGDOM

The *Report* cites a UK commentator who referred to the purpose of prompt payment legislation as "not to compel owners and general contractors to pay all certified amounts 'uncritically' but to avoid payment delays and to resolve disputes in a timely manner while the project is ongoing."[48]

The *UK Construction Act* contains several key elements relevant to prompt payment. Parties to a construction contract are generally free to agree on their own terms for payment and related payment periods.[49] Sections 109 through 113 describe the payment regime under the *UK Construction Act*, including a system of staged payments, requirements for adequate

---

47 28 October 2020 *Hansard*, *supra* note 41 at 2831 (Deron Bilous).

48 See Anthony May, "Set Back to Set Off" (2013) Society Construction L (UK) Paper 184 at 7–9, cited in *Report*, *supra* note 5, c 8, s 2.4.2.

49 *Report*, *ibid*.

mechanisms to determine due dates for payments, and provisions specifying conditional payments and notice requirements.

A construction contract must provide an adequate mechanism for determining what payment becomes due under the contract and when.[50] However, in complying with such requirements, a construction contract cannot make payment conditional on the performance of obligations under another contract or a decision by any person as to whether obligations under another contract have been performed.[51] Therefore, the *UK Construction Act* appears to prohibit any kind of pay-when-certified arrangements.

The UK courts have determined that adequate mechanisms for determining when payments become due under a contract include either a timetable or a means for resolving deadlock in reaching agreement.[52] Every construction contract must also provide for a final date for payment in relation to any sum which becomes due and the final date for payment.[53]

Separately, a three-stage payment procedure, in addition to the basic entitlement of a party to receive regular payments under a construction contract, creates a more certain payment regime.[54] First, the payer must give notice to the payee specifying the sum considered to be due at the payment due date. The payer's notice must identify the amount due and the basis on which that sum is calculated.[55] At the second stage, if the payer does not give notice, the payee can give a notice often referred to as a "payment default notice" or "payee's notice," identifying the sum claimed and the basis for its calculation. Typically, an application for payment is deemed to be a payee notice.[56] Lastly, the payer must pay the sum specified on or before the final date for payment. However, the payer may give notice of its intention to pay less than the notified sum before the amount becomes due, specifying its own calculations for the basis for the lesser amount.[57]

Pay-when-paid provisions are prohibited except in cases of insolvency.[58] This provision originally stemmed from the 1993 report of Sir Michael Latham, in which it was found that the use of pay-when-paid provisions were "a potential cause of bankruptcy among small and medium-sized businesses."[59]

On 17 September 2004, Sir Latham delivered a supplementary report on the *UK Construction Act* recommending a number of amendments to the *UK Construction Act*, including changes to provisions regarding adjudication, such as the removal of the requirement for a contract to be in writing, and changes intended to simplify the payment

---

50 *UK Construction Act*, *supra* note 3, s 110.
51 *Ibid*.
52 *Maxi Construction Management Ltd v Mortons Rolls Ltd* [2001], Scot CS 199 at paras 20, 28.
53 *UK Construction Act*, *supra* note 3, s 110(1).
54 Peter Coulson, *Coulson on Construction Adjudication*, 4th ed (Oxford: Oxford University Press, 2018) at 81 [Coulson 2018].
55 *UK Construction Act*, *supra* note 3, s 110A.
56 Coulson 2018, *supra* note 54 at 81.
57 *Ibid*.
58 *UK Construction Act*, *supra* note 3, s 113.
59 *Report*, *supra* note 5, c 8, s 2.4.2, citing Michael Latham, "Constructing the Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry" (July 1994), online: <constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>.

process.[60] The majority of the recommendations contained in Sir Latham's supplementary report were included in the *Local Democracy, Economic Development and Construction Act 2009* mentioned above.[61]

The *UK Construction Act* provides for the right to suspend performance for non-payment following the provision of at least seven days' notice of the intention to suspend performance containing the ground(s) of the suspension. Once payment is made in full, the right to suspend performance ceases.[62]

The default provisions of the *Scheme* will imply terms where the parties have failed to include required provisions in their contract.[63]

The *Scheme* provides that a party to a construction contract shall, not later than five days after the date on which any payment becomes due from such party or would have become due, give notice to the other party to the contract specifying the amount, if any, of the payment such party has made or proposed to make, to what the payment related, and the basis on which that amount is calculated.[64]

B. *CONSTRUCTION ACT* OF ONTARIO

On 1 October 2019, a cascading prompt payment regime came into effect in Ontario. Many, if not most, of the provisions of the *Construction Act* strikingly resemble or can find their roots in, those of the *UK Construction Act* and the *Scheme*. Like the UK legislation, the Ontario regime streamlines the payment process throughout the construction pyramid by prescribing timelines for payment to contractors and subcontractors while respecting the fundamental freedom of the parties to contract in respect of payment terms around a "proper invoice."

The concept of a proper invoice is key to understanding this inherent balance. The minimum requirements constituting a proper invoice are described in the *Construction Act* and include the expected basic information relating to the work such as contractor's details, date of invoice, and amount payable but also any other information that may be prescribed by regulation as well as additional documents that are agreed upon in the contract such as statutory declarations or Workplace Safety and Insurance Board related confirmations.[65]

Any contract provision that makes submission of a proper invoice conditional upon prior payment certification or the owner's prior approval will be of no force or effect; any such certification or approval would have to take place after submission of the proper invoice.[66] However, as an exception, the contract may contain a clause providing for testing and

---

60 *Ibid*.

61 Peter Coulson, *Coulson on Construction Adjudication*, 3rd ed (Oxford: Oxford University Press, 2015) at 1.35.

62 *UK Construction Act*, *supra* note 3, s 112.

63 *Pring & St Hill Ltd v CJ Hafner trading as Southern Erectors*, [2002] EWHC 1775 (TCC) at para 19; *Griffin and another (t/a K & D Contractors) v Midas Homes Ltd*, [2000] EWHC 182 (TCC) [*Griffin*]; *Scheme*, *supra* note 9.

64 *Griffin*, *ibid* at para 9; *Scheme*, *ibid*.

65 *Construction Act*, *supra* note 1, s 6.1.

66 *Ibid*, s 6.3.

commissioning of the improvement or services or materials supplied under the contract.[67] The timing of a proper invoice is subject to a monthly requirement if a contract is silent, but parties may consider the applicability of other payment terms including milestone payments relating to phases or other events. Subcontractors may request disclosure of whether such milestone payments are provided for under the contract.

Section 87(1) of the *Construction Act* describes how to give documents, such as a proper invoice, that are required to be given under the *Construction Act*. Unless otherwise ordered by the court, a proper invoice "may be served in any manner permitted under the rules of court or, in the alternative, may be sent by certified or registered mail."[68] Although a plain and ordinary reading of section 87(1) suggests it is permissive, to ensure the giving of a proper invoice is compliant with the *Construction Act*, contractors may wish to use one of the delivery methods explicitly described in section 87(1). Given the limited time available to a contractor between receiving invoices from subcontractors and submitting a proper invoice to an owner on a monthly basis in compliance with the contract, use of certified or registered mail may not be practical. Instead, a contractor may wish to give documents in one of the manners permitted under the rules of the court, which includes email.

The payment clock starts ticking once the owner receives a proper invoice from its contractor. The owner is required to pay the amount payable no later than 28 days after receipt. However, the owner may refuse to pay all or a portion of the amount payable if the owner gives the contractor a notice of nonpayment, specifying the amount that is not being paid and detailing all the reasons for nonpayment, no later than 14 days after receiving the proper invoice.[69] The notice of nonpayment must be in the form prescribed by the regulations under the *Construction Act*.[70]

Owners, in particular, must align their internal processes to consult, complete, and articulate the results of their invoice review within 14 days of receipt. This alignment is necessary because any failure of the owner to object to the invoice by issuing a notice of nonpayment to the contractor within this time period will result in the owner being obliged to pay the contractor the full amount of that proper invoice within the required 28-day timeframe, despite any subsequent objections. To avoid this unfortunate situation, owners should also have their external consultants shorten their invoice review periods and negotiate appropriate amendments to any credit or funding agreements to minimize any impediments to objecting or funding within these timeframes.

If an amount is not paid when due, mandatory interest will begin to accrue on the outstanding balance. These obligations are then cascaded down to the contractor and subcontractors, with tighter timelines. A contractor is required to pay subcontractors within seven days of receipt of payment from the owner. Unless the contractor gives the subcontractor a notice of nonpayment in the form prescribed by the regulations, specifying the amount that is not being paid and detailing all of the reasons for nonpayment, the contractor is still required to pay each subcontractor the amount payable, even if the owner

---

67 *Ibid*, s 6.2(4).
68 *Ibid*, s 87(1).
69 *Ibid*, s 6.4.
70 O Reg 303/18.

fails to pay the full amount of a proper invoice to the contractor. Similarly, a subcontractor, at any level, is then required to pay its subcontractors within seven days of receipt of payment, unless it serves a notice of nonpayment upon its subcontractors in the prescribed form.

Diagram 2 envisages a scenario where everything goes as expected, and none of the parties dispute the entitlement of the party submitting the invoice, and each receiving party pays the submitting party in full.

Diagram 2: Prompt Payment Timelines

*Number of days from "Day 0" in each circle.

Diagram 3 provides timelines for issuance of notice of nonpayment, in a scenario where a contractor receives a notice of nonpayment from the owner and where the contractor and subcontractor choose similarly to dispute payment down the construction pyramid.

Diagram 3: Timelines for Notice of Non-Payment

*Number of days from "Day 0" in each circle.

Contractors must generally be aware of the operation of applicable flow-down or flow-up provisions. For example, unpaid contractors who issue a notice of nonpayment to a subcontractor must also include an undertaking from the contractor to refer the matter to adjudication within 21 calendar days of issuing the notice of nonpayment. If the contractor was not already planning to do so, this provision therefore forces the contractor to initiate an adjudication against the owner within this timeframe, as discussed below.

