



Bennett
Jones

Bennett Jones Construction Breakfast Series

Prompt Payment & Adjudication in Canada

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Presenters

Paul Blundy
Vasilis Pappas
Geoff Stenger
Chris Petrucci

Overview

- › **New Federal and Provincial Legislation**
- › **Practical Considerations for the Construction Industry**
- › **Potential Legal Issues**



New Federal and Provincial Legislation

Federal *Prompt Payment for Construction Work Act*

Purpose and Application of the Federal *Prompt Payment for Construction Work Act*

- › The purpose is the orderly and timely carrying out of construction projects by addressing non-payment of Contractors and Subcontractors on federal projects
- › The Act applies to any Service Provider, Contractor or Subcontractor performing construction work on a project located in Canada for any federal real property or federal immovable
- › The Governor in Council may exempt any construction project from application of the Act



Federal *Prompt Payment for Construction Work Act*

Notable Definitions

› **Construction Project**

- › (a) addition, alteration or capital repair to, or restoration of any federal real property or federal immovable
- › (b) construction, erection or installation on any federal real property or immovable, including the installation of equipment essential to the normal or intended use of the federal real property or federal immovable
- › (c) complete or partial demolition or removal of any federal real property or federal immovable

› **Construction work**

- › The supply of materials or services including rental equipment, for the purposes of a construction project located in Canada



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Provisions

- › Government/Service Provider and Contractor
 - › A Contractor must submit a proper invoice in writing with respect to any construction work completed
 - › The Government or the Service Provider must pay the Contractor within 28 days of receiving a proper invoice
 - › The Government or the Service Provider has 21 days after receiving a proper invoice to dispute the invoice and provide the Contractor with a notice of non-payment
 - › On request, a Contractor must inform a Subcontractor of the date in which the Government or the Service Provider received the proper invoice from the Contractor



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Provisions

- › Contractor and Subcontractor
 - › If a Contractor is paid, they have 35 days after the day the proper invoice is received by the Government or the Service Provider to pay all of their Subcontractors for the construction work that was invoiced
 - › The Contractor can decline to pay the Subcontractors if they provide a notice of non-payment within 28 days of the proper invoice



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Provisions

- › Contractor and Subcontractor
 - › Partial Payment
 - › If a Contractor is only paid in part, it must distribute the funds received in the following manner:
 - › (1) On a rateable basis to any of the Subcontractors whose construction work is not covered by the notice of non-payment, retaining any amount owed to the Contractor for their own construction work not covered by such a notice
 - › (2) Then, from any remaining amount on a rateable basis, to any of its Subcontractors whose work is partly covered by a notice of non-payment, retaining any amount owed to the Contractor for their own construction work partly covered by such a notice



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Provisions

- › Subcontractor and Subcontractor
 - › A Subcontractor that is paid by a Contractor must pay each of their Subcontractors within 42 days of the day the proper invoice is received by the Government or Service Provider
 - › The Subcontractor may decline to pay their Subcontractors for some or all of the construction work if they provide Notice of Non-Payment within 35 days of when the proper invoice is received



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Provisions

- › Subcontractor and Subcontractor
 - › Partial Payment
 - › If the Subcontractor is only paid in part, it must distribute the amount received in the following manner:
 - › (1) On a rateable basis to each of its Subcontractors whose construction work is not covered by a notice of non-payment, retaining any amount owed for any of the Subcontractor's own construction work not covered by the notice
 - › (2) Then, any remaining amount must be paid on a rateable basis to each of its Subcontractors whose work is partly covered by the notice of non-payment, retaining any amount owed for any of the Subcontractor's own construction work not covered by the notice



