



Report prepared for Public Services and Procurement Canada

Building a Federal Framework for Prompt Payment and Adjudication

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Secretary of the Review: James K. Little

EXECUTIVE SUMMARY OF ANALYSIS AND RECOMMENDATIONS

Canada, like many other jurisdictions around the world, is considering mechanisms to ensure the orderly and timely building of federal construction projects by ensuring that cash flows down the construction pyramid quickly.

The review was announced on January 30, 2018. The purpose of the review is to make provide the Government of Canada with a set of recommendations in relation to the implementation of prompt payment and adjudication legislation on federal construction projects.

In the federal context, under the *Financial Administration Act*, the Treasury Board Payment Directive, and the federal government Contracting Policy, there is an ordinary course of payment environment established that can fairly be characterized as fundamentally based upon the core principles of prompt payment. In particular a 30-day from invoice payment cycle, payment of undisputed amounts, and mandatory interest which assists in ensuring that payments are made by the federal government promptly.

However, over the course of the stakeholder engagement process stakeholders have raised concerns about the lack of prompt payment on federal construction projects, citing reports prepared by Prism Economics and Analysis, Ipsos Reid (prepared for Ontario trade contractors) and Raymond Chabot Grant Thornton (prepared for the Quebec coalition contre les retard de paiement dans la construction) in relation to payment delays.

We have concluded that the existing prompt payment policies and/or proposed voluntary codes are inadequate to achieve prompt payment, particularly at the trade contractor level and below, such that the implementation of prompt payment legislation at the federal level makes sense.

From a policy perspective and considering the jurisdiction of the federal government to enact legislation, the reason that the federal government should introduce such legislation is to:

- a) assure the orderly and timely building of federal construction projects by ensuring that cash flows down the construction pyramid quickly, thereby avoiding the disruptive effects of delayed payment, and potentially non-payment;
- b) avoiding increased construction costs caused by trade contractors adding contingencies to their bid prices on federal projects to make up for the cost to them of slow payment; and

- c) reducing the risk of disruption on federal construction projects attributable to the insolvency of contractors and subcontractors.

We recommend that the above-policy reasons be expressed as the legislative intent behind the proposed legislation.

Regarding the content of the proposed legislation, as is apparent from a review of our recommendations set out below, we recommend legislation that is similar in many respects to that introduced in Ontario. Ontario is presently the only province or territory that has prompt payment or adjudication legislation and developing legislation that is aligned across the country, to the extent possible, is important from a policy perspective.

We note that Chapters I through VII of the report provide necessary context and our analysis and recommendations begin at Chapter VIII. A summary of our recommendations and their reference location in the report is set out below.

In this section:

- Chapter VIII—Applicability of Legislation
- Chapter IX—Prompt Payment
- Chapter X—Adjudication
- Chapter XI—Key Contractual Issues
- Chapter XII—Legislative Alignment
- Chapter XIII—Further Consultation
- Chapter XIV—Transition and Education

Chapter VIII – Applicability of Legislation

1. The federal government should enact legislation introducing prompt payment and adjudication on federal construction projects.
2. The legislation should make clear that the intent of the federal government is to:
 - assure the orderly and timely building of federal construction projects on federal lands by avoiding the disruptive effects, including gridlock, which arises from non-payment down the supply chain;
 - avoid increased the construction costs of construction that result from bidders adding a contingency amount to allow for the risk of late payment, which contributes to the federal government's objective of achieving best value; and,
 - reduce the risk of disruption to federal construction projects because of the insolvency of subcontractors and suppliers.

3. The legislation should operate only in relation to matters integral to federal powers. The legislation should be limited to:
 - federal construction projects on lands owned by the federal government, and defence projects. However, the legislation should not apply merely on the basis that the federal government has funded a project in whole or in part or because the federal government has specific regulatory authority in relation to a particular industry.
 - "Lands reserved for the Indians" (recognizing that this language is anachronistic, but is used in the *Constitution Act, 1867*), we recommend that the ability to include projects on such lands be included within the ambit of a subsequent regulation, if viewed as merited, after appropriate consultation.
 - construction projects that are part of a federal undertaking or of a work declared to be for the general advantage of Canada and in particular:
 - federal undertakings (as defined in s. 92(10) of the *Constitution Act, 1867*, e.g. lines of steam or other ships, railways, canals, telegraphs) or
 - declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
 - projects designated by a Minister on a case-by-case basis at the outset of a project.
4. Federal prompt payment and adjudication legislation should be deemed to apply to all construction contracts that fall within the ambit of recommendation 3, drawing on the definitions of terms like "improvement", "services and materials", etc. from provincial lien legislation.
5. Parties to construction contracts should not be permitted to contract out of the legislation.
6. Subject to recommendation 3, prompt payment and adjudication legislation should apply to all federal departments and federal Crown corporations that do federal construction work under their own contracting authority.
7. The legislation should apply to federal P3 projects so long as those projects are federal P3 projects that meet the constitutional requirements outlined above (i.e. matters integral to federal power(s)) with necessary modifications, as implemented under Ontario's *Construction Act*. Specifically, the following should be considered:

- the appropriate definitions of the special purpose vehicle (SPV), the project agreement, the design-build contractor and the design build agreement;
 - modifying the applicability of adjudication, including limiting the topics that can be adjudicated and having the independent certifier serve as adjudicator;
 - allowing milestone payments;
 - allowing provisions that impose pre-conditions on the delivery of a proper invoice (e.g. in relation to certification); and
 - requiring the Independent Certifier to be the adjudicator.
8. The legislation should not apply to maintenance and repair work under long term contracts and it should only apply to work that constitutes a "capital repair." The legislation should define capital repair and suggest consideration of the Ontario approach as a basis for that definition.
 9. The legislation should exclude fit-up work for leased buildings as described in the Contracting Policy.
 10. There should be no thresholds in the proposed legislation.

Chapter IX – Prompt Payment

11. Prompt payment should apply at the level of the owner to general contractor, general contractor to subcontractor, and downwards.
12. The trigger for payment should be the delivery of a "proper invoice" as defined by the legislation, subject to certain pre-conditions, as will be discussed below. We recommend that the Ontario definition of a "proper invoice" should be used as a basis for the development of a federal definition.
13. The time period for payment between federal owner to general contractor should be 28 days and the period for payment at levels below the general contractor should be 7 days from receipt of payment from the owner, and so on down the contractual chain.
14. The time period for payment by a federal owner to its general contractor in relation to Substantial Performance of the Work and Final Completion should be 28 days and then 7 days down the payment chain.
15. Parties should otherwise be free to contract in respect of payment terms, but if the parties fail to do so, payment terms will be implied by legislation, being monthly payments.
16. A policy should be developed for construction projects that is not inconsistent with existing policies and allowing the certification of a

claim as reasonable before "verification", but following the delivery of a proper invoice.

Provided this is feasible, the legislation should render a contractual provision of no force and effect that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or the owner's prior approval. As noted above, the exception to this is in relation to P3 projects.

17. Payers should be permitted to deliver a notice of non-payment within 14 days following receipt of a purported proper invoice, provided that the notice of non-payment must set out the quantum of the amount withheld and adequate particulars as to why that amount is being held back. Undisputed amounts should be paid. Parties who withhold after receiving a notice of non-payment must undertake to adjudicate that issue with the withholding party within a stipulated period of time. As a result of this undertaking, pay-when-paid clauses should be permitted.
18. Consistent with the broad rights of set-off under the FAA (i.e. under s.155), the federal government should retain its current right of set-off against all projects. In the alternative, a proviso to s. 155 of the FAA could be considered, if the federal government is prepared to forego its ability to apply cross-project set-offs, in order for the legislation to be consistent with Ontario.
19. Payers (below the level of the owner) should continue to be able to set off all outstanding debts, claims or damages but the right of set-off should not extend to set-offs for debts, claims and damages in relation to other contracts, except in circumstances of a payee's insolvency.
20. The Ontario model should apply to federal prompt payment legislation. Specifically, the following should be legislated in relation to the consequences of a failure to pay:
 - The right to commence an adjudication;
 - Mandatory statutory interest;
 - The right to suspend work (without breach) if an adjudicator's determination is not paid within 10 days; and
 - Resumption of work after suspension, conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension.

Chapter X - Adjudication

21. Adjudication should be adopted as a targeted dispute resolution mechanism to support prompt payment.

22. All participants in the construction pyramid on federal government projects (including owners, general contractors, subcontractors, and suppliers), should be permitted to commence an adjudication.
23. Adjudication should be permitted to be commenced from the outset of construction until final completion of the prime contract. The right to invoke adjudication should not extend beyond completion of the contract.
24. The legislation should provide that the period from December 24 to January 2 should be excluded from the counting of days for the purposes of adjudications.
25. There should be a single adjudicator who has the responsibility to make a determination on matters within his or her expertise. Federal adjudicators should have:
 - no conflicts of interest;
 - significant defined experience in the construction industry, and experience levels should be carefully defined and include a minimum number of years;
 - successfully undertaken a thorough training and certification program run by an Authorized Nominating Authority, paid the associated fees, and agreed to abide by the requirements for holders of certificate including complying with the code of conduct;
 - no criminal record;
 - no record of an undischarged bankruptcy; and
 - satisfied any security clearance requirements of the federal government as appropriate for the nature of the federal construction project at issue.
26. Adjudicators should have immunity from suit.
27. Judicial review of adjudication decisions should be permitted based on limited specified grounds, following the Ontario model, but parties should be free to subsequently litigate or arbitrate their disputes as the adjudicator's decisions are only binding on an interim basis.
28. The parties should be able to select an adjudicator after a dispute arises (but not before as part of the contract or otherwise) and they should have a short defined period of time to do so. We suggest 4 days after the notice of adjudication is delivered. If they cannot agree, then the Authorized Nominating Authority should appoint the adjudicator.

29.The federal government should determine whether one of its departments (e.g., the Department of Justice) or a private entity should fulfill the role of ANA, depending on resourcing constraints, and if the federal government requires additional time to consider this issue, then it should craft the legislation such that this function can be performed by a public or private entity, as long as that entity is able to perform the following functions effectively.

30.The Authorized Nominating Authority should be created and should be responsible for:

- Developing and providing training and continuing education for adjudicators;
- Certifying, renewing certifications, withdrawal of certifications for adjudicators, and ensuring that adjudicators meet all prescribed criteria;
- Maintaining a publicly available registry of qualified adjudicators that lists and categorizes qualifications and any other relevant information prescribed;
- Appointing an adjudicator where the parties are unable to choose their adjudicator within the timeframe required;
- Regulating the conduct of adjudicators, including establishing a code of conduct;
- Addressing complaints against an adjudicator in relation to breaches of the code of conduct, including establishing a complaints procedure;
- Addressing circumstances where adjudicators have resigned and appointing replacements;
- Reporting on adjudications (in a similar manner to the CDR in the UK) such that an annual report would be prepared by the Authority providing statistics on adjudication, so that ongoing assessments can be made about the success of adjudication. This report should be publicly available; and
- Establishing and maintaining a fee schedule and authorize fees where the parties do not agree.

31.Adjudication should be applied in relation to a defined set of issues focussed on payment disputes including the following:

- valuation of services or materials;
- payment under the contract/change orders;
- disputes in respect of notices of non-payment;

- set-offs;
- holdback payments;
- non-payment of holdback; and
- issues that the parties may agree to be part of an adjudication.

32. There should be clear timelines including the following:

- A notice of adjudication delivered by the claimant should be the start of the process. The notice of adjudication should set out essential details of the nature and a brief description of the dispute, the nature of the redress sought by the claimant and also the name of the proposed adjudicator to conduct the adjudication;
- The parties should then agree on the proposed adjudicator, or another adjudicator, or request that an adjudicator be appointed;
- If the parties agree on an adjudicator, an adjudicator should have four days to consent to conduct the adjudication following receipt of the notice of adjudication;
- If the parties do not agree on an adjudicator, the Authorized Nominating Authority, upon receiving a request to appoint an adjudicator, should have seven days to appoint an adjudicator;
- Five days after appointment of the adjudicator, the referring party should provide the adjudicator and the other party with the documents that party relies on;
- After the adjudicator receives documents from the referring party, the responding party should have a right of reply within a stipulated time period extended as necessary by the adjudicator;
- Thirty days after receiving documents, the adjudicator should make a determination (can be extended on consent after a request by the adjudicator for up to 14 days, or a longer period of time if agreed to by the parties);
- Copies of the notices of adjudication should be provided to the Authorized Nominating Authority (even if the parties agree on the adjudicator);
- Subject to extension by agreement, the entire process would be concluded in 46 days; and
- Following a determination, payment should be made within 10 days, failing which a right to suspend should arise as well as mandatory interest.

33. There should be one model of adjudication, but there should be some flexibility in relation to the timeframe for the completion of adjudications, and adjudicators should be provided with mechanisms to exercise some flexibility in relation to scheduling.

34. We recommend that adjudicators be given the following powers:

- Issuing directions respecting the conduct of the adjudication.
- Taking the initiative in ascertaining the relevant facts and law.
- Drawing inferences based on the conduct of the parties to adjudication.
- Conducting an on-site inspection of the improvement that is the subject of the contract or subcontract.
- Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question.
- Making a determination in the adjudication.
- Any other power that may be prescribed.

35. A carefully crafted set of provisions should be created to permit consolidation, but with appropriate constraints and timelines. Consolidation should be permitted if all parties agree or if the general contractor requests it, subject to timing constraints.

36. Adjudications should consider a single matter only, except in the context of a consolidated adjudication, or as agreed.

37. All parties to an adjudication should be obligated to maintain confidentiality in respect of the documents disclosed during an adjudication process and adjudicators should be bound by confidentiality obligations.

38. Each party should bear its own costs of an adjudication unless there has been frivolous or vexatious conduct.

39. The ANA should establish a fee schedule that would apply where the parties have not agreed on a fee schedule, and this schedule should take into account the principle of proportionality.

40. There should be a clear and straightforward mechanism to enforce an adjudication award by filing it with the court and then enforcing it as you would an arbitral award, as under the Ontario model.

Chapter XI – Key Contractual Issues

41. The federal government should revise its Standard Federal Government Construction Contract to include reference to the prompt payment and adjudication regimes recommended in this report, to take effect when the legislation takes effect. In addition, the contract should be revised to impose prompt payment obligations on general contractors and subcontractors.
42. In relation to contractual holdbacks:
 - Contractual holdbacks should be clarified and in particular there should be clarity in relation to when such holdbacks are to be released.
 - The total contractual holdback should be reasonable in quantum and should not be held back for longer than is reasonable (e.g. 12 months or a time period related to the warranty period).
 - The general contractor working for the federal government should be allowed to flow down a similar holdback, and this should apply down the contractual chain as appropriate.
 - In relation to the payment of holdback funds, once received by the contractor such funds should be paid within seven days of receipt, subject to a notice of non-payment.
43. The requirement for a statutory declaration should be amended such that statutory declarations for federal government projects are allowed to be provided in digital form and issues related to timing, in particular in relation to the first statutory declaration, should be addressed in the Standard Federal Government Construction Contract.
44. Contracts between federal government entities and their consultants should, if necessary, be amended to ensure prompt payment and adjudication timelines are appropriately accounted for and the consultant is obliged to meet its contractual requirements in relation to the review of payment applications and change order requests within the timeline available to the federal government under new legislation (i.e. prior to the deadline for issuance of a notice of non-payment).
45. PSPC and DCC should maintain their websites which provide payment information and include reference to the information available on the website in the contract, as well as the current practice of including it in their construction services solicitation documents. Other federal government entities should provide information to PSPC for posting on a regular basis.

46. A request based disclosure requirement should be included in the Standard Federal Government Construction Contract such that payees may request (in writing) defined information and the federal government contractors and subcontractors must cooperate and disclose this information and provide it within a timeframe prescribed by regulation.

Chapter XII – Legislative Alignment

47. In relation to alignment, we recommend that the government explore the following three options:

- The new legislation could utilize the approach used in the federal Personal Information Protection and Electronic Documents Act, which provides that part of the Act does not apply if the Governor in Council is satisfied that provincial legislation is "substantially similar" and makes an order exempting the organization, activity or class from the application of the relevant part of the Act.
- A "model law" could be developed by the federal government (possibly seeking the assistance of the Uniform Law Conference of Canada) to address the topic of prompt payment and adjudication legislation for a model or uniform law.
- The federal government could initiate an alignment initiative with a view to attempting to negotiate an inter-governmental agreement on prompt payment and adjudication legislation. The legislation proposed in this report could, in this context, be utilized as a "best practices" model.

Chapter XIII – Further Consultation

48. Further consultation may be required prior to the imposition of either prompt payment or adjudication in relation to projects on "lands reserved for the Indians." We recommend that if further consultation is found to be warranted that in the interim, provision be made in the legislation that provides the government with the ability, after appropriate consultation, to create regulations that will provide for the application of prompt payment and adjudication to Indigenous lands.

49. We recommend that a trust regime be considered and that further consultation be conducted in relation to a trust regime. If it is not possible to introduce a trust regime, or potentially as an additional protection, we recommend that mandatory surety bonding be considered as an alternative mechanism to address insolvency risk.

Chapter XIV – Transition and Education

50. The new legislation should come into effect approximately 18 to 24 months after it receives Royal Assent to allow for the creation of an

ANA and to revise standard form contracts (including the Standard Federal Government Construction Contract) and provide time for education of stakeholders.

51. The new legislation should apply only to:

- procurements that commenced after the date the legislation comes into force;
- contracts entered into by the federal government after the legislation comes into force or in the case of procurements; and
- existing Real Property Service Management Contracts (such as RP-1/RP-2) should be specifically grandfathered until the Government exercises any option, following which the legislation should apply to construction aspects of these arrangements, provided that fair adjustment is made to the pricing of such options. The legislation should apply to new Real Property Services Management contracts entered into after the effective date.

52. An education program should be implemented for delivery well prior to the effective date of the new legislation. Included in this program should be a practice guide, as well as web-based learning modules and clearly written plan language guides including flow-chart style informational guides on the use of prompt payment and adjudication. The federal government should work with stakeholders, including the CCA, GCAC and NTCCC to prepare educational materials regarding contract terms, service standards, and the new legislation as well as creating a training package to be delivered to local construction associations.

In addition, there should be opportunities for joint presentations between construction associations and the federal government.

53. The federal government should provide funding for provincial construction associations, or other applicable associations, to provide training to their members in relation to federal construction projects on an as needed basis.

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I. INTRODUCTION

This document is our report on prompt payment and adjudication in relation to federal construction projects. Among other things, it describes the input received from stakeholders over the course of the 136-day period of the review, the research we have conducted, and our recommendations.

1. The Retainer

On January 23, 2018, Singleton Urquhart Reynolds Vogel LLP ("Singleton Reynolds") was retained to conduct an expert review of prompt payment and adjudication in relation to federal construction projects.

We were retained by Public Services and Procurement Canada ("PSPC"), the ministry of the federal government that serves federal ministries, departments and their agencies as their central purchasing agent, real property manager, treasurer, accountant, pay and pension administrator, integrity advisor and linguistic authority.¹

The research we have performed and the stakeholder engagement sessions we have conducted across the country are described in Chapter II – Review Mandate and Process.

2. Impetus for the Retainer

Prior to our retainer, there were approximately two years of discussions between the federal government and industry stakeholders about how issues related to the promptness of payment and the role of supportive dispute resolution should be addressed in the federal context. During the same period, a Private Member's Bill on the same subject was introduced in the Senate of Canada. Also at the same time, various provincial initiatives have considered the subject, including in Ontario. These initiatives and the mandate assigned to the Minister of PSPC by the Office of the Prime Minister, cumulatively resulted in our retainer by PSPC.

(a) The Government-Industry Working Group and the Prompt Payment Movement

In relation to the discussions between PSPC and industry stakeholders, at the 50th annual joint meeting of the Canadian Construction Association ("CCA") and the federal government on April 11, 2016, the issue of prompt payment was tabled by the CCA. Subsequently, at the request of CCA, PSPC, and

¹Public Services and Procurement Canada website - <https://www.canada.ca/en/public-services-procurement.html>; <https://www.tpsgc-pwgsc.gc.ca/comm/index-eng.html>

Defence Construction (1951) Limited, operating as Defence Construction Canada ("DCC"), as well as the members of a CCA taskforce on federal prompt payment (made up of trade contractors, specialty contractors, and general contractors and service providers), formed a Government-Industry Working Group (the "Working Group"). The Working Group created a 14-point action plan, the final point of which refers to the consideration and development of an effective legislative solution.

As well, the National Trade Contractors Coalition of Canada ("NTCCC") participated in the Working Group process. The NTCCC was established in 2004 and its members are trade contractors. As will be discussed below, the prompt payment movement is an international movement and, within Canada, the NTCCC has been a prominent voice advocating for change.

(b) Provincial Initiatives

In February 2015, we were retained by the Province of Ontario to carry out an expert review of Ontario's *Construction Lien Act*. Our expert report to the Province of Ontario, titled *Striking the Balance* was issued on April 30, 2016 ("Striking the Balance").² *Striking the Balance* made 101 recommendations, 98 of which were approved by the Cabinet of the Ontario Government. Subsequently, our retainer was extended to have us assist in the legislative drafting process. Bill 142 was introduced in the Legislative Assembly of Ontario on May 31, 2017 and, having passed unanimously, was granted Royal Assent on December 12, 2017 (the "*Construction Act*"). Among other things, the new *Construction Act* implements prompt payment and adjudication in Ontario. Its modernization provisions in relation to construction liens will take effect as of July 1, 2018 and its prompt payment and adjudication provisions will take effect on October 1, 2019.

As is discussed further in Chapter XII - Legislative Alignment, in other provinces and territories, there has also been consideration of legislation in relation to prompt payment and adjudication.³

(c) Bill S-224 – Private Member's Bill introduced in the Senate

Shortly after the initiation of the Working Group, a Private Member's Bill (designated Bill S-224) respecting payments made under federal construction contracts was introduced in the Senate by Senator Donald Plett. Bill S-224

² Striking the Balance: Expert Review of Ontario's Construction Lien Act delivered April 30, 2016 - https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/

³ The details of these initiatives are discussed in Chapter XII – Legislative Alignment.

passed third reading in the Senate on May 4, 2017.⁴ Bill S-224 includes prompt payment and adjudication. Given the government's intention to introduce legislation following delivery of this Report, Bill S-224 is currently pending. The contents of Bill S-224 are addressed in Chapter VI – Bill S-224. The introduction of Bill S-224 sparked dialogue within the construction industry about federal prompt payment legislation as stakeholders responded to the Bill expressing both their support and their concerns.

(d) The Mandate Letter to the Minister of PSPC

On October 4, 2017, the Office of the Prime Minister issued a mandate letter to the Minister of Public Services and Procurement, the Honourable Carla Qualtrough (the "Minister's Mandate Letter").⁵ In it, the Prime Minister stated that the Government was committed to a "responsible, transparent fiscal plan" and to setting a "higher bar for openness and transparency in government"; that its work would be "informed by performance measurement, evidence and feedback from Canadians"; and that the Government's commitment included "constructive dialogue with Canadians, civil society, and stakeholders."⁶

Regarding the Minister's specific mandate, the Prime Minister stated:

In particular, I will expect you to work with your colleagues and through established legislative, regulatory, and Cabinet processes to deliver on your top priorities:

[...]

- Modernize procurement practices so that they are simpler, less administratively burdensome, deploy modern comptrollership, encourage greater competition, and include practices that support our economic policy goals, including innovation, as well as green and social procurement.

This includes:

[...]

- developing better vendor management tools to ensure the Government is able to hold contractors accountable for poor

⁴ Bill S-224 – An Act respecting payments made under construction contracts, First Session, 42nd Parliament, 64-65-66 Elizabeth II, <http://www.parl.ca/DocumentViewer/en/42-1/bill/S-224/third-reading>

⁵ Minister's Mandate Letter dated October 4, 2017 - <https://pm.gc.ca/eng/minister-public-services-and-procurement-mandate-letter>, see Appendix 1 to this Report.

⁶ Minister's Mandate Letter.

- performance or unacceptable behaviour, particularly in large scale procurements;
- publishing clear metrics to measure government performance on the competitiveness, cost, and timeliness of procurements;
- [...]
- ensuring prompt payment of contractors and sub-contractors who do business with your department.

[...]⁷

Accordingly, the principles informing the Minister's mandate include:

- openness and transparency;
- performance measurement evidence and feedback from Canadians;
- constructive dialogue with stakeholders;
- modernizing procurement practices so that they are simpler, less administratively burdensome, encourage greater competition and include practices that support the Government's economic goals;
- developing better vendor management tools to ensure that Government is able to hold contractors accountable for unacceptable behaviour;
- publishing clear metrics to measure government performance on the competitiveness, cost and timeliness of procurements; and
- ensuring prompt payment of contractors and subcontractors who do business with PSPC.

In the result, we were retained to research prompt payment and adjudication in relation to federal construction projects and prepare a report, respecting these principles, and provide our recommendations on the elements of a legislative solution to implement prompt payment and adjudication.

3. Report Structure

Our report, which provides the context and framework for our recommendations, is organized as follows:

Executive Summary – here, we provide a summary of our recommendations as well as a brief outline of the relevant context that supports them.

⁷Minister's Mandate Letter.

1. In the current Chapter I – Introduction, we provide a high-level outline of our mandate and the report itself.
2. In Chapter II - Review Mandate and Process, we describe the steps we have taken to obtain input from the stakeholder community, conduct research, and identify the elements required to develop an appropriate federal prompt payment and dispute resolution scheme for federal construction projects.
3. In Chapter III – The Financial Administration Act, Related Regulations, Treasury Board Directives and Contract Provisions, we examine the existing legislative context and policy framework that govern how the federal government spends money on construction work.
4. In Chapter IV – Construction and Construction-Related Activities of the Federal Government, we set out a general description of the construction activities of the federal government. This chapter provides the reader with a general understanding of the federal government as the “owner” in the construction pyramid, and summarizes payment statistics provided to us by certain federal government entities as further context for our analysis.
5. In Chapter V – The Government-Industry Working Group, we describe the history of the efforts of PSPC, DCC and the CCA in relation to prompt payment.
6. Chapter VI – Bill S-224, we provide a brief history of the private member’s bill introduced in the Senate, the feedback received on that Bill, and its relation to our engagement.
7. Chapter VII – Constitutional Considerations, we canvass an issue central to the operability of potential legislation. Specifically, this chapter provides a summary of the legal opinion prepared by retired Supreme Court of Canada Justice Thomas Cromwell on the constitutional issues associated with potential legislation in this sphere.
8. In Chapter VIII – Applicability, we consider the appropriate scope of the potential legislation and, having examined a spectrum of options in relation to the kinds of projects the new legislation should apply to, we provide our recommendations.

9. In Chapter IX – Prompt Payment, we explore the context of prompt payment, including existing legislation and practices, summarize stakeholder input and international experiences, and then provide our analysis and recommendations.
10. Similarly, in Chapter X – Adjudication, we explore the context of adjudication as an integral element of prompt payment, including existing legislation and practices, summarize stakeholder input and international experiences, and then provide our analysis and recommendations.
11. In Chapter XI – Key Contractual Issues, we describe our recommendations in respect of changes to existing federal government standard form contracts.
12. In Chapter XII – Legislative Alignment, we describe the efforts of various provinces in respect of prompt payment and adjudication as well as the importance of attempting to ensure that federal prompt payment and adjudication legislation is aligned with provincial legislation to the extent possible and that parties are clear as to the legislation that applies to any given project from the outset of the project.
13. In Chapter XIII – Further Consultation, we describe those issues requiring further consultation including in relation to projects on Indigenous lands and the potential for mandatory surety bonds or a mandatory trust regime.
14. In Chapter XIV – Transition and Education, we make recommendations as to a transition period and education efforts about the new legislation to be made during the transition period and subsequently.
15. Finally in Chapter XV – Conclusion and Acknowledgements, we acknowledge those who contributed to the preparation of this report.

For the benefit of the reader, the majority of analysis and recommendations begin at Chapter VIII through to Chapter XIV.

4. Summary

We have attempted to carry out our mandate in an efficient way, meeting with stakeholders in groups, if they were amenable to that approach, and

being flexible in terms of the form and timing of oral and written submissions. As described in Chapter II – Review Mandate and Process, to date we have met with over 500 people over the course of 55 meetings in 10 provinces and 2 territories.⁸

The work we previously performed in Ontario, in preparing the *Striking the Balance* Report and assisting in the legislative drafting of Ontario's *Construction Act*, has been of great benefit to us as we could draw on existing research we had previously performed and we were attuned to issues brought forward by the stakeholder community. However, in performing this mandate we have also encountered many different issues that arise in the federal context, as described in this report, and we have considered stakeholder views expressed in the national context.

Importantly, we appreciate that, to the extent our recommendations propose changes to existing payment and payment-related mechanisms, parties will need to be educated on these changes and they will need time to re-engineer existing processes. We hope that the dissemination of this report will be the first step in that process.

In closing, we note that for the convenience of the reader we have consolidated our recommendations in an Executive Summary, which accompanies this report.

⁸ While we reached out to stakeholders in Nunavut, we did not receive a response. We were able however, to conduct a meeting with the Northwest Territories and Nunavut Construction Association, which represents contractors in Nunavut.

II. REVIEW MANDATE AND PROCESS

1. The Government's Intention to Bring Forward Prompt Payment Legislation

(a) Announcement of Retainer

As noted above, on January 23, 2018, PSPC engaged us as expert consultants to conduct a series of stakeholder engagement sessions and develop a recommendation package for the federal government regarding promptness of payment and adjudication in relation to federal construction projects. On January 30, 2018, our retainer was formally announced to the public.⁹

(b) Process

Following the announcement, we set out to design a process that would both provide meaningful engagement opportunities and meet the aggressive schedule required for delivery of this report. We developed a three-phase approach:

- Phase 1 – Developing a Stakeholder List and Distributing an Information Package (“Information Package”)¹⁰
- Phase 2 – Receiving Submissions and Holding Stakeholder Engagement Sessions
- Phase 3 – Researching and Writing of the Report

(c) Schedule

Originally, our report was to be delivered on May 1, 2018, a 90-day time period from the date of the announcement of our retainer. However, as we embarked on the stakeholder engagement sessions, we realized that stakeholders, who were industry associations, needed time to educate their members, consult internally, and build consensus before they would be able to articulate a position to us. As a result, various stakeholder groups, including the CCA, the NTCCC, the General Contractors Alliance of Canada (“GCAC”), the Council of Ontario Construction Associations (“COCA”) and the Canadian Bar Association (“CBA”), requested that we be granted an extension.

⁹PSPC News release dated January 30, 2018 - https://www.canada.ca/en/public-services-procurement/news/2018/01/government_seekingrecommendationsonfederalpromptpaymentlegislati.html

¹⁰ The Information Package dated February 21, 2018 is appended to this Report as Appendix 2.

Subsequently, we were granted an initial extension until June 1, 2018 to deliver our report, which allowed us to extend the time period within which we could accept stakeholder submissions to April 30, 2018.

Following the release of a significant report in relation to prompt payment and adjudication prepared on behalf of the government of Australia on May 19, 2018, we were granted an additional week, until June 8, 2018, within which to deliver our report.

2. Stakeholder Engagement

(a) Stakeholder List and Information Package

Shortly following our retainer, PSPC provided us with a stakeholder list. We were able to supplement this list with the input and assistance of CCA, GCAC, and NTCCC. We then prepared a cover letter and Information Package to be delivered to the stakeholder community to inform them about our mandate and process. The cover letter and Information Package were sent to 107 stakeholders on February 21, 2018.¹¹

The 21-page Information Package familiarized the stakeholders with the issues that we intended to address so that they could prepare meaningful submissions and could attend substantive stakeholder engagement sessions to talk to us about the issues of concern to them.

The Information Package was not intended to canvass in detail every issue to be analyzed in the final report. Rather, it was intended to inform stakeholders generally about the core issues and to stimulate discussion by posing questions that we hoped stakeholders would attempt to answer in their written submissions and in the stakeholder engagement sessions.

(b) Stakeholder Engagement Sessions

As noted above, our intention was to conduct an efficient stakeholder engagement process, consistent with the principle of constructive dialogue with stakeholders noted in the Minister's Mandate Letter. Most of our engagement sessions were conducted in person to ensure the quality of the engagement session. We travelled to every province and all territories (except Nunavut, as we met with the Construction Association of the Northwest Territories and Nunavut in Yellowknife). We conducted 55 engagement sessions and met with more than 500 people. The stakeholder

¹¹ The Information Package was subsequently sent to additional stakeholders identified through the stakeholder engagement process. It should also be noted that not all 107 stakeholder addressees participated in the stakeholder engagement process.

engagement sessions included the following meetings (all of which were conducted face-to-face unless indicated below to the contrary):

No.	Date	Location	Stakeholder
1	March 6	Vancouver	GCAC (BC)
2	March 6	Vancouver	BC Construction Association
3	March 6	Vancouver	Partnerships BC
4	March 6	Vancouver	Prompt Payment BC
5	March 7	Regina	Saskatchewan Construction Association
6	March 7	Regina	GCAC (Saskatchewan)
7	March 7	Regina	SaskBuilds
8	March 7	Regina	Saskatchewan Minister of Central Services
9	March 8	Winnipeg	Winnipeg Construction Association
10	March 8	Winnipeg	Manitoba Law Reform Commission
11	March 8	Winnipeg	Prompt Payment Manitoba
12	March 13	Yellowknife	Northwest Territory and Nunavut Construction Association
13	March 13	Yellowknife	Northwest Territories, Ministry of Infrastructure
14	March 13	Yellowknife	NWT & Nunavut Chamber of Mines
15	March 15	Banff	Alberta Construction Association, Edmonton Construction Association, Red Deer Construction Association, Calgary Construction Association
16	March 15	Banff	GCAC (Alberta)
17	March 15	Banff	Canadian Construction Association
18	March 16	Calgary	Prompt Payment Alberta
19	March 19	Charlottetown	PEI Construction Association
20	March 19	Charlottetown	PEI Transportation, Infrastructure and Energy
21	March 19	Charlottetown	Mi'kmaq Confederacy of PEI
22	March 20	Saint John	Construction Association of New Brunswick
23	March 21	Halifax	Construction Association of Nova Scotia
24	March 21	Halifax	Nova Scotia Transportation and Infrastructure Renewal
25	March 26	Toronto	Canadian Construction Association (call)
26	March 27	Ottawa	Defence Construction Canada
27	March 27	Ottawa	Ottawa Construction Association
28	March 27	Ottawa	RCMP
29	March 27	Ottawa	RAIC/Engineers Canada/Association of Consulting Engineering Companies in Canada
30	March 28	Ottawa	PSPC
31	March 29	Toronto	Surety Association of Canada
32	March 29	Toronto	Canadian Bar Association
33	March 29	Toronto	Council of Ontario Construction Associations
34	March 29	Toronto	Canadian Institution of Plumbing and Heating
35	April 3	Yukon	Yukon Construction Association

No.	Date	Location	Stakeholder
36	April 3	Yukon	Yukon, Department of Highways and Public Works
37	April 3	Atlantic	GCAC – Atlantic (call)
38	April 4	Toronto	National Trade Contractors Coalition of Canada
39	April 4	Toronto	National Research Council Canada (call)
40	April 4	Toronto	Quebec Conseil du trésor (call)
41	April 5	Toronto	Manitoba Finance (call)
42	April 5	Toronto	Canadian Institute of Quantity Surveyors
43	April 6	Toronto	Canadian Council for Public-Private Partnerships
44	April 9	St. Johns, NFLD	Newfoundland and Labrador Construction Association
45	April 9	St. Johns, NFLD	Deputy Minister of Transportation and Works NL
46	April 9	St. Johns, NFLD	Canadian Bar Association, NFLD
47	April 10	Montreal	GCAC (Quebec)
48	April 10	Montreal	Prompt Payment Quebec
49	April 11	Toronto	GCAC (National)
50	April 17	Toronto	Building Trades Union (call)
51	April 20	Ottawa	National Capital Commission
52	April 20	Ottawa	Agriculture and Agri-food Canada
53	April 24	Toronto	Brookfield Global Integrated Solutions LP ("BGIS")
54	April 24	Toronto	Manitoba Infrastructure (call)
55	April 25	Toronto	Canada Post Corporation

We have prepared general summaries of these stakeholder engagement sessions which will be made publicly available.

(c) Written Submissions from Stakeholders

We also received 12 formal written submissions from stakeholders, several e-mails on related topics, and 21 letters of support from local associations or member associations for submissions made at the national level. These submissions were of excellent quality and were thoughtful and carefully considered.

The stakeholders that provided formal written submissions were as follows:

No.	Stakeholder	Date of Submission
1.	Alberta Construction Association ("ACA")	April 7, 2018

No.	Stakeholder	Date of Submission
2.	BGIS Global Integrated Solutions Canada LP ("BGIS")	April 30, 2018
3.	Canadian Bar Association	May 4, 2018
4.	Canadian Construction Association	March 23, 2018
5.	Canadian Institute of Quantity Surveyors ("CIQS")	March 28, 2018
6.	Defence Construction Canada	March 22 / March 29, 2018
7.	General Contractors Alliance of Canada	April 5, 2018
8.	National Trade Contractors Coalition of Canada	March 2018
9.	Public Services and Procurement Canada	March 21, 2018
10.	Coalition contre les retards de paiement dans la construction ("Quebec Coalition")	April 10, 2018
11.	Surety Association of Canada ("SAC")	March 29, 2018
12.	Winnipeg Construction Association ("WCA")	April 11, 2018

The aforementioned submissions are appended to this report as Appendix 3. Summaries of these submissions are appended as Appendix 4. We note that our mandate did not provide us with sufficient time to verify assertions made in the above-noted submissions, nor did it allow us to seek further feedback on these submissions from other industry stakeholders. As such, and given that we have no reason to doubt the validity of the submissions, we have considered their respective input in our analysis where applicable.

3. Summary

As noted in Chapter I – Introduction, we have been able to draw upon the research that we conducted at the time we prepared our report for the government of Ontario. However, this research needed to be updated because it was performed in 2015 and 2016 and we needed to consider issues unique to the introduction of adjudication at a federal level.

As well, there have been significant developments in various jurisdictions around the world, including in Australia, where a federal review has also taken place. We were able to liaise with John Murray, who has been conducting the federal review in Australia, and his report was released to the public on May 19, 2018 (the "Murray Report")¹².

In addition, in relation to the issue of potential legislative constraints, there was significant research to be performed in relation to the constitutional implications of the proposed federal legislation. In this regard, we were very fortunate to have been able to retain retired Supreme Court of Canada Justice Thomas Cromwell who, along with Guy Pratte, led a team at Borden Ladner Gervais LLP that has provided a detailed analysis of the relevant issues.

In terms of the drafting of our report, we particularly wanted to ensure we incorporated the feedback received from stakeholders and therefore embarked on drafting at the end of April.

Our report was finalized in early June, following which it was delivered to PSPC for translation.

¹² Review of Security of Payment Laws, J Murray AM, for the Australian Government Department of Jobs and Small Businesses, December 2017 (released May 2018) (the "Murray Report"). https://docs.jobs.gov.au/system/files/doc/other/review_of_security_of_payment_laws_-_final_report_published.pdf

III. THE FINANCIAL ADMINISTRATION ACT, RELATED REGULATIONS, TREASURY BOARD DIRECTIVES AND CONTRACT PROVISIONS

The federal government's contracting and payment practices are deeply rooted in legislation, regulation and policy. As we engaged with stakeholders during the consultation process, we were made aware of the practical implications of these policies and the mandatory environment within which entities such as PSPC, DCC, the Royal Canadian Mounted Police ("RCMP"), and other federal departments and agencies operate. The existing legal framework stipulates procedures and timelines for payments by the federal government. As well, there are numerous policy guidelines and directives in place to ensure consistency and certainty for the federal government and those contracting with federal government entities.

In this chapter, we provide a high-level outline of the key elements of the legal framework in which the federal government contracts and procures construction work and services. Our review is limited to the provisions of the statutes, regulations, and policies directly related to contracting and payment.

As the stakeholders are aware, at the federal level there is no construction lien legislation. Provincial liens cannot attach to federal Crown lands given the doctrine of inter-jurisdictional immunity, which restricts provincial lien legislation from intruding on a federal undertaking.¹³ Furthermore, we note that the Supreme Court of Canada has held that such provisions do not operate with respect to federal undertakings where the sale of the property subject to the lien would result in the fragmentation or dismemberment of the undertaking.¹⁴ The lack of availability of the lien remedy is an issue that was raised by many industry stakeholders as a justification for requesting that a legislative mechanism be introduced to ensure that cash flows down the construction pyramid quickly.

¹³ Striking the Balance at p. 24 citing *Vancouver International Airport v Lafarge Canada Inc.*, 2011 BCCA 89 (lien on airport discharged); Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 173.

¹⁴ See e.g. *Campbell-Bennett v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207; *CNR v. Nor-Min Supplies*, [1977] 1 SCR 322.

1. The FAA

(a) General

The *Financial Administration Act*¹⁵ (“FAA”) provides the legal framework for the “collection and expenditure of public funds, including the contracting practices” of federal government departments, agencies and Crown corporations.¹⁶

(b) Departments and Crown corporations

Section 2 of the FAA includes the definitions for the relevant government entities. The relevant definitions are as follows:

department means

- (a) any of the departments named in Schedule I,
- (a.1) any of the divisions or branches of the federal public administration set out in column I of Schedule I.1,
- (b) a commission under the Inquiries Act that is designated by order of the Governor in Council as a department for the purposes of this Act,
- (c) the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer, and
- (d) any departmental corporation; (*ministère*)

Crown corporation has the meaning assigned by subsection 83(1); (société d’État)

Under section 83(1) of the FAA, a Crown corporation is defined as follows:

Crown corporation means a parent Crown corporation or a wholly-owned subsidiary; (société d’État)

¹⁵ *Financial Administration Act*, R.S.C., 1985, c. F-11. <http://laws-lois.justice.gc.ca/eng/acts/f-11/> (“FAA”).

¹⁶ PSPC Supply Manual 1.20.5 - <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/20/5>

The definitions of “parent Crown corporation” and “wholly-owned subsidiary” are as follows:

parent Crown corporation means a corporation that is wholly owned directly by the Crown, but does not include a departmental corporation; (société d’État mère)

[...]

wholly-owned subsidiary means a corporation that is wholly owned by one or more parent Crown corporations directly or indirectly through any number of subsidiaries each of which is wholly owned directly or indirectly by one or more parent Crown corporations. (filiale à cent pour cent)

During our stakeholder engagement sessions, we met with seven federal government entities, which may be categorized as follows:

Federal Government Stakeholder	Designation under the FAA
Agriculture and Agri-Food Canada (“AAFC”)	Schedule I - Department
Canada Post Corporation (“Canada Post”)	Schedule III Part II – Crown corporation ¹⁷
DCC	Schedule III Part I – Crown corporation ¹⁸
National Capital Commission (“NCC”)	Schedule III Part I – Crown corporation ¹⁹
National Research Council Canada (“NRCC”)	Schedule II – Departmental Corporation
PSPC	Schedule 1 - Department
RCMP	Schedule I.1 – Division or Branch of the Federal Public Administration

(c) Treasury Board

The FAA establishes the Treasury Board.²⁰ The Treasury Board is a Cabinet committee of the Queen’s Privy Council of Canada. The Treasury Board is

¹⁷ Canada Post was established under the *Canada Post Corporation Act*, R.S.C., 1985, c. C-10.

¹⁸ DCC was established pursuant to the *Defence Production Act*, R.S.C., 1985, c. D-1.

¹⁹ NCC is established by the *National Capital Act*, R.S.C., 1985, c. N-4.

“responsible for accountability and ethics, financial, personnel and administrative management, comptrollership, approving regulations and most Orders-in-Council.”²¹

The FAA provides that the Treasury Board may make regulations in relation to the “collection, management and administration of, and the accounting for, public money.”²²

(d) Payment and Certification

The Relevant Provisions of the FAA in relation to payment and certification fall under Part III – Public Disbursements. In particular, Sections 32, 33, and 34 are of direct interest as they are applicable to payments made by federal government owners on construction projects. The PSPC Supply Manual (a document prepared by PSPC containing policies and procedures, as well as references to Acts and Directives, for the procurement of goods, services and construction) provides a useful overview of these sections of the FAA, which is summarized below.

Section 32 of the FAA provides that no contract or other arrangement providing for a payment can be entered into unless there is sufficient funding available to discharge any debt that will be incurred under the contract during the fiscal year in which the contract is entered into.²³

Section 33 of the FAA addresses requisitions and requires that no charge can be made against an appropriation except on the requisition of the appropriate Minister of the department for which the appropriation was made or of a person authorized in writing by that Minister.²⁴

Section 34 of the FAA then goes on to address payment for work, goods, or services and imposes a certification requirement. Under section 34, payment cannot be made unless “the deputy of the appropriate Minister, or another person authorized by the Minister certifies, in the case of a payment for the performance of work, the supply of goods or the rendering of services, that the work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged is in accordance with the

²⁰ FAA at s. 5.

²¹ Treasury Board Secretariat – About Us. <https://www.canada.ca/en/treasury-board-secretariat/corporate/about-treasury-board.html>; FAA at s. 7.

²² FAA at s. 10(c).

²³ FAA at s. 32(1); Standard Acquisition Clauses and Conditions (SACC) Manual (the “SACC Manual”) <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/20/5>

²⁴ FAA at s. 33; SACC Manual.

contract, or if not specified in the contract, is reasonable.”²⁵ Section 34(1) reads as follows:

Payment for work, goods or services

34 (1) No payment shall be made in respect of any part of the federal public administration unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister, or another person authorized by that Minister, certifies

(a) in the case of a payment for the performance of work, the supply of goods or the rendering of services,

(i) that the work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract, is reasonable,

(ii) where, pursuant to the contract, a payment is to be made before the completion of the work, delivery of the goods or rendering of the service, as the case may be, that the payment is according to the contract, or

(iii) where, in accordance with the policies and procedures prescribed under subsection (2), payment is to be made in advance of verification, that the claim for payment is reasonable; or

(b) in the case of any other payment, that the payee is eligible for or entitled to the payment.

Policies and procedures

(2) The Treasury Board may prescribe policies and procedures to be followed to give effect to the certification and verification required under subsection (1). .²⁶

Section 38 provides that in relation to advance payments, any advance or portion of it that is not repaid may be recovered out of **any** monies payable by Her Majesty to the person to whom the advance was made.

The relevant regulations created under the FAA and the directives of the Treasury Board in relation to payment of contractors are discussed below.

²⁵ FAA at s. 34(1)(a)(i).

²⁶ FAA at s. 34.

(e) Set-Off

The FAA provides for several forms of set-off against amounts otherwise due or payable by the federal government.

As noted above, Section 38 of the FAA (and regulations made pursuant to it) represents a form of set-off in which accountable advances not accounted for may be recovered as a debt to Her Majesty.²⁷

Furthermore, Section 155 of the FAA provides that where any person is indebted to Her Majesty in right of Canada (or in right of a province on account of taxes payable and subject to a federal tax collection agreement with that province), the Minister responsible for recovery or collection of the amount of indebtedness may authorize the retention of the amount by way of a deduction from or set-off against “any sum of money that may be due or payable by Her Majesty in right of Canada to the person” or to the estate of that person.²⁸ This is a very broad right of set-off, as it would apply to any project on which a party contracting with the federal government is working.

(f) Offences

The FAA also contains certain provisions in relation to offences under the Act. We understand from our meetings with federal government representatives that these potential sanctions impose further restrictions on the ability of public contracting authorities in regards to how they pay contractors and engage services under the FAA.

Our review of the FAA suggests that Section 80 is relevant to payments by the federal government to contractors. Under Section 80 of the FAA²⁹, every officer or person acting in any office or employment connected with the collection, management or distribution of public money is exposed to potential liability for the offences described under that Section, which can result in that person being guilty of an indictable offence and liable on conviction to a fine and imprisonment not exceeding 5 years. Some potential offences include: receiving any compensation or reward for the performance of any official duty, permitting contravention of the law by any other person, collusion to defraud Her Majesty, and making any false entry or false certificate.³⁰

²⁷ FAA at Section 38; see commentary in *Sherman v The Queen*, 2008 TCC 487 at para 19.

²⁸ FAA at Section 155.

²⁹ FAA at Section 80(1).

³⁰ FAA at Section 80.

Notwithstanding the fact that our review of case law under this provision suggests that it is rarely employed, the civil servants with whom we met take it as an important indicator of the seriousness of their responsibilities.

Furthermore, and as discussed below in relation to the Government of Canada Contracting Policy, there are sanctions under individual policies created in accordance with the FAA.

2. Government Contract Regulations

(a) General

The Government Contract Regulations (SOR87-402)³¹ ("GCR") set out conditions under which the federal government can enter into contracts.

The GCR is enabled under the authority of the Governor in Council under Section 41(1) of the FAA.³² It applies in relation to conditions under which contracts are entered. However, according to Subsection 41(2), the regulations do not apply in respect of Crown corporations, the Canada Revenue Agency or the Invest in Canada Hub.³³ Accordingly, the GCR does not apply to these entities unless specifically provided for in legislation establishing the Crown corporation. Consequently, as will be noted below, neither do certain directives of the Treasury Board or related contracting policies.³⁴

(b) The Contracting Authority

Part I of the GCR describes the Conditions of Contract Entry including in relation to bids, advance payments, and progress payments.³⁵ It defines a "contracting authority", which appears throughout other government policies. The definition of a "contracting authority" is as follows:

contracting authority means

- (a) the appropriate Minister, as defined in paragraph (a), (a.1) or (b) of the definition *appropriate Minister* in section 2 of the Financial Administration Act;

³¹Government Contract Regulations SOR/87-402 ([the "GCR"](http://laws-lois.justice.gc.ca/eng/regulations/SOR-87-402/page-1.html)) - <http://laws-lois.justice.gc.ca/eng/regulations/SOR-87-402/page-1.html>

³² FAA at Section 41.

³³ FAA at Section 41.

³⁴ For example, see Section 15(3) of the *National Capital Act*, R.S.C., 1985, c. N-4, which states that notwithstanding Section 41(2) of the FAA, the Governor in Council may make regulations that apply with respect to the National Capital Commission. We note however that as DCC has no enacting legislation, the GCR and Treasury Board directives do not apply to it.

³⁵ GCR at Part I.

- (b) a **department** within the meaning of paragraph (a.1) of the definition of department in section 2 of the *Financial Administration Act* that has the legal authority to enter into a contract;
- (c) a **departmental corporation** named in Schedule II to the *Financial Administration Act*;
- (d) any individual — other than a commissioner appointed under the *Inquiries Act* and any individual authorized under the *Parliament of Canada Act* to enter into a contract — who is authorized by or under an Act of Parliament to enter into a contract. (autorité contractante)

The term “contracting authority” is therefore defined quite broadly.

(c) Bids

Sections 5 through 7 address bids on federal projects. In this regard, Section 5 specifies that prior to entering into any contract, the contracting authority “shall solicit bids therefor in the manner prescribed by section 7.” Section 7 requires that the contracting authority shall solicit bids by:

- a) Giving public notice, in a manner consistent with generally accepted trade practices, of a call for bids respecting a proposed contract; or
- b) Inviting bids on a proposed contract from suppliers on the suppliers’ list.

This general requirement is subject to certain exceptions set out under Section 6 of the GCR, which states:

Notwithstanding section 5, a contracting authority may enter into a contract without soliciting bids where

(a) the need is one of pressing emergency in which delay would be injurious to the public interest;

(b) the estimated expenditure does not exceed

(i) \$25,000,

(ii) \$100,000, where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, or

(iii) \$100,000, where the contract is to be entered into by the member of the Queen’s Privy Council for Canada responsible for the Canadian International Development Agency and is

for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project;

(c) the nature of the work is such that it would not be in the public interest to solicit bids; or

(d) only one person is capable of performing the contract.³⁶

(d) Payments

Section 8 of the GCR allows a federal contracting authority to enter into a contract that provides for the making of advance payments, provided Treasury Board approval is sought (if Treasury Board approval is required to enter into the contract). We understand that Treasury Board guidelines specify that the advance payments however, are only to be considered in extraordinary circumstances.³⁷ Section 9 allows a federal contracting authority to enter a contract that provides for progress payments.³⁸

(e) Contract Security

Part II addresses bid and contract security.³⁹ Section 12 provides that a bid bond, payment bond, performance bond or non-negotiable security deposit shall be held until the terms of the security are fulfilled. However, this part does not require that contracting authorities retain any particular form of security.

(f) Deemed Terms

Section 18 sets out a list of terms that are deemed to apply to every construction, goods or services contract that provides for payment of any money by the federal government.⁴⁰ These terms include reference to the *Lobbying Act*,⁴¹ the *Criminal Code*,⁴² and the *Criminal Records Act*.⁴³

³⁶ GCR at s. 6.

³⁷ SACC Manual Chapter 4, Conditions of the Resulting Contract, Method of Payment, Advance Payments - <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/4/70/30/20>

³⁸ GCR at ss. 8-9.

³⁹ GCR at ss. 10-15.

⁴⁰ GCR at Part III.

⁴¹ *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.).

⁴² *Criminal Code*, R.S.C., 1985, c. C-46.

⁴³ *Criminal Records Act*, R.S.C., 1985, c. C-47.

3. Treasury Board Directive on Payments

(a) General

On April 1, 2017, the Treasury Board issued the Directive on Payments, pursuant to Section 7 of the FAA (the “Payment Directive”).⁴⁴ The Payment Directive replaced a number of existing directives that were relevant to payments on construction contracts at the federal level, including the Directive on Payment Requisitioning and Cheque Control (October 1, 2009).

The objective of the Payment Directive is to ensure that “[f]inancial resources of the Government of Canada are well managed in the delivery of programs to Canadians and safeguarded through balanced controls that enable flexibility and manage risk.”⁴⁵ The results expected from the directive are:

- Governance and oversight over financial management are effective;
- Internal controls over financial management are effective;
- Financial information supports decision making and accountability to Canadians;
- Standardized and efficient financial management practices are in place; and
- The financial management workforce is agile and sustainable.⁴⁶

(b) Terms of Payment

The Payment Directive sets out rules and responsibilities in relation to, among other things, payment by federal authorities on construction contracts. Of particular importance are Sections 4.1.4 and 4.1.6 under the heading “Payment on due date”, which state as follows:

4.1.4 Ensuring that suppliers are paid on the due date. A **30-day payment term is used and starts when both an invoice is received and the goods or services are accepted**, unless:

4.1.4.1 The terms of payment have a demonstrable benefit for the government if paid in less than 30 days;

⁴⁴Treasury Board Directive on Payment. <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32504> [Payment Directive]

⁴⁵ Payment Directive at s. 3.1 citing Section 3 of the Policy on Financial Management - <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32495>

⁴⁶ Payment Directive at s. 3.2 citing Section 3 of the Policy on Financial Management - <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32495>

4.1.4.2 Different payment terms are set out by contract, regulatory agencies, leases or rentals; or

4.1.4.3 It is more cost-effective to make a single payment for a number of invoices that are individually under \$5,000 and due within the same week, on the earliest due date of the combined invoices; [emphasis added]

[...]

4.1.6 Ensuring that **interest is paid when the payment is made later than the due date**, as required by contract or statute, or when awarded in legal proceedings against the Crown⁴⁷ [emphasis added]

As a result of the Payment Directive, we understand that federal government entities consistently endeavour to pay within the 30-day time period from acceptance of goods or services. We have been advised by PSPC that in relation to construction services, the term “accepted” is often interpreted by the federal government as meaning “certified.” PSPC and DCC advise that they aim to complete their total payment process within 30 days of the receipt of a valid invoice, inclusive of the 10 day certification requirement under the Standard Federal Government Construction Contract. However, we have been advised that certain federal government entities may interpret this to mean that the total process is to take 40 days from the receipt of an invoice. In our view, such an interpretation is contractually unsupportable.

4. Government Contracting Policy

(a) General

In addition to the GCR and the Payment Directive, Federal Government authorities are also subject to the federal government Contracting Policy⁴⁸ (“Contracting Policy”). The Contracting Policy is issued pursuant to paragraph 7(1)(a) and sub-section 41(1) of the FAA. The objective of this procurement policy is to “acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and **results in best value** or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people”⁴⁹ [emphasis added].

⁴⁷ Payment Directive at ss. 4.1.4-4.1.6.

⁴⁸Government of Canada Contracting Policy (the "Contracting Policy") - <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

⁴⁹ Contracting Policy at s. 1.

The Contracting Policy applies to all departments and agencies, including departmental corporations⁵⁰ and branches (designated as such under the *Financial Administration Act*, except those included within the meaning of paragraph (c) of the definition of “department” found in Section 2 of the FAA⁵¹ and entities listed under Schedule III to the FAA not included in the definition of a “department”⁵²) and is subject to a list of exclusions including, for example, leases and contracts for the fit-up of an office or residential accommodation pursuant to the federal *Real Property Act* and its Regulations.⁵³ PSPC is exempt from certain of the Contracting Policy requirements that require Treasury Board approval to enter into or amend contracts for a contracting authority listed in the Schedule of the GCR or for the use of an organization that is not subject to Appendix C of the Contracting Policy.

As a result of Section 41(2) of the FAA, as noted above, the Contracting Policy (as well as the GCR and the Treasury Board Contracts Directive) do not apply to Crown corporations unless the legislation of the Crown corporation specifically requires that it be subject to Section 41.1 of the FAA.⁵⁴ Below, we consider whether the Contracting Policy, GCR and Treasury Board directives apply to individual federal stakeholders. As will be discussed below, these policies and directives do not apply to DCC, though DCC has advised that, in fact, they generally apply these policies and directives.

Under the Contracting Policy, all government contracting is to be conducted in a manner that will:

- stand the test of public scrutiny in matters of prudence and probity, **facilitate access, encourage competition, and reflect fairness in the spending of public funds;**
- ensure the pre-eminence of operational requirements;

⁵⁰ Schedule II lists departmental corporations and includes, for example, the Canada Border Services Agency, Canada Revenue Agency, Canada Nuclear Safety Commission, NRCC, Parks Canada Agency.

⁵¹ This category includes the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer.

⁵² See Schedule III of the FAA which lists certain Crown corporations including, for example, Canada Infrastructure Bank, DCC, NCC, Via Rail Canada Inc., Canada Post Corporation and the Royal Canadian Mint.

⁵³ Contracting Policy at s. 3.

⁵⁴ Contracting Policy at s. 12.10.