C. *BUILDERS' LIEN (PROMPT PAYMENT) AMENDMENT ACT, 2020* OF ALBERTA

In Alberta, the Amended Bill 37, titled *Builders' Lien (Prompt Payment) Amendment Act, 2020*,[71] received royal assent on 9 December 2020.[72] The *ABLAA* will come into force on proclamation, which is anticipated to occur in the fall of 2021.[73] The Government of Alberta introduced Amended Bill 37 to help protect jobs in Alberta's multibillion-dollar construction industry, which employs about one in ten Albertans.[74] The *ABLAA* will rename the *ABLA* the *Prompt Payment and Construction Lien Act*.[75] Some of the most significant changes in the *ABLAA* include the prompt payment requirement, adjudication, and the extension of the lien registration periods. The changes respond to a long-standing issue with timely payment in the construction industry, as the average time for payment in Alberta's construction industry keeps increasing and has been exacerbated by the decreased demand for oil and gas, the global recession, and the COVID-19 pandemic.[76]

As mentioned above, the original payment timeline proposed was 28 days for all levels of the construction pyramid. However, after the amendment, the *ABLAA* provides payment timelines that are in line with Ontario's *Construction Act*,[77] requiring owners to pay contractors within 28 days of receiving a proper invoice and requiring contractors to pay subcontractors within seven days after receiving payment. This payment timeline removed the prohibition on pay-when-paid clauses originally introduced by the Original Bill 37.[78] The payment obligations under the *ABLAA* are mandatory and parties are not able to opt out of these timelines. This will ensure that contractors and subcontractors with little to no bargaining power can still benefit from the payment timelines.

The definition of a proper invoice is important since a proper invoice triggers the payment timelines in the *ABLAA*. A proper invoice is a written bill or request for payment that specifies: (1) the contractor's name and business address; (2) the date of the proper invoice and the period during which the work was done or materials were furnished; (3) information identifying the authority, whether in a written or verbal contract or otherwise, under which the work was done or materials were furnished; (4) a description of the work done or materials furnished; (5) the amount requested for payment and the corresponding payment terms broken down for the work done or materials furnished; (6) the name, title, and contact information of the person to whom the payment is to be sent; (7) a statement indicating that the invoice provided is intended to constitute a proper invoice; and (8) any other information that may be prescribed.[79]

---

71 Amended Bill 37, *supra* note 45.

72 *ABLAA*, *supra* note 40.

73 Amended Bill 37, *supra* note 45; Government of Alberta, "Prompt Payment & Adjudication: New Rules for Alberta's Construction Industry" (December 2020), online: <albertaconstruction.net/wp-content/uploads/2021/04/Builders-Lien-Act-Amendments-Fact-Sheet-April-2021.pdf> [Bill 37 Fact Sheet].

74 21 October 2020 *Hansard*, *supra* note 40 at 2665 (Hon Nate Glubish).

75 *ABLAA*, *supra* note 40, s 2; *ABLA*, *supra* note 2.

76 Alberta, Legislative Assembly, "Bill 37, Builders' Lien (Prompt Payment) Amendment Act, 2020," 2nd Reading, *Alberta Hansard*, 30-2, Day 58 (27 October 2020) at 2774 (Hon Nate Glubish) [27 October 2020 *Hansard*].

77 *Construction Act*, *supra* note 1.

78 Original Bill 37, *supra* note 39.

79 *ABLAA*, *supra* note 40, s 14.

Only a contractor can submit a proper invoice and, subject to the regulations, the contractor must issue a proper invoice every 31 days unless contractual requirements for testing and commissioning are not met. If the payment is not made within the timeframe prescribed by the *ABLAA*, then interest will begin to accrue on the amounts due.[80] As mentioned above, one concern was that the interest rates for late payments were not prescribed in the *ABLAA* but rather will be prescribed by the regulations. Since the regulations have not been published, it is unclear what the prescribed interest rate will be at this time. Additionally, if the paying party refuses to pay all or a portion of an invoiced amount, they must refer the matter to adjudication in accordance with the adjudication provisions set out in the *ABLAA*.[81]

Under the *ABLA*, the timeline for filing a lien is currently 45 days after completion of work or materials being provided for any contractors or subcontractors who have a claim of at least $300.[82] With the average payment timeline in Alberta significantly increasing to approximately 70 days, it is difficult for companies to assess whether it is necessary to file a lien within the 45-day lien period. The *ABLAA* makes two key changes to the liens filed under the *ABLA*. First, the *ABLAA* extends this lien period from 45 days to 60 days after completion of work or materials being provided.[83] Under the *ABLAA*, there is an additional exception relating to improvements or work done in relation to concrete, where the lien period will be 90 days after completion of work or materials being provided.[84] This timing matches the lien period for the oil and gas industry, which is already 90 days after completion of work or materials being provided. The intent of increasing the lien period was to help ensure that liens are only filed when absolutely necessary because of an actual problem rather than parties filing a lien as a proactive mechanism before the lien period ends just in case they eventually do not get paid.[85] Secondly, the new legislation increases the minimum lienable claim amount from $300 to $700.[86]

Currently the *ABLA* requires a mandatory 10 percent of all payments by the owner to be held back to satisfy any future liens filed against the land.[87] The owner cannot release these amounts until substantial completion. However, the *ABLAA* specifies a mandatory progressive release of the holdback amount at pre-set times.[88] Essentially, if certain conditions are met, the *ABLAA* now makes mandatory the release of both major and minor lien fund payments throughout the life of a project. The conditions include that the contract (1) has a completion schedule longer than one year and requires payment of the holdback on an annual basis; or (2) requires payment of the holdback on a phased basis, and in either case that the contract price exceeds an amount to be prescribed under the *ABLA*.[89]

---

80 *Ibid*.
81 *Ibid*, s 14, 17.
82 *ABLA*, *supra* note 2, ss 41, 35(3).
83 *ABLAA*, *supra* note 40, s 27.
84 *Ibid*, ss 7–9, 12, 20.
85 27 October 2020 *Hansard*, *supra* note 76 at 2775 (Hon Nate Glubish).
86 *ABLAA*, *supra* note 40, s 19.
87 *ABLA*, *supra* note 2.
88 Bill 37 Fact Sheet, *supra* note 73.
89 *ABLAA*, *supra* note 40, s 10.

D. FEDERAL *PROMPT PAYMENT FOR CONSTRUCTION WORK ACT*

The *Federal Prompt Payment Act* borrows the Ontario prompt payment mechanism which, absent a dispute, requires Her Majesty or the service provider to pay the contractor within 28 days from the date of receiving a proper invoice.[90] Under the *Federal Prompt Payment Act*, a proper invoice must be in writing and be submitted monthly or as specified by the contract with respect to any construction work that was performed by the contractor or performed and invoiced by any subcontractor in the subcontracting chain, up to the date of the proper invoice. Further, payment cannot be conditional upon prior verification of the construction work.[91] The proper invoice requirements in Ontario's *Construction Act* appear to be comparatively more prescriptive in both form and substance.[92]

If Her Majesty or the service provider wishes to refuse to pay the contractor for some or all of the work, it may do so by giving a notice of nonpayment within 21 days of receiving the proper invoice.[93] A notice of nonpayment must include a description of the construction work covered, the amount that will not be paid, the reasons for the nonpayment (including whether the party that must pay does not have the necessary funds to do so as a result of also receiving a notice of nonpayment that covers the construction work covered by the said notice), and any other information prescribed by regulation.[94]

Note, the *Federal Prompt Payment Act* classifies Her Majesty or the service provider as an owner, as applicable. A service provider is a

> party to a contract with Her Majesty under which that party is to provide Her Majesty with services related to federal real property or a federal immovable and may, for the purposes of fulfilling its obligations under that contract, enter into a contract with a person for the carrying out of a construction project, but does not include a party to such a contract if they are the lessor or lessee of the federal real property or federal immovable.[95]

This contracting model takes into consideration the federal government's practice of entering into broad-based service provider contracts to deliver certain services and projects, particularly real property services management which entails a significant amount of construction work.[96]

The payments must be made by the contractor and subcontractors down the construction pyramid within the prescribed timelines. Given that the payment timelines are linked to the receipt of a proper invoice by Her Majesty or the service provider, any subcontractor in the subcontracting chain may request the contractor to provide the date the proper invoice was received, which the contractor is obligated to provide.

---

90 *Federal Prompt Payment Act*, *supra* note 32, s 9(2).
91 *Ibid*, s 9(4).
92 *Construction Act*, *supra* note 1.
93 *Federal Prompt Payment Act*, *supra* note 32, s 9(3).
94 *Ibid*, s 13.
95 *Ibid*, s 2(1).
96 Reynolds & Vogel, Federal Report, *supra* note 29 at 51–57.

E. WHAT IS HAPPENING ELSEWHERE IN CANADA?

1. NEW BRUNSWICK

Following Ontario's lead, New Brunswick intends to introduce the prompt payment and adjudication regimes that would apply to all construction projects, both in the private and public sectors, at all levels of the construction pyramid, except for wages.[97]

Beginning in 2017, the Legislative Services Branch of the Office of the Attorney General (Branch) recommended reform of the *Mechanics' Lien Act*,[98] the main construction statute in the province.[99] The objective was to review and modernize the existing statute and to adopt a prompt payment regime along with an adjudication process, based on the Ontario model and adjusted to New Brunswick's situation.

Given the important implications of such a task, the Branch recommended a two-phase approach:[100] first, a review and modernization of the existing statute and, second, the introduction of the prompt payment and adjudication regimes.[101]

As part of the first phase, the *Construction Remedies Act*[102] was introduced as Bill 12 on 18 November 2020, and it received royal assent on 18 December 2020. The new statute repeals the *Mechanics' Lien Act*[103] and adopts related amendments to the *Crown Construction Contracts Act*.[104] Only a few provisions came into force by royal assent.[105] The balance of the Act will come into force by proclamation. This will allow the government to draft and implement the necessary regulations and give sufficient time to the industry stakeholders and the public to adjust.[106] The new statute modernizes the existing construction legislation by amending, among others, lien, holdback, trust, substantial performance, and surety bond provisions. Additionally, and contrary to the *Mechanics' Lien Act*,[107] the new statute applies to the Crown, including Crown corporations and agencies, with some exceptions and procedural modifications.

---

97 Legislative Services Branch of the Office of the Attorney General, *Law Reform Notes, No 41*, (May 2018) at 9, online: <www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes 41.pdf> [Legislative Services Branch, "Law Reform 41"].

98 *Mechanics' Lien Act*, RSNB 1973, c M-6 [*New Brunswick Lien Act*].

99 Legislative Services Branch of the Office of the Attorney General, *Law Reform Notes, No 40*, (December 2017) at 4, online: <www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/Law Reform/Notes 40.pdf.>.

100 Legislative Services Branch of the Office of the Attorney General, *Law Reform Notes, No 42*, (July 2019) at 2, 4, online: <www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes 42.pdf>.

101 Legislative Services Branch of the Office of the Attorney General, *Law Reform Notes, No 43*, (April 2020) at 7, online: <www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes43.pdf>.

