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CONSTRUCTION

Prompt payment movement hits Canadian construction and infrastructure sector

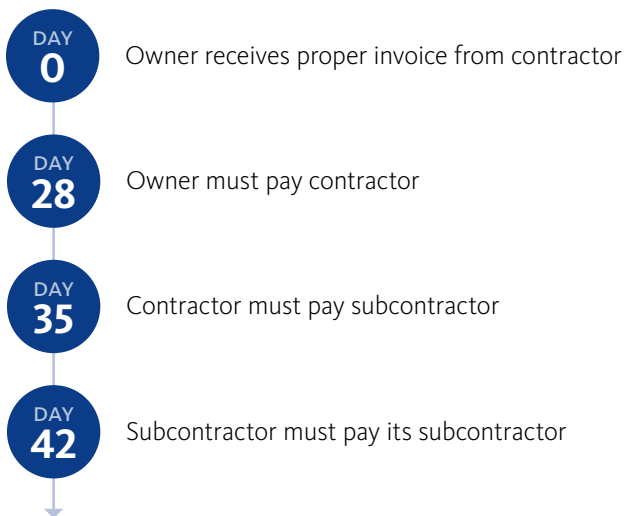
Prompt payment and mandatory adjudication legislation is being enacted across Canada in an effort to alleviate perceived payment delays down the construction pyramid. A watershed moment came in 2019 when such legislation came into force in Ontario through amendments to the [Construction Act](#) (formerly the *Construction Lien Act*). The development industry in Ontario is consumed with revising internal processes and re-drafting contracts to address the new rules, and will be grappling with the inevitable growing pains caused by the new legislation for some time. In the meantime, a number of other jurisdictions in Canada, including the federal government, are following Ontario's lead.

What changed on October 1, 2019 in Ontario?

Mandatory prompt payment

The prompt payment regime introduces swift payment deadlines that were inspired by similar reforms introduced over 20 years ago in the United Kingdom. The clock starts ticking once the owner receives a “proper invoice” from its general contractor, either on a monthly basis or as otherwise agreed in the contract. The owner must either pay within 28 calendar days (Figure 1) or dispute within 14 calendar days, describing the reasons for non-payment (Figure 2). In turn, the contractor must either pay its subcontractors within seven calendar days of receipt of payment (Figure 1) or send notices of dispute within seven calendar days (Figure 2).

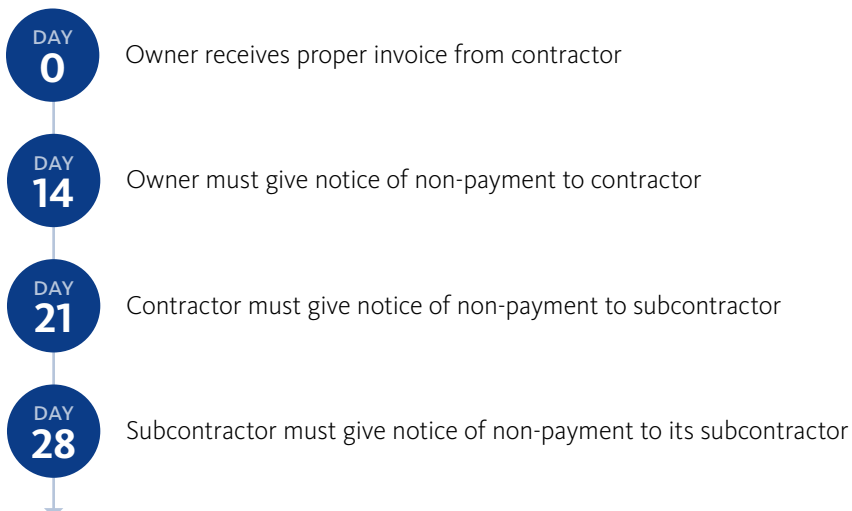
FIGURE 1: PROMPT PAYMENT TIMELINES



The clock starts ticking once the owner receives a “proper invoice” from its general contractor.

Figure 2 illustrates the cascading notices of non-payment starting from the owner to the contractor and subcontractors down the construction pyramid.

FIGURE 2: TIMELINES FOR NOTICE OF NON-PAYMENT



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

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

Mandatory adjudication

Introduced by the *Construction Act*, adjudication is a quick interim method to resolve disputes on a construction project. An adjudication must begin prior to completion of the contract or subcontract, unless the parties agree otherwise.