- support long-term industrial and regional development and other appropriate national objectives, including aboriginal economic development;
- comply with the government's obligations under the *North American Free Trade Agreement*, the *World Trade Organization – Agreement on Government Procurement* and the *Agreement on Internal Trade*.⁵⁵ [emphasis added]

(b) Contracting

The Contracting Policy sets out requirements in relation to when the Treasury Board must provide its approval prior to a government entity entering into a contract or a contractual arrangement. Specifically, Section 4.1.6 of the Contracting Policy states that Treasury Board approval must be obtained prior to entering into contracts or contractual arrangements where the values or the contract costs (incl. taxes) exceeds the limits prescribed by the Treasury Board in the Treasury Board Contracts Directive.⁵⁶

The Treasury Board Contracts Directive is included as Appendix C to the Contracting Policy.⁵⁷ This Appendix lists the delegated contracting authority or entry limits given to departments. Any contract that is above the identified limits in Schedule 1 to Appendix C requires Treasury Board approval prior to execution. By way of example, under Schedule 1, PSPC can award a competitive construction contract (electronically posted) up to a value of \$40 million (anything above this amount would require Treasury Board approval). Other federal departments (i.e. departments, agencies or Crown corporations not specifically named in Schedule 1) only have \$400,000 of authority to award a contract before they require Treasury Board approval.

Some government departments have applied for and received amendments to Schedule 1 of Appendix C which provides higher authorities on a department-by-department basis. For example, the RCMP may contract for construction services related specifically to housing or detachments by way of electronic competitive bid process for a value up to \$20 million and the NCC has an exception that allows it to contract for construction services without the need for Treasury Board approval.

The higher limits of PSPC's authority may serve as an incentive for federal departments to approach PSPC to engage their services.

⁵⁵ Contracting Policy at s. 2.

⁵⁶ Contracting Policy at 4.1.6.

⁵⁷ Contracting Policy at Appendix C.

The Contracting Policy also provides that all public servants who have been delegated authority to negotiate and conclude contractual arrangements⁵⁸ on behalf of the Crown “must exercise this authority with prudence and probity so that the contracting authority (the minister) is acting and is seen to be acting within the letter and the spirit of the [GCR], the Treasury Board Contracts Directive and the government’s procurement policies.”⁵⁹

(c) Standard Form Contracts

The Contracting Policy also sets out the requirements for the use of the federal government standard form contracts. Specifically, Section 4.2.17 of the Contracting Policy requires that the Standard Federal Government Construction Contract should be used for construction contracts over \$100,000 as follows:

4.2.17 The Standard Federal Government Construction Contract should be used for all construction contracts that exceed \$100,000. The basic policy governing the principles and expression of policy in the Standard Federal Government Construction Contract is the prerogative of the Treasury Board. However, the style and content of the form is the responsibility of the Department of Public Works and Government Services Canada [now PSPC].⁶⁰ [emphasis added]

We have been advised that federal government entities interpret this provision as creating a mandatory requirement for the use of the standard form contract in relation to all projects over \$100,000.

⁵⁸ “Contractual arrangements” are given a slightly different treatment than contracts under the Contracting Policy and in fact, the government has created a separate set of Guidelines on Contractual Arrangements (the “Arrangement Guidelines”)(Guidelines on Contractual Arrangements - <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=28230> - Note: These guidelines are not considered mandatory, but rather meant to provide advice to contracting authorities.) The Arrangement Guidelines note that “contractual arrangement” is not a defined legal term, but rather a policy term that includes “arrangements with various public sector organizations (including other levels of government and international partners) that involve the acquisition of goods, services or construction services.” (Arrangement Guidelines at s. 2.1). According to the Guidelines, Contractual Arrangements is a generic term, often referred to by other names, including, but not limited to, Memoranda of Understanding, Memoranda of Agreement, Exchange of Service Agreements, Letters of Agreement, Collaborative Arrangements. The key questions are whether the department will acquire goods or services through this instrument, and who the participants are (Arrangement Guidelines at s. 4.1.5). We understand that these instruments are typically used between government entities, rather than between the government and the construction industry.

⁵⁹ Contracting Policy at s. 4.1.8.

⁶⁰ Contracting Policy at ss. 4.2.4, 4.2.9, 4.2.10, 4.2.17.

As will be discussed below, PSPC applies variations of the standard form contracts for various types and sizes of contracts, and in our meetings with other government departments and Crown corporations, they advised that they use those forms, sometimes with adaptations. We understand these forms typically contain variations on the Standard Federal Government Construction Contract form.

(d) Payment Provisions

Section 12.2.6 of the Contracting Policy addresses “payments” as follows:

12.2.6 *Payments*. As required by article 4.2, Related requirements, work performed or goods received under a contract are to be paid for in accordance with the government's payment on due date policy on the payment of accounts (see the Comptrollership policies) as follows:

- a) the **standard payment period is 30 days**;
- b) departments and agencies are to ensure that their **systems and procedures are designed to attain this standard**;
- c) the payment period is measured from the date that the goods or services were **received in acceptable condition at the location(s) specified in the contract or the date that an invoice in proper form was received, whichever is later**;
- d) **interest shall be paid on payments made later than the due date where expressly authorized by contract or statute**. For that reason, clauses authorizing the payment of interest are included in government contracts.

Payments are scheduled so that they are made as close as possible to, but no later than, the due date. Except where statutes, contracts or fee schedules approved by federal regulatory agencies provide otherwise:

- interest is paid automatically on accounts that are not paid on the due date, 30 days from receipt of an invoice or 30 days from acceptance of goods or service, whichever is later, if the government is responsible for the delay (i.e., accounts outstanding for 50 days or more when the standard payment period of 30 days applies);

- the period for which interest is paid automatically is measured from the due date to the date that the payment is issued.⁶¹ [emphasis added]

The exceptions to the 30-day standard pay period are set out as follows under Section 12.2.10:

12.2.10 *Exceptions*. When it is more advantageous to the government, because of factors such as discounts, to pay accounts earlier, or when the terms and conditions for payment and interest under a contract are different from the 30-day standard, the standard payment period may be set aside.⁶²

(e) Punitive Sanctions

Under Section 12.1.3 of the Contracting Policy, there are certain consequences if the policy is ignored or if contracting practices or contract administration are determined to be unacceptable. Specifically, if this occurs, the Treasury Board may “direct that sanctions be imposed either on the contracting authority (the institution) or on the officials responsible.” This may include revocation of contracting authority or reduction in dollar levels or instructions to the contracting authority to apply sanctions in the applicable personnel policies against individual employees who have ignored the contracting policy.⁶³

Further, Section 12.5.4 of the Contracting Policy refers to Section 80 of the FAA (i.e. in relation to indictable offences) and explains that it is an indictable offence if any regulations under the Act, including the GCR, are violated. This section is stated to also apply to officers and employees who know of violations and neglect to report them.⁶⁴

(f) Subcontractor Claims

The Contracting Policy also provides instruction to federal government entities on how to deal with claims by sub-subcontractors under Section 12.7.4. Specifically, it permits regular payments under the contract as disputes are being resolved in circumstances where a second-tier claimant, either a sub-subcontractor or a third level supplier, makes a claim against the general contractor and a payment bond is posted.⁶⁵

⁶¹ Contracting Policy at s. 12.2.6. We note the reference in 12.2.6(c) to the invoice in “proper form.”

⁶² Contracting Policy at s. 12.2.10.

⁶³ Contracting Policy at s. 12.1.3.

⁶⁴ Contracting Policy at s.12.5.4.

⁶⁵ Contracting Policy at s. 12.7.4.

(g) Disputes

Section 12.8 of the Contracting Policy provides significant detail in relation to the manner in which government entities are to handle disputes. Some relevant details of this section include:

- A key factor when disputes arise is the expeditious handling of the disagreement as “prolonged disputes can delay performance” (s. 12.8.1);
- The Department of Justice has issued the *Directive Concerning the Use of Dispute Resolution Clauses in Contracts* which requires legal practitioners at the Department of Justice to make every effort to insert dispute resolution clauses into government contracts (s. 12.8.1);
- There is an emphasis on negotiations to resolve disputes as they arise (s. 12.8.3);
- Following negotiation, mediation should be used when acceptable to both parties (s. 12.8.4);
- If the parties cannot resolve the dispute by mediation, or do not agree to mediation, the parties can arbitrate (again subject to agreement)(s. 12.8.5)⁶⁶;
- Litigation remains an alternative to arbitration (s. 12.8.14).⁶⁷

5. The Standard Federal Government Construction Contract

(a) General

During our review, we have also had the opportunity to review the Standard Federal Government Construction Contract as utilized by PSPC⁶⁸ and by DCC.⁶⁹ For the purposes of this report, we have commented on the PSPC general form but note that as it relates to payment issues, the DCC form and the form(s) used by other federal government entities are substantially similar to the PSPC form of contract.

⁶⁶ We note there is a slight discrepancy here in relation to the standard form contract discussed below, which allows for mandatory arbitration on projects between \$100,000 and \$5 million.

⁶⁷ Contracting Policy at s. 12.8.

⁶⁸ PSPC provisions provided as part of the SACC Manual.

⁶⁹ DCC Standard Construction Contract Documents DCL250 (R2017-01).

(b) PSPC's Standard Form Contract

PSPC standard provisions are publicly available as part of the Standard Acquisition Clauses and Conditions (SACC) Manual ("SACC Manual").⁷⁰ The SACC Manual, prepared by PSPC, is intended to provide suppliers and clients of PSPC with information on clauses and conditions used by PSPC Acquisitions Program contracting officers in the contracting process for procuring goods and services on behalf of itself and/or client departments.

The SACC Manual is "designed to make dealing with the government more time and cost efficient by reducing the level of detailed text contained within the various procurement documents."⁷¹

The SACC Manual describes all of the potential variations of contract forms that PSPC enters into with its suppliers (e.g. for goods, services of various complexity, and professional services). In relation to construction services, we were provided with examples of the specific General Conditions, Supplementary Conditions and Clauses that PSPC uses in its contracts. For example, and as further discussed in Chapter X - Adjudication, the General Conditions relating to dispute resolution vary depending on whether a contract is over \$100,000, between \$100,000 and \$5 million, or over \$5 million.

For the purposes of our review, we focus on GC5 (Terms of Payment), GC8 (Dispute Resolution) and GC9 Contract Security.

(c) Terms of Payment

In relation to the terms of payment, PSPC has produced a set of provisions for contracts below \$100,000 (R2550D)⁷² and contracts above \$100,000 (R2850D).⁷³

(i) Contracts for Projects Over \$100,000

Under the contract for projects over \$100,000 (R2850D), GC5 provides as follows:

⁷⁰ SACC Manual - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual>

⁷¹ SACC Manual at s. 0 - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/0/INTRO/26>.

⁷² SACC Manual - R2550D - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2550D/6>

⁷³ SACC Manual – R2850D/7 - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2850D/7>

- a “payment period” means “30 consecutive days or such longer period as may be agreed between the Contractor and Canada” (GC5.1);
- an amount is due and payable when it is due and payable by Canada to the Contractor according to the sections for Progress Payment, Substantial Performance of the Work or Final Completion (GC5.1);
- on the expiration of a payment period, the Contractor is required to deliver to Canada “a written progress claim in a form acceptable to Canada that fully describes any part of the Work that has been completed, and any Material that was delivered to the Work site but not incorporated into the Work, during that payment period” as well as providing a “completed and signed statutory declaration” that includes confirmation that the Contractor has complied with all lawful obligations and that, in respect of the Work, all lawful obligations of the Contractor to its Subcontractors and Suppliers have been fully discharged (GC5.4.1). We understand from both industry and government stakeholders that this provision requires the delivery of an original statutory declaration;
- within 10 days of receipt of a progress claim and statutory declaration, Canada shall inspect or cause to have inspected, the part of the Work and the Material described in the progress claim and shall issue a progress report that indicates the value and an opinion as to whether it is “in accordance with the Contract” and was not included in any other progress report (GC5.4.2);
- Subject to receiving proper documentation and the steps above, Canada shall pay the Contractor 95 percent of the value indicated in Canada’s progress report if a labour and material payment bond has been furnished by the Contractor; or 90 percent of the value indicated in the progress report if no labour and material payment bond has been posted (GC5.4.3);
- Canada shall make its payment no later than 30 days after receipt of both the progress claim and statutory declaration; or 15 days after receipt of the Contractor’s progress schedule or updated progress schedule, as applicable (GC5.4.4);
- In the case of the first progress claim, it is a condition precedent that the Contractor provide all necessary documentation required by the Contract before Canada’s obligation to make payment arises (GC5.4.5);
- At Substantial Performance of the Work, Canada is required to pay the Amount Payable under the Contract, less the aggregate of sums paid (GC5.4); an amount equal to Canada’s estimate of the cost to Canada of rectifying defects described in the certificate of substantial performance;

and an amount equal to Canada's estimate of the cost to Canada of completing the parts of the Work described in the Certificate of Substantial Performance (other than defects)(GC5.5.3);

- Depending on the government payor, this payment following Substantial Performance of the Work is to be made in a specific number of days. For example:
 - For DCC, payment is to be made no later than 30 days after the issue of the Certificate of Substantial Performance or 30 days after the delivery of a statutory declaration, evidence of compliance for workers' compensation and an update of the progress schedule (GC5.5.4);
 - For PSPC, payment is to be made no later than 30 days after the issue of the Certificate of Substantial Performance or 15 days after the delivery of a statutory declaration, evidence of compliance for workers' compensation and an update of the progress schedule (GC5.5.4);
- At Final Completion, the balance of the holdback is to be paid in a specific number of days. For example:
 - For DCC, payment is to be made no later than 30 days after the issuance of the Certificate of Completion or 15 days after the delivery of a statutory declaration and evidence of compliance with workers' compensation legislation (GC5.6)
 - For PSPC, payment is to be made no later than 60 days after the issuance of the Certificate of Completion or 15 days after the delivery of a statutory declaration and evidence of compliance with workers' compensation legislation (GC5.6)

We have been advised by PSPC that it is considering aligning its payment practices with DCC in this regard.

As well, GC5.8.3 of the PSPC and DCC contracts provide the government entity with a right to make a direct payment to a subcontractor in order to discharge "lawful obligations of and satisfy lawful claims against the Contractor or its Subcontractors arising out of the performance of the Contract." This payment is, to the extent of the payment, a discharge of the federal entity's liability to the Contractor under the Contract and can be deducted from any amount payable to the Contractor under the Contract.

In addition, PSPC and DCC includes language related to set-off. Under PSPC GC5.9 for contracts over \$100,000, the set-off clause is as follows:

1. Without limiting any right of setoff or deduction given or implied by law or elsewhere in the Contract, Canada may set off any amount payable to Canada by the Contractor under the Contract, or under any current contract, against any amount payable to the Contractor under the Contract.⁷⁴
2. For the purposes of paragraph 1) of GC5.9, "current contract" means a contract between Canada and the Contractor
 - a. under which the Contractor has an undischarged obligation to perform or supply work, labour or material; or
 - b. in respect of which Canada has, since the date of the Contract, exercised any right to take the work that is the subject of that contract out of the Contractor's hands.

As a consequence of non-payment, GC5.11 provides that Canada shall pay interest if the Contractor demands it (for periods of less than 15 days overdue) and without a demand if the payment is more than 15 days overdue (GC5.11).

(ii) Contracts for Projects Over \$100,000

In relation to payment provisions for contracts under \$100,000 (R2550D), PSPC includes similar provisions to the larger contracts with a few variations including, as follows:

- The Contractor is entitled to progress payments when the duration of the Work is greater than thirty days (GC5.4.1);
- Subject to precedent conditions and proper documentation, Canada is to pay an amount equal to 90 percent of the value that is indicated in Canada's progress report (i.e. there is no 5% reduction in holdback related to the use of surety bonds as there is no requirement for contract security on contracts under \$100,000)(GC5.4.4);
- The contractor is entitled to a return of all or any part of its Security Deposit after a Certificate of Substantial Performance if it is not in breach or default of its Contract (GC5.13).⁷⁵

(d) Dispute Resolution

The PSPC standard form contract includes three versions of General Condition 8 – Dispute Resolution that are used depending on the value of the contract:

⁷⁴ See for example, GC5.9 (2008-05-12) Right of Setoff.

⁷⁵ SACC Manual at s. 5. - R2550D - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2550D/6>

- R2880 is applied for contracts with an estimated value between \$100,000 and \$5 million;⁷⁶
- R2882 is applied for contracts with an estimated value of \$5 million or more;⁷⁷ and
- R2884 is applied for contracts with an estimated value of less than \$100,000.⁷⁸

For contracts over \$5 million (i.e. R2882), GC8 includes the following in relation to alternate dispute resolution:

- a general obligation to maintain honest and open communication and to consult and cooperate with each other in the furtherance of the work and the resolution of problems or differences that may arise (GC8.2);
- the Government will deliver a written decision or direction in relation to any matter which is not resolved through consultation and cooperation, but if the Contractor disagrees with that decision or direction, within 15 working days it can issue a written notice of dispute requesting formal negotiation (GC8.3);
- the first level of negotiations starts within 10 working days after delivery of the notice of dispute between the representatives of the parties who play a direct supervisory role in the performance, administration, or management of the Contract (or a longer period of time if the parties agree) (GC8.4.1);
- if, after 10 working days at this first level of negotiation, the negotiations are not successful, there is a second level of negotiations between principal(s) of the contractor and senior level manager(s) of the government (GC8.4.2);
- if, after 30 working days from the date of the notice of dispute the second level of negotiations is unsuccessful (or a longer period of time if the parties agree), then the contractor can request mediation within 10 working days from the end of the negotiation period (GC8.4.3);
- the mediation will be conducted by a project mediator and is to be completed within 10 working days following the appointment of the mediator or the referral of the dispute to mediation (if there is already a

⁷⁶ SACC Manual at s. 5. - R2882 - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2880D/7>

⁷⁷ SACC Manual at s. 5. - R2882D - R2882 - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2882D/5>

⁷⁸ SACC Manual at s. 5. - R2884D - R2884 - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2884D/3>

project mediator in place) (GC8.5). There is a detailed set of rules as to how the project mediator is selected (GC8.8.4) and a series of rules in relation to the conduct of the mediation including confidentiality (GC8.8.5), the time and place of mediation (GC8.8.6), representation (GC8.8.7), procedure (GC8.8.8), settlement agreement (GC8.8.9), termination of mediation (GC8.8.10), costs (GC8.8.11), and subsequent proceedings (GC8.8.12);⁷⁹ and

- there is no reference to binding arbitration, so unresolved disputes would be litigated.

In relation to contracts between \$100,000 and \$5 million (i.e. R2880), the provisions of GC8 are largely the same, except that there is a right for either party to refer a dispute to binding arbitration, subject to certain exceptions, if the mediation is not successful (GC8.6).

Disputes under \$100,000 (i.e. RD2884) are subject to a significantly simplified procedure which includes a written protest of a federal government decision or direction, containing full reasons, signed by the Contractor and given to the federal government. There is no reference to binding arbitration, so such disputes would be litigated.

Dispute resolution provisions at the level below the owner – general contractor level (i.e. the general contractor – subcontractor, subcontractor – sub-subcontractor level, and so on) are contained in subcontracts and so a variety of dispute resolution mechanisms may be utilized.

(e) Contract Security

General Condition 9 (GC9) relates to Contract Security and requires that the Contractor, at its own expense, within 14 days after receiving written notice that its tender was accepted, obtain and deliver Contract Security to Canada in one of the stipulated forms.⁸⁰ GC9.2 provides several options including a 50% Performance Bond and a Labour and Material Payment Bond or a Labour and Material Payment Bond and a security deposit. The federal government also allows the use of an irrevocable standby letter of credit under GC 9.3. If part of the Contract Security includes a Labour and Material Payment Bond, the Contractor is required to post a copy of the bond at the site of Work.⁸¹

⁷⁹ SACC Manual at s. 5. - R2882D - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2882D/5>

⁸⁰ Standard Federal Government Construction Contract GC9.1.1.

⁸¹ GC9 Contract Security - <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R/R2890D/8>

6. Government Policy on Security and the National Defence Act

Another government policy that was identified as important during the course of our review was the Policy on Government Security (the "Security Policy").⁸² The Security Policy applies to all departments as that term is defined under the FAA unless specifically excluded.⁸³ Under the Security Policy, "Government security is the assurance that information, assets and services are protected against compromise."⁸⁴ Section 3.2 of the Security Policy provides as follows:

3.2 Security begins by establishing trust in interactions between government and Canadians and within government. In its interactions with the public when required, the government has a need to determine the identity of the individuals or institutions. **Within government, there is a need to ensure that those having access to government information, assets and services are trustworthy, reliable and loyal.** Consequently, a broad scope of government activities, ranging from safeguarding information and assets to delivering services, benefits and entitlements to responding to incidents and emergencies, rely upon this trust. [emphasis added]

Both DCC and the RCMP informed us that the Security Policy is critical to the protection of sensitive information. This issue will be discussed further in Chapter X – Adjudication, given the importance of protecting the confidentiality of certain types of information exchanged in the dispute resolution process.

7. Summary

In our view, the FAA, the Payment Directive, the Contracting Policy and various other policies and procedures adopted by the federal government as described in this chapter, taken together, establish an ordinary course of payment environment that can fairly be characterized as fundamentally based upon certain of the core principles of prompt payment, in particular a 30-day from invoice payment cycle, payment of undisputed amounts, and mandatory interest. We note however, that the Payment Directive, the Contracting Policy and the Standard Federal Government Construction Contract all describe the trigger for the counting of the 30-day payment period somewhat differently, with the Standard Federal Government Construction Contract being the only document that requires a statutory declaration. These existing legislative and policy mechanisms assist in ensuring that payments are made by the federal government promptly and

⁸² Policy on Government Security - <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16578>

⁸³ Security Policy at s. 2.

⁸⁴ Security Policy at s. 3.1.

inform our recommendations, as we endeavour to the extent possible to make recommendations that will achieve consistency with existing legislation and not interfere unnecessarily with effective policy mechanisms.

At the same time, based on industry stakeholder feedback received, the applicable legislation, regulations and policies are not achieving the overall outcome of promptness of payment for those further down the construction pyramid.

IV. CONSTRUCTION AND CONSTRUCTION-RELATED ACTIVITIES OF THE FEDERAL GOVERNMENT

The federal government enters into construction contracts in a number of ways, including: directly under an individual department or Crown corporation's own authority; indirectly through PSPC or otherwise; or through public-private partnerships. Construction contracts are also entered into by entities to which the federal government has out-sourced real property management services. These various modes of federal contracting are briefly discussed below, along with payment metrics of the government stakeholders from which we received data.

1. Federal Government Payment Metrics

As we conducted our stakeholder engagement sessions across Canada, we requested empirical data to support positions being taken by federal government departments and Crown corporations on the one hand, and by contractors and subcontractors on the other hand. In particular, in each federal government engagement session, we requested information on the volume of contracts, payment processes and timelines, as well as in relation to disputes. Not every federal department tracks these statistics, but we were able to obtain certain information in relation to payments made by PSPC and DCC, as summarized below.

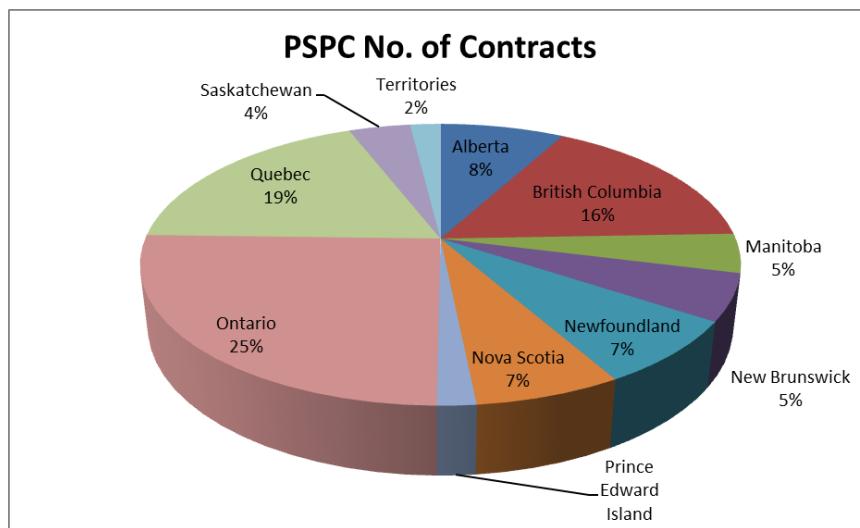
(a) PSPC

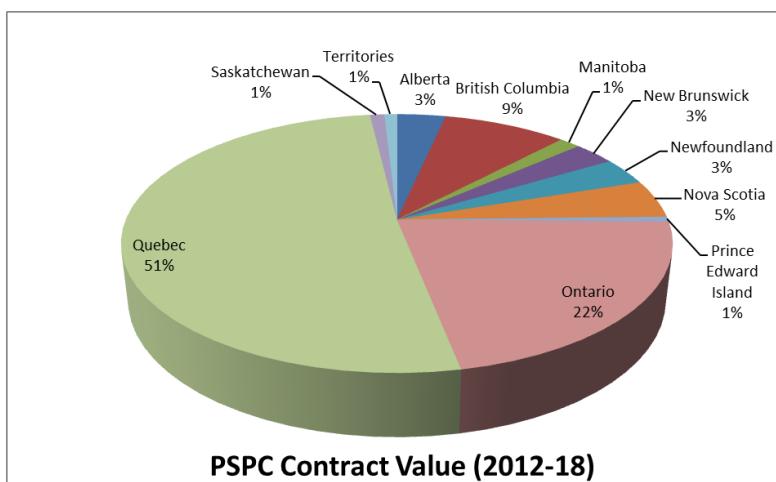
PSPC provided us with what was referred to as a construction activity "heat map." The heat map is in the form of an excel spreadsheet table reflecting the volume and values of all construction contracts awarded by PSPC between April 2012 and March 2018. The table breaks down the expenditures by city, and then by province, and finally provides a national figure. In the time period reflected, PSPC has awarded 17,775 construction contracts for a total of approximately \$11.65 billion (not including what is known as the RP-1 and RP-2 agreements). The table shows an average expenditure of \$1.94 billion per year for the entire country (with a high of approximately \$6 billion in 2015/16 and a low of approximately \$847 million in 2012/2013). We have summarized the results of the table for April 2012 – March 2018 as follows:

Province	Totals (2012-2018)	
	#	\$
Alberta	1422	\$398,614,027.00
British Columbia	2924	\$1,006,863,704.00

Province	Totals (2012-2018)	
	#	\$
Manitoba	799	\$172,816,470.00
New Brunswick	953	\$340,403,324.00
Newfoundland	1328	\$398,887,968.00
Nova Scotia	1187	\$552,970,905.00
Prince Edward Island	314	\$75,343,454.00
Northwest Territories	236	\$42,818,227.00
Nunavut	33	\$13,795,910.00
Ontario	4493	\$2,518,714,600.00
Quebec	3324	\$5,968,052,578.00
Saskatchewan	704	\$117,286,929.00
Yukon	79	\$45,577,510.00
Total	17775	\$11,649,864,704.00

As can be seen from this chart, federal funds are allocated across the provinces and territories with the largest volume of contracts entered into in Ontario and the most funds spent in Quebec. For a pictorial understanding of the proportion of the number of contracts per province/territory in proportion to the total nationally and the total value of projects per province/territory in proportion to the total nationally, please see the pie charts below.





In relation to the average \$1.9 billion of business PSPC expends annually with the private sector, approximately .013% of late payment interest was paid on this business volume (according to 2015-16 data).⁸⁵ PSPC submits that “analysis has shown that payment [is] delivered to [its] prime contractors on time over 96% of the time”,⁸⁶ counted we understand, from the receipt of an “invoice in proper form.” PSPC also went on record during the Standing Committee hearings (defined and discussed below) as saying, of the “other 4 per cent, 80 per cent of that is paid within 31 to 60 days.”⁸⁷ These statistics do not include what are known as the RP-1 and RP-2 contracts, but do include projects carried out by PSPC for other government departments (also discussed below).

(b) DCC

Construction work performed on DCC construction projects accounts for a significant portion of the total expenditure on federal construction in Canada. As of the 2017 calendar year-end, DCC has estimated that it completes approximately \$1 billion in construction work per year.⁸⁸ In relation to the construction work DCC procures, on March 29, 2018 DCC

⁸⁵ Engagement Strategy at p. 8; PSPC Submission dated March 21, 2018 (“PSPC Submission”) at p.3.

⁸⁶ PSPC Submission at p. 3.

⁸⁷ Evidence of Steven MacKinnon, M.P., Parliamentary Secretary to the Minister of Public Services and Procurement - Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 9, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53068-e>

⁸⁸ DCC year-end statistic provided by DCC.

provided to us with a supplemental submission that provided as follows in relation to its construction contracts and payments:

- Between 1,800 to 2,400 contracts of all types awarded annually, including call-ups under the standing offers and standing offer agreements totalling between \$650 million and \$850 million
- Between 900 to 1,300 construction contracts specifically awarded annually, totalling between \$450 million and \$750 million
- Between 13,000 and 15,000 Change Orders issued annually, totalling between \$280 million and \$500 million
- Between 13,000 and 15,000 invoices received and paid annually, covering progress, completion, changes, totalling \$1 billion
- Average days to process an invoice is 10 to 12 days from date of receipt of the invoice (including the certification process)
- Average days to pay an invoice is 30 days from date of receipt as per [the Payment Directive and Contracting Policy]; 96% of invoices are paid within 30 days⁸⁹

(c) Other Federal Departments, Agencies and Crown Corporations

The RCMP advises that 85% of their payments are made on time.⁹⁰ We also heard from other government entities such as Agriculture and Agri-Food Canada, the NCC, Canada Post and others that their payment metrics are similar. The NRCC advised that for 2017-2018 it paid within 30 days 64.3% of the time for all construction-related contracts.

NRCC also noted that it has implemented a new payment process and introduced an electronic workflow for payment of invoices at the beginning of 2018. As such, it may be that the metrics for 2017-2018 are reflective of an adjustment period or learning curve.

2. Direct Contracting

Of the federal government stakeholders with whom we met, many advised us that they enter into construction contracts under their own contracting authority. As noted in Chapter III, the Contracting Policy, Appendix C - Schedule 1 describes the values under which federal government entities can award construction contracts under their own contracting authority, as compared to values in respect of which they require Treasury Board

⁸⁹ DCC Supplementary Submission dated March 29, 2018.

⁹⁰ RCMP Meeting Summary for Meeting held March 27, 2018 (“RCMP Meeting Summary”).

approval. These values are also known as “entry limits.” Awarding contracts directly under a department or corporation’s own authority, or subsequent to Treasury Board approval, is what we refer to as “direct” contracting.

PSPC submitted that it is important that federal government contracting and procurement processes achieve best value (which is often perceived to be the lowest price), although at the same time, the federal government must use procurement to help implement other government policies (e.g. support to small and medium enterprises, aboriginal business opportunities, etc.) all while trying to comply with trade agreements and being open, fair and transparent.

As reviewed in Chapter III, because federal construction is publicly funded, there is significant oversight in respect of such expenditures. According to PSPC, a significant difference between federal government owners and private sector owners in relation to construction payments is that in the private sector, if an owner “over certifies”, there is no issue beyond the financial risk, whereas for a government employee who over certifies, the potential personal responsibility of that employee under the FAA must also be considered.⁹¹

(a) Departments, Ministries and Agencies Direct Contracting

(i) PSPC

As discussed in Chapter III, PSPC (a Schedule I department under the FAA) can award a competitive construction contract (electronically posted) up to a value of \$40 million (anything above this requires Treasury Board approval). For competitive (non-electronic) bids, PSPC can award a project up to \$10 million, and for sole-sourcing PSPC can award up to \$500,000. In this regard, PSPC has a relatively broad contracting authority under which it can pursue construction works.

In describing its contracting practices for construction, PSPC advised that it spends taxpayer dollars on projects of such significance that a high degree of oversight and due diligence must be exercised in regards to making payments. As well, PSPC must meet the requirements of the FAA, the

⁹¹ Another difference is that a private sector owner may develop relationships with certain construction firms such that the owner may continue to have only selected firms bid on work or sole-source certain work. In this way, owner and contractor can develop strong relationships and adjust to each other's practices. In public procurement, however, and in particular given the bid requirements of the GCR as discussed above (GCR at ss. 5-7.), it is not possible to limit bidders (except in limited circumstances) – with very limited opportunities in relation to sole-sourcing, each and every opportunity must be open to all.

Government Contracting Regulations and the Payment Directive when making government payments.

PSPC explained that invoices are processed on a project-by-project basis and involve multiple touch points for validation and certification. For example, the invoice payment process includes validation to certify completion and delivery of the work, clarifications and follow-up with suppliers for invoicing errors and discrepancies, oversight requirements, processing through financial systems, and finishes with confirmations through cheque issuance.

As is discussed above, PSPC “awards and amends” construction contracts for an average total of \$1.94 billion per year (not including outsourced work) on construction services generally (with a high of approximately \$6 billion in 2015/16 and a low of approximately \$847 million in 2012/2013).

(ii) The RCMP

The RCMP advises that it performs over \$200 million in construction per year, and that a significant portion of this work is done directly, although some of its work is performed indirectly through PSPC, as discussed below. The RCMP stated that it is the fourth largest building asset holder and is third or fourth largest in relation to land holdings within the federal government.

The RCMP is also one of the larger real property managers and constructors within the federal government. At least 10 other deputy ministers and organizations provide funding for the RCMP to build and perform work across Canada, including in remote locations. Accordingly, the RCMP engages with a broad range of subcontractors, including many smaller ones. We are advised that the RCMP has thousands of projects on the go on a year-to-year basis.

As well, the RCMP tells us it often builds on Indigenous lands, including detachments and housing projects. It prefers to build modularly and often relocates housing to suit the needs of the nearby detachments. In relation to housing and detachment projects, the Contracting Policy provides exceptions to spending by the RCMP. Specifically, the RCMP (given its role as a Schedule I.1 entity under the FAA) may:

- enter into a competitive construction contract awarded through electronic bidding process if the amount does not exceed \$20,000,000 and amend such contracts to a maximum of \$3,000,000.
- enter into a competitive architectural and engineering service contract awarded through electronic bidding process if the amount does not exceed \$3,000,000 and amend such contracts to a maximum of \$700,000.

- enter into a non-competitive architectural and engineering service contract if the amount does not exceed \$100,000 and amend such contracts to a maximum of \$50,000.⁹²

Given these exceptions, the RCMP has broad scope to directly enter into large contracts in relation to its construction needs.

(iii) Other Direct Contracting

Many other departments and agencies also have the ability to directly contract. Our ability to meet with certain federal departments was unfortunately limited by the time available for the engagement process; however, the departments and agencies we did meet with or received correspondence from gave us useful feedback in relation to how they perform construction work.

For example, AAFC advised us that it manages all construction projects up to \$400,000 directly (as allowed under the Contracting Policy and appended Treasury Board Contracts Directive), after which it refers work to PSPC. AAFC does approximately \$23 to \$50 million of capital projects every year, which has increased rapidly in recent years with the federal government's commitment to infrastructure spending. Most of its work is retrofits, lab investments, and renovations. There is not a large number of new builds undertaken. In relation to the projects AAFC carries out under its own contracting authority, AAFC engages its in-house project team, including professional engineers and project managers. AAFC did not provide us with any specific statistics or empirical data but mentioned that it was not typical for such data to be tracked by the project department.⁹³

Other ministries and departments have significant contracting authority exceptions in relation to certain types of work. For example, Foreign Affairs, Trade and Development⁹⁴ has the ability to enter into competitive contracts for certain design and construction work up to \$10 million (in the case of multiple unit facilities for example) or \$3 million for an official residence.⁹⁵

⁹² Contracting Policy, Appendix C, Schedule 1 – Exceptional Contracting Limits No. 24.

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

⁹³ AAFC Meeting Summary for Meeting held April 20, 2018 ("AAFC Meeting Summary").

⁹⁴ We did not meet with representatives of this Ministry, but rather obtained this information through a review of the Contracting Policy.

⁹⁵ Contracting Policy, Appendix C, Schedule 1 – Exceptional Contracting Limits No. 10.

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

Fisheries and Oceans⁹⁶ can enter into a competitive contract electronically for any project up to \$4 million,⁹⁷ and NRCC advised that they are able to enter into competitive contracts for up to \$6 million.⁹⁸ There are many other detailed exceptions under the Contracting Policy.

(b) By Crown Corporations

In addition to the departments and ministries of the Federal Government, Crown corporations also directly construct works. These departments each have their own structure and mandates, and their own types of construction work. As noted above, as a result of Section 41(2) of the FAA, the GCR and certain Treasury Board directives and policies do not apply to Crown corporations unless the legislation of the Crown corporation specifically requires it. Accordingly, some Crown corporations operate under a somewhat different framework than other federal entities.

The following represent some relevant examples.

(i) DCC

DCC advised us that the organization has a military history as it was created as a special purpose defence, security, and infrastructure assets corporation for Canada, both domestically and abroad. Fundamentally, DCC was created to meet Canadian defence infrastructure requirements.⁹⁹

DCC reports to Parliament through the Minister of PSPC and it is governed by the *Defence Production Act* and the FAA.¹⁰⁰ DCC's only current clients are the Department of National Defence and the Canadian Armed Forces (DND/CAF), Communications Security Establishment (CSE), and Shared Services Canada (SSC).¹⁰¹

⁹⁶ We did not meet with representatives of this Ministry, but rather obtained this information through a review of the Contracting Policy.

⁹⁷ Contracting Policy, Appendix C, Schedule 1 – Exceptional Contracting Limits No. 11.

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

⁹⁸ Contracting Policy, Appendix C, Schedule 1 – Exceptional Contracting Limits No. 56 (electronic contracting) <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

⁹⁹ DCC Meeting Summary for Meeting held March 27, 2018 ("DCC Meeting Summary").

¹⁰⁰ DCC – Corporate Governance Framework; Order Designating the Minister of Supply and Services as Appropriate Minister with Respect to the Defence Construction (1951) Ltd., SI/93-11, Financial Administration Act.

¹⁰¹ DCC Corporate Mandate, Board of Directors Profile December 15, 2016 - https://www.dcc-cdc.gc.ca/documents/corporate/Board_Profile.pdf

DCC was created pursuant to the *Defence Production Act*,¹⁰² was incorporated pursuant to the *Companies Act* of 1934, and was granted continuance under the *Canada Business Corporations Act* of 1978. DCC's mandate (i.e., to carry out a wide range of procurement, disposal, construction, operation, maintenance and professional activities required to support the defence of Canada, particularly related to real and personal property, lands, and buildings) was established by DCC's Letters Patent.¹⁰³ In that regard, DCC does not have enacting legislation. Accordingly, Section 41(2) of the FAA excludes DCC from the applicability of the GCR and related Treasury Board directives.¹⁰⁴ As a result, DCC is not required to follow the Payment Directive or Contracting Policy.¹⁰⁵ However, DCC's standard form contract is largely in alignment with the Standard Federal Government Construction Contract. In other words, DCC's payment policies are contractually aligned with the payment practices of other federal government entities.

Currently, DCC performs about \$1 billion in construction each year. Of this amount, a few hundred million dollars is spent on infrastructure repair and maintenance.

Industry stakeholders have advised us that DCC is a highly sophisticated and effective construction owner. This comment was made to us repeatedly by numerous stakeholders throughout the process. DCC is a good example of a Crown corporation performing direct contracting work, as it contracts directly for nearly all of its own work, with certain exceptions such as public-private partnership projects ("P3" or "PPP").

(ii) NCC

The NCC is a Crown corporation with a significant mandate for construction projects in the capital region of Canada and is enabled by the *National Capital Act*.¹⁰⁶ The NCC has a broad project and real property portfolio that includes

¹⁰² *Defence Production Act*, R.S.C. RSC 1985, c D-1.

¹⁰³ DCC's mandate has further been described as requiring DCC to meet the infrastructure and environmental needs of its client-partners by providing quality services and delivering and maintaining infrastructure and environmental projects and services, and providing full lifecycle infrastructure support, required for the defence of Canada. (DCC – Corporate Governance Framework - https://www.dcc-cdc.gc.ca/documents/corporate/DCC_Corporate_Governance_Framework.pdf)

¹⁰⁴ As noted previously, the GCR does not apply to Crown corporation unless specifically provided for in legislation establishing the Crown corporation.

¹⁰⁵ We have been advised by DCC that DCC elects to follow the spirit of the GCR, Payment Directive and Contracting Policy.

¹⁰⁶ *National Capital Act*, R.S.C., 1985, c. N-4.

1,700 properties, 300 km of roadways, 145 bridges and many other municipal-like assets, as well as farmland.¹⁰⁷

The NCC can enter into and amend its contracts without Treasury Board approval.¹⁰⁸ The NCC spends approximately \$22 million each year on capital projects. NCC's larger projects would be in the \$8-9 million range, and it has a significant number of smaller projects. NCC also collaborates on projects with other entities such as PSPC and DCC, but advised that it does not engage in any assignment of its contracting authority through agreements with PSPC.

3. Indirect Contracting

“Indirect Contracting” is a term we use to refer to projects that federal government departments and Crown corporations refer to PSPC for project management services. PSPC has significant expertise, resources and contracting management capabilities, as well as a strong familiarity with the provisions of the FAA, the GCR, the Payment Directive and the Contracting Policy.

PSPC advises that it carries out approximately 7,000 construction projects per year for Other Government Departments (“OGDs”) as it refers to them. These projects range from quite small to very large. However, PSPC advises that some agencies and Crown corporations do not utilize PSPC (e.g., PSPC advised that it does not do construction work for the National Capital Commission, Via Rail Canada Inc. or Canada Post Corporation).¹⁰⁹

We understand that once a department has made a decision to use the services of PSPC, it typically contacts PSPC's Real Property Services (“RPS”) to have that group “project manage” the construction project on behalf of the OGD. The RPS Project Manager then analyzes the requirements of the project and estimates the costs. A Specific Service Agreement (SSA) is then signed between the two departments, which is an internal financial agreement. Some departments may elect to project-manage the project themselves but will have the Acquisitions Branch of PSPC tender and issue contracts (using PSPC's higher level contracting authorities under the FAA and the Contracting Policy). In these cases, Acquisitions Branch signs a

¹⁰⁷ NCC Meeting Summary for Meeting held April 20, 2018 (“NCC Meeting Summary”).

¹⁰⁸ Contracting Policy, Appendix C, Schedule 1 – Exceptional Contracting Limits No. 55. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>

¹⁰⁹ We note that the PSPC payment metrics discussed above (i.e. the \$1.94 billion in awards and amended contracts), include amounts related to construction work PSPC carries out on behalf of OGDs. However, this metric does not include amounts related to construction work performed by OGDs under their own contracting authority.

Memorandum of Understanding (which is an agreement to cover the cost of the time of the PSPC procurement officers involved).

These inter-department agreements are structured to cover the costs and identify the services to be provided by PSPC.

In relation to disputes, we are advised that when PSPC is project-managing a construction contract, it is PSPC that attempts to resolve disputes that may arise. In those few cases where the OGD is performing the Project Management function, then the OGD will attempt to resolve any disputes. In both cases, Acquisitions Branch supports the dispute resolution process and provides advice and interpretation of the relevant contract clauses.

If an OGD has hired PSPC to manage its construction project, then most of the decision making is assigned to PSPC (e.g. PSPC would determine the delivery method for the project (Design-Bid-Build, Design-Build, Construction Management, etc.)). PSPC involves the OGD to identify project requirements and seeks clarification if there are questions around actual needs.

The services provided by PSPC are intended to meet the construction needs of those departments that are not designed for construction, as it would not be considered part of their respective “core business.” PSPC advises that departments have a specific mandate for which they have been established and funded (e.g. Department of Justice for legal issues or AAFC for issues and policy in relation to farming and food production, etc.). Construction is not a “core business” to these departments and thus they often rely on PSPC to support them.

PSPC’s key role is to “serve federal departments and agencies as their central purchasing agent, real property manager, treasurer, accountant, pay and pension administrator, integrity adviser and linguistic authority.” As PSPC explained, many other federal government departments do not spend the money to establish a group to oversee construction projects, but rather rely on the expertise and economies of scale provided by PSPC.

4. P3 Projects

The P3 model of project delivery has been objectively successful in Canada as there are now over 276 active P3 projects valued at over \$127 billion dollars according to the CCPPP website.¹¹⁰

¹¹⁰Canadian Council for Public-Private Partnerships - Spectrum P3
<http://www.p3spectrum.ca/>

The federal government engages in P3 projects directly and indirectly by way of providing funding to such projects. We have been advised of the following P3 projects underway or upcoming for the federal government itself:

- PSPC – Champlain Bridge Corridor;¹¹¹
- DCC – Shared Services Canada’s Enterprise Data Centre at CFB Borden;¹¹²
- DCC - Long-Term Accommodation Project for Communications Security Establishment Canada¹¹³
- RCMP – E Division Headquarters Relocation Project;¹¹⁴
- CBSA – Land Border Crossing project¹¹⁵

In addition, the federal government provides funding for P3 projects in Canada. For example, the Infrastructure Canada¹¹⁶ website states that it has invested \$1.3 billion in 25 large or complex infrastructure projects using the P3 model for project delivery. These projects are listed on the website and include significant projects from all over Canada.

Recently, the federal government established the Canada Infrastructure Bank¹¹⁷ as part of the Investing In Canada plan, which is expected to serve as an additional tool for provincial, territorial, municipal and Indigenous partners of the federal government to use to build infrastructure across Canada. It is expected that this newly-established Crown corporation will provide funding for a variety of P3 projects over the coming years.¹¹⁸

¹¹¹ Infrastructure Canada – Project Agreement: New Champlain Bridge <http://www.infrastructure.gc.ca/nbsl-npsl/agreement-entente-eng.html>

¹¹² DCC At Work – June 2016, Vol. 15, no. 2. https://www.dcc-cdc.gc.ca/english/dcc_at_work/2016/june/1606_article4/

¹¹³ https://www.dcc-cdc.gc.ca/english/dcc_at_work/2016/june/1606_article4/

¹¹⁴ Project Report: RCMP E Division Headquarters Relocation Project - <https://www.tpsgc-pwgsc.gc.ca/biens-property/nouvelles-news/ediv-grc-rcmp-eng.html>

¹¹⁵ Canada Border Services Agency Land Border Crossing project - <https://www.tpsgc-pwgsc.gc.ca/se-fm/2016/aout-august10-eng.html>

¹¹⁶ The Office of Infrastructure of Canada (Infrastructure Canada) was created as a federal department in 2002 via an order in council under Schedule 1.1 of the FAA. Infrastructure Canada is the main department responsible for federal efforts to enhance Canada's public infrastructure. This is accomplished through three main activities: investments in provincial, territorial and municipal assets; engagement in key partnerships with the provinces, territories, municipalities and the private sector; and the development and implementation of sound policies. <http://www.infrastructure.gc.ca/infosource/infosource2014-eng.html>

¹¹⁷ Canadian Infrastructure Bank – About Us - <http://canadainfrastructurebank.ca/about-us/>

¹¹⁸ Canada Infrastructure Bank – Portfolio - <https://www.infrastructure.gc.ca/CIB-BIC/index-eng.html>

5. Outsourced Federal Work

Federal Government departments, agencies and Crown corporations also enter into broad-based service provider contracts to deliver certain services and projects including, in particular, real property services management. These real property services include a significant amount of construction work.

During the stakeholder engagement process many stakeholders commented that there are payment delays in relation to real property services management contracts.

The two most significant examples of these types of arrangements are agreements known as Real Property 1 ("RP-1") which is comprised of six regional contracts and Real Property 2 ("RP-2") which is one contract, as further described below. These contracts are significant (\$22.8 billion total potential value and \$2.3 billion potential value, respectively). They are currently being performed by Brookfield Global Integrated Solutions Canada LP ("BGIS").

In addition to the two major arrangements between PSPC and BGIS, we are also aware that PSPC and other federal government entities engage the services of Real Property Management Service providers (including BGIS) for a variety of projects. For example, during the course of our stakeholder engagement process, we were made aware of arrangements in relation to the following categories of projects:

- DND military installations and related projects;
- CMHC facilities management;
- Public Safety Canada facilities management;
- Canada Post facilities management; and
- Atomic Energy of Canada Limited facilities.¹¹⁹

(a) The Rationale for Using Real Property Services Management Contracts

On its website, PSPC describes the rationale for entering into real property services management contracts as follows:

Real Property Services Management contracts leverage the private sector's ability to build human resources capacity and thus have the private-sector

¹¹⁹ We note that these categories of projects were identified to us during the stakeholder engagement process, and that the information is anecdotal.

contractor absorb the risk related to the fluctuation of demand for real property services.

Leveraging the private sector contributes to key government priorities like achieving value for money, realizing efficiencies, eliminating duplication of efforts by the public and private sectors and fostering economic growth in Canada.

This model represents best value to Canadians. In fact, to date, PSPC has identified savings of \$20 million per year as a result of the use of the private sector for the national delivery of real property services. The \$20 million in costs savings related to the contracts awarded in 1998 has been permanently removed from PSPC's budget.

Furthermore, an additional \$181 million for the first five years of the existing 2005 contracts was identified, bringing the total confirmed savings to \$521 million.

Based on this information, the Department estimates additional savings of \$181 million for the last five years of the 2005 contracts, which would bring the total confirmed and estimated savings from 1998 to 2015 to \$702 million.

Additional efficiencies will be realized by increasing the number of properties covered by these contracts and enhancing PSPC's and other departments' access to maintenance and building management expertise.¹²⁰

BGIS, in its submission, referenced the statistic above, i.e., that between 1998 and 2015 PSPC's model of outsourcing real property services management had resulted in estimated savings to Canada of at least \$702 million.¹²¹

In relation to its oversight of the real property services management contracts, PSPC stated that it maintains a commitment to due diligence and good stewardship through continually improving its procurement practices and using of fairness monitors, strong governance mechanisms and third party expertise.

In addition to the departments and corporations already using Real Property Management Services contracts, the NCC has stated that it intends to consider transitioning some of its work to real property management service contracts as well. We understand from our stakeholder engagement sessions that other departments, agencies and Crown corporations may follow suit within the coming years.

¹²⁰ PSPC History of Real Property 1 - <https://www.tpsgc-pwgsc.gc.ca/biens-property/psi-rpsd/bi-rp-1-eng.html>

¹²¹ BGIS Submission dated April 30, 2018 ("BGIS Submission") at p. 6.

(b) Brief History of Real Property Services Management Contracts

On its website, PSPC provides a brief history of the real property services management contracts.

We understand that for decades leading up to the 1990s, real property management and related services were provided directly by federal government employees, within what was then known as Public Works and Government Services Canada. Subsequently, in response to “multiple challenges such as fiscal constraint, downsizing objectives of program reviews and other reform initiatives”, PSPC redirected its focus to strategic advisory and service management while identifying a more efficient method of providing day-to-day operational services.

As a result, in 1998 PSPC initiated the outsourcing of real property management and related project delivery services. The first iteration of the so-called “real property” services contracts with the private sector involved 13 contracts competitively tendered and awarded to Brookfield LePage Johnson Controls at the federal level and an additional two arrangements with Provincial Crown Corporations, one in British Columbia and the other in Saskatchewan.

The initiative was deemed a success and was renewed in 2005 with the second generation of Real Property Services Management contracts (8 contracts) being awarded to SNC-Lavalin ProFac¹²² through a competitive bidding process. These contracts (which ended in March 2015) were for over 1,000 Crown facilities owned by PSPC, the Canada Border Services Agency (CBSA), the RCMP and Natural Resources Canada (NRCan), spread across Canada.

The third generation of real property services management contracts was awarded to BGIS after a three-year consultation and bidding process and it includes six competitive contracts (collectively, RP-1) for approximately 4,000 Crown assets owned by PSPC, CBSA, the RCMP and NRCan.¹²³ The announcement of the award of RP-1 was made on November 7, 2014 for the six encapsulated contracts with a total first-term value of \$9.559 billion. It is

¹²² SNC-Lavalin ProFac became SNC-Lavalin Operations and Maintenance Inc. In December 2016, SNC Lavalin reached financial close on the sale of its Real Estate Facilities Management business in Canada to BGIS - <https://www.newswire.ca/news-releases/snc-lavalin-finalizes-sale-of-its-real-estate-facilities-management-business-in-canada-to-brookfield-global-integrated-solutions-609892825.html>

¹²³ PSPC History of Real Property 1 - <https://www.tpsgc-pwgsc.gc.ca/biens-property/psi-rpsd/bi-rp-1-eng.html>

expected that with all extension options exercised, RP-1 could reach a total value of up to \$22.8 billion.¹²⁴

RP-1 began its operational start date on April 1, 2015 and is expected to continue its operational term until March 31, 2022. There are three two-year options associated with RP-1, which collectively total \$10.272 billion. RP-1 also includes an amending authority of \$2.969 billion.¹²⁵

RP-1 includes six regional contracts with an initial value of \$9.559 billion amongst these contracts. The next options for PSPC to extend the RP-1 contracts will be on March 31, 2024, March 31, 2026 and March 31, 2028.¹²⁶ Overall, with all options exercised, RP-1 can be summarized as follows:¹²⁷

Contract / Contrat	Initial contract period / Période initiale du contrat	Total for option periods / Total des périodes optionnelles	Total for unscheduled work / Total pour travaux imprévus	Total
Atlantic / Atlantique	\$952	\$1,018	\$295	\$2,265
Quebec / Québec	\$889	\$936	\$274	\$2,099
Ontario / Ontario	\$881	\$948	\$274	\$2,103
National Capital / Capitale Nationale	\$5,221	\$5,593	\$1,618	\$12,432
Western / Ouest	\$1,024	\$1,109	\$319	\$2,452
Pacific / Pacifique	\$592	\$668	\$189	\$1,449
Grand Total	\$9,559	\$10,272	\$2,969	\$22,800

RP-2 was also awarded to BGIS, and involves Property Management Services, Project Delivery Services and Optional Services related to campuses in the National Capital Region and in particular, the Carling Campus, Tunney's Pasture and Graham Spry Building. We understand that Graham Spry Building is no longer part of RP-2. The RP-2 contract had a starting value announced to be \$338 million.¹²⁸ Unlike RP-1, RP-2 is only one contract,

¹²⁴ PSPC History of Real Property 1 - <https://www.tpsgc-pwgsc.gc.ca/biens-property/psi-rpsd/bi-rp-1-eng.html>

¹²⁵ PSPC: RP1 – Contract Status Update as of March 8, 2018.

¹²⁶ PSPC: RP1 – Contract Status Update as of March 8, 2018.

¹²⁷ Chart provided by PSPC based on Contract Status Updates of March 8, 2018.

¹²⁸ PSPC: RP2 – Contract Status Update as of March 8, 2018.

which has a current value of \$1.394 billion and total current expected value of \$2.868 billion.¹²⁹

The first two options of RP-2 have been exercised, which means the term now is expected to run until March 31, 2021. The next option for PSPC to extend the RP-2 contract will be to March 31, 2023, and then to March 31, 2025.¹³⁰

We were unable to obtain information in relation to other real property service management contracts, however given the scope of RP-1 and RP-2 relative to other arrangements, it was prudent to provide further context on these two arrangements in particular, as their size, duration, and complexity imbue them with their own inherent policy significance.

(c) BGIS's Performance of Outsourced Federal Construction Work

In its submission, BGIS advised that it is a “provider of real estate management services, including facility management services, project delivery services, and energy and sustainability services.” In relation to this type of services generally, BGIS stated that, overall it manages 215 million square feet of real estate across 24,000 locations in Canada for all clients. In Canada, BGIS issues more than 700,000 work orders annually and manages 8,000 construction projects for its clients.¹³¹

BGIS also operates and maintains facilities at a number of public-private partnership (P3) projects in Canada (federally and provincially) where it has operations and maintenance responsibility and ‘lifecycle’ responsibility for the replacement and refurbishment of maintained elements.

In BGIS' view, the contracts related to the RP-1 and RP-2 portfolios relate to “services in the fields of, among others, construction, commissioning, cleaning, maintenance and repairs, landscaping, security, energy management, environmental management, lease administration, and parking.”¹³²

Significantly, BGIS advises that it is “an independent contractor engaged by PSPC to perform the work and is not an agent for Canada, except for exclusive exceptions that are specifically identified in the contracts.”¹³³

¹²⁹ PSPC: RP2 – Contract Status Update as of March 8, 2018.

¹³⁰ PSPC: RP1 – Contract Status Update as of March 8, 2018.

¹³¹ BGIS Submission at p. 1.

¹³² BGIS Submission at p. 3.

¹³³ BGIS Submission at p. 3. The issue of the perceived “agency” of BGIS arose in several of our stakeholder engagement sessions.

(d) Construction Work Performed by BGIS

In relation to its construction work, BGIS contracts with general contractors, who in turn contract with trade contractors. According to BGIS, its contracts with its construction contractors are typically in the form of CCDC 2 (2008) Stipulated Price Contracts with supplemental conditions.

BGIS is bound by “contractual obligations with parties who are also bound to contracts with others.”¹³⁴ BGIS, in a similar fashion to federal entities, does not have knowledge of the terms of the subcontracts entered into at the second tier and further down the construction pyramid. BGIS advises that, given this contractual structure, it is “often not aware of whether the sources of payment problems are due to administrative obligations, inadvertent error, contractual excusing events between only two parties, bad behaviour of particular parties, or a combination of these or other causes.”¹³⁵

To date, to address issues in respect of promptness of payment, BGIS has made systematic changes to its automated processes to reduce the amount of time that its contractors have to wait to receive payment.¹³⁶ Other stakeholders have confirmed to us that BGIS has reduced its payment period from 60 days to 45 days as a result of consultations with the government and industry.

BGIS provided us with a copy of one of its standard form contracts, which it noted refers to payment “no later than 45 days after the date of issuance by the *Consultant* of a certificate for payment.”¹³⁷

BGIS advised us that it does not include pay-when-paid provisions in its standard form subcontracts (as further discussed below in Chapter IX – Prompt Payment).

(e) BGIS Payment Metrics

BGIS submits that in “respect of construction projects for the RP-1 and RP-2 portfolios, 93% of BGIS’s subcontractors’ invoices are approved within 10 days of receipt.”¹³⁸

Following approval, BGIS states that, in relation to payment, of the subcontractors that have their invoices approved promptly (i.e. the 93%

¹³⁴ BGIS Submission at p. 3.

¹³⁵ BGIS Submission at p. 3.

¹³⁶ BGIS Submission at p. 3.

¹³⁷ BGIS Standard Form Supplementary Conditions at SC40. In this case, the Consultant is the consultant under the contract retained by BGIS as “owner.”