102 Bill 12, *Construction Remedies Act,* 1st Sess, 60th Leg, New Brunswick, 2020 (assented to 18 December 2020), SNB 2020, c 29 [Bill 12].

103 *New Brunswick Lien Act, supra* note 98.

104 RSNB 2014, c 105.

105 Bill 12, *supra* note 102, ss 107(b), 107(g)(i), 108(a), 108(b).

106 Legislative Services Branch of the Office of the Attorney General, *Law Reform Notes, No 44*, (February 2021) at 1, online: <www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/notes-44.pdf> [Legislative Services Branch, "Law Reform 44"].

107 *New Brunswick Lien Act*, *supra* note 98.

Further to the adoption of the applicable regulations and the coming into force of the balance of the *Construction Remedies Act*,[108] as part of the second phase, the Branch will continue monitoring the developments related to prompt payment and adjudication regimes in other jurisdictions.[109] Moreover, as the Ontario adjudication regime is complex and may not be feasible for smaller jurisdictions,[110] New Brunswick is evaluating the possibility of customizing the regime and co-operating with other jurisdictions along with referring claims under $20,000 to Small Claims Court.

2. NOVA SCOTIA

Nova Scotia is the first and only Atlantic province to date to incorporate prompt payment and adjudication systems for payments to be made under construction contracts into law. As can be observed from the parliamentary debates on the subject, all political parties share the understanding that "the construction sector is critically important to the economic growth of the province […] and it's responsible for 5.5 per cent of the province's GDP."[111] Various members of the House of Assembly have felt the pressure from, as well as the frustration of, various players of the construction industry, and were alarmed by the fact that "35 construction companies went bankrupt" in 2018, many of which "could be attributed to late or absent payments."[112] The amended *Builders' Lien Act* was strongly supported by both national and provincial key players and stakeholders of the construction industry.[113] It received royal assent on 12 April 2019,[114] but is yet to receive the Governor in Council's proclamation to come into force.[115] The changes will rename the legislation to the *Builders' Lien and Prompt Payment Act*.

The proposed prompt payment framework, from the "proper invoice" definition that is borrowed entirely from the Ontario *Construction Act*,[116] to the owner's ability to pay or issue a notice of nonpayment, and the contractor's corresponding obligations vis-à-vis the subcontractors is very close to its Ontarian counterpart. However, it should be noted that the legislation does not provide any indications as to the prescribed timelines, which will be later established by the regulations.[117]

The Government of Nova Scotia has announced that, before the legislation comes into effect, it will conduct extensive consultation on the regulations with "sub-contractors,

---

108 Bill 12, *supra* note 102.

109 Legislative Services Branch, "Law Reform 44," *supra* note 106 at 2.

110 Legislative Services Branch, "Law Reform 41," *supra* note 97 at 13.

111 Nova Scotia, Legislative Assembly, "Bill 119, Builders' Lien Act (amended)," 2nd reading, *Hansard Debates and Proceedings*, 63-2, No 37 (2 April 2019) at 2721 (Hon Mark Furey) [Bill 119 *Debates*].

112 *Ibid* at 2723 (Tim Halman); Nova Scotia, Legislative Assembly, "Bill 119, Builders' Lien Act (amended)," 3rd reading, *Hansard Debates and Proceedings*, 63-2, No 44 (11 April 2019) at 3259 (Tim Halman).

113 Legislative Counsel of Nova Scotia from General Contractors Alliance of Canada, Atlantic Canadian Federation of Independent Business, Surety Association of Canada, Construction Association of Nova Scotia and Merit Contractors Association of Nova Scotia, "Law Amendments Committee Submissions" (8 April 2019), online: <www.nslegislature.ca/legislative-business/committees/standing/law-amendments/submissions/assembly-63-session-2/119>.

114 Bill 119, *An Act to Amend Chapter 277 of the Revised Statutes, 1989, the Builders' Lien Act*, 2nd Sess, 63rd Leg, Nova Scotia, 2019 (assented to 12 April 2019), SNS 2019, c 12 [Bill 119].

115 Nova Scotia Legislature, "Proclamations of Nova Scotia Statutes," online: <www.nslegislature.ca/legislation/proclamations-nova-scotia-statutes>.

116 *Construction Act*, *supra* note 1, s 6.1.

117 Bill 119, *supra* note 114, s 4A(a).

suppliers, trade unions, engineers, roadbuilders, Canadian Federation of Independent Business, municipalities, the Nova Scotia Federation of Municipalities and other interested stakeholders"[118] to inform timelines and the appropriate model for the adjudication process suited for the industry, 65 percent of which is comprised of small and medium-sized companies.[119]

Without providing further details, the amended legislation states that certain classes of persons and construction contracts made after the date of enactment may be exempted from its application by the regulations.[120]

3. SASKATCHEWAN

Saskatchewan was the first western province to introduce prompt payment and mandatory adjudication in an effort to alleviate perceived payment delays down the construction pyramid and to minimize time and financial resources required to resolve disputes. The legislation seems to originate from an education day organized by the Saskatchewan Prompt Payment Working Group back in September 2016. Complaints from the industry stakeholders similar to those expressed in other provinces have been heard about payment delays that average around 70 days.[121]

The new regimes are layered on the existing lien regime governed by *The Builders' Lien Act*.[122] The *SK Act* was amended in 2019 by *The Builders' Lien (Prompt Payment) Amendment Act, 2019*,[123] which received royal assent on 15 May 2019, but is yet to come into force. On 20 August 2020, *The Builders' Lien Amendment Regulations, 2020*[124] were filed to amend the existing regulations. The *SK Regulations* elaborate on the prompt payment and adjudication regimes and will come into force on the same day as the *SK Amendment Act*.

The scope of application of both the prompt payment and adjudication regimes covers all contracts for service or materials yet excludes architects, engineers, land surveyors and persons providing services or materials for any improvement with respect to a mine or mineral resource, including any activities respecting exploration, development, production, decommissioning, or reclamation, or an improvement related to infrastructure in connection with the generation, transmission or distribution of electrical energy.[125] More specifically, the *SK Amendment Act* lays out a detailed payment deadline, a dispute resolution mechanism as an alternative to arbitration and court litigation, and introduces accruing interest and the right to suspend work in case of late or nonpayment.

---

118 Government of Nova Scotia, "Prompt Payment for Construction Industry" (15 March 2019), online: <www.novascotia.ca/news/release/ ?id=2019031500>.

119 Bill 119 *Debates*, *supra* note 111 at 2722 (Hon Mark Furey).

120 *Builders' Lien Act*, RSNS 1989, c 277, s 4K(3),(4), as amended by Bill 119, *supra* note 114.

121 Saskatchewan, Legislative Assembly, "Bill 152, The Builders' Lien (Prompt Payment) Amendment Act, 2018," 2nd reading, *Debates and Proceedings (Hansard)*, 28-3, No 27A (5 March 2019) at 5203 (Carla Beck).

122 SS 1984-85-86, c B-7.1 [*SK Act*].

123 SS 2019, c 2 [*SK Amendment Act*].

124 Sask Reg 92/2020 [*SK Regulations*].

125 *Ibid*, ss 5.1, 5.3.

The proposed amendments mainly follow the Ontario framework, with a few exceptions. For instance, unlike the Ontario *Construction Act*, which contains general provisions regarding how notices may be given, the *SK Regulations* lay down specific methods for serving the notice of non-payment at all levels of the construction pyramid using personal service, email, fax, or registered mail.[126]

However, like in the Ontario regime, if the contractor receives a notice of nonpayment from the owner and subsequently issues a notice of nonpayment to the subcontractor, the contractor must provide an undertaking to the subcontractor to refer the matter between the contractor and the owner to adjudication within 21 days after giving the notice to the subcontractor.[127]

4. BRITISH COLUMBIA

British Columbia, following the lead of Ontario and at the same time that Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, and Nova Scotia were examining the issue, introduced Bill M223 for the *Prompt Payment (Builders Lien) Act*[128] on 28 May 2019 for the first reading. The content of Bill M223 is entirely borrowed from Part I.1 of the Ontario *Construction Act*, with several notable exceptions. More precisely, Bill M223 is limited to prompt payment mechanisms and does not address adjudication, extension of time to file a claim of lien, or mandatory periodic release of holdbacks.

In July 2020, following the introduction of Bill M223, the British Columbia Law Institute (BCLI) released the *Report on The Builders Lien Act*.[129] The *BCLI Report* offers 86 recommendations to simplify the *Builders Lien Act*[130] and clarify the meaning of the more problematic provisions. The *BCLI Report* emphasizes that payment delays in the construction sector are not exclusively related to the *BC Act*,[131] and the recommendations in the *BCLI Report*, if implemented, would eliminate or minimize any delays related to the *BC Act* without creation of a prompt payment regime. Moreover, according to the *BCLI Report*, prompt payment and adjudication pertain to general financial management of construction projects,[132] whereas the lien legislation is concerned with security of payment.[133] Hence, the *BCLI Report* does not address the merits of prompt payment or adjudication legislation and suggests that it would be best to analyze it in a separate process and learn lessons from the legislation in Ontario prior to enacting such legislation in British Columbia.[134]

Additionally, the *BCLI Report* notes that mandatory release of holdbacks included in the Ontario statute "appears to be functionally connected with the introduction of prompt

---

126 *Ibid*, s 5.25. See also Forms A.1 to A.5 in Appendix A.
127 *SK Amendment Act*, *supra* note 123, s 5.5(5)(c).
128 Bill M223, *Builders Lien (Prompt Payment) Amendment Act, 2019*, 4th Sess, 41st Leg, British Columbia, 2019 (first reading 28 May 2019) [Bill M223].
129 British Columbia Law Institute, "Report on the Builders Lien Act" (July 2020), online: <www.bcli.org/wordpress/wp-content/uploads/2020/07/Report-Builders-Lien-Act-final.pdf> [*BCLI Report*].
130 SBC 1997, c 45 [*BC Act*].
131 *BCLI Report*, *supra* note 129 at 6–7.
132 *Ibid* at 6.
133 *Ibid* at 7.
134 *Ibid.*

payment and adjudication provisions."[135] The *BCLI Report* further elaborates that "[i]f prompt payment and adjudication provisions are enacted at some future point, the matter of mandatory holdback release with appropriate exceptions might be re-examined."[136]

