

Prompt payment and adjudication for federal projects

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In this Update

- Bill C-97 (*Budget Implementation Act, 2019*, No. 1) received second reading in the House of Commons on April 30, 2019. Division 26 of Part 4 of the Bill proposes the *Federal Prompt Payment for Construction Work Act* to address the non-payment of contractors and subcontractors performing construction work for federal construction projects.
- The Bill borrows changes to Ontario's *Construction Lien Act* (now *Construction Act*) which deals with prompt payment and adjudication.
- Stakeholders and participants in federal projects and federally regulated industries are advised to stay abreast of these developments.

The Canadian construction and infrastructure sector needs to prepare to embrace significant and somewhat surprising legislative reforms currently underway to federal construction projects.

On January 23, 2018, Public Service and Procurement Canada (PSPC) commissioned an industry engagement initiative to develop a recommendation package for the Government of Canada on the potential application of prompt payment and adjudication to federal construction projects. Industry consultation commenced in March 2018, and resulted in a report titled *Building a Federal Framework for Prompt Payment and Adjudication* on June 8, 2018 (Report). Although the consultation process represented a significant acceleration compared with the similar 13-month consultation process in Ontario, one of the key recommendations in the Report was to apply selected elements of the widely consulted new Ontario model, briefly described below, to the federal sphere. Note that for construction projects located on indigenous lands, the Report recommended further appropriate consultations before introducing a prompt payment or adjudication regime.

“...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”

- Report (Chapter VIII, page 105)

As readers from Ontario know, recent changes to Ontario's *Construction Lien Act* (now *Construction Act*) can be broadly categorized into: (i) lien modernization; and (ii) introduction of prompt payment and adjudication. The lien modernization provisions have been in force since July 1, 2018, and the prompt payment and adjudication provisions will come into force October 1, 2019. The *Construction Act* also includes transition provisions pursuant to which

certain projects will be “grandfathered” and subject to the *Construction Lien Act* as it read prior to the amendments taking effect.

On April 8, 2019, Bill C-97 (*Budget Implementation Act, 2019*, No. 1) was introduced, received second reading in the House of Commons on April 30, 2019, and has now been referred to the Standing Committee on Finance for detailed review. Meanwhile, on May 2, 2019, the Senate adopted a motion authorizing the Standing Senate Committee on National Finance to pre-study the Bill. Division 26 of Part 4 of the Bill, which proposes the *Federal Prompt Payment for Construction Work Act* to address the non-payment of contractors and subcontractors performing construction work for such projects.

The Bill borrows the Ontario prompt payment mechanism which, absent a dispute, requires Her Majesty or the service provider to pay the contractor within 28 days from the date of receiving a proper invoice. The payments must be made down the construction pyramid within the prescribed timelines. The requirements in Ontario’s *Construction Act* in respect of a proper invoice appear at present to be comparatively more prescriptive in form and substance.

The Bill also borrows other concepts from the Ontario legislation such as notice of non-payment, payment timelines and adjudication. While both the Bill and Ontario’s *Construction Act* allow parties to refer to adjudication any disputes relating to non-payment, the Ontario legislation allows parties to agree to refer to adjudication disputes respecting certain other matters as well.

Independently of the Bill, PSPC has also taken a leadership role to advocate that construction-related payments follow three prompt payment principles; namely promptness, transparency and shared responsibility and, in support, has developed a payment disclosure [website](#) for the public which currently discloses payments to contractors under PSPC construction-related contracts valued at \$100,000 or more since May 1, 2017.

One of the hottest topics in Ontario has been about transition, as industry participants rush to revise their external contracts and their internal processes to conform (and shape) the application of the changes. The Bill has some rather surprising transition provisions that contemplate a one-year deferral period, and do not provide for any grandfathering of existing contracts. Therefore, existing construction contracts executed prior to the enactment of the new legislation will be subject to the new legislation starting a year from its enactment. We anticipate disruption as existing contracts may be amended somewhere mid-performance to provide for contractual clarity and alignment on prompt payment and adjudication, or risk the potential application of the legislation which will override the contract to the extent of conflicting terms. Having said that, the scope of the Bill is narrower than the Ontario *Construction Act* by only dealing with prompt payment and adjudication, so the federal transition may be more targeted with specific surgical changes.

In addition, we are hearing a number of important questions on the application and scope of the statute, which was a point of discussion in the Report and is of keen interest to our clients. The highlighted extract above, referencing the banking, nuclear, and aeronautics industries, was a part of this discussion. The Bill also provides that Cabinet may exempt designated provinces from application of certain provisions of the Bill, after taking into account payment and adjudication provisions under provincial laws. However, the application of provincial legislation to a federal construction project in the designated province will need to be considered.

Our team will continue to analyze the Bill as it progresses, with a focus on advising industry participants on key issues such as understanding the scope of coverage to different types of federal projects, the differences with the Ontario legislation, and how to incorporate best

practices both internally and externally for compliance.

In the meantime, stakeholders and participants in federal projects and federally regulated industries are advised to stay abreast of developments in their individual provinces and federally, as prompt payment and adjudication continue to gain significant momentum in Canada.