¹³⁸ BGIS Submission at p. 3.

noted above), 82% are paid on time (i.e. in relation to the time specified in BGIS' contract with its subcontractor). The balance which are not paid on time typically relate to late subcontractor invoicing, according to BGIS.¹³⁹

6. Summary

As the foregoing discussion reveals, there are various contracting models used by the various federal government departments and Crown corporations. The recommendations included in this report must take these models into consideration, as changes, unless carefully managed, can have unforeseen consequences and resulting costs in relation to existing contractual relationships.

¹³⁹ BGIS Submission at p. 4.

V. THE GOVERNMENT-INDUSTRY WORKING GROUP

As noted above, in April of 2016, PSPC, DCC and members of a CCA taskforce on federal prompt payment (made up of trade contractors, specialty contractors, and general contractors and service providers) formed the Working Group. Specifically, the Working Group was made up of The Real Property Services Branch, Acquisitions Branch and Financial and Administration Branch of PSPC; the National Service Line Leader and Construction Services Operations Division of DCC; and the CCA Office President, Task Force Chair and members.¹⁴⁰

1. A Brief History of the Working Group

The Working Group's objective was to "jointly explore possible actions by the Government of Canada and/or industry to improve payment terms and practices within federal contracts, at all level[s] of the supply chain including the Government of Canada, prime contractors, subcontractors, sub-subcontractors and suppliers."¹⁴¹ Initial Working Group discussions related to current payment structures, as well as potential contractual and non-contractual solutions to address prompt payment issues.¹⁴² It was agreed amongst the members of the Working Group that the federal government would take, and be seen to be taking, a leadership role and engage in dialogue with the CCA to identify, assess and implement possible improvements in relation to prompt payment issues.¹⁴³ The Working Group also agreed to meet regularly on the topic with a view to reporting back to PSPC by October 2016.

During the first six months of its mandate, the Working Group members worked together to create a document titled the Prompt Payment Initiative Engagement Strategy (the "Engagement Strategy").¹⁴⁴ The Engagement Strategy was publicly released in November 2016. As part of the Engagement Strategy, the Working Group defined the prompt payment issue as follows:

Delayed payment throughout the payment chain on federal construction projects **erodes Government buying power**, increases financial risk and

¹⁴⁰ Government-Industry Working Group, Prompt Payment Initiative Engagement Strategy - <http://www.cca-acc.com/wp-content/uploads/2017/02/EngagementStrategy.pdf>

(“Engagement Strategy”) at p. 9.

¹⁴¹ Engagement Strategy at p. 5.

¹⁴² Engagement Strategy at p. 3. We note that consideration was also given to the real property management services contracts by the Working Group.

¹⁴³ Engagement Strategy at p. 3.

¹⁴⁴ Engagement Strategy.

cost for construction enterprises and stifles economic growth. It is believed that although construction projects may be completed as intended, the money invested may not have generated the intended socio-economic benefits.

While the Government of Canada maintains a good payment record, **in some cases inconsistent contract terms and payment delays further down the chain drive the cost of construction up** and drive growth, innovation and employment down.

From the perspective of CCA's membership, which includes thousands of small - and medium sized enterprises, along with some of the largest construction organizations in North America, timely cash flow throughout the construction payment chain is fundamental to a healthy construction industry. Delay in payments anywhere in the supply chain on construction projects reduces profit and the creation of capital. This restricts innovation, and investment in plant, machinery and equipment.

Payment delay also increases the cost for companies to finance their operations and drives up the cost of construction overall, which in turn **reduces the buying power of government**. The impact of payment delay on small- and medium-sized enterprises can be disproportionately severe, and even a minor delay in payment of one or two invoices can put smaller businesses under severe financial stress.

Timely payment throughout a construction chain enables companies to realize the competitive profit margins necessary to fuel growth, employment and to create the capacity in Canadian firms to build the infrastructure that is critical to the economic prosperity of Canada.¹⁴⁵ [emphasis added]

The Scope of Work for the Working Group was defined in the Engagement Strategy. The Working Group was tasked with finding a solution to promptness of payment issues in the federal context while also focusing on whether such solutions, if implemented, "would improve the timeliness of payment throughout the payment chain and meet the needs of the industry."¹⁴⁶ Following that assessment, the Working Group was to consider an implementation plan, assess costs, address feasibility/sustainability and compare the risks as against expected benefits. The initial phase of the Working Group solution was to include construction contracts over \$100,000 and managed directly by PSPC and DCC. It was then anticipated that as part of a second phase, the Working Group could consider whether the proposed solutions could be implemented on other contracts including: construction contracts by other government departments, future cycles of the real

¹⁴⁵ Engagement Strategy at p. 4.

¹⁴⁶ Engagement Strategy at p. 5.

property (RP) procurements, etc.¹⁴⁷ The Working Group, at the time, agreed that any proposed solution would not extend to existing federal government contracts.

In addition to the overall objectives of the Working Group, the Working Group also established in its Engagement Strategy a set of elements that it would expect to be in place in a well-functioning market that achieved timely payments on construction projects. Specifically, the Working Group set the objective of creating a solution that would include the following characteristics:

- contractual payment terms throughout the federal construction project supply chain/pyramid that would be fair. The benchmark for fairness was identified as the industry standard contract/subcontract documents endorsed by the CCA and CCDC.
- undisputed amounts, including holdback amounts, throughout the construction project supply chain/pyramid would be paid in accordance with fair contract/subcontract payment terms.
- sufficient transparency around the dates on which payments and holdback amounts are made/released to enable stakeholders within the payment pyramid to exercise remedies in a timely manner.
- the federal government would continue to manage fair and efficient payment processes within its contractual control, and where it does not have control, lead by example to influence good payment practices throughout the payment chain.
- the construction industry at all levels would be knowledgeable about available contractual and legal mechanisms, and would act with confidence to ensure timely cash flow throughout the industry.¹⁴⁸

The two main areas of concern in achieving these objectives, according to the CCA representatives of the Working Group, were: 1) how to ensure agreement on contractual payment terms at all levels (i.e. prime, subcontract, sub-subcontract, supplier) that are fair, and “reduce cost to the Government of Canada and industry by reflecting the shortest reasonable commercial payment periods”; and 2) how to ensure that payers at all levels honour agreed upon payment terms and related contract requirements affecting payment, and act with a sense of urgency around the issue of prompt payment.¹⁴⁹

¹⁴⁷ Engagement Strategy at p. 5.

¹⁴⁸ Engagement Strategy at p. 6.

¹⁴⁹ Engagement Strategy at p. 6.

2. The Action Plan

As a result of the Engagement Strategy, as noted above, the Working Group established an Action Plan, as referenced in Chapter I with 14 specific criteria identified to assist in addressing the issue of prompt payment on federal construction contracts. The Action Plan was released in March of 2017 along with the Working Group Interim Report.¹⁵⁰ The Interim Report demonstrates the commitment of the Working Group participants to: transparency, principles of prompt payment, fair payment terms, government service standards and education. The Action Plan, which was posted to PSPC's public website, contained the following items:

- 1) Engagement Strategy;
- 2) Prompt Payment Principles;
- 3) Transparency and Prompt Payment Disclosure;
- 4) Fair terms throughout the construction supply chain;
- 5) Payment certification process;
- 6) Review of payment terms;
- 7) Dispute Resolution;
- 8) Metrics;
- 9) Contractual holdback;
- 10) Education;
- 11) Treasury Board 30-day payment period;
- 12) Prompt payment codes and protocols for the industry;
- 13) Project close-out; and,
- 14) Legislation.

¹⁵⁰ Government-Industry Working Group Interim Status Report dated March 2017 - <http://www.cca-acc.com/wp-content/uploads/2017/03/InterimReport.pdf>

3. Implementation of the Action Plan

(a) Prompt Payment Principles

The Action Plan is informative in providing background context to our mandate. In it, PSPC and DCC made a commitment to further investigate and resolve the issues identified, creating a framework for our recommendations package. Points 2 and 3 have already been implemented by PSPC. Point 2 of the Action Plan describes the commitment to prompt payment principles. Specifically, PSPC committed to three prompt payment principles, which are as follows.

Promptness:

The department will review and process invoices promptly. If disputes arise, Public Services and Procurement Canada will pay for items not in dispute, while working to resolve the disputed amount quickly and fairly.

Transparency:

The department will make construction payment information such as payment dates, company names, contract and project numbers, publicly available; likewise, contractors are expected to share this information with their lower tiers.

Shared responsibility:

Payers and payees are responsible for fulfilling their contract terms including their obligations to make and receive payment, and to adhere to industry best practices.¹⁵¹

PSPC stated that these principles should be followed for all construction-related payments¹⁵² and the balance of the Action Plan reflects this commitment. DCC committed to the same prompt payment principles as reflected on its website.¹⁵³

(b) Publication of Payment Information

Point three of the Action Plan included publication of payment information.

¹⁵¹ Action plan item 2. <http://www.cca-acc.com/wp-content/uploads/2017/03/ActionPlan.pdf> ("Action Plan")

¹⁵² Prompt Payment PSPC - <http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/psdic-ppci-eng.html>

¹⁵³ DCC Payment Principles - http://www.dcc-cdc.gc.ca/english/recent_contract_payments/

PSPC developed a publicly-viewable payment disclosure website that includes information such as payment date, company name, and contract and project numbers from May 2017 onwards. However, PSPC has informed us that not many people have been viewing this website, despite PSPC advertising it and including reference to it in recent contracts. DCC has also made payment information available on its website.

As we travelled the country during the stakeholder engagement sessions, we raised the issue of the lack of use of this website. We were advised that most construction industry stakeholder groups were unaware of its existence. Below, we set out the relevant links to the information being published by PSPC and DCC:

<http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/psdic-ppci-eng.html#a1>

<https://open.canada.ca/data/en/dataset/451b5114-d554-4eba-85a0-43c518e0641f>

<https://www.dcc-cdc.gc.ca/english/awarded/>

(c) Implementation of Remaining Elements

The balance of recommendations (points 4 through 14) made by the Working Group as part of the Action Plan, each of which are further described below, have either been completed or deferred pending delivery of this report.

The fourth point of the Action Plan addresses fair terms throughout the supply chain. The Working Group recommended that PSPC and DCC include a statement in all contract documents that would require the prime contractor to pay subcontractors within a certain time period to highlight the importance of fair terms and encourage subcontractors to adopt the same practices.¹⁵⁴ We have heard from many stakeholders that the problem with this element of the Action Plan is that there is currently no way for the federal government to enforce such contractual provisions below the general contractor level. We note however, that GC5.8.3 of the Standard Federal Government Construction Contract allows for a direct payment to a subcontractor by the government in order to discharge obligations of the general contractor.

Payment certification, the fifth Action Plan item, is a step in the payment process that the federal government and the Working Group have identified as requiring further review. The process from receipt of invoice to issuance

¹⁵⁴ Action Plan item 4. <http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/papsdic-appcci-eng.html>

of payment can become elongated where a third party “payment certifier” is introduced into the equation. The nature of the involvement of third party consultants varies but PSPC and DCC both advised us that the final sign off on payment certification is from a PSPC or DCC employee, not a third party consultant and therefore the payment certification issue must be addressed by looking at the overall timeframe for all steps in the payment process to be completed before that final sign off occurs. In this regard, the Working Group’s review was further considering if a reduced timeline would compromise due diligence and accountability for ensuring value for money.

An important factor in the federal government’s analysis on this issue is whether or not a reduced payment timeline would compromise necessary due diligence and accountability in relation to ensuring value for money for Canadian taxpayers.¹⁵⁵ This theme of ensuring value for money is reflected in submissions made by government stakeholders over the course of our mandate.

The Working Group also completed a review of payment terms at the federal level which was the sixth point of the Action Plan. This review was performed by comparing federal construction contract terms against industry standards.

By way of bench-marking, PSPC compared its contractual practices with those of provincial governments, territorial governments and DCC. A survey was issued on March 1, 2017 that invited participants from the Provinces and Territories to answer 42 questions related to payment practices. The results of the Government Survey are discussed below in Chapter IX – Prompt Payment. PSPC found its practices to be fairly similar to the chosen comparators; however, PSPC has tasked us with looking for opportunities for more consistency nationally.¹⁵⁶

In relation to the seventh point of the Action Plan, Dispute Resolution, the CCA conducted a review of the CCDC and federal government processes for dispute resolution and concluded that both are well aligned. To supplement these existing processes, we were asked as part of our review to consider the potential adoption of a statutory adjudication process.¹⁵⁷

The eighth point of the Action Plan required the Working Group to develop metrics and a method to measure prompt payment improvements. The CCA agreed to develop a survey to be administered through local construction associations to capture industry feedback and establish a baseline.¹⁵⁸ We

¹⁵⁵ Action Plan item 5.

¹⁵⁶ Action Plan item 6.

¹⁵⁷ Action Plan item 7.

¹⁵⁸ Action Plan item 8.

were advised that this survey was not completed as terms have not yet been agreed to by the CCA and its membership associations.

During the stakeholder engagement process, stakeholders asked about the contractual holdbacks maintained by federal government departments on construction contracts. This issue is discussed below in Chapter X – Prompt Payment and Chapter XI – Key Contractual Issues; however it was also flagged by the Working Group in point nine of the Action Plan. In particular, CCA members of the Working Group asked the federal government why it needed such holdbacks given that there is no federal lien legislation. PSPC agreed to examine the use, benefits and purpose of holdbacks and to advise the Working Group on potential improvements to its practices and accordingly, this issue forms part of our review.¹⁵⁹

An important feature of any new payment regime is an education program. As such, the Working Group agreed that the CCA would develop and roll-out an education program intended to ensure that contractors and the balance of the supply chain would be aware of changes in responsibilities (e.g. regarding payment) and available remedies on federal construction projects. The Working Group committed to drafting educational materials regarding contract terms, service standards, frequent bottlenecks, remedies for delayed payment and payment best practices.¹⁶⁰ The intent was that the Working Group would create a training package to be developed for use by local construction associations. The training could be structured with local construction associations for joint delivery with government on how to do business with PSPC and DCC.¹⁶¹ We have heard from construction associations across the country that the need for education, and financial support for education, is very important. We discuss this issue further below in Chapter XIV – Transition and Education.

As point eleven of the Action Plan, the Working Group agreed to ask the Treasury Board to review the mandatory 30-day payment period to determine if there is any flexibility in this payment period. The Treasury Board Secretariat undertook a review of its Directive on Payment and implemented changes as of April 1, 2017.¹⁶² This issue is discussed in detail below in Chapter IX – Prompt Payment as consideration of the Payment Directive and the FAA are fundamental to any recommendations in relation to prompt payment.

¹⁵⁹ Action Plan item 9.

¹⁶⁰ Action Plan.

¹⁶¹ Action Plan item 10

¹⁶² Action Plan Item 11.

The federal government members of the Working Group requested that the CCA investigate prompt payment codes and protocols to be applied industry wide as point twelve of the Action Plan. The Better Business Bureau Code of Business Practices¹⁶³ had articulated a concept that would create opportunities for companies to self-identify as adhering to prompt payment principles.¹⁶⁴ As the government has concluded that it intends to introduce legislation, the necessity of a prompt payment code is greatly diminished.

Point thirteen of the Action Plan has been completed by the Working Group. This item included a review of project close-out processes on federal construction contracts and the release of final payments. The CCA reviewed processes undertaken in the Province of Alberta and shared information with the Working Group.¹⁶⁵ Best practices information was collected and was intended to be released as part of the Working Group training materials. We were not provided with copies of this material for our review. Project close out practices raised in the stakeholder engagement sessions are discussed in Chapter XII – Contract Provisions in relation to contractual holdback release.

The final item on the Action Plan was part of the impetus for this review. The Working Group agreed to review Bill S-224. Subsequently, PSPC engaged the services of Singleton Reynolds to create a package of recommendations with relation to proposed government led legislation.

4. Summary

In addition to the fourteen Action Plan items described above, PSPC also agreed to engage in an ongoing dialogue with the NTCCC to ensure any proposed prompt payment actions would have an impact at all levels of the construction supply chain.

Further, PSPC agreed to enter into an ongoing engagement with the provinces and territories. Specifically, PSPC agreed to engage with the provinces and territories to discuss payment practices and opportunities for improvement with a view to ensuring proper alignment across the country.¹⁶⁶

Each of the fourteen points and the supplemental issues raised in the Action Plan provided important context in relation to our review. As will be described in subsequent Chapters, we heard in the stakeholder engagement sessions that the 14 Action Plan items were of paramount importance to

¹⁶³ Better Business Bureau Code of Business Practices - <https://www.bbb.org/mbc/get-to-know-us/about-us/bbb-code-of-business-practices/>

¹⁶⁴ Action Plan item 12.

¹⁶⁵ Action Plan Item 13.

¹⁶⁶ Action Plan at p. 2.

industry stakeholders and to the effective functioning of federal government construction projects.

VI. BILL S-224

At the outset of our review, PSPC provided us with materials and submissions gathered in relation to Bill S-224.¹⁶⁷ We have reviewed and considered these materials as well as materials available on the Senate website.

1. Legislative History

(a) First Reading

Shortly after the initiation of the Government-Industry Working Group, on April 13, 2016 a private Member's bill (designated Bill S-224, An Act respecting payments made under construction contracts¹⁶⁸) was introduced in the Senate.¹⁶⁹

(b) Second Reading

The sponsor of Bill S-224, Senator Donald Plett, moved for second reading on April 19, 2016. At this time, Senator Plett stated in part, as follows:

There are two major problems in federal construction work in Canada today. First, there are delays by federal authorities in processing valid invoices for construction work when there is no dispute that the work has been performed according to contract. Second, there are delays in remitting payments down the subcontract chain, again when the work is not in dispute and when valid invoices have been submitted. These payments delays are not occasional; they are systemic.

[...]

The payment delay in the construction industry is systemic largely because of the construction pyramid. The complex structure of contracting and

¹⁶⁷ As was raised at numerous stakeholder engagement sessions, in many ways Bill S-224 was influenced by Bill 69 in Ontario. Bill 69 was a private member's bill in Ontario in 2013 that sought to address perceived payment delays in the construction industry. In April of 2014, the Standing Committee on Regulations and Private Bills voted to set aside Bill 69 to permit a broader review of prompt payment issues and the Ontario *Construction Lien Act*. The result was the engagement of Bruce Reynolds and Sharon Vogel (of Singleton Reynolds) resulting in the Striking the Balance report.

¹⁶⁸ <http://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=S224&Language=E&Mode=1&Parl=42&Session=1>

¹⁶⁹ Senate Debates, 1st Session, 42nd Parliament, Volume 150, Issue 26, https://sencanada.ca/en/content/sen/chamber/421/debates/026db_2016-04-13-e?language=e

subcontracting sets the construction industry apart from almost all other industries. In federal government work, a federal authority is at the top of the pyramid. The federal authority tenders the construction work to a general contractor or a trade contractor, who becomes the prime contractor — for example, the party that enters into a contract with the federal authority to complete the project according to the plans and specifications.

For the vast majority of projects, the prime contractor will subcontract various segments of the construction project to specialized trade contractors. On construction projects, these trade contractors often perform upwards of 80 per cent, and sometimes more, of the actual work. Also, on most construction projects, trade contractors either subcontract from a general contractor or a sub-subcontract from another trade contractor.

As is common in all small- and medium-sized businesses, a trade contractor's access to bank credit is often limited, and their dependence on cash flow is extremely high. This means that the trade contractor's revenues are subject to unpredictable delays without any flexibility on their payables. Payments to Canada Revenue Agency and the Workers' Compensation system must be paid monthly without delay. Wages must be paid weekly. Payment for materials and equipment rentals must be made within 15 to 30 days.

[...]

Federal government construction costs are higher because trade contractors have incorporated into their bids a factor to reflect the risk of late payment by general contractors.

The debate on the second reading of Bill S-224 continued from April 19, 2016 through to November 28, 2016. During this time, the Bill received non-partisan support from certain members of the Senate. For example, on June 7, 2016 Senator Mitchell rose to speak about how payment issues "actually affect people's livelihoods, their ability to take money home and feed their family."¹⁷⁰ On November 2, 2016, Senator Moore spoke in support of the Bill and the need for change in payment practices by citing the review conducted in Ontario and our *Striking the Balance* report. Further, the Senator noted that the problem was particularly urgent given that the Federal Government indicated that it "will make a further investment in infrastructure of \$80 billion over the next 12 years."¹⁷¹

¹⁷⁰ Senate Debates, 1st Session, 42nd Parliament, Volume 150, Issue 44 – June 7, 2016 - https://sencanada.ca/en/content/sen/chamber/421/debates/044db_2016-06-07-e?language=e#59

¹⁷¹ Senate Debates, 1st Session, 42nd Parliament, Volume 150, Issue 69 – November 2, 2016 - https://sencanada.ca/en/content/sen/chamber/421/debates/069db_2016-11-02-e?language=e#28

During the Senate Debate of November 28, 2016, Senator Ringuette spoke about the differences between Bill S-224 and the bill originally proposed in Ontario (Bill 69) as a result of *Striking the Balance*. The Senator noted that there was a need to synchronize the legislation at the federal level with that of Ontario. Specifically, the Senator noted that “Bill S-224 … is only half of the process recommended” in Ontario.¹⁷²

A review of the debate transcripts indicates that there was strong support for legislation in relation to federal prompt payment generally.

(c) Standing Committee Hearings

The Bill itself required further consideration and as such, on November 28, 2016, the Senate moved to refer Bill S-224 to the Standing Senate Committee on Banking, Trade and Commerce (“Standing Committee”).¹⁷³ The Standing Committee was composed of 14 senators and included the Honourable Senators Black, Campbell, Day, Enverga, Greene, Marshall, Massicotte, McIntyre, Moncion, Plett, Ringuette, Tkachuk, Wallin and Wetston.

Between February 2, 2017 and March 30, 2017, the Standing Committee conducted hearings in relation to Bill S-224. The views expressed during these hearings are summarized below.

(i) Support

Stakeholders who made submissions to the Standing Committee supported the concept of prompt payment. Several of the witnesses, many of whom are stakeholders in the current Review, made statements supportive of Bill S-224, emphasizing the need for prompt payment legislation.

Ralph Suppa, President and General Manager of the Canadian Institute of Plumbing and Heating (a stakeholder in this Review) stated, in part, as follows:

The Canadian Institute of Plumbing and Heating would like to go on record supporting Bill S-224, the Canada prompt payment act, and we congratulate Senator Plett and the National Trade Contractors Coalition of Canada for their work on this file.

¹⁷² Senate Debates, 1st Session, 42nd Parliament, Volume 150, Issue 77 – November 28, 2016 - https://sencanada.ca/en/content/sen/chamber/421/debates/077db_2016-11-28-e?language=e#42

¹⁷³ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 12 – Order of Reference – February 1, 2017 - <https://sencanada.ca/en/Content/SEN/Committee/421/banc/12or-e>

Late payment is a serious impediment to all of our members, making a trying economic condition even more difficult and, in some cases, forcing companies to lay workers off. We believe that the payment status quo is not working. We also specifically support the provision that would bind the federal government to pay its bills for completed, certified construction work within 30 days of it being certified as complete. We particularly support the same 30-day requirement down the contractual chain, as outlined in the bill.

The institute also believes that the payment status quo is not working, with payment not being passed on to the trade contractors promptly and without hassle, causing serious hardships throughout the distribution channel, from trade to wholesale distributors and, ultimately, to their manufacturer partners.¹⁷⁴

Bob Brunet, Executive Director of the Canadian Roofing Contractor's Association stated, in part, as follows:

Prompt payment legislation in Canada will provide contractors with the tools to ensure that their businesses can remain competitive and productive, and will also encourage a much-needed culture of prompt payment that is presently absent.

Prompt payment is about doing the right thing. Why should Canada be so different that we do not need prompt payment legislation? The United States, Ireland, Australia and New Zealand have enacted some form of prompt payment legislation. Trade contractors in these countries are operating more efficiently than in Canada.

In conclusion, we wish to thank the committee for allowing us time to express our support for Bill S-224. Passing this bill into law, in our opinion, is simply the right thing to do.¹⁷⁵

Dan Lancia, President of the Electrical Contractors Association of Canada, told the Standing Committee:

It's a systemic problem in our industry. I don't do any government work. I do private sector work. It's systemic in [the] private sector. When dealing with general contractors, they hold on to your money.

[...]

¹⁷⁴ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 12 – Evidence – February 2, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/12ev-53042-e>

¹⁷⁵ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 12 – Evidence – February 2, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/12ev-53042-e>

I am tired of being a bank. I am tired of having the bank call me. I am tired of having suppliers call me. I am just tired. I have been in business for 28 years. It has been a great business.

[...]

The business changed 15 years ago and it's just getting worse trying to get paid.¹⁷⁶

Steve Boulanger, the Deputy Director-General, Corporation des maîtres mécaniciens en tuyauterie du Québec, provided the Standing Committee with feedback on Quebec's prompt payment initiatives and stated, in part, as follows:

In Canada, the economic impact of late payments becomes simply astronomical for the industry, which is one of the country's economic drivers. According to the data collected, two-thirds of contractors' accounts receivable are 30 days or more, and 20 per cent are 120 days or more. So billions of dollars are owed to contractors, who remain unpaid without justification.

In fact, we have seen that the situation is deteriorating from year to year, which is why we support the Senate's initiative with Bill S-224, An Act respecting payments made under construction contracts, to address an unacceptable situation that jeopardizes the survival of several companies. In doing so, the Senate is a leader in Canada in adopting better business practices that are fair and effective, benefiting both businesses and workers.¹⁷⁷

Ed Whalen testified on behalf of the Canadian Institute of Steel Construction (a stakeholder in this Review) stating as follows:

The ultimate problem is that we're not getting paid in time. If some process takes 120 days or longer then it's not the solution. We have expectations from our suppliers that they want to be paid in 30 days. We're running up our lines of credit. The banks are on our backs. They're ready to pull the pin.

You wouldn't get this many trade contractors in front of this Senate committee unless this was very serious. Hundreds of thousands of

¹⁷⁶ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 8, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53057-e>

¹⁷⁷ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 8, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53057-e>

Canadians are at risk. Thousands of companies are at risk through no fault of their own.

[...]

This isn't a joke. We need immediate solutions. Is there some other possible way to solve this problem? The rest of the world said no. They all came down to the same common denominator, and that was legislation.

[...]

We're trying to make a living, to keep the economy going and to employ people. We're trying to build things, not feed the lawyers lots of money. All those legal fees and expenses come out of our bottom line. Right now our bottom line is nothing. Anything which delays payment and takes away from our ability to survive is money gone. We need a bit of profit in order to survive, and you're not giving it to us.¹⁷⁸

It was clear from the testimony that there was strong support for Bill S-224 from the trade contracting community.

(ii) Opposition

During the Standing Committee hearings, opposition to Bill S-224 largely focused on the form of the proposed Bill, as opposed to the principle of promptness of payment.

Steve MacKinnon, Parliamentary Secretary to the Minister of Public Services and Procurement, noted that the Bill as drafted could not be supported and stated in part, as follows:

Although I applaud the efforts toward improving prompt payment practices there are some challenges. First, under the Canadian Constitution, construction contracts fall within provincial jurisdiction under property and civil rights. This may give rise to jurisdictional disputes and legal challenges surrounding the proposed legislation. In addition, Bill S-224 does not identify any penalties dealing with contractors and subcontractors in default of the bill's provisions. This could result in possible legal actions against the federal government for not enforcing a contractor's obligations.

In addition, there is no mechanism for the government to know all of the firms working on a project, nor to be aware of the terms and conditions of contracts down the subcontract chain. It is therefore not possible for the

¹⁷⁸ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 8, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53057-e>

government to ensure prompt payment to firms with which it has no contract.

While we fully support the intent and spirit of the bill, we need to be mindful of forcing the Crown into a relationship with subcontractors and into new responsibilities where none was designed to exist. For this reason, our government cannot support Bill S-224. [...]

What I can say is that we fundamentally agree on spirit and intent. What we don't agree on are the specific provisions of this proposed legislation. We have concerns from a legal perspective around claims against the Crown and on potential interference with provincial jurisdiction.¹⁷⁹ [emphasis added] [...]

Further to this point, Mr. David Schwartz the Director General, Commercial and Alternative Acquisitions Management Sector, Procurement Branch of PSPC, commented that it was “unclear with respect to the role the government would play in terms of ... enforcing when there is a disagreement between two private sector entities.”¹⁸⁰

Mr. Yonni Fushman, Senior Vice President and Deputy General, Aecon Group Inc. was the only general contractor stakeholder representative to attend before the Standing Committee. As he noted in his remarks, Mr. Fushman noted as follows:

General contractors have just as much of a stake in prompt payment as our trade contractor partners because general contractors are the meat in the sandwich between the owner who receives the benefit of the work and the trade contractors who perform it.

I believe I speak for the majority of general contractors when I say that general contractors absolutely favour prompt payment, but, in the words of Senator Ringuette last week, we have to get it right. The general contractor community opposed Ontario's Bill 69 because that bill didn't get it right and we have consistently supported the Bruce Reynolds report because its balanced proposals did.

[...]

It's important to frame the issue by acknowledging how broad and varied the Canadian construction industry is. Projects range from thousands to billions of dollars, and they are delivered in vastly different contract forms, from

¹⁷⁹ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 9, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53068-e>

¹⁸⁰ Evidence of Mr. Schwartz, February 9, 2017 - Issue No. 13.

construction only to design, construction, finance, maintenance and operation of a project, all in one contract. It is important to recognize when painting with a broad brush of legislation just how fine the contours of the canvas really are.

We believe there are some aspects of Bill S-224 that inadvertently may paint with too broad of a brush.

[...]

To summarize, we ask the committee to recognize, first, that prompt payment is a complex issue and not [a] matter of general contractors exercising leverage at the expense of subcontractors; second, any legislation should serve the public interest in reducing the cost of construction projects; and, third, Bruce Reynolds' recommendations, which were formed after exhaustive consultation with [60] stakeholders groups from all walks of life of the construction industry, should be used as the template for any prompt payment legislation.¹⁸¹

Some of the issues Mr. Fushman identified were:

- Any legislation should enforce terms that parties have agreed to in relation to payment;
- The provisions related to milestone payments need to be drafted carefully to promote proper risk management on large projects and P3 projects;
- The legislation should consider certain projects to be exempt; and
- Further work needed to be done to resolve unintended technical consequences with the Bill as then drafted.

(iii) Constitutional Concerns

As noted above, Mr. MacKinnon addressed the constitutional issues in relation to Bill S-224 briefly during his February 9, 2017 testimony.¹⁸² The constitutional concern of the federal government, generally, was that the proposed legislation “could interfere with existing constitutional provisions and could lead to jurisdictional disputes around lien law, contract law, and the general regulation of the construction industry.”¹⁸³

¹⁸¹ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 9, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53068-e>

¹⁸² Evidence of Mr. MacKinnon’s - Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 13 – Evidence – February 9, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/13ev-53068-e>

¹⁸³ Mr. MacKinnon - Standing Committee Hearing Issue No. 13.

Senator Plett, in response, referred to a memo prepared by Mr. Gerald Chipeur of Miller Thomson LLP dated February 13, 2017, which the Senator described as stating that Bill S-224 was "one hundred percent" within the federal jurisdiction. This memo was not provided as part of the evidentiary record in Issue No. 13 of the Standing Committee hearings, however it can be found online.¹⁸⁴

PSPC referred the issue of the constitutionality of Bill S-224 to the Department of Justice and PSPC's counsel. On February 15, 2017, Mr. Louis Davis, Senior Counsel, Constitutional, Administrative and International Law Section, and Christopher Meszaros, counsel, Public Services and Procurement Canada, legal services, gave testimony to the Standing Committee.¹⁸⁵ Mr. Davis, citing his 39 years' experience as a constitutional legal advisor, explained that the "government's position is that it is questionable whether Bill S-224 is constitutional since regulation of construction contracts is generally a matter of provincial jurisdiction."¹⁸⁶ This position was based on the fact that the substance of Bill S-224 related to subcontractors and late payment by prime contractors to subcontractors and also on the lack of a relationship between the federal government and the subcontractors. The view of the government was that the constitutionality of Bill S-224 was particularly questionable in relation to subcontractors.¹⁸⁷

Mr. Davis referred to the Supreme Court of Canada decision called *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*¹⁸⁸ which he stated "deals with both the question of the application of provincial jurisdiction and the constitutionality of federal legislation in the context of federal government construction contracts." Mr Davis summarized the case as follows:

[E]mployees of a Quebec construction company were engaged in the carrying out of a contract with the federal government, on federal Crown land, for the construction of runways for the then-new Mirabel Airport that was being built in Quebec. They were being paid in accordance with minimum wage amounts set by federal legislation applicable to work done under contracts with the federal Crown.

¹⁸⁴ Letter from Gerald Chipeur to Donald Plett dated February 13, 2017 -
https://sencanada.ca/content/sen/committee/421/BANC/Briefs/S-224_GeraldChipeur_e.PDF

¹⁸⁵ Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue No. 14 – Evidence – February 15, 2017 -

<https://sencanada.ca/en/Content/SEN/Committee/421/banc/14ev-53089-e>

¹⁸⁶ Evidence of Mr. Davis – February 15, 2017 – Issue No. 14.

¹⁸⁷ Evidence of Mr. Davis – February 15, 2017 – Issue No. 14.

¹⁸⁸ [1979] 1 SCR, 754.

The workers wanted the higher minimum wage amounts provided for under Quebec minimum wage legislation. The question was whether the contractor was subject to the wage legislation of the province in the carrying out of the contract with the federal Crown. The court split seven to two on the question.

The majority stated the provincial laws apply because they do not relate to federal property or aeronautics, but they govern the civil rights of the construction company and its employees on federal Crown lands, and these lands do not constitute an extraterritorial enclave within provincial boundaries.

So I do not think there is any doubt that a province can pass prompt payment legislation and apply it to a construction company, even in the context of a contract with the federal Crown.

Mr. Davis noted that in *Montcalm*, the court considered the constitutionality of a federal statute – the *Fair Wages and Hours of Labour Act* (now repealed). There, the Supreme Court considered a Manitoba Court of Appeal decision on similar facts and issues, and Mr. Davis stated that “the court held that provincial law governs employees working for a contractor under a contract with the federal Crown for work to be performed on federal land”, and that (according to the Manitoba Court of Appeal) any contrary argument was “based on an artificial division of legislative competency.” Given the agreement of the Supreme Court with Manitoba’s Court of Appeal, the result was that “the question of the constitutionality of the federal legislation” was left open by the Supreme Court. However, Mr. Davis stated that the case did not detract from the concern that Bill S-224 was constitutionally questionable. This concern, he noted, was not only in relation to the subcontractors but also in respect of the owner-general contractor relationship because that relationship (referring to the *Montcalm* case) “deals with civil matters that are part of property and civil rights, even though it’s taking place on federal Crown land.”¹⁸⁹ This was not to say that Bill S-224 was unconstitutional, but rather, that its constitutionality was questionable.

Also on February 15, 2017, Mr. Gerald D. Chipeur (Partner at Miller Thomson LLP) appeared before the Standing Committee to speak to the constitutional issue.¹⁹⁰ Mr. Chipeur disagreed with the Department of Justice’s reading of the *Montcalm* decision because: 1) it dealt with labour law; and 2) in *Montcalm*, there was a requirement to prove that federal and provincial law were in actual conflict. The key issue, according to Mr. Chipeur, was paramountcy. In *Montcalm* it was possible for the contractor or subcontractor to be in compliance with both the federal and provincial law, so there was no

¹⁸⁹ Evidence of Mr. Davis – February 15, 2017 – Issue No. 14.

¹⁹⁰ Evidence of Mr. Chipeur – February 15, 2017 – Issue No. 14.

paramountcy issue. Due to these distinguishing features, Mr. Chipeur asserted that the *Montcalm* case was of no use to the Standing Committee when answering the question about whether Bill S-224 would be a valid federal law. Mr. Chipeur stated that “[i]f it is valid federal law, then to the extent that it imposes duties that the common law or a provincial statute does not impose, then it is [not] in conflict with the provincial statute or the provincial common law, and it will prevail.”¹⁹¹

To support his view, Mr. Chipeur referred to Section 91(1A) of the *Constitution Act* as Bill S-224 relates, he said, to federal property and “[n]o one has ever said that the federal government doesn't have the right to pass a law with respect to its own property.” He concluded that the key question to be asked was: “Is the subcontract integral to the main contract? Could you fulfill the main contract without fulfilling the subcontract? If you could, then I think one could make an argument that we can separate away the minor “subcontracts.”¹⁹²

Mr. Chipeur also referred to the 2007 Supreme Court of Canada *Burrardview Neighbourhood Assn v Vancouver (City) et al.*¹⁹³ In that case, the court asked the question of whether, in the Port of Vancouver, the federal law was going to apply to every aspect of the development. In that decision, according to Mr. Chipeur, the test was one of integration and whether the whole of the Lafarge project was “sufficiently integrated” to make “federal regulation applicable to all aspects of it.” Generally speaking, “the heart of the question for [the Standing Committee] to ask: Is each section of this legislation important to make sure that all integral activities related to the construction of federal buildings, any kind of federal infrastructure or any kind of federal property that is owned federally?” In the view of Mr. Chipeur, it does as it is federally owned projects – actual property owned by the government and new property that is being created by tradespeople.¹⁹⁴

To summarize, Mr. Chipeur stated that, in his view, the bill was constitutional as “[t]he Supreme Court of Canada is clear that Parliament has jurisdiction over federal property and that anything that is integral to the property or the

¹⁹¹ Evidence of Mr. Chipeur – February 15, 2017 – Issue No. 14.

¹⁹² Evidence of Mr. Chipeur – February 15, 2017 – Issue No. 14.

¹⁹³ *Burrardview Neighbourhood Assn v Vancouver (City) et al.*, [2007] 2 SCR 86, paras 72 and 78; also cited as *British Columbia (Attorney General) v. Lafarge Canada Inc., et al.*

¹⁹⁴ As further support for his position, Mr. Chipeur referred to the 2013 Federal Court case of *Gottfried v Canada*.¹⁹⁴ In that case, Mr. Chipeur stated, the issue was “whether or not the plaintiff could invoke the general law of a contract applicable to all persons, or whether there was federal jurisdiction.”

creation of that property is within the federal jurisdiction and is paramount to any provincial common law or legislation.”¹⁹⁵

(d) Amendments to Bill S-224

On February 15, 2017, Bruce Reynolds and Sharon Vogel (authors of this report) appeared before the Standing Committee to give testimony in relation to their work on the Ontario *Construction Act*. During the course of their testimony, Senator Plett stated that his team had “read the Reynolds report as well and [had] actually come up with a number of minor amendments that [he believed would bring] this legislation even closer to the Reynolds Report.”¹⁹⁶ At this time the amendments were in an envelope that had yet to be distributed but one key amendment noted was an amendment to add the concept of adjudication to Bill S-224.

Over the following weeks, the amendments to the Bill were discussed by the Standing Committee including a clause-by-clause review which was conducted on March 29, 2017.¹⁹⁷ The Standing Committee prepared and released its Twelfth Report on April 4, 2017.¹⁹⁸

(e) Third Reading

Following the release of the Twelfth Report and its amendments to the proposed language of Bill S-224, the Senate passed the bill in its third reading on May 4, 2017 and is currently pending.¹⁹⁹

2. Summary of Elements

The key elements of Bill S-224 include the following:

- The Bill has broad application to construction contracts between “government institutions” (defined to include departments or ministries, Crown corporations or related entities) and a contractor, and any subcontract related to that construction work.²⁰⁰ There are limited exclusions for employment contracts and certain projects to be prescribed. Unless regulations were to designate exclusions, the Act

¹⁹⁵ Evidence of Mr. Chipeur – February 15, 2017 – Issue No. 14.

¹⁹⁶ Standing Committee Hearing – February 15, 2017 – Issue no. 14.

¹⁹⁷ Standing Committee – March 29, 2017 – Issue No. 17.

¹⁹⁸Journals of the Senate, p. 1471 -
<https://sencanada.ca/en/Content/SEN/Committee/421/banc/17rp-e>

¹⁹⁹https://sencanada.ca/en/content/sen/chamber/421/debates/116db_2017-05-04-e?language=e

²⁰⁰ Bill S-224 at 4(1).

would apply to all types of Projects, such that public-private partnership contracts (i.e. P3s) would be covered and every contract and subcontract related to any work with a government institution, as therein defined in the Act.²⁰¹ There is no right to contract out of Bill S-224 in the bill itself.²⁰²

- Under Bill S-224, the definition of construction work includes the supply of labour, services – including design services – and materials in connection with an improvement.²⁰³
- Bill S-224 sets out specific obligations in relation to payments to the contractor and to subcontractors:
 - *For Contractors:* Payments are to be made to a contractor on a monthly basis or at a shorter interval if provided for under the construction contract.²⁰⁴ If no date is provided in the construction contract for progress payments, the contractor is required to submit its application on the last day of the month.²⁰⁵ The government institution is required to pay the contractor on or before the 20th day following the approval or certification of the contractor's payment application.²⁰⁶ In relation to the final payment, the government institution is required to make a final payment no later than 20 days from the date for final payment in the contract, and if no date is provided in the contract, as provided under the Act.²⁰⁷
 - *For Subcontractors:* Payments are to be made to a subcontractor on a monthly basis or at a shorter interval if provided for under the construction contract.²⁰⁸ If no date is provided in the construction contract for progress payments, the subcontractor is required to submit its application on the 25th of the month.²⁰⁹ The contractor or subcontractor is required to pay the subcontractor on or before the 23rd day following the approval or certification of the subcontractor's payment application.²¹⁰ In relation to the final

²⁰¹ Bill S-224 at 5.

²⁰² Bill S-224 at 6.

²⁰³ Bill S-224 at 3.

²⁰⁴ Bill S-224 at 7(1).

²⁰⁵ Bill S-224 at 7(2).

²⁰⁶ Bill S-224 at 7(3).

²⁰⁷ Bill S-224 at 8.

²⁰⁸ Bill S-224 at 9(1).

²⁰⁹ Bill S-224 at 9(2).

²¹⁰ Bill S-224 at 9(3).

payment, the contractor or subcontractor is required to make a final payment to the subcontractor no later than 30 days from the date for final payment under the contract, and if no date is provided, as provided under the Act.²¹¹

- Bill S-224 directly addresses milestone payments in Sections 11 to 14 in that it renders any milestone payment provision at the general contractor level or below null and void unless the prime contract “authorizes milestone payments in respect of the improvement” and in respect of milestones relating to time intervals, the milestone payments are to be provided at intervals no less frequent than the intervals provided in the prime contract. Further, notice must be provided to the contracting parties of the milestone payment structure prior to contract execution.²¹² Payments following the achievement of a milestone are required to be made promptly (i.e. on or before the later of the 20th day after the achievement of the milestone or the 10th day after the issuance of the certificate for payment for that milestone by the payment certifier) by the government institution and then from the contractor downwards as stipulated in the Act.²¹³
- A payment application is deemed to be approved within ten days after submission of a payment application by a contractor (twenty days after submission by a subcontractor) unless the payer gives written notice that all or part of the application is being disputed or amended.²¹⁴ The portion of a payment application in respect of which an amount is disputed or an amendment required is limited and the payer must make payment on the balance of the amount set out in the payment application that is not set out in the notice of dispute.²¹⁵
- There is brief reference to adjudication as a means to resolve payment disputes. Adjudicators would be appointed under the construction contract and otherwise by agreement or application to the court. No authorized nominating authority is contemplated. The Bill sets out a general process for the adjudication including the requirement that the adjudicator render a decision within 28 days of the expiry of the period for written submissions (10 days from appointment of the adjudicator).²¹⁶

²¹¹ Bill S-224 at 10.

²¹² Bill S-224 at 11.

²¹³ Bill S-224 at 12 and 13.

²¹⁴ Bill S-224 at 16.

²¹⁵ Bill S-224 at 16.

²¹⁶ Bill S-224 at 20.

- A right to suspend work arises if a payee is not paid a progress payment or has not received payment within seven days of an adjudicator's decision on the dispute. The suspension provisions also contain requirements for the payment of interest and remobilization costs.²¹⁷
- Interest is required be paid on late payments at a rate of the greater of the prescribed rate of interest or the contractual rate of interest.²¹⁸
- Contractor or subcontractor payees are also given the ability to terminate the construction contract for nonpayment of amounts due in accordance with a decision of the adjudicator subject to a notice and the expiry of a period of fourteen days.²¹⁹
- A right to information is included in relation to due dates for payments and final payments as well as receipt of payment. All payees, aside from the government institution, are required to provide notice to each of its payees of the date and amount of payment received and be subject to damages in the case of failure to notify or in relation to misstatements in the notice.²²⁰
- Holdbacks are permitted, provided that the holdbacks in the contracts between a contractor and a subcontractor (or between a subcontractor and its subcontractors) do not exceed the holdback in the prime contract.²²¹

3. Statement of Legislative Intent

Bill S-224 provides that its purpose is to: "strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving government institutions."²²²

4. Applicability to "Government Institutions"

As noted in the purpose provision of the Bill, and as noted above, the proposed legislation is intended to apply to construction contracts involving

²¹⁷ Bill S-224 at 17.

²¹⁸ Bill S-224 at 18.

²¹⁹ Bill S-224 at 19.

²²⁰ Bill S-224 at 21.

²²¹ Bill S-224 at 22.

²²² Bill S-224 at First reading April 13, 2016: <http://www.parl.ca/DocumentViewer/en/42-1/bill/S-224/first-reading>

“government institutions.” Specifically, Section 4 of Bill S-224 provides as follows:

Application

4 (1) This Act applies in respect of a construction contract made between a government institution and a contractor and any subcontracts related to the construction work provided for in the construction contract.

The Bill defines a “government institution” under Section 3 as follows:

government institution means

- (a) a department or ministry of state of the Government of Canada, and any body or office listed in Schedule I to the Access to Information Act; and
- (b) any parent Crown corporation, and any wholly-owned subsidiary of a Crown corporation, within the meaning of section 83 of the Financial Administration Act. (institution fédérale)

Schedule I to the *Access to Information Act* is broad. It includes all of the Departments and Ministries of State as well as a lengthy list of government institutions. With the addition of subclause (b) above in relation to Crown corporations, the definition of government institution is very broad.

5. Analysis

As the summary of stakeholder input on the Bill reveals, there was both support for and opposition Bill S-224. A critical concern of some stakeholders was its constitutional implications.

In addition, some commentators have published submissions or articles in relation to the Bill and its contents. In particular, and as we heard during our own stakeholder engagement process, it has been suggested that Bill S-224 does not take into account certain commercial considerations and arrangements and would require significant consultation in order to achieve an appropriate balance. Included in the feedback was the observation that the adjudication process built into Bill S-224 does not provide for an Authorized Nominating Authority and therefore would be vulnerable to delay tactics.

By way of example, on November 9, 2017, the Canadian Bar Association wrote to the Honorable Carla Qualtrough, Minister of Public Services and Procurement, in relation to Bill S-224. In its submission, the CBA raised issues in relation to the lack of proper consultation, the impact of an unfettered right of suspension on projects, and the effect on negotiations between

parties. The CBA also viewed the Bill as failing to exercise the appropriate balance between regulation and freedom of contract. For example, the CBA cited Section 7 which prescribes monthly invoicing terms regardless of the intention of the parties. In terms of its applicability, it was the view of the CBA that the third reading version of Bill S-224 did not provide clarity on how the proposed legislation would apply to P3 projects.²²³

Over the course of our stakeholder engagement process, we heard about a number of the above-mentioned concerns in relation to Bill S-224, including:

- a concern that Bill S-224 required significant additional consultation and further discussion before becoming law;
- concerns as to the Bill's the rigidity of approach, for example in relation to the deemed approval of a payment application;
- concern in relation to the application of the Bill to diverse projects including P3s and diverse payment mechanisms;
- significant constitutional concerns were raised in relation to how the Bill would infringe on provincial rights; and
- concerns were raised about the application of the Bill being too broad.

As noted above, at the same time as Bill S-224 was being considered, Mr. John Murray was conducting a federal review of Australia's security for payment legislation, some of which dates back to 1999. A number of Mr. Murray's observations are relevant to the issues in regards to the proper role and responsibilities of an Authorized Nominating Authority. In particular, the Murray Report identifies, among other things, a number of problems with existing Australian prompt payment legislation including "questions around the process of appointing adjudicators; the adequacy of qualifications; training and grading of adjudicators; and the variable quality of adjudication decisions."²²⁴

As a result of these problems the Australian courts have been very active in reviewing adjudicators' determinations.

An entire chapter of the Murray Report reviews the case law concerning judicial review of adjudicator's decisions in Australia.²²⁵ There have been hundreds of such cases in Australia. As the Murray Report notes, a review of these cases discloses the difficulties in striking a balance between:

²²³ CBA Submission to Carla Qualtrough on November 9, 2017 - <https://www.cba.org/CMSPages/GetFile.aspx?guid=07bd7e03-1392-44ed-b7e2-22ea0f2b2c07>

²²⁴ Murray Report, p. xiii.

²²⁵ Murray Report, Chapter 5, pp. 49-60.

- a) upholding the legislature's intention of providing a rapid, informal process for resolving progress payment disputes (thereby maintaining a contractor's cash flow), and
- b) preserving a party's right to seek judicial relief from adjudication errors.²²⁶

After analyzing the cases, the Murray Report comments on why the courts in Australia have demonstrated a propensity to intervene in adjudication decisions. He observes that the extent of court intervention is not indicative of judicial disregard of the intent of the legislation. To the contrary, he notes that the courts' initial approach was to recognize the objects and purpose of the legislation. However, as the Society of Construction Law Australia has noted in its 2014 *Report on Security of Payment*:

It is not hard to see an explanation for this collapse of confidence in the adjudication process by the courts. The courts came to the process eager to enforce the legislative intent. As time has gone by, the courts have seen more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene.

It is to be emphasised that the courts do not quash adjudicators' determinations merely because they are wrong, even obviously wrong on their face. The courts have recognised that the intent of the legislation is for rough justice, and thus there are bound to be cases in which errors are made (as noted above, these errors are almost always made in favour of the claimant). In many cases, the determinations are quashed because of the traditional judicial review grounds - bias, denial of natural justice, want of good faith and acting without jurisdiction. More recently, there has been a trend for the courts also to quash decisions which are of such poor quality that it cannot be said that the adjudicator had done his or her job at all.²²⁷

The Murray Report concludes that the courts examining adjudicator's decisions under the East Coast model have required that respondents "are entitled to at least some intellectual process before being ordered to pay a sum in dispute and this is what has been lacking."²²⁸ Despite the high level of concern expressed by senior level practitioners about the quality of the adjudication process²²⁹, the Murray Report does not recommend that

²²⁶ Murray Report, Chapter 5, p. 49.

²²⁷ SoCLA (2014), *Report on Security of Payment and adjudication in the Australian Construction Industry*, Australian Legislation Reform Sub-Committee, February 2014, paras 110-12.

²²⁸ Murray Report, p.60.

²²⁹ Murray Report, p.60. In addition to commenting on the validity of these observations by SoCLA, Mr. Murray reports on the "equally disconcerting... inconsistent approach that the

adjudication be abandoned. Rather, a number of detailed recommendations are made in relation to improving adjudication, as summarized below in Chapter X – Adjudication.

Many of the concerns Mr. Murray has raised are similar in certain respects to concerns raised by stakeholders in relation to Bill S-224.

In Ontario, the issues identified in the Murray Report will be avoided or ameliorated by the installation of a single, well-organized Authorized Nominating Authority with the abilities and obligations granted to it by the regulations. In particular, in Ontario, the Authorized Nominating Authority will have the following duties and responsibilities:

- Training of adjudicators;
- Certification of adjudicators;
- Maintenance of the adjudicator registry;
- Establishment and maintenance of an adjudicator code of conduct;
- Appointment of adjudicators;
- Establishment of an adjudicator complaint procedure;
- Education of the industry;
- Establishment of an adjudicator fee schedule; and
- Preparation of an annual report on adjudication in Ontario.²³⁰

6. Summary

Bill-224 represents a significant legislative accomplishment and it served as an important impetus for this review. In the following chapters, we endeavour to build upon the initiative of Senator Plett, while taking into account the feedback received in our stakeholder engagement process and our research.

judiciary have adopted regarding its willingness to allow an adjudicator's decision to be reviewed' which inconsistency has caused considerable confusion and uncertainty within industry." (The Murray Report, p.60)

²³⁰ Ontario Regulation 306/18 under Part II.1 of the *Construction Lien Act*. <https://www.ontario.ca/laws/regulation/r18306>. While we recognize that the Murray Report recommends a prompt payment mechanism similar to what is being proposed in Bill S-224, we are of the view that the approach of using a proper invoice is the appropriate approach. In this specific regard, we disagree with Mr. Murray.

VII. CONSTITUTIONAL CONSIDERATIONS

1. Overview

Inasmuch as the constitutional issue was clearly identified during the Standing Committee Hearings as an issue in respect of which there was no consensus, we sought and obtained the approval of PSPC to retain The Honourable Thomas Cromwell of Borden Ladner Gervais LLP, an eminent jurist recently retired from the Supreme Court of Canada, and Guy Pratte, a pre-eminent litigator with BLG, to provide us with an opinion regarding the constitutional issues raised by the proposed legislative approach of the Government. Attached as Appendix 5 is BLG's opinion, dated June 1, 2018 (the "BLG Opinion").²³¹

Specifically, we requested Mr. Cromwell's and Mr. Pratte's opinion concerning:

- (1) the constitutionality of possible federal "prompt payment" legislation;
- (2) the interaction of federal and provincial prompt payment legislation; and
- (3) the extent to which similar objectives could be achieved by contractual rather than by legislative means.²³²

The second issue, concerning how federal and provincial prompt payment legislation would interact, was the subject of two questions in our consultation package provided to stakeholders for comments during the stakeholder engagement process.²³³

For the purposes of this opinion, BLG was instructed to assume that federal prompt payment legislation would have the following key features:²³⁴

- (a) Apply to all construction contracts let by the Federal Crown or a Crown agency;

²³¹ The federal government did not commission the opinion provided to Singleton Reynolds by Borden Ladner Gervais. Public Service and Procurement Canada receives its legal advice from the Department of Justice. The Department of Justice had no part in the preparation of the opinion and the opinion does not necessarily represent the official position of the federal government of Canada.

²³² BLG Opinion at p. 1.

²³³ BLG Opinion at p. 1.

²³⁴ BLG Opinion at p. 1.

- (b) Set out timelines for payment of amounts payable under contracts and subcontracts;
- (c) Provide that payments must be made within these timelines unless the payer provides a notice of non-payment as provided for in the legislation and subject to holdback obligations;
- (d) Provide that amounts not paid on time bear interest at a specified rate; and
- (e) Establish interim adjudication processes for resolution of disputes about payment, subject to determination by a court, arbitrator, or by the parties by written agreement.²³⁵

Importantly, we requested that BLG's opinion be responsive to each of the following ways in which the Crown or a Crown agency might be involved in a construction project:

- (a) Construction of a federally-owned building on federally-owned land for federal purposes, including federal construction projects on "lands reserved for the Indians"²³⁶ and federal construction projects for defence purposes;
- (b) Construction of a part of a federal undertaking or a work declared to be for the general advantage of Canada;
- (c) Construction of a part of a federally regulated industry (telecommunications, aeronautics, nuclear etc.);
- (d) Construction of a building that is built in partnership among Canada, a province and a private party for some non-federal, or at least not exclusively federal purpose; construction projects which the federal government funds in whole or in part (including First Nations projects); and P3 projects in which the federal government is a participant.²³⁷

While the current state of the jurisprudence and the absence of the precise form of the potential legislation did not permit Mr. Cromwell and Mr. Pratte to render an unequivocal opinion, BLG's conclusions are nevertheless of great significance for the purposes of this Report.

²³⁵ BLG Opinion at pp. 1-2.

²³⁶ The term "lands reserved for the Indians," while not expressed in language that we now consider appropriate, is taken *verbatim* from the *Constitution Act, 1867*, s. 91(24)

²³⁷ Mr. Cromwell was not asked to consider how prompt payment legislation would interact with existing federal statutory provisions, regulations or directives in relation to payments or dispute resolution under federal government contracts.

In summarizing the BLG Opinion, the reader will appreciate that, in addition to quoting from it, we have borrowed liberally from the text of the opinion.

2. Summary of the Opinion

According to Mr. Cromwell and Mr. Pratte, the constitutional validity of federal prompt payment legislation turns on two factors: (1) the purpose and effect of the legislation; and (2) whether the legislation is integral to a federal head of power.²³⁸

(a) Purpose and Effect

The first factor, the purpose and effect of the legislation, is also referred to as its “pith and substance” or its “matter.” Here, from the perspective of the federal government, the purposes and effects of the legislation include, (a) assuring orderly and timely building of federal construction projects by avoiding the disruptive effect and possible gridlock that arise from non-payment down the supply chain, (b) avoiding increased construction costs that result from bidders adding a contingency amount to allow for late payment, and (c) reducing the risk of disruption of federal construction projects because of the insolvency of subcontractors and suppliers.²³⁹ If the legislation has as its purpose and effect ensuring the orderly and timely completion of federal construction projects, the prospects of it being found to be valid federal legislation are reasonably good, based on the analysis provided by BLG.

As the BLG Opinion points out, and as noted by Parliamentary Secretary Steve MacKinnon in his appearance before the Standing Committee, legislation dealing with contractual relations, and especially contractual relations among non-federal government parties such as a contractor and its subcontractors, would normally be considered as falling within exclusive provincial legislative jurisdiction in relation to property and civil rights in the province. Accordingly, if the primary focus of the legislation is seen as being to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors, the prospects of the legislation being found to be valid federal legislation would be significantly reduced. For example, in the purpose clause of Bill S-224, the purpose and effect of the law may be seen as relating to contracts, a matter generally

²³⁸ BLG Opinion at p. 3.

²³⁹ BLG Opinion at p. 3.

within exclusive provincial legislative competence, in which case Bill S-224 may not be found to be valid federal legislation.²⁴⁰

(b) Integral to a Federal Head of Power

The second key consideration is whether the legislation would be found to be “integral” to a head or heads of federal power.²⁴¹ The various possible heads of power to which the “integral” test would be applied will depend on the various heads of power that may be engaged by different sorts of federal projects, and whether the link between the “matter” and a head of federal power is made out will be strongly influenced by the particular federal power relied on for particular types of projects.

These two factors, and others, are considered in greater detail below.

3. Key Constitutional Principles

The BLG Opinion explains that the analysis to determine whether a law or parts of a law fall within federal or provincial legislative jurisdiction under the *Constitution Act, 1867* proceeds through two main steps.