Federal *Prompt Payment for Construction Work Act*

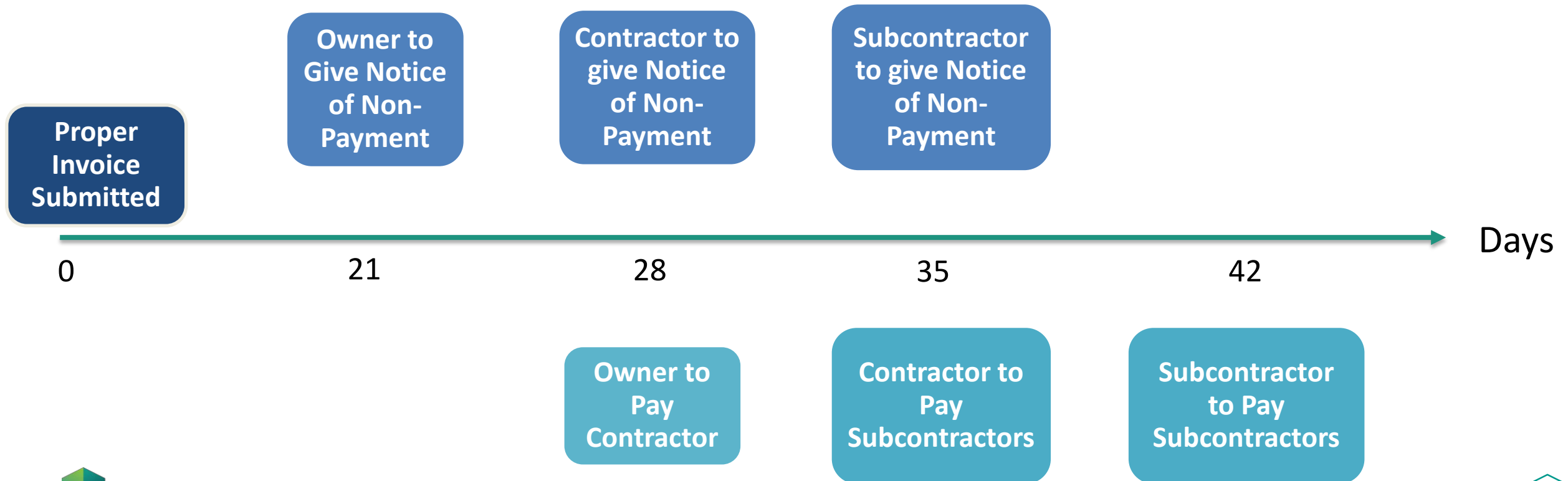
Prompt Payment Provisions

- › Notice of Non-Payment
 - › Must include:
 - › A description of the construction work covered by the notice
 - › The amount that will not be paid
 - › The reasons for non-payment, including whether the paying party does not have the necessary funds to do so
 - › Any other information prescribed by the regulation



Federal *Prompt Payment for Construction Work Act*

Prompt Payment Timelines



Federal *Prompt Payment for Construction Work Act*

Adjudication

- › If a Contractor or Subcontractor has not been fully paid for construction work within the applicable time limit, either party may obtain a determination from an Adjudicator
- › The party seeking to have the dispute determined by an Adjudicator must provide the opposing party a notice of Adjudication no later than the 21st day following:
 - › The day the Contractor receives the certificate of completion for the project; and
 - › If any of the construction work is covered by the last proper invoice, the expiry of the time limit provided under the Act
- › The notice of Adjudication must include the name of a proposed Adjudicator selected from a list of Adjudicators established by the Adjudication Authority



Federal *Prompt Payment for Construction Work Act*

Adjudication

- › The parties to a dispute must jointly appoint an Adjudicator
 - › If the parties cannot jointly appoint one, either party can request that the Adjudicator Authority appoint one
- › Adjudicators must provide a determination
 - › Exceptions for this provision will be provided in the regulations
 - › Determination is binding unless the parties come to a written agreement or the determination is set aside by court order or arbitral award
- › Compliance with determination
 - › If an Adjudicator orders a party to pay under the contract, the party must make the payment within 10 days after the day it receives the determination



Federal *Prompt Payment for Construction Work Act*

Adjudication

- › If the breaching party fails to pay
 - › Non-breaching party may:
 - › Suspend the work; or
 - › File in Federal Court or Superior Court in the province to enforce the judgment
- › Costs
 - › Each party must pay its own costs and an equal portion of the Adjudicators fees and expenses



Ontario *Construction Act*

Prompt Payment

- › Proper invoices are required to be given to the Owner on a monthly basis unless the contract provides otherwise
 - › Proper invoice: written bill or request for payment for services or materials in respect of an improvement under a contract
- › Requirements to pay are subject to any holdback requirements
- › A proper invoice cannot be subject to certification



Ontario *Construction Act*

Prompt Payment

- › Owner to Contractor
 - › An Owner has 28 days from receiving the notice of non-payment to pay the Contractor
 - › If an Owner disputes any or all of a proper invoice, they must deliver a notice of non-payment within 14 days from receiving the proper invoice

Ontario *Construction Act*

Prompt Payment

- › Contractor to Subcontractor (s 6.5)
 - › If a Contractor receives full payment of a proper invoice, they shall pay their Subcontractors within 7 days of receiving payment
 - › Subcontractors are paid on rateable basis if the Owner does not pay the full proper invoice
 - › Contractor has 35 days to deliver a notice of non-payment to the Subcontractor, or 7 days from when notice is given from the owner
 - › With the notice of non-payment, the Contractor must provide an undertaking to refer the matter to Adjudication within 21 days