5. MANITOBA

Despite subcontractors' demands for legislative intervention dating back to 2009 regarding prompt payment difficulties,[137] Manitoba has had two unsuccessful attempts to adopt *The Prompt Payments in the Construction Industry Act.* The first one, a private member's Bill 218, was introduced but did not get past the second reading in April 2018.[138] Subsequently, the same private member introduced Bill 245 on 3 June 2019 that, if enacted, would have been a separate law, independent from the existing *Builders' Lien Act*,[139] but it did not pass first reading.[140] Bill 245 was meant to bind the Crown and to exclude contracts in respect of a public-private partnership, referred to as P3 contracts, from application if all parties to the contract are participants in the partnership.[141] Similar to the Ontario *Construction Act*, Bill 245 introduced the notion of a "proper invoice," had a grandfathering clause with regard to contracts made before the legislation comes into force, and specified that the owner must make progress payments to a contractor on a monthly basis or at shorter intervals provided for in the contract.[142] Bill 245 also contained adjudication provisions that were meant to be completed with future regulations.[143]

Between the two bills that did not proceed, the Manitoba Law Reform Commission (Commission) published its final report on the subject of *The Builders' Lien Act* with 87 recommendations.[144]

Though there is little information as to why the Legislative Assembly of Manitoba did not proceed with Bill 245, it is worth noting the recommendations regarding prompt payment made in the *Commission Report*. In particular, the Commission recommends that "any new prompt payment process ought to be incorporated within *The Builders' Lien Act* and not legislated as a stand-alone statute."[145] Thus, one of the Commission's recommendations is "to incorporate a new remedy imposing statutory timelines and processes requiring prompt payment of amounts owed under contracts and sub-contracts as well as penalties for failure

---

135 *Ibid* at 114.
136 *Ibid*.
137 Manitoba Law Reform Commission, The Builders' Liens Act*: A Modernized Approach*, (Consultation Paper), (February 2018) at 18, online: <www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_feb2018.pdf>.
138 Bill 218, *The Prompt Payments in the Construction Industry Act*, 3rd Sess, 41st Leg, Manitoba, 2018; Legislative Assembly of Manitoba, "Status of Bills Third Session, Forty-First Legislature, 2017-18" at 6, online: <www.web2.gov.mb.ca/bills/41-3/billstatus.en.pdf>.
139 *Builders' Lien Act*, CCSM, c B91.
140 Bill 245, *The Prompt Payments in the Construction Industry Act*, 4th Sess, 41st Leg, Manitoba, 2019 (first reading 3 June 2019) [Bill 245]; Legislative Assembly of Manitoba, "Status of Bills Fourth Session, Forty-First Legislature, 2018-19" at 8, online: <web2.gov.mb.ca/bills/41-4/billstatus.en.pdf>.
141 Bill 245, *ibid*, cl 6.
142 *Ibid*, cls 1(1), 4, 10(1).
143 *Ibid,* cl 23.
144 Manitoba Law Reform Commission, The Builders' Liens Act *of Manitoba: A Modernized Approach*, (Final Report), (November 2018), online: <www.manitobalawreform.ca/pubs/pdf/136-full_report.pdf> [*Commission Report*].
145 *Ibid* at 76.

to adhere to the prescribed timelines."[146] Furthermore, the Commission recommends the development of a private adjudication system, similar to the one under the Ontario *Construction Act* with necessary modifications.[147] In order to reflect changes to the legislation, the *Commission Report* also recommends renaming the legislation as *The Construction Contract Remedies Act*.[148]

6. QUEBEC

Before adopting the most appropriate regulatory framework with respect to prompt payment and adjudication regimes, Quebec decided to implement a pilot project to experiment with various measures to facilitate payments in public contracts and related subcontracts and to assess and evaluate the impacts of the measures implemented on industry and public bodies.[149] The pilot project applies to certain public construction contracts and subcontracts, and establishes a mandatory payment schedule together with a related adjudication mechanism.

In 2016, in response to some of the recommendations from the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, the Government tabled Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*.[150] On 1 December 2017, Bill 108 came into force. It amended the *Act Respecting Contracting by Public Bodies*[151] by incorporating sections 24.3 to 24.7, which provide the Chair of the Conseil du trésor with the power to authorize the implementation of pilot projects aimed at testing various measures to facilitate payment in public contracts and related subcontracts.[152]

In 2018, the *Pilot Project to Facilitate Payment to Enterprises that are Parties to Public Construction Work Contracts and Related Public Subcontracts* was set up via ministerial order.[153] The Conseil du trésor subsequently had a year to determine which public contracts would be included in the *Pilot Project*. Approximately 50 public construction projects were selected.[154] Later, Bill 66, which came into force on 11 December 2020,[155] provided for the application of the *Pilot Project* to over 180 listed public infrastructure projects, unless the manner in which the relevant contract or subcontract is to be carried out does not allow for

---

146 *Ibid*.
147 *Ibid* at 88.
148 *Ibid* at 23.
149 Quebec, National Assembly, "Clause-by-Clause Consideration of Bill 108, An Act to Facilitate Oversight of Public Bodies' Contracts and to Establish the Autorité des marchés publics," *Journal des débats (Hansard) of the Committee on Public Finance*, 41-1, Vol 44, No 187 (15 November 2017) at 11:50.
150 Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*, 1st Sess, 41st Leg, Quebec, 2017 (assented to 1 December 2017), SQ 2017, c 27 [Bill 108].
151 CQLR, c C-65.1.
152 *Ibid*, ss 24.3–24.7.
153 *Pilot Project to Facilitate Payment to Enterprises that are Parties to Public Construction Work Contracts and Related Public Subcontracts,* CQLR c C-65.1, r 8.01 [*Pilot Project*].
154 Coalition Against Payment Delays in the Construction Industry, "Mémoire de la Coalition contre les retards de paiement dans la construction: Présenté à la Commission des finances publiques" (2020) at 6–7, online: Assemblée nationale du Québec <www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_159327&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vIv9rjij7p3xLGTZDmLVSmJLoqe/vG7/YWzz>.
155 Bill 66, *An Act respecting the acceleration of certain infrastructure projects*, 1st Sess, 42nd Leg, Quebec, 2020 (assented to 11 December 2020), SQ 2020, c 27.

the application of a monthly payment schedule.[156] Most infrastructure projects covered by the *Pilot Project* involve the construction of senior living facilities, long-term care centres, schools, and roads. A public body whose contract is subject to the *Pilot Project* is required to state as such in its call for tenders.

Initially, the *Pilot Project* was established for a three-year term. Subsequently, Bill 66 provided that the terms and conditions prescribed in the *Pilot Project* "are applicable to a contract or subcontract … until the infrastructure project from which it arises ends, provided the contract was entered into no later than 11 December 2025."[157]

The *Pilot Project* sets out a mandatory prompt payment and adjudication regime.[158] It establishes a precise payment schedule. First, subcontractors provide the general contractor with a payment application on or before the twenty-fifth day of the month for the work performed in that month and the work scheduled up to the end of that month.[159] The general contractor submits its payment application to the public body for approval on the first day of the month for the work performed in the preceding month.[160] A duly completed payment application is presumed to be approved on the twenty-first day of the month in which it is received, unless, before the end of the twentieth day of that month, the public body gives a notice of refusal.[161] Payment to the general contractor is then made on or before the last day of that month.[162] Finally, the general contractor pays subcontractors on the fifth day of the following month, and subcontractors pay other subcontractors on the tenth, fifteenth day, and so on until the end of the subcontracting chain.[163]

IV. ADJUDICATION

A. ADJUDICATION IN THE UNITED KINGDOM

As noted above, where a construction contract does not provide for adjudication, the *UK Construction Act* provides that the *Scheme* must be followed.[164]

At the time of its inception, the *UK Construction Act* was "considered revolutionary," providing a mechanism for the prompt resolution of construction disputes by an adjudicator through an interim binding decision within 28 days, following which the parties could proceed to litigation or arbitration.[165] Adjudicators were given wide latitude in implementing "just, expeditious and economical results."[166] Several years later, two other authors identified the following eight fundamental components of the UK's statutory adjudication mechanism: (1) the right to refer a dispute at "any time"; (2) notices; (3) appointment; (4) time scales; (5)

156 *Ibid*, cl 71.
157 *Ibid*, cl 66.
158 *Pilot Project*, *supra* note 153.
159 *Ibid*, s 9.
160 *Ibid,* s 10.
161 *Ibid,* s 11.
162 *Ibid*, s 14.
163 *Ibid*, ss 15–16.
164 *UK Construction Act*, *supra* note 3; *Scheme*, *supra* note 9.
165 *Report*, *supra* note 5, c 9, s 2.
166 *Ibid*.

act impartially; (6) act inquisitorially; (7) binding nature; and (8) immunity.[167] Additionally, all construction contracts must comply with the *Scheme*.

The *Report* notes that adjudication, in both payment dispute and broader contexts, has been adopted in numerous common law jurisdictions across the globe, including in Australia, Singapore, Malaysia, Ireland, and New Zealand.[168]

On one hand, adjudication under the *UK Construction Act* has been described as "pay now, argue later."[169] Further, some have deemed it to be "rough justice,"[170] considering "the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial court or to a substantive hearing before an Arbitrator."[171] On the other hand, however, UK adjudication decisions are binding, enforceable, and have been said to be robustly applied by UK courts.[172] Adjudication has also resulted in judicial efficiency by eliminating gridlock on these issues in the courts.[173]

A key provision in the *UK Construction Act* related to adjudication gives parties the right to refer contractual disputes to adjudication.[174] "Dispute" includes any difference between the parties.

The required contractual components of the adjudication procedure include provisions to: (1) enable a party to give notice at any time of the intention to refer a dispute to adjudication; (2) provide a timetable to secure the appointment of the adjudicator and referral of the dispute within 7 days; (3) require the adjudicator to reach a decision within 28 days of referral or as agreed by the parties following referral of the dispute; (4) impose a duty on the adjudicator to act impartially; and (5) enable the adjudicator to take the initiative in ascertaining the facts and the law.[175]

While there was initially a roster of adjudicators appointed in the UK, a process was later created to add adjudicators who had received appropriate training.[176] The selections are generally made on the basis of technical expertise, although in practice they may also receive expert submissions to assist in interpreting technical matters.[177] There is a flexible process for adjudicator nominations in the UK, including by way of prior agreement, upon the emergence of a dispute, or by unilateral appointment by one of the parties through referral

---

167 Nicholas Gould & Charlene Linneman, "Ten Years On: Review of Adjudication in the United Kingdom" (2008) 134:3 J Professional Issues in Engineering Education and Practice 298 at 299, cited in *Report*, *ibid*.

168 *Report*, *ibid*.