At the first step, and as noted above, one determines the subject matter, or “pith and substance”, of the law whose constitutional validity is in question. This analysis identifies the law’s “dominant purpose or true character” or “the ‘matter’ to which it essentially relates.”²⁴² Both the law’s purpose and its legal and practical effects are considered as part of this analysis.²⁴³ The purpose and effects of the law, not its form, are what determine its true character. As a second step, the law is assigned a place within the division of powers in the Constitution,²⁴⁴ focusing on “whether the ‘matter’ of the law is ‘in relation to’ one of the ‘classes of subjects’ established under s. 91 and 92 of the *Constitution Act, 1867*.²⁴⁵

The law’s “dominant purpose” is decisive in the pith and substance analysis; the law’s secondary objectives and effects have no impact on its constitutionality.²⁴⁶ Thus, where the “matter” of the legislation is squarely within federal or provincial legislative authority, that legislation may have

²⁴⁰ BLG Opinion at p. 3.

²⁴¹ BLG Opinion at p. 3.

²⁴² *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 29; *Canadian Western Bank v Alberta* 2007 SCC 22 (“Canadian Western Bank”).

²⁴³ *Reference Re Securities Act*, 2011 SCC 66 at paras 63 – 64 (“Securities Reference”).

²⁴⁴ BLG opinion, p. 5.

²⁴⁵ BLG opinion, p. 6.

²⁴⁶ *Global Securities Corp v British Columbia (Securities Commission)*, [2000] 1 SCR 494 at para 23. BLG Opinion at p.5.

substantial effects on matters that, considered on their own, would be outside that legislative authority. This point is often expressed by saying that “incidental effects”, that is, effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature, do not alter the constitutionality of an otherwise valid law.²⁴⁷

Canadian constitutional law recognizes that matters may have a “dual aspect”: the same “matter” may possess both federal and provincial aspects.²⁴⁸ This allows the concurrent operation of federal and provincial laws that pursue objectives that are, in pith and substance, within their respective jurisdictions.

The second and third questions in our consultation package dealt with the relationship between provincial and federal prompt payment legislation. These questions asked:

2. Are there potential conflicts between such federal legislation and provincial legislation?
3. If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?²⁴⁹

These questions are answered by the constitutional doctrines of concurrency, paramountcy and inter-jurisdictional immunity.

(a) Concurrency

Regarding concurrency, the BLG Opinion explains that “[t]he doctrine of concurrency holds that, where possible, courts should favour the operation of statutes enacted by both levels of government where the pith and substance analysis leads to the conclusion that those laws are properly within the legislative competence of both. This doctrine is based on two realities that flow from the commitment to the ‘pith and substance’ approach.”

The BLG Opinion continues:

Putting the case for federal jurisdiction at its highest, we think that prompt payment legislation has a “dual aspect”: the “matter” of prompt payment legislation has both a contractual aspect falling within provincial jurisdiction in relation to property and civil rights and an orderly and timely completion of federal construction projects aspect potentially falling within a number of heads of federal jurisdiction. This

²⁴⁷ BLG Opinion at p.5.

²⁴⁸ BLG Opinion at p. 6.

²⁴⁹ BLG Opinion at p. 6.

sort of legislation would therefore operate in an area of concurrent jurisdiction.

This means that provincial prompt payment legislation of general application would apply to federal construction projects. Assuming that federal prompt payment legislation is also valid in relation to federal constructions projects in certain circumstances, both the provincial and federal prompt payment schemes would operate concurrently with respect to those projects, subject to federal paramountcy ... [emphasis added]²⁵⁰

(b) Federal Paramountcy

In relation to federal paramountcy, the BLG Opinion states, "[i]f otherwise constitutional federal and provincial laws are in conflict, the doctrine of federal paramountcy resolves the conflict by holding that the federal law prevails. This doctrine would govern in the event that there were (otherwise constitutional) prompt payment legislation in effect in the province in which a federal project subject to federal prompt payment legislation was being built."²⁵¹

(c) Inter-jurisdictional Immunity

Regarding inter-jurisdictional immunity, the BLG Opinion goes on to say, "[c]onsideration of how federal and provincial prompt payment legislation would interact also requires a brief look at the doctrine of inter-jurisdictional immunity. This doctrine holds that there can be no concurrent operation of laws in relation to matters that are within the “core” of a head of legislative power. Inter-jurisdictional immunity has been applied in numerous, mostly older cases dealing with federal undertakings as well as other heads of federal legislative power."²⁵²

The BLG Opinion concludes:

In our view, inter-jurisdictional immunity would not be engaged by federal prompt payment legislation because the payment scheme would not be found to be at the “core” of any federal legislative power. Similarly, we think that provincial prompt payment legislation would not be found to be at the core of the provincial power over property and civil rights.

²⁵⁰ BLG Opinion at p. 7.

²⁵¹ BLG Opinion at p. 7.

²⁵² BLG Opinion at p. 7.

It follows that:

- the constitutionality of federal legislation would depend on whether the prompt payment scheme is considered integral to a head of federal legislative power;
- otherwise valid and applicable provincial contract law would operate under the doctrine of concurrency in the absence of federal law; and
- the interaction of otherwise valid federal and provincial laws would be addressed by the doctrine of federal paramountcy.

4. Analysis

(a) The Pith and Substance of the Potential Legislation

Regarding the pith and substance of the proposed legislation, the BLG Opinion states:

The material that we have reviewed suggests that the legislation's purpose and its legal and practical effect would be to assure the orderly and timely completion of federal construction projects. As explained earlier, payment disputes may disrupt or even bring projects to a standstill. Preventing this sort of disruption focuses more clearly on the federal interest in dealing effectively with the project rather than on improving the legal position of contractors and subcontractors. Thus, the legal and practical effects of imposing time limits for payments, interest levies and rapid dispute resolution mechanisms serve the broader purpose of enhancing the Crown's ability to assure the orderly and timely completion of federal construction projects.

For the purposes of our analysis, we will assume that this alternative way of stating the true purpose is the more apt. We therefore conclude that the "matter" of the legislation is the regulation of payment obligations and the resolution of payments disputes to assure the orderly and timely completion of federal construction projects.²⁵³

(i) To What Class or Classes of subject does the "matter" relate

In respect of the relevant heads of the federal legislative power, the BLG Opinion states:

Given that the "matter" of the legislation is assuring the orderly and timely completion of federal construction projects, the main competing heads of power will be, one hand, the provincial legislative authority over contracts by

²⁵³ BLG Opinion at p. 9.

virtue of s. 92(13) of the *Constitution Act* and, on the other, various heads of federal legislative power including in relation to public property (s. 91(1A), defence (s. 91(7)) and federal undertakings (e.g. s. 92(10)).

The constitutionality of potential federal prompt payment legislation will depend on whether the purpose and effect of the legislation are sufficiently linked to a head of federal legislative power. This, in turn, will depend on the answers to both a legal and a factual question.

The legal question concerns the test for determining the nature of the required link. The factual question is whether that link exists.²⁵⁴

Regarding the legal test, the BLG Opinion explains:

The legal test for the required link or relationship between the "matter" of the legislation and the head of federal power asks whether the "matter" of the legislation is an "integral element" of the federal head of power. This test has been applied with respect to a number of federal heads of power.²⁵⁵

In the result, the BLG Opinion concludes that matters having to do with federal property, "land reserved for the Indians" (as that term is used in the *Constitution Act 1867* s. 91(24)), and "defence", are likely integral to the effective exercise of federal power. In this regard, it states:

The key point for our purposes ... is that, generally speaking, matters of contract law fall within exclusive provincial legislative competence except to the extent that aspects of contract law are "an integral element of [Parliament's] primary jurisdiction over some other matter." Whether a matter is "integral" to a head of power turns on the court's assessment of how central the matter is to the effective exercise of the power.²⁵⁶

The BLG Opinion notes that Parliament's exclusive legislative authority over "lands reserved for the Indians" relates not only to reserves as defined in the *Indian Act*, but to "all lands reserved, upon any terms or conditions, for Indian occupation."²⁵⁷ Therefore, "lands reserved for the Indians" may not be owned by the federal Crown and, as well, this power must be read subject to section 35 of the *Constitution Act, 1982*, which entrenches the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."²⁵⁸ The BLG Opinion reviews the case law, which has interpreted the power over "lands

²⁵⁴ BLG Opinion at p. 10.

²⁵⁵ BLG Opinion at p. 10.

²⁵⁶ BLG Opinion at p. 13.

²⁵⁷ BLG Opinion at p. 15, citing *St. Catherine's Milling and Lumber Company v The Queen* (1888), 14 AC 46 at 59 (PC Canada); quoted with approval in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 174.

²⁵⁸ BLG Opinion at p. 15, citing Enacted as Schedule B to the *Canada Act, 1982* c 11 (U.K.).

reserved for the Indians" broadly, for example in relation to possession and occupation of lands on a reserve, although most of these cases have dealt with the applicability of provincial laws on reserve lands rather than the scope of federal legislative power in relation to reserve lands.

(ii) The Four Project Scenarios

The BLG Opinion then considers the factual aspect regarding four project scenarios as follows:

A. Construction of a federally-owned building on federally-owned land for federal purposes, on "lands reserved for the Indians"²⁵⁹, or for federal construction projects for defence purposes.

The projects referred to in this scenario engage the legislative authority of Parliament in relation to "the public debt and property" under s. 91(1A), "land reserved for the Indians" under s. 91(24) and "defence" under s. 91(7).

[...]

We referred earlier to the broad interpretation given to the federal power in relation to "militia, military and naval service, and defence" under s. 91(7) in the *Nykorak* case.²⁶⁰ It seems likely that the orderly and timely completion of defence-related construction projects would be found to be integral to this head of power.

To conclude on these points, in our opinion, the scope of federal legislative power in relation to public property, "lands reserved for the Indians" and defence is broad. It is likely, although not certain, that federal prompt payment legislation would be constitutionally valid in relation to such federal projects.

B. Construction of a part of a federal undertaking or of a work declared to be for the general advantage of Canada.

To begin, we have to identify the source of legislative powers in relation to these various matters.

Turning first to works and undertakings, section 91(29) confers exclusive federal legislative authority in relation to matters excepted from the powers expressly conferred on the provinces by s. 92.²⁶¹ Section 92(10) excludes

²⁵⁹ The term "Lands reserved for the Indians," while not expressed in language that we now consider appropriate, is taken *verbatim* from the *Constitution Act, 1867*, s. 91(24).

²⁶⁰ BLG Opinion at p. 16.

²⁶¹ BLG Opinion at p. 16.

from provincial jurisdiction and therefore places within exclusive federal jurisdiction:

- (a) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
- (b) lines of steam ships between the province and any British or Foreign Country; and
- (c) such works as, although wholly situate within the Province, are ... declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.²⁶²

Section 91(10) confers exclusive legislative authority on Parliament with respect to "navigation and shipping."

Finally, Parliament acquires legislative jurisdiction over works declared to be for the general advantage of Canada.²⁶³

...

If prompt payment legislation could be said to enable the federal government to build or regulate facilities necessary to the federal undertaking, then it would be found to be constitutional.

The same approach would apply in relation to a project declared to be for the general advantage of Canada.²⁶⁴

C. The Construction of a part of a federally regulated industry.

By way of example, banks fall within federal jurisdiction under s. 91(15), federal legislative power in relation to aeronautics is supported by the power to legislate for the Peace, Order and Good Government of Canada in the preamble to s. 91 and the same head of power supports federal jurisdiction in relation to atomic energy. Would federal prompt payment be valid in these areas of federal legislative authority?

The same analytical approach based on the "integral" test would apply in this context. The key question would be whether prompt payment is integral to the operation of, for example, a bank, an airport or a nuclear reactor. However, we think that in general it will be harder to uphold federal

²⁶² BLG Opinion at p. 17.

²⁶³ BLG Opinion at p. 17.

²⁶⁴ BLG Opinion at p. 19.

jurisdiction in this context: it will be more difficult to sustain the position that the timeliness of payment is integral to these areas of federal regulation.²⁶⁵

D. Construction of a building that is built in partnership between Canada, a province and a private party for some non-federal, or at least not exclusively federal purpose; construction projects which the federal government funds in whole or in part (including First Nations projects); and P3 projects in which the federal government is a participant.

In order for there to be federal legislative authority in relation to the contractual aspects of construction, there has to be some federal head of power to which those contractual aspects can be attached as an integral part. In this scenario, there does not appear to be any relevant head of federal legislative power engaged.

However, as we shall discuss below, the federal government can likely incorporate the prompt payment provisions into its contracts and achieve substantially the same result as it could by means of legislation.²⁶⁶

In this regard, the BLG Opinion concludes:

For there to be federal legislative authority in relation to the contractual aspects of construction, there has to be some federal head of power to which those contractual aspects can be attached as an integral part. In this scenario, there does not appear to be any relevant head of federal legislative power engaged.

(iii) Interaction of Federal and Provincial Legislation

Regarding the potential interaction of federal and provincial prompt payment legislation, the BLG Opinion identifies three possible approaches to aligning federal and provincial prompt payment legislation:

- 1) Providing that the Governor in Council may make an order that the federal legislation does not apply (to all or certain types of federal construction projects) if satisfied that there were “substantially similar” provincial legislation;
- 2) Having the Uniform Law Conference of Canada take up the topic of prompt payment legislation in order to create a model law for adoption by the federal and provincial governments; or

²⁶⁵ BLG Opinion at p. 19.

²⁶⁶ BLG Opinion at p. 19.

- 3) Allowing the Minister to designate projects as being subject to the legislation.²⁶⁷

(b) Achieving Prompt Payment Goals by Contract

Regarding the constitutionality of attempting to achieve prompt payment by contractual means, the BLG Opinion states:

Generally, the Crown has the power of a natural person to enter into contracts and is not confined in this regard within the limits of its power to legislate.²⁶⁸ This general statement is subject to the Crown complying with statutory requirements and to the further qualification that the contractual arrangements are not, in substance, regulation of a matter beyond the legislative competence of that order of government.²⁶⁹ Provided that the contracting parties voluntarily assume their respective obligations, there is no legislative power being exercised.²⁷⁰

In our view, there is no constitutional impediment to the federal government including prompt payment provisions in its construction contracts and insisting that everyone working on the project does the same in their contracts.

5. Summary

The BLG Opinion concludes as follows:

In our opinion:

- The strongest case for constitutionally valid federal prompt payment legislation is with respect to legislation in relation to federal projects on federal lands. The courts have generally understood federal legislative powers to be wide in relation to federal property. The case for federal jurisdiction would be similarly strong for federal projects on "lands reserved for the Indians" and in relation to "defence." It is likely, although not certain, that federal prompt payment legislation in relation to these projects would be found to be within the legislative authority of Parliament.
- There is also a good, but by no means certain case to be made for the constitutionality of federal legislation in relation to the construction

²⁶⁷ BLG Opinion at p. 20.

²⁶⁸ BLG Opinion at p. 20 citing *British Columbia (Attorney General) v Deeks Sand and Gravel Co*, [1956] SCR 336; *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532 ["YMHA"].

²⁶⁹ BLG Opinion at p. 20.

²⁷⁰ BLG Opinion at p. 21.

of federal works and undertakings and works declared to be for the general advantage of Canada.

- With respect to other types of federal projects, the case for constitutionality is much weaker. Federal prompt payment legislation that is made to apply to any construction contract made by a government institution (i.e. any department or ministry, Crown Corporation and wholly owned subsidiaries of Crown Corporations) regardless of the head of legislative power under which the government institution operates with respect to that construction contract is, in our opinion, unlikely to be upheld as valid federal legislation.
- With respect to the adjudication aspects of the potential legislation, we doubt that there would be any constitutional problem arising from s. 96 of the *Constitution Act* (i.e., the core of superior court jurisdiction) given that the adjudication scheme leads only to interim decisions and does not purport to oust the jurisdiction of the courts.
- The federal government could achieve the goals of prompt payment legislation by inserting appropriate provisions in its contracts and insisting that contractors and subcontractors working on the project do the same. There is no constitutional impediment to the federal government doing this by way of contract. In our opinion this approach will yield more certain results than legislation in situations in which the constitutionality of federal legislation is in doubt.
- Federal legislation could be drafted so that it would not apply in jurisdictions with substantially similar provisions or that it would apply to projects designated by a Minister.²⁷¹

Given the conclusions of the BLG Opinion, we recommend in Chapter VIII - Applicability that legislation should operate only in relation to matters integral to federal powers. In particular, the legislation should be limited to:

- federal construction projects on lands owned by the federal government, including defence projects. However, the legislation should not apply merely on the basis that the federal government has funded a project in whole or in part or because the federal government has specific regulatory authority in relation to a particular industry.
- in respect of "lands reserved for the Indians" (recognizing that this language is anachronistic, but is used in the *Constitution Act*), we recommend that the ability to include reference to projects on such lands

²⁷¹ BLG Opinion at pp. 21-22.

be included within the ambit of a subsequent regulation, if viewed as merited, after appropriate consultation.

- construction projects that are part of a federal undertaking or of a work declared to be for the general advantage of Canada and in particular:
 - federal undertakings (as defined in s. 92(10) of the *Constitution Act*, e.g., lines of steam or other ships, railways, canals, telegraphs), or
 - declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.
- projects designated by a Minister, which would be designated on a case-by-case basis at the outset of a project in relation to the applicability of legislation.

VIII. APPLICABILITY OF LEGISLATION

1. Overview

Based on Chapters III to VII above, we have analyzed the relevant issues from a public policy perspective, and in this chapter we provide our recommendations as to the applicability of the proposed legislation. Our detailed recommendations in relation to prompt payment and adjudication, as well as related subjects, will then follow.

This chapter is structured as follows:

1. Overview
2. Prompt Payment and Adjudication Legislation
3. Federal Legislative Objective(s)
4. Matters Integral to Federal Powers
5. Types of Projects and Work
6. Defining the Owner
7. Thresholds and Restrictions
8. Summary

2. Prompt Payment and Adjudication Legislation

At the time our mandate was announced, the federal government had determined that it would introduce prompt payment and adjudication legislation. That said, and as discussed further in Chapter IX we are of the view that such legislation is warranted given the policy objectives described below.

The existing legislative and policy framework, including the FAA, the Payment Directive, and the Contracting Policy (as described in Chapter III) creates an environment where prompt payment by the federal government is encouraged and our consultations with federal stakeholders indicate that the federal government takes seriously the obligation to pay promptly. However, the input received from industry stakeholders, particularly those lower down the construction pyramid, indicates that there are nevertheless systemic payment delays, as described in Chapter IX – Prompt Payment.

Such payment delays impede the ability of the federal government to complete its construction projects quickly and at the best value for the Canadian taxpayer. At the same time, with a number of provinces taking steps and with legislation alignment being such an important issue, it is

essential that the federal government continue to proactively engage. As a result, we have formed the view that there is a valid policy basis for the implementation of federal prompt payment and adjudication legislation.

Recommendation 1

The federal government should enact legislation introducing prompt payment and adjudication on federal construction projects.

3. Federal Legislative Objectives

Our recommendation in regards to the enactment of such legislation is based upon our view that such legislation would achieve the following federal purposes:

- assuring the orderly and timely building of federal construction projects on federal lands by avoiding the disruptive effects, including gridlock, which arises from non-payment down the supply chain;
- avoiding increased construction costs that result from bidders adding a contingency amount to allow for the risk of late payment, which contributes to the federal government's objective of achieving best value; and,
- reducing the risk of disruption to federal construction projects because of the insolvency of subcontractors and suppliers.

Based on our review of the BLG Opinion, as summarized in Chapter VII - Constitutional Considerations, assuring the orderly and timely completion of federal construction projects on federal land falls within the general power of the federal government to control and regulate its property. Preventing disruption due to payment disputes is very much in the federal government's interest. In other words, the legal and practical effects of imposing time limits for payments, interest levies, and rapid dispute resolution mechanisms serve the broader purpose of enhancing the Crown's ability to assure the orderly and timely completion of federal construction projects and to achieve best value.²⁷²

²⁷² By comparison, the purpose of Bill S-224, as set out in s. 2 of the Bill, is "to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving government institutions", which may be perceived as focussing on contractual matters that are typically considered to be within provincial jurisdiction. To put it somewhat differently, while the objectives of the prompt payment movement, and the motivation of

While a purpose clause in legislation is not determinative of a court's assessment of the legislation's true purpose, we recommend the inclusion of such a provision.

Recommendation 2

The legislation should make clear that the intent of the federal government is to:

- assure the orderly and timely building of federal construction projects on federal lands by avoiding the disruptive effects, including gridlock, which arises from non-payment down the supply chain;
- avoid increased the construction costs of construction that result from bidders adding a contingency amount to allow for the risk of late payment, which contributes to the federal government's objective of achieving best value; and,
- reduce the risk of disruption to federal construction projects because of the insolvency of subcontractors and suppliers.

4. Matters Integral to Federal Powers

We recommend that the new legislation operate in areas of and in relation to matters integral to federal powers. In this regard, and as discussed in Chapter VII, the BLG Opinion states that the strongest case for constitutionally valid federal prompt payment legislation is with respect to legislation in relation to federal projects on federal lands. The courts have generally understood federal legislative powers to be wide in relation to federal property. Further, the case for federal jurisdiction would be similarly strong for federal projects on "lands reserved for the Indians" (subject to additional consultation with Indigenous peoples) and in relation to "defence" projects. In that regard, these are the matters integral to federal power(s) for the purposes of potential legislation. In respect of "lands reserved for the Indians" we propose a transition provision to allow time for further consultation as explained in Chapter XIII - Further Consultation.

the Canadian construction industry to favour prompt payment are clearly laudable, they do not constitute an appropriate basis for federal legislation of this nature.

As well, and as noted in the BLG Opinion, Section 92(10) of the *Constitution Act, 1867*,²⁷³ excludes from provincial jurisdiction and therefore places within exclusive federal jurisdiction:

- lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
- lines of steam ships between the province and any British or Foreign Country; and
- such works as, although wholly situate within the Province, are ... declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

Section 91(10) of the *Constitution Act, 1867*, also confers exclusive legislative authority on Parliament with respect to "navigation and shipping."²⁷⁴

Some stakeholders advocated that any construction project that receives federal funding should be included in the ambit of the legislation. The NTCCC, for example, suggested that prompt payment legislation should apply to:

- The federal government and its departments when they contract for construction;
- Agencies of the federal government established by statute or regulation when they contract for construction;
- Entities that receive capital grants from the federal government for the purpose of construction;
- Entities that receive transfer payments from the federal government for the purpose of construction; and
- Any construction contractor who is providing services that benefit the federal government, one of its agencies or one of its grant or transfer partners, regardless of whether the federal government, one of its agencies or one of its grant or transfer partners is a direct contracting party.²⁷⁵

PSPC's view was that prompt payment legislation should only apply to work for federal government departments that "typically do construction contracts

²⁷³ *Constitution Act, 1867*, s. 92(10)

²⁷⁴ *Constitution Act, 1867*, s. 91(10)

²⁷⁵ NTCCC Submission at p. 14.

under their own contracting authority" (i.e. entities that are contracting authorities under the Contracting Policy).²⁷⁶

The GCAC recommended that the legislation should apply to work where the Owner as defined under the contract is a federal government ministry, special agency or Crown corporation. In the GCAC's view, such legislation should not apply to projects where the federal government is only providing funding to the project, but is not otherwise the "owner" of the project.²⁷⁷

However, in 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.

As noted above, Parliament acquires legislative jurisdiction over works properly declared by Parliament to be for the general advantage of Canada.²⁷⁸ In this regard, and as noted by the BLG Opinion and the CBA Submission, the legislation could also provide that it applies to projects designated by a Minister, along the lines of the designation process under the *Canadian Environmental Assessment Act, 2012*.²⁷⁹ Allowing for the option of a designation process would permit a case-by-case determination of whether the legislation should apply.

In relation to "lands reserved for the Indians", we address this issue in Chapter XIII - Further Consultation because additional time is required to adequately consult with Indigenous stakeholders.

As a result, we recommend as follows:

²⁷⁶ PSPC Submission at p. 11.

²⁷⁷ GCAC Submission at p. 3.

²⁷⁸ See e.g. *British Columbia v Canada*, [1994] 2 SCR 41.

²⁷⁹ S.C. 2012, c. 19, s. 52; see e.g. s. 14(2)

Recommendation 3

The legislation should operate only in relation to matters integral to federal powers. The legislation should be limited to:

- federal construction projects on lands owned by the federal government, and defence projects. However, the legislation should not apply merely on the basis that the federal government has funded a project in whole or in part or because the federal government has specific regulatory authority in relation to a particular industry.
- "Lands reserved for the Indians" (recognizing that this language is anachronistic, but is used in the *Constitution Act, 1867*), we recommend that the ability to include projects on such lands be included within the ambit of a subsequent regulation, if viewed as merited, after appropriate consultation.
- construction projects that are part of a federal undertaking or of a work declared to be for the general advantage of Canada and in particular:
 - federal undertakings (as defined in s. 92(10) of the *Constitution Act, 1867*, e.g. lines of steam or other ships, railways, canals, telegraphs) or
 - declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
- projects designated by a Minister on a case-by-case basis at the outset of a project.

5. Types of Projects and Work

(a) Application to Construction Projects

The legislation would apply to construction work performed on construction projects. We heard from various stakeholders about how broadly these terms should be defined and about exclusions.

Recommendation 4

Federal prompt payment and adjudication legislation should be deemed to apply to all construction contracts that fall within the ambit of recommendation 3, drawing on the definitions of terms like "improvement", "services and materials", etc. from provincial lien legislation.

(b) Contracting out of the Act

We also heard from multiple stakeholders that all contracts should be deemed to conform (i.e. there should be no ability to contract out of the Act).²⁸⁰ Absent such a provision, parties who do not view the legislation as beneficial to their interests may elect to insert a waiver provision into their contracts. We understand from our stakeholder engagement sessions that this is the practice in Newfoundland in regards to the provincial lien legislation, which serves to frustrate the intent of this provincial legislation. Trade contractors and suppliers have made it clear that they want federal prompt payment legislation to offer a measure of protection that does not currently exist at the federal level and that, in their view, allowing waiver provisions would defeat this objective. As the majority of provincial lien legislation includes a “no contracting out” provision, we are of the view that this approach makes good policy sense in the federal context as well.

Recommendation 5

Parties to construction contracts should not be permitted to contract out of the legislation.

6. Defining the Owner

PSPC suggested that the legislation should apply to contracts entered into by departments regulated under Schedule 1 of the FAA as well as DCC.

In relation to Crown corporations other than DCC, PSPC suggested that prompt payment legislation should not include these other Crown corporations as, according to PSPC, they typically follow provincial laws and regulations when performing construction work.²⁸¹

In our view, it makes sense to include federal Crown corporations within the ambit of the legislation, subject to the conclusions reached in the BLG Opinion, because these entities are engaged in construction projects for federal purposes.

²⁸⁰ CCA Submission at p. 3.

²⁸¹ PSPC Submission at p. 11.

Recommendation 6

Subject to recommendation 3, prompt payment and adjudication legislation should apply to all federal departments and federal Crown corporations that do federal construction work under their own contracting authority.

7. Exclusions

In relation to exclusions or exemptions from the applicability of the potential legislation, several stakeholders took the position that there should be no exclusions.²⁸² Others recommended that only limited exemptions should be incorporated in the Act.

Canada Post suggested that their asset renewal program should be excluded given that they have hundreds of construction projects a year that are small and difficult to apply from an administrative perspective.²⁸³

Generally, we heard that if there are exclusions from the legislation, they should be very clearly explained. In this regard, the CBA also recommended that we consider prescribing an express list of the types of projects the legislation applies to (e.g. the *Canadian Environmental Assessment Act, 2012* uses a list).²⁸⁴

(a) P3s

Some stakeholders took the position that federal prompt payment legislation should apply to P3 projects with certain modifications, as applied in Ontario (for example, the NTCCC, CBA, CCA, GCAC, SCA²⁸⁵).

Certain provincial government stakeholders (who interact with the federal government on jointly funded P3 projects) such as SaskBuilds, Partnerships BC, Infrastructure Ontario, as well as the infrastructure-related departments in the Northwest Territories, PEI, Newfoundland, and Nova Scotia all suggested, generally, that they would be comfortable with federal prompt payment legislation applying to P3 projects so long as it is clear what legislation applies to what project from the outset of the project and the legislation is properly adapted to suit the project delivery method.

²⁸² See for example, CIQS Submission at p.2; NTCCC Submission at p. 14.

²⁸³ Canada Post Meeting Summary.

²⁸⁴ CBA Submission at pp. 4-5.

²⁸⁵ Saskatchewan Construction Association Meeting Summary.

PSPC suggested that there should be certain exceptions to the applicability of prompt payment, such as for fit-up work for leased buildings and work done under RP-1/RP-2 contracts. In relation to P3s, PSPC suggested that we consider the complexity of the arrangement before arriving at any conclusions on the applicability of prompt payment provisions.²⁸⁶ PSPC advised us that they typically have three to four P3 projects ongoing at a time. DCC advised us that they have only ever participated in two P3 projects, but did not express any objection to the application of prompt payment legislation to P3 projects.

The Canadian Council for Public-Private Partnerships (CCPPP) expressed the view that prompt payment legislation could apply to P3 projects so long as the legislation recognizes the unique characteristics of the project delivery model. In particular, the CCPPP suggested we look at the Ontario model and make sure that legislation permits milestone payments and appropriate certification processes utilized in the P3 model.²⁸⁷

In particular, we heard from several stakeholders on the subject of public private partnerships (referred to as P3, PPP, or AFP). The CCA recommended that we adopt the Ontario model which provides for certain modifications for P3 projects including: that the SPV is deemed to be the contractor, the project agreement is deemed to be the contract, the design-build contractor is deemed to be a subcontractor, and the design-build agreement is deemed to be a subcontract.²⁸⁸ There are also modifications in relation to the applicability of adjudication, including limiting the topics that can be adjudicated and having the independent certifier serve as adjudicator.

GCAC also submitted that the modifications to P3 projects in the Ontario *Construction Act* should apply.²⁸⁹

While the NTCCC stated that there should be no exclusions for prompt payment in P3 projects, it acknowledged that certain modifications for P3 projects were allowed in Ontario (e.g. payment being tied to milestones, no prohibition on pay-when-certified clauses and the use of the Independent Certifier as the adjudicator).²⁹⁰

²⁸⁶ PSPC Submission at pp. 11-12.

²⁸⁷ CCPPP Meeting Summary.

²⁸⁸ CCA Submission at p. 4.

²⁸⁹ GCAC Submission at p. 3.

²⁹⁰ NTCCC Submission at p. 14.

Recommendation 7

The legislation should apply to federal P3 projects so long as those projects are federal P3 projects that meet the constitutional requirements outlined above (i.e. matters integral to federal power(s)) with necessary modifications, as implemented under Ontario's *Construction Act*. Specifically, the following should be considered:

- the appropriate definitions of the special purpose vehicle (SPV), the project agreement, the design-build contractor and the design build agreement;
- modifying the applicability of adjudication, including limiting the topics that can be adjudicated and having the independent certifier serve as adjudicator;
- allowing milestone payments;
- allowing provisions that impose pre-conditions on the delivery of a proper invoice (e.g. in relation to certification); and
- requiring the Independent Certifier to be the adjudicator.

(b) Maintenance and Repair Work

We heard from several stakeholders (including BGIS and the GCAC, GCAC Saskatchewan) that we should give careful consideration to project lifecycle costs and maintenance work. This is a particular concern on projects that have an operations and maintenance phase. We heard from the general contracting community as well as BGIS that obligations on 25 to 30 year projects create concerns in relation to what is or is not included for prompt payment purposes.

This issue is of importance to transition issues as discussed in Chapter XIV – Transition and Education. The GCAC recommended that any prompt payment legislation should not apply to maintenance work.²⁹¹ This is similar to exclusions in the Ontario *Construction Act* and the distinction made between maintenance and repair work versus capital repair work, which would extend the life of a project.

²⁹¹ GCAC Submission at p. 3.

Recommendation 8

The legislation should not apply to maintenance and repair work under long term contracts and it should only apply to work that constitutes a "capital repair." The legislation should define capital repair and suggest consideration of the Ontario approach as a basis for that definition.

(c) Fit Up Work for Leased Buildings

PSPC recommended that fit-up work for leased buildings should not be included. As noted above in Chapter III, the Contracting Policy does not apply to leases and contracts for the fit-up of an office or residential accommodation pursuant to the federal *Real Property Act* and its Regulations. In this regard, we note that this type of work is subject to provincial lien legislation and, as such, it makes sense to exclude as contractors will already be provided with payment protection.

Recommendation 9

The legislation should exclude fit-up work for leased buildings as described in the Contracting Policy.

(d) Real Property Service Management Contracts

A significant issue that was raised in many stakeholder meetings was the Real Property Management Services Contracts. In particular, the potential inclusion or exclusion of the RP-1/RP-2 contracts between BGIS and PSPC from the legislation was raised repeatedly.

The NTCCC submitted that all construction and contracting activity of facilities managers (such as BGIS) should be subject to prompt payment obligations.²⁹² GCAC similarly suggested that legislation should apply where the federal government is the owner of a project notwithstanding engaging the project management services of a third party (i.e. RP-1/RP-2). Considering issues of transition, the CCA and WCA recommended that RP-1/RP-2 and similar contracts should be considered in prompt payment legislation but only after the expiry of their current terms.²⁹³ The CCA submitted that prompt payment legislation should apply immediately to all "subcontracts" under the facility management contracts currently in existence. However, we

²⁹² NTCCC Submission at p. 14.

²⁹³ WCA Submission at p. 2; CCA Submission at p. 4.

heard directly from BGIS that this sort of immediate change would have a catastrophic impact on its internal processes and its budgeting. BGIS emphasized that there was a potential for serious financial disruption should any drastic changes occur immediately.

Obviously, this would not be in the public interest. Rather, BGIS recommended that, the legislation should apply “from only a point in time when the federal authority initiates a construction project” and that we should consider this point to be the “date the federal government authority tenders the head contract or the date the federal authority enters a head contract.”²⁹⁴ Alternatively, BGIS suggested that there may be an opportunity within existing contracts to apply prompt payment legislation “provided [that] there are statutorily protected contractual accommodations for changing payment mechanisms and recovery of attendant expenses incurred.” We note that this alternative is relevant particularly as neither RP-1 nor RP-2 contain a change in law provision and the impact on BGIS of a universally applicable prompt payment regime applying on an immediate basis would have serious effects, which would be unfair to BGIS and not in the public interest.

We also note that the Working Group strategy which contemplated prompt payment applying to “future cycles” of RP-1 and RP-2 only.²⁹⁵ In this regard, PSPC was of the view that any work done on PSPC owned or managed property through a property manager (i.e. RP-1/RP-2) should be excluded from prompt payment legislation generally. However, PSPC was of the view that *new* large-scale contracts with a construction component executed after the effective date of new legislation should be included.²⁹⁶ This issue is further discussed in Chapter XIV – Transition and Education.

8. Thresholds and Restrictions

Various stakeholders raised issues in relation to whether or not there should be a minimum or a maximum threshold for the application of the legislation both in relation to prompt payment and adjudication.

In addition to monetary thresholds, some stakeholders raised concerns about whether the legislation, and particularly adjudication, should be applied in relation to very complex matters – with the degree of complexity not always capable of being measured by dollar value alone. Delay claims were often used as an example of a particularly complicated form of claim

²⁹⁴ BGIS Submission at p. 6.

²⁹⁵ Engagement Strategy at p. 5 - <http://www.cca-acc.com/wp-content/uploads/2017/02/EngagementStrategy.pdf>

²⁹⁶ PSPC Submission at pp 11-12.

that is difficult to assess by way of a swift dispute resolution mechanism because of the extent of the necessary factual evidence to prove a claim.

Stakeholder comments on the threshold issue included the following:

- BC Construction Association raised a concern over whether certain projects would be excluded based on their order of magnitude (i.e. a financial threshold).²⁹⁷
- The CCA suggested that its general contractor members would prefer a threshold in relation to adjudications based on the value of the dispute (although no threshold was proposed).²⁹⁸
- The NTCCC and CCA trade contractor members suggested there be no threshold (i.e. the Ontario approach).
- DCC suggested a threshold for adjudication that is based on the amount of the dispute or the complexity of the dispute itself to ensure fairness and avoid overly complex disputes being addressed in insufficient time periods. In particular, DCC suggested that adjudication should not apply to claims for: extra expense, loss or damage incurred or sustained by the Contractor due to delay, neglect, discrepancies and ambiguities in the plans and specifications, or unforeseen conditions that require expert technical testing, analysis and testimony; or claims over \$500,000.
- PSPC suggested we consider the complexity of certain disputes for adjudication in relation to the applicability of the legislation generally.
- The Quebec Coalition submitted that the legislation should not apply to contracts below \$25,000.²⁹⁹
- The Yukon Justice/Highways and Public Works suggested that there could be a threshold based on project duration and recommended, for example, that projects that have a duration between 0-3 months typically have one invoice at mobilization and one invoice at completion whereas longer projects necessarily have more complex structures. It was suggested that this discrepancy should be accounted for.³⁰⁰

In Ontario, there are no monetary thresholds in relation to the prompt payment or adjudication elements of the legislation. Nor are there monetary thresholds in the UK. A monetary threshold is not necessarily indicative of complexity, although large disputes do tend to be more complex. From a policy perspective, having a minimum threshold may cause those with

²⁹⁷ BCCA Meeting Summary.

²⁹⁸ CCA Meeting Summary.

²⁹⁹ Quebec Coalition Submission at p. 8.

³⁰⁰ E-mail from Legal Counsel at Highways and Public Works, Yukon dated April 10, 2018.

smaller payment claims to lose the ability to pursue a cost effective remedy, which would not make sense. In relation to large claims, it would seem to make more sense to limit the nature of the claims to be pursued through adjudication as opposed to the complexity of the claims. An adjudication regime should be structured so as to serve as an enforcement mechanism for prompt payment which will necessarily constrain the number of disputes that go to adjudication.

In addition, in our view, and as will be discussed in the Chapter X, it would seem to make sense to provide procedural protections in relation to the timing and process associated with complex claims as opposed to barring them entirely.

Recommendation 10

There should be no thresholds in the proposed legislation.

9. Summary

The application of a federal prompt payment and adjudication regime is necessarily constrained by the nature of our federal system and in particular the powers given to the federal government and those given to the provinces and territories under the *Constitution Act*.

The foregoing recommendations are based on the BLG Opinion and are made with a view to making recommendations that will result in legislation that is likely to withstand a constitutional challenge.

The specific mechanics of the recommended prompt payment and adjudication regime, as well as a detailed analysis of the rationale for such a regime, are described below in Chapter IX – Prompt Payment and Chapter X – Adjudication

IX. PROMPT PAYMENT

1. Overview

In this chapter we address prompt payment. In particular, we focus on the history of the prompt payment movement, related issues, surrounding context, and potential solutions.

This chapter is structured as follows:

1. Overview
2. Context
 - a) Prism Economics and Analysis Report commissioned by NTCCC
 - b) IPSOS Reid Trade Contractor Survey commissioned by Prompt Payment Ontario
 - c) A survey conducted by PSPC (the "Government Survey")
 - d) Bill S-224
 - e) Relevant Experiences (International and Ontario)
3. Stakeholder Input
4. Analysis and Recommendations
5. Summary

2. Context

(a) Prism Economics and Analysis Report

In April of 2015, the NTCCC released a report entitled “The Need for a Prompt Payment Act in Federal Government Construction” prepared by Prism Economics and Analysis (the “Prism Report”).³⁰¹ The Prism Report takes a comparative analysis approach to prompt payment legislation in Canada at the federal level. The Prism Report concludes as follows:

There are two distinct problems in federal construction work. The first is delays by federal authorities in processing valid invoices for construction work where there is no dispute that the work has been performed according

³⁰¹ Prism Report. <http://www.promptpayment.ca/wp-content/uploads/2015/08/Need-for-a-Federal-Prompt-Payment-Act.pdf>

to contract. The second is delays in remitting payments down the subcontract chain, even when valid invoices have been submitted and where there is no dispute that the work was performed according to contract. These payment delay problems are not occasional; they are systemic.³⁰²

In relation to how this issue affects the Canadian economy, the Prism Report states that the result is “a smaller pool of Trade Contractors who will bid on work, less employment in the construction industry, and reduced investment by Trade Contractors in apprenticeship training.”³⁰³

The Prism Report examines five key elements of the federal construction projects, which are summarized below.

- 1) **The nature of the construction pyramid.** The contracting structure on construction projects differs from other industries.³⁰⁴ On some large construction projects, trade contractors perform upwards of 80% of the actual construction work. Trade contractors, however, have limited access to bank credit and dependence on cash-flow is high.³⁰⁵
- 2) **Payment freeze-ups.** On federal construction projects, funds flow from the federal authority to the general contractor and then on to subcontractors and sub-subcontractors based on satisfactory progress. The step of determining satisfactory progress (or completion) is confirmed by the payment certifier, who is often supported by a third-party consultant. The Prism Report states that the subcontractors and suppliers below the general contractor may be subjected to unexpected payment delays, even if their work was wholly satisfactory due to other issues with the invoice presented by the general contractor to the owner. The Prism Report describes the process as being “highly vulnerable to freeze-ups.”³⁰⁶
- 3) **The Liquidity Vice.** The Prism Report suggests that there is no flexibility on the payment side of the ledger for trade contractors. Specifically, even if there are delays in getting paid, these lower-tier contractors are still required to make their payments to the Canada Revenue Agency, to workers' safety schemes, to employees or union

³⁰² Prism Report at p. 1.

³⁰³ Prism Report at p. 1.

³⁰⁴ The Murray Report comments on this issue noting that the pyramid structure of the construction industry creates difficult payment pressures. Murray Report at s. 16.1 – Power Imbalances, p. 276.

³⁰⁵ Prism Report at pp. 1-2.

³⁰⁶ Prism Report at pp. 2-3.

labour, and for materials and equipment rental, within 15 to 30 days. According to the Prism Report, having no flexibility in relation to these payments that must be made on the one hand and being exposed to unpredictable and often late payments on the other hand, is a cause of businesses collapsing in the trade contractor sphere.³⁰⁷

- 4) **Late Payment is Distinct from Default.** The Prism Report draws a distinction between late payments and payment default as separate risks. It discusses the lien system as a partial remedy for defaults, despite the fact that there are no liens on federal projects, but states that there is no remedy for systemic late payment.³⁰⁸
- 5) **Imbalance of Economic Power.** Finally, the Prism Report states that unequal bargaining power is the fundamental cause of the late payment problem in the construction industry. The report suggests that general contractors force lower-tier contractors to accept late payments as a cost of doing business and that these lower-tier contractors accept such practices for the survival of their businesses. The report further suggests that general contractors use pay-when-paid clauses to manage delays in payment and that the current payment system rewards general contractors who delay payment. In brief, the assertion is that general contractors are provided with an opportunity to obtain interest-free cash flow by delaying payments to subcontractors while imposing serious cash flow risk down the supply chain. This creates an unfair advantage in favour of those who hold the money, according to the Prism Report.³⁰⁹

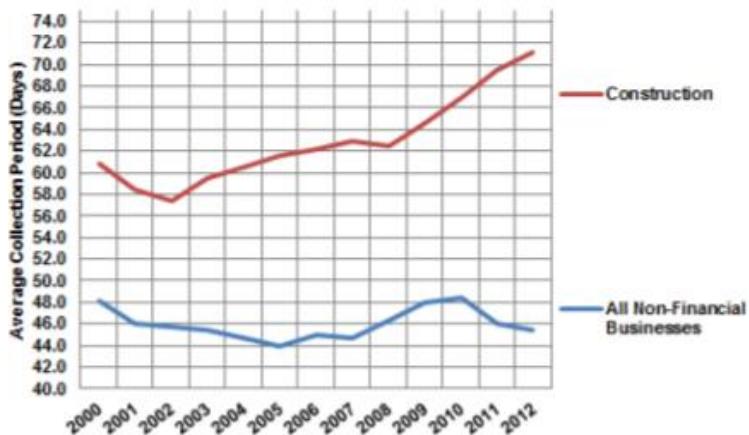
The Prism Report provides a comparison chart to demonstrate the trend in average duration of receivables in the construction industry as compared to all non-financial industries. This chart is reproduced below.

³⁰⁷ Prism Report at p. 3.

³⁰⁸ Prism Report at p. 3.

³⁰⁹ Prism Report at pp. 3-4.

Figure No. 1
Average Collection Period (Days) for Receivables:
Construction Industry compared to All Non-Financial Businesses, 2000 - 2012 (Canada)
Based on Statistics Canada, CANSIM, Table No. 180-0003



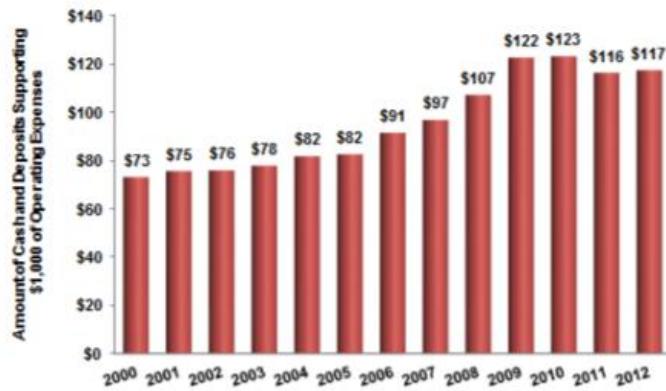
From this figure, the Prism Report concludes that: a) the average duration of receivables in the construction industry is much higher than other industries; and b) there is an upward trend in the age of receivables over the period from 2002 to 2012.³¹⁰ According to this chart, by 2007, the average duration of a receivable in the construction industry was 62.8 days (8.97 weeks). By 2012, the average duration had increased to 71.1 days (10.16 weeks). We note that these statistics were gathered from the construction industry nationally and are not specifically focused on federal construction projects.

The Prism Report explains that trade contractors maintain larger than necessary cash balances in order to protect against this risk of late payment, which the report refers to as "tail risk." The following figure provided by the Prism Report suggests that over the same period of time that the age of receivables has increased, trade contractors have had to increase their cash balance per \$1,000 of operational expenditure:³¹¹

³¹⁰ Prism Report at p. 5.

³¹¹ Prism Report at p. 6.

Figure No. 2
**Amount of Cash and Deposits Supporting \$1,000 of Operating Expenses
in the Construction Industry, Canada, 2000 – 2012**
Calculations based on Statistics Canada, CANSIM Table No. 180-0003



The Prism Report suggests that the idle cash is dead weight on smaller businesses and that these businesses are forced to carry cash balances of this magnitude to protect themselves against interruptions in cash flow resulting from late payment.

The NTCCC draws on the findings of the Prism Report to conclude that late payments lead to: higher project costs, a reduced bidding pool, lower employment, issues with reported earnings and source deductions, fewer apprenticeships, and fewer investments in new equipment/machinery.³¹²

The Prism Report summarizes the NTCCC position as follows:

- The NTCCC appreciates the efforts of PSPC to address payment issues, but the steps taken do not get to the heart of the problem.
- PSPC's policy to pay for all work that is performed satisfactorily and only withhold payment in relation to disputed work is supported. However, this policy does not oblige general contractors to apply the same principle to their subcontractors.
- Statutory declarations do not solve the issues of late payment, as they are retrospective documents and do not address issues related to purported disputes.
- PSPC's requirement for contract security on projects over \$100,000 provides protection against non-payment but not late payment.
- Standardized contract documents (i.e. CCDC and CCA standard contracts) do not provide protection for subcontractors, as it is standard practice for

³¹² Prism Report at pp. 6-7.

general contractors to use their own subcontracts or amend the CCDC/CCA contracts. Furthermore, these contracts do not contain unqualified prompt payment requirements.³¹³

The Prism Report further states that voluntary codes have not worked in Canada or other jurisdictions. It asserts that, in these other jurisdictions, legislation was adopted because industry solutions failed.³¹⁴ The Prism Report concludes that the only solution to systemic late payment is to legislate prompt payment.³¹⁵

(b) IPSOS Reid Trade Contractor Survey

In November of 2015, Prompt Payment Ontario published the results of a survey it had commissioned from Ipsos Reid entitled the Trade Contractor Survey ("Ipsos Reid Survey").³¹⁶ The survey was conducted between August 17 and October 2, 2015 and was compiled based on 535 responses obtained through 272 telephone interviews and 263 online questionnaires.³¹⁷

The report states that "survey data show[s] that late payment is a serious and systematic problem in Ontario's construction industry" with a "high incident [sic] of late payment in every sector of the construction industry." The Ipsos Reid Survey report includes the following payment statistics:

- The average age of current receivables among the surveyed trade contractors is 61.3 days.
- Almost one contractor in every five (18.7%) is carrying current receivables which have an average age of 90 days or more. (Accounts that are outstanding for more than 90 days are not eligible for receivables financing through banks.)
- Almost one invoice in every five (19.5%) that was outstanding for more than 30 days (excluding holdback monies) took 90 days or more to settle.
- almost a quarter of trade contractors (24.7%) reported that late payments had caused their company to face a threat of insolvency.³¹⁸

In relation to economic damage caused by delayed payment, the Ipsos Reid Survey found that:

³¹³ Prism Report at p. 7.

³¹⁴ Prism Report at p. 8.

³¹⁵ Prism Report at p. 11.

³¹⁶ Ipsos Reid Survey November 2015.

³¹⁷ Ipsos Reid Survey at p. 2.

³¹⁸ Ipsos Reid Survey at p. 2.

- 23.9% of trade contractors were forced to lay off workers because of delays in receiving payments;
- 39.1% of trade contractors declined to pursue or take on additional work because delays in receiving payments had stretched their line of credit or their prudent use of reserves;
- 57.4% of trade contractors avoided or delayed investing in machinery and equipment because of delays in receiving payments; and
- 61.1% of trade contractors added a contingency factor to the bids because of owner, builder or general contractor's reputation for late payment.³¹⁹

The report concludes that late payment practices have cascading consequences, such as forcing contractors to delay their hourly (5.0%) and salaried (11.6%) payroll, forcing contractors to delay employee benefit funds remittances (13.5%), CRA source deductions remittances (17.8%) and HST remittances (20.0%), forcing contractors to delay payments to their bank (19.1%) and delaying payments on leases on equipment (27.9%).³²⁰

The Ipsos Reid Survey was conducted among Ontario trade contractors. However, the Survey Report does contain some data in relation to those trade contractors' experiences on federal projects. At least 184 of the 535 trade contractors surveyed reported that they had undertaken work on projects initiated by the Federal Government or its agencies within three years of the survey.³²¹ The survey results in relation to late payments by the federal government were as follows:³²²

³¹⁹ Ipsos Reid Survey at p. 3.

³²⁰ Ipsos Reid Survey at p. 3.

³²¹ Ipsos Reid Survey at p. 10.

³²² Ipsos Reid Survey at p. 22.

Figure No. 14

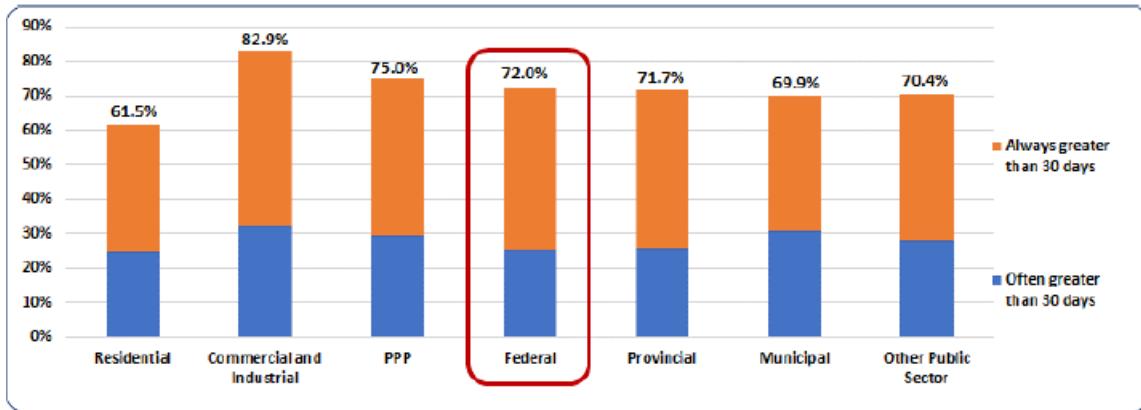
Excluding statutory holdbacks permitted by the *Construction Lien Act*, over the past three years, how often was it for an approved or certified payment to be delayed beyond 30 days when monies were owed?

	n=	Never greater than 30 days	Occasionally greater than 30 days	Often greater than 30 days	Always greater than 30 days	Don't know	Total
Residential Builders or Developers	142	2.8%	13.4%	30.3%	48.6%	4.9%	100.0%
Private Individuals in Residential	102	19.6%	41.2%	16.7%	20.6%	2.0%	100.1%
Commercial Owners	210	1.4%	12.9%	33.8%	49.5%	2.4%	100.1%
Industrial Owners	177	3.4%	11.9%	30.5%	52.0%	2.3%	100.1%
P3s	68	1.5%	11.8%	29.4%	45.6%	11.8%	100.1%
Federal Government	107	8.4%	14.0%	25.2%	46.7%	5.6%	99.9%
Provincial Government	113	7.1%	18.6%	25.7%	46.0%	2.7%	100.1%
Municipal Government	133	8.3%	19.5%	30.8%	39.1%	2.3%	100.0%
Boards of Education	130	6.2%	20.0%	29.2%	43.1%	1.5%	100.0%
Colleges and Universities	133	4.5%	19.5%	27.8%	46.6%	1.5%	99.9%
Hospitals	116	6.0%	19.8%	26.7%	37.1%	10.3%	99.9%
Other Not-for Profits	80	11.3%	17.5%	15.0%	6.3%	50.0%	100.1%
Other Projects (Unclassified)	11	9.1%	36.4%	9.1%	45.5%	0.0%	100.1%
All Projects Irrespective of Sector	272	17.3%	21.0%	24.6%	19.9%	17.3%	100.1%

Therefore, according to the Ipsos Reid Survey, Ontario trade contractors are reporting payment delays on federal construction contracts of more than 30 days 72% of the time, which is similar to the delays experienced in other sectors as follows.³²³

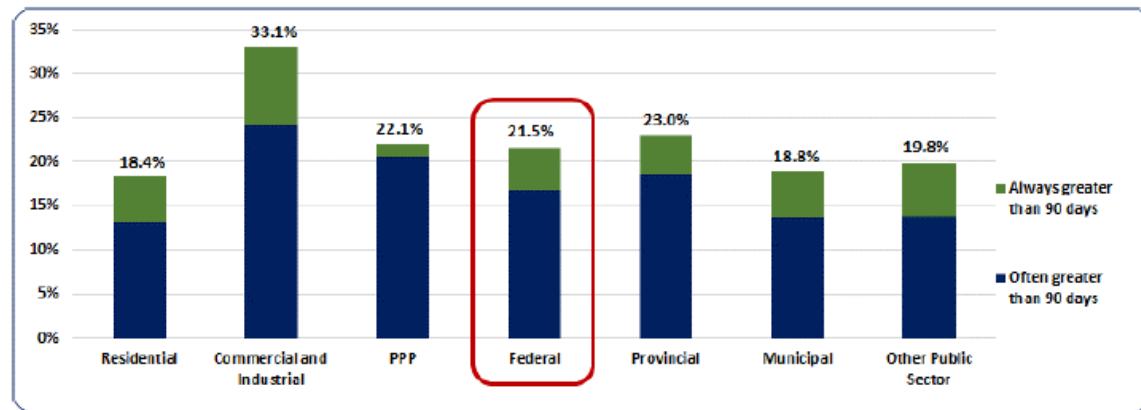
³²³ NTCCC Submission at p.3, citing Ipsos Reid Survey data.

Figure No. 1
 Percentage of Contractors by Type of Owner or Developer who reported receiving Payment 'Often' or 'Always'
 more than 30 days after Certification or Approval
 Prompt Payment Ontario Survey, 2015
 (Total Sample, n=535) (Federal Projects Sample, n=107)



Further, trade contractors reported that receipt of approved or certified payment was 'often' or 'always' taking more than 90 days after the submission of the invoice as follows:³²⁴

Figure No. 2
 Percentage of Contractors by Type of Owner or Developer who reported receiving Payment 'Often' or 'Always'
 more than 90 days after Certification or Approval
 Prompt Payment Ontario Survey, 2015
 (Total Sample, n=535) (Federal Projects Sample, n=107)



In the NTCCC Submission, discussed further below, the 90-day threshold is raised as being significant, given that 90-day receivables are generally not

³²⁴ NTCCC Submission at p.4, citing Ipsos Reid Survey data.

acceptable to banks as security for demand loans.³²⁵ The above two figures relate to the total time to receive payment **after** receiving certification or approval from the federal government contracting authority.

The Ipsos Reid Survey reported on causes of public sector payment delays based on responses from trade contractors, although no survey results were available that provide these details for federal projects only.³²⁶ The greatest perceived sources of delay on public sector projects generally identified by trade contractors were unexplained contractor delays and bureaucratic delays in approving payment.

In relation to the use of CCDC and CCA standard form contracts, trade Contractors reported that only 37.5 percent of their contracts were **unaltered** CCDC or CCA contracts. The Survey report used this data to conclude that “voluntarist strategies for dealing with late payment have not succeeded.”³²⁷ We note that this is a broad conclusion drawn from a limited set of statistics.

(c) Government Survey

As noted above, in March of 2017 PSPC invited government entities to complete a Government Survey.

The Government Survey asked government participants to answer forty-four questions and received a 100% response rate from participants, including from all ten provinces, all three territories and DCC and PSPC, for a total of fifteen respondents. The majority of respondents in the survey issued fewer than 500 contracts a year, however four issued over 500 a year.

In terms of contract structure, the respondents reported using their own standard form construction contracts, with only two respondents stating that they used CCDC-2 contracts on some occasions.³²⁸

In relation to the payment process, the Government Survey focused on the following topics: the submission of the invoice, preview of the invoice, problems with invoices, certification, payment and release of payment.