Prompt Payment

- › Subcontractor to Subcontractor
 - › A Subcontractor who receives full payment from a Contractor shall pay their Subcontractors within 7 days
 - › Payment on rateable basis if the Contractor does not pay the full invoice
 - › Subcontractor has 42 days to deliver a notice of non-payment to the Subcontractor or 7 days after receiving notice from the Contractor
 - › Must provide undertaking to refer matter to Adjudication within 21 days

Ontario *Construction Act*

Adjudication

- › Authorized Nominating Authority will be designated to train Adjudicators, qualify people as Adjudicators and appoint Adjudicators
- › A party may enter into Adjudication when a dispute involves:
 - › Valuation of services or materials
 - › Payment under the contract
 - › Disputes subject to a notice of non-payment
 - › Amounts retained under set-off
 - › Non-payment of holdback
 - › Any other matter that the parties to the Adjudication agree to, or that may be prescribed



Ontario *Construction Act*

Adjudication

- › An Adjudication may not be commenced if the notice of Adjudication is given after the date of the contract or subcontract
- › An Adjudication is subject to the Adjudication procedures set out in the subcontract or contract if they comply with the requirements of the Act
- › Party must give written notice of Adjudication
- › Adjudicator
 - › Parties may agree or request the authority to appoint an Adjudicator
 - › A provision of a contract naming an Adjudicator is of no force or effect



Ontario *Construction Act*

Adjudication

- › Adjudicators fee shall be split between parties
- › Power of Adjudicator
 - › Issue directions respecting conduct of the Adjudication
 - › Taking the initiative in ascertaining the relevant facts and law
 - › Drawing inferences based on conduct of the parties to the Adjudication
 - › Conducting an on-site inspection of the improvement subject to the dispute
 - › Subject to prior consent
 - › Obtaining assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person to enable a better determination of any matter of fact in question
- › Making a determination in the Adjudication



Ontario *Construction Act*

Adjudication

- › Adjudicator has 30 days from receiving documents from the parties to make a determination (subject to extensions)
- › The parties may agree to terminate the Adjudication at any time after the notice of Adjudication is given and before a determination is made
- › Determination is binding on the parties until a determination is made by a court, a determination is made by way of an arbitration under the *Arbitration Act* or a written agreement is made between the parties respecting the matter
- › Parties shall bear own costs
 - › A party that has acted in a manner that is frivolous, vexatious, an abuse of process or lack of good faith, may be ordered to pay some or all of the other parties costs
- › A party may file a certified copy of the determination with the court and the determination is enforceable as if it were an order of the court



BC *Builders Lien (Prompt Payment) Amendment Act*

History

- › May 28, 2019, Bill M-233 was introduced into the Legislative Assembly of British Columbia
- › If passed, this act will amend the current British Columbia *Builders Lien Act*
- › It has currently passed the First Reading

BC *Builders Lien (Prompt Payment) Amendment Act*

Prompt Payment

- › Proper invoices shall be given to an owner on a monthly basis unless the contract provides otherwise
- › A provision that makes giving of a proper invoice conditional on payment certification is of no force or effect

BC Builders Lien (Prompt Payment) Amendment Act

Prompt Payment

- › Owner to Contractor
 - › 28 days to pay after proper invoice is received
 - › Owner can dispute payment by giving a notice of non-payment within 14 days



BC Builders Lien (Prompt Payment) Amendment Act

Prompt Payment

- › Contractor to Subcontractor
 - › Contractor has 7 days after receiving payment of a proper invoice to pay all Subcontractors
 - › Subcontractors are paid on a rateable basis if the Owner does not pay the full proper invoice
 - › Contractor has 35 days to deliver a notice of non-payment to the Subcontractor, or 7 days from when notice is given from the Owner
 - › With the notice of non-payment the Contractor must provide an undertaking to refer the matter to Adjudication within 21 days



BC Builders Lien (Prompt Payment) Amendment Act

Prompt Payment

- › Subcontractor to Subcontractor
 - › Subcontractor has 7 days after receiving proper invoice to pay their Subcontractors
 - › Subcontractors will be paid on a rateable basis if the Contractor does not pay the full proper invoice
 - › Subcontractor has 42 days to give a notice of non-payment, or 7 days after receiving notice from the Contractor
 - › With the notice of non-payment the Subcontractor must provide an undertaking to refer the matter to Adjudication within 21 days