Any party to a contract or subcontract may refer a dispute to adjudication by giving a written notice of adjudication to the other party to the dispute. The notice of adjudication initiates the process and extremely tight timelines follow, culminating in the adjudicator's determination. The adjudication regime in Ontario will be administered and overseen by a new entity called the Ontario Dispute Adjudication for Construction Contracts (ODACC).

The parties may agree to an adjudicator or request ODACC to appoint an adjudicator. If the adjudicator selected by the parties does not consent to adjudicate the matter within four calendar days after the notice of adjudication is given, it is mandatory for the referring party to request ODACC to appoint an adjudicator. Somewhat strangely, neither the *Construction Act* nor the regulations prescribe a timeframe for making this request, though presumably the referring party will have an interest in doing so as quickly as possible. On receiving a request for appointment from the referring party, ODACC must appoint an adjudicator within seven days.

ODACC has prepared four pre-designed adjudication processes, with flat adjudicator fees ranging from \$800 to \$3,000, to assist the parties and the adjudicator in determining the best process for a particular dispute. Interestingly, three of the four processes are to be conducted in writing only, while the fourth process allows oral presentations. The oral presentations under that process will be conducted by either videoconference or teleconference, but not in person. Further, each oral presentation is limited to 30 minutes per party. Each process also sets out page limits for the parties' submissions and the adjudicator's determination. Alternatively, the adjudicator has the power to conduct the adjudication in the manner he or she considers appropriate. This will permit flexibility for more complex disputes.

The adjudicator must give his or her determination within 30 days of receiving the required documents. If a party fails to make a payment within 10 days of the adjudicator's determination, the contractor or subcontractor, if it is the successful party, is entitled to suspend further work under the contract or subcontract.

Other amendments

Ontario is the only jurisdiction with a prompt payment and adjudication regime layered on top of an existing construction lien regime. To a large degree, the intersections with liens have been considered. Lien periods have been extended to allow for disputes to be resolved before liens are used to enforce payment. As a result, starting July 1, 2018, the deadline for preserving a lien was extended from 45 days to 60 days, and the deadline for perfecting a lien was extended from 45 days to 90 days. Interestingly, the *Construction Act* allows an extension to the time for the preservation of a lien, if the issue that is the subject matter of the lien is also the subject matter of an adjudication; this may lead to unexpected results when the owner attempts to determine when a lien period expires.

What's happening elsewhere in Canada?

At the federal level, the *Federal Prompt Payment for Construction Work Act*, which addresses the non-payment of contractors and subcontractors performing construction work for federal construction projects, was first introduced and passed as part of a larger budget bill on June 21, 2019. However, it is not yet in effect. Once in force, it surprisingly will not grandfather existing contracts; instead, it will provide for a one-year deferral period before it applies to existing contracts. At that point, it may be imagined that the sudden application mid-performance of the new law to existing contracts drafted before the Act came into effect may be quite disruptive to those contracts.

As described in our [Canadian prompt payment and construction law reforms page](#) on osler.com, some other provinces, such as Nova Scotia and Saskatchewan, have just passed legislation of their own that follows Ontario's approach. Similar to the *Construction Act* amendments in Ontario, Québec adopted Bill 108 in December 2017, authorizing the implementation of pilot projects to test construction law reforms aimed at facilitating public contract payment. In August 2018, the "Pilot project to facilitate payment to enterprises that are parties to public construction work contracts and related public subcontracts" was implemented, which established a prompt payment and adjudication scheme that is similar to Ontario's, but limited its scope to the public sector. This project is being implemented in two phases, the first of which is underway and affects contracts relating to the Société Québécoise des Infrastructures and to the Ministry of Transport, and the second of which will extend to contracts in the education, healthcare and social service sectors.

Still other provinces, namely New Brunswick, Manitoba, Alberta and British Columbia, are either implementing other initiatives in relation to prompt payment, or considering what form prompt payment and adjudication should take in their provinces. Such provinces are having some interesting discussions regarding whether the "Ontario model" is right for them.

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What will the federal law mean for federal construction projects located in provinces that have passed prompt payment legislation, such as Ontario, Nova Scotia and Saskatchewan, and others who plan to do so in the future? At present, it is not clear, although the federal government may choose to exempt federal projects from the federal regime either individually or on a province-wide basis in cases where equivalent provincial legislation has been adopted. However, given the constitutional considerations regarding jurisdiction, it will be interesting to see what approach the federal government chooses to take in such situations.

Conclusion

Across Canada, all actors in the construction pyramid are adjusting to the new reality of prompt payment and adjudication. In the coming months, it will be interesting to see what rules are adopted in provinces outside Ontario and how the new regimes are implemented in practice.

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