In terms of the receipt of invoices, 50% of the respondents stated that they receive invoices directly, while the balance indicated that the invoices went to consultants. The majority of survey participants responded that they did not require a preview of an invoice before it was submitted (77%). The participants were then asked to consider what problems they experienced

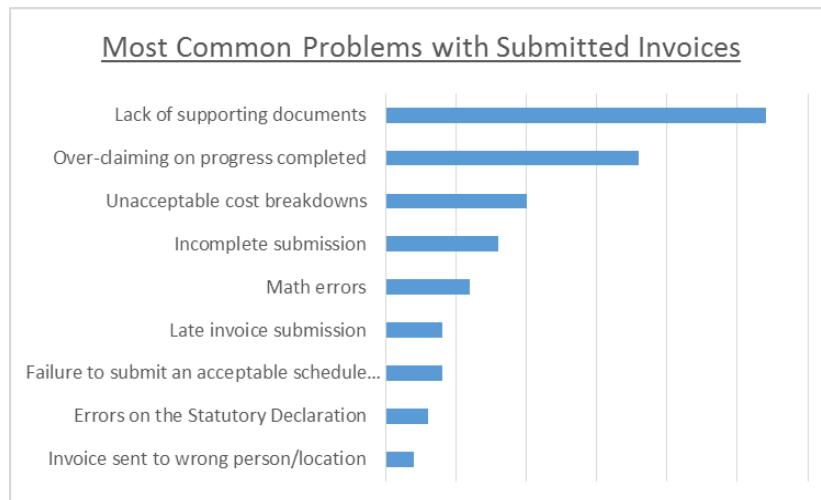
³²⁵ NTCCC Submission at p.4.

³²⁶ Ipsos Reid Survey at p. 26.

³²⁷ Ipsos Reid Survey at p. 18.

³²⁸ Government Survey at p. 4.

with invoices that were submitted.³²⁹ The most common submission issues were listed in the following chart:³³⁰



On the subject of certification, 73% of respondents indicated that they took 15 days or less to certify an invoice (with 33% advising that they took only 5 days to certify). The balance of respondents advised that they complete their certification processes within the 30-day payment period required by the Payment Directive (as described in Chapter III).³³¹ Therefore, all of the participants responded that they were paying within the 30-day requirement or less.

In relation to the release of payments, some respondents reported that they release a payment as soon as it is ready, others reported that they release a payment early but not before a specified period of time, and the balance advised that they hold onto payments until the stipulated payment period has expired even if payment could be made earlier. In this series of questions, respondents were asked if release of payment was tied to any specific event and many indicated that it was tied to receipt of certain documents (e.g. a Statutory Declaration, Worker's Compensation certificate, updated construction schedules, etc.). Over 73% of the participants responded that they require a Statutory Declaration.³³²

In relation to payments to subcontractors, a small number of respondents (3 of 15) indicated that they required the general contractor to pay its

³²⁹ Government Survey at p. 5.

³³⁰ Government Survey at p. 5.

³³¹ Government Survey at p. 6

³³² Government Survey at p. 6.

subcontractors within a stipulated period of time (i.e., 10 to 30 days).³³³ The general approach, however, was that the general contractors working for government entities were typically able to set their own payment terms vis-à-vis their own subcontractors.

The respondents were also asked to address other issues such as release of information, holdbacks and dispute resolution. In relation to release of information, the survey produced a variety of results as the provinces have different disclosure requirements in respect of both content and method of disclosure. For holdbacks, the amount retained varied across the country and the differences appeared to be attributable to the variations in the lien legislation across the country. Half of the respondents indicated that they allowed for a progressive release of holdback.³³⁴

When asked about dispute resolution, four respondents stated that they have a dispute resolution process specific to payment disputes while an additional nine respondents confirmed that there is a general contract dispute resolution process in their respective construction contracts. The survey presented participants with a hypothetical that was summarized as follows:

[A] dispute in which there was one item worth 10% of the overall invoice. For that item, 50% was in dispute (or 5% of the total invoice). Eleven respondents identified that they would pay everything on the invoice except for the specific amount in dispute (i.e. 5%). One respondent identified that the entire amount for the item in dispute would be withheld (i.e. 10%) while three identified that the entire invoice amount would be withheld until resolution.

Finally, respondents were asked to consider whether prompt payment legislation existed in their respective jurisdictions. Only the Ontario respondent answered affirmatively, while four respondents noted that legislation was being considered in their jurisdiction and another six suggested that there was a current initiative underway to address prompt payment issues.³³⁵ The response to this final category of questions reflects a current national momentum in relation to prompt payment legislation.

The Government Survey concluded that the majority of respondents have payment terms of 30 days or less and that all respondents are paying within the stipulated payment periods or sooner. The authors of the summary take the position that the survey results support the conclusion that the government, as the first payer in the payment chain, is not the source of

³³³ Government Survey at p. 6.

³³⁴ Government Survey at p. 7.

³³⁵ Government Survey at p. 7.

delays in payment and that the delay in payment “must therefore develop lower in the payment chain.”³³⁶

(d) Relevant Experiences (International and Ontario)

We have considered prompt payment legislation that is in place in a number of jurisdictions around the world and in Ontario, as the only Canadian jurisdiction that has passed prompt payment legislation. These models provide useful examples of best practices, and lessons can be learned from the weaknesses inherent in some of these models.

(i) International

A. The United States of America

Prompt payment originated in the United States. American legislation addresses the elongation of the payment cycle (or what has been characterized as the “ordinary course” issue) by imposing time limits for processing payment applications and by imposing mandatory interest payments for breach of these statutory payment timelines. However, U.S. prompt payment legislation does not address the gridlock that results when there is a payment dispute.

Specifically, there is no alternative form of dispute resolution provided for in U.S. prompt payment legislation. In this regard, the efficacy of U.S. prompt payment legislation has been criticized. Disputes that are not resolved between the parties are instead litigated at significant cost and time.

There is prompt payment legislation at both the federal and state levels in the United States.

(1) U.S. Federal Prompt Payment

The federal *Prompt Payment Act* (U.S. Code Chapter 39) was enacted in 1982.³³⁷ It applies to all contracts for the supply of services and materials to federal agencies. Provisions specifically applicable to construction contracts were introduced in 1988 by way of amendment.³³⁸

³³⁶ Government Survey at p. 8.

³³⁷ 1 USCA §§ 3901 to 3907 (West Supp. 2001).

³³⁸ John P. Miller & Necia B. Hobbes, “Trends in Prompt Payment Acts Governing Private Construction Contracts”, Jones Day (March 2013), online: <<http://www.lexology.com/library/detail.aspx?g=92a6fdd4-8ba6-4c59-a334-a4b42ce314ba>> [Miller and Hobbes referring to 31 USC § 3905].

Under the U.S. federal legislation, the trigger that starts the clock running for payment is the delivery of a "proper invoice." Interest penalties start to run if payment is not made within 14 days in relation to progress payments and 30 days after receipt of a final invoice, unless otherwise agreed. A contractor is entitled to issue an invoice when all relevant contractual requirements have been met. Each invoice is to be reviewed "as soon as is practicable after receipt." If an invoice is determined not to be a "proper invoice", then the invoice is to be returned to the sender within 7 days after its receipt, specifying the reasons why it is not a proper invoice.

In addition to imposing obligations on federal agencies, the U.S. Federal Acquisition Regulation imposes payment obligations on contractors in respect of payments to their subcontractors. A subcontract is required to contain a provision stipulating that a contractor will pay a subcontractor within 7 days of receiving payment from the federal agency for work performed by that subcontractor, and interest charges apply if payment is not made within this time frame.

(2) U.S. State Prompt Payment

In addition to the federal legislation that applies to contracts with the U.S. federal government, 49 states have enacted prompt payment legislation for public sector projects.³³⁹ As our review is focused on federal legislation, we have not summarized the legislation in place in each of these states. However, as with the federal legislation, state prompt payment legislation does not include provisions for the expeditious resolution of disputes over the life of a project. Payment disputes are again resolved through litigation, which is often a costly and time-consuming exercise.

B. The United Kingdom

In the United Kingdom, the *Housing Grants, Construction and Regeneration Act 1996* (the "UK Construction Act") came into force in 1998.³⁴⁰ The UK Construction Act requires that certain minimum standards be met in respect of payment terms in construction contracts, failing which terms contained in secondary legislation, referred to as the "Scheme" are implied. The UK Construction Act applies to all construction contracts for carrying out construction operations, which includes architectural and engineering work and construction work, with limited exceptions. The legislation otherwise applies at all levels of the construction pyramid.

³³⁹ Edward H. Tricker, Kory D. George & Erin L. (Gerdes) Ebeler, "Survey of Prompt Pay Statutes" (2009) 3:1 J Amer C Con Law, updated April 2010 at 2 and 158.

³⁴⁰ *Housing Grants, Construction and Regeneration Act 1996*, c 53. [UK Construction Act]

Amendments to the legislation introduced in 2009 (the "2009 Amendments") included a requirement to deliver a payment notice within the period specified in the contract but no more than 5 days after the expiry of the payment due date. The identification of which party delivers this notice can be set out in the contract. If it is the party who expects to be paid who gives the notice, then the party who did not make the expected payment delivers a second notice called a "pay less notice", which indicates that that party intends to pay less than the amount set out in the payment notice and provides a basis for the calculation. If a payer does not challenge the payee's notice but still fails to make a payment which is due, then the contractor may suspend its work.

The *UK Construction Act* specifically prohibits conditional payment provisions (i.e. pay-when-paid clauses) in construction contracts. In particular, Section 113 of that legislation renders ineffective a "provision making payment under a construction contract conditional on the payer receiving payment from a third person." The only exception to this prohibition is when "that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that person, is insolvent."³⁴¹ The prohibition on contractual limitations on downstream payments was extended in the 2009 amendments under the *Local Democracy, Economic Development and Construction Act 2009* to extend the ban on conditional payment to include "performance obligations under another contract" and "a decision by any person as to whether obligations under another contract have been performed."³⁴²

As subcontractors are often not privy to the certification process, they often faced difficulties in determining the timelines associated with certification of payments and difficulties in enforcing payment. In effect, this 2009 amendment served to prohibit "pay-when-certified" or "pay-when-entitled" clauses in contracts (i.e. certification of the head contract could not be a condition of payment from the general contractor to the subcontractor). The prohibition of "pay-when-certified" clauses under the 2009 amendments did, however, include certain exceptions including where "the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise" and "the obligations referred to in that subsection are obligations on that other person to carry out those operations."³⁴³ Furthermore, first-tier

³⁴¹ *UK Construction Act* at s. 113.

³⁴² *Local Democracy, Economic Development and Construction Act 2009*, 2009 c. 20 ("LDEDCA") at s. 142(2) amending the *UK Construction Act* by adding a new s. 110A.

³⁴³ LDEDCA at s. 142(2).

PFI (i.e. P3) subcontracts are exempt by virtue of an independent Exclusion Order.³⁴⁴

In addition to the legislative rules under the *UK Construction Act*, when the Scheme applies to a construction contract, it provides dates for payment and includes a requirement for a 30-day payment period following completion of the work (or the making of a claim by the payee). In circumstances where the Scheme does not apply, the parties are otherwise able to agree to their own terms for payment, including the payment period.

Any party to a construction contract has the ability (but not the obligation) to refer a payment dispute to adjudication, as will be discussed below.

C. Australia

Over the past 18 years, every state and territorial government in Australia has progressively enacted security of payment legislation with the objective of facilitating prompt payment. All of the Australian jurisdictions, other than Western Australia and the Northern Territory, have based their legislation on the legislation of New South Wales that was introduced in 1999, and these legislative regimes have come to be referred to as the "East Coast Model." The legislative regimes that operate in Western Australia and the Northern Territory have come to be referred to as the "West Coast Model." There are significant differences between the two models and also among the jurisdictions that have adopted the East Coast Model.

Since this legislation was introduced, there have been some improvements in the payment practices in the construction industry in Australia, but there are major problems with current legislative regimes. These problems are analyzed in the Murray Report. The issues addressed in the Murray Report include the following in relation to prompt payment:

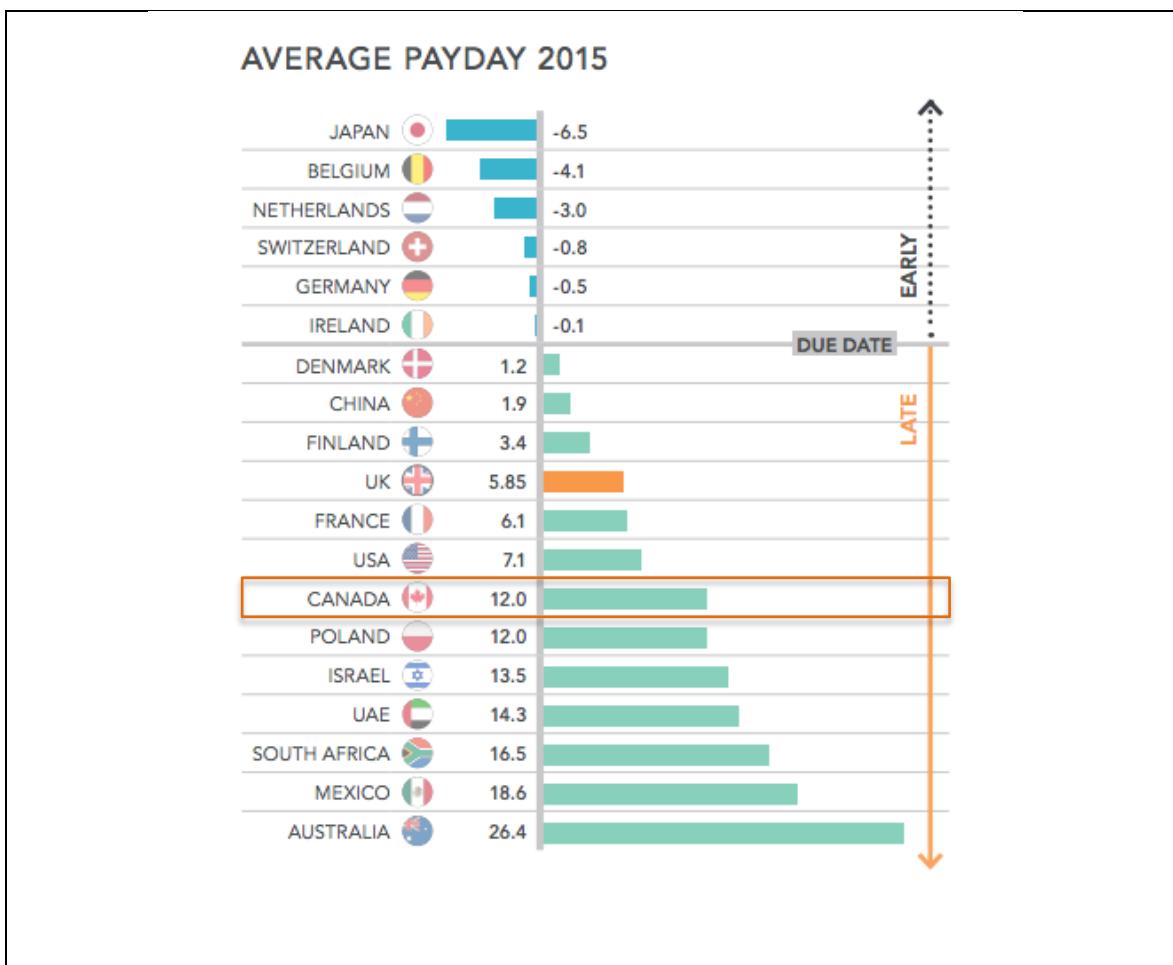
- a) With the exception of Queensland, none of the existing state and territory legislations provide any effective 'security' of payment where a party higher up the contractual chain becomes insolvent.
- b) The legislative regimes are unduly complex and this has discouraged their usage and caused confusion.
- ...
- d) There is an imbalance of bargaining power within the contractual chain and the practice of passing on contractual risks has resulted in

³⁴⁴ The *Construction Contracts (England) Exclusion Order 2011* (SI 2011/2332) excludes certain PFI subcontracts from certain prompt payment requirements.

the imposition of unfair contract terms that operate to prevent payment to the party that has carried out construction work.

- e) There are suggestions that acts of intimidation and retributive conduct by head contractors discourage subcontractors from pursuing their entitlements.
- f) Late payment continues to be a major issue for the construction industry.³⁴⁵

In relation to the latter issue identified above, Mr. Murray notes that recent data suggests that Australia is "by far the worst performer on a global comparison in relation to late payment" citing the following global comparison of payment times for **all** industries:



Interestingly, Canada is 13th of the 19 countries listed in this global comparison.³⁴⁶ We note that these results relate to **all** industries, not just the

³⁴⁵ Murray Report, pp. xiii-xiv.

³⁴⁶ Murray Report, p. 14; MarketInvoice, *The State of Late Payment 2016*, www.marketinvoice.com.

construction industry, and are different from the results reflected in the Prism Report and the IPSOS Reid Survey described above.

Mr. Murray made a significant number of recommendations to address the issues raised by stakeholders over the course of his consultation process in Australia. In doing so, he identified three policy considerations:

1. Preserving the cash flow of the party that has carried out construction work or provided related goods and services by enshrining its right to receive prompt payment of progress claims
2. Providing an adjudication process that ensures disputed payment claims are quickly and efficiently determined so that prompt payment can be made, and
3. Protecting payments made in respect of a progress claim so that the party who receives the payment holds the payment for those to whom it is rightfully due.³⁴⁷

The first of these policy objectives is achieved through prompt payment legislation, by ensuring that the recipient of a progress "payment claim" will provide a prompt response and that "incentivising a recipient to do so is an essential precursor to achieving the objective of maintaining a contractor's cash flow."³⁴⁸ In order to achieve this policy objective, the current East Coast Model requires the recipient of a progress payment claim to respond within a prescribed time period, failing which the claimed amount will be deemed to be a debt. Specifically, parties receiving a payment claim must respond with a "payment schedule". If the amount in this schedule is less than the claimed amount, the respondent is required to set out all its reasons for withholding payment.

The Murray Report contrasts this model with the West Coast Model, in relation to which a respondent who has failed to reply to a payment claim faces no immediate consequences.

In the result, Mr. Murray recommended that the achievement of the policy objective of maintaining a contractor's cash flow was more effectively achieved through the adoption of a legislative regime broadly based on the East Coast Model, not the West Coast Model.

In a Statement accompanying the release of the Murray Report, the Hon. Craig Laundy MP, Federal Minister for Small and Family Business, the Workplace and Deregulation, said

³⁴⁷ Murray Report, p. xiv.

³⁴⁸ Murray Report, p. xiv.

The Government acknowledges that some states and territories have taken steps in the right direction on security of payments. However, with payments on average 26.4 days late and the construction industry in Australia accounting for 20 to 25 per cent of all insolvencies more needs to be done to protect subcontractors and small businesses who are the industry's most vulnerable participants.

In terms of recommendations to improve contractors' cash flow, Mr. Murray made 20 detailed recommendations in relation to the rights to progress payments and the process for recovering progress payments.³⁴⁹ In relation to the rights to progress payments, the Murray Report recommends that the legislation should:

- provide that a person who has undertaken to carry out construction work (or supply related goods/services) under a construction contract is entitled to make a payment claim monthly, or more frequently if provided for in the contract;
- include provisions that address lump sum and milestone payments in circumstances where the contract does not address these matters;
- enable a claimant, in circumstances of termination, to make a payment claim for work, goods or services supplied, up to the date of termination;
- prohibit pay-when-paid clauses;
- provide that the due date for when a progress payment is to be paid is either: a) the date provided under the contract (to a maximum of 25 business days after the payment claim is made), or b) if the contract is silent in this regard, 10 business days after the payment claim;
- provide that the amount of a progress payment is to be calculated either: a) in accordance with the contract, or b) on the basis of an assessment of the value of the construction work carried out (or goods/services provided) if the contract is silent on this issue; and
- provide that the construction work and related goods/services are valued either: a) in accordance with the terms of the contract, or b) if the contract is silent on valuation, then having regard to: contract price, other rates or prices in the contract, variations agreed to by the parties in which the contract price, other rates/prices, is to be adjusted by a specific amount, and if any of the work/goods are defective, the estimated costs to rectify those defects.³⁵⁰

In relation to the process for recovering progress payments, the Murray Report recommends that the legislation should:

³⁴⁹ Murray Report, pp. xviii-xxi.

³⁵⁰ Murray Report, pp. xviii-xix.

- require a claimant to identify, in its payment claim, the contract on which the claim is based and a breakdown of the items claimed (e.g. description, quantity, outline of how the assessment was done on the amount claimed);
- expressly require a payment claim to state that it is a payment claim under the legislation, provide the period for which a payment schedule is to be provided and identify the potential consequences for failing to provide a payment schedule;
- require that a progress payment claim must be made within 6 months after the construction work was last carried out or the related goods and services were supplied (unless the contract provides for a longer period);
- provide, in relation to a final payment, that the claim must be made within either: a) the period specified in the contract; or b) the later of 28 days after the end of the defects liability period or 6 months after the completion of all construction work (or good and services are supplied);
- require a payment schedule to identify the payment claim it relates to, the amount the responding party proposes to pay, and if the amount to be paid is less than the amount claimed, reasons for the discrepancy;
- provide the Regulator with powers to prescribe the form and contents of a payment schedule;
- require that a payment schedule be served by the earlier of: a) the time set out in the contract; or b) 10 business days after the payment claim was served;
- provide that, in circumstances where a responding party fails to provide a payment schedule in the prescribed timeframe or fails to pay (in whole or in part) the amount claimed by the due date, the claimant may either apply for adjudication or recover the unpaid portion of the claim through litigation;
- provide that, where a claimant elects litigation, the respondent is not entitled to: a) cross claim against the claimant; or b) raise any defence in relation to matters arising under the construction contract;
- provide that where a respondent provides a payment schedule in time but fails to pay the whole or part of the amount by the payment date, the claimant may either apply for adjudication or recover the unpaid portion of the claim through litigation;
- include a requirement for a supporting statement (that includes a declaration similar to a statutory declaration) to be included in any payment claims submitted by the general contractor to the owner, and that a copy of that statement be provided to each of the subcontractors whose work was included in the general contractor's payment claim; and

- provide that making a false or misleading supporting statement constitutes an offence.³⁵¹

D. Other International Jurisdictions

In addition, Ireland, New Zealand, Singapore, Malaysia, and Hong Kong all have or are in the course of implementing prompt payment legislation. When comparing the legislation in these jurisdictions, significant variations are evident but there are recurring features that are relevant to a consideration of the issues that arise, including the following:

- the timing of delivery of claims for progress payments and final payments by contractors and subcontractors;
- the timing of the evaluation of a progress payment application by owners and general contractors;
- pre-conditions to the submission of progress payment applications such as testing, commissioning, certification, etc.
- the right to deliver a written notice of a disputed claim for payment, with reasons; and
- the consequences of a failure to pay on time, including interest charges and whether or not and when a right to suspend work arises.

(ii) Ontario

To date, the only jurisdiction in Canada to have enacted broadly applicable prompt payment legislation is Ontario. Prompt payment provisions feature in the new *Construction Act*, which received royal assent on December 12, 2017.

In Ontario, the key elements of the new legislation in relation to prompt payment include:

- freedom of contract in respect of invoicing terms (so as to permit a variety of mechanisms such as milestone payments, phase payments, etc.);
- no restriction on pay-when-paid clauses provided that, in the event of non-payment, the upstream payee initiates adjudication to enforce payment;
- a 28-day payment period which runs from the delivery of a proper invoice and a 7-day payment period, commencing upon receipt of payment by the contractor, for payment to subcontractors;

³⁵¹ Murray Report, pp. xviii-xxi.

- evaluation of payment applications and delivery of a notice of non-payment (14 days if from owner to contractor, and 7 days if from contractor to subcontractor);
- any notice of non-payment must include reasons for non-payment and may include certain set-offs under the Act;
- interest charges arising from a failure to pay and a right to suspend arising after the failure to pay in accordance with an adjudicator's decision; and
- adjudication of payment disputes.

As noted above, many stakeholders have proposed to us that the federal government adopt prompt payment legislation that is similar to the Ontario legislation as discussed in the Analysis and Recommendations section below.

3. Stakeholder Input

A wide range of perspectives was reflected in the submissions we received in relation to the mechanics of prompt payment. However, the concept of prompt payment was accepted by nearly all the stakeholders.

From the contractor side, we heard from the CCA, NTCCC and the GCAC, as well as several members of each of their respective organizations, largely in support of submissions of the umbrella organization.

Broadly speaking, the CCA (whose membership includes suppliers, manufacturers, service providers, civil, trade and general contractors in all sectors across Canada) has endorsed a balanced approach to prompt payment as achieved in Ontario's *Construction Act*. In this regard, the CCA has recommended that any potential federal legislation governing payment "should be aligned with the principles and mechanisms in the Ontario *Construction Act*".³⁵² As part of its efforts in the Working Group, the CCA had previously established its own policy on payment which articulated support for payment terms that are fair and reflect industry consensus as expressed in the CCDC and CCA standard documents.³⁵³ In relation to potential legislation, the CCA Submission states as follows:

While CCA supports free competitive enterprise and individual freedom (CCA policy statement 1.1), CCA does not object in principle to the use of effective regulation and legislation where there is broad industry consensus that this is necessary in specific circumstances in order to correct imbalances or

³⁵² CCA Submission dated March 23, 2018 ("CCA Submission") at Cover Letter.

³⁵³ CCA Submission.

preserve an efficient and productive economic and commercial environment for the benefit of the whole construction industry.

The WCA delivered a submission that was largely in support of the position articulated in the CCA Submission.³⁵⁴ The WCA noted that it “share[s] the view that all parties in the payment chain should comply with all legal requirements and should honour their contractual obligations on time.”³⁵⁵ The WCA further stated that it agreed “that effective regulation and legislation aligned with industry consensus can correct certain imbalances and preserve an efficient and productive economic and commercial environment for the benefit of the whole construction industry.”³⁵⁶

The Yukon Construction Association (“YCA”) noted that there were some differences in construction in the north, including the Yukon, as compared with other areas of Canada. The YCA stated that there were difficulties on federal projects and in some circumstances, because of payment issues, contractors no longer were interested in bidding on federal projects. It was suggested that mandatory bonding could help resolve their concerns.³⁵⁷

The NTCCC (the organization established as a coalition of construction associations, unions, suppliers, contractors and interested industry stakeholders created for the purpose of championing promptness of payment in the Canadian construction industry) stated in its submission that its key goal is to “see that the principles of prompt payment, as embodied in Ontario’s recently adopted *Construction Act*, are adopted at the federal level.”³⁵⁸ Citing the Ipsos Reid Survey, the NTCCC provided an analysis of delays in payment on federal projects and concluded that projects involving the federal government are “not an exception” to the pervasive issues of late payment in the Canadian construction industry. The NTCCC referred to these issues as “destructive and pervasive.”³⁵⁹ The NTCCC reiterated that “Ontario’s *Construction Act* sets out the principles and standards that should inform a federal solution”³⁶⁰ and that “federal legislation [should] not water down, reduce or diminish in any way the prompt payment standards” established therein.³⁶¹

The NTCCC Submission provided the following high level recommendations:

³⁵⁴ WCA Submission dated April 11, 2018 (“WCA Submission”) at p. 1.

³⁵⁵ WCA Submission at p. 1.

³⁵⁶ WCA Submission at p. 2.

³⁵⁷ YCA Meeting Summary.

³⁵⁸ NTCCC Submission dated March 2018 (“NTCCC Submission”) at p. 2.

³⁵⁹ NTCCC Submission at p. 6.

³⁶⁰ NTCCC Submission at p. 6.

³⁶¹ NTCCC Submission at p. 8.

Prompt Payment Obligations

1. The obligations to make timely, prompt payment of construction payables should be enacted in legislation.
2. Prompt payment obligations should be mandatory. The parties to a construction contract should not be free to amend or vary those obligations by contract.
3. Prompt payment obligations should apply to all projects undertaken using federal monies. This includes projects that are undertaken directly by the federal government or a federal agency. It also includes projects that are undertaken by a transfer or grant partner using federal monies. Prompt payment should also apply to P3 projects where the federal government or a federal agency has commissioned the project, but federal monies may not be directly involved. Prompt payment should also apply to all construction undertaken on reserve lands. The applicability of prompt payment obligations should not be contingent on the existence of any prompt payment legislation in the province or territory where the project is undertaken.
4. Prompt payment obligations should extend, without qualification, through all levels of the sub-contracting pyramid.

Prompt Payment Timelines

5. Prompt payment by the federal government, federal agency or transfer/grant partner to the prime contractor should mean payment within 28 days of delivery of a proper invoice.
6. Prompt payment by a prime contractor to a subcontractor, and so on down the sub-contracting pyramid, should mean each payee is paid within 7 days of a payer receiving the corresponding payment from its payer.³⁶²
7. The parties to a construction contract should be allowed to negotiate the timing for delivery of a proper invoice or payment application. Contracts may involve performance milestones as conditions for invoicing. However, payment obligations triggered by such milestones should be subject to the time limits as those set out above.
8. While payers should remain free to require certification as part of the payment process, certification should not be a precondition to a proper invoice and should not affect the triggering date governing

³⁶² NTCCC Submission at p. 8.

the payment period. Any certification should take place during the prescribed payment period. NTCCC accepts that there could be an exception to this principle in the case of P3 projects, as is the case under Ontario’s Construction Act[.]³⁶³

[...]

23. Interest at a prescribed rate should be payable on all late payments.³⁶⁴

The NTCCC Submission was endorsed broadly by a series of submissions (in substantially the same form) from NTCCC members or related parties (many of whom we met with during the stakeholder engagement sessions), including:

- Alberta Roofing Contractors Association;³⁶⁵
- Alberta Trade Contractors Coalition,³⁶⁶
- Atlantic Masonry Institute;³⁶⁷
- Canadian Institute of Plumbing and Heating;³⁶⁸
- Electrical Contractors Association of Alberta;³⁶⁹
- HRAI Atlantic Contractors Division;³⁷⁰
- HRAI Calgary Chapter;³⁷¹
- HRAI Greater Toronto Area;³⁷²
- HRAI Manitoba;³⁷³
- L’Association d’isolation du Québec (AIQ)³⁷⁴
- Manitoba Masonry Contractors Association;³⁷⁵
- Masonry Contractors Association of Alberta-South Region;³⁷⁶

³⁶³ NTCCC Submission at pp. 8-9.

³⁶⁴ NTCCC Submission at p. 10.

³⁶⁵ ARCA Submission dated March 28, 2018.

³⁶⁶ ATCC Submission dated March 28, 2018.

³⁶⁷ AMI Submission dated March 28, 2018.

³⁶⁸ CIPH Submission dated March 27, 2018.

³⁶⁹ ECAA Submission dated March 28, 2018.

³⁷⁰ HRAI Atlantic Submission dated March 27, 2018.

³⁷¹ HRAI Calgary Submission dated March 28, 2018.

³⁷² HRAI GTA Submission dated April 11, 2018

³⁷³ HRAI Manitoba Submission dated March 29, 2018.

³⁷⁴ AIQ Submission dated April 31, 2018.

³⁷⁵ MMCA Submission dated March 27, 2018.

- Mechanical Contractors Association of Alberta;³⁷⁷
- Mechanical Contractors Association of Ottawa;³⁷⁸
- Mechanical Contractors Association of Newfoundland and Labrador;³⁷⁹
- Mechanical Contractors Association of Saskatchewan Inc.,³⁸⁰
- Saskatchewan Masonry Institute Inc.;³⁸¹
- Saskatchewan Roofing Contractors Association;³⁸²
- Sheet Metal Contractors Association of Alberta;³⁸³ and
- Thermal Insulation Association of Canada.³⁸⁴

These submissions reflected support for NTCCC's submission by these associations.

Similarly, the GCAC also generally supported the notion that the Ontario model should be adopted on federal construction projects for the following reasons:

1. The process adopted in Ontario required cooperation and compromise involving many industry participants. The GCAC could put forward positions in this response to try to improve the position of general contractors, and other participants could do likewise in an attempt to improve their position. We see little benefit in revisiting the debate undertaken in Ontario which was comprehensive and balanced.
2. The GCAC sees significant benefits to the construction industry and to buyers of construction across Canada by having uniformity in prompt payment and adjudication legislation across jurisdictions. The Federal Government has a unique opportunity to lead the way for the provinces by developing clear and practical legislation similar to that adopted in Ontario as an example for jurisdictions considering adopting prompt payment legislation.

[...]

³⁷⁶ Masonry Contractors Association of Alberta-South Submission dated March 29, 2018.

³⁷⁷ MCA AB Submission dated March 28, 2018.

³⁷⁸ MCA Ottawa Submission dated March 30, 2018.

³⁷⁹ MCA NFLD Submission dated April 3, 2018.

³⁸⁰ MCA Saskatchewan Submission dated March 29, 2018.

³⁸¹ Saskatchewan Masonry Institute Inc. Submission dated March 27, 2018.

³⁸² SRCA Submission dated March 29, 2018.

³⁸³ SMCA Submission dated March 28, 2018.

³⁸⁴ TIAC Submission dated May 1, 2018.

The broad support for Ontario Bill 142 was, in large measure, a result of the open and consultative approach adopted during both the development of the Striking the Balance report, but importantly, during the drafting of the legislation and supporting regulations. Prompt payment legislation is commercially complex and must function well across a broad range of project sizes and project types, and must balance the interests of a wide variety of participants including the Federal Government, general contractors, trade contractors, suppliers, architects, engineers, sureties and insurance companies, to name only a few.

The GCAC suggested that federal legislation should defer to provincial prompt payment legislation in jurisdictions where it exists.³⁸⁵

In Quebec, prompt payment has received strong support at both the provincial and federal levels of the construction industry. The Quebec Coalition reported that it has formed a general consensus with all general and specialized contractors in relation to detailed prompt payment legislation at the provincial level.³⁸⁶ The Quebec Coalition advised us that it supports prompt payment legislation at the federal level, although it has not had sufficient time to form the same consensus in relation to the proposed mechanics of federal legislation as was achieved at the provincial level.

In relation to the consultant stakeholder community, we met with Engineers Canada, the Royal Institute of Architects (RAIC) and the Association of Consulting Engineering Companies (ACEC). While no written submissions were provided by these stakeholders, they advised in their stakeholder engagement session that they had a collective interest in prompt payment legislation so long as that legislation was fairly worded and broadly applied.³⁸⁷ In relation to payment processes, these stakeholders were concerned about having adequate time to complete a proper certification process.

On the owner side, we received formal submissions from PSPC and DCC that were supportive of the principle of prompt payment. As reflected by their participation in the Working Group initiatives and the Action Plan, PSPC and DCC advised that they are committed to improved payment practices.

For example, DCC stated that it “supports the principle that contractors throughout all tiers of a construction contract should be paid promptly when they are entitled to payment.”³⁸⁸ DCC expressed some concern in relation to the application of any proposed legislation, in particular as it relates to

³⁸⁵ GCAC Submission at p. 3.

³⁸⁶ Quebec Coalition Submission dated April 10, 2018.

³⁸⁷ Consultant Meeting Summary dated March 27, 2018.

³⁸⁸ DCC Submission dated March 22, 2018 (“DCC Submission”) at p.1.

adjudication, and the need to be fair and reasonable to all parties, as will be discussed in Chapter X – Adjudication.³⁸⁹

PSPC provided a detailed submission in relation to its views on prompt payment. PSPC stated that “timely cash flow throughout the construction chain is fundamental to a healthy construction industry” as it “enables companies to realize the competitive profit margins necessary to fuel growth, employment, and to create the capacity in Canadian firms to build the infrastructure that is critical to the economic prosperity of Canada.”³⁹⁰

In relation to payment delays, in its submission PSPC stated “delayed payment throughout the payment chain on federal construction projects erodes Government buying power, increases financial risks and costs for construction enterprises, and stifles economic growth.”³⁹¹ PSPC expressed the view that prompt payment within the construction industry is an important issue that needs to be addressed. Specifically, PSPC noted that

It is of concern to PSPC if payment is not promptly flowing to all tiers of the construction supply chain. We have, and will continue, [sic] to look at ways to ensure that we are paying our prime contractors on time and would like to ensure that this money flows down the chain. It is hoped that the information provided in this document will support the preparation of recommendations to the development of an effective legislative solution.³⁹²

PSPC noted that it understood that our mandate in preparing this recommendation package is intended to “build off of the recently completed Bill 142 (the *Construction Lien Amendment Act*) in Ontario.”³⁹³

In relation to other federal government departments, Crown corporations, and agencies, we met with a number of these agencies. For example, we met with the RCMP, which builds thousands of projects a year, all over the country, in the range of \$200 million total construction per year. The RCMP were of the view that prompt payment was beneficial so long as the mechanics functioned effectively.³⁹⁴ Given that its portfolio extends across most of the country, the RCMP was particularly concerned about the applicability of prompt payment legislation in relation to small contracts with small contractors emphasizing that any prompt payment legislation should be functional, accessible and easily understood.

³⁸⁹ DCC Submission at p. 1.

³⁹⁰ PSPC Submission dated March 21, 2018 at p.3.

³⁹¹ PSPC Submission dated March 21, 2018 at p.3.

³⁹² PSPC Submission at p. 4.

³⁹³ PSPC Submission at p. 8.

³⁹⁴ RCMP Meeting Summary.

The National Research Council of Canada (NRC), which builds 50-60 projects a year (including highly technical and unique projects with complex specifications), was supportive of PSPC's approach to prompt payment generally. The NRC was concerned about maintaining the effectiveness of procedures and protections in its contracts and did not want to lose its freedom of contract in relation to any proposed legislation.³⁹⁵

At the provincial government level, we heard from a variety of provincial government stakeholders (largely ministries and Crown agencies responsible for infrastructure and other construction) on their proposed prompt payment initiatives and their views on the potential applicability of federal prompt payment legislation.

We also met with BGIS, as a representative example of a large organization procuring construction contracts under an outsourcing arrangement with the federal government. In relation to prompt payment, BGIS was in support of efforts by the industry to encourage prompt payment.

BGIS asked us to consider and review what it characterized as an apparent disconnect between invoicing and payment practices on federal projects. Specifically, BGIS submitted that any proposed legislation should correlate the varying bases for payment by a federal entity and bases for payment subsequently down the contractual chain. Further, BGIS noted that each payer should expressly identify the specific projects and invoices being paid or disputed. In this regard, BGIS stated in respect of the RP-1 and RP-2 agreements, the bases for invoicing and payment were not aligned for the following reasons:

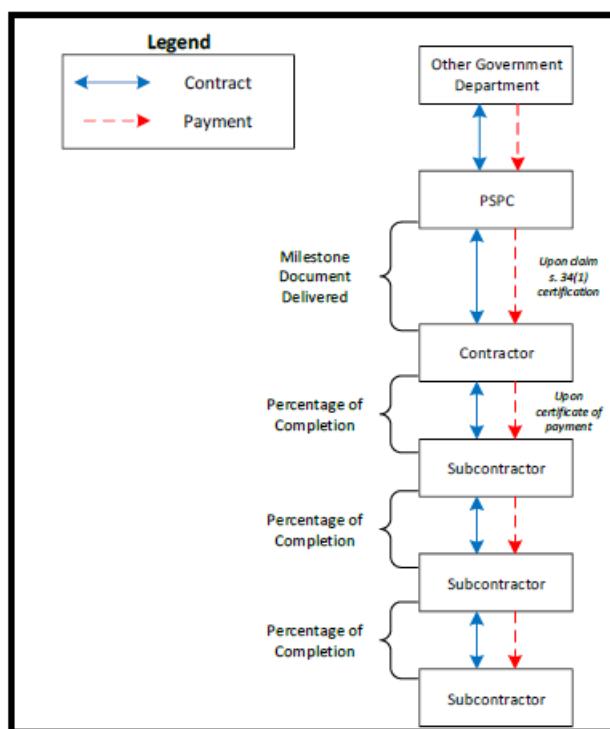
- In BGIS's experience, in the Canadian construction industry generally, invoices are largely based on 'percentage of completion' as certified by a third-party payment certifier. BGIS stated that there was a disconnect between the percentage of completion method because the federal authorities in the context of the RP-1 and RP-2 contracts require invoices "made against prescribed tangible deliverables, namely, the delivery of 46 specified sets of documentation, each objectively representing a milestone, e.g., a commissioning plan, tender documents, and as-built drawings."³⁹⁶

³⁹⁵ NRC Meeting Summary. The NRC advised that it has authority to manage its own construction work valued under approximately \$6 million.

³⁹⁶ BGIS Submission at p. 4.

- Certifications under subsection 34(1) of the FAA “must be objective and must overcome the actual or perceived subjectivity inherent [in] the ‘percentage of completion’ method.”³⁹⁷
- “The improper preparation of any tangible deliverable, any error in uploading a required document to a database, or any deficiency in the document, could give rise to delays in federal payment. Only upon each document being deemed acceptable, can there be certification under section 34(1) of the Act and corresponding payment. The determination of proper invoices, and delays in payments, are not based on construction work performed in accordance with the contract.”³⁹⁸

BGIS submitted that this “disconnect must be removed.”³⁹⁹ As BGIS does not employ pay-when-paid clauses in its subcontracts, and pays its subcontractors on a percentage of completion basis, its position is that it is “stuck between two disconnected invoicing methodologies” and as a result it “bears the risks that funds received are not sufficient to address funds payable.” BGIS prepared the below table to illustrate this problem.



We heard from numerous stakeholders generally that any recommendations made in relation to prompt payment legislation should be fair. As noted

³⁹⁷ BGIS Submission at p. 4.

³⁹⁸ BGIS Submission at p. 4.

³⁹⁹ BGIS Submission at p. 5.

above, DCC stated that any legislation should be “fair and reasonable to all parties.” The Alberta Construction Association (“ACA”) similarly noted that any recommendations “embody fairness and consistent treatment to each party in the construction value chain.”⁴⁰⁰ The WCA and CCA both noted that contractual payment and related terms should be fair and reflect industry consensus. We heard this feedback many times during our engagement sessions as we travelled the country.⁴⁰¹

The balance of stakeholders responded to the questions posed in our Information Package. Summaries of these responses are set out in Appendix 4 to this Report.

(a) What Kinds of Contracts and What Level of the Pyramid?

We asked stakeholders to consider what kinds of contracts and what level of contracts in the contractual pyramid prompt payment legislation should apply to. The following stakeholders expressed the view that prompt payment should apply to all levels of the construction pyramid:

- CCA;
- GCAC;
- PSPC;
- NTCCC; and
- WCA.

In relation to the kinds of contracts that prompt payment should apply to, stakeholders noted that the ambit of such legislation should be limited to construction work and not other types of work.

(b) Trigger for Payment

We asked stakeholders to consider what the trigger for payment should be. Many stakeholders suggested that payment should be triggered on the basis of delivery of a proper invoice from the general contractor to the owner (i.e., utilizing the Ontario model, which defines the necessary elements of a proper invoice), including the following:

- CBA;
- CCA;
- GCAC;

⁴⁰⁰ ACA Submission dated April 7, 2018.

⁴⁰¹ WCA Submission dated April 11, 2018.

- NTCCC; and
- WCA.

BGIS and CIQS recommended that, in addition to the proper invoice, a general contractor should also be required to obtain a payment certificate before the payment period would be triggered. Similarly, PSPC stated that the trigger should be a combination of the submission of a valid invoice and the acceptance of the work identified in the invoice.

The Quebec Coalition suggested that we consider a system based on payment claims issued in accordance with a monthly payment schedule. The Quebec Coalition had some concern with the concept of the proper invoice and questioned what happens when a subcontractor does not provide its invoice to the general contractor in a timely way. We heard from the general contractor community that this generally does not happen as general contractors want to get paid, and will therefore submit their invoices on time.

We also heard from stakeholders that the delivery of the proper invoice should be accompanied by a notice letter to the subcontractors and trades below so that they may understand the payment timelines.⁴⁰²

Others suggested there may be disputes as to whether an invoice is proper.⁴⁰³

(c) Reasonable Payment Period

Responses were fairly consistent as to a reasonable period of payment.

Several stakeholders recommended that we follow the Ontario model which would provide for payment in 28 days from the owner to the general contractor and then a period of 7 days from receipt of payment down the contractual chain. This approach was recommended by: CCA, GCAC, GCAC Atlantic, NTCCC, and the WCA.

Other stakeholders recommended that we consider allowing parties to agree to terms for longer payment periods and to consider either a monthly payment schedule or a reasonable period of between 15 to 45 days depending on where a party sits in the contractual chain.

Federal government stakeholders all indicated they were obligated to pay within 30 days in accordance with the requirements of the Payment Directive and therefore were comfortable with a 30-day period. Several stakeholders mentioned that they did not see a significant difference in procedure if the requirements were changed from 30 to 28 days, as they already had in place

⁴⁰² See for example, Alberta Prompt Payment Meeting Summary.

⁴⁰³ See for example, PEI Construction Association Meeting Summary.

internal processes that would allow them to pay in advance of the 30-day deadline.⁴⁰⁴

Some provincial infrastructure stakeholders suggested that the 28-day payment period would not be reasonable in smaller or more remote jurisdictions.⁴⁰⁵

(d) Preconditions to Payment

(i) General

We asked stakeholders to make submissions in relation to what, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms. We also asked them to consider what pre-conditions, if any, should be imposed on the delivery of a proper invoice.

In relation to invoicing terms, many stakeholders viewed freedom of contract as being of paramount importance. For example, the CCA, CIQS, GCAC, PSPC and WCA all recommended that parties should be given freedom to negotiate their own invoicing terms. NTCCC recommended freedom to negotiate certain terms, such as milestone payments and the frequency of invoices, but that such terms needed to be described in the contract tender documents.

We frequently heard from government and general contractors that the payment arrangements needed to be flexible to account for various project delivery methods and changing construction methods.⁴⁰⁶

(ii) Certification as a Pre-Condition

We specifically asked stakeholders to consider whether certification of an invoice should be a pre-condition to payment. Some stakeholders such as BGIS and PSPC felt that having the ability to certify the work described in an invoice is beneficial to a project. However, PSPC submitted that there should be no need for certification as a pre-condition to the submission of the invoice. Government stakeholders generally stated that government employee sign off is required as the final step in the certification process and that this step was undertaken within 30 days under the current Payment Directive.⁴⁰⁷ That said, PSPC stated that there are potentially significant consequences under the FAA if a government entity improperly certifies a

⁴⁰⁴ See for example, DCC Meeting Summary.

⁴⁰⁵ See for example, Yukon Government Meeting Summary.

⁴⁰⁶ See for example, GCAC Quebec Meeting Summary.

⁴⁰⁷ See for example, PSPC Meeting Summary and DCC Meeting Summary.

payment application such that the government entity needs to ensure that there is adequate time for proper certification.

Other stakeholders (e.g. CBA, CCA, CIQS, GCAC, NTCCC, and the Quebec Coalition) generally recommended the Ontario model, which prohibits certification as a pre-condition to the delivery of a proper invoice. Some stakeholders suggested that allowing certification as a pre-condition would cause an increase in overbilling or "gaming" of the prompt payment system.⁴⁰⁸

Certain stakeholders identified concerns with trying to complete certification within a short period (i.e. the 28-day prompt payment period). In particular, the consultants we met with suggested this would create challenges due to obligations to perform proper due diligence prior to certification. Under the Ontario model, as discussed in the stakeholder engagement sessions, certification is intended to take place within the timelines described in the *Construction Act* and certification processes can commence prior to the delivery of a proper invoice.⁴⁰⁹

We heard from other stakeholders that the actions or inactions of some consultants can sometimes contribute to delays in payment and this issue needs to be addressed.⁴¹⁰ We also heard there needs to be a shift in culture that results in more independence for third-party consultants participating in the certification process.⁴¹¹

(e) Basis for Withholding Payment

We also asked the stakeholder community about the bases for withholding payment. The answers we received to this question related to two different types of withholding: 1) withholdings in relation to ordinary course payments; and 2) contractual holdback at the federal level at the end of the project. The contractual holdback issue is dealt with in Chapter XI – Key Contractual Issues.

In relation to holdbacks, government stakeholders were clear that payment would be withheld in circumstances where the services contracted for did not meet the requirements of the drawings and/or specifications in accordance with the applicable contract terms.

Other stakeholders expressed the view that only disputed amounts should be withheld and that undisputed amounts should be paid within normal

⁴⁰⁸ See for example, GCAC Saskatchewan Meeting Summary, CANB Meeting summary.

⁴⁰⁹ Consultant Meeting Summary.

⁴¹⁰ See for example, WCA Meeting Summary.

⁴¹¹ CIQS Meeting Summary.

timeframes. This approach would reflect the Ontario model and was supported by the CCA, GCAC, NTCCC, and the WCA. This suggestion by stakeholders was often accompanied by requests for provisions like those found in the Ontario legislation such as requiring a notice of non-payment to be provided in circumstances where a party is withholding payment and a requirement that a party that has given such a notice be required to commence an adjudication against the party above it that has not paid.

(f) The Right of Set-off

Set-off is an issue that was the subject of significant discussion during the stakeholder engagement sessions. We asked stakeholders to consider whether there should be any limitations imposed on the existing rights of set-off on construction projects at the federal level.

We received warnings from several stakeholders that interference with set-off rights could have significant consequences, particularly in insolvency situations. We also heard from owner stakeholders such as DCC and PSPC that the federal right to set-off must be protected as it is an efficient means of resolving situations where payment deductions are warranted for added costs incurred by owners as a result of contractor actions. Furthermore, federal government entities referred us to the provisions of the FAA, which allow for set-off against multiple projects.

The GCAC also recommended that set-off rights be protected at the general contractor level as they advised that failing to do so increases the risk borne by general contractors and upper level subcontractors in circumstances where subcontractors fail to perform the work and the only recourse is post-project litigation or arbitration.

Other stakeholders such as the Quebec Coalition, NTCCC , YCA and WCA suggested that there should be restrictions on set-off and projects should be treated as stand-alone projects for this purpose.

(g) The Consequences of a Failure to Pay

Finally, we asked stakeholders to consider what consequences would be appropriate when a paying party fails to make payment in accordance with a prompt payment regime. This subject was raised at most of the stakeholder engagement sessions. In particular, we discussed the remedies of a right to suspend and mandatory interest.

Most stakeholders were in favour of mandatory interest and the government stakeholders noted that the Payment Directive required government entities to pay interest when payments are made late.

The more contentious issue discussed was the right to suspend. As noted above in relation to Bill S-224, an unfettered right to suspend work causes significant concern to a large portion of the construction stakeholder community.

In relation to federal projects, stakeholders such as PSPC, BGIS, DCC and others recommended that we carefully consider security concerns in relation to suspension of work. BGIS viewed it as reasonable to require subcontract work to continue despite payment disputes until an independent person (e.g., an adjudicator) could determine the legitimacy of the claim given that many of the projects for the federal government affect the safety and security of Canadians or may otherwise provide economic benefits to Canada.

DCC referenced significant safety or security risks in relation to suspension on projects of security importance or of international significance.

The majority of stakeholders viewed the limitations on the right to suspend set out in the Ontario model to be appropriate. In that regard, the CBA, BGIS, CCA, GCAC, NTCCC and WCA all suggested that we consider adopting the Ontario model.

Conversely, the Quebec Coalition recommended that suspension of work be broadly available in cases of a failure to pay. Also, the Manitoba Prompt Payment Coalition suggested that the right to suspend should not be limited, and the right to suspend based on a failure to pay an undisputed amount should arise prior to the need to refer a matter to adjudication. Prompt Payment Manitoba referred us to the rights of suspension available in Bill S-224 and later, Bill 218 in Manitoba.⁴¹² The Yukon Contractors Association also recommended that there should be a right to suspend and, if necessary, terminate following non-payment.⁴¹³

4. Analysis and Recommendations

The statistics provided to us by federal government stakeholders were very positive in relation to the federal government's payment practices. Based on the feedback we received during the stakeholder engagement process, with some anecdotal anomalies, stakeholders generally advised that the federal government pays promptly, as long as there are no issues with an invoice and its supporting documentation.

Importantly, and as noted above, the FAA and the Treasury Board Payment Directive, taken together, establish an ordinary course of payment

⁴¹² Prompt Payment Manitoba Meeting Summary.

⁴¹³ YCA Meeting Summary.

environment that can fairly be characterized as fundamentally based upon certain of the core principles of prompt payment, in particular a 30-day from invoice payment cycle, payment of undisputed amounts, and mandatory interest which assist in ensuring that payments are made by the federal government promptly.

At the same time, however, the Prism report characterizes the payment delay problems on federal projects as systemic:

There are two distinct problems in federal construction work. The first is delays by federal authorities in processing valid invoices for construction work where there is no dispute that the work has been performed according to contract. The second is delays in remitting payments down the subcontract chain, even when valid invoices have been submitted and where there is no dispute that the work was performed according to contract. These payment delay problems are not occasional; they are systemic.⁴¹⁴

The Prism Report describes the federal payment process as being "highly vulnerable to freeze-ups" if there are problems with invoices, which freeze-ups will affect subcontractors down the chain.

As well, the IPSOS-Reid Survey shows that trade contractors do not view federal projects as an exception to the phenomena of payment delay, and that Ontario trade contractors report receiving payment beyond 30 days 72% of the time, and over 20% of trade contractors report receiving payment on federal projects over 90 days following certification by the contracting authority. Over a third of Ontario trade contractors reported that the risk of late payment on federal projects ranked 8, 9 or 10 on a scale of 10.

Accordingly, and as has been identified by the Working Group, the NTCCC, and others, it is reasonable to conclude that, for the most part, payment delays arise after the federal government has paid the entities with which it has contracted, and that existing methods of attempting to provide for prompt payment to trade contractors, such as Statutory Declarations and prompt payment policies or voluntary codes, are inadequate to achieve prompt payment at the trade contractor level and below. In our view, it is also reasonable to conclude that the negative view of trade contractors as to the lack of timeliness of payment on federal projects causes trade contractors to include contingencies within their bid prices on federal projects.

Several stakeholders made comments or submissions to us in relation to the federal benefits that flow from the implementation of prompt payment, including, for example:

⁴¹⁴ Prism Report, p.1.

- The NTCCC gave several examples of negative consequences that in effect, show that prompt payment could increase the bidding pool, decrease construction costs and reduce bid premiums to the net benefit of the federal government.⁴¹⁵
- PSPC similarly identified issues with delays in payment that, when ameliorated, would allow for increased government buying power, decreased financial risks and costs for construction enterprises and a boost to economic growth. It would also allow the money invested to better generate the intended socio-economic benefits.⁴¹⁶

From a policy perspective and in the context of considering legislation that operates within the ambit of federal jurisdiction, the *reason* that the federal government should introduce such legislation is to assure the orderly and timely building of federal construction projects by ensuring that cash flows down the construction pyramid quickly, thereby avoiding the disruptive effects of delayed payment, and potentially non-payment; avoiding increased construction costs caused by trade contractors adding contingencies to their bid prices on federal projects to make up for the costs to them of slow payment; and reducing the risk of disruption on federal construction projects attributable to the insolvency of contractors and subcontractors. In other words, the reason that such legislation should be introduced is not for the primary purpose of assisting the construction industry to enhance its financial performance by preventing delayed payment. In this regard, we would recommend a different approach to the statement of legislative intent than that contained in Bill S-224. Rather, the appropriate federal objectives are best served by legislation that assures the orderly and timely building of federal construction projects, as described above, with the collateral effect of addressing the payment-related concerns of the construction industry.

In the circumstances, the case for the introduction of federal prompt payment legislation is made out. As noted above, while we appreciate that the federal government has already announced its intention to introduce prompt payment legislation, such that our task is to recommend the *form* of such legislation, we nevertheless consider it appropriate to make it clear that we recommend the introduction of appropriate federal prompt payment legislation, as set out at Recommendation No. 1 in Chapter VIII.

Below we provide our analysis and recommendations in relation to specific prompt payment issues on federal construction projects.

⁴¹⁵ NTCCC Submission at pp. 5-6.

⁴¹⁶ PSPC Submission at p. 3.

(a) Levels of the Construction Pyramid

While the breadth of applicability of the potential legislation based on constitutional considerations is discussed in Chapter VIII - Applicability, in this section we consider at what levels of the construction pyramid the legislation should apply.

Generally speaking, when asked what levels of the construction pyramid prompt payment should apply to, we heard from stakeholders that it should apply broadly to all levels. As noted by PSPC, “everyone in the construction pyramid should be entitled to prompt payment.”⁴¹⁷ This sentiment was reiterated by every government stakeholder, general contractor stakeholder, and trade contractor stakeholder with whom we met. The CCA, GCAC and the NTCCC all agreed that prompt payment should apply to every tier of contract in the construction pyramid.

Recommendation 11

Prompt payment should apply at the level of the owner to general contractor, general contractor to subcontractor, and downwards.

(b) Trigger for Payment

Having recommended the general form of prompt payment at the federal level, the next step is an analysis of the mechanics. Based on our review of the prompt payment regimes in the various jurisdictions considered and the proposals made to us by various stakeholders, there are three potential triggers to choose from, namely: (1) the receipt of a proper invoice, (2) the delivery of services or materials, or (3) the approval of an invoice by the payment certifier.

Overwhelmingly, stakeholders including the CCA, NTCCC and GCAC advocated for the “proper invoice” approach taken in Ontario.⁴¹⁸ PSPC was of the view that the trigger should be a combination of the submission of a “valid invoice” and the acceptance of the work identified in the invoice. A concern with an invoice alone was that it would allow for false invoices and an expectation of payment. PSPC submitted that certification, generally speaking, should be included prior to the conclusion of the payment period.

⁴¹⁷ PSPC Submission at p. 12.

⁴¹⁸ CCA Submission at p. 4; GCAC Submission at p. 4; NTCCC Submission at p. 15; WCA Submission at p. 3.

As we have seen in international jurisdictions, certification allows the payment process to be "gamed" in certain respects. This is a concern in the federal context in Canada as well. Certification as a pre-condition is discussed further below.

Some stakeholders recommended that the concept of the "proper invoice" requires careful consideration and an industry-developed definition.⁴¹⁹ In Ontario, the "proper invoice" is defined in the *Construction Act* and requires:

- The contractor's name and address.
- The date of the proper invoice and the period during which the services or materials were supplied.
- Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
- A description, including quantity where appropriate, of the services or materials that were supplied.
- The amount payable for the services or materials that were supplied, and the payment terms.
- The name, title, telephone number and mailing address of the person to whom payment is to be sent.
- Any other information that may be prescribed.⁴²⁰

Other stakeholders suggested that we consider the payment to be triggered upon a payment claim at set calendar dates. We view this as being an overly prescriptive approach, which does not address the freedom of contract concerns raised by stakeholders; nor does it account for defective invoices. Most stakeholders do not view the prescriptive approach as an acceptable solution.

The deemed approval concept is central to the East Coast Model in Australia considered in the Murray Report and is also referenced in Bill S-224. As noted in Chapter VI, under Bill S-224, a payment application is deemed to be approved within ten days after submission of a payment application by a contractor (twenty days after submission by a subcontractor) unless the payer gives written notice that all or part of the application is being disputed or amended.⁴²¹ The deemed approval concept was also utilized in Bill 69 which was introduced in Ontario in 2013.