169 UK, HL Deb (22 April 1996), vol 571, cols 989–90 (Lord Ackner), online: <publications.parliament.uk/pa/ld199596/ldhansrd/vo960422/text/60422-28.htm#60422-28_spnew1>; *Report*, *ibid*, c 9, s 2.1; Nicholas Dennys, Mark Raeside & Robert Clay, eds, *Hudson's Building and Engineering Contracts*, 13th ed (London, UK: Sweet & Maxwell, 2010) at 11-010, citing *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*, [2002] EWCA Civ 270; *Thomas-Frederic's (Construction) Ltd v Wilson*, [2003] EWCA Civ 1494.

170 *Report*, *ibid*.

171 *Ibid*; *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd*, [2003] EWCA Civ 1750; *Gipping Construction Ltd v Eaves Ltd*, [2008] EWHC 3134 (TCC) at para 8.

172 *Report*, *ibid*, c 9, s 2.2; Dennys, Raeside & Clay, *ibid* at 11-010.

173 *Report*, *ibid*, c 9, s 2.1; Dennys, Raeside & Clay, *ibid*; Gould & Linneman, *supra* note 167.

174 *UK Construction Act*, *supra* note 3, s 108.

175 *Ibid*, s 108(2).

176 *Report*, *supra* note 5, c 9, s 2.3.2.1.

177 *Ibid*.

of the dispute to an adjudicator nominated by an Adjudicator Nominating Body.[178] Pursuant to the *Scheme*, a person requested to act as adjudicator shall indicate whether he or she is willing to act within two days of receiving the request.[179] The *Scheme* also sets out that the nominating body must communicate its adjudicator selection to the referring party within five days of receiving the request.[180]

Where the Adjudicator Nominating Body fails to name an adjudicator, the *Scheme* sets out that the referring party may (1) agree with the other party to the dispute to request a specified person to act as adjudicator or (2) request any other adjudicator nominating body to select a person to act as adjudicator.[181] Where the named adjudicator is unable or unwilling to act, the referring party may (1) if available, request another person specified in the contract to act as adjudicator; (2) if available, request the nominating body referred to in the contract to select a person to act as adjudicator; or (3) request any other adjudicator nominating party to select a person to act as adjudicator.[182]

There are various types of disputes that may be adjudicated in the UK, including final account claims, extension of time or loss and expense claims, value of variations, disputed terminations, claims to enforce post-termination rights, and recovery of costs to complete a project following termination.[183] These types of disputes are relatively wide ranging. Exclusions to adjudication include certain types of construction operations noted above in accordance with sections 105(2) and 106 of the *UK Construction Act*, such as drilling or extraction of oil and natural gas, agreements with residential occupiers, and exclusionary orders and private finance initiatives.[184] There are also various procedural limitations on the types of disputes that may be adjudicated in addition to the two issues mentioned above, particularly with respect to ongoing court or arbitration proceedings.

The process is generally simple and flexible, with adjudicators given the latitude to develop the process to obtain relevant facts. The *Scheme* sets out the minimum standard of procedural powers of an adjudicator, which includes, among others, powers to request any party to the contract to supply him or her with such documents as he or she may reasonably require, decide the language(s) used in the adjudication, meet and question any of the parties to the contract, and give directions as to the adjudication timetable.[185]

There are no dictated timeframes within which a notice of adjudication must be delivered.[186] However, while the construction contract shall "enable a party to give notice at any time of his intention to refer a dispute to adjudication," the phrase "at any time" may not

---

178 *Ibid*, c 9, s 2.3.2.2, citing John L Riches & Christopher Dancaster, *Construction Adjudication*, 2nd ed (Oxford: Blackwell, 2004) at 146.

179 *Scheme*, *supra* note 9, ss 2, 5.

180 *Ibid*.

181 *Ibid*, s 5.

182 *Ibid*, s 6.

183 *Report*, *supra* note 5, c 9, s 2.3.3; Richard Davis, Construction Insolvency: Security, Risk and Renewal in Construction Contracts (London: Sweet & Maxwell, 2011) at 332–33, citing *All in One Building & Refurbishment Ltd v Makers UK Ltd*, [2005] EWHC 2943 (TCC); *Banner Holdings Ltd v Colchester Borough Council*, [2010] EWHC 139 (TCC); *Volker Stevin Ltd v Holystone Contracts Ltd*, [2010] EWHC 2344 (TCC).

184 *Report*, *supra* note 5, c 9, s 2.3.3.

185 *Scheme*, *supra* note 9, s 13.

186 *UK Construction Act*, *supra* note 3, s 108(2).

be as unlimited as it appears.[187] In *London Borough of Camden v. Makers UK Ltd.*, for instance, the Queen's Bench Division, Technology and Construction Court held that while a party to a construction contract has a statutory right to adjudicate upon any dispute at any time, "[t]here is of course a finite point at which adjudication on a given dispute is no longer possible, that is when the Court or arbitrator has finally resolved the dispute one way or the other."[188] The fact that court or arbitration proceedings have been instituted does not prevent or bar a party's statutory or contractual right to adjudicate but rather "produces a decision which, although binding temporarily, is not final."[189]

This issue was also considered in *Twintec Ltd. v. Volkerfitzpatrick Ltd.*, where the Court relied on various authorities for the following propositions: (1) the fact that a referral to adjudication is brought in parallel with existing litigation raising the same issue is not in itself a ground for restraining the referral; (2) the mischief at which the *UK Construction Act* is aimed is the delay in achieving finality in arbitration or litigation; (3) the right to refer a dispute to adjudication at any time confers a commercial advantage on the referring party, and this must be taken to have been known by Parliament when the *UK Construction Act* was passed; and (4) "[a] party should not be prevented from pursuing its right to refer a dispute to adjudication save in the most exceptional circumstances."[190]

Once the notice of adjudication is delivered, the referring party has seven days within which to refer the dispute in writing to the adjudicator.[191] The UK does not prescribe a timeframe for a response and reply.[192] There is, however, a 28-calendar-day process running from the time a matter is referred to the adjudicator for the adjudicator to render a decision.[193] This timeframe may be extended by up to 14 days, for 42 days total, on consent of the referring party, or longer on consent of both parties.[194] As noted below, these timeframes are mandatory. Indeed, "the only way to ensure both speed and certainty is for the adjudicator and the parties to comply with the statutory time limits."[195]

In practice, courts have proved hesitant to overturn adjudication decisions.[196] As mentioned above, adjudicators' decisions are binding on an interim basis and enforceable through the courts, arbitration, or agreement between the parties, as the case may be.[197] Courts actively discourage "simply scrabbling around to find some argument, however tenuous, to resist payment."[198] Consequently, there is tendency to follow the rule set out in *Nikko Hotels (UK) Ltd. v. MEPC plc.* that, where the adjudicator has answered the right question in the wrong way, the decision will be binding; where he answers the wrong question, his decision will be a nullity.[199] These notions were perhaps most aptly summarized

---

187 *Ibid*, s 108(2)(a).
188 [2009] EWHC 605 (TCC) at para 31.
189 *Ibid*.
190 [2014] EWHC 10 (TCC) at para 69 [citations omitted].
191 *UK Construction Act*, *supra* note 3, s 108(2); *Scheme*, *supra* note 9, s 7.
192 *Report*, *supra* note 5, c 9, s 2.3.4.2.
193 *UK Construction Act*, *supra* note 3, s 108(2)(d); *Scheme*, *supra* note 9, ss 19(1)(b), 19(1)(c).
194 *UK Construction Act*, *ibid*, s 108(2)(d).
195 *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd*, [2007] EWHC 1360 (TCC) at para 6.
196 *Report*, *supra* note 5, c 9, s 2.1.
197 *UK Construction Act*, *supra* note 3, s 108(3); *Scheme*, *supra* note 9, s 23.
198 *Report*, *supra* note 5, c 9, s 2.1, citing Dennys, Raeside & Clay, *supra* note 169 at 11-010.
199 [1991] 2 EGLR 103 at 108.

by the UK Court of Appeal in *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.*:

> The objective which underlies the [*U.K. Construction Act*] and the [*Scheme*] requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator.[200]

Jurisprudence also shows that courts may avoid overturning an adjudicator's decision for procedural error unless such error amounts to a serious breach of natural justice.[201] In *Macob Civil Engineering Ltd. v. Morrison Construction Ltd.*, Justice Dyson of the Queen's Bench Division, Technology and Construction Court, while cautioning that allowing any challenge to be mounted on an alleged breach of natural justice would result in the party making the allegation to say there has been no decision, held that a party may challenge an adjudicator's decision on the ground of its validity rather than on its merits.[202] Indeed, an adjudicator is bound to act impartially but may take the initiative in ascertaining the facts and the law and, in so doing, conduct an entirely inquisitorial process.[203] Further, courts will take a negative view of parties attempting to avoid their obligations, including the obligation to pay an amount owed to another party.[204]

As the *UK Construction Act* is silent on how an adjudicator's decision should be enforced, a claimant will typically bring an action and move for summary judgment in that action to enforce an adjudication decision.[205] In *Ferson Contractors Ltd. v. Levolux AT Ltd.*, the Court relied on several authorities to explain that the intended purpose of section 108 of the *UK Construction Act* was plainly to provide a speedy method for parties to construction contracts to have disputes decided on a provisional basis and, as such, requiring the parties to comply with any decision of an adjudicator pending the final determination of disputes by arbitration, litigation, or agreement.[206] Nevertheless, it was estimated in 2010 that only about 5 percent of adjudicated decisions in the UK were the subject of enforcement applications.[207]

With respect to costs, the *Report* notes that the most popular ranges of fees for an adjudication in the UK have been between £2,500 and £5,000, with a very close second range of fees between £15,001 and £20,000.[208] There was no reported fee above £40,000 in any adjudication.[209]

---

200 [2005] EWCA Civ 1358 at para 85, cited in *Report*, *supra* note 5, c 9, s 2.3.5.

201 *Macob Civil Engineering Ltd v Morrison Construction Ltd*, [1999] EWHC Technology 254 (TCC) [*Macob*]; *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*, [2000] EWCA Civ 507; *Wycombe Demolition Ltd v Topevent Ltd*, [2015] EWHC 2692 (TCC); *Science and Technology Facilities Council v MW High Tech Projects UK Ltd*, [2015] EWHC 2889 (TCC).

202 *Macob*, *ibid* at 8–9.

203 *Ibid*.

204 See *Able Construction (UK) Ltd v Forest Property Development Ltd*, [2009] EWHC 159 (TCC).

205 *Report*, *supra* note 5, c 9, s 2.3.5; *The Civil Procedure Rules 1998* (UK), No 3132, L 17, part 24. See also HM Courts & Tribunals Service, *Technology and Construction Court Guide*, 2nd ed, 3rd rev (2015) at s 9.