BC *Builders Lien (Prompt Payment) Amendment Act*

Adjudication

- › The Bill briefly references Adjudication
 - › The Contractor and Subcontractor must provide an undertaking to refer a dispute to Adjudication with a notice of non-payment
- › Adjudication procedures have not been further defined

Similarities and Differences Between the Acts

Prompt Payment

Provision	Federal Act	Ontario Act	BC Bill
Owner to Contractor Payment	28 Days	28 Days	28 Days
Owner Notice of Non-Payment	21 Days	14 Days	14 Days
Contractor to Subcontractor Payment	35 Days	7 days after payment	7 days after payment
Contractor Notice of Non-Payment	28 days	35 days from proper invoice or 7 days from Owner notice	35 days from proper invoice or 7 days from Owner notice

Similarities and Differences Between the Acts

Prompt Payment

Provision	Federal Act	Ontario Act	BC Bill
Subcontractor to Subcontractor Payment	42 Days	7 days after payment	7 days after payment
Subcontractor to Subcontractor Notice of Non-Payment	35 Days	42 days from proper invoice or 7 days from Owner notice	42 days from proper invoice or 7 days from Owner notice
Undertaking to refer matter to Adjudication	No	Yes, 21 days	Yes, 21 days

Similarities and Differences Between the Acts

Adjudication

Provision	Federal Act	Ontario Act	BC Bill
Time to refer dispute to Adjudication	21 Days	21 Days	21 Days
Costs of Adjudication	Split between parties	Split between parties	N/A
Time to determine a dispute	N/A	30 Days	N/A



Practical Considerations



Practical Considerations for Owners

Prompt Payment

- › Adjusting billing cycles to abide by new provincial and federal legislation
- › Identifying payment disputes early and providing prompt notice of non-payment
- › Training project managers and other project employees on Prompt Payment timelines

Practical Considerations for Contractors

Prompt Payment

- › Understanding the requirements for a proper invoice in each jurisdiction
- › Putting the Owner on notice if they do not abide by Prompt Payment timelines
- › Adjusting billing cycles to abide by new provincial and federal legislation
 - › Develop processes to facilitate proper Subcontractor payment upon payment disputes with Owner
- › Identifying payment disputes early and providing prompt notice of non-payment to Subcontractors
- › Training project managers and other project employees on Prompt Payment timelines

Practical Considerations for Subcontractors

Prompt Payment

- › Understanding the requirements for a proper invoice in each jurisdiction
 - › Identifying when the Contractor submits their proper invoice which triggers the timeline to pay
- › Putting the Contractor on notice if they do not abide by prompt payment timelines
- › Adjusting billing cycles to abide by new provincial and federal legislation
 - › Develop processes to facilitate proper Subcontractor payment upon payment disputes with Contractor
- › Identifying payment disputes early and providing prompt notice of non-payment to Subcontractors
- › Training project managers and other project employees on prompt payment timelines



Practical Considerations for All Parties

Adjudication

- › Identifying disputes early and referring them to Adjudication within time periods under the Act
- › Identifying preferred Adjudicators in each jurisdiction
- › Managing project documentation as it will be needed to submit to the Adjudicator upon a potential Adjudication
- › Determining whether an Adjudicator's decision will need to be appealed in a timely fashion



Potential Legal Issues

Potential Legal Issues

Prompt Payment

- › Parties should consider retaining project counsel early upon a dispute due to the quick timelines within the Acts
- › Parties must understand the legal ramifications of failing to abide by timelines in the Acts, as this may lead to costs of the other party upon Adjudication

Potential Legal Issues

Adjudication

- › The effect of dispute resolution terms on the adjudication legislative provisions is somewhat unclear
 - › This gives rise to interesting strategic considerations
- › Adjudication could be an expensive and time consuming process
 - › It is likely that it will be cheaper than arbitration and litigation, yet parties still must equally bear the Adjudicators costs and their own costs
 - › Parties should consider managing these disputes on their own rather than proceeding to Adjudication to minimize this burden
- › It is not clear the level of sophistication Adjudicators will have
 - › Parties should identify experienced Adjudicators and recommend their use on projects



QUESTIONS?



**Bennett
Jones**



Paul Blundy

blundyp@bennettjones.com



Vasilis Pappas

pappasv@bennettjones.com



Geoff Stenger

stengerg@bennettjones.com



Chris Petrucci

petruccic@bennettjones.com