⁴¹⁹ CIQS Submission at p. 2.

⁴²⁰ *Construction Act*, R.S.O. 1990, CHAPTER C.30 at s. 6.1.

⁴²¹ Bill S-224 at 16.

However, in the Ontario stakeholder consultation process, many owner and general contractor stakeholders objected to the concept of deemed approval, as in their view it negatively impacted the ability of owners to properly certify work. We similarly heard in the federal stakeholder engagement process that the concept of deemed approval was not a palatable concept at the owner and general contractor level. We did not recommend deemed approval of invoices in Ontario and see no reason to depart from that approach.

Recommendation 12

The trigger for payment should be the delivery of a "proper invoice" as defined by the legislation, subject to certain pre-conditions, as will be discussed below. We recommend that the Ontario definition of a "proper invoice" should be used as a basis for the development of a federal definition.

(c) Reasonable Payment Period

Stakeholders broadly submitted that the Ontario *Construction Act* should be the scheme imported into the federal legislation.⁴²² One stakeholder recommended that a reasonable payment period would be 15 to 45 calendar days depending on where the party sits in the construction pyramid.⁴²³ Others recommended a payment cycle on a monthly schedule.⁴²⁴

When the reasonable payment period was considered in the Ontario review process, it was determined that the most common period of time employed in security of payment legislation around the world was 28 days from the owner to general contractor level. We did not see a reason to depart from that period of time.

The federal government and related entities are currently bound by a payment period of 30 days to pay invoices and are accustomed to administering the payment process on that basis. PSPC recommended that the payment period should remain at, or very close to, the 30 days currently required at the government level.⁴²⁵ PSPC stated that this timeframe allows for certification of work at remote locations and respects the timeline of the Payment Directive and related policies. Further, PSPC noted that there is no

⁴²² CCA Submission at p. 4; GCAC Submission at p. 4; NTCCC Submission at p. 16; WCA Submission at p. 3.

⁴²³ CIQS Submission at p. 2.

⁴²⁴ Quebec Coalition Submission at p. 10.

⁴²⁵ PSPC Submission at p. 12.

concern that the federal government will not pay the prime contractor due to lack of funds or bankruptcy.⁴²⁶

While some might view it as unnecessary to adjust a payment period by two days (i.e. from 30 days to 28 days), we view 28 days as reasonable at the federal level as it will account for internal processes that already exist to validate payment expeditiously and provide for opportunities of legislative harmony in relation to the Ontario model.

Below the owner to general contractor level, in Ontario and elsewhere in the world, 7 days is a period frequently used. PSPC submitted that for the rest of the supply chain below the general contractor, there could be a time frame applied that is not dependent on the timing of payment to the general contractor.⁴²⁷ However, in our view, such an approach would unfairly prejudice general contractors.

We view the 7-day period as a reasonable period of time for general contractors to pay their subcontractors following receipt of payment from the owner, subject to withholding(s) as discussed below.

Recommendation 13

The time period for payment between federal owner to general contractor should be 28 days and the period for payment at levels below the general contractor should be 7 days from receipt of payment from the owner, and so on down the contractual chain.

As noted above in Chapter III, in relation to payment, PSPC's standard form contract provides for final payment after the issuance of a Certificate for Completion in no later than 60 days⁴²⁸, whereas DCC provides for this payment to be made no later than 30 days.⁴²⁹ We understand that PSPC may be considering adjusting this timeline, as well as other timelines, to align with certain DCC best practices.

In regards to payment following receipt of a proper invoice, we have recommended above that this payment be made within 28 days from receipt of the proper invoice. We view this as being an appropriate amount of time in relation to the payment of an invoice for amounts owed at Substantial Performance of the Work and Final Completion.

⁴²⁶ PSPC Submission at p. 12.

⁴²⁷ PSPC Submission at p. 12.

⁴²⁸ PSPC Standard Form Contract at GC5.6.

⁴²⁹ DCC Standard Form Contract at GC5.6.

Recommendation 14

The time period for payment by a federal owner to its general contractor in relation to Substantial Performance of the Work and Final Completion should be 28 days and then 7 days down the payment chain.

(d) Preconditions to Payment

(i) General

As was the case in Ontario, freedom to contract in respect of payment terms was a critical concern for many stakeholders at all levels. In order for parties to account for project conditions, flexibility is critical.

We heard from the CCA that there should be no limitations on parties agreeing on invoicing terms and that the Ontario model should be recommended such that if invoicing terms are not in a contract, the provisions of the Act should be implied.⁴³⁰ Other stakeholders also suggested that parties should be left with full freedom of contract.⁴³¹ Flexibility would allow parties to contract for payment structures such as milestone payments on larger or complex projects.

The CCA added that a general contractor should be required to notify subcontractors and suppliers who bid on their work if the invoicing terms differ from the default scheme.⁴³² The NTCCC agreed, stating that it viewed the appropriate notice as being included in the tender documents.⁴³³

The Quebec Coalition submitted that new payment measures should be public policy and therefore all conflicting contract terms should be declared null and void and replaced by the provisions of the legislation.⁴³⁴

We are of the view that the majority of stakeholders support freedom of contract in regards to invoicing and that this would be appropriate at the federal level as it is in Ontario.

⁴³⁰ CCA Submission at p. 4.

⁴³¹ GCAC Submission at p. 4; CIQS Submission at p. 2.

⁴³² CCA Submission at p. 5.

⁴³³ NTCCC Submission at p. 16.

⁴³⁴ Quebec Coalition Submission at p. 11.

Recommendation 15

Parties should otherwise be free to contract in respect of payment terms, but if the parties fail to do so, payment terms will be implied by legislation, being monthly payments.

(ii) Certification and Pay-When-Paid clauses

As mentioned above, pay-when-paid clauses and clauses that imposed certification as a condition prior to the delivery of a proper invoice were a significant issue in the implementation of the *UK Construction Act*. Many owner stakeholders included provisions in their contracts after the legislation was introduced that required payment from an owner or certification of an amount to be paid as a pre-condition to the delivery of the proper invoice, which allowed payments to be delayed and potentially frustrated the purpose of the legislation.

As a result of our research, in Ontario we recommended that certification should not be permitted to be a pre-condition to the delivery of a proper invoice, with the exception of P3/AFP projects where the involvement of the lender's technical agent as a certifier is crucial. We did not, however, prohibit pay-when-paid clauses as the general contracting community made significant arguments in relation to their necessity to ensure fairness in the construction payment chain. Given the other concessions made by the general contractor community (including in relation to adjudication), we viewed this as a necessary part of the balance achieved in Ontario.

In relation to the federal context, we heard from general contractors that they would expect pay-when-paid clauses to be permitted on federal projects given the other concessions they would have to make related to prompt payment legislation.

We asked all stakeholders in this federal review to consider whether certification should be permitted as a pre-condition to the delivery of a proper invoice in the federal context. In response, entities such as the NTCCC and Quebec Coalition responded that certification should not be permitted as a pre-condition.⁴³⁵

Certification is important to federal government stakeholders as it ensures value for the public dollar, according to these entities. Entities such as PSPC and DCC, however, advised us that certification could occur within the timeframe of 30 days set out in the Payment Directive. In fact, DCC submitted that they complete certification in-house quite quickly and that there would

⁴³⁵ NTCCC Submission at p. 16; Quebec Coalition Submission at p. 11.

be no issue with meeting timelines similar to those set out in the Ontario legislation.⁴³⁶ While not all government departments and Crown corporations have advised that they could currently meet this timeline, by re-engineering processes it is likely that certification can take place within the timelines required under a prompt payment regime, in our view.

The CCA, GCAC and NTCCC were all in agreement that P3 projects were an acceptable exception to the general rule against clauses that imposed certification as a pre-condition to payment and similar pre-conditions, as was incorporated in Ontario's *Construction Act*.⁴³⁷

In relation to whether certification can precede delivery of a proper invoice, this key issue is particularly difficult to address in the federal context. The reason for this is that the FAA specifically refers to certification as described in Chapter III. Section 34 of the FAA states that no payment shall be made unless the Deputy of the appropriate Minister or other person authorized by that Minister "**certifies**" in relation to a payment for the performance of the work, the supply of goods, or the rendering of services, that one of the following three requirements has been met:

- (i) that the work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract, is reasonable,
- (ii) where, pursuant to the contract, a payment is to be made before the completion of the work, delivery of the goods or rendering of the service, as the case may be, that the payment is according to the contract, or
- (iii) **where, in accordance with the policies and procedures prescribed under subsection (2), payment is to be made in advance of verification, that the claim for payment is reasonable;**^[1] [emphasis added]

Of these three potential forms of certification, the one that offers some potential flexibility is the third as it allows payment to be made in advance of "verification", if the Minister or designee confirms that "the claim for payment is reasonable" in accordance with the relevant policies and procedures of the Treasury Board.

In Ontario, the new *Construction Act* does not permit certification to be a pre-condition to the delivery of a proper invoice (except in relation to P3 Projects). The reason for this prohibition is so that the certification process

⁴³⁶ DCC Meeting Summary.

⁴³⁷ CCA Submission at p. 5; GCAC Submission at p. 4; NTCCC Submission at p. 16.

^[1] FAA at 34(1)(a)(i) to 34(1)(a)(iii).

does not delay payment. We view this policy rationale as equally applicable in the federal context and important for the purposes of alignment.

As a result, given the requirements of s.34 of the FAA in relation to certification, described above, we recommend that a policy be developed for construction projects that is not inconsistent with existing policies and allows the certification of a claim as reasonable before "verification", but following the delivery of a proper invoice.

Recommendation 16

A policy should be developed for construction projects that is not inconsistent with existing policies and allowing the certification of a claim as reasonable before "verification", but following the delivery of a proper invoice.

Provided this is feasible, the legislation should render a contractual provision of no force and effect that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or the owner's prior approval. As noted above, the exception to this is in relation to P3 projects.

(e) Basis for Withholding Payment

We asked stakeholders to consider the basis under which payments should or can be withheld, as well as the timing for such withholdings. The responses we received related to two different types of withholdings: 1) withholdings in relation to ordinary course payments; and 2) contractual holdback at the federal level at the end of the project. The second issue is discussed in detail in a Chapter XI – Key Contractual Issues.

(i) Withholding in the Ordinary Course

In relation to the first issue, we understand that there are often disputes in relation to a payment. These disputes range from issues in relation to the amount of the payment, quantity/quality of the work and compliance with the contract. These are often referred to as "disputed amounts." The balance of the payment or "undisputed amount", is something that may be withheld as negotiating leverage in certain circumstances by some stakeholders higher up the construction pyramid.

A common theme that arose during our stakeholder engagement sessions was that undisputed amounts should be paid within the normal timelines set

out in the contract and the legislation. We heard this from many stakeholders.⁴³⁸

In relation to amounts withheld, several stakeholders recommended the Ontario model. That is to say, if there is an intention to withhold payment or to make a partial payment, notice must be provided. Each party down the chain can then make a similar withholding and provide notice. There is also a corresponding requirement for payers to commence an adjudication to recover the disputed payment amounts within a certain period of time.⁴³⁹

The GCAC submitted that all payers should be permitted to withhold payment by providing a notice of non-payment that identifies the amount withheld and the reason for the withholding, subject to the right of the payee to prompt dispute resolution of that withheld payment.⁴⁴⁰ This would be consistent with the Ontario model. In addition, the GCAC recommended a single form of notice of non-payment for all tiers of the construction pyramid.⁴⁴¹

The NTCCC provided a detailed analysis of the circumstances it viewed as being legitimate reasons to withhold payment. NTCCC submitted that if an invoice is itself deficient this provides a legitimate reason to withhold payment but recommended that the payer should be required to immediately advise the payee that the invoice is deficient and provide additional information as to the deficiency. The NTCCC also viewed performance deficiencies as a legitimate basis for withholding payment so long as the payee is protected from gratuitous claims for deficient performance. In this regard, the NTCCC endorsed the Ontario *Construction Act* process for disputing payments (i.e., a written notice of non-payment that identifies deficiencies and limits the amount of payment withheld to an amount that is proportionate to the magnitude of the deficiency), which should be given within 14 days of the proper invoice.⁴⁴²

Finally, the NTCCC viewed payment interruptions (i.e. when a payee receives a notice of non-payment) as being a legitimate reason to withhold payment to parties down the chain. In this case, the NTCCC submitted that the payee must take the issue of non-payment to adjudication.

There was a significant degree of consensus that the Ontario *Construction Act* model should apply in relation to withholdings. Throughout our stakeholder engagement sessions, we heard that this approach was supported, with the

⁴³⁸ CCA Submission at p. 5.

⁴³⁹ WCA Submission at p. 3.

⁴⁴⁰ GCAC Submission at p. 4.

⁴⁴¹ GCAC Submission at pp. 4-5.

⁴⁴² NTCCC Submission at p. 17.

exception of Quebec and several federal government entities who did not think it was necessary.

Recommendation 17

Payers should be permitted to deliver a notice of non-payment within 14 days following receipt of a purported proper invoice, provided that the notice of non-payment must set out the quantum of the amount withheld and adequate particulars as to why that amount is being held back. Undisputed amounts should be paid. Parties who withhold after receiving a notice of non-payment must undertake to adjudicate that issue with the withholding party within a stipulated period of time. As a result of this undertaking, pay-when-paid clauses should be permitted.

(ii) Blanket Contractual Holdback(s)

We consider the federal holdback under the Standard Federal Government Construction Contract to be a contractual issue in relation to prompt payment and as such, this issue is discussed in Chapter XI – Key Contractual Issues.

(f) The Right of Set Off

Given the importance of the right of set-off as explained by stakeholders, we asked stakeholders whether there should be any limits on the right of set-off (e.g. in relation to other projects).

Where problems in the performance of a contract or subcontract occur, certain stakeholders have asserted that the right to set off payment may be essential to the success of the project and, for payers other than government entities, to the financial stability of the payer. We have also heard from many stakeholders that when a contractor raises a significant claim, particularly for delay, the owner should have the ability to advance a claim for set-off in response.

Having said this, however, an unsubstantiated and general assertion of a set off can cause the flow of funds to stop entirely, adversely affecting subcontractors and suppliers, even if they are not involved in the dispute between owner and contractor. In other words, the assertion of a right of set-off, which can go untested for a lengthy period of time as a traditional

dispute resolution process proceeds, may prove to be an inviting strategy for a payer seeking bargaining leverage.

Importantly, a number of members of the contracting community submitted that the ability of the federal government to set-off should be restricted to amounts arising under the project at issue.⁴⁴³ The project-by-project set-off model was recommended and accepted in Ontario. The NTCCC accepted that one situation where the single project principle of set-off should be modified is where a payer becomes insolvent.⁴⁴⁴

The GCAC submitted that all payees should be permitted to set-off in relation to other improvements under the same contract and in relation to other contracts or subcontracts. The GCAC was also concerned that absent set-off, general contractors and upper-tier subcontractors will be placed in a situation where payees can fail to perform work, yet the only recourse for the payer is to go to court or arbitration (e.g. if the defect is discovered near the end of a project after the subcontract is complete). Adjudication would likely no longer be available in that circumstance.⁴⁴⁵

The owner community at the federal level viewed the right to set off as a right that needed to be protected, as it was often the most efficient means of dealing with issues and costs arising out of the contractor's actions or inactions.⁴⁴⁶ PSPC referred us to the government right to set off debts from anyone who owes them money on any project as it is required under the FAA (i.e. section 155 of the FAA). In this regard, there is a legislative requirement as to the ability of the federal government to set off on any project.

Recommendation 18

Consistent with the broad rights of set-off under the FAA (i.e. under s.155), the federal government should retain its current right of set-off against all projects. In the alternative, a proviso to s. 155 of the FAA could be considered, if the federal government is prepared to forego its ability to apply cross-project set-offs, in order for the legislation to be consistent with Ontario.

⁴⁴³ WCA Submission at p. 3.

⁴⁴⁴ NTCCC Submission at p. 17.

⁴⁴⁵ GCAC Submission at p. 5.

⁴⁴⁶ DCC Submission at p. 2.

Recommendation 19

Payers (below the level of the owner) should continue to be able to set off all outstanding debts, claims or damages but the right of set-off should not extend to set-offs for debts, claims and damages in relation to other contracts, except in circumstances of a payee's insolvency.

(g) The Consequences of Failure to Pay

The consequence of non-payment is an issue that goes to the heart of the prompt payment issue. Proponents of Bill S-224 were focused on the concept of a broad right of suspension to assist trade contractors to enforce payment provisions. Around the world we have seen a variety of different applications of suspension provisions as well as mandatory interest and adjudication.

In Ontario, we recommended mandatory interest, adjudication and suspension, in that order. Allowing an unfettered right of suspension would expose federal construction projects to an unnecessary risk. PSPC submitted that no unqualified right to suspend should be allowed.⁴⁴⁷ We heard from entities such as DCC that an unexpected suspension could derail a significant project and potentially cause a national security concern. Specifically, DCC stated that:

The ability for subcontractors to suspend work could have significant operational impact to departments and in some cases on defence projects, may impact national security. When a contract contains security requirements, the process for another subcontractor to obtain security clearance before being granted access to the site is quite lengthy. We would suggest that the legislation permit the Owner to make discretionary payments of amounts directly to a subcontractor following the decision of the Adjudicator, to avoid interruptions in the work and impact to Owner operations. However, such payments must be at the Owner's discretion and the legislation or contractual terms must not create a duty of any kind from the Owner to the subcontractors.

In light of this, there should be a requirement for the general contractor and the subcontractors to advise the Owner of any matter submitted for Adjudication and prior to suspension of the work.⁴⁴⁸

Many stakeholders endorsed the Ontario *Construction Act* approach, which includes:

⁴⁴⁷ PSPC Submission at p. 14.

⁴⁴⁸ DCC Submission at p. 2.

- The right to commence an adjudication;
- Mandatory statutory interest;
- The right to suspend work (without breach) if an adjudicator's determination is not paid in 10 days;
- Resumption of work after suspension conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension.⁴⁴⁹

The GCAC recommended that suspension should not be allowed except in cases where there was a failure to pay an adjudication determination. In addition, the GCAC submitted that if a subcontractor fails to abide by an adjudication determination with respect to any amount owing to the contractor or any work that should be performed, the contractor should be allowed to suspend the subcontractor and/or terminate the subcontract for cause.⁴⁵⁰

The NTCCC agreed that the Ontario model should apply and reiterated that in the event that a payee resumes work on a project following a suspension, the payee should be entitled to reasonable remobilization costs.⁴⁵¹

If the Ontario model is adopted, DCC noted that security issues would still require as a condition that contractors and subcontractors advise the owner of any matter submitted to adjudication, and that they do so prior to suspension of the work.⁴⁵²

DCC also submitted that it would benefit from the legislative ability to make direct payments to subcontractors to avoid issues of non-payment if they arise.⁴⁵³ We view this as unnecessary given the contractual ability to make a direct payment under GC5.8.3 of the Standard Federal Government Construction Contract and DCC's standard construction contract.

CIQS made a different suggestion, recommending that parties should have the right to pre-determined damages akin to liquidated damages.⁴⁵⁴ However, determining the amount of these damages would be difficult.

⁴⁴⁹ CCA Submission at p. 6; SAC Submission at p. 3; NTCCC Submission.

⁴⁵⁰ GCAC Submission at pp. 5-6.

⁴⁵¹ NTCCC Submission at p. 10.

⁴⁵² DCC Submission at p. 2.

⁴⁵³ DCC Meeting Summary.

⁴⁵⁴ CIQS Submission at p. 3.

Recommendation 20

The Ontario model should apply to federal prompt payment legislation. Specifically, the following should be legislated in relation to the consequences of a failure to pay:

- The right to commence an adjudication;
- Mandatory statutory interest;
- The right to suspend work (without breach) if an adjudicator's determination is not paid within 10 days; and
- Resumption of work after suspension, conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension.

5. Summary

Prompt payment is a concept that is embraced by most in the stakeholder community. The divergence in views becomes apparent, however, when exploring the triggers for payment, payment periods, and the remedies available in relation to non-payment. In our recommendations, we have attempted to achieve a compromise which will satisfy most stakeholders. The model recommended is similar in nature to that in place in Ontario, but takes into consideration existing legislation (i.e. the FAA) and related policies. The result is a package of recommendations intended to improve the efficiency of federal construction projects.

X. ADJUDICATION

1. Overview

In this chapter we will consider adjudication, as a supportive component of prompt payment to resolve payment disputes on federal construction projects.

This chapter is structured as follows:

1. Overview
2. Context
 - a) Breaking the Gridlock
 - b) Disputes on Federal Construction Projects – Nature and Metrics
 - c) Remedies including the Right to Suspend
 - d) Relevant Experiences (International and Ontario)
3. Stakeholder Input
4. Analysis and Recommendations
5. Summary

2. Context

Adjudication is a pragmatic process to resolve disputes that arise between parties during construction. Below, we describe the adjudication model generally as a way to unlock a payment gridlock. We then consider the nature of the disputes that can arise on federal construction projects and the consequences of these disputes, including the exercise of the remedy of a right to suspend.

(a) Breaking the Gridlock

On construction projects, including federal construction projects, significant disputes may delay payment down the construction pyramid. Sometimes work may be halted, given contractors' cash flow requirements.

Adjudication ameliorates the risk of payment gridlock, as it is a swift, flexible mechanism for resolving payment disputes. The essential characteristics of an adjudication involve the determination of a dispute, on an **interim** basis, by a qualified adjudicator who has been trained and certified to perform

adjudications and has experience in the construction industry, but is not a judge. An adjudicator must not have any conflicts of interest in acting as an adjudicator. The adjudicator is often selected quickly by the parties after a dispute arises, or, if the parties cannot agree who will adjudicate their dispute, then by a nominating authority authorized to make the selection.

The adjudicator may receive submissions and documents from the parties, and in some jurisdictions may conduct an investigation themselves. The adjudicator will then make a determination. In most jurisdictions that use this form of dispute resolution, the entire process takes, on average, about 40-60 days from delivery of the notice of adjudication.

Adjudicators in many jurisdictions are given considerable freedom to implement a process that is appropriate for the dispute at issue. The adjudicator may meet the parties in person, by videoconference, or by telephone, or may conduct the adjudication entirely in writing, receiving paper submissions only. An adjudicator may determine that a site visit is appropriate, or he or she may retain an expert.

Generally, each party bears its own costs of an adjudication, unless there is frivolous or vexatious conduct.

As noted, the decision of an adjudicator is binding on an interim basis and is often enforced in a similar manner to that of an arbitral award. The bases for challenging an adjudicator's interim binding decision are intentionally narrow. An adjudicator has immunity and cannot be compelled to testify.

If one of the parties is unsatisfied with the adjudication decision and wants to litigate or, if the contract so provides, arbitrate the dispute, the parties can do that. However, as described below, the experience in other jurisdictions is that the vast majority of the time, the parties accept an adjudicator's decision and do not subsequently litigate or arbitrate.

(b) Disputes on Federal Construction Projects - Nature and Metrics

In considering adjudication, it is useful to have in mind the nature of disputes that arise on federal construction projects and how they are currently addressed.

As noted in Chapter III above, the federal government's Contracting Policy refers explicitly to the expeditious handling of disagreements that may arise on a construction project. The Contracting Policy notes that "[t]his is particularly important because prolonged disputes can delay performance as

defined in the contract and payment to the contractor.⁴⁵⁵ As a result, according to the Contracting Policy, the Minister of Justice has committed to working with the departments of the federal government to introduce dispute resolution clauses into government contracts, and the Department of Justice has issued a *Directive Concerning the Use of Dispute Resolution Clauses in Contracts*. In terms of general guidance, the Contracting Policy provides as follows in relation to negotiations, mediation, and arbitration:

12.8.3 *Negotiations*. Efforts should be made to resolve disputes as they arise, first by negotiating with the contractor. This can be through discussion between representatives of the contractor and the contracting authority or by a more formal review established by the department or agency. Contracting authorities should develop systems that ensure:

- a. prompt attention is given to disputes;
- b. unresolved disputes are brought forward quickly to a designated senior level in the department or agency for decision; and
- c. the decision is quickly communicated to the contractor so that the contractor may take further action if so desired.

12.8.4 *Mediation*. When a dispute has not been resolved by negotiation, mediation by a third party may be used when it is acceptable to both sides. Mediation should conform to the following principles:

- a. it should be voluntary on the part of the contracting department or agency and the contractor with respect to entry into mediation, selection of mediator, and acceptance of the mediator's recommendations;
- b. the powers of a mediator should be limited to persuasion and cannot include adjudication.⁴⁵⁶ (There should not, however, be any restriction on the mediator in terms of making contacts and collecting information relevant to the dispute);
- c. the costs of mediation should be shared equally by both parties.

12.8.5 *Arbitration*. Arbitration that is binding on both parties is an alternative to litigation, provided that both the contractor and the contracting authority agree to it. The agreement to allow for its use may be inserted in a contract at the outset, or it may be negotiated between the parties at the time a dispute arises....⁴⁵⁷

⁴⁵⁵ Contracting Policy, section 12.8.1.

⁴⁵⁶ This is an accurate description of the role of a mediator, which is different from that of an adjudicator, and in our view, this provision does not detract from the policy reasons for the introduction of a separate adjudication regime.

⁴⁵⁷ Contracting Policy, sections 12.8.3, 12.8.4, and 12.8.5.

Pursuant to section 12.8.14 of the Contracting Policy, litigation is an alternative to arbitration. The Department of Justice assumes responsibility for litigation.

In keeping with the Contracting Policy, there is a conventional dispute resolution process in the standard form contracts of federal government departments. The dispute resolution process is described above in Chapter III and includes a general obligation to maintain open and honest communication, negotiations, mediation, and in some instances arbitration, and litigation.

In relation to the frequency of disputes arising on federal construction projects, much of the information we received over the course of our stakeholder engagement sessions was anecdotal in nature. By way of example, we heard the following:

- one report we received was of a contractor who had performed work for both PSPC and DCC and found the change procedure difficult under their contracts because the work in relation to a change was required to be completed before pricing was agreed. This contractor was also not satisfied with the mediation process, where he found there was an unwillingness to compromise;
- we heard that not being able to file a claim for lien on a federal project means that there is no effective way to pursue a remedy quickly;⁴⁵⁸ and
- stakeholders commented that at the end of a project, disputes can arise in relation to the release of contractual holdbacks, but that there is no effective mechanism to ensure that these holdbacks are released within a reasonable period of time. One stakeholder referred to delays of two to three years in the payout of the final holdback.⁴⁵⁹

PSPC advised that, in reality, it does not have a significant number of disputes. For example, under their \$22.8 billion RP-1 contracts, PSPC is aware of only one formal dispute in relation to one contract. PSPC advised that it does its best to resolve issues before either party needs to pursue the formal dispute resolution provisions in the contract.

DCC data indicates that over a three-year period on approximately 6,000 projects in the last three years, it has only had 17 “complex” claims.⁴⁶⁰ Furthermore, there have been only 2 disputes which have gone to arbitration in the past decade,⁴⁶¹ and DCC is currently involved in only one active piece

⁴⁵⁸ See for example, ACA Meeting Summary.

⁴⁵⁹ Saskatchewan Construction Association Meeting Summary.

⁴⁶⁰ DCC Meeting Summary; DCC Supplemental Submission.

⁴⁶¹ DCC Meeting Summary.

of litigation (and has litigated less than 10 claims over the previous 8 years).⁴⁶² DCC further noted that it had a nearly 99% success rate in resolving disputes outside of the court system or arbitration.⁴⁶³

The RCMP advised that it does not maintain dispute statistics, but that most of its disputes are resolved through the applicable contract procedures and technical reviews.⁴⁶⁴

Agriculture and Agri-Food Canada advised that it was not aware of any arbitration or litigation on any of its projects.⁴⁶⁵

We were unable to independently confirm the statistics provided by the federal government and its various departments, agencies and Crown corporations. For disputes at the level of the general contractor and subcontractors and further down the construction pyramid, there are no statistics available.

(c) Remedies including the Right to Suspend

As discussed in Chapter III and Chapter IX under the Payment Directive and standard form contracts, mandatory interest is payable by the federal government if payments are more than 30 days late. As noted above, PSPC has been required to pay very little interest as a result of late payments (approximately .013% of late payment interest was paid by PSPC between 2015-16).⁴⁶⁶ We were not provided any other metrics regarding parties' experiences in relation to recovery of interest payments. Anecdotally, we heard from stakeholders, particularly those lower down in the construction pyramid, that it is difficult to enforce entitlement to interest payments. We also heard from one government entity that it only pays interest when it is asked for interest.

As noted above in Chapter IX – Prompt Payment, we also heard from federal government and Crown corporation owners about the enormity of the consequences if a project grinds to a halt because a contractor or subcontractor suspends work based on allegations of wrongful non-payment. Examples of serious consequences of work stoppages were provided by government stakeholders, including some in relation to projects of importance for national security reasons. Over 36% of DCC projects have security clearance requirements. In such circumstances, DCC has advised

⁴⁶² DCC Supplemental Submission.

⁴⁶³ DCC Meeting Summary.

⁴⁶⁴ RCMP Meeting Summary.

⁴⁶⁵ Agriculture and Agri-Food Canada Meeting Summary.

⁴⁶⁶ Engagement Strategy at p. 8; PSPC Submission dated March 21, 2018 ("PSPC Submission") at p.3.

that it can take months to replace a contractor on some projects, in particular in the North (i.e., given the short construction season and difficulties securing materials and labour). On projects with high security clearance requirements, such a delay can cause a project to lose an entire construction season. We also heard from DCC that projects relating to key security installations and projects with international significance (i.e., in relation to defence and security agreements with other countries) are of particular concern in circumstances where a contractor or subcontractor stops work.⁴⁶⁷

As a result, in considering disputes on federal construction projects, it is necessary to carefully consider the repercussions of permitting certain remedies, including the right to suspend.

In other jurisdictions around the world where adjudication has been implemented, the experience is that the existence of adjudication can reduce the number of disputes that are raised on construction projects because participants are aware that those disputes will be addressed swiftly and that consequences will be forthcoming in the foreseeable future if there is a failure to adhere to an adjudicator's decision. International experience with adjudication will be explored in the next section.

(d) Relevant Experiences (International and Ontario)

Adjudication has been used in a number of other jurisdictions as a mechanism to support prompt payment and to resolve construction disputes more quickly than through other means, thereby ensuring that work continues on the project.

(i) International

A. The United Kingdom

Adjudication was introduced by legislation in the UK in 1998. In the UK, adjudication has been found to be a pragmatic solution to unlock the payment gridlock caused by construction disputes, freeing up resources and allowing cash to flow down the construction pyramid and move projects to completion.⁴⁶⁸

The UK Construction Act contains a scheme that has a default set of procedures, but adjudicators are given a fair degree of control over the processes they adopt. In the UK, any party to a construction contract has a

⁴⁶⁷ DCC Meeting Summary; DCC Submission.

⁴⁶⁸ Prior to the introduction of adjudication in legislation, contractual adjudications had been utilized in the UK since the 1970s.

right to refer a dispute arising under the contract to adjudication. The scope of disputes that are subject to adjudication is very broad.

When adjudication was first introduced, an initial roster of adjudicators was created, drawn from the ranks of quantity surveyors, engineers, architects, and lawyers. Subsequently, a number of Adjudicator Nominating Bodies (ANBs) were created, and these bodies took on the role of training adjudicators and maintaining rosters of qualified adjudicators with expertise in relevant technical subjects.

In the UK, the parties can choose their adjudicator by prior agreement, by agreeing on an adjudicator at the time the dispute arises, or by referring the dispute to an adjudicator nominated by the Adjudicator Nominating Body. The maximum length of the process is 42 days, absent the agreement of both parties to an extension.

In the UK, there are statistics available which assist in the assessment of adjudication as a dispute resolution mechanism. Following the introduction of the UK Construction Act, in 1996 Glasgow Caledonian University set up a UK-wide Adjudication Reporting Centre ("ARC") to gather data on the progress of adjudication and to disseminate this information to the construction and property industries.⁴⁶⁹ Research was conducted by the ARC in conjunction with the UK's Authorized Nominating Bodies ("ANBs"), as well as individual adjudicators who provided feedback. From 2012 onwards, several members of the original ARC team continued their research and record keeping under the banner of Construction Dispute Resolution Ltd. ("CDR"), with the support of the UK Adjudication Society. As stated in the introduction of CDR's September 2016 Report (No. 15), this research is the only work of its kind, having been carried out continuously and consistently since 1998.

We do not propose to summarize the entirety of the CDR's research product, however the four most recent reports (i.e., Report No. 14 (2012 to 2015), Report No. 15 (May 2015 to April 2016), the November 2017 Report, and Report No. 16 (May 2016 to October 2017)) provide relevant information.

⁴⁶⁹ 12 Years in Review Document – Glasgow Caledonian University June 2017 - <https://www.gcu.ac.uk/ebe/media/gcalwebv2/ebe/Twelve%20Years%20in%20Retrospect.pdf>

The previous Reports 1 through 13 can be found on the CDR/ARC websites reproduced below for those who are interested: Reports 1-12 of this research up to April 2012, can be found on the GCU Adjudication Reporting Centre website - <http://www.gcu.ac.uk/ebe/businessservices/Adjudicationreports>

Report No 13 covering the period May 2012 to April 2014, and this Report, can be found at <http://www.cdr.uk.com/research.html>.

CDR's Report No. 14 (addressing the period from May 2012 to April 2015) published in April of 2016 includes the following:⁴⁷⁰

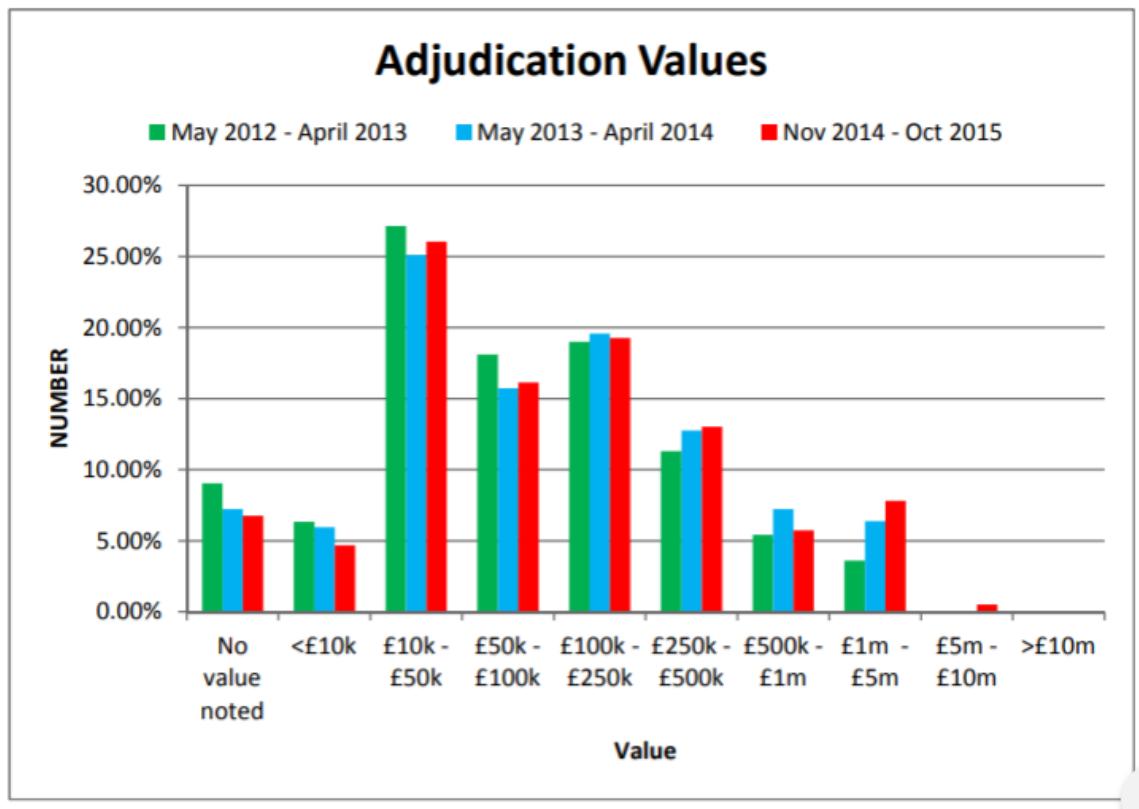
- In relation to sources of appointment, 93.5% of adjudications in the UK involved nominations through an ANB from 2015-2016. 4.2% of adjudicators were appointed by agreement of the parties, and 2.3% were named in the contract.⁴⁷¹
- In relation to the subject matter of disputes, payment constituted the largest proportion of referrals to adjudication at 29.3% in the last period covered. Other subjects that were often disputed include withholding (19.7%), value of work (8.2%), extension of time (9.9%), and final accounts (6.9%). We note that these values fluctuated on a year-over-year basis.⁴⁷²
- The period November 2014 to October 2015 is in line with previous trends, with the majority of referrals in the value range of £10,001 - £50,000. There was a steady increase of the value range of £1 million - £5million which may have been the result of disputes occurring on larger, high value projects or work packages. The CDR noted that the results did not align with commentators' views, which had suggested that adjudication was not appropriate for high-value disputes. Rather, it appeared that parties in practice saw the benefits of referring high-value disputes to adjudication as opposed to expensive litigation or arbitration. In terms of values, the CDR provided the following chart:⁴⁷³

⁴⁷⁰ CDR Report No. 14 dated April 2016 - *Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs) and from a sample of Adjudicators* - <http://cdr.uk.com/wp-content/uploads/2017/01/Report-14.pdf> [CDR Report 14]

⁴⁷¹ CDR Report 14 at p. 5.

⁴⁷² CDR Report 14 at p. 9.

⁴⁷³ CDR Report 14 at p. 10.



- The CDR's research indicated that 39.06% of the disputes were subcontractor disputes being pursued against the general contractor, and 31.77% of the disputes were disputes that the general contractor brought against the owner. The next highest category involved the owner bringing an adjudication against the general contractor (11.98%). The number of disputes brought between subcontractors and their sub-subcontractors is relatively low.⁴⁷⁴
- In terms of procedures adopted, the CDR reported that the adjudicators adopt a **documents only procedure 80% of the time**. A full hearing is only conducted 10% of the time.⁴⁷⁵
- The CDR also reported on the typical timeframe for adjudicators to issue determinations. Between 2014-2015, adjudicator decisions were given within 28 days 52% of the time, between 28-42 days 32% of the time, and more than 42 days in only 16% of reported adjudications.⁴⁷⁶

⁴⁷⁴ CDR Report 14 at pp. 11-12.

⁴⁷⁵ CDR Report 14 at p.13.

⁴⁷⁶ CDR Report 14 at p. 14.

In relation to the number of appointments that proceed to a decision by the adjudicator between 2012-2015, the range is between 63-71% for the case where an adjudication results in a decision rendered and 17-25% of adjudications being settled. Between 1-6% of adjudications were reported as being abandoned during this period.⁴⁷⁷

In its November 2017 report, the CDR reviewed adjudicator fees, adjudication costs and values of disputes between October 2015 and September 2016, as summarized below.⁴⁷⁸

- The average total fee charged was £8,878 per adjudication, and the median was £7,000.⁴⁷⁹
- The average number of hours charged by adjudicators is 43 per adjudication (although this is not necessarily reflective of actual hours worked).⁴⁸⁰
- The highest total fee recorded in the period was £46,000, representative of 263 hours at the applicable hourly rate of £175, although almost three quarters of adjudications attracted a fee of less than £10,000.⁴⁸¹
- The average value of disputes was £344,160, with a median of £139,500. The range of disputes went up to £6 million.⁴⁸² Around one quarter of disputes referred to adjudication are in the range of £10,000 to £50,000, and an aggregate of 83% of disputes referred had a value of £500,000 or less.

During the writing of this report, the CDR released its Report No. 16 in late April 2018, covering the period from May 2016 to October 2017.⁴⁸³ The feedback received during this reporting period was as follows:

- In the first year following implementation, there were 187 adjudications reported. The following year there was a 600% increase given the 1,309 adjudication appointments by ANBs. Adjudication nominations ranged between approximately 1,100 and 2,000 between 1997 and 2016. From May 2016 to April 2017 there were 1,503 adjudications. The CDR noted

⁴⁷⁷ CDR Report 14 at p. 14.

⁴⁷⁸ CDR November 2017 Report.

<https://www.adjudication.org/sites/default/files/Report%20on%20Adjudication%20Fees.pdf>

⁴⁷⁹ CDR November 2017 Report. At p. 4.

⁴⁸⁰ CDR November 2017 Report. At p. 4.

⁴⁸¹ CDR November 2017 Report. At p. 4.

⁴⁸² CDR November 2017 Report. At p. 5.

⁴⁸³ CDR Report No. 16 dated April 2018 - *the Research Analysis of the development of adjudication based on returned questionnaires from ANBS* - <http://cdr.uk.com/wp-content/uploads/2018/04/Report-No-16.pdf> [CDR Report No 15]

there had been a steadyng of referrals. For the past several years there have been about 1,500 adjudications per year.⁴⁸⁴

- The UK court has experienced difficulties with "smash and grab" adjudications (i.e. adjudication notices delivered at an inconvenient time on an unsuspecting recipient) although recent court decisions⁴⁸⁵ have attempted to constrain such conduct.⁴⁸⁶ The CDR is monitoring future adjudications to see whether smash and grab adjudications will decline.⁴⁸⁷
- Adjudications are tracked throughout the course of the year with noticeable dips in certain periods on a year-to-year basis. This recent study was done in relation to whether there was merit to the "Christmas ambush" theory, or similar theories (i.e. Easter or summer holiday ambushes) wherein a party delivers a notice of adjudication at a time where the other party would be otherwise occupied. The evidence recorded by the CDR would suggest there is no discernible pattern over recent years.⁴⁸⁸
- As of 2017 there were approximately 745 registered adjudicators in the UK (although not all of these adjudicators are practising).⁴⁸⁹
- The disciplines of adjudicators are broad, but in the UK the adjudicator population (in 2016-2017) was largely comprised of Quantity Surveyors (32.6%), Lawyers (42.4%), Civil Engineers (9.8%), Architects (8.9%), Builders (1.5%), etc.⁴⁹⁰

In its conclusion to Report No. 16, the CDR noted that "the future of Adjudication as a method of dispute resolution remains promising, with its use returning to levels experienced in more fruitful times within the construction industry."⁴⁹¹ Adjudication remains a popular choice for resolving construction disputes, and increasingly parties are opting to refer legally complex disputes to adjudication."

⁴⁸⁴ CDR Report 15 at p. 3.

⁴⁸⁵ Mr. Justice Coulson in *Grove Developments Ltd v S&T (UK) Ltd* ([2018] EWHC 123 (TCC)) , which held, broadly, that *ISG Construction Ltd v Seevic College* ([2014] EWHC 4007 (TCC)) and *Galliford Try Building Ltd v Estura Ltd* ([2015] EWHC 412 (TCC)) were wrongly decided.

⁴⁸⁶ The report referenced a 2018 decision of the UK Technology and Construction Court which referenced the "smash and grab" phenomenon.

⁴⁸⁷ CDR Report 16 at p. 4.

⁴⁸⁸ CDR Report 16 at p. 5.

⁴⁸⁹ CDR Report 16 at p. 6.

⁴⁹⁰ CDR Report 16 at p. 8.

⁴⁹¹ CDR Report 16 at p. 12.

B. Australia

As mentioned in Chapter IX – Prompt Payment, a number of problems had been identified in Australia in relation to the various security of payment acts in operation in each of its states and territories. These problems have been thoroughly described in the Murray Report. In relation to adjudication, the Murray Report identifies a number of problems, including "questions around the process of appointing adjudicators; the adequacy of qualifications; training and grading of adjudicators; and the variable quality of adjudication decisions."⁴⁹²

In terms of a review of the adjudication process itself, the Murray Report canvasses existing processes in the various states and territories of Australia. The first issue addressed is the appropriate timeframe within which a claimant is to "lodge" an adjudication application in circumstances where the respondent (i.e. the party receiving the invoice) provides a payment schedule but the schedule amount is less than the claimed amount. The concept of a "payment schedule" is explained in Chapter IX – Prompt Payment. Briefly, under the East Coast Model, a payment schedule is a document prepared by a party who receives an invoice from a contractor or subcontractor. The payment schedule indicates what will be paid and not paid in relation to the invoice received.

A related issue is whether a respondent should be given a "second chance" to provide a "payment schedule" and, if so, what should be the appropriate timeframe for lodging an adjudication application. In considering this issue, the Murray Report states that "a claimant should be required to pursue its payment claim in a diligent and timely manner."⁴⁹³ The Murray Report concludes that a claimant should lodge its adjudication application within 10 business days of receiving the respondent's payment schedule.⁴⁹⁴ In circumstances where the respondent has provided a payment schedule but then fails to pay, the adjudication application should be lodged within 20 business days after the due date for payment.⁴⁹⁵

In terms of the process for the appointment of an adjudicator, in Victoria, New South Wales, South Australia, Australian Capital Territory, and

⁴⁹² The Murray Report, p. xiii.

⁴⁹³ The Murray Report, Chapter 13, p. 169.

⁴⁹⁴ The Murray Report, Chapter 13, p. 169.

⁴⁹⁵ The Murray Report, Chapter 13, p. 169. In Australian jurisdictions, there is a distinction drawn between "nomination" and "appointment" of adjudicators. In relation to the former, parties in the West Coast Model may agree to nominate the adjudicator or an appointing body in the contract whereas parties under the East Coast Model have adjudicators appointed by accredited ANAs or in Queensland, by the Queensland Building and Construction Commission Registrar. See Murray Report, s. 13.2, p. 171.

Tasmania, adjudicators are appointed by Authorized Nominating Authorities. In Queensland, adjudicators are appointed by the Queensland Building and Construction Commission. In contrast, in Western Australia and the Northern Territory, the parties are allowed to agree and nominate in the contract either the appointing body or to name an accredited adjudicator.⁴⁹⁶ Various Australian reviews have considered the issue of whether a claimant should have the right to choose an adjudicator due to concerns about conflict of interest and apprehended bias.⁴⁹⁷

In considering the appropriate process for the appointment of an adjudicator, the Murray Report comments as follows:

Clearly, a process that involves matching the nature of the dispute with the skill sets, background and expertise of an adjudicator is more likely to result in a credible decision within a compressed timeframe. Equally, any mismatch of the adjudicator's background with the issues in dispute is less likely to result in a credible decision being made in a timely and cost-effective manner.⁴⁹⁸

Particular disputes might require the expertise of an adjudicator with a civil engineering background or a legal background, for example, depending on the dispute at issue. In the result, the Murray Report sets out a process by which ANAs would nominate adjudicators, but the recommended "appointment" of the adjudicator would be made by a "Regulator", such that any direct connection between an ANA receiving an adjudication application and appointing an adjudicator would be broken. The Murray Report recommends that the legislation should allow parties in certain circumstances to agree on an accredited adjudicator but (a) **only** at the time the dispute arises, (b) within two business days of the claimant serving a notice of adjudication and a copy of the adjudication application, and (c) where the amount claimed is greater than \$250,000.⁴⁹⁹

In terms of the timing of an adjudication process, the Murray Report comments on the importance of providing the respondent with sufficient

⁴⁹⁶ The Murray Report, Chapter 13, p. 171.

⁴⁹⁷ Collins, B. QC (2012), *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW*, November 2012, refer to last bullet point of Recommendation 39 at p. 369. Wallace, A. (2013), *Discussion Paper: Payment Dispute Resolution in the Queensland Building and Construction Industry - Final Report*, Queensland Building and Construction Commission, Brisbane, May 2013, p. 164. Moss, A. (2015) *Review of Building and Construction Industry Security of Payments Act 2009 (SA)*, South Australia Small Business Commissioner, see recommendations (a) and (b), p. 17.

⁴⁹⁸ The Murray Report, Chapter 13, p. 174.

⁴⁹⁹ The Murray Report, Chapter 13, p. 182.

time to address each of the claimant's arguments.⁵⁰⁰ In addition, from the respondents' perspective, the right to expand on the reasons for withholding payment (from those set out in the payment schedule) was requested. In balancing these interests against the objective of ensuring that the adjudication process retains its rapid nature, the Murray Report recommended that a respondent must provide an adjudication response "within 5 business days after the respondent had received a copy of the claimant's adjudication application, or 2 business days after receiving notice of the adjudicator's acceptance, whichever is the later."⁵⁰¹

Furthermore, the Murray Report recommended that the legislation prohibit "a respondent from including in its adjudication response any reasons for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant."⁵⁰² The reason for this recommendation was that permitting new reasons to be included in an adjudication response was viewed as extending the adjudication process and not serving the interests of the industry well.⁵⁰³ However, the Murray Report also recommended that the respondent be permitted to make a written application to the adjudicator to request an extension of time for up to 10 business days to provide its adjudication response.

In terms of the timeframe for an adjudicator to make an adjudication decision, stakeholders in Australia made various submissions, which included raising concerns that existing legislation did not differentiate a time period for adjudication decisions when the amount of money involved in a claim differs substantially (i.e. whether it be a claim for \$1,000 or \$10 million). Some stakeholders considered that more complex claims required the adjudicator to spend more time in performing his or her duties and making a determination. Stakeholders differed in their views as to whether an additional time period should be capped. In identifying the appropriate time period within which an adjudicator's decision must be delivered, the Murray Report states:

...this will depend on identifying such a period that will ensure that a decision relating to a disputed payment claim can be made quickly whilst still providing the adjudicator with sufficient time to consider each of the parties' submissions and provide written reasons as to how the decision has been arrived at.⁵⁰⁴

⁵⁰⁰ The Murray Report, Chapter 13, p. 187.

⁵⁰¹ The Murray Report, Chapter 13, p. 188.

⁵⁰² The Murray Report, Chapter 13, p. 189.

⁵⁰³ The Murray Report, Chapter 13, p. 189.

⁵⁰⁴ The Murray Report, Chapter 13, p. 192.

The Murray Report recognizes that where an adjudication requires an adjudicator to consider many disputed items and where detailed and complex submissions have been made and extensive documentation has been delivered, the adjudicator's task can be expected to be more difficult and time consuming. Providing insufficient time will "very likely result in a sub-standard adjudication decision."⁵⁰⁵ However, the adjudication process "contemplates an adjudicator who is experienced in the industry being able to quickly identify the issues in dispute and make a decision and provide the reason for arriving at their conclusions in a clear and succinct manner."⁵⁰⁶ The Murray Report concluded that a cap on the extension of time for making a decision would help to ensure the rapid nature of the adjudication process "is not watered down and that an adjudicator is not able to apply any suasion on the parties to accept requests for an extension of time for making a decision."⁵⁰⁷

In the result, the Murray Report recommended that the adjudicator make his or her decision:

- a) 10 business days after the respondent has lodged an adjudication response, or
- b) such further time as agreed to by the parties, subject to the total timeframe for the adjudicator to make a decision being not more than 30 business days.⁵⁰⁸

In relation to the suspension of work, the review did not specifically seek stakeholder feedback on this issue and did not receive any comments.⁵⁰⁹ The Murray Report supported the current provisions set out in the New South Wales Act related to a claimant's right to suspend its work. In New South Wales, a claimant can suspend work where:

- (i) the respondent has delivered a valid payment schedule, but then fails to pay the scheduled amount by the due date;
- (ii) a payment schedule was not served in time and the respondent fails to pay the whole or any part of the claimed amount by the due date, or
- (iii) the adjudicated amount has not been paid by the relevant date (usually five days after an adjudication determination is

⁵⁰⁵ The Murray Report, Chapter 13, p. 192.

⁵⁰⁶ The Murray Report, Chapter 13, p. 192.

⁵⁰⁷ The Murray Report, Chapter 13, p. 193.

⁵⁰⁸ The Murray Report, Chapter 13, p. 194.

⁵⁰⁹ The Murray Report, Chapter 13, p. 208.

received). The claimant must give two days' notice prior to suspending the work.⁵¹⁰

In terms of enforcement, the Murray Report recommends that the "legislation should provide that if an authorised nominating authority or Regulator issues an adjudication certificate, the claimant can file the certificate as a judgement debt in any court of competent jurisdiction."⁵¹¹

Regarding ANAs, the Murray Report recommends regulating the oversight of ANAs in relation to all of its functions in order to address the lack of uniformity regarding the degree of regulatory oversight of ANAs.⁵¹²

In terms of the adjudicators themselves, under the East Coast model there are consistent provisions setting out procedures relating to the conduct of adjudication and the matters that an adjudicator is permitted to consider in making his or her decision.⁵¹³ The Murray Report recommends that:

In determining an adjudication application, the legislation should include provisions setting out:

- a) the procedures an adjudicator may follow in proceedings
- b) what an adjudicator is to determine
- c) the matters the adjudicator is to consider
- d) the format and information that the determination is to include, and
- e) that the adjudicator may, on their own initiative, correct errors, defects etc. in the determination.⁵¹⁴

Most East Coast model jurisdictions require an adjudicator to sign a conflict of interest form, but the Murray Report notes that legislation should clearly spell out the circumstances when an adjudicator will be disqualified due to conflict of interest and a process to address circumstances where a conflict of interest arises.⁵¹⁵

The Murray Report notes that most adjudicators arrive at a decision on a documents - only basis, although an adjudicator does have "the power to request the parties to provide further written submissions or to convene an

⁵¹⁰ Murray Report, Chapter 13, p. 209 and Adjudicate Today.

⁵¹¹ Murray Report, Chapter 13, p. 220.

⁵¹² Murray Report, Chapter 14, p. 225.

⁵¹³ Murray Report, Chapter 14, pp. 225-227.

⁵¹⁴ Murray Report, Chapter 14, p. 234.

⁵¹⁵ Murray Report, Chapter 14, pp. 227 and 232.

informal conference or carry out an inspection.⁵¹⁶ There is an express requirement for an adjudicator to consider the parties' submissions, which the Murray Report concludes:

...ought to be understood as an obligation to turn one's mind to each of the party's [sic] arguments and to then clearly outline why one party's arguments are preferred over the other. Indeed, the very nature of adjudication involves making a considered conclusion on two competing arguments and the parties are entitled to expect that the decision-maker will approach that task in good faith.⁵¹⁷

After reviewing the relevant caselaw, the Murray Report recommended that the legislation should include specific provisions requiring an adjudicator to decide his or her own jurisdiction.⁵¹⁸ In addition, the Murray Report noted that the "legislation should provide that an adjudicator's function (other than in respect to minor clerical tasks) is personal and non-delegable."⁵¹⁹

As noted in the Murray Report, the approach in Australia varies between jurisdictions in relation to an adjudicator's eligibility, criteria, and qualifications. The Murray Report noted that there is a compelling case to be made for a uniform approach. The Murray Report recommended that the legislation should provide for:

- a) the registration and renewal of adjudicators and for the suspension, cancellation or amendment of adjudicators' registrations, and
- b) a process for reviewing decisions associated with adjudicators' registrations.⁵²⁰

The Murray Report recommended that the Queensland Act and Regulations be followed in this regard, and as well that there be consequences set out in the legislation for adjudicators who have made technical errors or not acted in good faith if a finding has been made by the court in this regard.⁵²¹

In relation to fees, there are specific recommendations made for fixed fees for adjudications involving payment claims up to and including \$25,000 and capped fees for claims over \$25,000.⁵²²

⁵¹⁶ Murray Report, Chapter 14, p. 228.

⁵¹⁷ Murray Report, Chapter 14, p. 231.

⁵¹⁸ Murray Report, Chapter 14, pp. 232-234.

⁵¹⁹ Murray Report, Chapter 14, p. 234.

⁵²⁰ Murray Report, Chapter 14, p. 245.

⁵²¹ Murray Report, Chapter 14, p. 245.

⁵²² Murray Report, Chapter 14, p. 246.

Queensland is the only jurisdiction in Australia that provides that adjudicators' decisions are to be published, and the Murray Report did not recommend publishing adjudicators' decisions given their interim nature and the fact that they have been made within a compressed timeframe and essentially on a document-only basis.⁵²³

Finally, the Murray Report recommended that the legislation should provide protection from liability for adjudicators.⁵²⁴

C. Other International Jurisdictions

A number of other jurisdictions have implemented or are in the course of implementing adjudication legislation, including Singapore, Malaysia, Ireland, and New Zealand. There are some interesting distinguishing features adopted in some jurisdictions that differ from the UK model.⁵²⁵ For example:

- Singapore has utilized a more restrictive model where only a payee can initiate an adjudication;
- different criteria exist as to who can be an adjudicator, with some jurisdictions requiring certain professional designations and others relying more generally on the number of years of construction industry experience;
- in some jurisdictions, there is only one body that is responsible for training adjudicators and maintaining a roster (e.g. Singapore, Malaysia, and Hong Kong), and in other jurisdictions there are multiple bodies;
- in some jurisdictions, such as New Zealand, it is not possible to select an adjudicator prior to a dispute arising;
- in Singapore, only disputes related to payment matters can be adjudicated;
- in New Zealand, Malaysia, and Singapore, the conduct of adjudication proceedings is prescribed by legislation; and
- In Malaysia, an adjudicator is able to consolidate two or more adjudications in respect of the same subject matter with the consent of all parties and adjudicate the disputes together in the same adjudication proceedings.

With the exception of the UK, the majority of jurisdictions practising adjudication in relation to security of payment legislation do not keep

⁵²³ Murray Report, Chapter 14, pp. 251-252.

⁵²⁴ Murray Report, Chapter 14, p. 253.

⁵²⁵ For greater detail, see the website, www.constructionlienactreview.com for the Striking the Balance report.

accurate or updated statistics. In the Ontario review, we recommended that records be kept so that the successes and failures of adjudication can be tracked (as in the UK), in part to inform further regulation or necessary amendments to the legislation.

Recently, in May 2017, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) (i.e. the Malaysian Authorized Nominating Authority under the *Construction Industry Payment and Adjudication Act 2012*) published a paper for a conference entitled "Breaking Barriers".⁵²⁶ This paper provides detailed statistics on the success of adjudication in Malaysia since 2012. Among other statistics, the KLRCA reported that:

- A total of 547 cases were registered in the third fiscal year (2016-2017) on adjudication, which was a considerable increase from 84 cases in the first year (2014-2015)⁵²⁷
- In 2017 there were 446 adjudicators empanelled by the KLRCA.⁵²⁸
- 94.6% of all appointments in 2016-2017 were made by the director of the ANA, with 5.4% of the appointments based on parties' agreements.⁵²⁹
- The majority of claimants were subcontractors (47%), followed by contractors (40%).
- In relation to subject matter, the KLRCA reported that the two main types of dispute between 2016-2017 were interim payments (24%) and final account values (18%) (both of which have featured prominently since the implementation of Malaysia's prompt payment legislation). Other large categories are payments of professional fees (22%) and withholding notices (17% of claims).⁵³⁰
- It was reported that **93% of the proceedings were conducted by documents only** in the 2016-2017 period. Parties tend to opt for oral hearings only after consideration of the circumstances and complexities of the case.⁵³¹

⁵²⁶ KLRCA CIPAA Conference 2017 Paper – Breaking Barriers – 17 May 2017 [KLRCA Report] <https://aiac.world/wp-content/KLRCA-guides-and-special-reports/KLRCA-CIPAA-Report-2017/PDF.pdf>

⁵²⁷ KLRCA Report at p. 5.