206 [2003] EWCA Civ 11 at paras 7–8, citing *Macob Civil Engineering Ltd v Morrison Construction Ltd*, [1999] BLR 93 at para 24.

207 *Report*, *supra* note 5, c 9, s 2.3.5; Davis, *supra* note 183 at 12-003.

208 *Report*, *ibid*, c 9, s 2.3.4.3.

209 *Ibid*.

B. ADJUDICATING IN ONTARIO

1. OVERVIEW

On 1 October 2019, the *Construction Act* introduced adjudication as a quick, inquisitorial dispute resolution mechanism for payment-related disputes and any other disputes agreed to by the parties.[210] Ontario Dispute Adjudication for Construction Contracts (ODACC) serves as the Authorized Nominating Authority (Authority) in Ontario.[211] ODACC is responsible for developing and overseeing programs for the training of persons as adjudicators, qualifying persons who meet the requirements as adjudicators, establishing and maintaining a publicly available registry of adjudicators, appointing adjudicators under limited circumstances, and performing other prescribed duties.[212]

Unlike Ontario, there are nearly 30 Adjudicator Nominating Bodies (ANBs) for training adjudicators in the UK. The ANBs span a number of industries, including, for example, the Association for Consultancy and Engineering, the Dispute Board Federation, the Law Society of Scotland, and the Royal Society of Ulster Architects.[213] Each of the ANBs has a website outlining its adjudication functions and procedures.[214]

Under the *Construction Act*, a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any matters relating to the valuation of services or materials provided under the contract, payment under the contract, disputes that are the subject of a notice of nonpayment, amounts retained as set-off by trustee or lien set-off, payment and nonpayment of holdback, and any other matter that the parties to the adjudication agree to or that may be prescribed (for instance, a person to whom payment is guaranteed under a labour and material payment bond may refer to adjudication any dispute with the principal and the surety).[215]

On 1 October 2020, ODACC issued its much anticipated first annual report covering its operations for the fiscal year 2020, ending 31 July 2020 — including the first ten months since the adjudication provisions of the *Construction Act* came into force.[216] The *Annual Report* highlights that 32 adjudications were commenced at ODACC — however, only three determinations were rendered, which resulted in a total of $35,000 paid out in determinations or, on average, $11,000 under each adjudication. All three of those adjudications were in the residential sector, outside city centres, and were rendered in the timelines specified under the *Construction Act*. The adjudications that resulted in determinations dealt with the valuation

---

210 *Construction Act*, *supra* note 1.

211 Ontario Attorney General, "Ontario Cutting Red Tape to Support Jobs and Growth in the Construction Industry" (18 July 2019), online: <https://news.ontario.ca/en/release/53018/ontario-cutting-red-tape-to-support-jobs-and-growth-in-the-construction-industry>.

212 *Construction Act*, *supra* note 1, s 13.3.

213 See also Adjudication Society, "Links To Adjudicator Nominating Bodies," online: <www.adjudication.org/resources/anbs> (full list of ANBs).

214 See e.g. "UK Adjudicators," online: <www.ukadjudicators.co.uk>.

215 *Construction Act*, *supra* note 1, s 13.5(1).

216 Ontario Dispute Adjudication for Construction Contracts (ODACC), "2020 Annual Report" (2020), online: <odacc/wp-content/uploads/2020/10/ODACC-2020-Annual-Report-.pdf> [*Annual Report*].

of services or materials provided under a contract and payment under a contract, including in respect of a change order.[217]

With respect to the rest of the adjudications commenced in the past year, only seven adjudications remained open as of the end of the 2020 fiscal year.[218] The remainder were terminated largely because the dispute between the parties settled. All but one of those adjudications were terminated before an adjudicator was ever appointed.[219]

The *Annual Report* also sets out the total amount claimed in the adjudications that were commenced in the past fiscal year — approximately $2.9 million or $90,000 on average.[220] Of the adjudications that were commenced, the vast majority were in the residential sector, averaging $22,000. Only five adjudications were commenced in the commercial sector, averaging $360,000, with another five adjudications commenced in the public buildings, averaging $120,000, and the transportation and infrastructure sectors, averaging $125,000.[221]

Overall, the *Annual Report* highlights that uptake in the Ontario construction industry of adjudication is not widespread yet. Whether this is a result of the fact that many existing construction contracts are grandfathered under the old legislation per the transition provisions of the *Construction Act*, because there is a lack of familiarity or comfort among industry stakeholders with the adjudication process itself or because payors are adhering to the prompt payment regime and drafting adequate contract provisions to help resolve potential disputes before they occur, remains to be seen. Commencing a formal dispute, especially during the currency of a project, may also be the subject of some hesitancy for some parties, particularly those further down the construction pyramid who may have commercial interests in preserving relationships for future work prospects.

2. ADJUDICATION PROCESS

An adjudication must begin prior to completion of the contract or subcontract and may only address a single matter, unless the parties agree otherwise.[222] Any party to a contract or subcontract may refer a dispute to adjudication by giving a written notice of adjudication to the other party, and on the same day, it must provide an electronic copy of the notice to ODACC.[223] The notice of adjudication must be crafted with significant caution as it is the key to determining the jurisdiction of an adjudicator for the purposes of the particular matter.

The parties may agree to an adjudicator or request ODACC to appoint an adjudicator. However, a contract or subcontract cannot name a person to act as an adjudicator before a dispute arises. If the adjudicator selected by the parties does not consent to adjudicate the matter within four days after notice of adjudication is given, it is mandatory for the referring party to request ODACC to appoint an adjudicator.[224] However, neither the *Construction Act*

---

217 *Ibid* at 18–21.
218 *Ibid* at 17.
219 *Ibid* at 21–22.
220 *Ibid* at 19.
221 *Ibid*.
222 *Construction Act*, *supra* note 1, s 13.5(3).
223 *Ibid*, s 13.7.
224 *Ibid*, s 13.9.

nor the regulations prescribe timelines for making such a request, though we would assume that the referring party has an interest in doing so as quickly as possible.

On receiving a request for appointment from the referring party, ODACC must appoint an adjudicator within seven days. ODACC can appoint a person as adjudicator only upon his or her prior consent, and nothing in the *Construction Act* or regulations requires an adjudicator to agree to or accept an appointment by ODACC.[225]

The *Annual Report* highlights that in the past year, ODACC developed its website (www.odacc.ca) and a computer system (ODACC Custom System), and a training program for adjudicators, which has been attended by 319 participants.[226] Of those participants, 85 applied to become adjudicators and ODACC has certified 65 as adjudicators.[227] The certified adjudicators are listed in ODACC's adjudicator registry.[228] A brief review demonstrates that the adjudicators come from a wide variety of professional backgrounds, including accountants, arbitrators, architects, engineers, project managers, quantity surveyors, and lawyers.

The majority of ODACC certified adjudicators have chosen to set their hourly rates in the range of $250–$500 per hour.[229] Only a handful of adjudicators have set their rates above that range. Ninety-five percent of adjudicators are willing to conduct adjudications for a flat fee rate, ranging from $800–$3,000, that is proportionate to the amount in dispute.[230] While many of the adjudicators were willing to travel across Ontario to address disputes, without any travel or disbursement charges, ODACC also has the capability of conducting video hearings for adjudications during the COVID-19 pandemic.

After the adjudicator's appointment, the referring party must provide documents for adjudication along with a copy of the notice to the adjudicator and to the responding party within five days.[231] The responding party, if it submits a response, must submit such response to the adjudicator, referring party, and every other party on the same day within the timelines prescribed by the adjudicator.[232] The adjudicator must make the determination of the matter within 30 days after receiving the documents.[233] ODACC is encouraging parties to use the ODACC Custom System for exchanging documents and messages during the adjudication process and for receiving the adjudicator's determination.

---

225 *Ibid*.
226 *Annual Report*, *supra* note 216 at 8–11.
227 *Ibid* at 12.
228 Ontario Dispute Adjudication for Construction Contracts (ODACC), "Adjudicator Registry," online: <odacc.ca/en/adjudicator-registry/>.
229 *Annual Report*, *supra* note 216 at 13.
230 *Ibid* at 14.
231 *Construction Act*, *supra* note 1, s 13.11.
232 *Ibid*, s 13.11.1.
233 *Ibid*, s 13.13.

3. AFTER THE DETERMINATION

There are a number of key considerations that parties to an adjudication may want to keep in mind if they have received a determination from an adjudicator under the *Construction Act*.

First, an adjudication determination will be admissible as evidence in court proceedings.[234] The determination by an adjudicator is binding on the parties until a determination of the matter by a court,[235] and as such, it is important to ensure that the decision is accurate and does not contain any typographical errors that may create issues for any of the parties in the future. Adjudicators can make changes to a determination to correct typographical errors or errors of a similar nature. For example, we would expect that the omission by an adjudicator of an importantly placed "not" in a sentence could be fixed. Corrections to determinations, however, must be made no later than seven days following the determination. Therefore, parties should immediately review the determination upon receipt to determine if there are any errors that require correction. If a party wishes to suggest corrections, they must message the adjudicator through the ODACC Custom System, and if necessary, a corrected determination will be issued.

Second, a party who is required to make a payment to comply with an adjudicator's determination must do so within ten calendar days after the determination has been communicated to the parties.[236] It is important, then, for a party facing a determination to consider aligning its internal processes, as well as external processes to the extent that funds are provided by lenders, to ensure payments can in fact be processed within ten calendar days. Advanced notice to the person or group responsible for accounts of a potential award may be required prior to receiving the determination to facilitate compliance. Failure to make payment on time could result in significant consequences, including the possible suspension of further work by the successful contractor or subcontractor awaiting payment, until the amount required under the determination is paid, along with interest and reasonable costs resulting from suspension of work.[237] While there is room for debate regarding what exactly constitutes "reasonable" costs, a party wishing to avoid any exposure whatsoever to delays as well as costs should take the necessary steps to ensure compliance with its payment obligations.

Third, once a certified copy of a determination has been received from an adjudicator, the successful party to an adjudication must consider whether it wishes to have the option to enforce the determination as if it were a court order. If so, the successful party must file a certified copy of the determination, which can be obtained from ODACC, with the court within the later of two years of the communication of the determination to the parties or, where a motion for judicial review has been filed, two years from the dismissal of the motion or the final determination of the application if it is not dismissed.[238] A successful party's

---

234 *Ibid*, s 13.13(7).
235 *Ibid*, s 13.15.
236 *Ibid*, s 13.19(2).
237 *Ibid*, s 13.19(3)–(5).
238 *Ibid*, s 13.20.

decision to seek a court order has a variety of implications, including on the requirement of the successful party to make related payments to parties down the construction pyramid.