⁵²⁸ KLRCA Report at p. 13.

⁵²⁹ KLRCA Report at p. 6.

⁵³⁰ KLRCA Report at p. 8.

⁵³¹ KLRCA Report at p. 9.

- Of the decided Adjudications, 98.1% of parties were satisfied with the outcome.⁵³²

(ii) Ontario

Adjudication is a key element of the new *Construction Act* in Ontario. The adjudication provisions of the *Act* will come into force in October 2019.

The key elements of the legislation include:

- targeted interim binding adjudication in relation to a defined set of issues focussed on payment disputes;
- available to all participants in the construction pyramid on projects in both the public and private sectors;
- consolidated adjudications are permitted;
- adjudicators will have significant experience in the construction industry;
- there will be a single Authorized Nominating Authority created to administer all adjudications;
- parties cannot agree in advance to the adjudicator;
- adjudicators have immunity from liability;
- adjudicators will have considerable discretion in setting procedures; and
- the total time frame of an adjudication will be 46 days, unless extensions are agreed to.

Adjudication will be available in respect of a defined set of issues, as set out under Section 13.5 of the *Construction Act*, which provides as follows:

13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).

⁵³² KLRCA Report at p. 17.

5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.⁵³³

In Ontario, the single Authorized Nominating Authority will be designated by the Ministry of the Attorney General through an application process. The Authorized Nominating Authority will be responsible for a number of duties relating to adjudicators and adjudications including: developing and overseeing adjudicator certification programs, providing ongoing education to adjudicators, certifying and de-certifying adjudicators, establishing and maintaining a registry of adjudicators, maintaining a schedule of adjudicator fees, establishing an adjudicator code of conduct, preparing an annual report on adjudications and appointing adjudicators upon the application of a party.

The Authorized Nominating Authority is a critical component to the success of the Ontario model in that it provides a mechanism by which parties can guarantee the prompt selection of an adjudicator and avoid further delays associated with other dispute resolution mechanism (e.g. arbitration).

3. Stakeholder Input

A number of stakeholders responded to the questions posed in our Information Package by way of written submissions. Those responses are summarized in Appendix 4 to this Report. Below we briefly describe some of the insights that were gleaned from our stakeholder engagement sessions.

(a) Varied Experiences with Dispute Resolution

Government stakeholders advised that few disputes arose in relation to their projects and when disputes did arise, they were resolved without the need to resort to litigation or arbitration.⁵³⁴

Industry stakeholders expressed differing perspectives on the issue of how disputes are addressed on federal construction projects. In some instances, stakeholders expressed concern that they were pressured to settle matters at lower than the actual value of their claims because the dispute resolution process was weighted in favour of the owner. Some also noted that it was

⁵³³ Construction Act, s. 13.5.

⁵³⁴ Meetings with PSPC, DCC, NCC, NRCC, Agriculture and Agri-Food Canada, and Canada Post.

very time consuming to pursue a dispute through the dispute resolution mechanisms of the contract and expensive to pursue litigation or arbitration.

The fact that there are no liens in relation to federal projects was raised as a concern by stakeholders because stakeholders cannot pursue a remedy by delivering a lien and pursuing a lien action, which is perceived by some as a more effective and efficient dispute resolution mechanism than a breach of contract action.

(b) Timing of and Participation in Adjudications

In respect of existing alternative dispute resolution mechanisms, being negotiation, mediation, and arbitration, stakeholders asked about the interplay between existing dispute resolution mechanisms and adjudication. In other jurisdictions, adjudication works alongside existing contractual dispute resolution mechanisms such that parties are able to institute an adjudication at their discretion without having to go through any particular contractual dispute resolution mechanisms as a pre-condition to adjudication. From the owner perspective, this process raised some concerns as expressed by stakeholders such as DCC and PSPC. These government stakeholders view existing dispute resolution mechanisms as being effective and well understood by project participants.⁵³⁵ As noted above, some government owner stakeholders advised that they have not been involved in many disputes on their projects to date.⁵³⁶ They noted that existing disputes have been focused primarily, in their view, at the general contractor-subcontractor level and downwards,⁵³⁷ and they did not want to be drawn into an excessive number of adjudications.

As a result, some government owner stakeholders raised general concerns about an increased number of disputes requiring their involvement, if adjudication is introduced.⁵³⁸ Owners expressed particular concern about this risk in the context of consolidation.⁵³⁹

The issue of whether or not consolidated adjudications should be permitted was a matter of significant discussion at various stakeholder engagement sessions. Some expressed concern about the potential frequency of

⁵³⁵ Meetings with DCC and PSPC.

⁵³⁶ Meeting with Canada Post.

⁵³⁷ Meeting with BGIS.

⁵³⁸ Meetings with BGIS, PSPC, and DCC.

⁵³⁹ Meetings with PSPC and DCC.

consolidated adjudications, the complexity of these adjudications, and the timeline within which they would take place.⁵⁴⁰

Others raised questions about whether subcontractors as well as general contractors should be entitled to consolidate adjudications.⁵⁴¹

There was also discussion in a number of meetings about whether there should be a time limit for subcontractors to bring an adjudication so that the adjudications do not extend beyond a reasonable timeframe.⁵⁴² Some government owner stakeholders suggested that consideration be given to implementing a provision similar to a notice provision in a contract, providing that adjudications could not be commenced unless notice was provided within a certain number of days of the dispute arising.⁵⁴³

(c) Types of Disputes to be Adjudicated

As previously discussed, some stakeholders suggested that there be a threshold in relation to a dollar amount or level of complexity beyond which a matter would not be adjudicated.⁵⁴⁴

A number of owner-side stakeholders suggested that delay claims in particular were not amenable to resolution through adjudication.⁵⁴⁵

In terms of broadening the potential scope of matters to be adjudicated, at one meeting the issue of whether or not adjudication might be applied to surety bond disputes, and particularly both labour and material payment bond disputes and performance bond disputes, was raised.

With respect to the issues to be addressed on adjudication, some stakeholders suggested that adjudication should also apply to design professionals in relation to issues such as indirect costs for additional work and unforeseen site conditions.⁵⁴⁶

(d) Adjudicator Selection and Qualifications

In terms of the timing of the selection of an adjudicator, stakeholders favoured the prompt selection of an adjudicator. Some suggested that an adjudicator could be selected at the outset of the contract, though

⁵⁴⁰ Meetings with Canadian Counsel for Public-Private Partnerships and Construction Association of New Brunswick.

⁵⁴¹ Meeting with Canadian Construction Association.

⁵⁴² Meeting with Canadian Construction Association.

⁵⁴³ Meeting with PSPC.

⁵⁴⁴ Meeting with DCC.

⁵⁴⁵ Meeting with DCC.

⁵⁴⁶ Meeting with General Contractors Alliance of Canada – Quebec.

acknowledged that this might provide opportunities for an owner to essentially select the adjudicator, as the owner may create the form of contract that would be delivered with the bid documents and name an adjudicator in that form. Another concern raised was that the adjudicator named in the contract documents might not be available by the time an adjudication took place if named in the contract because of lack of availability, illness or otherwise.⁵⁴⁷

A number of stakeholders also commented on the need to have the ability to select an adjudicator who was well-suited to adjudicate particular kinds of disputes. An example given was that if a dispute is technical in nature, then the adjudicator ought to have technical experience and expertise in order to adequately understand and adjudicate the dispute.⁵⁴⁸ Various mechanisms were discussed in relation to how parties might be able to identify adjudicators with the appropriate expertise both in terms of the categorization of adjudicators within the listing made available to parties by the Authorized Nominating Authority and by requiring the Authorized Nominating Authority to select adjudicators with defined areas of expertise.

In relation to potential adjudication on Indigenous projects, one stakeholder made the point that if adjudication is introduced on Indigenous projects, cultural differences will have to be taken into consideration, including cultural differences as to decision-making processes and the need for consultation.⁵⁴⁹ Another stakeholder asked whether there should be Indigenous adjudicators on projects involving Indigenous participants.⁵⁵⁰

A number of stakeholders raised the challenges of conflicts of interest arising if there is a small pool of adjudicators to draw from in a specific jurisdiction.⁵⁵¹ If there is a national pool of adjudicators, some stakeholders wondered if there were differences in the law to be applied across the country that might affect the outcome of an adjudication decided by an adjudicator from a jurisdiction outside of his or her home province or territory.⁵⁵² It was noted in response that international arbitrators seem to be able to manage this issue.

⁵⁴⁷ Meetings with General Contractors Alliance of Canada – Quebec and Newfoundland and Labrador Construction Association.

⁵⁴⁸ Meeting with Canadian Institute of Quantity Surveyors.

⁵⁴⁹ Surety Association of Canada Meeting.

⁵⁵⁰ Meeting with Canadian Construction Association.

⁵⁵¹ Meetings with Canadian Bar Association and Department of Transportation, Infrastructure and Energy, Prince Edward Island.

⁵⁵² Meeting with Canadian Construction Association.

In relation to adjudicators with particular expertise, some stakeholders noted that for P3 projects, it would be necessary for adjudicators to have expertise on P3 projects in particular.⁵⁵³

DCC noted that adjudicators may require appropriate security clearances if they are to adjudicate disputes involving projects with security clearance requirements, which many DCC projects require.⁵⁵⁴

In addition to the complexities of P3 projects, stakeholders raised issues about other types of complex projects that might require specialized expertise of adjudicators to understand the nature of the project and the technical issues in dispute.⁵⁵⁵

In more sparsely populated communities, concern was expressed about adequate access to local adjudicators.⁵⁵⁶ In the North, it was noted that adjudicators should have Northern knowledge in order to understand the challenges specific to the region.⁵⁵⁷

In relation to the qualification of adjudicators, a number of stakeholders advocated strongly for the need for adjudicators to have significant Canadian experience.⁵⁵⁸

A number of stakeholders asked about the training of adjudicators. It was emphasized that appropriate training was necessary to ensure that adjudicators properly understood their role and function so that some of the problems encountered in other jurisdictions, including Australia, were not replicated in Canada.⁵⁵⁹

Some stakeholders asked questions about an adjudicator's ability to interpret the contract if he or she were not a lawyer. It was pointed out that many disputes would require an adjudicator to interpret the contract, including disputes about whether a particular request for a change order was or was not a change under the terms of the contract at issue.⁵⁶⁰

The timely selection of appropriate adjudicators is crucial to the success of an adjudication regime, as was noted by many stakeholders and as we have seen from the experiences in other jurisdictions.

⁵⁵³ CCPPP Meeting Summary.

⁵⁵⁴ DCC Meeting Summary.

⁵⁵⁵ Meeting with Construction Association of New Brunswick.

⁵⁵⁶ Meeting with Government of North West Territories, Department of Infrastructure.

⁵⁵⁷ Meeting with Yukon Government.

⁵⁵⁸ Meeting with CCA.

⁵⁵⁹ Meeting with Canadian Institute of Quantity Surveyors.

⁵⁶⁰ Meeting of the Construction Association of New Brunswick.

(e) Adjudication Process

Concern was expressed about the party bringing an adjudication having time to obtain documents and evidence prior to launching an adjudication process, such that the responding party would not be able to respond adequately to such carefully gathered evidence within the timeframes available given the speed of an adjudication process.⁵⁶¹ Some stakeholders were aware of and commented on the "smash and grab" phenomenon from the UK that is described above.

Stakeholders expressed concern that adjudication needs to be fair to everyone involved and noted that providing an adjudicator with inquisitorial powers would provide for a more effective process.⁵⁶²

Generally, we received a great deal of support for the Ontario adjudication process.

(f) Costs of Adjudication

Stakeholders were curious about how the fees for adjudication would be determined and expressed some concern that these fees would be too high (as in litigation). There were discussions about the fact that adjudication fees can be negotiated directly with an adjudicator or there would be a fee schedule set by the Authorized Nominating Authority.⁵⁶³

(g) Additional Suggestions

Concern was expressed by a number of stakeholders about what would be confidential in an adjudication process. Some stakeholders were of the view that adjudication decisions should be made public so that there would be information publicly available about the past history of a particular owner or contractor.⁵⁶⁴ Others were concerned about matters of commercial sensitivity being disclosed publicly if an adjudicator's decision were to be released.⁵⁶⁵

The CBA recommended that we take a "wait-and-see" approach to adjudication and test out the Ontario model. Otherwise, the CBA recommended that the federal government focus on existing government contractual mechanisms or create a legislative scheme that includes a

⁵⁶¹ Meeting with DCC.

⁵⁶² Meeting with General Contractors Alliance of Canada – Quebec.

⁵⁶³ Meeting of the Construction Association of Nova Scotia.

⁵⁶⁴ Meeting with Prompt Payment Manitoba.

⁵⁶⁵ Meeting with Department of Transportation, Infrastructure and Energy, Prince Edward Island.

default to adjudication unless the federal entity has a fast track dispute resolution mechanism in its contract. Alternatively, the CBA suggested we recommend an adjudication ‘light’ process whereby payment disputes are subject to a 30-day decision-making process.⁵⁶⁶

4. Analysis and Recommendations

In general, we received positive feedback about implementing adjudication as a mechanism to support prompt payment and to accelerate the completion of federal construction projects.

As described above, concerns were expressed by general contractor and trade contractor stakeholders about the current federal system because there is no ability to register a construction lien.

Having said this, adjudication, like any dispute resolution mechanism, is not perfect. Commentators have noted that its very speed can be a weakness, particularly for a party responding to an adjudication who will have less time to prepare its case than the party referring the matter to adjudication. Sometimes, a responding party can be caught off-guard, particularly when the notice of adjudication is deliberately delivered at an inconvenient time.⁵⁶⁷ This concern can be ameliorated through procedural protections, as will be discussed below.

The speed of the process also affects the quality of the submissions and the evidence presented to an adjudicator.⁵⁶⁸ Some adjudicators have been subjected to criticism for the quality of their decisions, which is why the qualification, training, and certification of adjudicators is so important. Feedback as to the need for qualified adjudicators was also consistently given and stressed in the context of federal projects that have geographical and technological challenges. For example, some CBA members stated that the “scope of federal projects, combined with the vastness of Canada, raises questions about the efficiency of a federal adjudication process in the traditional sense; in-person adjudications appear impractical.”⁵⁶⁹ These same challenges, the CBA has noted, are less of an issue in smaller geographical areas such as a province or territory.

It is also important that the Authorized Nominating Authority be an efficient and competent organization capable of assessing the qualifications of

⁵⁶⁶ CBA Submission at p. 10.

⁵⁶⁷ James Pickavance, *A Practical Guide to Construction Adjudication*, p.23

⁵⁶⁸ James Pickavance, *A Practical Guide to Construction Adjudication*, p.21-22

⁵⁶⁹ CBA Submission at p. 9.

adjudicators, selecting appropriate adjudicators, and conducting thorough training programs.

Some have raised concerns about using adjudication as a mechanism to resolve large disputes which may involve many issues and sub-issues and considerable volumes of documents. As noted above, concern has been raised about delay claims in particular as being complex and not amenable to resolution by adjudication.

However, in general, there was support for adjudication across the country at various levels of the construction pyramid and industry participants favoured the introduction of a faster and more efficient process than litigation.

Recommendation 21

Adjudication should be adopted as a targeted dispute resolution mechanism to support prompt payment.

(a) Who Can Require Adjudication

Stakeholders did not express concerns about all participants in a federal construction project having the ability to commence an adjudication, but some did have concerns about who would be necessary participants in those adjudications and what the timing would be. The policy reason for such concerns is that the nature and timing of an adjudication process should be fair and reasonable for all parties, including owners, general contractors, subcontractors, and suppliers.

Stakeholders noted that adjudication should be an "all-in" mechanism such that all parties in the pyramid should be included, regardless of the contractual structure. For example, in relation to P3 projects, it was emphasized that government sector participants should participate in an adjudication. Some stakeholders proposed extending the parties participating in adjudication to insurers and sureties. This topic will be addressed below in considering the types of disputes to be adjudicated, but we note that given the time available for this review and the issues we were asked to focus on, we have not consulted with insurers.

Recommendation 22

All participants in the construction pyramid on federal government projects (including owners, general contractors, subcontractors, and suppliers), should be permitted to commence an adjudication.

(b) When Can Adjudication Be Required

Some stakeholders noted that they already use alternative dispute resolution mechanisms in their contracts and that these mechanisms should be utilized prior to an adjudication taking place, as noted above, and given the concern about being forced to participate in frequent adjudications.

However, one of the advantages of adjudication is that disputes can be adjudicated "at any time." Statutory adjudication is said to "cut through multi-tiered procedures."⁵⁷⁰

We note that the experience in international jurisdictions is that many of these other dispute resolution mechanisms continue to be used, even after adjudication is introduced. For example, in the United Kingdom, following the introduction of adjudication the number of mediations conducted actually increased.⁵⁷¹ In the UK, other forms of dispute resolution, including mediation, arbitration, and litigation can take place concurrently with adjudication.

As noted above, some stakeholders expressed the view that there should be a period of time after a payment dispute arises within which an adjudication must be commenced.

In the UK, parties have been permitted through their contracts to effectively limit the right to commence an adjudication "at any time." For instance certain forms of contract provide that the final payment certificate shall have effect in any proceedings under or arising out of or in connection with the contract as conclusive evidence of the matters listed in the certificate unless adjudication proceedings are commenced within 28 days of its issuance.⁵⁷²

In considering such requests to limit the timeframe within which adjudications can be commenced, we were mindful of the onerous burden such requirements may place on the party commencing the adjudication, but at the same time, the introduction of a prompt payment and adjudication regime is intended to create a process that provides parties with an opportunity to exercise their rights in a timely way, should they choose to do so. Particularly in relation to a final payment certificate and the completion of a project, it would not be in keeping with the policy objective of ensuring that

⁵⁷⁰ James Pickavance, *A Practical Guide to Construction Adjudication*, p.120

⁵⁷¹ Dr. Robert Gaitskill, "UK: Adjudication: Its Effect on Other Forms of Dispute Resolution (the UK Experience) 2005.

⁵⁷² *Tract Bennett v. FMK Construction Ltd.* [2005] EWHC 1268 at 18., James Pickavance, *A Practical Guide to Construction Adjudication*, p.121

disputes are addressed swiftly if the adjudication process extends beyond completion of the project.

Recommendation 23

Adjudication should be permitted to be commenced from the outset of construction until final completion of the prime contract. The right to invoke adjudication should not extend beyond completion of the contract.

In relation to the "smash and grab" phenomenon and the Christmas Eve delivery of a notice of adjudication, the Murray Report recommended that a careful definition of what constitutes a business day could help to curb the use of such tactics. This recommendation in respect of the counting of days merits consideration, in our view.

Recommendation 24

The legislation should provide that the period from December 24 to January 2 should be excluded from the counting of days for the purposes of adjudications.

(c) Who Should Adjudicate a Dispute

Adjudications are conducted by one person and not a panel, team, or partnership because, given the speed at which adjudication takes place, the experience in other jurisdictions has been that one individual should retain decision-making responsibility.

In terms of stakeholder feedback, many stakeholders emphasised the need for an adjudicator to be knowledgeable in the particular subject matter of the dispute. Adjudicators who may be suited for one type of dispute may not be suited for another type of dispute.

Keeping in mind the importance of the expertise of adjudicators, some stakeholders advocated that adjudicators should necessarily be a member of a defined set of professional associations, for example architects, engineers and lawyers while others noted that experienced construction executives and project managers may well be suited to be adjudicators, despite the fact that they do not have a professional accreditation.

A specified minimum number of years of construction experience was also suggested by some stakeholders. There was disagreement among stakeholders as to whether or not that construction experience needed to be in the Canadian context. Some stakeholders advocated a specific number of years of Canadian experience. For example, the GCAC suggested that adjudicators should be individuals with a minimum of seven years of construction work experience, five of which should be Canadian experience.

Other stakeholders were focused on the areas of expertise of the adjudicator including, for example, if an adjudicator is going to adjudicate a P3 dispute, that adjudicator should have experience on P3 projects. Other stakeholders framed their suggestions in terms of "subject matter" expertise.

In relation to subject matter expertise, a number of stakeholders have noted that it should be possible for the parties to identify from a roster of potential adjudicators the areas of expertise of those adjudicators so an appropriate subject matter expert can be selected. Also, some stakeholders have suggested that it should be possible for the Authorized Nominating Authority not to just choose the next name on a roster, but to choose the next qualified name by clearly identifying an adjudicator with the appropriate expertise.

As noted above, security clearance requirements may be necessary for adjudicators dealing with disputes on projects with security clearance requirements or sensitive information (i.e., in relation to the Security Policy).

Nearly all stakeholders advocated that adjudicators needed to be trained and certified by an appropriate body. Many commented on the necessity to develop a thorough education program, particularly since adjudication is a new process in Canada.

In relation to the availability of adjudicators nationally, a number of stakeholders commented on their concern that in smaller jurisdictions there may be significant conflicts of interest and/or a smaller pool of adjudicators to draw from. We note that it would be necessary to create a national pool of adjudicators to draw from in order to have sufficient ability for a stakeholder to find an adjudicator in any part of the country. In stakeholder engagement sessions, it was discussed that, given that many adjudications will take place in writing, by telephone, or by video conference, the need for geographic proximity is not strictly necessary. Others, however, stressed the need for specialized knowledge, for example the need for winter construction experience in relation to disputes in the Northern parts of Canada.

Recommendation 25

There should be a single adjudicator who has the responsibility to make a determination on matters within his or her expertise. Federal adjudicators should have:

- no conflicts of interest;
- significant defined experience in the construction industry, and experience levels should be carefully defined and include a minimum number of years;
- successfully undertaken a thorough training and certification program run by an Authorized Nominating Authority, paid the associated fees, and agreed to abide by the requirements for holders of certificate including complying with the code of conduct;
- no criminal record;
- no record of an undischarged bankruptcy; and
- satisfied any security clearance requirements of the federal government as appropriate for the nature of the federal construction project at issue.

In other jurisdictions, the legislation makes it clear that adjudicators have no liability. This principle of statutory immunity is generally applied to arbitrators and mediators as well. It is generally not contentious, as was noted in the Murray Report.⁵⁷³

There are good policy reasons behind such provisions, as appropriately qualified individuals would be disinclined to become adjudicators if there was a risk of personal liability.

Recommendation 26

Adjudicators should have immunity from suit.

If one of the objectives of security of payment legislation is to enable cash to flow quickly, then allowing an adjudicator's decision to be reviewed would

⁵⁷³ Murray Report, pp. 252-253.

"run the risk of protracting the process and so slow down the flow of cash."⁵⁷⁴ On the other hand, if "the nature of the rapid adjudication process, particularly where it involves disputed payments claims for large amounts, results in adjudication decisions which are perceived to be clearly wrong, then considerable injustice may be inflicted."⁵⁷⁵ What we tried to do in respect of our recommendations in Ontario was to strike a balance between these competing concerns so as to provide for limited judicial review of decisions, but to avoid the circumstance that has arisen in Australia where many adjudication decisions have been set aside. We did not go as far as the Murray Report which has recommended a separate review process and we are not of the view that such a process is justified in the federal context either. Under Ontario's *Construction Act*, an adjudicator's decision will be set aside in the following circumstances:

13.18(5) The determination of an adjudicator may only be set aside on an application for judicial review if the applicant establishes one or more of the following grounds:

1. The applicant participated in the adjudication while under a legal incapacity.
2. The contract or subcontract is invalid or has ceased to exist.
3. The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication.
4. The adjudication was conducted by someone other than an adjudicator.
5. The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject under this Part, and the failure to comply prejudiced the applicant's right to a fair adjudication.
6. There is a reasonable apprehension of bias on the part of the adjudicator.
7. The determination was made as a result of fraud.⁵⁷⁶

⁵⁷⁴ Murray Report, p. 200.

⁵⁷⁵ Murray Report, p. 200.

⁵⁷⁶ *Construction Act*, s. 13.18(5).

Recommendation 27

Judicial review of adjudication decisions should be permitted based on limited specified grounds, following the Ontario model, but parties should be free to subsequently litigate or arbitrate their disputes as the adjudicator's decisions are only binding on an interim basis.

(d) How An Adjudicator Should Be Nominated

In most jurisdictions, the party who refers a matter to adjudication will, at the time the matter is referred, request the appointment of an individual as an adjudicator.

In some jurisdictions, parties are able to name an adjudicator in the contract. In Ontario, it was determined that an adjudicator could not be named in the contract given that, by the time of an adjudication that individual may no longer be available and also given the potential inequality of bargaining power that may enable the owner during the bidding or proposal phase of a project to name the adjudicator through the draft form of contract circulated at that time. As James Pickavance notes, a further disadvantage of listing an individual in the contract is that:

...parties are unlikely to be able to predict the nature of the disputes that will arise at the point in time when the contract is drafted. It may well be therefore that the named adjudicator is available and willing to act, but does not have the expertise to decide the dispute in question.⁵⁷⁷

As noted below, we have recommended that parties should be permitted to agree on an adjudicator after the dispute arises. If however, the parties cannot agree as to who their adjudicator will be, an Authorized Nominating Authority plays a key role in quickly selecting an adjudicator with the appropriate skill set to determine the dispute at issue.

As James Pickavance also notes, in respect of the responsibility of someone approached to perform an adjudication:

When an individual is approached with a request for an appointment, it is incumbent upon that individual to satisfy himself [or herself] that, as a minimum, he [or she] has the requisite expertise to decide the dispute, that he [or she] has the capacity to take on the appointment and that he [or she] has no conflict of interest. There may be additional stipulations that

⁵⁷⁷ James Pickavance, *A Practical Guide to Construction Adjudication*, p. 162.

adjudicator nominating bodies require adjudicators to meet, both before the individual's appointed to the adjudicator nominating body panel and before he [or she] accepts the appointment.⁵⁷⁸

After an adjudicator is appointed, the adjudicator will go through the process of obtaining the agreement of the parties to the terms of his or her appointment. In practice, the adjudicator will communicate with both parties on the process to be undertaken in the adjudication that suits the dispute at issue.

Stakeholders generally were supportive of the notion that they should have the ability and opportunity to first attempt to agree on an adjudicator themselves prior to any involvement by an Authorized Nominating Authority.

In Ontario, we recommended that an adjudicator not be selected until after a dispute arises because:

- (a) The inequity of bargaining power that exists at the outset of contractual negotiations will allow the owner to select the adjudicator;
- (b) The adjudicator may not be available; and
- (c) The adjudicator may not have the appropriate expertise for the specific dispute at issue.

Notably, if the parties are not successful in agreeing on an adjudicator within a relatively short period of time, most stakeholders agreed that one solution would be to have an adjudicator chosen for them utilizing the model in place in other jurisdictions, like the UK.

Some stakeholders suggested that there should be more than one body that could be responsible for the nomination of adjudicators. In other jurisdictions, there is sometimes one authorized nominating authority and sometimes multiple authorized nominating authorities. For example, in the UK there are 25 adjudicator nominating bodies. In those jurisdictions where there are multiple authorized nominating bodies, some commentary indicates that there is a disparity as to the quality of the various authorized nominating authorities. The Murray Report noted that there is no uniformity regarding the degree of regulatory oversight of ANAs.⁵⁷⁹ He specifically recommended that the legislation should contain provisions regulating the oversight of ANAs.⁵⁸⁰

⁵⁷⁸ James Pickavance, *A Practical Guide to Construction Adjudication*, p. 145.

⁵⁷⁹ John Murray Report, p. 222.

⁵⁸⁰ John Murray Report, p. 225.

Almost all stakeholders agreed that there should be an Authorized Nominating Authority. Some proposed that the provincial Authorized Nominating Authorities could be utilized for this purpose.⁵⁸¹

However, the Quebec Coalition proposed that the parties be permitted to agree on an adjudicator in their contract and if not, then that the party delivering a notice of adjudication would propose three potential candidates and the party receiving the notice would have five days to respond indicating whether it accepted one of those three, and if the parties did not agree that they could ask a representative appointed by the Minister of Justice to appoint an adjudicator.

We note that the experience in relation to selection of arbitrators indicates that it can take a significant amount of time to select arbitrators if there is no appointment mechanism other than seeking relief from the appropriate court. Therefore, assigning this responsibility to an Authorized Nominating Authority within a defined timeframe, similar to that in the Ontario legislation, so that the speed of the adjudication process is maintained would, in our view, be appropriate.

Recommendation 28

The parties should be able to select an adjudicator after a dispute arises (but not before as part of the contract or otherwise) and they should have a short defined period of time to do so. We suggest 4 days after the notice of adjudication is delivered. If they cannot agree, then the Authorized Nominating Authority should appoint the adjudicator.

(e) The Role of An Authorized Nominating Authority

In certain stakeholder engagement sessions, stakeholders proposed that there be no authorized nominating authority. However, given the importance of a rapid selection of an adjudicator to the overall speed of the process, we view it as fundamental that there be an authorized nominating authority to train, certify, select and regulate adjudicators. We have reviewed examples in the arbitration context where parties cannot agree on an arbitrator and are bogged down for months, sometimes even years, of court proceedings in order to agree on an arbitrator. In order for adjudication to function effectively, such delays would need to be avoided to the extent possible.

⁵⁸¹ See for example, PSPC Submission at p. 21 where PSPC proposes a system of adjudication that first identifies whether a particular province has an adjudication system available.

We recognize that PSPC in its draft adjudication procedure did not include an ANA, but as is apparent from the international experience, the ANA is critical in incentivising parties to agree on an adjudicator and, if they cannot agree, then in selecting an adjudicator quickly – in a week or less in most jurisdictions.

A number of stakeholders have supported the notion that the role of Authorized Nominating Authority could, possibly at first instance or permanently, be assigned to a Minister of the federal government to ensure that this role could be effectively delegated and implemented.

The alternative would be to utilize a private entity selected through a fair and transparent procurement process.

In general, stakeholders were supportive of the model in Ontario, where the Authorized Nominating Authority will be a private entity selected through an application process.

Recommendation 29

The federal government should determine whether one of its departments (e.g., the Department of Justice) or a private entity should fulfill the role of ANA, depending on resourcing constraints, and if the federal government requires additional time to consider this issue, then it should craft the legislation such that this function can be performed by a public or private entity, as long as that entity is able to perform the following functions effectively.

Recommendation 30

The Authorized Nominating Authority should be created and should be responsible for:

- Developing and providing training and continuing education for adjudicators;
- Certifying, renewing certifications, withdrawal of certifications for adjudicators, and ensuring that adjudicators meet all prescribed criteria;
- Maintaining a publicly available registry of qualified adjudicators that lists and categorizes qualifications and any other relevant information prescribed;
- Appointing an adjudicator where the parties are unable to choose their adjudicator within the timeframe required;
- Regulating the conduct of adjudicators, including establishing a code of conduct;
- Addressing complaints against an adjudicator in relation to breaches of the code of conduct, including establishing a complaints procedure;
- Addressing circumstances where adjudicators have resigned and appointing replacements;
- Reporting on adjudications (in a similar manner to the CDR in the UK) such that an annual report would be prepared by the Authority providing statistics on adjudication, so that ongoing assessments can be made about the success of adjudication. This report should be publicly available; and
- Establishing and maintaining a fee schedule and authorize fees where the parties do not agree.

(f) The Types of Disputes that Should be Subject to Adjudication

Stakeholders expressed concern about certain types of disputes being adjudicated. In particular, concern was expressed about the adjudication of delay claims. It was noted that adjudication timelines are too aggressive for

such complex disputes. As well, stakeholders expressed concerns about large dollar value disputes being adjudicated.

A threshold was suggested by some stakeholders. At the upper end of the spectrum, based on the international experience, some suggested that the procedure should permit extension of the time of adjudications for more complex disputes. We note that disputes of a large size can be and have been adjudicated in other parts of the world. We therefore suggest that a cap not be imposed, but rather that adjudication procedures allow for extensions.

Other stakeholders expressed the view that disputes in relation to a broad range of issues should be subject to adjudication, including insurance policy disputes and surety bond disputes.

Recommendation 31

Adjudication should be applied in relation to a defined set of issues focussed on payment disputes including the following:

- valuation of services or materials;
- payment under the contract/change orders;
- disputes in respect of notices of non-payment;
- set-offs;
- holdback payments;
- non-payment of holdback; and
- issues that the parties may agree to be part of an adjudication.

(g) The Adjudication Process

(i) Timelines

We recommend that the process not be too prescriptive. An adjudicator should be able to play the role of an inquisitor and to shape the process to suit the dispute, following the model in Ontario. The process in Ontario is intended to function as follows:

- A dispute arises;
- A claimant delivers a notice of adjudication in the form specified under the *Construction Act* and that proposes an adjudicator;

- The parties can either agree on the adjudicator or elect to have the Authorized Nominating Authority appoint an adjudicator within a specific timeframe;
- The adjudicator receives the notice of adjudication and documents the claimant intends to rely upon;
- The adjudicator sets the process;
- The responding party is given a right of reply; and
- The adjudicator makes a determination within 30 to 44 days (from receipt of the claimant's documents), unless the parties agree to an extension.

Recommendation 32

There should be clear timelines including the following:

- A notice of adjudication delivered by the claimant should be the start of the process. The notice of adjudication should set out essential details of the nature and a brief description of the dispute, the nature of the redress sought by the claimant and also the name of the proposed adjudicator to conduct the adjudication;
- The parties should then agree on the proposed adjudicator, or another adjudicator, or request that an adjudicator be appointed;
- If the parties agree on an adjudicator, an adjudicator should have four days to consent to conduct the adjudication following receipt of the notice of adjudication;
- If the parties do not agree on an adjudicator, the Authorized Nominating Authority, upon receiving a request to appoint an adjudicator, should have seven days to appoint an adjudicator;
- Five days after appointment of the adjudicator, the referring party should provide the adjudicator and the other party with the documents that party relies on;
- After the adjudicator receives documents from the referring party, the responding party should have a right of reply within a stipulated time period extended as necessary by the adjudicator;
- Thirty days after receiving documents, the adjudicator should make a determination (can be extended on consent after a request by the adjudicator for up to 14 days, or a longer period of time if agreed to by the parties);
- Copies of the notices of adjudication should be provided to the Authorized Nominating Authority (even if the parties agree on the adjudicator);
- Subject to extension by agreement, the entire process would be concluded in 46 days; and
- Following a determination, payment should be made within 10 days, failing which a right to suspend should arise as well as mandatory interest.

(ii) Single-Tier System

Some jurisdictions have a two-tiered system of adjudication, one for complex disputes and one for simple disputes, of a smaller dollar value. Having a multi-tiered system can cause confusion and add a significant degree of complexity. However, in our view, there should be flexibility in the process particularly in relation to giving the respondent an adequate opportunity to respond.

Recommendation 33

There should be one model of adjudication, but there should be some flexibility in relation to the timeframe for the completion of adjudications, and adjudicators should be provided with mechanisms to exercise some flexibility in relation to scheduling.

(iii) Powers of an Adjudicator

Based on international experiences, there is a defined set of powers of an adjudicator to provide the adjudicator sufficient scope to make a determination. Generally, these powers can be expanded by way of contract.

Recommendation 34

We recommend that adjudicators be given the following powers:

- Issuing directions respecting the conduct of the adjudication.
- Taking the initiative in ascertaining the relevant facts and law.
- Drawing inferences based on the conduct of the parties to adjudication.
- Conducting an on-site inspection of the improvement that is the subject of the contract or subcontract.
- Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question.
- Making a determination in the adjudication.
- Any other power that may be prescribed.

(iv) Consolidation and Multiple Issue Adjudication

Consolidation of adjudications was one of the most difficult issues we addressed in the Ontario review. Permitting consolidation in Ontario was a key element of obtaining consensus amongst stakeholder groups. At the federal level, we received consistent support for consolidation in the stakeholder engagement process from contractors, subcontractors, and suppliers.

However, as noted above, some stakeholders from the federal owner community expressed concern about being drawn into multiple adjudications, which will cause an increased burden in terms of responding to adjudications. These stakeholders point out that they have well-established alternative dispute resolution mechanisms in their contracts and do not want to be drawn into disputes at lower levels of the construction pyramid. Yet, for other stakeholders, the ability to consolidate adjudications is key so that the ultimate payor is a party to a dispute in circumstances where the reason for the lack of payment relates back to that payor.

Recommendation 35

A carefully crafted set of provisions should be created to permit consolidation, but with appropriate constraints and timelines. Consolidation should be permitted if all parties agree or if the general contractor requests it, subject to timing constraints.

An adjudication is typically only related to a single matter. In Ontario, we recommended that adjudications may only address a single matter, unless the parties to the adjudication and the adjudicator otherwise agree. In other jurisdictions, this is a typical requirement in order to ensure adjudications are achievable within the narrow timelines required. We agree with this rationale. That said, we recognize the importance of allowing multiple matters to be considered in consolidated adjudications.

Recommendation 36

Adjudications should consider a single matter only, except in the context of a consolidated adjudication, or as agreed.

(v) Confidentiality

In terms of the confidentiality of adjudications, as noted above, confidential documents that are commercially sensitive may be disclosed in an adjudication. Understandably, as noted above, concern was expressed by certain stakeholders about this confidential and commercial sensitive information being released to the broader public following an adjudication. We heard from some stakeholders that they would prefer the process to be entirely confidential, as is the case with arbitrations.

In contrast, as noted above, some stakeholders preferred that adjudicated decisions be made publicly available to create a past history or precedent system in relation to payment issues or other construction issues.⁵⁸²

The commercial sensitivity of documentation and evidence given during an adjudication is an important consideration. On the other hand, enforcement of an adjudicator's decision necessarily requires that the decision become a matter of public record as it is submitted to the courts to be enforced as a judgment. Notwithstanding the potential for adjudicator decisions being made public through enforcement, we nevertheless view it as important to maintain confidentiality in relation to the adjudication process.

As well, given that adjudication decisions are binding on an interim basis only and are prepared based on a review of a limited set of documents and on an expedited basis, the value of making these decisions publically available would appear limited. The result is relevant for future court proceedings, if the dispute is subsequently litigated, but not the decision itself. In that regard, we do not view it as necessary that adjudication decisions be made publicly available.

Recommendation 37

All parties to an adjudication should be obligated to maintain confidentiality in respect of the documents disclosed during an adjudication process and adjudicators should be bound by confidentiality obligations.

(h) The Costs of Adjudication

The experience in other jurisdictions is that the adjudicator's costs are generally shared equally between the parties.

⁵⁸² Meeting with Prompt Payment Manitoba.

In the UK, the scheme provides that the adjudicator may apportion costs as he or she sees fit. In practice, costs may be apportioned where there has been frivolous or vexatious conduct by one party.

In relation to fees, the adjudicator's fees must be reasonable and in many jurisdictions there are stipulated schedules of fees if the parties do not agree on the adjudicator's fees.

Normally, the adjudicator's fees will be set out in the regulations to the legislation or by the authorized nominating authority. As well, an individual adjudicator's terms of appointment will describe the fees to be paid. In the UK, there is some case law in relation to a joint and several liability for an adjudicator's fees and the courts have upheld the joint and several liability principle.⁵⁸³

Many adjudication schemes and regulations provide that an adjudicator should avoid incurring unnecessary expenses and that the fees in an adjudication should be proportionate to the size of the dispute at issue.

Recommendation 38

Each party should bear its own costs of an adjudication unless there has been frivolous or vexatious conduct.

Recommendation 39

The ANA should establish a fee schedule that would apply where the parties have not agreed on a fee schedule, and this schedule should take into account the principle of proportionality.

(i) The Process of Enforcement

The process for enforcing an adjudication should be clear and straightforward. In most jurisdictions the process for enforcing an adjudication is similar to that employed in enforcing an arbitral award, such that a certified copy of the determination is filed and then is enforced as if it were an order of the court. In Ontario, this model was adopted, and over the course of our stakeholder meetings, alternative suggestions were made.

⁵⁸³ *Gary Kitt and EC Harris LLP v The Laundry Building Ltd and Etcetera Construction Services Ltd*, [2014] EWHC 4250 (TCC), per Akenhead J at [34].

Recommendation 40

There should be a clear and straightforward mechanism to enforce an adjudication award by filing it with the court and then enforcing it as you would an arbitral award, as under the Ontario model.

5. Summary

In conclusion, we recommend adjudication as a swift, flexible mechanism for resolution of payment disputes on federal construction projects, understanding that such a mechanism will meet federal objectives by accelerating the completion of projects avoiding the addition of payment delay contingencies in the bids of contractors and subcontractors. We recognize that adjudication does not have all of the procedural protections of a litigation proceeding or an arbitration, but the cost savings can be significant and the experience from international jurisdictions is that adjudication is an effective mechanism to resolve payment disputes.

In respect of our recommendation for a prompt payment regime supported by adjudication, we have prepared a brief flowchart illustrating the process from a high level. This chart can be found at Appendix 6.

XI. KEY CONTRACTUAL ISSUES

1. General

As noted in Chapter III, the federal government employs variations of the Standard Federal Government Construction Contract on its construction projects, depending on the project and the entity using the contract.

Largely, this form of contract and its provisions have been accepted by the industry and have been in use for years.

However, during the course of our stakeholder engagement sessions, we were advised of several contractual issues that impact or relate to the promptness of payment on federal construction projects and that required our consideration. These issues were:

- payment provisions;
- contractual holdback;
- statutory declarations;
- third party consultants; and
- posting of payment information.

2. Payment Provisions

As noted in the BLG Opinion, the Crown has the power of a natural person to enter into contracts and is not confined in this regard within the limits of its power to legislate.⁵⁸⁴ While this general statement is subject to the Crown complying with statutory requirements and the further qualification that the contractual arrangements are not in substance the regulation of a matter beyond its legislative competence,⁵⁸⁵ then provided that the contracting parties voluntarily assume their respective obligations, there is no legislative power being exercised.⁵⁸⁶

Accordingly, pursuant to the BLG Opinion, there is no constitutional impediment to the federal government including prompt payment provisions in its construction contracts and requiring that all parties working on the

⁵⁸⁴ BLG Opinion, p. 21 citing *British Columbia (Attorney General) v Deeks Sand and Gravel Co*, [1956] SCR 336; *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532.

⁵⁸⁵ BLG Opinion, p. 21.

⁵⁸⁶ BLG Opinion, p. 21.

project do the same in their contracts,⁵⁸⁷ and we therefore recommend that supportive contractual amendments be made.

Recommendation 41

The federal government should revise its Standard Federal Government Construction Contract to include reference to the prompt payment and adjudication regimes recommended in this report, to take effect when the legislation takes effect. In addition, the contract should be revised to impose prompt payment obligations on general contractors and subcontractors.

3. Contractual Holdback

As noted above, GC 5.4.3 of the Standard Federal Government Construction Contract provides that contractors working for the federal government are to be paid 95 percent of the value indicated in Canada's progress report (i.e. the report prepared by the federal government following receipt of an invoice) if a labour and material payment bond has been furnished by the Contractor; or 90 percent of the value indicated in the progress report if no labour and material payment bonds⁵⁸⁸ have been posted.

The effect of this provision (and similar provisions applicable to smaller construction contracts) is to provide the federal government with a contractual holdback of 5-10%, depending on whether or not surety bonds are used (i.e. 5% if bonds are used and 10% if they are not).

A number of stakeholders requested that this holdback be eliminated⁵⁸⁹ or at the least, clarified.⁵⁹⁰ The WCA specifically referred to this practice as "outdated and draconian."⁵⁹¹

The general sentiment expressed to us by industry stakeholders was that there was no justification for the federal government to maintain a holdback of 5-10% when there is no lien legislation applicable. We also heard from contractor stakeholders that the final 3% of this holdback was often difficult to collect and that federal owners were essentially treating the holdback as a

⁵⁸⁷ We have not considered whether these sorts of provisions are permitted under the existing statutory framework for federal contracts as we thought that question was beyond our terms of reference.

⁵⁸⁸ We note that, in fact, labour and material payment bonds do not provide protection to an owner in relation to the performance of the work, as it is the performance bond that serves this purpose.

⁵⁸⁹ For example, the ACA, CCA, WCA.

⁵⁹⁰ For example, NTCCC.

⁵⁹¹ WCA Submission at p. 5.

deficiency or warranty holdback for performance purposes. According to certain stakeholders, sometimes this final amount is not paid out for 2-3 years even when there is no dispute.⁵⁹² The contractual holdback is not specifically referred to as a performance holdback (to cover matters like deficiencies and warranties), but functions effectively in this manner.

Other stakeholders, such as the NTCCC, suggested that the purpose of the holdback and the process in order for contractors to receive the funds after the project is complete should be clarified. As opposed to the complete elimination of contractual holdbacks, the NTCCC made the following recommendations:

- a) the percentage of the total contract amount which an owner may hold back for warranty purposes should be reasonable in relation to the risk of deficiencies;
- b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work;
- c) a prime contractor should be allowed to holdback for warranty purposes an amount that does not exceed in percentage terms the holdback that is allowed in the contract between the owner and the prime contractor;
- d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the holdback monies applicable to the work completed by that subcontractor. The same principle should apply to holdback between a subcontractor and a sub-subcontractor.
- e) contractors should have the right to substitute a demand form surety bond for any such holdback.⁵⁹³

In this regard, the CCA also submitted that where holdback is implemented to manage contractual performance risk (e.g. warranty, manuals, as-builts, commissioning, etc.), these amounts should be clearly itemized and dealt with in the normal course of invoicing and payment.⁵⁹⁴

As for general contractor stakeholders, the GCAC submitted that the mandatory contractual holdback employed by the federal government should not be eliminated. The two reasons given by the GCAC were that:

⁵⁹² SCA Meeting Summary.

⁵⁹³ NTCCC Submission at pp. 10-11 and pp 24-25.

⁵⁹⁴ CCA Submission at p. 10.

- a) The current broad form labour and material payment bonds employed by the federal government permits second tier and lower subcontractors/suppliers to claim with a cap against the value of the holdback. Eliminating the holdback would eliminate the protection for these claimants and/or expose general contractors to an unacceptable risk, according to the GCAC.
- b) These holdback funds serve as a performance security holdback, which is often used to address issues and deficiencies that manifest after the completion of a general or trade contractor's work.⁵⁹⁵

The GCAC submitted that if such a holdback exists, all payers down the supply chain should have the same right to withhold.⁵⁹⁶

We also heard from federal government stakeholders that the holdback is an effective mechanism to ensure the project reaches completion and that the balance of the work is completed.⁵⁹⁷ All of the federal government entities we met with advised us that they tend to use these contractual holdbacks on their respective projects. The reasons given were fairly consistent. We heard that government entities are of the view that they would experience significant difficulty getting contractors to finish the work absent such a holdback. This holdback also allows federal government entities the ability to withhold payment when the construction goods and services do not meet the requirements of the project drawings or specifications.⁵⁹⁸ No government stakeholder was comfortable with the contractual holdback being removed, as they thought it would significantly hinder their ability to deliver projects effectively.

In other words, these holdbacks are viewed as an important and practical performance security. In our experience, performance-related holdbacks are not uncommon in the private sector, quite apart from lien act considerations.

While it is clear that there is not complete stakeholder consensus on this issue, it appears to us that the approaches proposed by the NTCCC, CCA and GCAC, to clarify the purpose of the holdback and clarify the rules around how to access it at the end of the project, represent the appropriate compromise approach.

⁵⁹⁵ GCAC Submission at pp. 10-11.

⁵⁹⁶ GCAC Submission at pp. 4-5.

⁵⁹⁷ See for example, AAFC Meeting Summary, NCC Meeting Summary.

⁵⁹⁸ PSPC Submission at p. 13.

Recommendation 42

In relation to contractual holdbacks:

- (a) Contractual holdbacks should be clarified and in particular there should be clarity in relation to when such holdbacks are to be released.
- (b) The total contractual holdback should be reasonable in quantum and should not be held back for longer than is reasonable (e.g. 12 months or a time period related to the warranty period).
- (c) The general contractor working for the federal government should be allowed to flow down a similar holdback, and this should apply down the contractual chain as appropriate.
- (d) In relation to the payment of holdback funds, once received by the contractor such funds should be paid within seven days of receipt, subject to a notice of non-payment.

4. Statutory Declarations

As noted above in Chapter III, the Standard Federal Government Construction Contract requires, in several instances, that prior to triggering the payment period, the general contractor must provide a “completed and signed statutory declaration” that includes confirmation that the Contractor has complied with all lawful obligations and that, in respect of the Work, all lawful obligations of the Contractor to its Subcontractors and Suppliers have been **fully discharged**.⁵⁹⁹ As noted by the Working Group, one purpose of such a declaration is to ensure that subcontractors have been paid, but many stakeholders question their utility, as noted below. Prior to receipt of this document, the government does not conduct its inspection of the Work or Material described in the progress claim.

As part of the Government Survey discussed in Chapter IX, government respondents were asked if release of payment was tied to any specific event and many indicated that it was tied to receipt of certain documents (e.g. a Statutory Declaration, Workers’ Compensation certificate, updated construction schedules, etc.). This aligns with the Standard Federal Government Construction Contract requirements. In particular, and as noted

⁵⁹⁹ See for example, PSPC Standard Form Contract at (GC 5.4.1) or DCC Standard Form Contract (GC 5.4.1.)

above, over 73% of the participants in the Government Survey responded that they require that a Statutory Declaration accompany each progress claim.⁶⁰⁰

As part of the stakeholder engagement process, we heard that the statutory declaration process, as it currently functions, is flawed and in many cases, detrimental to the payment process. In fact, we heard from some stakeholders that payment metrics from federal government entities fail to take into account the time it takes to resolve issues with the actual progress claim or invoice, and in particular the accompanying statutory declaration.

Relevant stakeholder comments are summarized below:

- The WCA commented that statutory declarations are not worth the paper they are printed on and noted timing issues related to the delivery of a statutory invoice in respect of the receipt of payments from the previous payment period.⁶⁰¹
- The PEI CA noted that the requirement for a "wet" signature on statutory declarations made invoicing difficult. Members of PSPC attending this engagement session noted that the finance branch was not able to accept digital signatures on statutory declarations at this time. It was suggested that statutory declarations, if maintained, should allow for digital signatures.⁶⁰²
- PEI Transportation and Infrastructure suggested that federal prompt payment legislation ought to include language in respect of statutory declarations, given some of the concerns highlighted in respect of false statutory declarations. In that regard, the stakeholders did not think there was much value in the current statutory declaration process.⁶⁰³
- The Ottawa Construction Association also noted issues with the requirement for a "wet" signature. Further, it stated that on the second and third progress draw, an issue arises when a party must declare that it has dispersed funds on the first draw when it has not yet been paid for that draw. That party is unable to disperse funds because it has not yet been paid by the owner.⁶⁰⁴

In reviewing the Standard Federal Government Construction Contract, we note that there is a requirement for the Statutory Declaration to be provided

⁶⁰⁰ Government Survey at p. 6.

⁶⁰¹ WCA Meeting Summary.

⁶⁰² PEI CA Meeting Summary.

⁶⁰³ PEI Transportation and Infrastructure Meeting Summary.

⁶⁰⁴ OCA Meeting Summary.

as a notarized copy that is “correctly completed” with each progress claim.⁶⁰⁵ We further understand that, in practice, there is currently no allowance for a digital statutory declaration to be provided.

This is not directly stated in the language of the Statutory Declaration used by PSPC, for example. That Statutory Declaration requires, in relation to a progress claim, the Contractor to declare as follows:

[T]hat, up to the date of the attached Progress Claim, the **CONTRACTOR** has complied with all its lawful obligations in respect of the Labour Conditions, discharged all its lawful obligations to workmen in respect of the work contracted for and has discharged all its lawful obligations to its subcontractors and suppliers except for holdback monies properly retained, payments deferred by agreement or amounts withheld by reason of legitimate dispute which have been identified to the party or parties, from whom payment has been withheld.⁶⁰⁶

As noted above, we received significant feedback during the stakeholder engagement process in relation to the difficulties caused by the Federal Government’s requirement for a notarized statutory declaration to be provided as part of every payment claim. In particular, the requirement for a “wet signature” on the statutory declaration and the ability for the federal government to reject the statutory declaration and delay the submission of a proper invoice is viewed as problematic. Ultimately, it causes payment delays but also affects the federal government’s ability to secure the best pricing and competitive bids as contractors build the anticipated payment delays into their pricing.

While many industry stakeholders and some owner-side stakeholders questioned the validity of statutory declarations entirely, there were an equal number of stakeholders that found value in their use. In that regard, we do not propose to remove the requirement for statutory declarations entirely, but rather, allow them to be provided digitally.

Recommendation 43

The requirement for a statutory declaration should be amended such that statutory declarations for federal government projects are allowed to be provided in digital form and issues related to timing, in particular in relation to the first statutory declaration, should be addressed in the Standard Federal Government Construction Contract.

⁶⁰⁵ See for example, DCC Contract at Annex A.

⁶⁰⁶ <http://www.tpsgc-pwgsc.gc.ca/app-acq/forms/2835-eng.html>

5. Third Party Consultants

During early stakeholder engagement sessions, we heard feedback in relation to delays caused by “third party consultants” or “third-party certifiers.” The term “third-party certifier” caused some confusion when raised with owner-side stakeholders as we were advised that it is not common practice to use “third-party certifiers” on federal government projects.

Rather, third-party consultants (i.e. engineers, architects) are engaged by PSPC (and other federal government entities) to *assist* in the process of certifying work, providing revisions to designs, or performing other roles assigned by the federal government under professional services contracts. Importantly, the federal government does not delegate any of its FAA obligations to any third party, including the certification obligation set out in s.34 of the FAA, as described in Chapter III.

In relation to payment, we were not provided with any significant feedback on how or when consultants delay payment. In fact, the anecdotal evidence provided conflicted with the metrics provided by owner-side stakeholders in relation to payments by the federal government to general contractors.

The only circumstance in which it appeared that a third-party consultant was contributing to delay was in relation to authorizing change orders. In this regard, we understand from stakeholder feedback that there is a potential for delay.

We view this as a contractual issue as between federal government stakeholders and their consultants. We therefore recommend that the consultant contracts be reviewed in order to ensure that there are no delays related to payment as a result of a consultant’s performance of its obligations, including in relation to change orders.

Recommendation 44

Contracts between federal government entities and their consultants should, if necessary, be amended to ensure prompt payment and adjudication timelines are appropriately accounted for and the consultant is obliged to meet its contractual requirements in relation to the review of payment applications and change order requests within the timeline available to the federal government under new legislation (i.e. prior to the deadline for issuance of a notice of non-payment).

6. Payment Information

Generally, there was broad support for the posting of payment information. Stakeholders such as the CBA, CCA, CIQS, and WCA all submitted that certain information in relation to payment should be posted and continue to be posted on federal websites. Each of DCC and PSPC submitted that it was and would continue to post such information at the general contractor level. In fact, PSPC stated that it includes its prompt payment principles as well as a reference to its prompt payment information website as part of its construction services solicitation documents (i.e. its invitation to tender). The GCAC submitted that information should not be posted below the level of general contractor as this would be administratively burdensome.

We also heard from stakeholders that we should consider the option of a request-based information system similar to that in place in Ontario, pursuant to which a subcontractor can write to the owner of a project to receive further disclosure of project information. For example, the CCA submitted that it would support a “by request” disclosure system similar to what is required under Section 39 of the *Construction Act* (particularly 39(1) and (2)).

Certain associations also offered to communicate payment information to their members at no cost (e.g. the WCA).

The one stakeholder that did not view posting information as relevant was the Quebec Coalition. We understand that, under the Quebec model proposed by the Quebec Coalition, the Coalition takes the view that payment information is not necessary, as the monthly schedule for payment makes the system predictable for all those involved.

Generally, stakeholders agreed with the practice of posting payment information and wanted it to continue. The information to be posted would be the date of the proper invoice, the date on which payment was made, and some information on the project to identify the payment. Such postings should also be made in a timely manner.

PSPC has stated that this website is something it is willing to continue to update, but that industry uptake has been very low and the costs of keeping the information current on the website are disproportionate as compared to the extent of the current use of the website. We have suggested to most stakeholders that they review the PSPC and DCC payment websites and inform association members of their existence.

Recommendation 45

PSPC and DCC should maintain their websites which provide payment information and include reference to the information available on the website in the contract, as well as the current practice of including it in their construction services solicitation documents. Other federal government entities should provide information to PSPC for posting on a regular basis.

Recommendation 46

A request based disclosure requirement should be included in the Standard Federal Government Construction Contract such that payees may request (in writing) defined information and the federal government contractors and subcontractors must cooperate and disclose this information and provide it within a timeframe prescribed by regulation.

7. Summary

In summary, there is a variety of contractual provisions in relation to payments made by the federal government that should be revised in order to improve the efficiency of the payment process.

XII. LEGISLATIVE ALIGNMENT

1. Introduction

There is significant value to having a consistent approach across the country in relation to prompt payment and adjudication. Creating consistency across the country for the construction industry would reduce uncertainty and provide increased stability because the members of the construction industry as a whole would better understand the protections available to them and projects could be completed more efficiently and at lower cost.

Canada is not the only jurisdiction to address legislative alignment issues in the context of security of payment legislation. In Australia, different states and territories have adopted different legislative models, which, as noted above, have been generally categorized as the East Coast Model and the West Coast Model, although there are differences even among the states and territories that have adopted the East Coast Model. There are eight separate pieces of legislation in Australia that deal specifically with security of payment.⁶⁰⁷ As noted by the Honourable Justice Peter Vickery, there is in all of this legislation "the recognition of a common objective and a manifest divergence in approach to achieving it."⁶⁰⁸

In Australia, the need for consistency in security of payment laws was identified by various expert legislative reviews and articles. In the Murray Report, the arguments favouring a consistent national approach to security of payment are described as follows:

1. A national industry requires a national approach.
2. Equality of rights and protections across jurisdictions.
3. A national approach will reduce complexity and administrative burden.
4. There is significant practical and legal experience to support a national approach.
5. There is widespread industry support.⁶⁰⁹

⁶⁰⁷ Murray Report at s. 6.1, p. 62.