For example, where a successful contractor has filed a determination and is engaged in enforcement of a court order, any related payment obligations of that contractor to its subcontractors are deferred pending the outcome of the enforcement.[239] Where a successful party has not been paid within the ten calendar days required under the *Construction Act*, it may be particularly beneficial for the party to file the determination and seek to enforce a court order — in order to avoid payees down the pyramid demanding related payments while the monies required to be paid under the determination remain outstanding. Furthermore, once a determination has been reflected in a court order, the party seeking enforcement can engage more traditional remedies like performing a judgment-debtor examination and seeking a writ of seizure and sale or garnishment. These remedies have their own strategic considerations including timing and cost.

Fourth, determination of an adjudicator is binding on the parties to the adjudication until a further determination of the matter by a court, an arbitration, or a written agreement between the parties respecting the matter.[240] Once the adjudication process is over and an unsuccessful party has complied with the determination, it must then consider whether it wishes to end the dispute where it stands or to pursue it under other dispute resolution methods, such as mediation, arbitration, or court proceedings. Parties will need to consult their existing contracts as they relate to dispute resolution procedures, which may impact the options available. The impact the determination may have on future disputes between the parties in respect of the same or similar projects may be an important factor in an unsuccessful party's decision whether to take further action. Furthermore, if the adjudicator's determination is in relation to a contract before the certification or declaration of substantial performance, a party's choice regarding whether to end the dispute or pursue it further will have an effect on the contract price in determining substantial performance under the *Construction Act*. Any amounts ordered by an adjudicator to be paid, or deducted amounts if overpaid, will be added to, or subtracted from, the contract price in determining substantial performance.[241]

Fifth, the determination of an adjudicator can only be set aside by an application for judicial review on limited grounds, such as legal incapacity of the parties, reasonable apprehension of bias of the adjudicator, or fraud. Another ground for judicial review is where the adjudicator lacked jurisdiction, such as where the determination was either of a matter that may not be the subject of adjudication under the *Construction Act* or of a matter entirely unrelated to the subject of the adjudication, or where the adjudicator breached the principles of natural justice, such as where the adjudicator failed to follow the procedures to which the adjudication was subject and the failure resulted in prejudice to a party's right to a fair adjudication.[242]

---

239 *Ibid*.
240 *Ibid*, s 13.15.
241 *Ibid*, s 2(2.1).
242 *Ibid*, s 13.18(5).

4. LAYERING ADJUDICATION OVER THE LIEN REGIME

The *Construction Act* allows an extension of time for preservation of a lien if the matter that is the subject of a valid lien is also the subject of an adjudication. For the purposes of preserving the lien, the lien is deemed to have expired on the later of 60 days from the standard trigger date for preserving a lien and 45 days from the day the adjudicator receives the documents for adjudication.[243] Therefore, parties must consider the impact of this on construction lien deadlines and holdback release and in particular whether any action is required following the receipt of a determination. It is not clear what would happen to the timeframes if an adjudicator were to fail to complete an adjudication and the referring party issues a fresh notice of adjudication on the same subject.

C. ADJUDICATION FRAMEWORK IN ALBERTA

Under the *ABLA*, parties did not have a dispute resolution or adjudication process to resolve any disputes relating to payment obligations.[244] Unless the contract specifically provided otherwise, this omission resulted in unpaid contractors and subcontractors resorting to disputing their claims in court, which can be extremely costly, lengthy, and time-consuming. The *ABLAA* implements a mandatory adjudication process that is intended to provide contractors and subcontractors with a more efficient and affordable method of resolving disputes.[245] Having the legislation mandate the adjudication process is important because sometimes contractors and subcontractors may not have the bargaining power to implement mandatory dispute resolution provisions into their existing contracts, leaving court as the only option to resolve any disputes.

The *ABLAA* implements a process and establishes an adjudication body to resolve disputes respecting "any prescribed matter."[246] The fees associated with this adjudication process will be set out in the regulations, which has raised concerns about whether this process will actually be significantly more affordable for contractors and subcontractors. However, since the consultation with the stakeholders regarding the regulations has not been concluded and the draft regulations have not been published, it is unclear what disputes will qualify as a "prescribed matter," how the procedures implemented under this regime will operate, and the fees that will be associated with this process.

The timelines under the adjudication rules are also based on a sliding scale for each level of the pyramid. The *ABLAA* sets out that an owner can also refuse to pay all or any portion of a proper invoice if the owner submits a notice of dispute within 14 days of receiving the proper invoice.[247] On receiving a notice of dispute, the contractor has two options: it can either pay the subcontractor within 35 days after giving the proper invoice to the owner, or it can issue a notice of nonpayment to the subcontractor within seven days of receiving the notice of dispute from the owner.[248] If the contractor issues a notice of nonpayment, the

---

243 *Ibid*, s 34(10).
244 *ABLA*, *supra* note 2.
245 *ABLAA*, *supra* note 40.
246 *Ibid*, s 17.
247 *Ibid*, s 14.
248 *Ibid*.

contractor must also provide an undertaking to refer the matter to adjudication within 21 days.[249] If the owner pays the full amount of a proper invoice but a contractor or subcontractor disputes entitlement of its subcontractor, the contractor or subcontractor must issue a notice of nonpayment within 35 or 42 days respectively after the proper invoice was given to the owner.[250]

For the adjudication authority, the Minister will designate one or more entities to act as the nominating authority (Nominating Authority) under the *ABLAA*.[251] The Nominating Authority will be responsible for, among other things, qualifying persons as adjudicators, appointing adjudicators, arranging for adjudicators to hear prescribed matters for which the Nominating Authority is responsible, developing and overseeing programs for the training of adjudicators, and establishing and maintaining a publicly available registry of adjudicators. A Nominating Authority has not been designated yet, and if one is not designated by the time the *ABLAA* comes into force, the Minister responsible for the *ABLAA* will be the interim Nominating Authority.[252] The creation of a dedicated adjudicating body is intended to provide expedient, contemporaneous, and less costly payment dispute resolution while preserving some ability for contracting parties to resolve disputes as they choose.

The *ABLAA* sets out that the adjudication will be conducted in accordance with adjudication procedures that are set out by the regulations or established by the Nominating Authority.[253] Additionally, parties who already have dispute resolution provisions in their contracts or subcontracts will only be able to rely on those contractual provisions to the extent they do not conflict with the *ABLAA* procedures or regulations. The *ABLAA* further provides that the adjudication regulations or procedures implemented by the Nominating Authority will prevail in the event of a conflict with the contractual dispute resolution clause.[254]

Pursuant to the *Alberta Amendment Act*, an adjudicator will have the ability to hear any dispute regarding any matter under Part 5 of the *ABLAA* and the adjudicator's decision will be final and binding on all parties.[255]

On 8 April 2021, further amendments to the *Alberta Amended Act* were proposed under Bill 62, *Red Tape Reduction Implementation Act, 2021*.[256] If Bill 62 receives royal assent, important changes will ensue for the proposed adjudication provisions. Importantly, Bill 62 stipulates that an adjudicator's decision will no longer be final and binding. Instead, an adjudicator's decision is binding on the parties except when a court order is made, a party makes an application for judicial review, the parties have entered into an agreement to

---

249 *Ibid*.
250 *Ibid*.
251 *Ibid*, s 17.
252 *Ibid*.
253 *Ibid*.
254 *Ibid*.
255 *Ibid*.
256 2nd Sess, 30th Leg, Alberta, 2021 (assented to 17 June 2021), SA 2021, c 16 [Bill 62].

appoint an arbitrator, or the parties have entered into a written agreement that resolves the matter.[257]

Pursuant to Bill 62, the adjudicator must issue a written notice of determination along with the adjudication order.[258] Enforcement of an adjudication order requires registration by a clerk of the court in accordance with specified requirements, including that it be submitted within 30 days from receipt of the order. Once the adjudication order is registered, it has the same effect as if it were an order made by the Alberta court.[259]

Pursuant to Bill 62, the adjudication process cannot be initiated if the parties have commenced an action in court with respect to the same dispute.[260] If a party commences court action on the same day that the dispute is referred to adjudication, the adjudication will be discontinued, and the court action will proceed. Additionally, unless the parties agree otherwise, notice of adjudication is required before the contract or subcontract is complete.

Pursuant to the *ABLAA*, the adjudicator can refer matters to court or refuse to hear a dispute if, in the adjudicator's opinion, the dispute is frivolous or vexatious.[261] The *ABLAA* sets out narrow grounds for judicial review of an adjudicator's decision, including: mistake of law, jurisdiction, an invalid contract or subcontract at the time of the dispute, the determination was of a matter unrelated to the adjudication, the adjudication was not conducted by a qualified adjudicator, the adjudicator did not follow the procedures, reasonable apprehension of bias on the part of the adjudicator, or fraud.[262] However, Bill 62 removes the narrow grounds for judicial review and sets out that an application for judicial review shall be filed with the court and served no later than 30 days from the date of notice of determination.[263]

It is not clear whether the changes proposed under Bill 62 will be further amended before they are implemented. It will be important to monitor the progress of Bill 62 to ensure parties fully understand the material changes to the adjudication provisions under the *ABLAA* and to ensure that their contracts are compliant with the adjudication requirements that are adopted.

Further, industry participants should also map out the interactions between construction lien remedies and adjudication remedies in order to understand the interplay and, where there is ambiguity, to take the appropriate positions to preserve their rights.

D. FEDERAL *PROMPT PAYMENT FOR CONSTRUCTION WORK ACT*

Under the *Federal Prompt Payment Act*, a contractor or subcontractor who is not fully paid within the timelines prescribed by the *Federal Prompt Payment Act* or shorter timelines

---

257 *Ibid*, cl 2(4)(b).
258 *Ibid*.
259 *Ibid*, cl 2(4)(c).
260 *Ibid*, cl 2(4)(a).
261 *ABLAA*, *supra* note 40, s 17.
262 *Ibid*.
263 Bill 62, *supra* note 256, cl 2(4)(e).

set out in the contract, may refer a dispute over nonpayment by the payor to be determined by an adjudicator.[264]

Unlike the Ontario *Construction Act*, under the federal regime, the contractor or subcontractor must give a notice of adjudication to the payor within a set time frame of 21 days after the later of: (1) the day on which the contractor receives a certificate of completion with respect to the construction project from Her Majesty or a service provider; and (2) if any of its construction work is covered by the last proper invoice submitted with respect to the construction project, the expiry of the time limit provided under the *Federal Prompt Payment Act* for payment for that work.[265] Any subcontractor may seek information from the contractor of the date on which the contractor received the certificate of completion for the particular construction project from Her Majesty or the service provider.

Similar to the Alberta requirements, the Minister may designate the Adjudicator Authority, which shall be responsible for establishing a list of adjudicators and appointing adjudicators under limited circumstances.[266] Other powers, duties, and functions of the Adjudicator Authority are yet to be prescribed in the regulations.

In February 2021, as a part of PSPC's continuing consultation initiative, PSPC issued a Request for Information (RFI) requesting industry feedback on its approach to establish an Adjudicator Authority, which would help PSPC develop a comprehensive and competitive Request for Proposal for procuring an Adjudicator Authority. The RFI also details a potential adjudication process being considered by the federal government, which is very similar to Ontario's regime.

However, as for consolidation of adjudication, the RFI provides that, if the same matter or related matters are the subject of disputes to be adjudicated in separate adjudications, the parties to each of the adjudications may agree to the adjudication of the disputes together by a single adjudicator as a consolidated adjudication. If the parties do not agree to the consolidation but the prime contractor wants to consolidate the disputes at lower levels into a consolidated adjudication, it may do so.

The adjudicator's determination is binding on the parties to the dispute unless they come to a written agreement or the determination is set aside by a court order or arbitral award.

E. WHAT IS HAPPENING ELSEWHERE IN CANADA?

1. NOVA SCOTIA

Other than the fact that adjudication is a more expedient and less costly alternative to the court process, there is very little discussion on the subject in the Nova Scotia parliamentary debates.[267] The overwhelming majority of the discussion is centered around payment timelines. As such, although the amendments to the *Builders' Lien Act* introduce concepts

---

264 *Federal Prompt Payment Act*, *supra* note 32, s 16(1).
265 *Ibid*, s 16(2).
266 *Ibid*, s 22(d).
267 Bill 119 *Debates*, *supra* note 111 at 2722 (Hon Mark Furey).

from Ontario's new prompt payment regime such as "proper invoice"[268] and accruing interests on unpaid amounts,[269] it takes a narrower approach as regards availability of adjudication as it limits the availability of adjudication to disputes that are the "subject of a notice of non-payment."[270]

There are no further indications as to what the adjudication procedures or requirements will resemble, except that the Governor in Council may make regulations respecting the required criteria to be selected or appointed as adjudicator, the adjudicators' powers, conduct, fees, and overseeing authority, to name a few.[271]

2. SASKATCHEWAN

An adjudication will be subject to the adjudication procedures set out in the contract or subcontract if the procedures comply with the requirements of the Saskatchewan legislation. However, if there are no such procedures or if the procedures are non-compliant with the legislative requirements, the adjudication will be subject to procedures set out in the *SK Amendment Act* and *SK Regulations*.[272] Although the Saskatchewan legislation's language appears to provide greater deference than Ontario to the parties to lay down their adjudication procedures, it essentially leads to the same result where only additional adjudication procedures may be set out in the contract or subcontract.[273] The legislation envisages designation of an entity to act as an Adjudication Authority,[274] similar to ODACC in Ontario, which will train and regulate the adjudicators and their fees in Saskatchewan.[275] The Minister may act as the Adjudication Authority until one is designated.[276]

3. QUEBEC

The *Pilot Project* in Quebec provides that a mandatory adjudication mechanism must be initiated before a dispute can be referred to an arbitrator or a court and before a notice of a legal hypothec can be published.[277] It covers any dispute unable to be settled amicably, to the extent that the dispute is likely to affect payment of all or a portion of covered public contracts or subcontracts.[278] The Institut de médiation et d'arbitrage du Quebec (IMAQ) is the body in charge of creating and maintaining a registry of qualified adjudicators.[279]

With respect to the procedure, a party wishing to submit a dispute to an adjudicator, the applicant, must give a notice of adjudication to the other party to the contract. The notice must notably contain the names of three adjudicators listed in the registry.[280] Upon receipt of the notice of adjudication, the other party has five days to choose an adjudicator from the

---

268 Bill 119, *supra* note 114, cl 2.
269 *Ibid*.
270 *Ibid*.
271 *Ibid*, cl 3.
272 *SK Amendment Act*, *supra* note 123, s 21.22; *SK Regulations*, *supra* note 124.
273 *SK Amendment Act*, *ibid*; *Construction Act*, *supra* note 1, s 13.6.
274 *SK Amendment Act*, *ibid*, s 21.12.
275 *Ibid*, s 21.4.
276 *Ibid*, s 21.2.
277 *Pilot Project*, *supra* note 153, ss 6–7.
278 *Ibid*, s 20.
279 *Ibid*, s 24.
280 *Ibid*, s 21.

list proposed in the notice or to request that the IMAQ appoint a different adjudicator.[281] Failure to do so enables the applicant to do the latter.[282]

The adjudicator has 30 days to render its decision. The decision is enforceable as soon as it is received by the parties. A party ordered to make a payment must do so within ten days of receiving the decision, failing which it is guilty of an offence and is liable to a fine ranging from $10,000 to $40,000.[283]

V. HOW CAN THE ENERGY INDUSTRY PREPARE?

Parties building and maintaining energy infrastructure in Canada will need to adapt their customary contractual provisions, communication practices, and internal corporate processes as these new requirements come into effect.

A. CONTRACT DRAFTING STRATEGIES

To strike a balance between the prescribed rules and freedom of the parties to contract, the legislation discussed above contemplate using a contract or subcontract to populate details of parties' arrangement. For instance, under the *Construction Act*, parties may add requirements for a proper invoice. Given the strict payment timelines, parties may agree on a template for the proper invoice, use a draft invoice mechanism for smooth processing of the proper invoice upon receipt by the owner, stipulate the time for giving proper invoices so the owner has certainty regarding the payment and notice deadlines, and carefully consider boilerplate provisions such as the notice clause in a contract to clarify how notices and invoices are to be given. In addition, parties must consider establishing internal processes to ensure the proper invoices reach the concerned internal stakeholders promptly so that they are processed on time.

Separately, for adjudication, parties may review dispute resolution provisions in their contracts and assess how adjudication would fit. Given the rapid pace of adjudication, parties may keep a roster of adjudicators, document the project to respond to an adjudication within a short period, and contractually agree to restrict time periods for commencing an adjudication if permitted by the legislation, for example, between 24 December and 2 January.

B. CAPL OPERATING PROCEDURE AND THE *ALBERTA BUILDERS' LIEN AMENDMENT ACT*

Many oil and gas agreements in Alberta incorporate a version of the CAPL Operating Procedure which generally governs the duties of the operator, gives the operator the authority to make certain decisions, and allows the operator to make certain expenditures for the joint account.[284] The CAPL Operating Procedure also prescribes how the operator will recover the costs and expenditures made for the joint account from the other joint owners. For example,

---

281 *Ibid*, s 25.
282 *Ibid*.
283 *Ibid*, ss 37, 50.
284 Canadian Association of Petroleum Landmen, *Operating Procedure* (Calgary: The Association, 1990).

under the 1990 CAPL Operating Procedure, clause 502 provides that the operator will initially advance and pay all costs and expenses incurred for the joint account.[285] This section further provides that the operator will charge to each joint operator its proportionate share of such costs and expenses and each respective joint operator shall pay the amounts owed to the operator within 30 days after receipt of the operator's statement. Since the operator is required to advance the funds on behalf of the other joint interest owners and recover amounts later, the time period prescribed in the CAPL Operating Procedure will not be impacted by the new payment timelines in the *ABLAA*. However, operators will still be required to make the payments to contractors and suppliers in accordance with the prescribed timeline of 28 days in situations that qualify as an improvement to land. Operators will need to factor in this shorter payment timeline and may want to consider its options to receive advance funds from working interest owners for improvements within a shorter time period that aligns with the 28-day payment timeline.

Another example is clause 503 of the 1990 CAPL Operating Procedure which sets out the mechanism for the operator to require the other joint operators to advance their proportionate share of the costs incurred upon approval of an Authority for Expenditure.[286] If the operator makes this election, it will submit a written estimate of costs to the other joint operators not earlier than 30 days prior to the month for which they are requesting payment. The joint operator is required to pay their respective portion on or before the twentieth day after receipt of such estimate or by the fifteenth day of the calendar month, whichever is the later. If the advanced costs are for work or improvement to the land and the *ABLAA* is applicable, the operator would need to be mindful of the 28-day payment timeline and how to manage the risk that actual costs exceed the estimated amount advanced to the operator under this clause. Operators likely will not have enough time to recover additional amounts from the other joint interest owners before the payment is due to the contractor.

Existing energy agreements, especially ones with multiple owners, ought to be reviewed to ensure they provide appropriate time for operators to recover costs from joint owners. Similarly, standard payment terms for new contracts in the energy industry may need to be modified to provide shorter timelines for an operator to recover costs from joint owners to ensure the operator does not always have to fund these amounts on behalf of joint owners for lengthy periods while ensuring compliance with the *ABLAA*.

C. UPDATE PRACTICES AND PROCESSES

Stakeholders may consider reviewing and amending their communication practices to comply with the notice requirements of the legislation under the prompt payment and adjudication regime. For instance, a contracting party may establish a separate email address specifically designated to receive notices of adjudication or proper invoices. Other internal corporate processes may also be reviewed and revised to adhere to the prompt payment and adjudication legislation, such as the payment approval process for payment of proper invoices or payment in accordance with an adjudicator's decision. Failure to adapt some of these processes to the governing legislation could have significant and unwanted

---

285 *Ibid.*
286 *Ibid.*

repercussions. For example, pursuant to the *Construction Act*, a party must make a payment under the adjudicator's determination within ten days after the determination has been communicated to the parties to the adjudication, failing which the contractor or subcontractor may suspend further work.[287] A contractor or subcontractor who suspends work is entitled to payment of any reasonable costs incurred by him or her as a result of the resumption of work following the payment of the amount.[288]

VI. CONCLUSION

Across Canada, actors within the construction pyramid are adjusting to the new reality of prompt payment and adjudication in various jurisdictions and adapting their procedures to comply with the significant changes this new legislation has introduced. Because rules differ in each province, parties building and maintaining energy infrastructure in Canada need to understand what rules are adopted in the jurisdictions in which they operate and how the new regimes are implemented in practice so they can be sure to draft contracts, develop processes, and enact policies to support compliance.

---

287 *Construction Act*, *supra* note 1, s 13.19(2).
288 *Ibid*, s 13.19(6).