⁶⁰⁸ The Honourable Justice Peter Vickery, 'Security of Payment Legislation in Australia: Differences between the States – Vive la Différence?' (Speech delivered to the Building Dispute Practitioners Society, Melbourne, 12 October 2011 (Vickery J's Speech delivered to the Building Dispute Practitioners Society, 2011).

⁶⁰⁹ Murray Report, p. 62.

These same points apply equally in the Canadian context. We can learn from the Australian experience, where the nine different schemes have caused significant issues given the inconsistency in approach.

As a solution, the Murray Report recommended a "best practices model" that can be adopted so as to improve the ability of contractors to enforce their entitlement to prompt payment and improve the efficiency of the completion of projects across the country.

In the Murray Report, the 2003 Cole Royal Commission into the building and Construction Industry is cited.⁶¹⁰ Commissioner Cole concluded in this report that the "Commonwealth had the ability to legislate in relation to security of payment by drawing on its constitutional head of power" provided that "at least one of the transacting parties is a corporation."⁶¹¹ However, as the BLG Opinion makes clear, given our division of powers, the situation in Canada is different.

Also discussed in the Murray Report as mechanisms which might provide greater certainty of coverage are (i) referral of power, and (ii) intergovernmental agreements. In relation to the referral of power, in Australia, the Constitution provides that in addition to the heads of power set out in the Constitution, the Commonwealth has the power to make laws with respect to matters referred to the Commonwealth by states. Again, in Canada, the situation is different, although inter-governmental agreement is possible.

A further mechanism described in the Murray Report to create harmonized laws is "mirror legislation." This term is used to describe a system where one jurisdiction enacts a law that is then enacted in similar terms by other jurisdictions, thereby "mirroring" the terms of the original legislation.⁶¹² Here, it may be possible that the legislation adopted by the federal government could be mirrored by other provinces and territories in Canada.

As a final suggested solution which is similar to mirror legislation, the Murray Report comments on a "complementary" legislative scheme involves one jurisdiction, which need not be the federal jurisdiction, enacting a law on a topic which other jurisdictions then apply by enacting their own legislation. An example given in the Australian context is the Uniform Consumer Credit Code.

⁶¹⁰ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report of the Royal Commission into the Building and Construction Industry*, 2003

⁶¹¹ Murray Report, p. 316

⁶¹² Murray Report, p. 317.

Both the mirror and complementary legislation model approaches are essentially what we refer to below as the "model law" approach.

The Murray Report concludes that:

However, what is clear is that the adoption of a nationally consistent and effective set of security of payment laws will require Commonwealth involvement. The issues of poor payment practices and insolvency have plagued the construction industry for decades, and despite the best intentions of the various jurisdictions in enacting their own security of payment legislation to deal with these issues, the different approaches are not serving the industry well. Leaving it to the states and territories to implement the recommendations of this Review will only result in cherry-picking and further divergence in the security of payment legislations operating across the nation.⁶¹³

The Murray Report therefore concludes that the recommendation of the Cole Royal Commission for nationally consistent legislation is appropriate.

Given the various initiatives underway at the provincial and territorial level, as described later in this chapter, we are concerned that different approaches could be implemented in various Canadian jurisdictions and that the resulting inconsistencies would not serve the industry well, as has occurred in Australia.

The BLG Opinion identifies three possible alternative approaches to achieve alignment, as follows:

One device worth considering is the one used in the federal *Personal Information Protection and Electronic Documents Act*. It provides that part of the Act does not apply if the Governor in Council is satisfied that provincial legislation is "substantially similar" and makes an order exempting the organization, activity or class from the application of the relevant part of the Act. A similar approach could be used in federal prompt payment legislation. The Governor in Council could be given authority to exempt all or certain types of federal construction projects from the federal legislation if satisfied that there were substantially similar provincial legislation.

Another possibility would be for governments to propose to the Uniform Law Conference of Canada that it take up the topic of prompt payment legislation for a model or uniform law. If prepared and adopted by the various jurisdictions, this approach could achieve consistency of treatment within and among jurisdictions and avoid potential constitutional controversies.

Yet another possibility would be for the legislation to provide that it applies to projects designated by a Minister, along the lines of the designation

⁶¹³ Murray Report, p. 318.

process under the *Canadian Environmental Assessment Act, 2012*. The ministerial designation would not strengthen (or weaken) the case for constitutional applicability of federal legislation to the designated project and the scope of the designation power itself would be subject to constitutional scrutiny. But the designation process would permit a case by case analysis of the strength of the claim for federal jurisdiction and the decision not to designate could avoid the nuanced inquiries of the paramountcy analysis that might otherwise be required.⁶¹⁴

In terms of our assessment of these three options, there are advantages and disadvantages to each.

The first option, which is the one utilized in the *Personal Information and Electronic Documents Act*, involves exempting all or certain federal construction projects in a particular province, Ontario for example, where the province already has prompt payment and adjudication legislation in place. This solution would be relatively straightforward to implement from a drafting perspective. However, there are some significant disadvantages including:

- (a) This would not resolve the problem of inconsistent legislation across the country because the requirement that the provincial or territorial legislation would need to be "substantially similar" means that there could be differences in approach that could cause problems, as has occurred in Australia. The need for consistency has been raised in a number of contexts over the course of the stakeholder engagement sessions, including in relation to projects that involve more than one province or territory and for contractors and subcontractors who carry on business in more than one province or territory.
- (b) There may be uncertainty about what is exempted from the federal legislation if all or certain construction projects are carved out of the legislation and, particularly for smaller participants in the construction market, this may not be readily apparent which could cause confusion.
- (c) If, as we have recommended, a national ANA is created because it is essential to the functioning of an effective adjudication system, the business model of such an organization could be significantly eroded.

In relation to the second option, which involves the introduction of a model law, in the Canadian context, the model law concept has been used when there is a need for a national uniform approach to an issue which has federal, provincial and territorial implications and where discrepancies in the substance of legislation would create significant difficulties in application.

⁶¹⁴ BLG Opinion at p. 20.

The Uniform Law Conference of Canada ("ULCC") has participated in such efforts by developing "uniform statutes", which the Section adopts and recommends for enactment by all relevant governments in Canada.⁶¹⁵ One method used adopts a "model statute", which the ULCC offers as a method of harmonization for member governments who want to use it.⁶¹⁶

The primary advantages of implementing a model statute applicable at the federal level and across all provinces and territories are consistency and certainty. Uniform legislation would ensure that prompt payment and adjudication regimes are consistent across the country. Also, conflicts of laws in respect of inter-provincial projects would be avoided. Stakeholders, including those participating in projects across the country, would have certainty about the rules to be applied.

The model statute approach has been used in Canada in a number of circumstances, including the following:

- (a) The *Uniform International Commercial Arbitration Act* (1987), which adopts with minor differences, the UNCITRAL Model Law and the New York Convention.⁶¹⁷ The federal government and all 13 provinces and territories have adopted the Model Law, either as a schedule to a short statute, or as the substance of their international arbitration statute or codified law.⁶¹⁸ For example, in Ontario, the Model Law was implemented in the *International Commercial Arbitration Act*.⁶¹⁹ In Québec, most provisions of the Model Law were implemented in

⁶¹⁵ Uniform law Conference of Canada. Uniform Acts Section. <https://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/462-josetta-1-en-gb/uniform-actsa/international-commercial-arbitration-act/292-uniform-international-commercial-arbitration-act-1987>

⁶¹⁶ Ibid.

⁶¹⁷ "Arbitration procedures and practice in Canada: Overview." Lawrence E. Thacker, Lenczner Slaght Royce Smith Griffin LLP. Thomson Reuters. September 1, 2013. [https://content.next.westlaw.com/Document/l2dfab2701cb111e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/l2dfab2701cb111e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1)

⁶¹⁸ "Why Canada Leads as the Model Law Turns 25". Andrew McDougall. August 10, 2010. [McDougall] <http://www.perlaw.ca/en/newsroom/publications/2010/8/10/why-canada-leads-as-the-model-law-turns-25-andrew>

⁶¹⁹ "New International Commercial Arbitration Law For Ontario." Scott Fairley. Cambridge LLP. <http://www.cambridgelpp.com/publications/new-international-commercial-arbitration-law-ontario/>

substance through amendments to the Civil Code of Québec and the Code of Civil Procedure.⁶²⁰

- (b) The Canada Water Preservation Act which came into force in 2011 after consultation with all provinces and territories the purpose of which is to preserve Canada's waters from bulk export.⁶²¹

However, this approach has significant drawbacks as well, including:

- (a) the lengthy process of having the ULCC or some other entity draft uniform legislation; and
- (b) the difficulty of obtaining consensus from all provinces and territories.

In relation to the third option, which is to allow the Minister to designate projects as being subject to the legislation, this would be the easiest of the three options as it would not require consensus building among the provinces and territories and would not require a review of provincial and territorial legislation. However, this option would not achieve the desired goal of alignment and, as a result, there would be inconsistencies in the legislation applied across the country.

As a result, we do not recommend that this third option be explored in relation to overall alignment, but it is discussed in Chapter VIII – Applicability of Legislation.

There is, however, a fourth option which is an inter-governmental agreement. The concept of an inter-governmental agreement was raised in the Murray Report. In Canada, this concept would involve gathering the relevant provincial and territorial ministers together along with the relevant federal ministers. The ministers could attempt to negotiate an inter-governmental agreement. The goal of this approach would be to create a model that works for all jurisdictions, using the legislation proposed in this report as a "best practices" model. This option may be difficult to achieve, but, if successful, would result in a high degree of alignment between all jurisdictions.

⁶²⁰ McDougall.

⁶²¹ A Model Act for Preserving Canada's Waters. Adele Hurley. Munk School of Global Affairs, University of Toronto.

2. Provincial Efforts To Achieve Prompt Payment

(a) Ontario Legislative History

In Ontario, we were appointed by the Ministry of the Attorney General and the then Ministry of Economic Development, Employment and Infrastructure to conduct an expert review of Ontario's *Construction Lien Act* on February 11, 2015 for the purpose of modernizing the legislation as well as considering issues related to promptness of payment and efficiency of dispute resolution.

From early 2015 through to April 2016, we conducted a review in Ontario including a lengthy stakeholder consultation process, a review of legislation both nationally and internationally, and a series of meetings with a group of construction law experts referred to as the Advisory Group. The ultimate result was the issuance of the Striking the Balance report on April 30, 2016 which contained 101 recommendations. 98 of these were accepted by the provincial government.

Following the issuance of that report, we were retained to provide ongoing guidance in relation to the drafting of the legislation. After proceeding through debate, the Standing Committee on the Legislative Assembly and a series of amendments, Bill 142 was passed unanimously in the Legislative Assembly of Ontario and received Royal Assent on December 12, 2017. As a result, the modernization provisions of the legislation will come into effect on July 1, 2018, and a new prompt payment and adjudication regime will come into effect on October 1, 2019.

(b) Alberta Prompt Payment Initiatives

The province of Alberta does not currently have any prompt payment legislation, nor are we aware of any current legislative effort to implement prompt payment legislation. However, in view of the prompt payment movement across the country and as a result of an ongoing dialogue with industry stakeholders, in April 2016 Alberta Infrastructure changed its construction contracts to address prompt payment and progressive release of holdback. Specifically, we understand that Alberta Infrastructure included changes such as the following:

1. The contract specifies a maximum of 30 calendar days after the initial receipt of the application for payment, provided the contractor has properly completed their claim. Infrastructure will verify the invoice and adjust if necessary, advise the General Contractor within 14 days of the amount to be paid. Infrastructure has modified the Statutory Declaration so that the General Contractor must confirm that they

paid their subcontractors within 10 days of receipt of payment from the Government.

2. Their contracts specify that amounts which are not in dispute will be paid. Disputed amounts will be resolved during the next invoice period.
3. Alberta Infrastructure has committed to publicizing the date of payment so that subcontractors and suppliers will be aware of when the prime contractor was paid (see contact info below).
4. Upon appropriate application, holdback funds will be released once the portion of the work is complete. The contractor will submit their certificate of substantial performance for their portion of the work performed, and follow normal procedures of posting the certificate at the job site. Infrastructure will verify substantial performance. After the 45-day period, the contractor then applies for release as part of the next progress claim. Warranty will still be from the date of Interim Acceptance [sic].⁶²²

In relation to posting of payment information, Alberta Infrastructure created a dial-in phone service that stakeholders can use to learn the date of payment to the prime contractor on a project.

(c) Manitoba Law Reform and Private Members Bill

In June 2017, the Manitoba Law Reform Commission (“MLRC”) commenced a project to review *The Builders’ Liens Act*,⁶²³ which had not been fully reviewed since it was introduced in 1981. The MLRC review was triggered by a number of factors including judicial criticisms of the existing legislation, local and national efforts around prompt payment, and the First Reading of Bill 142 in Ontario.⁶²⁴

In February 2018, the MLRC released its Consultation Paper titled “The Builders’ Liens Act: A Modernized Approach” (the “MLRC Paper”).⁶²⁵ The MLRC Paper was prepared with extensive support from Betty Johnstone, a well-respected retired lawyer from the construction law bar of Manitoba.

The MLRC Paper sets out 46 issues to be considered for consultation purposes. It does not set out any conclusions. The majority of these relate to

⁶²² Alberta Construction Association Newsletter – *Alberta Infrastructure Introduces Prompt Payment in Contracts*, April 19, 2016 - <http://albertaconstruction.net/?p=1184>

⁶²³ RSM 1987 c B91.

⁶²⁴ MLRC Paper at p. 8.

⁶²⁵ MLRC Consultation Paper February 2018 -

http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_feb2018.pdf

technical aspects of the Manitoba lien legislation and trust provisions. As noted in the paper, however, Manitoba subcontractors have been seeking legislative intervention since 2009 to address prompt payment problems/requirements.⁶²⁶ In this regard, the MLRC considered the work done in Ontario to address prompt payment and adjudication. Specifically, the MLRC set out the following objective:

Consideration will be given to whether Manitoba's Act ought to be amended to incorporate typical components of a prompt payment regime, whether the trust provisions in the Act may be used as the foundation of such a regime, and what other potential options ought to be considered to ensure the timely flow of periodic payments from the apex of the *construction contract pyramid* down to the sub-contractors and suppliers at its base.⁶²⁷

Fundamental to the consideration of this issue was whether or not the goal of prompt payment would be best secured by free-standing legislation or an update to the *Builders' Liens Act*. To arrive at this conclusion, the authors examined the elements of the Ontario prompt payment regime in the context of Manitoba's statutory framework and posed certain questions.⁶²⁸ In relation to adjudication, the MLRC suggested the investigation of alternatives such as (i) enhanced access to existing court resources; (ii) the use of dedicated specialized Masters; or (iii) enhanced trust provisions. Comments on the MLRC paper were due on April 2, 2018 however, to date, no official results have been made public. Some commentators have also noted that the consultations and related timeframe meant that legislation would likely not be introduced before the fall 2019 Manitoba election.⁶²⁹

Separately, prompt payment advocates in Manitoba moved for a standalone piece of legislation on prompt payment. On April 11, 2018, a Private Members Bill was introduced by Reg Helwer in the Legislative Assembly of Manitoba (Bill 218),⁶³⁰ known as the Prompt Payments in the Construction Industry Act. The following is the explanatory note provided with the Bill:

This Bill deals with payments to contractors and subcontractors in the construction industry.

Owners must make periodic payments under a construction contract to their contractors at specified times as the work progresses or when milestones

⁶²⁶ MLRC Paper at p. 18.

⁶²⁷ MLRC Paper at p. 20.

⁶²⁸ MLRC Paper at p. 89.

⁶²⁹ <https://www.winnipegfreepress.com/business/province-moves-to-protect-contractors-479470933.html>

⁶³⁰ Legislative Assembly of Manitoba, 3rd Session, 41st Legislature, Bill 218 - <http://web2.gov.mb.ca/bills/41-3/b218e.php>

are reached. They must also make final payments promptly upon work completion. Similar obligations apply to contractors' payments to their subcontractors, and subcontractors' payments to other subcontractors.

If payment obligations are not met, a contractor or subcontractor may, with notice, suspend work or terminate the contract. An adjudicator may be appointed to resolve payment disputes.⁶³¹

Bill 218 received second reading on April 24, 2018.⁶³²

(d) Quebec

In the fall of 2013, the Quebec Coalition was formed by associations of general contractors, subcontractors, suppliers and consultants who were collectively interested in promoting a new prompt payment regime in Quebec.⁶³³ In Quebec, an additional impetus for prompt payment legislation was the Charbonneau Commission's recommendations on the need to address construction industry corruption by improving payment practices. The Charbonneau Commission was initiated in October of 2011, and after four years of work and 261 days of hearings the Commission released a report to the public on November 24, 2015.⁶³⁴ It was the view of some stakeholders (and Justice Charbonneau) that the lack of prompt payment created a greater likelihood of corruption and abuses of power in the construction industry.⁶³⁵ In particular, in recommending a reduction to delays in payment to contractors in Quebec, Justice Charbonneau stated as follows:

For the Commission, this situation involves three major problems. First, it confers significant power on site supervisors, since they must approve incremental payments. These professionals can speed up or slow down approval for these payments in order to intimidate or favour construction contractors, thereby contributing to private corruption schemes.

Second, such a situation contributes to limiting competition in the industry, thereby facilitating the creation and maintenance of collusion agreements. Contractors have already paid their workers, their suppliers and their subcontractors, and must financially underwrite these delays in payment. This lack of liquidity limits their numbers and growth by restricting their ability to undertake new contracts. In 2013, more than three quarters of

⁶³¹ Bill 218 – Explanatory Note - <http://web2.gov.mb.ca/bills/41-3/b218e.php>

⁶³² Manitoba Legislative Assembly Bill Status -
<https://www.gov.mb.ca/legislature/business/billstatus.pdf>

⁶³³ Quebec Coalition Submission at p. 4.

⁶³⁴ Charbonneau Commission Report November 2015 - <https://www.ceic.gouv.qc.ca/>

⁶³⁵ Charbonneau Commission Report November 2015 (Volume 3 – English)

contractors refused to respond to at least one call for tenders because they found the payment clauses to be abusive or they anticipated payment problems. In addition, late payments penalize SMEs even more since they do not always have easy access to credit. They are therefore at greater risk of experiencing financial difficulty. This is not likely to encourage them to commit to new contracts.

Third, such a situation favours infiltration of the construction industry by organized crime. An SME faced with financial difficulties arising from excessive accounts receivable may be tempted to resort to sources of non-traditional financing. In fact, that is exactly what happens. Non-traditional financing is used by a significant proportion of construction firms as a result of payment delays.

To these three important problems is added a fourth, this one for the state. **This situation encourages contractors to factor this financial risk into the price of their bids. In other words, these financing costs are transferred to public contracting authorities, and therefore to taxpayers.** [emphasis added]⁶³⁶

Given the efforts of the Quebec Coalition, and given the recommendations of the Charbonneau Commission, the Quebec government introduced Bill 108 - *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics* in June 2016.⁶³⁷ The Bill received royal assent on December 1, 2017.⁶³⁸

Bill 108 addresses a variety of issues in relation to public projects and procurement. In particular, Bill 108 "establishes the Autorité des marchés publics (the Authority) to oversee all public procurement for public bodies, including municipal bodies, and apply the Act respecting contracting by public bodies."⁶³⁹ The Quebec 'Authority' was granted various rights, including determining compliance with tendering and procurement practices for public contracts and examining the performance of a contract awarded by a public body.

⁶³⁶Charbonneau Commission Report November 2015 (Volume 3 – English) at p.88 - https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929_001_EN_Rapport_final_CEIC_Tome3.pdf

⁶³⁷ <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-108-41-1.html>

⁶³⁸ <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2017C27A.PDF>

⁶³⁹ Bill 108 at p. 3.

Bill 108 also effects several amendments to the *Loi sur les contrats des organismes publics* or in English, *The Act Respecting Contracting by Public Bodies*, C-65.1 ("Quebec Contracting Act").⁶⁴⁰

Le Secrétariat du Conseil du trésor (SCT) du gouvernement du Québec (the Treasury Board Secretariat) confirmed in our discussions with them that the Quebec Contracting Act had been amended to introduce certain provisions as a result of efforts by the Quebec Coalition.⁶⁴¹

In particular, the Chair of the Conseil du trésor has the power to "authorize the implementation of pilot projects aimed at testing various measures to facilitate the payment of enterprises party to [...] public contracts [...] and [...] subcontracts."⁶⁴² As part of the pilot projects, the Chair may "despite any inconsistent provision of any general or special Act, prescribe the use of various payment calendars, the use of a dispute settlement mechanism and accountability reporting measures."⁶⁴³

The terms and conditions of a pilot project will be published on the website of the Secrétariat du Conseil du trésor,⁶⁴⁴ as will the final report on the "implementation of the pilot project in which the Chair evaluates the terms of a regulatory framework aimed at establishing measures to facilitate the payment of enterprises party to public contracts and to public subcontracts related to such contracts" that is produced at the end of the pilot project.⁶⁴⁵

We understand from the submission of the Treasury Board Secretariat that the potential terms and conditions for the pilot projects are currently being examined. The Treasury Board Secretariat plans to use the pilot projects to test two main elements, namely: mandatory payment schedules, and faster dispute resolution processes (i.e. adjudication).⁶⁴⁶ We have been advised by stakeholders in Quebec that discussions are ongoing between the Treasury Board Secretariat and representatives of the construction industry and certain public bodies and that feedback on terms and conditions for the pilot projects is expected in June.

As part of our stakeholder engagement process, we were provided with a copy of proposed draft legislation prepared by the Quebec Coalition. However, we understand that this legislation has not been accepted (in its current form) by the Quebec Government. Accordingly, at this time there are

⁶⁴⁰ <http://legisquebec.gouv.qc.ca/en>ShowDoc/cs/C-65.1>

⁶⁴¹ Quebec Treasury Board Secretariat Submission dated March 16, 2018.

⁶⁴² Bill 108 at p. 24.3.

⁶⁴³ Bill 108 at s. 24.3.

⁶⁴⁴ Bill 108 at s. 24.3.

⁶⁴⁵ Bill 108 at s. 24.7.

⁶⁴⁶ Quebec Treasury Board Secretariat Submission dated March 16, 2018.

no existing terms and conditions related to prompt payment and adjudication for us to consider.

(e) British Columbia

The British Columbia Law Institute (“BCLI”), with the aid of an expert volunteer Project Committee, is currently undertaking a builders lien reform project. The *Builders Lien Act*⁶⁴⁷ has not been comprehensively amended since it was passed in 1997.⁶⁴⁸ The BCLI was expected to release its report to the Ministry of Justice and Attorney General in mid-2016,⁶⁴⁹ however this report has not yet been published. We understand that the concepts of prompt payment and adjudication were not part of the scope of this project.

We have been advised that as of the date of this report, industry stakeholders have approached the BCLI, as well as the British Columbia provincial government, in relation to the merits of prompt payment and adjudication.

(f) New Brunswick

In December 2017, the Legislative Services Branch of the New Brunswick Office of the Attorney General released an information package in relation to, among other things, the modernization of New Brunswick’s Mechanics’ Lien Act. As in Ontario, New Brunswick views its legislation on this subject to be long overdue for reform as it is “cumbersome, hard to understand, costly to apply, and often of limited help to those it was most intended to protect – suppliers of labour, services and materials at the bottom of the construction pyramid.” It has also been criticized for failing to address the issue of payment delay.⁶⁵⁰

In addition to modernization of its provincial lien remedy, the Legislative Services Branch noted that it was considering promptness of payment, and asked its stakeholders to review the Ontario report, *Striking the Balance*.⁶⁵¹ Following this request, on June 4, 2018, the Legislative Services Branch issued a supplementary note wherein it provided the New Brunswick construction

⁶⁴⁷ [SBC 1997] CHAPTER 45

⁶⁴⁸ British Columbia Law Institute – Builders Lien Reform Project
<https://www.bcli.org/project/builders-lien-reform-project>

⁶⁴⁹ BCLI Backgrounder – Builders Lien Act Reform Project – May 2015 –
<http://www.bcli.org/wordpress/wp-content/uploads/2015/05/Builders-Lien-Act-Reform-Project-Backgrounder-1.pdf>

⁶⁵⁰ New Brunswick Legislative Services Branch Law Reform Notes December 2017 at p. 4 –
<http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes40.pdf>

⁶⁵¹ *Ibid* at p. 16-17.

industry with recommendations in relation to the issues of prompt payment and adjudication.⁶⁵²

In particular, in relation to prompt payment, the Legislative Services Branch recommended as follows:

In our view, a prompt payment scheme similar to that in Ontario should be adopted in New Brunswick. It should apply to both the public and private sector, to all construction projects (from small renovations to P3s) at all levels of the construction pyramid (with the exception of wages)⁶⁵³

Further, the Legislative Services Branch recommended that "if prompt payment is adopted in New Brunswick, it should be accompanied by some sort of expedited dispute resolution mechanism." However, the Legislative Services Branch queried whether the Ontario adjudication approach would be the best option given concerns about feasibility of the Authorized Nominating Authority.⁶⁵⁴

In this regard, the Legislative Services Branch considered the comparative size of the industry (being \$1.4 billion in construction compared to Ontario's \$38 billion – in 2016 figures). In that regard, stakeholders were asked to consider whether the Ontario scheme was the best option or whether a simplified version of it should be applied.⁶⁵⁵

3. Analysis and Recommendations

In its submission to us, the CBA noted that, currently, jurisdictions across Canada are taking diverse approaches to prompt payment legislation. The CBA stated that it was "concerned with the challenges stemming from a lack of uniformity in legislation across Canada and that this may be exacerbated if another unique legislative scheme is implemented at the federal level."⁶⁵⁶ We heard from a variety of other stakeholders as well that they were concerned with different processes and rules across the country. In many instances, this led stakeholders to recommend that we apply the Ontario model, given that it is already in place and achieved a broad industry consensus.

In this regard, the CBA recommended that we should "consider if the federal legislation could run lock-step with any elements of the Ontario model to address some of these existing jurisdictional challenges." The CBA viewed it

⁶⁵² New Brunswick Legislative Services Branch Law Reform Notes June 4 2018 #41 - <http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes41.pdf>

⁶⁵³ NB LSB Notes 41 at p. 9.

⁶⁵⁴ NL LSB Notes 41 at p. 13.

⁶⁵⁵ NL LSB Notes 41 at p. 15.

⁶⁵⁶ CBA Submission at p. 3.

as important to consider the values of harmonization and clarity as much as possible, while also maintaining flexibility to avoid stifling innovation on complex federal projects.⁶⁵⁷

Various other stakeholders recommend that we consider alignment and/or harmonization of legislation.⁶⁵⁸ These comments are as follows:

- Prompt Payment Manitoba stated that harmonization between the federal and provincial pieces would be important, as there is a concern about both overlap and gaps.
- The NWT and Nunavut Construction Association stated that there is frustration about territorial lien legislation, and that there is a certain level of anxiety about prompt payment due to concerns about administration and the possibility of multiple types of contract administration and procedure. They observed that the dynamics between the NWT and the federal government fluctuate, and that there is a possibility of conflict between the levels of government.
- The CCA submitted that there is economic benefit to both industry and government in creating alignment in legislation and regulation between federal and provincial jurisdictions. Specifically, it noted a largely common set of rules across jurisdictions would reduce risk for industry and reduce costs associated with training and compliance. They believe consistency also enables competition across Canada on a level playing field.⁶⁵⁹
- The GCAC stated that it saw significant benefits to the construction industry and to buyers of construction across Canada by having uniformity in prompt payment and adjudication legislation across jurisdictions.⁶⁶⁰ However, the GCAC also suggested that federal legislation should defer to provincial prompt payment legislation in jurisdictions where it exists.⁶⁶¹
- The YCA stated a preference for federal rules to apply across the country, and they did not wish for there to be deference to provincial processes given that they are a territory.

⁶⁵⁷ CBA Submission at p. 3.

⁶⁵⁸ The CBA was also of the view that Bill S-224 contained “significant flaws” and that the federal government should draft legislation that was separate and apart from it as a result (CBA Submission at p. 3)

⁶⁵⁹ CCA Submission at p. 2.

⁶⁶⁰ GCAC Submission at p. 1.

⁶⁶¹ GCAC Submission at p. 3.

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In relation to alignment, we recommend that the government explore the following three options:

- The new legislation could utilize the approach used in the federal Personal Information Protection and Electronic Documents Act, which provides that part of the Act does not apply if the Governor in Council is satisfied that provincial legislation is "substantially similar" and makes an order exempting the organization, activity or class from the application of the relevant part of the Act.
- A "model law" could be developed by the federal government (possibly seeking the assistance of the Uniform Law Conference of Canada) to address the topic of prompt payment and adjudication legislation for a model or uniform law.
- The federal government could initiate an alignment initiative with a view to attempting to negotiate an inter-governmental agreement on prompt payment and adjudication legislation. The legislation proposed in this report could, in this context, be utilized as a "best practices" model.

4. Summary

As is apparent from the foregoing, there are various initiatives underway in various Canadian jurisdictions, while others are adopting a "wait and see" approach to assess the efficacy of the Ontario model.

The differences in the approaches currently being taken highlight the importance of determining if it is possible to achieve alignment between the provinces and as between provincial and territorial legislation and the proposed federal legislation, by either: a) having the federal legislation defer to provincial and territorial legislation if there is "substantially similar" legislation in place, b) developing a model law, or c) attempting to align the provinces and territories and reach an inter-governmental agreement.

XIII. FURTHER CONSULTATION

As noted in Chapter I – Introduction, the preparation of this report took place over a period of 136 days. Stakeholder engagement was a cornerstone of our process. Over the course of the review, we became aware of several significant issues about which we were not able to consult sufficiently to make an informed recommendation to PSPC. We do not consider it appropriate to make a recommendation where stakeholder groups have not been adequately consulted. There are two issues that, in our view, require further consultations:

1. Indigenous lands; and
2. Insolvency risk.

Each of these issues is described below and recommendations are made with respect to next steps.

1. Indigenous Lands

As noted in Chapter VII and the BLG Opinion, Parliament has exclusive legislative authority over "Lands reserved for the Indians" as set out in section 91(24) of the *Constitution Act, 1982*. This power is quite broad as it relates not only to reserves (as that term is defined in the *Indian Act*) but to "all lands reserved, upon any terms and conditions, for Indian occupation."⁶⁶² According to the BLG Opinion, the power over "lands reserved for the Indians" has been "interpreted broadly to include, for example, exclusive federal legislative jurisdiction over the right to possession and occupation of lands on a reserve, subject, as noted, to the constitutional entrenchment of aboriginal and treaty rights."⁶⁶³

Section 35 of the *Constitution Act, 1982* entrenches existing aboriginal and treaty rights of the aboriginal peoples of Canada. If federal prompt payment and adjudication legislation affects aboriginal and treaty rights, the question arises as to whether there is a duty to consult with Indigenous peoples. The BLG Opinion notes that there is appellate authority holding that the duty of the Crown to consult with Indigenous peoples does not extend to the enactment of legislation.⁶⁶⁴ However, we note that in 2010, the Alberta Court of Appeal held that even if there is no duty to consult prior to passing legislation, "the duty may still fall upon those assigned the task of developing

⁶⁶² *St. Catherine's Milling and Lumber Company v The Queen* (1888), 14 AC 46 at 59 (PC Canada); quoted with approval in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 174.

⁶⁶³ BLG Opinion, pp. 15-16; see section 35 of the *Constitution Act, 1982*.

⁶⁶⁴ See e.g. *R v Lefthand*, 2007 ABCA 206 at para 38; *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311.

the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions.⁶⁶⁵ Moreover, on January 15, 2018 the Supreme Court of Canada heard and reserved judgment on an appeal which raised the question of whether the duty to consult applies to the legislative process.⁶⁶⁶ The issue must therefore be considered to be unsettled until the Supreme Court renders its judgment in this case.

In general, the duty to consult Indigenous peoples is well entrenched and considered essential to fostering reconciliation between Indigenous peoples and the Crown.⁶⁶⁷

Most stakeholders that we spoke with recognized the importance of appropriate consultation with Indigenous peoples, including the GCAC.⁶⁶⁸ CCA referred us to its Indigenous Engagement Guide.⁶⁶⁹ We were also referred to the Advocates' Society guide for Lawyers working with Indigenous People.⁶⁷⁰

In addition, CCPPP provided us with a copy of their publication entitled "P3's: Bridging the First Nations Infrastructure Gap."⁶⁷¹ In the CCPPP guide, there is a reference to the significant infrastructure deficit in relation to Indigenous lands and the need to address this issue. In the stakeholder engagement sessions, some stakeholders indicated that having prompt payment and adjudication legislation apply in the context of projects on Indigenous Lands might assist in having those projects completed more quickly and at lower prices.

In relation to adjudication, as mentioned in the Adjudication Chapter, various stakeholders raised issues about the need to adopt a culturally appropriate adjudication process. Accordingly, there should also be consideration of who would be appropriate to adjudicate disputes related to projects on Indigenous lands.

⁶⁶⁵ *Tsuu T'ina Nation v Alberta (Minister of Environment)*, 2010 ABCA 137 at para 55.

⁶⁶⁶ *Sub nom Chief Steve Coutoreille on behalf of himself and the members of the Mikisew Cree First Nation v Governor General in Council* SCC case number 37441; appeal heard and judgment reserved January 15, 2018.

⁶⁶⁷ *Clyde River (Hamlet) vs. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069, 2017 SCC 40 (CanLII).

⁶⁶⁸ GCAC Submission at p. 3.

⁶⁶⁹ <http://www.cca-acc.com/wp-content/uploads/2016/03/IndigenousEngagementGuide.pdf>.

⁶⁷⁰ http://advocates.ca/TAS/Publications/Best_Practices_Publications/TAS/Publications_Resources/Best_Practices_Publications.aspx?hkey=12ee9725-d4e8-408d-93bc-462a365c7d82

⁶⁷¹ http://www.pppcouncil.ca/web/pdf/first_nations_p3_report.pdf.

Recommendation 48

Further consultation may be required prior to the imposition of either prompt payment or adjudication in relation to projects on "lands reserved for the Indians." We recommend that if further consultation is found to be warranted that in the interim, provision be made in the legislation that provides the government with the ability, after appropriate consultation, to create regulations that will provide for the application of prompt payment and adjudication to Indigenous lands.

2. Insolvency Risk

Over the course of our review, various stakeholders raised concerns with us about insolvency on federal construction projects. If a party on a construction project becomes insolvent, there is significant risk that those further down the construction pyramid below that insolvent entity will not be paid. At present, there are various legislative mechanisms utilized at the provincial and territorial level to attempt to address insolvency risk.

(a) Trust Provisions

For example, in the lien legislation of a number of provinces and territories, there are trust provisions. Trust provisions are a separate set of rights (separate from lien rights) that are, in essence, designed to keep all funding within the construction pyramid until all accounts for work are paid in full.⁶⁷² These trust provisions provide remedies to unpaid contractors, subcontractors, and suppliers not only against the corporate owner, contractor or subcontractor, but, under some legislation, also personally against their directors, officers, and any employees or agents who have "effective control" of the corporation or its relevant activities. Personal liability for breach of trust may survive personal bankruptcy and in extreme cases may give rise to criminal liability for breach of trust under section 336 of the Canadian *Criminal Code*.

Such trusts are particularly important in the event of an insolvency because contractors, subcontractors, and suppliers will want to be able to access the funds from the trust as beneficiaries of that trust.⁶⁷³

⁶⁷² *Minneapolis-Honeywell Regulator Co. v Empire Brass Co.* [1955] SCR 694.

⁶⁷³ There are some jurisdictions in Canada that do not have trust provisions in their lien legislation, including the Northwest Territories, Yukon, Nunavut, Prince Edward Island, Newfoundland, and Quebec as noted in the CBA Submission at p. 8.

However, in the context of provincial and territorial lien legislation, in the event of a bankruptcy or insolvency, federal legislation, namely the *Bankruptcy and Insolvency Act* and *Companies Creditors Arrangement Act* plays a key role, and there is a significant risk that trust claims will be treated just like any other unsecured claim such that opportunities for recovery are limited. As noted in our *Striking the Balance* report the following principles arise:

- the doctrine of constitutional paramountcy, whereby federal legislation prevails over provincial legislation to the extent of any operational conflict;
- stay provisions that prevent lien and trust claimants from commencing actions without bankruptcy court approval;
- the Canada Revenue Agency's super-priority for unpaid source deductions; and
- the super-priority of post-filing debtor-in-possession financing or receiver's interim financing.⁶⁷⁴

There are number of cases which consider the problems encountered in respect of statutory trusts, including those cases described in *Striking the Balance*.⁶⁷⁵

The difficulty in implementing a trust regime at the provincial level is described in *Iona Contractors Ltd v Guarantee Company of North America*:

The categorization of a claim for the purposes of relative priority is a matter of federal law. Thus, the provinces cannot define what is a 'trust' or a 'secured party' for the purposes of bankruptcy law; which claims are included in these various categories is a matter of federal law. This ensures the uniformity of bankruptcy law across Canada.⁶⁷⁶

A trust regime also presents issues with respect to accounting for funds and ensuring monies are not co-mingled, thus becoming difficult to trace and losing their character as trust funds.

In the 2014 Ontario Superior Court case of *Royal Bank of Canada v Atlas Block Co.*⁶⁷⁷ the Court considered the issue of whether or not trust funds under Part II of the Ontario *Construction Act* lose their character as trust funds when

⁶⁷⁴ *Striking the Balance*, p. 115.

⁶⁷⁵ *Iona Contractors Ltd. (Receiver of) v Guarantee Co. of North America*, 2015 ABCA 240; *Kel-Greg Homes Inc (Re)* 2015 NSSC 274; and *Royal Bank of Canada v Atlas Block Co.* (2014), 37 CLR (4th) 286

⁶⁷⁶ *Iona Contractors Ltd. (Receiver of) v Guarantee Co. of North America*, 2015 ABCA 240 [*Iona Contractors*].

⁶⁷⁷ *Royal Bank of Canada v Atlas Block Co.* (2014), 37 CLR (4th) 286 [*Atlas Block*].

they are not segregated but are co-mingled, in the context of *Bankruptcy and Insolvency Act* proceedings. The court noted that section 67(1)(a) of the *Bankruptcy and Insolvency Act* does not “extend to assets subject to a deemed trust created by provincial statute where such deemed trust does not otherwise have all the attributes of a valid trust at common law.”⁶⁷⁸ The court examined the three certainties (i.e., (i) certainty of intention, (ii) certainty of subject matter and (iii) certainty of object). Given that funds from construction projects were co-mingled with funds from other sources, there was no certainty of subject matter and “the mere fact that it might be possible to trace the funds for products incorporating Holcim materials [a supplier of cement powder to Atlas Block] to particular construction projects does not change this. Once co-mingling has occurred, that is the end of the matter.”⁶⁷⁹ Accordingly, the priorities under the *Bankruptcy and Insolvency Act* governed the disposition of the funds.⁶⁸⁰

However, the Supreme Court of Nova Scotia considered the trust provisions of the Nova Scotia *Builders’ Lien Act* in the context of a general contractor’s bankruptcy in *Kel-Greg Homes Inc (Re)*⁶⁸¹ and reached a different conclusion from that reached in *Atlas Block*. In *Kel-Greg*, the Court held that, despite the fact that the trust funds were co-mingled with other monies; the funds had nevertheless remained traceable and had not lost the required certainty of subject matter.

In addition to the hurdles posed by federal insolvency legislation, author Duncan Graholt has described the key legal problems with statutory trusts as follows:

It must be conceded that the idea of statutory construction trusts is brilliant. It is almost perfect in its simplicity of expression. If statutory construction trusts were actually carried into effect uniformly, we would not need liens, trusts would be enough. The legal problems have come in trying to overlay this otherwise simple statutory trust scheme over existing commercial relationships such as those between bank and customer, landlord and tenant, and over the business practices of the construction industry itself.⁶⁸²

A number of stakeholders recommended that a trust regime similar in nature to the trust regimes created in the lien legislation of many provinces and territories be implemented for federal construction projects because

⁶⁷⁸ *Ibid* at para 34.

⁶⁷⁹ *Ibid* at para 45.

⁶⁸⁰ *Ibid* at para 48.

⁶⁸¹ 2015 NSSC 274 [*Kel-Greg*].

⁶⁸² Duncan W. Graholt & Markus Rotterdam, “Managing Trust Funds: The New York Model” (2002) 21 CLR (3d) at 2

there are no liens at the federal level. This issue was not addressed in our Information Package.

The CCA suggested that consideration be given to introducing a trust regime that would apply to funds received by a general contractor, subcontractor, supplier, and other payors down the construction chain. The CCA noted that it was not suggesting that the federal government should become a trustee, but rather that such a regime would apply at the level of a general contractor downwards. It was suggested that a trust regime at the federal level that was aligned with that contained in the Ontario *Construction Act* would increase accountability within the payment chain and increase the effectiveness of the federal legislation.⁶⁸³ The Winnipeg Construction Association made a similar submission.

Some CBA members also advocated for the introduction of a trust regime at the federal level pursuant to which officers and directors could be held personally liable for any failure to pay beneficiaries of the trust.

As far back as December 2001, the CBA’s national construction law section (as it was then named) urged the federal government to adopt construction trust legislation for federal Crown construction projects using the Ontario *Construction Lien Act* provisions as a template.⁶⁸⁴ In terms of the benefits of its recommendations, the CBA stated:

- The government would not be exposed to legal liability resulting from a breach of trust or other claim. The funds paid by the Crown to the contractor would only be impressed with a trust once they were in the contractor’s hands. Sub-contractors could not, therefore, claim directly against the Crown for breach of trust, as only the contractor would be a trustee of the funds;
- The proposal would be a self-help remedy which would not cost the federal government anything to administer. Trades would simply sue their contractor in the superior court of a province or territory, adding the trust claim to their claim for simple breach of contract. The government would not be involved in any lawsuit and would not have any responsibilities under the proposal.
- The proposal would actually reduce the government’s costs, in terms of both lower bid amounts (recognizing the reduced credit risk of non-payment) and fewer construction delays (with fewer work slowdowns during periods of trade non-payment).

⁶⁸³ CCA Submission at p. 10.

⁶⁸⁴ CBA Submission to the Department of Public Works and Government Services dated December 19, 2001 (“CBA 2001 Submission”) - <https://www.cba.org/CMSPages/GetFile.aspx?guid=b0c97fa7-d58a-47e1-8a1c-78be27c677f8>

- In a bankruptcy of the general contractor, the statutory trust would preserve construction trades' prior claims. This would reduce the government's cost of replacing the bankrupt contractor where the bankrupt contractor has not paid the existing trades;
- The present system works best when the Department of Public Works and Government Services can holdback money from the general contractor or threaten termination of the general contract. The remedy we have proposed addresses the situation where money has already left the government's hands and the project has been substantially completed. As such, government would not be required to change its contract terms, including holdback provisions and bonding requirements;
- The remedy would not increase litigation because trades would sue on their unpaid debt in any event. Our proposal would increase the trades' chances of recovering the judgment debt, given that a trust would survive a bankruptcy and would impose personal liability on a contractor's directors and officers;
- The proposal helps to ensure that trades actually get paid for the work they do; and
- Using a trust to funnel money from the Crown to trades and labourers who actually do the work is consistent with the general prohibition on the assignment of Crown debts found in s. 67 of the Financial Administration Act, R.S.C. 1985, c. F-11.⁶⁸⁵

In Australia, the Murray Report recommends that a deemed statutory trust scheme should be established by legislation and applied to all parts of the contractual payment chain. The Murray Report concluded that such legislative intervention was long overdue as it had been an issue first promoted in the early 1990s and recommended by previous inquiries. In Australia, project bank accounts had been proposed in Queensland, but the Murray Report concluded that the introduction of such project bank accounts would have a "suboptimal outcome compared to what would be able to be achieved through the introduction of a cascading statutory trust."⁶⁸⁶ The Murray Report recommended that this national statutory trust would apply for all construction projects of a value of \$1 million or more. In respect of the details of such a regime, the Murray Report endorsed the recommendation of the Collins Inquiry which was to implement a trust regime for projects over \$1 million.

⁶⁸⁵ CBA 2001 Submission at p. 3.

⁶⁸⁶ Murray Report, p. 310.

If a mandatory trust regime were to be implemented through Canadian federal legislation, a careful review would need to be conducted as to the constitutionality of such legislation, as well as further consultations with stakeholders.

In Ontario we recommended that provisions be inserted in the *Construction Act* to require that a trustee follow specific statutory requirements as follows:

We recommend that the Act should be amended to require that a trustee must follow specific statutory requirements in relation to trust fund bookkeeping similar to that applied in the New York Lien Law, including the following:

- If a trustee deposits trust funds they are to be deposited in the trustee's name;
- The trustee is not required to keep the funds of separate trusts in separate bank accounts or deposits provided that his books and records of account clearly show the allocation to each trust of the funds deposited in the general account;
- The trustee must keep separate books for each trust for which it is trustee (and if funds of separate trusts are in the same bank account, the trustee is to keep a record of such account showing the allocation to each trust of deposits and withdrawals); and
- The books and records of each trust must show specifically articulated particulars with respect to assets receivable, assets payable, trust funds received, trust payments made with trust assets and any transfers made for the purpose of the trust.⁶⁸⁷

In addition, to avoid the problems associated with co-mingling trust funds with other monies which is described in our summary of the relevant caselaw in Chapter 7 of *Striking the Balance*, we recommended the initiation of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. This recommendation was not accepted by the Ontario government because of the administrative burden it would impose.

This recommendation was not implemented at the provincial level in Ontario. However, we suggest that further consultation at the federal level to consider pilot projects for project trust accounts utilizing a representative number of projects in the federal public sector may be warranted.

In any event, we recommend further consultation on the statutory trust issue generally, as noted below.

⁶⁸⁷ *Striking the Balance*, p. 148.

(b) Surety Bonds

In *Striking the Balance* we also recommended the introduction of mandatory surety bonding. Mandatory surety bonding has been in place in the United States in one form or another since 1894. In 1935, the *Miller Act* was enacted to "provide a statutory mechanism to protect persons supplying materials and labor to contractors or subcontractors working on federal projects."⁶⁸⁸ The purpose of the payment bond required under the *Miller Act* is to "to shift the ultimate risk of nonpayment from workers and suppliers to the surety."⁶⁸⁹

In the United States, there is no right to lien a federal project given mandatory payment bonds. All federal public construction projects in the United States valued at over \$100,000 with few exceptions are subject to the provisions of the *Miller Act*.⁶⁹⁰

In addition, in the United States each one of the 50 states enacted a "Little Miller Act."⁶⁹¹

In Ontario, we recommended a mandatory surety bonding on public and broader public sector projects. In particular, mandatory performance bonds and labour and material payment bonds were recommended for projects of a value above a prescribed threshold (with certain caps in relation to surety bonds on large projects).⁶⁹²

The issue of surety bonds was not a topic addressed in our Information Package because the same policy rationale that was applied to the introduction of mandatory surety bonding in Ontario did not apply in the federal context, given that in the context of federal legislation the paramountcy doctrine, which is discussed in Chapter VII, would not apply.

⁶⁸⁸ Kevin L. Lybeck & H. Bruce Shreves, eds, *The Law of Payment Bonds* (Chicago: American Bar Association, 1998) at 65

⁶⁸⁹ *Ibid.*

⁶⁹⁰ James D. Fullerton, *Construction Bonds on Public Projects*, Manual of Credit and Commercial Laws, 104 ed, reprinted in Construction Law Survival Manual (2005) at 609, online:

<http://www.fullertonlaw.com/docs/appendices/50_state_survey_of_payment_bond_rights.pdf>. James D. Fullerton, *Construction Bonds on Public Projects*, Manual of Credit and Commercial Laws, 104 ed, reprinted in Construction Law Survival Manual (2005) at 609, online:

<http://www.fullertonlaw.com/docs/appendices/50_state_survey_of_payment_bond_rights.pdf>

⁶⁹¹ *Ibid*; Lawrence R. Moellmann & John T. Harris, eds, *The Law of Performance Bonds* (Chicago: American Bar Association, 1999) at 8.

⁶⁹² *Construction Lien Act* at s. 85.1 and 85.2 and Ontario Regulation 304/18 at s. 12.

There were a few stakeholders who suggested that performance and labour and material payment bonds should be required, namely the Surety Association of Canada and NTCCC.⁶⁹³ Others noted that making surety bonds mandatory at the federal level was unnecessary and unwarranted. The GCAC, for example, recommended that bonds should not be mandated.⁶⁹⁴

The Standard Federal Government Construction Contract requires that contract security be in place, as does the GCR. Surety bonds are used frequently on federal construction projects over \$100,000. However, some federal owner stakeholders noted that dictating the form of security to be utilized on such projects could lead to essentially providing a monopoly to the surety industry to provide the required form of security.

Recommendation 49

We recommend that a trust regime be considered and that further consultation be conducted in relation to a trust regime. If it is not possible to introduce a trust regime, or potentially as an additional protection, we recommend that mandatory surety bonding be considered as an alternative mechanism to address insolvency risk.

⁶⁹³ SAC Submission at p. 4. NTCCC Submission at p. 11.

⁶⁹⁴ GCAC Submission at p. 4.

XIV. TRANSITION AND EDUCATION

The implementation of new legislation requires careful consideration in respect of transition in order to ensure minimal impact on existing projects and procurements, and to provide the stakeholders with an appropriate amount of time to review and revise contracts to bring them into alignment with the new legislation. This is of particular importance in the federal context given the extent of federal construction projects.

1. Transition

Transition is a key issue for all participants in the construction industry. Parties need to understand what legislation is going to apply from the outset of a procurement. This is important to the owner entities drafting the contract, who are assessing the appropriate risk profile. Perhaps even more importantly, certainty is key to those who are determining whether they will bid on a project, what their pricing will be, and even who they will team with at the qualifications stage of a project.

In Ontario's *Construction Act*, the transition period is described in Section 87.3. This provision has garnered significant attention in the lead up to the July 1, 2018 effective date of the modernization provisions of the new Act.

The transition provision is s.87.3 of the *Construction Act* provides as follows:

87.3 (1) This Act, as it read immediately before the day subsection 2 (2) of the Construction Lien Amendment Act, 2017 came into force, continues to apply with respect to an improvement if,

- (a) a contract for the improvement was entered into before that day, regardless of when any subcontract under the contract was entered into;
- (b) a procurement process, if any, for the improvement was commenced before that day by the owner of the premises; or
- (c) the premises is subject to a leasehold interest, and the lease was first entered into before that day. 2017, c. 24, s. 61 (1).

Examples, procurement process

(2) For the purposes of clause (1) (b), examples of the commencement of a procurement process include the making of a request for qualifications, a request for proposals or a call for tenders. 2017, c. 24, s. 61 (1).

Note: On October 1, 2019, the day named by proclamation of the Lieutenant Governor, section 87.3 of the Act is amended by adding the following subsection: (See: 2017, c. 24, s. 61 (2))

Same

(3) Parts I.1 and II.1 apply in respect of contracts entered into on or after the day subsection 11 (1) of the Construction Lien Amendment Act, 2017 comes into force, and in respect of subcontracts made under those contracts. 2017, c. 24, s. 61 (2).

Therefore, the modernization provisions apply only to projects in respect of which the RFQ, RFPs or Calls for Tender were issued after July 1, 2018.

Only contracts entered into on or after October 1, 2019 would be subject to the prompt payment and adjudication provisions of the *Construction Act*.

One of the reasons for this deferral of the effective date for prompt payment and adjudication is the need to: a) set up the Authorized Nominating Authority; b) produce an initial cohort of adjudicators who have been properly trained and certified; and c) to allow construction industry participants time to revise their contracts and internal processes. This will be no different at the federal level. The second reason is the need for education, as discussed below.

In relation to these and other transition issues, stakeholders made specific submissions including:

- The CCA and WCA recommended that RP-1/RP-2 and similar contracts should be included in prompt payment legislation but only after the expiry of the current terms;⁶⁹⁵
- However, the CCA submitted that the proposed legislation should apply to “subcontracts” under RP-1/RP-2 immediately upon proclamation;
- The CCA also submitted that procurements initiated prior to proclamation should continue under the existing legislation and policy;⁶⁹⁶
- BGIS advised us that there should be significant consequences if the legislation was applicable to RP-1/RP-2 immediately, in particular given that the RP-1/RP-2 contracts do not contain a change of law provision;
- BGIS suggested that the legislation should apply only to projects under new head contracts but that there could be opportunities to implement legislative changes to existing contracts, provided that contractual revisions for cost recovery of contractors and subcontractors would be implemented.

⁶⁹⁵ WCA Submission at p. 2; CCA Submission at p. 4.

⁶⁹⁶ CCA Submission at p. 4.

- The NCC was concerned with an increase in costs of projects due to compliance issues for government entities over a construction period.⁶⁹⁷

Recommendation 50

The new legislation should come into effect approximately 18 to 24 months after it receives Royal Assent to allow for the creation of an ANA and to revise standard form contracts (including the Standard Federal Government Construction Contract) and provide time for education of stakeholders.

Recommendation 51

The new legislation should apply only to:

- procurements that commenced after the date the legislation comes into force;
- contracts entered into by the federal government after the legislation comes into force or in the case of procurements; and
- existing Real Property Service Management Contracts (such as RP-1/RP-2) should be specifically grandfathered until the Government exercises any option, following which the legislation should apply to construction aspects of these arrangements, provided that fair adjustment is made to the pricing of such options. The legislation should apply to new Real Property Services Management contracts entered into after the effective date.

2. Education

As noted in Chapter V, Education was an important element of the Working Group’s action plan. In particular, the Working Group considered the roll-out of an education program that was intended to ensure that contractors and the balance of the supply chain would be aware of changes in responsibilities

⁶⁹⁷ NCC Meeting Summary.

(e.g. regarding payment) and available remedies on federal construction projects. Specifically, the Working Group committed to drafting educational materials regarding contract terms, service standards, frequent bottlenecks, remedies for delayed payment and payment best practices.⁶⁹⁸

As part of our stakeholder engagement process, stakeholders expressed concern about the complexity of new legislation and in particular, the difficulty for small contractors to adequately cope with the legislation. We considered mechanisms which the federal government could implement to alleviate concerns regarding the complexity of the proposed legislation. We also considered opportunities for the industry itself to participate in educational programming to aid in the transitional period leading up to the effective date of the proposed legislation.

In this regard, stakeholders such as the WCA submitted that they, among other Canadian construction associations, would be prepared to offer to communicate information to their members at no cost.⁶⁹⁹ However, this was not the case across all provincial associations. We heard from some stakeholders in smaller and more remote jurisdictions that they would not have the necessary funds to provide adequate training and education to members looking to understand the new legislation.

In this regard, we understand that the Working Group discussed creating a training package to be developed for use by local construction associations. The training could be structured with local construction associations for joint delivery along with government on how to do business with PSPC and DCC. With some funding, this process could be effective in providing education in relation to the proposed legislation.

⁶⁹⁸Education - <https://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/papsdic-appci-eng.html>

⁶⁹⁹ WCA Submission at p. 3.

Recommendation 52

An education program should be implemented for delivery well prior to the effective date of the new legislation. Included in this program should be a practice guide, as well as web based learning modules and clearly written plan language guides including flow-chart style informational guides on the use of prompt payment and adjudication. The federal government should work with stakeholders, including the CCA, GCAC and NTCCC to prepare educational materials regarding contract terms, service standards, and the new legislation as well as creating a training package to be delivered to local construction associations.

In addition, there should be opportunities for joint presentations between construction associations and the federal government.

Recommendation 53

The federal government should provide funding for provincial construction associations, or other applicable associations, to provide training to their members in relation to federal construction projects on an as needed basis.

XV. CONCLUSION AND ACKNOWLEDGEMENTS

We are grateful to have had the opportunity to undertake this mandate. There has not yet been any federal legislation in Canada on the topic of prompt payment and adjudication and to have had the opportunity to break new ground in the industry within which we practice was an honour.

In carrying out our mandate, we have attempted to use an open, collaborative, and transparent approach. As we travelled the country, we were privileged to hear the differing perspectives of stakeholders, who had carefully considered the issues associated with the introduction of prompt payment and adjudication at the federal level. We received thoughtful and considered input from many stakeholders, which we have taken into consideration in the drafting of this report.

We would like to thank Minister Carla Qualtrough, Parliamentary Secretary Steve MacKinnon, the Honourable Judy Sgro and the Deputy Minister of Public Services and Procurement Canada, Marie Lemay. Their leadership and commitment to the mandate assigned by Prime Minister Trudeau in relation to prompt payment has allowed PSPC to move forward with this initiative and support us in the performance of the review.

As well, we would like to thank Senator Donald Plett for his contributions to prompt payment with the introduction of Bill S-224 and his tireless efforts in relation to that Bill. Bill S-224 provided significant momentum to bring forward prompt payment legislation.

We would also like to thank our key contacts at PSPC, being the Assistant Deputy Minister Kevin Radford, Crawford Kilpatrick (A/Director General, Strategic Sourcing Sector Real Property Services), and Shawn Gardner (Senior Director of Real Property Services Management Contracting Directorate), for the time and attention they devoted to this effort. They were unfailingly helpful as we worked towards finalization of this report. As both a stakeholder and our client, they gave us intellectual freedom and were generous with their time as they answered our questions and tracked down information for us. Similarly, the team at Defence Construction Canada were of great assistance, including James Paul (President and CEO), Mélinda Nycholat (VP Operations-Procurement), Daniel Benjamin (VP Operations) and Dave Burley (National Service Line Leader, Contract Management and Real Property Management Services).

Thanks too to our partners and associates at Singleton Urquhart Reynolds Vogel LLP who pitched in whenever asked and participated in the stakeholder engagement sessions. We are particularly grateful to our partners John Singleton, QC, Helmut Johanssen, David Edinger, and Jane Ingman Baker for their insights and contributions. Our associates Jesse Gardner, Emira Bouhafna, Evan Rankin and

Lysandra Bumstead also deserve thanks for their research assistance and efforts on the stakeholder engagement process.

James Little, the Secretary of the Review, deserves significant credit for organizing and participating in almost every stakeholder meeting across the country and for playing an indispensable role in the drafting of this report.

As well, we would like to thank our esteemed friends and colleagues the Honourable Thomas Cromwell and Guy Pratte for their assistance in regards to issues fundamental to our work.

We would also like to thank the many stakeholders who engaged with us to share their views – sometimes in the form of lively debates, but always in a respectful and productive manner with a view to achieving the best outcome for all.

Finally, on a personal note, we would like to dedicate our work on this important project to our families and to Kenneth W. Scott, Q.C.



R. Bruce Reynolds



Sharon C. Vogel